Employee Participation and Collective Bargaining in Europe and China

Edited by
JÜRGEN BASEDOW, CHEN SU,
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Max-Planck-Institut
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Mohr Siebeck

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Preface

The legal framework for the supply of goods and services between private market actors is usually provided by two bodies of law: contract law and public (state) regulation. Contracts are essentially a matter of voluntary commitment on both sides, public regulation a matter of public policy. Contracting is driven by individual interests, public regulation by political decisions on matters such as working hours, safety and the need for standardization or the protection of health. The mix of private ordering and public regulation differs from market to market, but across the whole economy there is a borderline between private and public order which means that an issue is covered either by public regulation or by private agreement. This is, to a significant extent, also true of labour law. The labour market is governed, like other markets, in part by private agreements between employees and their employers and in part by public regulation. While labour relations come into being through contracts, numerous issues (such as safety and health at work) are governed by public regulations. But in labour law, since the late nineteenth century, a third body of law has evolved: rules resulting from collective bargaining between trade unions and individual employers or associations of employers.

Collective bargaining includes the right of either side to exert pressure on the other (by collective action, such as a strike and lock-out) with a view to achieving a favourable bargain. It also presupposes the right of either side to form organizations for the conduct of negotiations with the other side. At the European level, this has explicitly been acknowledged in Article 28 of the Charter of Fundamental Rights of the European Union. We find various provisions of a similar thrust in the national constitutions of Member States. At the universal level, analogous rights are ensured by Article 8 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (939 UNTS 1), which has been ratified by 162 states including the European countries and the People's Republic of China. China stated upon ratification, however, that it is bound by Article 8(1)(a) only in so far as this is consistent with the Constitution of the People's Republic of China, the Trade Union Law of the People's Republic of China and the Labour Law of the People's Republic of China. While collective bargaining is considered a fundamental right of all actors in the labour market, certain limits are

imposed resulting from the right of states to shape labour relations through public regulation. Limits are also imposed on the individual freedom of employees and employers to contract. As a result, labour relations are subject to three bodies of law: individual contracts, public regulation and collective bargaining.

Collective bargaining, which has such a significant position in that triad, was the primary object of a conference – held on 16 and 17 May 2014 – on the subject of "Employee participation and collective bargaining in the era of globalization". The conference spanned the entire bargaining process, including the prior establishment of appropriate organizations and the various forms of industrial disputes. The conference programme also included workers' co-determination. Labour organizations in Germany have always considered the participation of employees – both at workplace level and in the boards of companies – to be a sibling of collective bargaining. The Nordic, or Scandinavian, labour model is based on a high level of trade union density and a strong system of collective agreements and employee participation. Chinese laws provide for systems of collective bargaining, collective agreement and employee participation, yet the coverage and function of these systems are to be improved. At the same time, Chinese labour law and industrial relations are undergoing profound changes.

Labour law, for many years, has generally been studied from the perspective of the domestic labour market. Contrary to other parts of private law, comparative labour law still is poorly developed. However, individual labour disputes with a cross-border dimension have, ever since 1900, been decided by courts in many countries. The scholarly analysis of this case law has ultimately led, in the European Union, to the adoption of a conflict rule on individual employment contracts in what is now Article 8 of the Rome I Regulation on the law applicable to contractual obligations. Several judgments of the Court of Justice of the European Union illustrate the significance of this conflict rule. They also highlight the need for a comparative perspective in matters relating to individual and collective labour law. As national frontiers progressively open up for goods and services at a universal level, the significance of comparative research in labour law will only increase in the coming years. Bearing in mind the growing importance of comparative labour law, the organizers of the conference have decided to publish its papers.

The Hamburg conference was part of the research project "Employee participation and collective bargaining in the era of globalization – Nordic and Chinese perspectives", carried out jointly by the Faculty of Law of the University of Helsinki and the Chinese Academy of Social Sciences (CASS) Institute of Law. It was made possible through the project funding of the Finnish Academy of Sciences, and organized by the Max Planck Institute for Comparative and International Private Law. We would like to express our gratitude to Alice Neffe in Helsinki and Cara Warmuth and Gundula Dau in

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Jürgen Basedow
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September 2015 *Ulla Liukkunen*

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C. Employee Participation

Abbreviations

AC	Akademikernes Centralorganisation – Danish Confederation of Professional Associations
AEntG	Arbeitnehmer-Entsendegesetz – Posting of Workers Act (Germany)
AEUV	Vertrag über die Arbeitsweise der Europäischen Union (*see* TFEU)
AG	Aktiengesellschaft (Germany)
AGM	Annual general meeting
AIAS	Amsterdams Instituut voor Arbeids Studies – Amsterdam Institute of Advanced Labour Studies
AKAVA	Finnish Confederation of Unions for Academic Professionals
AktG	Aktiengesetz – Stock Corporation Act (Germany)
All ER	All England Law Reports
ARBED	Aciéries Réunies de Burbach, Esch et Dudelange – Luxembourg-based steel and iron producing company
ArbVG	Diskussionsentwurf eines Arbeitsvertragsgesetzes (Germany)
ArbZG	Arbeitszeitgesetz – Working Time Act (Germany)
AÜG	Arbeitnehmerüberlassungsgesetz – Temporary Agency Work Act (Germany)
AuR	Arbeit und Recht (Germany)
BAG	Bundesarbeitsgericht – Federal Labour Court (Germany)
BAGE	Entscheidungen des Bundesarbeitsgerichts (Germany)
BetrVG	Betriebsverfassungsgesetz – Works Constitution Act (Germany)
BGB	Bürgerliches Gesetzbuch – Civil Code (Germany)
BGBl.	Bundesgesetzblatt (Germany)
BGH	Bundesgerichtshof – Federal Court of Justice (Germany)
BOE	Boletín Oficial del Estado (Spain)
BUSINESSEUROPE	Union of Industrial and Employers' Confederations of Europe (formerly UNICE)
BVerfG	Bundesverfassungsgericht – Constitutional Court (Germany)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Germany)
BVerwG	Bundesverwaltungsgericht – Federal Administrative Court (Germany)
CA	Court of Appeal
CASS	Chinese Academy of Social Sciences
CBM	Social and Economic Council Committee on the furthering of worker involvement

CDU	Christlich-Demokratische Union (Germany)
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CEEP	European Centre of Employers and Enterprises providing Public Services
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CETS	Council of Europe Treaty Series
cf.	confer
CFA	Committee on Freedom of Association
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Reports
Co.	Company
CSU	Christlich-Soziale Union (Germany)
DERPI	Département d'étude des relations privées internationales (France)
DGB	Deutscher Gewerkschaftsbund – German Confederation of Trade Unions
e.g.	exempli gratia
E.L.Rev.	European Law Review
EBLR	Employee board level representation
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ed.	edition
ed./eds.	editor(s)
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EIROnline	European Industrial Relations Observatory Online
ELJ	European Law Journal
Emp LB	Employment Law Bulletin
EqA 2010	Equality Act 2010 (United Kingdom)
ERA 1996	Employment Rights Act 1996 (United Kingdom)
et al.	et alii
et seq.	et sequens
etc.	et cetera
ETS	European Treaty Series
ETUC	European Trade Union Confederation
ETUI	European Trade Union Institute
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EUV	Vertrag über die Europäische Union (*see* TEU)
EuZA	Europäische Zeitschrift für Arbeitsrecht (Germany)
EWC	European Works Council

EWCA Civ	England and Wales, Court of Appeal (Civil Division)
EWG	Europäische Wirtschaftsgemeinschaft (*see* EEC)
fn.	footnote
FTF	Danish Confederation of Professionals
GEDIP	Groupe Européen de Droit International Privé
GG	Grundgesetz – Constitution (Germany)
GmbH	Gesellschaft mit beschränkter Haftung (Germany)
GS	Großer Senat
G.U.	Gazzetta Ufficiale (Italy)
HR	Human Resources
HRC	Human Rights Committee
I&C	Information and consultation
id.	idem
i.e.	id est
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICR	Industrial Cases Reports
IJCL	International Journal of Comparative Labour Law and Industrial Relations
ILJ	Industrial Law Journal
ILO	International Labour Organization
IRLR	Industrial Relations Law Reports
ITF	International Transport Workers' Federation
JCP	La Semaine Juridique (France)
JCP S	La Semaine Juridique – Social (France)
JORF	Journal officiel de la République française (France)
JZ	Juristenzeitung (Germany)
LO	Labour organization
LOD	Landsorganisationen i Danmark – Danish Federation of Trade Unions
LON	Landsorganisasjonen i Norge – Norwegian Federation of Trade Unions
LOS	Landsorganisationen i Sverige – Swedish Trade Union Confederation
Ltd	private limited company
MD&A	Management Discussion and Analysis
MiLoG	Mindestlohngesetz – Minimum Wage Act (Germany)
MLR	Modern Law Review (United Kingdom)
NHO	Næringslivets Hovedorganisasjon – Confederation of Norwegian Enterprise
NJB	Nederlands Juristenblad (Netherlands)

NJW	Neue Juristische Wochenschrift (Germany)
NMWA 1998	National Minimum Wage Act 1998 (United Kingdom)
no./n.	number
NZA	Neue Zeitschrift für Arbeitsrecht (Germany)
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
p./pp.	page(s)
para./paras.	paragraph(s)
PDG	Président-Directeur-Général (France)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht – Rabel Journal of Comparative and International Private Law (Germany)
RdA	Recht der Arbeit (Germany)
RDT	Revue de Droit du Travail (France)
RJS	Revue de Jurisprudence Sociale (France)
Rev. Crit. DIP	Revue Critique de Droit International Privé (France)
RGBl.	Reichsgesetzblatt (Germany)
RMB	renminbi – official currency of the People's Republic of China
SACO	Sveriges Akademikers Centralorganisation – Swedish Confederation of Professional Associations
SAF	Svenska Arbetsgivareföreningen – Swedish Employers' Confederation
SAK	Suomen Ammattiliittojen Keskusjärjestö – Central Organization of Finnish Trade Unions
Sàrl	Société à responsabilité limitée (France)
SCE	Societas Cooperativa Europaea – European Cooperative Society
SE	Societas Europaea – European Company
SER	Sociaal-Economische Raad – Social and Economic Council (Netherlands)
SNB	Special Negotiating Body
SPD	Sozialdemokratische Partei Deutschlands (Germany)
STTK	Finnish Confederation of Salaried Employees
TCO	Tjänstemännens Centralorganisation – Swedish Confederation for Professional Employees
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TUC	Trades Union Congress
TULRCA 1992	Trade Union and Labour Relations (Consolidation) Act (United Kingdom)
TVG	Tarifvertragsgesetz – Collective Bargaining Act (Germany)
UAW	United Auto Workers (USA car manufacturers' union)

UEAPME	Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises – European Association of Craft, Small and Medium-Sized Enterprises
UK	United Kingdom
UN	United Nations
UNICE	Union of Industrial and Employers' Confederations of Europe (*now known as* BUSINESSEUROPE)
Unio	Confederation of Unions for Professionals (Norway)
UNTS	United Nations Treaty Series
US/U.S./USA/U.S.A.	United States of America
v./vs.	versus
ver.di	Vereinte Dienstleistungsgewerkschaft – United Services Trade Union (Germany)
WTR 1998	Working Time Regulations (United Kingdom)
ZfA	Zeitschrift für Arbeitsrecht (Germany)
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (Germany)
ZRP	Zeitschrift für Rechtspolitik (Germany)

Part I:
Setting the Stage

A. Collective Bargaining and its Interaction with State Legislation and Individual Employment Contracts

Collective Labour Law in the Nordic Countries: The Relationship between Individual Employment Contracts and State Legislation

Örjan Edström

I. Introduction

The aim with this article is to highlight and briefly analyse basic industrial relations features with a focus on labour law in four Nordic (i.e. Scandinavian) countries, including both the collective dimension, with collective bargaining regulations, and certain legislation that directly regulate the individ-

ual employment contract. The article will give an overall account of the situation and developments in Denmark, Norway, Sweden and Finland.[1]

Further, the development in Nordic labour law will be discussed, paying attention to the collective agreement model's position in a legal environment complete with substantive laws and rights connected to the individual labour contract.

To begin with, some historical notes on the development of Nordic labour law will be presented. Thereafter I will set out the labour law regulating, primarily, the collective dimension (which means the relationships between the organized parties on the labour market), including regulations on industrial action and codetermination and more.

Collective bargaining and collective agreements play a fundamental role for the individual employee, and an overview of labour law regulating the individual worker's rights vis-à-vis the employer in the employment contract will be made in respect of employment protection and discrimination.

The article will not deal with rules on board representation or work environment protection; i.e. labour law substantially regulated through public law, although the labour market parties in collective agreements today have agreed on the way in which to apply these laws and, in particular, matters concerning workers environment, safety committees, etc.

Concerning international law, the article will in the main only deal with European Union (EU) law, even if there are also other international legal instruments that could be observed. In particular the focus will be on the conditions and the development of the private sector.

1. The collective dimension

The collective dimension in employment relations is fundamental in the Nordic countries.[2] Important aspects of the employer – employee relationship are ruled by collective agreements. These agreements are the result of collective bargaining between trade unions and employers' associations.

Further, both the globalization process, the internationalization of labour relations and the integration process in the EU challenge not only the national state but also the Nordic model of labour market regulations. Meeting new international standards and commitments while at the same time maintaining a Nordic model will sometimes mean legal conflicts that must be resolved.

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[1] Formally, also Iceland is included as a Nordic country but will not be dealt with here.

[2] A useful source for basic information concerning industrial relations in the Nordic countries (as well as other countries in Europe) is the Eurofound; for country profiles, see <http://eurofound.europa.eu/observatories/eurwork/comparative-information/industrial-relations-country-profiles>. Another comprehensive source is *Peter Wahlgren* (ed.), Stability and Change in Nordic Labour Law, 2002.

Even if the Nordic model of industrial relations in general is considered to be founded on a collectivistic tradition putting emphasis on the role of trade unions and collective bargaining, there are important varieties between the Nordic countries. Further, there are other significant issues which relate to the regulation of individual workers' rights in Nordic labour law. For instance, the development of legislation on employment protection and discrimination has meant substantial restrictions for collective bargaining.

2. EU law and some other international legal instruments

Three of the Nordic countries dealt with in this article are members in the EU; Denmark became affiliated to the European Community (EC) in 1973 and Sweden and Finland in 1995. Norway has been a part of the Agreement on the European Economic Area (EEA Agreement)[3] since 1994 and is, accordingly, bound to follow EU labour law.[4]

Hence, EU law must, together with certain other legal instruments in international law, be considered and followed by the Nordic countries.

In particular, there are some EU directives that should be considered in connection with collective and individual rights respectively.

The EU Charter on Fundamental Rights in the European Union[5] values the workers' right to information and consultation within the undertaking (Article 27) and the right to collective bargaining and industrial action as fundamental rights (Article 28). Beyond that, the EU Charter also protects the employed individual in several respects, such as the right to non-discrimination (Article 21), protection against unjustified dismissal (Article 30) and the right to fair working conditions (Article 31).

Compared with labour law in the Nordic countries, EU law puts more emphasis on individual rights and this fundamental difference has meant new restrictions for collective bargaining, and has an important impact on labour law in the Nordic countries.

The Nordic countries are also bound to follow the European Convention on Human Rights (ECHR).[6] Article 11 of the ECHR protects the freedom of association, and from the case law the European Court of Human Rights (ECtHR) it follows that this right also embraces a right to collective bargain-

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[3] [1994] OJ L 1/1.

[4] The EEA Agreement entered into force on 1 January 1994 and brings together the EU Member States and the three EEA states associated to the European Free Trade Association (EFTA) – Iceland, Liechtenstein and Norway – in the EU Internal Market.

[5] [2012] OJ C 326/391.

[6] Concerning the link between EU law and the ECHR, the Treaty of the European Union (TEU) claims in Article 6(2): "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties".

ing and industrial action.[7] Nonetheless, even if there has been some case law from the ECtHR involving the Nordic countries, or otherwise is of relevance for this area of law, this article will not deal with the ECHR.

Further, together with other European countries the Nordic countries have ratified many conventions from the International Labour Organization (ILO); including, for instance, the ILO Conventions No. 87 on freedom of association and No. 98 on collective bargaining.[8]

II. Basic features in the development of Nordic labour law

1. The liberal era – the beginning of a new order

The breakthrough of liberal ideas in the second half of the nineteenth century meant the abolition of the former pre-capitalistic restrictions concerning the right to exercise trade and more.[9] The economy and labour relationships were liberalized with the establishment of the free work contract; i.e. this was the end of the forced labour era.

The liberal approach meant the establishment of a non-interventional policy from the state. In spite of this, the state did not hesitate to intervene through the criminal law in order to hinder workers and the growing trade union movement from participating in strikes and collective actions on the labour market.[10] Furthermore, there was a close connection between the trade unions and radical political movements arguing for socialism and a new order in society.

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[7] See also the 1996 revised European Social Charter and Article 5 concerning the right to freedom of association, and Article 6 on the right to collective bargaining.

[8] ILO Convention No. 87 of 1948 on the Freedom of Association and Protection of the Right to Organise and ILO Convention No. 98 of 1949 on the Application of the Principles of the Right to Organise and to Bargain Collectively. For an overall picture of the current situation, see *International Labour Conference* (ILO), Report of the Committee of Experts on the Application of Conventions and Recommendations, The Application of International Standards in 2014 (I), (Report III, Part 1a, ILO 103rd Session, 2014), 2014.

[9] Concerning laws on commerce and trade, this was the case in Norway in 1839, in Denmark in 1862, in Sweden in 1864 and in Finland in 1868. For a brief comment on the following development in Nordic labour law, see for instance *Ole Hasselbalch*, The Roots – the History of Nordic Labour Law, in Wahlgren (fn. 2) 11–35.

[10] For instance, in Denmark, a formal ban on strikes was introduced as soon as 1800, even if a new democratic Constitution in 1849 opened the door for the forming of private organizations, facilitating also the workers' strive to organize in respect of their employment; *Hasselbalch* (fn. 9) 16. Another example is Sweden, where changes to the criminal law were made in 1893, 1897 and, in particular, 1899 in order to counteract strikes.

2. *Self-regulation, basic agreements and arrangements*

In circumstances involving the liberalization of markets, a state that was reluctant to intervene in order to secure and stabilize the labour market situation, the workers' general vulnerability and the establishment of trade unions with often radical political ideas, the labour market parties themselves began to regulate their relations, establishing a new balance on the labour markets.

In Denmark a basic agreement between the labour market parties – although not complete – was concluded in 1899, and called the "September Compromise". Later, after a labour conflict in 1908, the "August Committee" recommended the introduction of the Permanent Arbitration Court in 1910 for the resolution of disputes and the development of case law concerning labour contracts (now the Labour Court).

Further, the "August Committee" recommended some standard rules relating to the handling of labour disputes (i.e. the "Normen" providing rules on conciliation, negotiations and arbitration), and from these fundamentals the Danish collective agreement system has continued to be developed by the parties.[11]

Also, in Norway, a basic agreement was concluded between the labour market parties in 1902, providing that disagreements between them should be settled by mediation and possibly arbitration. Even though the agreement was soon terminated, a basic structure for dealing with conflicts in the future had been established and integrated into the collective agreements.

In 1935 a new Basic Agreement on the national level was settled on these fundamentals. The still working Basic Agreement in Norway also regulates, for instance, industrial action in the form of sympathy actions, shop stewards and collective dismissals.

In Sweden the state's reaction towards the growing trade union movement was comparatively tough. At the turn of the century strikes and other similar industrial actions were often considered to be a breach of the employment contract. However, in 1906, the "December Compromise" was agreed upon between the employers' and the blue-collar workers' organizations.

The "December Compromise" meant that the right to associate was accepted by the employers, and in return the trade unions recognized the employer's right to lead and distribute work as well as to hire and fire workers.

Following this arrangement, collective agreements were concluded between the employers and the blue-collar workers' trade unions on the labour market. It was not until the end of the 1920s that laws were enacted, with the exception of the previously 1906 Act on Mediation in Labour Disputes.

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[11] Also the Official Conciliator's Act – recommended by the August Committee – should be mentioned, regulating the procedure used by the public conciliation and mediation service. See *Ole Hasselbalch*, Labour Law in Denmark, 2nd ed. 2010, 36.

In Finland, and in the labour law perspective, the liberalization process meant the abolition of formal legal restrictions on trade unions. However, unions still had to be recognized by the state, but in 1906 freedom of association was enacted, and protected by the Constitution in 1919. Further, in 1922, the protection of freedom of association was further reinforced by the Employment contract act.

The Finnish situation was peculiar since Finland became independent from Russia in 1917; this was followed by a civil war between the "Whites" and the "Reds", which for a long period strained relations between workers and employers. Even though the building of trade unions had begun in the late nineteenth century, leading to the establishment of a trade union confederation, it had been oppressed by the Russian authorities.

The trade union movement in Finland was for a long time influenced by communist ideology, and in 1930 many unions were dissolved on the suspicion of being involved in "subversive activities". It was not until after World War II that the Finnish trade unions became generally accepted by the employers.

3. Legislation confirming self-regulation

In the Nordic countries state labour law was more or less developed by building on the self-regulatory private arrangements, often meaning that the already established agreements on procedures etc. were confirmed by the legislature.[12]

Since, in general, the collective agreements did not embrace, for instance, white-collar workers, there was also a need – as was the case in Sweden – for state regulation in order to extend and establish the collective structure and trade union rights on the whole labour market.

Considering these features and the interplay between collective self-regulation and state legislation, it might be seen remarkable that in Denmark there are no specific laws regulating the right to association, collective bargaining, collective agreements, peace obligations, industrial actions or shop stewards. Therefore, the important Danish national regulations are still to a large extent to be found in collective arrangements between the labour market parties.[13]

In Norway the legislation on labour disputes concerning the conclusion of collective agreements, mediation and more came into force in 1916, and in 1927 a revised Labour Disputes Act was adopted. The act has regulations concerning collective agreements, industrial actions, mediations and sanc-

[12] For a brief account, see *Reinhold Fahlbeck*, Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features, in Wahlgren (fn. 2) 103–106.

[13] *Fahlbeck* (fn. 12) 105.

tions.[14] It is still the core legislation for collective labour law, even if further amendments influencing collective labour law also have been made.

In Sweden the legislation relating to collective agreements was enacted by the Riksdag in 1928, at the same time as the enactment of legislation relating to the labour court. The 1936 Act on the Right to Association and Negotiation was founding a base for collective bargaining and trade union rights, reinforcing and extending these rights to embrace white-collar workers and other groups that had not been strong enough to establish collective agreements with the employers.

In Finland the laws for the protection of labour peace had been made in 1924 and repealed in 1945. In addition, the Collective Agreements Act came into force in 1924, and in 1946 the act was modernized, forming the legal basis for the concluding of collective agreements. The Labour Court was established in 1924, and one year later, the legislation on conciliation was in force.[15]

Considering its history and connection with Russia, Finland was a little late in developing its labour law – in principle founded on agreements from collective bargaining – compared with the other Nordic countries. In 1940 an overall agreement was concluded on the basic principles that apply between the parties. After that more regular agreements between the labour market parties were concluded in 1944 and thereafter, but the Basic Agreement from 1946 still forms the basis for how the system works, even if many subsequent laws have completed the picture.

4. Collective labour law today

The regulations on collective bargaining are amounting to a procedural structure for the collective bargaining between the labour market parties. Accordingly, to a very large extent, working conditions are settled through self-regulation by the parties themselves, even if substantive individual labour law often means the setting up of a floor with minimum requirements for the collective bargaining outcome.

Traditionally collective bargaining has been very centralized, even if the bargaining activities in practice have taken place at three levels: the national level, the industry wide/branch level and at the local company/workplace level. In principle, an agreement on a higher level binds the lower level and, in doing so, creates restrictions for the parties bargaining on, for instance, the workplace level.

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[14] For an overview of the Norwegian industrial relations and legislation, see *Espen Løken/Torgeir Aarvaag Stokke*, Labour Relations in Norway, Fafo-report 2009:33, 2009.

[15] *The Finnish Ministry of Employment and the Economy*, Finnish Labour Legislation and Industrial Relations, 2012, 30, available at: <https://www.tem.fi/files/31813/Finnish_Labour_Legislation.pdf>.

In general, the trade unions have striven to maintain the centralized structure of collective bargaining, but for many years there has been – as in other European countries – a tendency towards decentralized bargaining at the local level.[16]

The system has become more open even for individual bargaining within the framework of the collective agreements, for instance concerning wages. That is the case particularly in the private sector, while a comparatively more centralized bargaining structure still is upheld on the public sector, even if there has also been increased room for more individualized contracts.

Concerning the country level, Denmark is, as mentioned above, an example where the foundation for fundamental rights concerning rights of association, collective bargaining and collective agreements are established through the Basic Agreement, originally from 1899. The agreement also embraces regulations on peace obligation, industrial actions and shop stewards.

However, there is (beyond EU law with the Charter and the ECHR) in Denmark, from 1982, certain legislation on protection against dismissals in violation of the freedom of association, providing legally based protection.

In Norway important regulations are found in the Basic Agreement of 1935, but here we find regulations in law on important matters. In the previously mentioned 1927 Labour Disputes Act there are also rules on parliamentary intervention if there are failures in collective bargaining.[17] Further, important regulations have also been introduced through amendments of the Work Environment Act from the 1970s.

In Sweden the Saltsjöbaden Basic Agreement concluded in 1938 laid down the regulations for collective bargaining and industrial actions, including bargaining for the prevention of industrial conflicts. The agreement from 1938 has of course been amended, but it is still in force, even though the parties for some years have lobbied for the creation a modernized Basic Agreement.

Fundamental regulations in law are now found in the 1976 Codetermination Act. The act was to a very large extent built on previous legislation from 1936 on freedom of association and collective bargaining and the 1906 law on mediation in industrial disputes (including amendments made in 1920).

The Codetermination Act was completed, with new regulations on mediation, in 2000, which has meant completing collective agreements on bargaining orders to apply to different sectors of the labour market. Labour disputes have since 1974 been regulated by the legislation on the court procedure in labour disputes.

Finally, in Finland the basic structure for the freedom of association and collective bargaining etc. in practice was established after World War II.

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[16] *European Commission*, Industrial Relations in Europe in 2012, Commission Staff Working Document, 2013, 25.

[17] *Fahlbeck* (fn. 12) 105 et seq.

The general law on association is applicable to organizations on the labour market. In 1946 the general regulation on collective agreements was taken and in 1962 the former legislation on mediation was replaced with the new Act on Mediation in Labour Disputes, and new regulations on mediation came into force.

5. Labour market organizations and trends

For the proper functioning of the labour market, trade unions and organizations are crucial. Following from freedom of association, membership is voluntary, but it is of great importance for the system's legitimacy that workers and employers are organized.

However, in the recent years there has been a declining trend in the trade union organization rate on the labour markets all over Europe. This development in general has also been observed by the European Commission and discussed as a problem for the development of European industrial relations.[18]

This trend is in particular considered to be a problem for the employee in general, but in practice also employers benefit from having trade unions to deal with as well, as this set-up facilitates a well-functioning labour market if the collective bargaining is well coordinated (keeping down transactional costs).

This general trend with a decline in trade union membership is clear also in the Nordic countries. For instance, while in Sweden 85% of the workers were organized in 1993, only 71% were organized in 2007.[19] However, the organizational rate in the Nordic countries is comparatively high. In the EU Member States the corresponding figure in average in 2008 was around 23% among employed workers.[20]

An explanation to this trend in the Nordic countries is high unemployment rates (even though the unemployment figures are low compared with southern Europe), deregulation of labour markets and cut-downs in the social security system.[21]

As stated above, the trade union movement in the Nordic countries is considered to be comparatively centralized. In each country there are three or four dominating organizations on the central level, covering different branches, and mostly each branch has separate nation-wide organizations both for

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[18] *European Commission* (fn. 16). See also, for instance, the previous corresponding annual reports *European Commission*, Industrial Relations in Europe in 2008, 2009, 20 et seq., also available at <http://ec.europa.eu/social/BlobServlet?docId=2535&langId=en>.

[19] See: <http://www.nordiclabourjournal.org/nyheter/news-2012/article.2012-09-14.0381597146>.

[20] *European Commission* (fn. 18) 20 and (fn. 16) 24.

[21] See *Gunhild Walling*, Unions in retreat across Europe (available at <http://www.nordiclabourjournal.org/nyheter/news-2012/article.2012-09-14.0381597146>).

the workers and the employers respectively.[22] Usually there are separate trade unions for blue-collar workers and white-collar workers.

In Denmark, Norway and Sweden blue-collar workers – and to some extent sometimes also white-collar workers – are organized in each country's central LO (labour organization). These organizations were founded in the late nineteenth century, but due to historical reasons, previously mentioned, the corresponding organizations were established later in Finland.

The organizations – which have been reorganized as they developed – are predominantly industrial (for instance the metal industry and the private service sector, but sometimes even public sector employees are included to a large extent). Beyond that there are also different craft and professional unions.

The most important trade unions on the national level today are: the Danish Federation of Trade Unions (LOD), the Norwegian Confederation of Trade Unions (LON), the Swedish Trade Union Confederation (LOS) and the Central Organization of Finnish Trade Unions (SAK).

There are also trade unions on the national level for white-collar workers or salaried employees (divided, generally, into non-academics and more specialized academic professionals). I will mention some of the most important organizations on the national level; there is also a number of more specialized trade unions, such as those organizing teachers, managers and executives and more.

In Denmark there is the Danish Confederation of Professionals (FTF) and the Danish Confederation of Professional Associations (Akademikernes Centralorganisation, AC). In Norway there is the Confederation of Unions for Professionals (Unio) and the Federation of Norwegian Professional Associations (Akademikerne).

In Sweden there is the Swedish Confederation for Professional Employees (TCO) and the Swedish Confederation of Professional Associations (SACO), and in Finland there is the corresponding Finnish Confederation of Salaried Employees (STTK) and the Confederation of Unions for Academic Professionals in Finland (AKAVA).

Even if these central organizations are very important, the substantive collective bargaining activities are often carried out on industrial or branch level by trade union organizations that are members in a central organization. In addition, they might at the same time organize in respect of bargaining agreements or clusters, coordinating trade union activities for the sector concerned.

Further, the employers are well organized both on branch level and on the national level. For instance on the central level, there is the Confederation of

[22] A valuable source for these facts is the Eurofound's database, European Industrial Relations Observatory Online (EIROnline) presenting country profiles, see <http://eurofound.europa.eu/observatories/eurwork/comparative-information/industrial-relations-country-profiles>. See also *Fahlbeck* (fn. 12) 106 et seq.

Danish Employers, the Confederation of Norwegian Enterprise, the Confederation of Swedish Enterprise and the Confederation of Finnish Industries. Even here collective bargaining is coordinated through industry or branch organizations that are members of the employers' associations on the central level.

III. The trade union representative

An important aspect of the collective dimension in industrial relations is the position of the trade union representative. Again, here we find differences among the Nordic countries with a mixture of regulations in law and collective agreements.

In Denmark and Norway the workers' representative system is characterized as a shop steward system. The position of trade union representatives is subject to contractual regulation between the parties, and there are regulations in the basic agreements with, for instance, formal criteria on who can be chosen as a trade union representative.

Concerning the trade union representatives in Sweden, the Swedish Act on the Trade Union Representative in the Workplace, which came into force in 1974, was the first of its kind among the Nordic countries. In Sweden the right to appoint trade union representatives enjoying protection from the 1974 Act is almost exclusively reserved for trade unions bound to a collective agreement with the employer.[23]

The election of the workers' representatives in the work place is exclusively a matter for trade union members to decide. Collective agreements are common, specifying for instance how many hours the trade union representative can spend on union work in the work place.

In Finland representatives for the employees are appointed by the trade union members referring to a collective agreement. Workers that do not have a representative in accordance with a collective agreement have the right to appoint a representative in accordance with the Employment Contract Act (Chapter 13 § 3).

Further, a majority of these workers can leave it to the representative to represent them in employment matters. Such representatives also have, referring to law, the right to spend working time on this respect and he or she enjoys a certain employment protection that is the same as that for ordinary trade union representatives (Employment Contract Act, Chapter 7 § 10).

If the trade union representative's position is dependent on EU law, all workers may take part in the election.

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[23] An exception is the workers' representation in work and safety matters, which basically is regulated in the 1977 Work Environment Act.

IV. Industrial action

The right to industrial action is of crucial importance for the Nordic industrial relations system. Before a collective agreement is concluded in the Nordic countries both parties have the right to industrial action. Hence, there are regulations in law (however, not in Denmark) and collective agreements on how to deal with industrial actions as well as the procedure for resolving labour disputes. Further there are – as mentioned above – regulations providing for mediation in the main areas of conflicts of interests and labour courts to deal with labour disputes, that I will not comment on in particular.[24]

As previously mentioned, the right to industrial action – including the right to strike – also enjoys protection as a fundamental right in the EU Charter on Fundamental Rights (Article 28), as well as being confirmed in the case law of the European Court of Justice (ECJ)[25] and the European Court of Human Rights (concerning Article 11 of the ECHR).[26]

A common feature in the Nordic countries is that industrial actions should be decided by trade unions, i.e. the right to industrial action is not an individual but a collective right. The normal situation is also that there are peace obligations clauses in the collective agreements, binding not only the organizations but also their individual members.

In Denmark there are regulations in, for instance, the agreement "Normen" between the Danish LO and the Danish employers on the rules applicable to industrial actions, mediation and more.[27] Compared with the other Nordic countries the Danish regulation is remarkable, since there is no legislation on industrial actions, peace obligations and more (beyond what follows from the transposition of the EU Posting of Workers Directive 96/71[28]).[29]

In Norway there are also regulations in collective agreements, for instance, in the Basic Agreement between the Norwegian LO and the Confederation of

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[24] For an overview, see *Torgeir Aarvag Stokke*, Mediation in Collective Interest Disputes, in Wahlgren (fn. 2) 134–158.

[25] *European Court of Justice* (ECJ) 18.12.2007 – C-341/05 – Laval un Partneri Ltd ./. Svenska Byggnadsarbetareförbundet and others.

[26] See, for instance, *Örjan Edström*, The Right To Collective Action – in Particular the Right to Strike – as a Fundamental Right, in Mia Rönnmar (ed.), Labour Law, Fundamental Rights and Social Europe, 2011, 57–76.

[27] Available at: <http://www.lo.dk/arbejdsret/Aftaler/NormenReglerforbehandlingaffagligstrid.aspx>.

[28] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, [1997] OJ L 18/1.

[29] *Fahlbeck* (fn. 12) 105 (however not commenting on the Posting of Workers Directive).

Norwegian Enterprise (NHO).[30] However, there are basic regulations in the legislation on labour disputes concerning industrial actions (for instance § 3) as well as on mediation, sanctions and more, even though the most important regulations are in collective agreements.

In Sweden the regulations on industrial actions in law are found in the Co-determination Act (§§ 41–45), where there are also – as stated above – regulations on mediation (§§ 46–53). The collective agreements provide further regulations, for instance on bargaining procedures that must proceed industrial actions.

The right to industrial action is protected by the Constitution, but at the same time the Constitution makes it possible for the labour market parties to agree on peace clauses in collective agreements, which is the normal situation (see also the Codetermination Act § 41 that, with some minor exceptions, prohibits industrial actions between parties bound by collective agreements).

In principle, the basic regulations in law and collective agreements in Finland are like those in Sweden. The Collective Agreements Act from 1946 means there is a peace obligation between parties bound to a collective agreement, while parties not bound to a collective agreement have the right to industrial action in disputes relating to their interests. Further, the 1962 Act on mediation in labour disputes opens up the possibility of mediation when there is a labour conflict on the labour market.

V. Codetermination – information and consultation

Information and consultation – or *codetermination* – in the Nordic countries is regulated both in law and in collective agreements. The main differences in this respect are between Sweden and Finland and, on the other side, Denmark and Norway. Again differences have to do with the extent to which information and consultation are regulated in both law and collective agreements respectively.[31]

In all Nordic countries there have also been certain transposition measures through legislation in order to transpose EU directives containing rules on information and consultation (see, below, the section on "Challenges and the impact of EU law"). Hence, for that purpose in Denmark a certain law on the consultation of employees was taken while in Norway, Sweden and Finland

[30] Available at: <https://www.nho.no/siteassets/nhos-filer-og-bilder/filer-og-dokumenter/engelsk/basic-agreement-2010-2013.pdf>.

[31] For a more extensive overview on regulations concerning information and consultation, see *Örjan Edström*, Involvement of Employees in Private Enterprises in Four Nordic Countries, in Wahlgren (fn. 2) 159–188.

amendments were made in the acts concerning the work environment, co-determination and co-operation in undertakings respectively.

In the main and in particular in Denmark, regulations on codetermination have been settled in collective co-operation agreements (if the information etc. is not relying on EU directives concerning collective redundancies or the transfer of undertakings), while in Sweden and Finland co-determination basically is regulated by law, but to a large extent collective agreements on the matter replace or specify how to apply the legal regulations. To some extent, information and consultation is also to be carried out in co-operation councils, relying on collective agreements.

In Denmark the main regulation on codetermination is the 1986 Co-operation Agreement between the Danish Employers' Federation and the Danish Federation of Trade Unions. The agreement provides different forms for the involvement of workers in the employer's activity. In activities with more than 35 employees certain 'co-operation councils' shall be established and a number of issues that should be subject to information and consultation are specified. Beyond the local level there is also a council on the national level for the development of the forms for information, etc.

In Norway the basic regulation concerning the employees' right to information and consultation in general is found in the Constitution (§ 110). In practice the most important regulations are found in collective agreements. In accordance with the Work Environment Act (Chapter 8), there is a right to information and consultation in undertakings with more than 50 employees, following the EU Framework Directive on Information and Consultation.[32]

The Co-operation Agreement between the employers' and workers' organizations on the Norwegian labour market regulates different forms of information and consultation on certain matters, for instance, measures for increased efficiency, decreased costs and improved competiveness. Works councils with representatives for both the workers and the employer should be established in enterprises with at least 100 employees for information and consultation.

The Codetermination Act is the basic legislation for codetermination in Sweden. The act regulates both the workers' right to information as well as negotiations in matters that the employer until 1976 had the right to decide without hearing the employees (§ 11–22; even if there were already collective agreements giving similar rights to the workers' party). Compared with the other Nordic countries, there are no restrictions regarding the number of employees in the activity for the law to apply.

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[32] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L 80/29.

There is both a general and a more specified right to information. In general the right to information and consultation prior to significant changes in the employer's activity belongs to trade unions bound to a collective agreement with the employer. However, EU law has meant an extension of these rights also to other trade unions in certain matters concerning collective redundancies and the transfer of undertakings, but only if the employer is not bound to a collective agreement with any trade union at all.

The regulations on the right to information and consultation are optional and the greater part of the labour market is covered by collective agreements replacing the law, and making further adaptations to different branches or sectors of working life.

In Finland the basic and comparatively substantive legislation is the Act on Cooperation within Undertakings that came into force in 1979. The act is in principle similar to the Swedish Codetermination Act, but one difference is that in Finland the law applies only to employers having at least 20 employees.

The employer should, according to the Finnish legislation, inform the workers' representatives, who should be elected after reference has been made to a collective agreement, regarding the company's general plans, objectives, etc. Who will be informed in certain matters is not – as for instance in Sweden – strictly said to be trade unions; i.e. in Finland it could also be a certain person appointed to represent the workers in the work place (§ 8).

The legislation on cooperation within undertakings regulates the procedure for cooperation negotiations. The issues that should be subject to such negotiations are listed, in a rather detailed fashion, in the act (Chapter 4). Beyond that, there are also regulations in collective agreements that could replace the act's provisions on information and cooperation negotiations (§ 62).

VI. The individual contract and labour law

Basically, the individual employment contract is formed with the principle of freedom of contract as its basic foundation. If the employer is bound to a collective agreement the individual contract should be concluded within the framework of the collective agreement. For such employers the collective agreement in general also has a normative function in respect of the employment of non-organized workers.

With the exception of Denmark, there are substantive laws on, for instance, employment protection, working conditions and more for individual employees. At the same time these laws to a large extent could be optional and subject to other regulations in collective agreements.

By way of example, I will give short comments on laws concerning employment protection and discrimination.

These regulations in the Nordic countries are often optional and can be replaced by collective agreements. Often the laws provide the minimum requirements, meaning that collective agreements often provide better – but never worse – working conditions for the employees. That is, for instance, the case concerning the length of the period of notice during redundancy periods, the number of holidays, etc.

In practice, the collective agreements set the framework for most individual employment contracts and they regulate many significant working conditions. It may be that the most important working conditions laid down in the collective agreements are wages and the extent workers' duties, even if there has been room for more individualized bargaining on these matters. Further, for instance concerning wage levels, including minimum wages, there are no regulations in law.

Hence, the collective agreements to a large extent fulfil a normative function for the regulation of the individual employment contracts, in practice by disregarding whether the individual employee is a member of the contracting trade union or not.

However, there are certain differences between the Nordic countries in that respect, but in general the individual employment contract is concluded within the framework of the collective agreement for the particular branch.

1. Employment protection

Article 30 of the EU Charter on Fundamental Rights provides protection for workers "against unjustified dismissal, in accordance with Community law and national laws and practices".[33]

Certain regulations in law and collective agreements on employment protection apply in the Nordic countries.[34] In particular, the focus has been on the protection against unfair dismissals including both redundancy and economic dismissals as well as dismissals referring to the individual. (Further, these laws also cover the EU term collective dismissals.)

In Denmark employment protection for blue-collar workers is part of the Basic Agreement, which stipulates that there should be "reasonable grounds" for any dismissal. Hence, complaints concerning dismissals are in Denmark handled by an industrial tribunal constituted under the Basic Agreement. However, for white-collar workers employment protection is regulated in the 1938 White-collar Workers Act.[35]

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[33] See also Article 24 of the revised 1996 European Social Charter: "All workers have the right to protection in cases of termination of employment."

[34] *Tore Sigeman*, Employment Protection in Scandinavian Law, in Wahlgren (fn. 2) 257–275.

[35] See *Hasselbalch* (fn. 9) 36.

In Norway the main rules on employment protection in law for private employees are part of the 1977 Work Environment Act, which specifies, for instance, period of notice at dismissals and the termination of employment contracts (Chapter 15), and further regulations are found in collective agreements.

Concerning Sweden, in 1974 a general Employment Protection Act was brought into law (replacing a previous act from 1971 with a more limited scope). However, in 1982 employment protection was renewed when a new Act on Employment Protection was introduced, only with minor amendments to the previous law.

In Finland employment protection for private sector employees is regulated in the 2001 Employment contract act. Before that, a general law concerning employment protection had been introduced in 1970.[36]

In Norway and Finland disputes on employment protection are dealt with by general courts, while in Sweden the Labour Court normally is the forum for the examination of most cases. Before that, the matter has been subject to collective bargaining, which is the normal process if the employees concerned are organized.[37]

2. Discrimination law

Substantive laws, protecting the individual employee against discrimination, have also been introduced. This development started in the 1960s and 1970s, stimulated by the intensive debate on these matters and growing social movements; i.e. the feminist movement and more.

In these years the Nordic countries acceded to international agreements and conventions such as the 1951 ILO Convention No. 100 on equal remuneration and the 1958 Convention No. 111 on discrimination.[38]

The process in the Nordic countries began with sex discrimination; public investigations were appointed, and the national parliaments enacted national laws in the 1960s and 1970s.

Legislation on in particular sex discrimination and equal pay was introduced (in Denmark in 1976, as an EEC member implementing the Directive

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[36] *Sigeman* (fn. 34) 259 et seq.

[37] For instance, in Sweden if there are dismissals because of shortage of work (collective redundancies), the matter should be subject to collective bargaining under the Codetermination Act (see § 29 of the 1982 Employment Security Act).

[38] *Lynn Roseberry*, Equal Rights and Discrimination Law in Scandinavia, in Wahlgren (fn. 2) 215. Further, *Roseberry* points at the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

117/75/EEC on equal pay;[39] Norway in 1979; Sweden in 1979; and Finland in 1986, referring to ILO Convention No. 98 and 111).[40]

Even if legislation on sex discrimination, often focusing on equal pay in particular, was made, the labour market parties were sometimes reluctant to accept proposals for new laws that interfered with the traditional way of dealing with employment problems, i.e. within the collective bargaining system.[41] However, it should be mentioned that, for instance, in Sweden a collective agreement was concluded between the then Swedish Employers' Confederation (SAF) and the LO in 1960, aimed to remove directly sex-discriminatory wage terms in the private sector.[42]

This development continued in the 1990s and thereafter with new and amended laws, to a large extent driven by EU law. Now the individual became protected against discrimination on further grounds in professional life. The directives concerned were originally referring to EU directives founded on what today is Article 19 of the Treaty on the Functioning of the European Union (TFEU).

Hence, following the transposition of these EU directives, new or elaborated laws combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation were introduced on the national level.[43] This development has contributed both to an extensive protection in particular in professional life and at the same time to an individualization of Nordic labour law based on public law.

Certain institutional authorities deal with discrimination in particular and fulfil an important function in these matters. In Denmark there are several legal bodies dealing with discrimination and complaints on discrimination. The main legal institutions dealing with discrimination matters based on public law are: in Norway the Equality and Anti-Discrimination Ombud (Equality Ombud); in Sweden the Discrimination Ombudsman; and in Finland the Equality Ombudsman.

Further, EU law has also led to the creation of new laws concerning temporary (or flexible) work, posted and temporary agency workers, employees'

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[39] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, [1975] OJ L 45/19.

[40] See *Roseberry* (fn. 38) 224 et seq.

[41] For example, in Denmark the introduction of a law on equal pay failed in 1970 because such matters were considered to be dealt with in the collective bargaining between the labour market parties. See *Roseberry* (fn. 38) 226.

[42] In Denmark a corresponding agreement for clerical workers was concluded in 1963, see *Roseberry* (fn. 38) 222 et seq.

[43] For an overview, see the European Network of Legal Experts in the Non-discrimination field, providing EU country reports, available at: <http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>.

rights at the transferring of undertakings and more, contributing to regulations in professional life from the individual's perspective.[44]

VII. Challenges and impact from EU law

Compared with the Nordic countries EU labour law clearly puts more emphasis on the individual workers and individual rights. Further, in most EU countries it is normal that the state is able to extend collective agreements to embrace workers independent of whether they are members of a trade union bound to a collective agreement or not, i.e. the so called *erga omnes* institute.[45]

Hence, the most substantial effect EU law has had on Nordic labour law concerns individual workers' rights, in particular regulations on discrimination and equal treatment.[46] Beyond that, the EU Charter of Fundamental Rights also protects the right to non-discrimination.[47]

Even EU directives concerning the individual employment relationship have had an obvious impact on labour law in the Nordic countries. New or amended laws have been taken in order to transpose these regulations, in particular the directives on these matters.[48]

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[44] See the various directives on discrimination, for example the Racial Equality Directive 2000/43/EC, [2000] OJ L 180/22 and the Employment Equality Framework Directive 2000/78/EC, [2000] OJ L 303/16, the Posted Workers Directive 96/71/EC, [1997] OJ L 18/1 and the Temporary Agency Work Directive 2008/104/EC, [2008] OJ L 327/9.

[45] For a general overview over principal problems in the relationship between EU law and Nordic labour law, see *Ruth Nielsen*, Europeanization of Nordic Labour Law, in Wahlgren (fn. 2) 2002, 37–75.

[46] In particular through the transposition into national law of Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, [1998] OJ L 14/9, Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [1999] OJ L 175/43, Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ 2000 L 303/16 and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23.

[47] See Article 21 of the Charter, concerning discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority property, birth, disability, age or sexual orientation, and Article 23 of the Charter concerning equality in employment and more between men and women.

[48] Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies, [1998] OJ L 225/16; Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in

Some of these directives concerning the employment relationship have meant that new restrictions have been imposed on the labour market parties' abilities to conclude collective agreements. However, these regulations have only – at least in principle – meant marginal changes to the fundamental features of Nordic labour law. The same statement could be made regarding the directives concerning the employees' right to information and consultation.[49]

The general debate and any points of contention between EU law and the collective agreement model in the Nordic countries have emanated from the free movement of services (Article 56 of the TFEU, ex Article 49 of the EC Treaty).[50] Beyond Article 56, the Posting of Workers Directive has also been in focus as a crucial regulation.[51]

In this respect, the most contentious issue in recent years has been the right to industrial action as dealt with by the ECJ in the *Laval* case.[52] The case touched on a fundamental feature in Nordic labour law; i.e. the right to take industrial action to facilitate the conclusion of a collective agreement between the trade union and an employer.

A Latvian firm posting workers to Sweden was – in accordance with Swedish law – subject to industrial action from a Swedish trade union, which claimed that the employer should sign a collective agreement with the Swedish trade union despite the fact that the employer already was bound to a collective agreement concluded in Latvia.

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the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2001] OJ L 82/16; Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, [2008] OJ L 283/36; Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, [1991] L 288/32; Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, [2010] OJ L 68/13.

[49] Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L 80/29; Directive 2009/38/EC of the European Parliament on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), [2009] OJ L 122/28.

[50] For the debate in Sweden and an analysis of the arguments before the Laval case was decided by the ECJ, see *Örjan Edström*, The free movement of services in conflict with Swedish industrial relations model – or was it the other way around?, in Nils Wahl/Per Cramér (eds.), Swedish Studies in European Law, vol. 1, 2006, 129–156.

[51] Concerning the posting of workers, in 2014, Directive 2014/67/EU on the enforcement of directive 96/71, [2014] OJ L 159/11 was taken. The directive sets out clarified and more detailed criteria on the term "posting", together with measures for better information in order to prevent abuse.

[52] *ECJ* – Laval (fn. 25).

In short, the ECJ found that Swedish law on the matter was contrary to the free movement of services. The result was that Swedish law (the Codetermination Act and the 1999 Posting Workers Act) was changed. Certain restrictions were imposed on trade unions' right to take industrial action in free movement of services situations, in order to ensure that national law meets EU law requirements.

One reason for this legal conflict was that Swedish law did and still does not have any minimum wage law, nor any possibility to extend the collective agreements in that respect. Instead it was up to the trade unions to take action in order to make the employer sign an agreement – in conformity with the Swedish model.

Among the other Nordic countries, Denmark faced the same difficulties as Sweden. In Finland, a system with the extension of collective agreements had been working since the 1970s. Also in Norway a possibility of declaring a collective agreement applicable to certain sectors had been introduced in 1994 (although not applied in practice until 2003), when Norway concluded the EEA Agreement, meaning that Norway had to observe EU directives on labour law and more. Accordingly, important changes following *Laval* were only made in Danish and Swedish law.

Further, the right to industrial action in connection with the freedom of establishment (now Article 49 of the TFEU, ex Article 43 of the EC Treaty) was dealt with by the ECJ in the *Viking* case.[53] The trade unions took industrial action against the Viking Line in Finland in order to force the employer to sign a collective agreement, rendering it meaningless for the employer to register the vessel Rosella in another Member State. Here the ECJ stated a number of guidelines for balancing conflicting fundamental freedoms and rights.

Finally, the competition between ordinary labour and labour working for temporary agencies has been sharpened in the Nordic countries. This is particularly the case when such agencies come – or engage workers – from the new Member States in Eastern Europe, referring to the free movement of services and the Posting of Workers Directive.

Here the Directive 2008/104/EC on Temporary Agency Work has been taken in order to put in place some standards for which employment terms should apply, both for the protection of the temporary agency workers and also to balance differences between the labour markets in the Member States.

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[53] *ECJ* 11.11.2007 – C-438/05 – International Transport Workers' Federation and Finnish Seamen's Union/Viking Line.

VIII. Collective regulation of working life together with state intervention?

The first regulations in Nordic collective labour law followed from initiatives taken by free trade unions and employers independent of state legislation. The situation today means that this basic feature still remains with extensive collective bargaining activities, but the formal legal context has been fleshed-out with state regulations both on procedures for collective bargaining as well as laws establishing substantial workers' rights, strongly influenced by international law.

What is the impact on the traditional collective bargaining model in the Nordic countries from this development of a gradually expanding state law, clearly connected to the individual labour contract?

1. Self-regulation within the framework of law

Nordic labour law can be characterized as three types of rules, at the beginning founded on self-regulation without state interference:

(i) Self-regulation by the labour market parties, the trade unions and employers, gradually completed by state law establishing a procedural legal framework securing self-regulating mechanisms and the resolution of labour disputes through mediation and labour courts.
(ii) State regulations created to regulate the individual employment contract, but still within the collective framework, setting basic standards for employment protection and more regulated in civil law contracts.
(iii) State legislation providing individual rights through public law and an increased role for public authorities; i.e. in the main, discrimination law, driven by EU law from the 1990s.

The development could also be described as a historical process going from civil law-based regulations towards increased state involvement in labour relationships, partly through public law. At the same time these three types of rules of law exist in parallel, more or less emphasizing the role of the labour market parties or the state.

Further, there is a close interaction between these laws and the collective bargaining system. In between these there is the individual worker and the individual employment relationship, regulated by the individual contract concluded within the framework of collective agreements and state law.

2. Self-regulation and the development of a reflexive law

The first steps in the development of Nordic labour law from the turn of the nineteenth to the twentieth centuries still form the basis of what is considered

by many Nordic people to be the ideal model for the regulation of the labour market in the Nordic countries; i.e. the development of labour law should take place independently of the state, and the labour market parties' autonomy from the state is considered to be a very important feature.

The establishment of a collectivistic structure relying on collective bargaining and collective agreements was founded on a reciprocal recognition of the employer's prerogatives and the workers' right to association. The function was to stabilize labour relations and to establish a collectivistic framework based on civil law principles, and the individual worker's contracts should be concluded and ruled by a collective agreement.

The subsequent state intervention meant that these basic features were recognized and settled by law. Labour relations now were regulated by law through the establishment of procedures and trade union rights for self-regulation and the resolution of labour conflicts referring to collective agreements in labour courts. To some extent also legislation for the enforcement of labour peace was developed.

In general, state law was codifying the 'historical compromises' that took place at around the year 1900. An important function was to secure the right to association, extend the right to collective bargaining and lay the ground for coming laws, while also embracing groups on the labour market that had not been organized and bound to collective agreements.

Denmark is an exception to this development in law, having no state legislation on for instance collective bargaining. Further, because of historical reasons the development in Finland was delayed and did not fully follow the same route as the other Nordic countries.

The essence of the legislation – or as in Denmark the collective regulation emanating from the labour market parties – was the creation of procedures and the provision of competence to certain parties to act in an arena for the shaping of substantive rules (agreements on wages, working conditions etc.).

In respect of the law, this development meant the expansion of procedures and non-substantive regulations that correspond to what the German law researcher Günther Teubner called a "reflexive law".[54] A basic feature of the reflexive law concept is that substantive regulations should be settled by actors with the legally founded competence to regulate what should apply.

Later, new laws with the same "reflexive" character were also created in respect of codetermination; i.e. information and consultation, often corresponding to, or developing, regulations in collective agreements (Sweden and Finland) or aiming at the transposition of EU law into national law.

From this legal basis the labour market parties have concluded extensive collective agreements on collective bargaining orders, mediation and more,

[54] The reflexive law concept was first presented in *Günther Teubner*, Substantive and reflexive elements in modern law, 17 Law & Society Review 1983, 239–285.

i.e. regulations dealing with the labour market parties' interplay on the organizational level, independent of the state but sometimes within the framework of state regulations (the ideal reflexive model has been undermined).

3. Regulations on the individual employment contract

The next type of regulation on the Nordic labour markets – again with the exception of Denmark – was state legislation, paying attention to particular aspects of the individual employment contract; i.e. for example, employment protection.

Referring to the reflexive law model this is considered to mean the introduction of substantive law (i.e. state restrictions on the labour market parties in matters that they before had been free to regulate through collective bargaining).

It should be noted that the development of a legal practice had already begun through the case law of the labour courts, for example concerning what should be considered to be reasonable ground for dismissal. However, in principle this case law was emanating from the collective agreements and not from state law.

Nonetheless, the new type of legislation – taking employment protection law as an example – meant a step away from the freedom of contract principle and the ideal of the parties' autonomy from the state. In principle, the state taking the 'weaker party's' position in law also meant imposing restrictions on the employer's prerogatives, recognized by the labour party in the "historical compromises" around the period of the turn of the nineteenth to the twentieth centuries.

However, to a large extent this legislation also built on the regulations in collective agreements; i.e. law was to some extent confirming regulations established by the parties themselves, but also establishing regulations to embrace new groups on the labour market, and sometimes also on matters where the traditional parties had failed to come to agreement.

Further, this type of legislation is normally optional, meaning that it could be set aside by collective agreements, for instance concerning employment protection (matters such as the period of notice for the termination of employment contracts), while at the same time some basic requirements following from law should be observed.

4. International influences and enforced individual rights

In the 1990s Sweden and Finland joined the EU while Norway (and Iceland) remained as members of the European Free Trade Association (EFTA); Denmark was already a member of the EU. The impact of EU law and other industrial relations models in Europe now became extensive, setting new and

comparatively significantly tougher restrictions on the collectivistic structure and the regulation of the employment relationship.

EU law had a more individualistic approach and many regulations and directives on, in particular, discrimination matters were developed, strengthening the individual's position in professional life. This had a considerable impact on labour law in the Nordic countries. Discrimination laws were alreadyy present in the Nordic countries, but following from EU law the scope for discrimination law now was widened to embrace new groups and new situations.

The state agencies, such as the ombudsmen on discrimination, were further developed and they could intervene and represent or support the individual from a stronger position in law, aiming at the securing of equal treatment and acting more independently from the collectivistic structure than before.

Even though discrimination matters could be – and to some extent also have been – the subject of collective bargaining, discrimination law in practice relies on public law, constituting new legal instruments and substantive rules which narrow the scope for collective bargaining solutions. For instance, in accordance with EU law, the individual should have the right to go directly to the court him or herself in certain matters.

IX. Final conclusions

The reflexive model was built up with procedural rules, providing the labour market parties with a stable framework for self-regulation. However, gradually the collective agreement model has been completed with substantive rules. In this development there is a significant difference between substantive rules on employment protection etc., and rules on discrimination and equal treatment, deriving from public law and state authorities.

Hence, the development since the 1990s has meant the introduction of more labour law regulations through public law, in particular on discrimination matters. This has meant that there has been a new tendency to undermine the traditional collective agreement model going beyond the type of regulations that, for instance, laws on employment protection represent.

However, at the same time the labour market parties traditionally have been reluctant to regulate discrimination matters in collective agreements. Therefore the development of discrimination law does not really conflict with the "hard core" of the collective agreement model. This is despite the fact that discrimination law, in terms of principle, means that restrictions are imposed on what can be agreed upon between the labour market parties.[55]

[55] Further, state authorities had for a long time been in charge of workers' protection, child work etc., relying on public law and not regulated through the collective agreement model.

Furthermore, legislation concerning the individual employment contract is substantial, and restricts self-regulation based on the collective agreement model, but to a large extent these regulations are optional and can be themselves subject to collective regulations.

Further, the collective agreements have been developed so as to be more open to adaptation to the individual employment contract. Nonetheless, the collective agreements, considering substantive law, provide a framework but regulate the individual contract less intensively than was previously the case.

The internationalization of professional life and the integration of in particular EU labour law has led to conflicts of law concerning the right to industrial action in cross-border situations when EU free movement law has been applied. So far this has meant restrictions within the "hard core" of collective labour law in the Nordic countries.

A final conclusion is that collective labour law in the Nordic countries has been under pressure. The collective agreement model has been the subject of restrictions, both through domestic substantive law, a general individualization trend concerning the employment contract and because of the external impact of EU law.

However, if there is reason to speak about a Nordic model – considering certain national differences – this model has shown a good capacity for adapting to these trends and integrating influences from international law.

The significant threat to collective labour law is the declining trend in unionization in professional life, undermining the legitimacy of the collective agreement model founded on strong organizations in the labour market.

Collective Bargaining in Germany and its Interaction with State Legislation and Individual Employment Contracts

Matteo Fornasier

I. Introduction: Sources of German labour law

What makes employment law an intriguing – and, at times, daunting – subject for both practitioners and scholars is the plurality of legal sources. For a civil lawyer, the vast amount of legal instruments in the field of labour law is quite unusual. To date, the legislature in Germany has adopted neither a labour code nor even an employment contract act.[1] This is rather surprising, considering that England, a common law jurisdiction, has codified large parts of its individual employment law in the Employment Rights Act 1996 and most of its collective labour law in the Trade Union and Labour Relations (Consolidation) Act 1992. German labour law, on the other hand, consists of a patch-

[1] In the past there have been repeated calls for the legislature to codify employment contract law. Moreover, experts and scholars have elaborated drafts for such a codification; see, for a recent proposal, *Martin Henssler/Ulrich Preis*, Diskussionsentwurf eines Arbeitsvertragsgesetzes (ArbVG), Neue Zeitschrift für Arbeitsrecht (NZA) Beilage 2007 Heft 21, 6–32.

work of different laws and provisions, which essentially comprise a few scattered articles of the Constitution (*Grundgesetz – GG*),[2] a handful of provisions laid down in the chapter on service contracts of the Civil Code (*Bürgerliches Gesetzbuch – BGB*)[3] and a large number of separate statutes dealing with different aspects of individual as well as collective employment law. The *Erfurter Kommentar*,[4] probably the commentary on German labour law most widely used in practice, covers nearly 50 different statutory instruments.

Another important legal source besides statutory law is the case law of the labour tribunals and, in particular, the Federal Labour Court (*Bundesarbeitsgericht – BAG*). Unlike in other fields of German private law, the role of the courts is not confined to interpreting the law – it also involves, to a considerable degree, active law making. The reason is that the legislature has refrained from regulating certain politically sensitive issues such as the right to strike and other forms of industrial action, leaving it to the courts to develop rules on these issues.

In addition to the various legal sources at the level of domestic law, there is an increasing number of European and international instruments affecting employment relationships. The European legislature has enacted several directives designed to provide minimum standards of protection for employees throughout Europe.[5] Moreover, the EU economic freedoms as well as the fundamental rights guaranteed under EU primary law and under the European Convention on Human Rights (ECHR) have a significant impact on national labour law.[6]

The present paper focuses on a legal source outside the realm of state-law: collective bargaining. It sheds some light on the mechanisms of collective bargaining provided for by German law and how these mechanisms interact with other legal sources, namely state legislation, on the one hand, and the

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[2] See e.g. Article 9 (freedom of association), Article 12 (occupational freedom), Article 20(1) *GG* (providing that the Federal Republic of Germany is a democratic and *social* federal state).

[3] See §§ 612a, 613a, 619a, 622, 623 *BGB*.

[4] *Rudi Müller-Gloge/Ulrich Preis/Ingrid Schmidt* (eds.), Erfurter Kommentar zum Arbeitsrecht, 15th ed. 2015.

[5] See on EU legislation in the field of employment law and its impact on German law e.g. *Joachim Oppertshäuser*, Arbeitsrecht, in Martin Gebauer (ed.), Zivilrecht unter europäischem Einfluss, 2nd ed. 2010, 879–990; *Karl Riesenhuber*, Europäisches Arbeitsrecht, 2009; *Daniela Schrader*, Arbeitsrecht, in Katja Langenbucher (ed.), Europäisches Wirtschafts- und Privatrecht, 3rd ed. 2013, 410–446.

[6] See, on the impact of the Charter of Fundamental Rights of the European Union and the ECHR on employment law, *Matteo Fornasier*, Die Wirkung der europäischen Grundrechte im Arbeitsverhältnis, in Clemens Latzel/Christian Picker (eds.), Neue Arbeitswelt, 2014, 25–53; *Abbo Junker*, Europäische Grund- und Menschenrechte und das deutsche Arbeitsrecht (unter besonderer Berücksichtigung der kollektiven Koalitionsfreiheit), Zeitschrift für Arbeitsrecht (ZfA) 44 (2013), 91–136.

individual employment contract, on the other. The second part of the contribution highlights some current trends in the German system of collective bargaining and points out how the relationship between collective bargaining and state legislation is in the process of changing.

II. Foundations of the German system of collective bargaining

1. Legal sources regulating the terms of employment and the two mechanisms of collective bargaining

Under German law, the terms of employment are regulated by three different legal sources: (1) statutory law and other sources of state law such as constitutional law as well as judicial case law; (2) collective agreements; and (3) the individual contract of employment. In this regard, the situation is essentially the same as in most other legal systems. What is special about the German model, however, is that there are two different types of collective agreements: the *Tarifvertrag* and the *Betriebsvereinbarung*. In English legal terminology, the term 'collective agreement' is often used exclusively for the *Tarifvertrag*, whereas the *Betriebsvereinbarung* is generally referred to as 'company agreement'[7] or 'works agreement'.[8] Yet it is important to note that, contrary to what the English terminology may suggest, both the *Tarifvertrag* and the *Betriebsvereinbarung* rest on collective bargaining and, thus, represent collective agreements. Although the two types of agreements share certain elements, they also display a number of important differences that will be highlighted in the following sections.

a) Tarifvertrag

The *Tarifvertrag* rests on the traditional model of collective bargaining that is also common to other European legal systems. According to § 2(1) of the German Collective Bargaining Act (*Tarifvertragsgesetz – TVG*), the *Tarifvertrag* may be only concluded by trade unions, on the one hand, and employers' organisations or single employers on the other. The agreements are entered into either at sectoral level with an employers' organisation or at company level with the management of an individual firm. The territorial scope of sectoral-level collective agreements varies and is generally stipulated by the

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[7] *Ulrich Runggaldier*, Company Agreement, in Jürgen Basedow/Klaus J. Hopt/Reinhard Zimmermann (eds.), Max Planck Encyclopedia of European Private Law, 2012, 277–281.

[8] *Bernd Waas*, Employee Representation at the Enterprise in Germany, in Roger Blanpain (ed.), Systems of Employee Representation at the Enterprise, 2012, 71 (84).

collective bargaining parties. Thus, it may extend to the whole of Germany or be limited to certain regions.

The right to negotiate and conclude a *Tarifvertrag*, although not expressly mentioned by the German Constitution,[9] has been recognised by the German Constitutional Court as an integral part of the freedom of association guaranteed under Article 9 of the *Grundgesetz*.[10] Hence, the freedom of professional organisations to determine working conditions through the mechanism of the *Tarifvertrag* has the status of a constitutional right.

According to § 3(1) *TVG*, the provisions in a *Tarifvertrag* that regulate the terms and conditions of employment are only binding on employers and employees who are members of the signatory organisations. Where an employer concludes a *Tarifvertrag* on his own behalf (and not through a professional organisation), the agreement is binding on the individual employer and on the members of the signatory union. The rule of § 3(1) *TVG* marks an important difference from the model of '*erga omnes* effect' followed by other legal systems such as Austria or France. In the latter countries, if an employer is bound by a collective agreement, the agreement is applicable vis-à-vis all of his employees, whether or not they are members of the signatory union.[11] In practice, however, the differences between the German model and the systems following the model of '*erga omnes* effect' turn out to be smaller than one might, at first blush, think. The reason is that, in Germany, most employers bound by a collective agreement observe the terms of the agreement, on a voluntary basis, also vis-à-vis employees who are not union members.

Finally, § 4(1) *TVG* provides that the content of the *Tarifvertrag* regulating the terms of employment has a "direct and mandatory effect". In essence, this means that the provisions of the collective agreement are directly applicable to the individual employment relationship in a way similar to statutory provisions. In other words, the *Tarifvertrag* gives rise to rights and duties in the individual employment relationship *ipso iure*. Therefore, unlike for instance in England, the collective agreement does not need to be incorporated into the individual employment contract in order to become effective. Incorporation clauses are only used where one or both parties to the individual employment

[9] The situation is different with regard to fundamental rights at EU level. Here, the Charter of Fundamental Rights of the European Union expressly recognises, in its Article 28, a right of collective bargaining and action.

[10] See e.g. *Bundesverfassungsgericht* (BVerfG) 24.4.1996 – 1 BvR 712/86 – BVerfGE 94, 268 = NZA 1996, 1157.

[11] See § 12(1) of the Austrian *Arbeitsverfassungsgesetz*; for France, see *Martin Henssler*, Collective Bargaining Agreements, in Jürgen Basedow/Klaus J. Hopt/Reinhard Zimmermann (eds.), Max Planck Encyclopedia of European Private Law, 2012, 233 (237). See, in general, for an overview of different models adopted in Europe *Sudabeh Kamanabrou* (ed.), Erga-omnes-Wirkung von Tarifverträgen, 2011, 121–385.

relationship are not members of the signatory organisations but nonetheless want to adhere to the collective agreement voluntarily.

b) Betriebsvereinbarung

The *Betriebsvereinbarung*, on the other hand, is a collective agreement at plant or company level. It is not covered by the Collective Bargaining Act but falls under the legal framework of employee participation and has its legal basis in § 77 of the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG)*. Unlike the *Tarifvertrag*, the *Betriebsvereinbarung* is not negotiated and signed by a trade union. The signatory on the employee side is the works council (*Betriebsrat*), which is a representative body at plant level elected by the employees regardless of whether or not they are union members. On the employer's side, the agreement is concluded only by the individual employer. By allowing for the conclusion of bilateral agreements with the employer, the German framework of employee representation confers more extensive participatory rights on works councils in comparison to other legal systems that frequently only grant a right to information and consultation to employee representatives.[12]

Where a company with multiple establishments has more than one works council at plant level, it is possible, on the basis of § 47 *BetrVG*, to install a joint works council at company level (*Gesamtbetriebsrat*) which deals with employment-related issues that concern the whole company or several establishments. Likewise, in a group of companies, § 54 *BetrVG* permits the establishment of a works council representing all workers of the group (*Konzernbetriebsrat*). Moreover, § 3 *BetrVG* provides that in companies, and in groups of companies with a more complex structure, the collective bargaining parties may set up, on the basis of a *Tarifvertrag*, joint works councils for particular business divisions. The works councils at company and group level as well as the works councils established on the basis of a *Tarifvertrag* may all enter into *Betriebsvereinbarungen* with the employer.

According to § 77(4) *BetrVG*, the *Betriebsvereinbarung* has a "direct and mandatory effect". Thus, to describe the legal effect of the *Betriebsvereinbarung*, the legislature has used the same terms as in § 4(1) *TVG* with regard to the *Tarifvertrag*.[13] However, unlike the *Tarifvertrag*, the *Betriebsvereinbarung* covers all workers employed in the respective plant, irrespective of whether or not they are unionised. Again, the reason is that the works council is, in principle, independent from trade unions[14] and is elected to represent the whole workforce.

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[12] See, for a comparative overview, *Runggaldier* (fn. 7) 278 et seq.

[13] See supra II 1 a).

[14] It should be noted, however, that in practice trade unions and works councils interact in different ways. According to § 2(1) *BetrVG*, the employer and the works council are

Another important difference between the *Betriebsvereinbarung* and the *Tarifvertrag* lies in the fact that the right to conclude the former type of collective agreement is not protected as a specific constitutional right. As will be shown below, the lack of a constitutional guarantee has significant implications for the status of the *Betriebsvereinbarung* within the hierarchy of legal sources and, in particular, on the relationship between *Betriebsvereinbarung* and *Tarifvertrag*.

Finally, it should be noted that, under the framework of employee representation, the employer and the employee representatives are required to interact in a spirit of mutual trust and cooperation.[15] One important aspect of this duty is that, according to § 74(2) *BetrVG*, no collective measures may be taken. Therefore, the works council may not call a strike in order to force the management of the company to conclude or to comply with a particular *Betriebsvereinbarung*.

2. *Hierarchy of legal sources*

In legal systems based on multiple legal sources, the question always arises as to which instrument takes precedence in the event of a conflict.

In German employment law, there is a clear hierarchy between the different legal sources: statutory law is placed on top, the individual contract of employment at the bottom, while collective bargaining occupies an intermediary position. It follows from this hierarchical order that, as a general rule, employment rights provided for by statutory law cannot be excluded in collective agreements or in the individual employment contract. Likewise, the individual contract may not deviate from the terms of a collective agreement. However, the lower-ranking instrument trumps the higher-ranking one to the extent that it provides for employment terms that are more favourable to the employee.[16] In other words, the collective bargaining parties and the parties of the individual contract may depart from statutory law to the benefit of the employee; the same is true for the relationship between collective bargaining and individual contracting.

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required to cooperate with the trade unions represented in the company for the good of all workers and the company. Pursuant to § 31 *BetrVG*, union representatives may take part, under certain conditions, in the meetings of the works council. Moreover, members of the works council are often members of a trade union. For the new forms of cooperation between works councils and trade unions resulting from the process of decentralisation of collective bargaining, see infra III 3 a.

[15] See § 2(1) *BetrVG.*

[16] This rule is laid down in § 4(3) *TVG* with regard to the relationship between collective agreements (*Tarifverträge*) and the individual contract of employment. According to the Federal Labour Court, the provision expresses a general principle that applies also in relation other sources of employment law, see *BAG (GS)* 16.9.1986 – GS 1/82 – NZA 1987, 168.

The relationship between the two mechanisms of collective bargaining – that is, *Tarifvertrag* and *Betriebsvereinbarung* – is more complex. As already mentioned, only collective bargaining through trade unions is guaranteed as a constitutional right, while the agreements concluded by works councils do not enjoy a similar degree of protection.[17] The reason for the privileged status of trade unions is that they are voluntary associations which workers are free to join or not to join. Hence, trade unions derive their mandate to negotiate the terms of employment directly from their members. The works council, by contrast, is a mechanism provided for by the legislature. Thus, the regulatory powers of the works council, though legitimised through elections, are conferred upon by the state and not by individual employees. Moreover, by virtue of their organisational structure and independence, trade unions are generally believed to have stronger bargaining power vis-à-vis the employer than works councils and thus to be in a better position to defend the interests of employees effectively. Against this background, the mechanisms of employee representation provided for in the *BetrVG* are devised so as not to intrude into the prerogative of the parties to the *Tarifvertrag* and to avoid any rivalry between trade unions and works councils.[18] In particular, a *Betriebsvereinbarung* may not interfere with the arrangements made by the social partners on the basis of a *Tarifvertrag*. According to § 77(3) *BetrVG*, a *Betriebsvereinbarung* may not deal with terms of employment that are regulated in a *Tarifvertrag* for the relevant industrial sector. As a result of this rule, a *Tarifvertrag* takes precedence over a *Betriebsvereinbarung* even in the event that the latter is more favourable to employees. Moreover, the works council and the employer are precluded from entering into a company agreement also where the conflicting *Tarifvertrag* is not binding on the employer (for instance, on the grounds that the latter is not a member of the professional organisation that concluded the *Tarifvertrag*). Finally, § 77(3) *BetrVG* provides that even in the absence of a conflicting *Tarifvertrag*, a company agreement is deemed void if it covers matters that, in the industry in question, are *usually* regulated by the social partners in a *Tarifvertrag*.

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[17] Supra II 1 b).

[18] See in general on the relationship between the frameworks of (union-based) collective bargaining and employee representation *Thomas Dieterich*, Tarif- und Betriebsautonomie – ein Spannungsverhältnis, Festschrift für Reinhard Richardi, 2007, 117–125; *Rüdiger Krause*, Gewerkschaften und Betriebsräte zwischen Kooperation und Konfrontation, Recht der Arbeit (RdA) 2009, 129–142; *Eduard Picker*, Tarifautonomie – Betriebsautonomie – Privatautonomie, NZA 2002, 761 (769); *Waas* (fn. 8) 88–89.

III. Current trends and developments

Like elsewhere in the world, globalisation has had a considerable impact on the labour market in Germany, posing new challenges to businesses, workers, and regulators. Firms move or threaten to move their activities abroad where labour costs are lower. Another common scenario is that companies from low wage countries post workers to provide services in Germany, for example in the construction industry, underbidding local companies that employ domestic workers.

Against this background, the agenda of the social partners has changed. Trade unions, in particular, have realized that it is no longer possible to pursue a 'one-fits-all' strategy for the whole industry or for entire branches of the industry. Rather, they have to take into account the economic situation and particular needs of individual employers. In many cases, securing jobs instead of improving working conditions has become the top priority for trade unions. This more flexible approach, however, has alienated many workers from the unions. The degree of unionisation has decreased and, consequently, the position of trade unions has been further weakened.[19]

In the light of these developments, the legislature faces a difficult double task: on the one hand, it is called upon to accommodate the desire of the social partners for more flexibility. On the other hand, it has to solve the problems arising from the fact that social partners today play a less important role in determining the terms and conditions of employment.

In a nutshell, we can see that the process of globalisation and the strong exposure of firms to cross-border competition have left their imprint on the German system of collective bargaining.[20] On closer inspection, one can observe three major developments that are currently changing the foundations of collective labour law, namely (1) flexibilisation; (2) decentralisation; and (3) Europeanisation. The following sections will highlight each of these three developments in turn.

1. Flexibilisation

The process of flexibilisation concerns the relationship between statutory law and collective bargaining. Traditionally, the general goal of statutory law has

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[19] In 1991, the trade unions that formed part of the *Deutscher Gewerkschaftsbund* (Confederation of German Trade Unions), the principal umbrella organisation of trade unions in Germany, had more than 11 million members. By 2013, the number of members had dropped to 6 million (see: <http://www.dgb.de/uber-uns/dgb-heute/mitgliederzahlen>).

[20] See, on the impact of globalisation on the German system of collective bargaining from a comparative perspective, *Thorsten Schulten*, Das deutsche Tarifvertragssystem im europäischen Vergleich, in Reinhard Bispinck/Thorsten Schulten (eds.), Zukunft der Tarifautonomie – 60 Jahre Tarifvertragsgesetz: Bilanz und Ausblick, 2010, 193–204.

been to afford a non-excludable minimum standard of protection to employees. Collective bargaining, on the other hand, is generally meant to improve the position of employees and achieve employment terms more favourable than those required by statutory law. In recent times, however, a new regulatory pattern has emerged. In order to satisfy the need for more flexibility in employment relations, the legislature has implemented a number of statutory rules from which collective bargaining parties are allowed to depart also to the *detriment* of employees.

a) Advantages of flexibilisation: the case of working time regulation

At first sight, the new regulatory approach appears to be superior to the traditional model of strict mandatory regulation as it widens the scope of collective bargaining and enhances the autonomy of social partners. Considering that statutory employment rules have a broad scope of application and cover all kinds of professions and industrial branches, it seems reasonable, in principle, to allow for some flexibility by permitting social partners to modify those rules where appropriate. Generally, the collective bargaining parties are better informed than state regulators about the particular needs and interests in a given branch of industry. Moreover, in firms faced with economic difficulties, restricting certain statutory rights may be an effective transitional measure to avoid layoffs or the winding up of the entire company.

The provisions of the Working Time Act (*Arbeitszeitgesetz – ArbZG)* provide an example of statutory law from which collective bargaining parties can derogate to the detriment of employees. § 3 of that act, which is based on the European Working Time Directive 2003/88/EC,[21] stipulates that, as a general rule, the daily working hours may not exceed 8 hours. Under the same provision, the parties to the individual employment contract may agree to extend the working hours to a maximum of 10 hours per day provided that the average working time, calculated on the basis of a period of 6 months, does not exceed 8 hours per day. While these requirements may be appropriate and allow for sufficient flexibility in most branches of industry, they may prove too rigid for particular branches and professions. This may be the case, for instance, for emergency workers such as firemen or paramedics who, for the most part of their working shift, are merely in attendance without performing active work. To respond to the needs of such professions, § 7 *ArbZG* permits collective bargaining parties to derogate from the precepts of § 3 and to extend the working time, subject to certain conditions, beyond the limits imposed by that provision.

[21] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, [2003] OJ L 299/9.

The risks for employees arising from the derogable character of the provisions on maximum working hours seem to be rather limited especially for two reasons. First, § 7 *ArbZG* allows the extension of the daily working time only subject to strict requirements which are designed to protect employees against health hazards resulting from the prolonged working hours (thus, the average working time per week may not exceed 48 hours; furthermore, if the daily working time is extended to more than 12 hours, the employee must be guaranteed an uninterrupted rest period of at least 11 hours immediately subsequent to the completion of the working shift). The second argument rests on a more general consideration. At the collective level, employers and employees have usually equal bargaining power and, thus, negotiate the terms of employment on an equal footing. Against this background, one may assume that trade unions will be only willing to accept derogations from statutory provisions to the detriment of employees if the employer offers some form of compensation. Thus, there appears to be no risk of unfair bargains or, even worse, of exploitation of workers.

b) Risks of flexibilisation: the case of temporary agency work

The latter assumption, however, does not always prove correct in practice. Frequently, the system of collective bargaining fails to produce fair outcomes and, as a consequence, employees are deprived of their statutory protection rights without obtaining proper compensation in return.[22] The rules on temporary agency work provide an illustrative example. Under the German Temporary Agency Work Act (*Arbeitnehmerüberlassungsgesetz – AÜG*), temporary agency workers assigned to a particular undertaking – the 'user undertaking' – are entitled to the same pay as the regular staff employed in that undertaking. However, according to the *AÜG*, the temporary-work agency may exclude the right to equal pay on the basis of a collective agreement and stipulate that the temporary agency worker is paid a wage lower than that earned by the employees working in the user undertaking. The *AÜG* makes clear that a collective agreement departing from the principle of equal pay is also applicable vis-à-vis temporary agency workers who are not members of the signatory union provided that the collective agreement is incorporated into the individual contract of employment. From a practical point of view, the latter aspect plays a crucial role, as the level of unionisation is very low among temporary agency workers. What happens in practice is that temporary-work agencies conclude collective agreements with some minor trade unions that represent

[22] See, for a critique of the possibility of derogating from statutory law to the detriment of employees on the basis of collective agreements, *Rudolf Buschmann*, Abbau des gesetzlichen Arbeitnehmerschutzes durch kollektives Arbeitsrecht?, in Festschrift für Reinhard Richardi, 2007, 93–116; *Monika Schlachter/Melanie Klauk*, Tarifdispositivität – eine zeitgemäße Regelung?, Arbeit und Recht (AuR) 2010, 354–362.

just a small percentage of temporary agency workers, fixing wages in derogation from the principle of equal pay. Those collective agreements are incorporated, on the basis of standard contractual terms, also into individual employment contracts with temporary agency workers who are not members of the signatory unions. Thus, virtually all temporary agency workers are exempted from the principle of equal pay[23] and earn significantly less in comparison to non-temporary workers.[24] As a result, what the legislature intended to be the general rule – the principle of equal pay – almost never applies. This marks an important difference from the rules on maximum working hours mentioned above. In the latter context, the collective bargaining parties generally derogate from statutory provisions only in exceptional cases to meet specific requirements of a particular industry.

What the example of temporary agency work illustrates is that the possibility of derogating from statutory law on the basis of collective agreements poses problems especially in industries where the level of unionisation is low. Here, trade unions generally lack the power to defend the interests of employees effectively and, hence, are more likely to accept collective agreements containing terms which are rather unfavourable to employees. The harm inflicted on employees would be limited if the collective agreements at issue were only binding, in accordance with the principle laid down in § 4(1) *TVG*,[25] on the few members of the signatory union. However, since the legislature generally permits the employer to incorporate the content of such agreements also into employment contracts with non-union members, the agreements become *de facto* universally applicable. As a result, a collective agreement formed by a trade union that represents only a small minority of workers ends up covering virtually the whole workforce in a particular industry – it may be doubted whether this is a legitimate outcome.[26]

Moreover, unlike in the case of collective agreements designed to afford to employees terms of employment more favourable than those required by law, employers have a genuine interest in negotiating with 'weak' unions as this

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[23] According to *Raimund Waltermann*, Fehlentwicklung in der Leiharbeit, NZA 2010, 482 (485), approximately 95% of all temporary agency workers are exempted from the principle of equal pay.

[24] According to a study published in 2010, temporary workers earn around 20% less than their non-temporary counterparts, see *Elke Jahn*, Reassessing the Pay Gap for Temps in Germany, Journal of Economics and Statistics 230 (2010), 208–233 (the study takes into account that temporary agency workers are sometimes less skilled and less experienced than their counterparts in the user undertaking).

[25] See supra II 1 a).

[26] Also critical with regard to the possibility of incorporating collective agreements excluding statutory rights into employment contracts with non-union members, *Reinhard Richardi*, Verbandsmitgliedschaft und Tarifgeltung als Grundprinzip der Tarifautonomie, NZA 2013, 408 (410); *Waltermann* NZA 2010, 482 (485).

enables them to reduce the standard of protection for employees without having to make substantial concessions to employees. In fact, empowering social partners to exclude certain statutory rights favours the emergence of 'yellow' unions which act primarily in the interest of employers rather than of employees.[27] Thus, instead of enhancing flexibility to meet the demands of particular industrial branches to the mutual benefit of employers and employees, the new regulatory approach poses the risk of lowering, to the sole benefit of employers, the overall standard of protection afforded to employees.

In response to this threat, the courts have started to scrutinize closely whether the employee associations that sign collective agreements excluding statutory rights are sufficiently strong and independent to qualify as trade unions entitled to engage in collective bargaining. In particular, the Federal Labour Court has refined its case law according to which employee organisations concluding collective agreements on a regular basis are presumed to be sufficiently powerful to possess collective bargaining capacity.[28] According to the Court, the presumption does not hold where the collective agreements signed by the association in question derogate from statutory law to the detriment of employees.[29]

2. Decentralisation

The second major trend that can be observed in the German system of collective labour law is decentralisation. This aspect concerns the relationship between the different levels of collective bargaining. Generally speaking, we can see that collective bargaining is shifting more and more from sectoral level to company level.

a) Main aspects of decentralisation

The process of decentralisation is reflected in different developments. First, the number of collective agreements (*Tarifverträge*) concluded at company level has increased substantially over the last two decades. In 1990, roughly 2,500 firms in Germany were bound by a *Tarifvertrag* at company level.[30] By the year 2000, the number had risen to more than 6,000. In 2013, more than 10,000 companies were signatories of company-level collective agreements.

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[27] See also *Raimund Waltermann*, Gesetzliche und tarifvertragliche Gestaltung im Niedriglohnsektor, NZA 2013, 1041 (1045): "Das Regelungsmuster des tarifdispositiven Gesetzesrechts […] begünstigt die Bildung schwacher Gewerkschaften, die zur Unterbietung gesetzliche Schutzes bereit sind".

[28] *BAG* 28.3.2006 – 1 ABR 58/04 – NZA 2006, 1112 Rn. 80 et seq.

[29] *BAG* 5.10.2010 – 1 ABR 88/09 – NZA 2011, 300 Rn. 41 et seq. See, on this development, *Richard Giesen*, Verschärfte Anforderungen an die Tariffähigkeit, in Richard Giesen/Abbo Junker/Volker Rieble (eds.), Neue Tarifrechtspolitik?, 2014, 139–168.

[30] See the figures in *Hans-Böckler-Stiftung* (ed.), WSI Tarifarchiv 2014 (2014).

These figures reflect the fact that collective agreements at sectoral level are increasingly facing resistance from small and medium-sized companies in particular. In fact, many firms drop out of their respective professional organisations altogether or remain members but without authorising the professional organisation to conclude collective agreements on their behalf.[31] The effect is the same either way: those firms are not bound by the sectoral level collective agreements signed by their associations.

Another factor contributing to the decentralisation of the collective bargaining system is the use of 'opening clauses' in collective agreements at sectoral level.[32] Such clauses allow for adjustments of the respective *Tarifvertrag* at plant or company level through a *Betriebsvereinbarung*. This type of arrangement aims to strike a balance between the interests of trade unions (which usually strive for uniform working conditions in a particular branch of industry), and the interests of employers (who seek to achieve more flexible agreements tailored to their individual needs). The combination of collective bargaining at sectoral and company level has given rise to new forms of cooperation between trade unions and works councils, thus blurring the traditionally clear-cut divide between the two mechanisms of collective bargaining, namely the *Tarifvertrag* and the *Betriebsvereinbarung*.[33] Some economists have credited this decentralised model of collective bargaining with Germany's remarkable economic recovery during the last decade.[34] According to these analysts, the flexibility granted by the social partners at industry level to the individual firms and their works councils constituted the main cause for Germany's gains in competitiveness and for the significant reduction of unemployment. The far-reaching reforms of the social security system (the 'Hartz reforms') carried out by the Schröder Government in the early 2000s, on the other hand, are said to have played only a minor role.

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[31] As has been mentioned (supra II 1 a)), collective agreements concluded by an employers' organisation are binding on all members of the organisation in accordance with § 4(1) *TVG*. However, in order to remain attractive for firms, many professional associations have introduced a new form of membership (generally referred to as *OT-Mitgliedschaft*), by which firms continue to be part of the organisation (and therefore pay their contributions) but are no longer bound by the sectoral-level collective agreements signed by the organisation. This practice has been approved, albeit subject to certain restrictions, by the Federal Labour Court, see *BAG* 18.7.2006 – 1 ABR 36/05 = NZA 2006, 1225.

[32] *Thomas Dieterich*, Zukunft der Tarifautonomie, in Bispinck/Schulten (fn. 20), 179 (181 et seq.); *Manfred Walser*, Stabilisierung des Verbandstarifvertrags: Widersprüchliche Impulse der Rechtsordnung?, WSI Mitteilungen 2013, 491 (494).

[33] See, on this aspect, *Dieterich* (fn. 18) 119 et seq.

[34] See e.g. *Christian Dustmann/Bernd Fitzenberger/Uta Schönberg/Alexandra Spitz–Oener*, From Sick Man of Europe to Economic Superstar: Germany's Resurgent Economy, Journal of Economic Perspectives 28 (2014), Issue 1, 167–88.

b) Impact on system of collective bargaining

The trend towards decentralisation in collective bargaining has a significant impact on industrial relations in general. First, it affects the way firms compete over employment conditions. Collective agreements at sectoral level are described as having effects similar to those produced by a cartel (*Kartellwirkung*).[35] Essentially, such agreements neutralise the impact of working conditions on competition since all firms bound by the collective agreement have to comply with the same terms of employment. Thus, they are precluded from employing workers on less favourable – and hence less expensive – terms with a view to gaining a competitive advantage in the relevant industry. Firms may only compete to offer working conditions more favourable than those provided for in the collective agreement – for instance, to attract high-skilled or particularly talented workers. By withdrawing from collective bargaining at sectoral level and negotiating the terms of employment at company level (where the bargaining power of unions is often weaker), firms are generally in a position to impose working conditions on employees that are less favourable than those provided for in the agreements at sectoral level. The resulting reduction of labour costs confers a competitive advantage on the firms in question. This, in turn, puts pressure on competitors to withdraw from collective bargaining at sectoral level as well. Thus, in sum, the process of decentralisation has the effect of harming companies that offer more favourable employment terms to their employees.

A second major effect of decentralisation relates to the coverage of collective bargaining. Over the last few decades, the coverage of collective bargaining has been decreasing constantly. In 1998, more than 75% of all employment relations in Western Germany were covered by a collective agreement (63% in Eastern Germany).[36] Since then, the percentage has dropped to no more than 60% in 2013 (48% in Eastern Germany). The process of decentralisation has contributed to this trend. As has been mentioned, the number of firms represented by employers' organisations and taking part in collective bargaining at sectoral level has sunk considerably over recent years. While some of the firms that opt out of sectoral level collective bargaining conclude collective agreements at company level, many other firms conclude no collective agreements at all. The reason is that, in practice, trade unions often lack the power to force a particular firm to conclude company-level collective agreements. This is especially true for smaller companies in which trade unions

[35] See, on the *Kartellwirkung* of collective agreements, *Franz Gamillscheg*, Kollektives Arbeitsrecht, vol. I, 1997, 498 et seq.

[36] *Hans-Böckler-Stiftung* (ed.), WSI Tarifarchiv 2014 (2014). The numbers comprise also employment relations with non-union members where the collective agreement applies on the basis of a voluntary incorporation clause.

are not represented.[37] In such circumstances, it is difficult for a trade union to organise collective action to exert pressure on the firm's management. Thus, in sum, it can be stated that the process of decentralisation has reduced the coverage not just of collective agreements at sectoral level, but also the coverage of collective bargaining in general, as it is more difficult for unions to represent and organise workers at company level.

c) Legislative responses

The general aim of collective bargaining is to overcome the inequality of bargaining power between the parties to the individual contract of employment and to enable employers and employees to negotiate the terms of employment autonomously and on an equal footing. In the absence of a collective agreement, there is a risk that the employer may abuse his superior bargaining power and dictate employment terms that are unfair to the employee.

In view of the declining coverage of collective bargaining, the legislature has recently taken action to afford better protection to employees who are not covered by a collective agreement. In July 2014, Parliament passed the Collective Bargaining Strengthening Act (*Tarifautonomiestärkungsgesetz*).[38] The act provides for two measures to guarantee better working conditions in the absence of a collective agreement. First, it introduces a statutory minimum wage, which is mandatory for all professions and industrial branches. As of 2015, employees are entitled to a minimum rate of pay of 8.50 Euro per working hour. The Government, acting in concert with an advisory committee composed of representatives of the social partners, may adjust the rate in order to keep it in line with inflation or other economic developments. The collective bargaining parties may not derogate from the statutory minimum wage to the detriment of employees.[39]

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[37] According to *Stephan Seiwerth*, Stärkung der Tarifautonomie – Anregungen aus Europa?, Europäische Zeitschrift für Arbeitsrecht (EuZA) 2014, 450 (451), approximately 79% of the companies employing up to 40 workers are not bound by a collective agreement. Among the companies employing 1000 workers or more only 12% are not covered by a collective agreement.

[38] Gesetz zur Stärkung der Tarifautonomie vom 11. August 2014, BGBl. 2014 I 1348.

[39] Critical, in this regard, are *Thomas Lobinger*, Stärkung oder Verstaatlichung der Tarifautonomie, Juristenzeitung (JZ) 2014, 810 (817) and *Christian Picker*, Niedriglohn und Mindestlohn, Recht der Arbeit (RdA) 2014, 25 (34), both taking the view that collective bargaining parties should be entitled to fix wages below the statutory minimum wage; see, for the opposite view, *Waltermann* NZA 2013, 1041 (1047), who points out the negative experiences made with collective agreements excluding statutory rights in the context of temporary agency work (see, on this matter, supra III 2 b)). However, it should be noted that, according to § 24 of the Minimum Wage Act (*Mindestlohngesetz – MiLoG*), existing collective agreements which have been declared universally applicable and which provide

The second regulatory measure adopted by the legislature in the *Tarifautonomiestärkungsgesetz* relates to the power of authorities to declare collective agreements universally applicable. The effect of such a declaration of universal application is that the collective agreement becomes binding on employers and employees falling within the personal and territorial scope of the agreement irrespective of whether or not they are members of the signatory organisations. In the new act, the power of the authorities to declare collective agreements universally applicable has been extended considerably.[40]

However, as commentators have rightly pointed out, the Collective Bargaining Strengthening Act might eventually have the effect of *weakening* collective bargaining.[41] The reason is that by guaranteeing a statutory minimum wage and by extending the rights and benefits provided in collective agreements also to non-union members, the legislature actually reduces the incentives for employees to join unions. Employees may in fact question the benefit of union membership if union members and non-union members enjoy the same level of protection. As a result, unions may face even more difficulty in organising employees.

d) Decentralisation of collective bargaining within companies

Finally, it should be mentioned that the trend towards decentralisation occurs also *within* companies. Up to the year 2010, the Federal Labour Court took the position that, for each category of employees in a given establishment, an employer could not be bound by more than one collective agreement.[42] It followed that different trade unions were precluded from competing with each other at company level to represent the same groups of employees. This case law had the effect of weakening the position of small trade unions that represent, exclusively, specific professional groups such as pilots, train con-

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a minimum rate of pay below 8.50 Euro per working hour remain valid until 31 December 2017.

[40] Previously § 5 *TVG* stipulated that a collective agreement could be declared universally applicable on grounds of public interest provided that the employers bound by the agreement employed 50% or more of the workers falling under the personal scope the agreement. Under the new § 5 *TVG*, the 50% threshold has been abandoned. In addition, it is now easier to declare collective agreements universally applicable also under the framework of the Posting of Workers Act (*Arbeitnehmer-Entsendegesetz – AEntG*). Whereas § 4 *AEntG*, in its previous version, contained an exhaustive list of industries in which collective agreements could be declared universally applicable, the new § 4 *AEntG* now extends to any branch of industry.

[41] *Lobinger* JZ 2014, 810 (813); *Seiwerth* EuZA 2014, 450 (455); *Raimund Waltermann*, Stärkung der Tarifautonomie – Welche Wege könnte man gehen?, NZA 2014, 874 (877) („Anreize zur Stärkung der Tarifautonomie an sich enthält das Gesetz zur Stärkung der Tarifautonomie nicht").

[42] BAG 20.3.1991 – 4 AZR 455/90 – NZA 1991, 736.

ductors, doctors or other highly skilled workers. For those unions, it was generally difficult to conclude separate collective agreements for their members since the employment terms for the groups of employees they represented were also regulated in the collective agreements negotiated by the large trade unions that represent a variety of professions. According to the case law of the Federal Labour Court, the latter agreements would usually take precedence in the event of a conflict.

The situation changed in 2010, when the Federal Labour Court departed from its previous case law by ruling that a company can be bound by several collective agreements concluded with different trade unions that all represent the same groups of employees.[43] This new case law has unleashed fierce competition among trade unions. In particular, trade unions which represent employees that hold key positions in their relevant companies such as pilots, train conductors or security personnel at airports are now given the chance to conclude separate collective agreements that provide especially favourable terms for their members. Given the considerable impact of collective measures conducted by those groups of employees, the companies concerned are often forced to give in to the demands raised by the respective unions. The new case law of the Federal Labour Court faces strong criticism from employers and the traditional trade unions that represent different categories of workers. Moreover, there is a general fear that, as a result of the emergence of competition among trade unions, more collective disputes might arise, affecting not just the interests of the employers involved in the negotiations but the economy as a whole.

Against this background, the German legislature amended the *TVG* through the *Tarifeinheitsgesetz* in 2015. The new § 4a *TVG* essentially provides that among the trade unions represented in a given plant, only the one with the most members in the plant concerned may conclude a collective agreement with the management of the firm. One major goal of the new provision is to eliminate competition between unions at plant level. However, according to many commentators, the Government's proposal is incompatible with freedom of association and hence violates the constitution.[44] Soon after the new law entered into force, a number of trade unions filed a constitutional complaint against § 4a *TVG*, which at the moment is still pending.

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[43] BAG 7.7.2010 – 4 AZR 549/08 – NZA 2010, 1068.

[44] See e.g. *Wolfgang Ewer*, Aushöhlung von Grundrechten der Berufs- und Spartengewerkschaften – das Tarifeinheitsgesetz, Neue Juristische Wochenschrift (NJW) 2015, 2230–2235; *Reinhard Richardi*, Tarifeinheit als Placebo für ein Arbeitskampfverbot, NZA 2014, 1233 (1235 et seq.); *Bernd Rüthers*, Ein Gesetz gegen die Verfassung? – Die „Tarifeinheit" im Streit der Verbandsinteressen, Zeitschrift für Rechtspolitik (ZRP) 2015, 2 (4 et seq.).

3. Europeanisation

Finally, also the process of Europeanisation has a significant impact on the interaction between collective bargaining and state legislation. In fact, the harmonisation of employment law in the EU Member States through numerous directives has increased the importance of legislation as a legal source and has reduced the scope for collective bargaining. In those areas where EU law and the corresponding implementation acts adopted by national legislatures regulate certain terms of employment there remains usually little room for social partners to negotiate working conditions autonomously.[45]

However, one may argue that, for measures in the field of social policy (which also includes employment law), the Treaty on the Functioning of the European Union (TFEU) requires the involvement of the social partners in the legislative procedure. According to Art 154(2) TFEU, the Commission is required, before submitting proposals in the social policy field, to consult management and labour on the possible direction of action. Moreover, once a directive has been adopted, Art 153(3) TFEU stipulates that Member States may entrust management and labour, at their joint request, with the implementation of the directive. Finally, Art 155 TFEU provides for a social dialogue between management and labour at EU level, which "may lead to contractual relations, including agreements." Pursuant to Art 155(2) TFEU, such agreements may be implemented either in accordance with the procedures and practices specific to management and labour in the Member States or by a Council decision on a proposal from the Commission. In the latter case, the agreement is generally implemented on the basis of a directive that is then transposed by the Member States into domestic law.

Yet none of the aforementioned procedures confers a degree of regulatory autonomy on social partners comparable to that enjoyed by the collective bargaining parties at the national level. Under Art 154 TFEU, social partners are only consulted and do not actively participate in the legislative procedure. The involvement of social partners in the context of Art 153(3) is confined to the implementation of legislative acts: here, again, employers and employees lack the right to decide on the content of the measure in question. The social dialogue envisaged by Art 155 TFEU, on the other hand, empowers social partners at the European level to regulate employment-related issues autonomously. However, one major weakness of this mechanism lies in the fact that agreements between management and labour have no direct impact on individual relationships of employment. In particular, unlike the *Tarifvertrag* and the *Betriebsvereinbarung*,[46] such agreements are not capable of giving rise to

[45] It should be noted, however, that some directives contain 'opening clauses', permitting social partners to derogate from the content of the directive. This is true, for instance, for the Working Time Directive 2003/88 (fn. 21); see Article 18 of the Directive.

[46] See supra II 1 a) and b).

rights and duties for the parties to the individual contract of employment.[47] Thus, the social dialogue under Art 155 TFEU is a much less powerful regulatory tool in comparison to the instruments of collective bargaining at the national level.

These considerations show that what is still missing in the European internal market is an effective framework for cross-border collective bargaining. If such a framework were implemented, it would indeed be possible to harmonise the terms of employment in different Member States through collective bargaining.[48] In the absence of transnational mechanisms of collective labour law, the only way to harmonise the working conditions in Europe is through legislation.

IV. Summary

The German model of collective bargaining is currently undergoing significant change. On close inspection, one can discern three major developments:

Flexibilisation. While historically the primary aim of collective bargaining has been to afford to employees terms of employment above the minimum standard guaranteed by statutory law, the legislature has now empowered collective bargaining parties, in a variety of contexts, to derogate from statutory law also to the detriment of employees. This regulatory approach enables social partners to adjust the terms of employment to the needs of particular professions and industrial branches. However, as the example of the Temporary Agency Work Act has illustrated, the possibility of excluding workers' statutory rights on the basis of collective agreements poses problems in industries where the level of unionisation is low and unions therefore lack the power to defend the interests of employees effectively.

Decentralisation. Collective bargaining is shifting more and more from sectoral level to company level. Collective agreements at sectoral level frequently contain 'opening clauses' allowing for adjustments at company or plant

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[47] See *Eberhard Eichenhofer*, in Rudolf Streinz, EUV/AEUV, Article 155 AEUV para. 2. See, on the other hand, *Reingard Zimmer*, Entwicklungsperspektiven transnationaler Kollektivverhandlungen in Europa – Schaffung eines rechtlichen Rahmens für transnationale Kollektivverträge in der Europäischen Union, EuZA 2013, 247 (256), who takes the view that Article 155 TFEU may provide a legal basis for collective agreements at EU level.

[48] In its Social Agenda 2005–2010, the European Commission raised the idea of creating an "optional European framework for transnational collective bargaining". The idea is also supported by numerous academics, see most prominently the 'Ales Report' (*Edoardo Ales/Samuel Engblom/Teun Jaspers et al.*, Transnational collective bargaining. Past, present and future. Final Report financed by and prepared for the use of the European Commission, 2006, 33–41). To date, however, the Commission has refrained from taking legislative action.

level through bilateral agreements between the works council and the management of the respective firm. At the same time, a growing number of companies withdraw from collective bargaining at sectoral level. While some of these firms (especially the larger ones) conclude collective agreements at company level, others refrain from signing collective agreements altogether. As a result, the coverage of collective bargaining diminishes. In response to this development, the legislature has adopted measures to improve the working conditions of employees who are not covered by a collective agreement.

Europeanisation. Finally, the harmonisation of employment law through EU legislation has the effect of increasing the importance of statutory law as a legal source and reducing the scope for collective bargaining. The reason is that EU law still lacks effective mechanisms for cross-border collective bargaining. As a consequence, harmonisation of working conditions in Europe can be only achieved by means of legislation.

Collective Bargaining in the UK and its Interaction with State Legislation and Individual Employment Contracts

Louise Merrett

I. Introduction

Employment law in the UK encompasses three main areas: collective labour law, individual employment contracts and legislation. The intention is not to delve into the content of the substantive law in these areas. Nor is this paper concerned, at least primarily, with procedural aspects, for example, of the collective bargaining process. In order to assess the importance of collective labour law in the UK, the focus of this paper is on the way in which these areas interact as *sources* of labour law. In particular, by what legal mechanism or mechanisms rules in each category impact on the employment relationship. As will be explained, the individual employment contract acts as the fulcrum around which the other sources operate. The role of collective agreements is essentially secondary and voluntary: in UK law collective agreements can only take effect through voluntary incorporation into the contract of employment.

In the UK, a broad division is drawn between individual labour law (that is, the law relating in a narrow sense to the relationship between employer and employee), and collective labour law (that is, the law which is concerned with collective bargaining, trade union organisation and industrial action).[1] This paper is essentially concerned with the interface between the two, in particular, how collective agreements impact on individual employment relationships. It also considers how both are affected by statutory regulation. Legislation can impact on the employment relationship directly; in particular, by setting statutory norms or rights which cannot be derogated from by the parties. Legislation can also provide support for the process of collective bargaining and, through that route, indirectly affect the individual employment relationship. However, the relationship is also a circular one, in that, in the majority of cases, employment protection legislation recognises the contract of employment as the basis for the legal regulation of the individual employment relationship and in many cases that contract provides the gateway to statutory employment rights.

Section II. begins with a brief historical overview of the role of collective bargaining in the UK. Section III. considers the sources of labour law in the UK, starting with the individual contract of employment and explaining how the employment relationship is affected by, first, legislation, and, secondly, collective bargaining. Finally, Section IV. explores in more detail the voluntary role of collective agreements by focusing on the contractual model of voluntary incorporation into the individual employment contract. It also explains the limited impact of statutory trade union recognition. Before concluding, this section also considers an important recent development in the role of collective agreements, that is, the modification and in some cases derogation from certain statutory rights in relation to working time, fixed-term contracts and parental leave.

[1] *Simon Deakin/Gillian Morris*, Labour Law, 6th ed. 2012, 3.

II. Overview of collective bargaining in the UK

Collective bargaining is the process of negotiation between an employer or employers' association and one or more recognised trade union, designed to produce collective agreements which themselves have two main aspects:[2]

(1) A procedural or contractual function in regulating the relationship between the parties themselves (that is, between the employer and trade union); and
(2) A normative or rule-making function which consists of the establishment of terms and conditions which may be applicable to the contracts of individual workers.[3]

Traditionally, one of the distinctive features of UK labour law was the relatively limited role played by legislation in regulating both the individual employment relationship and relations between trade unions and their members. By contrast, greater importance was accorded to voluntary sources and collective bargaining. This attitude to industrial relations, which remained dominant throughout the first half of the twentieth century, is often described by Otto Kahn-Freund's term "collective laissez-faire"[4] and the idea of "legal abstentionism"[5] or "voluntarism"[6]. A fundamental premise of this approach was the idea that if workers joined together to create trade unions their bargaining power would increase to match the position of employers. It was also a key belief that while government could promote and assist in this process, it should not intervene directly in the bargaining process.[7] However, structural changes

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[2] See generally on the purposes and methods of collective bargaining: *Paul Davies/Mark Freedland*, Kahn-Freund's Labour and the Law, 3rd ed. 1983, chapters 3 and 6. See further for a broader definition based on the idea of "joint regulation", *William Brown/Sarah Oxenbridge*, Trade Unions and Great Britain: Law and the Future of Collectivism, in Catherine Barnard/Simon Deakin/Gillian Morris, The Future of Labour Law, 2004, 64. See also *Deakin/Morris* (fn. 1) 982, and ILO Convention 98 Article 4 discussed in *Hugh Collins/Keith Ewing/Aileen McColgan*, Labour Law, 2012, 85. For a discussion of the right to engage in collective bargaining at EU level, see *Catherine Barnard*, EU Employment Law, 4th ed. 2012, 711 et seq.

[3] *Deakin/Morris* (fn. 1) para. 1.3.

[4] See, for a full description, *Ruth Dukes*, Otto Kahn-Freund and collective laissez-faire: an edifice without a keystone, (2009) 72 Modern Law Review (MLR), 220 (221): summarising the idea in the words of Kahn-Freund as "the retreat of the law from industrial relations and of industrial relations from the law." See also *Paul Davies/Mark Freedland*, Labour Legislation and Public Policy, 1993, chapter 1.

[5] See *Collins/Ewing/McColgan* (fn. 2) 10.

[6] Explained further in *Ruth Dukes*, The statutory recognition procedure 1999: no bias in favour of recognition, Industrial Law Journal (ILJ) 37 (2008), 236 (239).

[7] Although during the second world war compulsory incorporation of collective agreements was imposed under Order 1305 (see fn. 29 below). In the early years, strikes were an

in the labour market and the economy from 1950 onwards led to a shift in emphasis.[8] The level of bargaining moved from a national or sectoral level towards the individual employer or workplace. Furthermore, union membership and the percentage of those covered by collective agreements fell dramatically, particularly over the final quarter of the twentieth century.[9] At the same time, the past 30 years have seen a great expansion in statutory intervention. One aspect of the rationale of such legislation was a perception that, given the changing position in the labour market, there were limits to what could be achieved through collective bargaining.[10]

This change in emphasis from collective bargaining towards direct statutory intervention also brought about a corresponding increase in the importance of the individual employment contract. It has been noted that: "It was only with the advent of employment protection legislation in the 1960s and 1970s that the individual contract of employment came to assume the importance which it has in the modern law."[11]

The significance of collective bargaining, and the attitudes of various governments towards it, shifted over the course of the twentieth century. However, what is striking for the purposes of this paper, is that throughout this period the *legal* role of collective agreements as a source of employment law has been and remains essentially the same, namely voluntary. It has consistently been the case that there is usually no legal compulsion on either party to engage in collective bargaining or to negotiate a collective agreement, or to comply with the terms of any such agreement once concluded. Both collective agreements and statute take effect on and through the individual contract of employment. The voluntary nature of collective bargaining in the UK is considered further in the final section of this paper by reference to two issues: first, the contractual model of voluntary incorporation, and, secondly, the very limited scope of the new statutory recognition procedure for trade unions. However, to understand the framework in which these issues arise, further consideration must first be given to the sources of UK labour law and how they interact.

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inescapable part of collective bargaining which was why the immunity from tortious liability was seen as being so important (see *Brown/Oxenbridge* (fn. 2) 67).

[8] The 1950s have been identified as the heyday of collective laissez-faire (see *Davies/Freedland* (fn. 2) chapter 1).

[9] Estimates differ, but *Deakin/Morris* (fn. 1) 872 report that the percentage of those covered by collective agreements fell from 64% in 1984 to 47% in 1990 and, in 1998, 41% for workplaces with more than 25 employees. *Brown/Oxenbridge* (fn. 2) 69–70, note that in 20 years from 1980, the coverage of collective agreements contracted from over three quarters to under one third of the employed workforce. The range of issues on which bargaining took place also shrunk massively.

[10] For a detailed historical account see *Davies/Freedland* (fn. 2) chapters 1 and 2.

[11] *Deakin/Morris* (fn. 1) para. 1.19.

III. Sources of UK labour law

1. The contract of employment

The cornerstone of the modern labour law system in the UK is the contract of employment.[12] Thus, it has been said that: "the law of the contract of employment, although obsolete in some respects and misconceived in others, has a critical role not only in individual employment law but also in collective labour law."[13] Although criticisms might be made of the contractual model, its *legal* significance as a source of obligations and, more importantly, as a tool for the incorporation of other sources cannot be doubted.[14]

At one level, the employment contract is a contract like any other and accordingly is subject to the normal private law of contract: it is formed by agreement between two parties, constituting a work wage bargain which is legally enforceable and with compensation available for breach. But in other respects, the relationship is unique. In particular, it is long term, not static, the terms are not usually specific and the relationship of subordination inherent in employment relationships all have an impact. These features may require rules which modify or supplement the normal rules of contract, in particular, through the role of implied terms.[15]

The debate about the "relational" nature of the relationship of employment and the extent to which normal private law principles are appropriately applied to such relationships will no doubt continue;[16] but the starting point in considering the terms under which an employee is employed must be the express

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[12] *Otto Kahn-Freund*, Legal Framework, in Allan Flanders/H. A. Clegg, The System of Industrial Relations in Great Britain, 1954, 2. The contract of employment has also been referred to as providing the "scaffolding" for labour law: *Collins/Ewing/McColgan* (fn. 2) 95. *Mark Freedland's* 1976 book, The Contract of Employment, had a profound impact on the understanding of labour law in emphasising the importance of the employment contract. He refers to the fact that "The law of the contract of employment combines an apparatus for the regulation of the individual employment relationship […] with a body of legal theory which is necessary for the working of many other parts of our system of labour law" (*Mark Freedland*, The Contract of Employment, 1976, 4).

[13] *Freedland*, The Contract of Employment (fn. 12) Introduction.

[14] *Davies/Freedland* (fn. 2) 45.

[15] See *Collins/Ewing/McColgan* (fn. 2) chapter 1. *Freedland*, in the introduction to his 2004 book, The Personal Employment Contract, 2004, explained that one of the key changes in method from his seminal 1976 work was in recognising that instead of seeking to apply the general principles of contract, the work now depicts the contract of employment as an autonomous body of contract law, intimately interlinked with a large body of employment legislation.

[16] See *Collins/Ewing/McColgan* (fn. 2) 98 et seq. for criticisms of the contractual model and for discussion of the notion of the "psychological contract". Cf. *Douglas Brodie*, How relational is the employment contract, ILJ 40 (2011), 232 questioning where classification

terms of the employment contract.[17] However, it is also possible for the court to imply terms into the contract of employment through the common law contractual process of implication of terms. Traditionally, terms implied in fact are terms which reflect the actual but unexpressed intention of the particular parties, and are, accordingly, conceptually no different from express terms.[18] But more significantly, judges have also made use of the common law power to imply terms as a matter of law.[19] When considering the legal sources of rights and obligations under the employment contract, terms implied by law are conceptually different. Terms which are imposed as a matter of law are seen as necessary incidents of the particular type of relationship; they are judge imposed mandatory terms. Important examples in UK employment law are the implied duty to obey legal instructions[20] and the implied obligation of trust and confidence.[21]

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of a contract as relational really takes us and suggesting that the implications of the ongoing nature of a relationship might be equally well dealt with by classical law of contract.

[17] There is no requirement that the contract must be in writing, although there is an obligation under Section 1 Employment Rights Act 1996 to provide a written statement of principal terms and conditions.

[18] Traditionally two criteria have been applied: business efficacy and where the term represents the obvious, but unexpressed, intention of the parties. See *Hugh Beale*, Chitty on Contracts, 31st ed. 2012, para. 13-004. More recently, Lord Hoffmann in the *Privy Council* 18.3.2009 – *AG of Belize v. Belize Telecom Ltd* [2009] UKPC 10, stated that in every case the question was whether such an implied term would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.

[19] *Beale*, Chitty on Contracts (fn. 18) para. 13-004: in many classes of contract, implied terms have become standardised and it is somewhat artificial to attribute such terms to the unexpressed intention of the parties. Cf. *Freedland* (fn. 12) 38 arguing that the difference between terms implied in fact and terms implied by law in the context of the employment relationship is largely illusory.

[20] See *Deakin/Morris* (fn. 1) 260: a vital part of the contract, the content of the work to be done, cannot be specified or enforced in the normal way. The problem is solved by granting the employer the unilateral right of direction over the employee.

[21] *Collins/Ewing/McColgan* (fn. 2) 141: the invention of the implied term of mutual trust and confidence (first recognised by the House of Lords in *Malik v Bank of Commerce and Credit International SA* [1998] AC 20) has been one of the most remarkable and significant developments of the common law of the contract of employment in recent decades. See also *Freedland* (fn. 12) 125, commenting that the implied duty of trust and confidence is generally agreed to be the single most important development in employment law in recent years. Ground breaking-work in this area has been carried out by *Douglas Brodie*: see, inter alia, *Douglas Brodie*, The Contract of Employment, 2008; *id.*, Protecting dignity in the workplace: the vitality of mutual trust and confidence, ILJ 33 (2004), 349; *id.*, Mutual trust and confidence: catalysts; constraints and commonality, ILJ 37 (2008), 329, and *id.*, Fair Dealing and the world of work, ILJ 43 (2014), 29.

Parties can also chose to incorporate terms into their contract from other sources (including, for example, handbooks, standard terms and conditions or codes of practice[22]): once the relevant provision is incorporated it becomes a term like any other term of the contract of employment. Thus, the individual employment contract may contain terms which are directly agreed between the parties (express terms or terms implied in fact), imposed by judges (terms implied in law) or incorporated from other non-legal sources.

Many aspects of the contract of employment are still governed by the common law rules of contract described above, but those rules cannot be considered in isolation. In particular, the employment contract is potentially subject to statutory regulation and collective bargaining and it is to those two sources to which we now turn.

2. *Employment legislation*

There is now a huge body of legislation which impacts on the individual employment relationship. The three main consolidation statutes are: the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) (which deals, *inter alia*, with trade union administration, rights of union members, recognition and industrial action); the Employment Rights Act 1996 (ERA 1996) (which includes rights in relation to employment particulars, protection of wages, notice, unfair dismissal and redundancy) and the Equality Act 2010 (EqA 2010) (which brings together rules about discrimination in a number of fields including age, disability, race, religion and sex). In addition, rules relating to minimum wages are contained in the National Minimum Wage Act 1998 (NMWA 1998) and in relation to working time in the Working Time Regulations 1998 (WTR 1998). Although there is no comprehensive employment code in the UK, in combination this legislation means that a large proportion of employment rights are now set out in statute. But the relationship between these legislative provisions and the common law of the contract of employment is a complex and multi-faceted one.

Employment legislation takes effect in a variety of ways. In some cases, the statute expressly adopts the mechanism of the imposition of a contractual term

[22] See *Deakin/Morris* (fn. 1) para. 4.34 on works rules and company handbooks and para. 4.78 on workplace agreements. See also *Collins/Ewing/McColgan* (fn. 2) 119, noting that terms may also be incorporated by reference to custom and practice, trade usage, work rules or company handbooks under similar principles. See *Deakin/Morris* (fn. 2) chapter 2 fn. 29 which lists codes currently in practice. Even if not binding, such codes may be admissible in legal proceedings.

(a classic example being the equality clause in the EqA 2010[23]). More commonly, legislation grants independent statutory rights.[24] In all cases, statutory rights will usually prevail over the express or implied terms of the employment contract as any agreement by the parties to exclude the provisions of the legislation will be void.[25] Thus, statutory rights override the parties' freedom to contract and at the same time "mould" the contract of employment itself.[26]

Conversely, the contract of employment is itself the 'gateway' to many statutory rights. For example, under ERA 1996, Section 94(1), an employee has the right not to be unfairly dismissed. Under Section 230(1) an "employee" means an individual who has entered or works under a contract of employment.[27] There are also other overlaps. For example, the question of whether an employee has been "constructively dismissed", which may be crucial to a statutory claim for unfair dismissal, depends on acceptance of the employer's repudiatory breach of contract. The use of contractual concepts to define dismissal, continuity of employment and the definition of a contract of employment makes the law of the contract of employment crucial to the application of many statutes.[28]

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[23] Section 66 of the EqA 2010 provides:
(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
(2) A sex equality clause is a provision that has the following effect—
(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;
(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

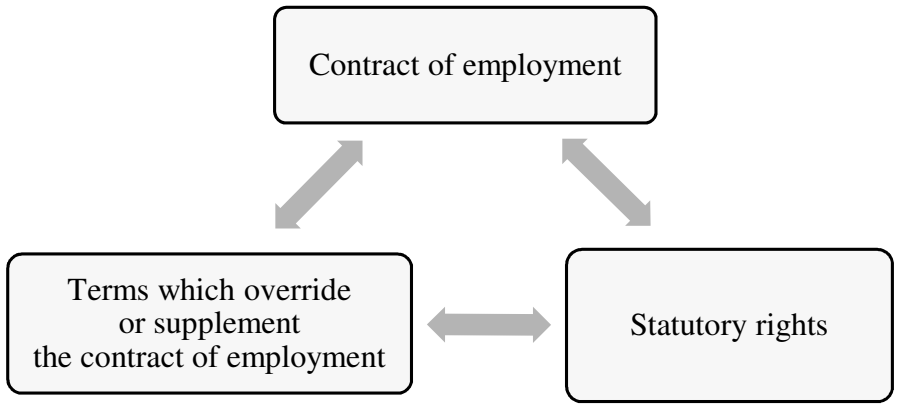
[24] Cf. *High Court, Queen's Bench Division*, 3.3.1999 – *Barber v. RJB Mining (UK) Ltd* [1992] 2 CMLR 833 where Gage J held that Regulation 4(1) WTR 1998 imposed a contractual obligation in respect of maximum working week which was enforceable through a declaration in the High Court.

[25] See, for example, Section 203(1) ERA 1996 which provides:
(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—
(a) to exclude or limit the operation of any provision of this Act, or
(b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.

[26] *Davies/Freedland* (fn. 2) 43.

[27] The provisions in the Employment Relations Act 1999 concerning the recognition of trade unions apply to a wider category of "workers" as do the rights in Part II of the ERA 1996, the NMWA 1998, the WTR 1998 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The EqA 2010 applies to persons in employment which includes employment under a contract of service or apprenticeship or a contract personally to execute any work or labour.

[28] *Freedland* (fn. 12) 10.



3. Collective agreements

One of the defining characteristics of UK labour law is that the role of collective bargaining remains "voluntary" in a number of different senses.[29]

First, the 1971 Industrial Relations Act created a statutory presumption that collective agreements were intended to be legally enforceable unless they contained an agreement to the contrary.[30] However, nearly all such agreements contained such a statement. Since 1974, the reverse statutory presumption has applied. This means that although the parties can provide otherwise, the procedural aspects (that is, the terms regulating the relationship between the parties themselves) of a collective agreement are unlikely to be legally binding.[31]

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[29] During the second world war, legislation (in particular, the Conditions of Employment and National Arbitration Order 1940 (Order 1305)) was put into place with the intention of reducing the incidence of industrial action and this included mechanisms for compulsory effect and extension of collective agreements. From 1940 until 1980 a variety of provisions remained in place but there is no longer any statutory mechanism for giving compulsory effect to collective agreements (see *Dukes* (2009) 72 MLR, 220 (231) and *Davies/Freedland* (fn. 4) chapters 1 and 2).

[30] This reflected the position established at common law. For example, the Report of the Royal Commission on Trade Unions and Employers' Associations, 1965–1968 (Cmnd 3623) under the chairmanship of Lord Donovan, noted in relation to collective agreements that: "[The parties themselves] do not intend to make a legally binding contract, and without both parties intending to be legally bound there can be no contract in the legal sense. This lack of intention to make legally binding collective agreements, or, better perhaps, this intention and policy that collective bargaining and collective agreements should remain outside the law, is one of the characteristic features of our system of industrial relations which distinguishes it from other comparable systems. It is deeply rooted in its structure" (paras 470–471).

[31] The legal status of collective agreements is now provided for in Section 179 of the TULRCA 1992 which provides that a collective agreement shall be conclusively presumed

In practice, the parties very rarely include such a provision.[32] Trade unions and employers prefer to rely on non-legal sanctions (such as conciliation or arbitration, industrial action or withholding wages) and usually neither party wishes to be subject to potential claims for damages or injunctions which would be possible if the collective agreement was a legally binding contract.

Second, and more significantly in relation to the sources of individual employment law, there is also no automatic or compulsory integration of the norms (say as to pay or working hours) generated by collective agreements into individual employment contracts, even where they result from statutory recognition.[33] The presumption that collective agreements are not binding between the collective parties themselves (discussed above) does not prevent them being incorporated into the terms of individual employment contracts and in many cases they are an important source of terms. But such incorporation is voluntary, not compulsory. For example, in *Marley v. Forward Trust Group*[34] Dillon LJ noted that collective agreements may be unenforceable between employer and union, but held that the terms of the agreement were incorporated into the personnel manual and had legal effect thereby as terms of the contract between employer and employee. The Court of Appeal in *George v. Ministry of Justice*[35] also emphasized that "the question which more regularly arises is whether, accepting that a collective agreement will not itself usually constitute a legally enforceable contract, its terms (or any of them) have become incorporated into a contract of employment between employer and employee so as to be legally enforceable between them."

This contractual model, depending on the process of contractual construction and incorporation, means that collective agreements take effect, if at all, as terms of the individual contract of employment. As *Freedland* has explained:

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not to have been intended by the parties to be a legally enforceable contract unless the agreement (a) is in writing, and (b) contains a provision which, however expressed, states that the parties intend that the agreement shall be a legally enforceable contract.

[32] The Court of Appeal in *George v. Ministry of Justice* [2013] EWCA Civ 324 para. 18, noted that in modern industrial relations, it is unusual to find provisions in a collective agreement expressing an intention that all or any part is intended to be a legally enforceable contract.

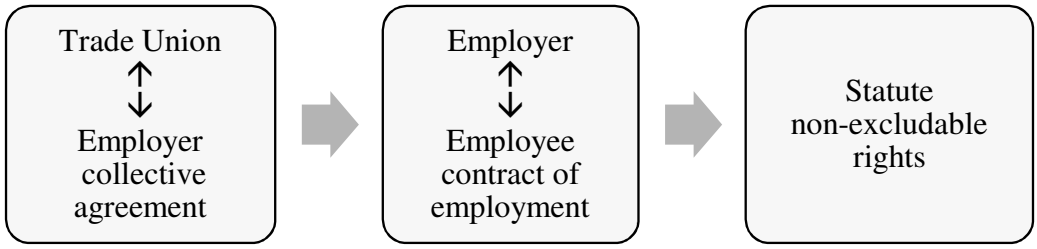
[33] Statutory recognition is discussed further below. This means that in the UK there can be no general role for collective agreements as a method of implementing obligations derived from other sources (such as European directives). By comparison, in most mainland European systems, legislation specifies the circumstances in which the normative terms of collective agreements take effect, regulating the sectoral scope and level of their application, the extent to which they apply to non-union members and their temporal effect: usually automatic and compulsory, i.e. they apply to all contracts and lay down minimum rights (*Deakin/Morris* (fn. 1) para. 4.27).

[34] *Court of Appeal (CA)* 30.6.1986 – *Marley v. Forward Trust Group* [1986] ICR 891.

[35] *CA* 17.4.2013 – *George v. Ministry of Justice* [2013] EWCA Civ 234 para. 18.

"there is almost no possibility of construing workers as making contracts of employment jointly or collectively. It has become uncontroversial, almost axiomatic, to regard collective agreements as juristically atomized into individual contracts."[36] Thus, the relevant contract is that between the individual employee and his employer; it is the contractual intention between those two parties which must be ascertained.[37]

The role of c*ollective* labour law in the UK and how it operates between individual employment contracts and statutory regulation is accordingly essentially voluntary and determined by the doctrine of incorporation.[38]



A number of consequences flow from this contractual model. A collective agreement can never be a floor of rights, used, for example, to implement minimum terms of a directive, because there is no guarantee that its terms will be enforceable. An employee does not need to be a member of a trade union to benefit from a collective agreement: the employer and employee can agree to incorporate terms from any source. Conversely, although there is no doctrine of extension (*erga omnes* effect) of collective agreements, the collective agreement can be applied to the whole workforce (whether members of a union or not) if they have the relevant bridging term in their contract. Given the widespread use by employers of standard term contracts this may well be likely in practice. Another consequence of the contractual model is that the complex disputes concerning the hierarchy between different levels of agreement which may arise in other jurisdictions become simply a matter for contractual construction. Either terms from a particular agreement are incorporated or they are not. If terms are incorporated into the contract of employment they become terms of the same status as any other contractual term and are thus subject to non-excludable statutory rights like any other term in the contract of employment.

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[36] *Freedland* (fn. 12) 49.

[37] *High Court*, *Chancery Division*, 11.7.1989 – *Alexander v. Standard Telephones & Cables Ltd (No. 2)* [1991] IRLR 286 (292).

[38] Unions, employers and employers' associations appear to be acting as principals when making collective agreements so that the negotiating parties are not usually treated as acting as agents when concluding collective agreements (see *Beale*, Chitty on Contracts (fn. 18) para. 39-045).

IV. The voluntary role of collective agreements in UK labour law

1. Voluntary incorporation of collective agreements into the contract of employment: the contractual model

Provided that the intention of the parties is clear, terms agreed in a collective agreement can be incorporated into the contract of employment between employer and individual employee provided two conditions are satisfied:

- There must be a "bridging term", and
- The terms must be suitable for individuation.

Thus, the role of collective agreements as a source of employment rights and obligations is essentially determined by concepts drawn from the common law of contract.[39]

It is common for individual contracts of employment *expressly* to incorporate collective agreements, for example, by stating that wages or hours of work are set by collective agreement. In *National Coal Board v. Galley*,[40] the defendant entered into a written contract of service with the National Coal Board as a deputy; the contract provided, inter alia, that his wages should be "regulated by such national agreement and the county wages agreement for the time being in force and that this contract of service shall be subject to those agreements and to any other agreements relating to or in connexion with or subsidiary to the wages agreement and to statutory provisions for the time being in force affecting the same." An agreement had been reached with the relevant trade union "on revised terms and conditions of employment of deputies". This agreement contained a provision that "deputies shall work such days or part days in each week as may reasonably be required […]". It was held that this term was expressly incorporated into the defendant's contract of employment.[41]

If there is no express incorporation, it may also be possible to imply an agreement that the terms of a collective agreement should be incorporated on the basis of the joint intention of the parties.[42] However, the test is strict in that

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[39] For the incorporation of terms through course of dealing see *Beale,* Chitty on Contracts (fn. 18) paras 12-011 to 12-012.

[40] *CA* 27.11.1957 – *National Coal Board v. Galley* [1958] 1 All ER 91.

[41] This case also illustrates the role of incorporated collective bargains in the variation of terms: see further *Deakin/Morris* (fn. 1) 297 and *Collins/Ewing/McColgan* (fn. 2) 166.

[42] See *Collins/Ewing/McColgan* (fn. 2) 124–127 and *Beale,* Chitty on Contracts (fn. 18) paras 39-047 to 39-050. See also *Freedland* (fn. 12) postscript, noting the possibility of incorporation of collective agreements via statutory particulars of employment which often overrides the difficulties which arise out of implied incorporation, e.g. as to degree of knowledge and appropriateness for incorporation.

it also depends on the "appropriateness" or "aptness" of a term for incorporation.[43]

In *Alexander v Standard Telephones & Cables Ltd (No. 2)*[44] Hobhouse J held that: "where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract."[45] In the context of terms relating to redundancy procedures he explained that:

"The so-called 'normative effect' by which it can be inferred that provisions of collective agreements have become part of individual contracts of employment is now well recognised in employment law […]. However, serious difficulties still arise because the principle still has to be one of incorporation into the individual contracts of employment and the extraction of a recognisable contractual intent as between the individual employee and his employer. The mere existence of collective agreements which are relevant to the employee and his employment does not include a contractual intent […]. The contractual intent has to be found in the individual contract of employment and very often the evidence will not be sufficient to establish such an intent in a manner which satisfies accepted contractual criteria and satisfies ordinary criteria of certainty. Where the relevant subject-matter is one of present day-to-day relevance to the employer and employee, as for example wage rates and hours of work, the continuing relationship between employer and employee, the former paying wages and providing work, the latter working and accepting wages, provides a basis for inferring such a contractual intent. Where, as in the case of redundancy, the situation is one which does not have daily implications but only arises occasionally the inference will be more difficult to sustain."[46]

Hobhouse J's approach to the issue of suitability for incorporation in *Alexander* was followed by the Court of Appeal in *Kaur v MG Rover Group Ltd.*[47] In the context of a provision in a collective agreement preventing compulsory redundancy, the Court of Appeal pointed out that there may well be provisions in a collective agreement "which are clearly not intended to give rise to legally-enforceable contractual rights between the employer and the individual employee" and that one "must therefore look at the contents and character of the

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[43] See *Douglas Brodie*, Collective Agreements: unreasonable expectations, Employment Law Bulletin (Emp LB) 2013, 4 (4–6).

[44] *High Court*, *Chancery Division*, 11.7.1989 – *Alexander v. Standard Telephones & Cables Ltd (No. 2)* [1991] IRLR 286 (293).

[45] *High Court*, *Chancery Division*, 11.7.1989 – *Alexander v. Standard Telephones & Cables Ltd (No. 2)* [1991] IRLR 286 para. 31. If it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn.

[46] *High Court*, *Chancery Division*, 11.7.1989 – *Alexander v. Standard Telephones & Cables Ltd (No. 2)* [1991] IRLR 286 para. 27.

[47] *CA* 17.11.2004 – *Kaur v. MG Rover Group Ltd* [2005] ICR 625.

relevant parts of the collective agreement to determine whether they are apt to be a term of the individual contract of employment." Keene LJ's conclusion was that the provisions of the collective agreement claimed to have been incorporated were in words "expressing an aspiration rather than a binding contractual term" and so were inapt for incorporation into the employment contract.[48]

In *Malone and others v British Airways plc,*[49] the Court of Appeal had to consider whether the express incorporation into contracts of employment of the terms of a collective agreement concerning minimum crew complements resulted in a particular term being individually enforceable by the employee. The conclusion was that it did not. Smith LJ explained that any such right of individual enforcement carried the potential for such disastrous consequences for the employer that it could not have been the intention of the parties to the collective agreement that it was to be so enforceable. It was therefore a term intended to be binding in honour only and so not "apt" to become a term of the employment contract in which it had been expressly incorporated.[50]

These authorities were applied by the Court of Appeal in *George v Ministry of Justice*.[51] The case concerned the terms of a 1987 collective agreement introducing reforms to the prison service, contained in what was referred to as Bulletin 8. The central question was the extent to which certain provisions of Bulletin 8 were incorporated into the claimant's contract of employment. Having concluded that there was no express incorporation, the question became whether it was possible to *infer* an intention on the part of the employer/ employee to incorporate one or more of the terms of the collective agreement. Having referred to the test set out in *Alexander* and applied in *Kaur* and *Malone*, the Court of Appeal held that the entitlement to require prison officers to work additional hours and a corresponding obligation upon the employer to repay such hours were, by *inference*, terms incorporated into the employment contracts of prison officers such as Mr George. However, the judge had specifically stopped short of also finding that the term so incorporated required the payments to be provided within the maximum period of five weeks. The five week long stop was simply a target for guidance. This finding was not challenged in the Court of Appeal and accordingly the claim failed. However, the Court of Appeal went on to consider whether, contrary to the finding that the five week long-stop had not been impliedly incorporated, it was in any event "apt" for incorporation. The judge had concluded that the five week long stop was not apt for incorporation. The Court of Appeal agreed: the language employed was redolent of the aspirational rather than the mandatory (for example

[48] *CA* 17.11.2004 – *Kaur v. MG Rover Group Ltd* [2005] ICR 625 paras 31 to 32.
[49] *CA* 3.11.2010 – *Malone and others v. British Airways plc* [2011] ICR 125.
[50] *CA* 3.11.2010 – *Malone and others v. British Airways plc* [2011] ICR 125 para. 62.
[51] *CA* 17.4.2013 – *George v. Ministry of Justice* [2013] EWCA Civ 324.

the word "normally" was used liberally in the relevant provisions, so flagging up that these paragraphs were no more than general guidance).[52] The result is a strict test for incorporation. The terms all dealt with day to day matters such as pay, which the Court of Appeal in *Alexander* indicated might be more readily incorporated. Furthermore, even if the relevant provision itself had contained a "normally" provision (which it did not) *Galley* shows that even relatively open-ended obligations, in that case "to behave reasonably", can be enforced by the courts.[53]

2. *Limited role of statutory recognition procedure*

Under the TULRCA 1992, s 178(3), "recognition" in relation to a trade union means "the recognition of the union by an employer, to any extent, for the purpose of collective bargaining". "Collective bargaining" means negotiations relating to or connected with one or more of the matters specified in Section 178(2), including: terms and conditions of employment or physical conditions, termination or suspension, allocation of work, discipline or matters relating to union membership. Recognition can be voluntary, but Schedule A1 of the 1999 Employment Relations Act, which came into force in 2000, introduced a new statutory procedure for trade union recognition.[54]

A trade union which has been refused voluntary recognition can apply to the Central Arbitration Committee for a declaration that the union is recognised as entitled to conduct collective bargaining.[55] The union must meet certain conditions: the employer must employ a minimum of 21 workers, a minimum threshold of workers (10%) in the bargaining unit must be members of the applicant union; the union must demonstrate more than 50% membership within the bargaining unit, if not, in a ballot the union must receive the support of 50% of

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[52] *CA* 17.4.2013 – *George v. Ministry of Justice* [2013] EWCA Civ 324 para. 27.

[53] *Brodie* Emp LB 2013, 4 (4–6).

[54] Amended in 2004 under the Employment Relations Act 2004 part 1. There was no direct legislative regulation of trade union recognition in the UK before 1971. However, there was indirect support, for example, through requiring compulsory arbitration. The statutory recognition procedure is discussed in a number of articles including: *Dukes* ILJ 37 (2008), 236; *Gregor Gall*, Union Recognition in Britain: The End of Legally Induced Voluntarism?, ILJ 41 (2012), 407; *Michael Doherty*, When You Ain't Got Nothin', You Got Nothin' to Lose… Union Recognition Laws, Voluntarism and the Anglo Model, ILJ 42 (2013), 369, and *Allan Bogg*, ERA 2004: another false dawn for collectivism?, ILJ 35 (2005), 72. The ILO Committee of Experts, in a 2007 Observation, noted five separate respects in which the recognition procedure did not conform with ILO Convention 98 on the Right to Organise and Collective Bargaining. However, the focus in this paper is not on the detail of the procedure but on its role in affecting sources of labour law.

[55] Collective bargaining being defined for these purposes as bargaining relating to pay, hours and holidays.

those voting and 40% of the workers in the bargaining unit.[56] As well as declaring the union to be recognised,[57] an order can also be made imposing an enforceable collective bargaining "method".[58] However, crucially, for these purposes, there is no obligation to reach an agreement and no requirement that any agreement cover any particular matter or include particular terms.[59] A successful recognition application does not require substantive outcomes of any kind: it is a duty "simply to meet and to talk".[60]

Furthermore, the legal status of any agreement reached is for the parties themselves to determine. Thus, the terms of any collective agreement entered into will not be compulsory incorporated into a contract of employment: its status will depend on voluntary incorporation by the individual parties in the way described above and is thus subject to the contractual model in exactly the same way.[61]

3. Modification of EU imposed standards

By contrast to the voluntary model so far described, in the fields of working time, successive use of fixed term contracts and parental leave, collective agreements may well develop a new and substantive regulatory role. Furthermore, the role of collective agreements in these areas is also unusual in that collective agreements can be used to derogate from what would otherwise be mandatory rights.[62]

In the context of working time, collective agreements potentially have a number of roles to play. Article 4 of the Working Time Directive[63] provides, in relation to rest breaks:[64]

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[56] Applications cannot be made if the employer already recognises a trade union, even if that union is not independent and is not representative of the relevant workers.

[57] Consequences of recognition include the right of union officials to take time-off for union related activities and the right to obtain information for collective bargaining, see *Collins/Ewing/McColgan* (fn. 2) 578 et seq.

[58] Enforceable by specific performance.

[59] There are areas where an employer cannot vary terms without first consulting with a union. There are also four contexts in which an employer has a statutory duty to consult employee representatives: redundancy, transfer of an undertaking, health and safety and pensions. This consultation role, which forms part of the broader picture of worker participation, is outside the scope of this paper.

[60] *Deakin/Morris* (fn. 1) 894 quoting Lord McIntosh of Haringey, HL Debs Vol 601, col 1275, 7 June 1999.

[61] In introducing the statutory procedure, the Government stressed that the procedure was intended as a continuation of the voluntary tradition, see *Dukes* ILJ 37 (2008), 236 (256).

[62] *Collins/Ewing/McColgan* (fn. 2) 300 identify the new procedures as a "potentially important bridge between collective and individual labour law".

[63] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, [2003] OJ L 299/9.

[64] Similarly, Article 16(c) in relation to length of night work.

Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation. Thus, firstly, in the case of rest breaks, collective agreements can act as a direct source of the detailed obligations on an employer.

Secondly, in other areas (for example, Article 6) the directive provides for rights and limits to be implemented by collective agreements.[65]

Thirdly, Article 17 provides that it is possible collectively to derogate from certain obligations (under Articles 3 (daily rest), 4 (rest breaks), 5 (weekly rest periods), 8 (length of night time work) and 16 (reference periods)) "by means of collective agreements or agreements concluded between the two sides of industry at national or regional level, or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level."

Under this provision, collective agreements have a role in derogating from statutory norms. As has been described, most employers in the UK do not recognise a trade union for the purposes of collective bargaining. Declining trade union membership and coverage of collective agreements means that alternatives need to be explored. To allow for the possibility of collectively agreed derogations for non-unionised workers, the UK introduced the idea of "workplace agreements".[66] Under the WTR 1998 a "relevant agreement" (which is an agreement which is capable of varying or implementing statutory standards) is defined in regulation 2(1) as in relation to a worker "a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract of employment between him and his employer, or any other agreement in writing, which is legally enforceable between the worker and his employer."

The provisions only apply when the collective agreement, and presumably workforce agreement,[67] forms part of the contract of employment. This means that the common law rules for voluntary incorporation of terms are implicitly

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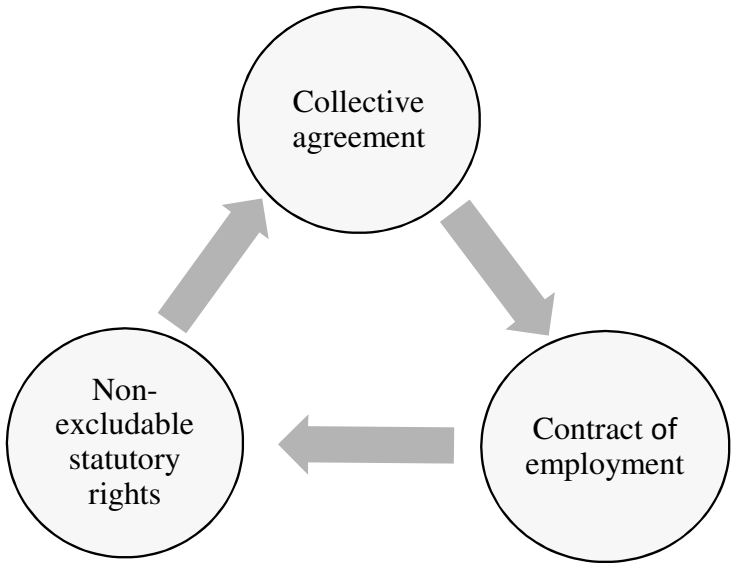
[65] Although in the UK, as noted above, the contractual model means that collective agreements cannot be used to set a floor of rights in this way.

[66] See *Collins/Ewing/McColgan* (fn. 2) 302. Under the Regulations a workplace agreement is "an agreement between an employer and workers employed by him or their representatives in respect of which the conditions set out in Schedule 1 of the Regulations are satisfied." Schedule 1 sets out detailed requirements for such agreements. A workforce agreement must be in writing, having effect for a specified period not exceeding five years, signed by a workers' representative or a majority of workers where there are less than 20. In practice, it seems that workplace agreements are little used (see *Hugh Collins/Keith Ewing/Aileen McColgan*, Labour Law Text and Materials, 2nd ed. 2005, 410).

[67] Although there are no cases considering the legal effect of workplace agreements, presumably the same contractual model will apply. See *Collins/Ewing/McColgan* (fn. 2) 304.

adopted.[68] Thus, the derogation operates through a permitted contractual variation but a variation which takes effect from a collective starting point.[69] "This form of devolution of law-making authority from statute to collective bargaining (and beyond that, to individual contract) is unusual in the UK context, although it has a longer history in continental systems."[70] In these areas, the hierarchy between the individual contract of employment, statutory norms, and collective agreements is more complex.



The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 contain similar provisions. Article 8(2) provides that once an employee's period of employment exceeds four years, the employee shall be treated as a permanent employee. However, according to Article 8(5), a collective agreement or workplace agreement can modify those provisions.[71]

Another area in which a significant role is given to collective agreements is in the context of parental leave. Recognising the need for management and

[68] See *Deakin/Morris* (fn. 1) 336.

[69] Article 18(1)(b)(i) of the Directive, which provides for *individual* exemption from the 48 hour working week, works in a different way. In *European Court of Justice* (ECJ) 24.10.2005 – C-397/01 – Pfeiffer ./. Deutsches Rotes Kreuz Kreisverband Waldshut, the ECJ held that in order to comply with the requirement that "the worker had agreed to perform the work," the employee's consent must be given individually, freely and expressly and it was not sufficient that the contract of employment refers to a collective agreement authorising an extension.

[70] See *Deakin/Morris* (fn. 1) 336.

[71] Workplace agreements are defined in Schedule 1 in a similar way to the WTR 1998.

labour to find solutions that account for the needs of both employers and workers[72] both the directive and the implementing Maternity and Parental Leave Regulations 1999 set out minimum standards which are then implemented through collective or "workforce agreements"[73] which provide the details concerning those default provisions.

V. Conclusions

In UK labour law, the individual contract of employment is the fulcrum around which other sources operate. In particular, the relationship between legislation and the contract of employment is complex and multi-faceted. The contract is both subject to statutory overriding provisions, and also informs and sometimes provides the gateway to the application of those rights. Within that framework, the role of collective agreements is essentially voluntary. Where the necessary intention is found, the parties can choose to incorporate the provisions of a collective agreement into the individual contract of employment. When this happens, generally, the terms become terms of the contract of the same status as any other terms, and are accordingly themselves subject to statutory overriding provisions. It is only in the limited fields of working time, fixed contracts and parental leave, that collective agreements are accorded a special and more powerful role in moulding or in some cases derogating from statutory norms.

[72] Preamble to the Parental Leave Directive (Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, [2010] OJ L 68/13).

[73] Again defined in the same way as in the WTR 1998.

The Collective Contract System in China

CHEN Su

I. Introduction

In the process of constructing the labour law system in China, great importance has been attached to the system of collective contracts by both legal scholars and practitioners for two reasons. The first is related to the time period in which the system is being implemented, an era in which China finds the labour relationship in a critical historical period of transition, moving from the individual relationship to the collective relationship.[1] The second is related to the construction of the labour law system. Currently, the collective labour relationship and collective labour laws are increasingly important. It is not merely labour contract law but the establishment of a sound mechanism of collective labour relationships that can be regarded as an important indicator of labour law's development having reached an advanced stage.[2] Therefore,

[1] See 常凯 [*Chang Kai*], 劳动关系的集体化转型与政府劳工政策的完善 [Collectivization of the Labour Relationship and Improvement of Government Labour Policies], 中国社会科学 [China Social Sciences] 6 (2013).

[2] 集体合同法立法可行性研究课题组 [*Research Team on the Legislative Feasibility of the Law on Collective Contracts*], 集体合同法的可行性研究 [Legislative Feasibility of

improvement of the collective contract system is one of the most important tasks faced by China in the current construction of the labour law system.

II. The significance of the collective contract system in China

Under Chinese labour law, a collective contract refers to a written agreement between an employing entity and its employees on such matters as labour remuneration, working time, rest and vacations, occupational safety and health, professional training, insurance, and welfare that is concluded through collective negotiation in accordance with relevant laws, regulations and rules.[3] As far as its nature and basic content are concerned, a collective contract is basically the same as the collective contract that has been generally accepted by many other countries.

The appearance of collective contracts in the social and economic life of contemporary China was gradually realized only after many ideological and institutional transitions. Beginning with the implementation of the planned economic system in the mid-1950s, employment of workers, management of enterprises, wages and the welfare of employees had all been determined according to the unified plan of the government, with the result that the boundaries between the two parties to the labour relationship became blurred.[4] Previously, employment was characterized by the assignment of jobs by the state, so that workers became "permanent employees" of enterprises. Under the "centralized job allocation system", a labourer who had been assigned to work in a state-owned enterprise became the holder of an "iron rice bowl"[5] because there was no institutional arrangement whereby an enterprise could dismiss its employees under the labour relationship at that time.

Under the economic reform that started in 1978, invigorating state-owned enterprises became one of the main tasks. In 1979, the State Council promulgated *Several Provisions on Expanding the Operational and Managerial Autonomy of State-Owned Enterprises* as well as other documents which established the autonomy of enterprises in matters of employment and personnel. Later, the labour contract system was introduced as a reform which aimed at breaking the "iron rice bowl". Needless to say, however, labour contracts were

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the Law on Collective Contracts], 中国劳动关系学院学报 [Journal of China Institute of Industrial Relations] 1 (2012), 84.

[3] Article 3 of 集体合同规定 [Provisions on Collective Contracts] 2004.

[4] 张鸣起 [*Zhang Mingqi*], 劳动关系中的集体协商实践 [Practice of Collective Negotiation in Labour Relationships], in Li Lin et al. (ed.), 中国法治发展报告 [Report on the Development of the Rule of Law in China], 2009, 284–285.

[5] 黎建飞 [*Li Jianfei*], 社会变革中的中国劳动合同法 [Chinese Labour Contract Law in a Time of Social Transition], 法学家 [The Jurist] 6 (2008), 80.

initially adopted as a tool of human resources management so that "workers under the contract system" actually meant workers that could be laid off. With the marketization of most state-owned enterprises, the employees of these enterprises became hired workers under the market economy. Meanwhile, hundreds of millions of farmers had abandoned their land and joined modern industrial production as "peasant workers", thereby directly becoming hired workers in the labour market.[6] At the early stage of the economic reform, although some labour contracts did claim "to uphold workers' rights and interests", their main purpose was to give enterprises the power to dismiss workers. It should be admitted that the relationship between an enterprise and workers under labour contracts did lead to greater efficiency and autonomy. But it also should be admitted that, under such a system, the autonomy gained by workers was far smaller than that gained by enterprises. In the process of contractualization of labour relationships, workers soon found themselves in a disadvantaged position and faced with such problems as a harsh enterprise management system, a shortened duration of labour contracts and a lack of reasonable grounds for their dismissal. Although some measures had already been provided for in the relevant Chinese labour laws to deal with these problems, it was not until 2007 that the Labour Contract Law, a law that truly takes the protection of workers' rights and interests as the primary objective of labour contracts, was adopted. For this reason, most enterprises that had enthusiastically supported the labour contract system in the early stages of reform opposed the adoption and implementation of the Labour Contract Law.

The transition of the main objective of the labour contract system from expanding the autonomy of enterprises in matters of employment and personnel to upholding the rights and interests of workers greatly improved the position of workers in the labour contract relationship. However, the labour contract relationship between an individual worker and an enterprise is actually an individualized legal relationship, and the economic relationship affirmed and regulated by such a contract is unable to fully improve the labour relationship. Moreover, currently the labour relationship in enterprises, especially non-public enterprises, in China is basically in an atomized and fragmentized condition, namely the condition of an individualized labour relationship between one employer and a group of employees.[7] Because individualized workers lack the ability to hold equal negotiations with enterprises, it is very difficult to realize substantive fairness in labour contract relationships. Especially in the process of contractualization of labour relationships, workers in China were basically in a passive position, having been 'thrown' into the

[6] 常凯 [*Chang*] (fn. 1).
[7] 常凯 [*Chang*] (fn. 1).

labour market during the transition,[8] and they therefore lack the knowledge, experience, organization and skills necessary for negotiating with enterprises. For this reason, the system of collective negotiation and collective contract – aimed at improving workers' bargaining power – was introduced into labour law practice in China.

The inclusion of (i) provisions on collective contracts in the 1992 Trade Union Law and (ii) general provisions on the system of collective negotiation and collective contracts in the 1994 Labour Law indicated that the collective contract system had been formally established in China as an important legal system.[9] In 1994, the Ministry of Labour promulgated the Provisions on Collective Contracts, which further elaborated the content of collective contracts. In 2004, the Ministry of Labour and Social Security promulgated the new Provisions on Collective Contracts, which contained more methodical, reasonable and operable provisions on collective contracts. The 2007 Labour Contract Law contains seven articles of systematic stipulations on the most important matters relating to collective contracts. These legal provisions on collective contracts are no doubt of great significance to the improvement of the labour law system in China.

The collective contract has a very important position in the Chinese labour law system. First, as far as the objective of the collective contract system is concerned, the fundamental objective of concluding and implementing a collective contract, as a legal means for regulating labour relationships, is to uphold workers' rights and interests and, under this precondition, to realize the coexistence and mutual promotion of the interests of enterprises and those of workers. Although a collective contract can be concluded only with the consent of the enterprise, workers can take initiatives for collective negotiation and have a considerable voice in proposing and deciding the terms of a collective contract. Namely, both the initiation and conclusion of negotiations for a collective contract depend on the decision and consent of workers. Second, as far as the legal functions of a collective contract are concerned, concluding a collective contract is the motive as well as the result of collective negotiation between the enterprise and its workers. The concrete objective of initiating a specific collective negotiation is to put forward conditions for negotiation and expectations of consensus by both the enterprise and its workers; specifically, conclusion of a collective contract is the objective pursued by as well as the legal consequence of collective negotiation.[10] Third, as far as the position of collective contracts in the structure of the Chinese labour law system is concerned, a collective contract serves as an important

[8] 常凯 [*Chang*] (fn. 1).

[9] 张鸣起 [*Zhang*] (fn. 4) 284 (285).

[10] 常凯 [*Chang Kai*], 试析集体合同制度的法律性质 [An Analysis of the Legal Nature of the Collective Contract System], 中国党政干部论坛 [Chinese Cadres Tribune] 5 (2013), 25.

mechanism in addition to the labour contract system. A labour contract is based on a voluntary decision made by an individual worker. Although the relevant laws have provided strong protections for workers' rights and interests in the conclusion and implementation of labour contracts, workers as individuals are often in a disadvantaged position in concluding a labour contract because of their lack of bargaining power. A collective contract, as the result of collective negotiation, is a legal mechanism for pre-balancing the interest relationship – between an enterprise and its workers – that is to be established by individual labour contracts. To a large extent, the effective utilization of collective contracts can prevent the imbalance or even the total overturn of workers' interests that might otherwise result from their disadvantaged position. And fourth, a collective contract is a legal mechanism for ensuring full implementation of various measures provided for by the Labour Contract Law. A collective contract, as a legal mechanism falling between the labour statutes and individual labour contracts, serves to ensure the appropriateness of the terms of individual labour contracts. Namely, the level of protection of workers' rights and interests in an individual labour contract must be higher than that in a collective contract, which, in turn, must be higher than that provided by law.

In the mid-1990s, when the collective contract system was first established, public awareness of collective contracts was still very low. When the law was first promulgated, many people, including participants in collective negotiation, had no idea as to what the collective contract system was, why they must carry out collective negotiation and whether collective negotiation could be carried out.[11] However, with the development of practice, concluding a collective contract and collective negotiation carried out for this purpose have quickly won the recognition of broad masses of workers and the energetic support of relevant departments of the government. As a result, the collective contract system has quickly been popularized in the country. Statistics show that, by 2012, there were a total of 2.245 million collective contracts covering 5.792 million enterprises and 267.197 million employees, and 1.229 million specialized collective contracts on wages covering 3.081 million enterprises and 150.295 million employees in the whole country.[12] It is thus clear that the collective contract system is compatible with the economic system and social environment in China and that the collective contract system plays an important role in the market economy system in China.

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[11] 郑桥 [*Zheng Qiao*], 中国集体合同制度建设发展新趋势 [New Trends in Development of the Collective Contract System in China], 新视野 [Expanding Horizons] 1 (2013), 88.

[12] 中华全国总工会 [*All-China Federation of Trade Unions*], 2012 年工会组织和工会工作发展状况统计公报 [2012 Statistics Communique for Development of the Organization and Work of Trade Unions in China], available in Chinese at <http://stats.acftu.org/upload/files/1370483520528.pdf>.

III. Main content of the collective contract system in China

The content of current Chinese laws and regulations on the collective contract system and their application in practice shows that the current collective contract system in China embodies both the inherent common nature of the collective contract system and the characteristics of reality in China.

1. Types of collective contracts

A collective contract in China is usually concluded between an enterprise and all the employees in the enterprise. However, it can also take the forms of industrial or regional collective contracts. The former refers to a collective contract concluded within the scope of and applicable only to a specific industry (such as the construction industry, the mining industry or the catering service industry) in a specific region. The latter refers to a collective contract applicable to all enterprises and workers in a specific region, regardless of industry. Current practice in China shows that, apart from collective contracts covering a specific enterprise, industrial collective contracts are also widely used in China. For example, the 2011 Specialized Collective Contract on Wages for the Catering Service Industry in the Wuhan Municipality provides that the standard of labour remuneration in labour contracts concluded between a catering enterprise and its employees may not be lower than that provided for in this contract. The Contract set minimum wages for 10 main types of work in the catering industry and raised the minimum wage for the lowest paying type of work in the industry to 130% of the minimum wage in the municipality.[13]

2. Main provisions in a collective contract

According to Article 8 of the Provisions on Collective Contracts, the main content of a collective contract includes: (1) labour remuneration; (2) working time; (3) rest and vacations; (4) occupational safety and health; (5) additional insurance and welfare; (6) special protection for female employees and minors; (7) training for professional skills; (8) management of labour contracts; (9) rewards and punishments; (10) staff reduction; (11) the term of the collective contract; (12) procedures for modifying or cancelling the collective contract; (13) settlement through negotiation of disputes arising from implementation of a collective contract; (14) liabilities for breach of a collective contract; and (15) other matters agreed upon by both parties through negotiation. An enterprise and its employees may conclude a comprehensive collective

[13] Cited from 鲁叔媛 [*Lu Shuyuan*], 合同相对性规则・集体合同・单个劳动合同 [The Rule of Privity of Contract: Collective Contract and Individual Contract], 中国劳动关系学院学报 [Journal of China Institute of Industrial Relations] 2 (2012), 91.

contract that covers all the above matters or a specialized collective contract on a specific matter, such as occupational safety and health, protection of female employees, or mechanisms for wage adjustment.

3. Parties to a collective contract

A collective contract is concluded between an enterprise and a trade union acting as representative of the employees in the enterprise. In an enterprise that has not yet established a trade union, the collective contract should be concluded between the enterprise and representatives elected by its employees under the guidance of a higher-level trade union (such as an industrial or regional trade union).[14] The employees' representative in collective negotiation should be elected through democratic recommendation by the employees of the enterprise and subject to consent by at least half of the employees.[15]

4. Concluding a collective contract

A collective contract should be concluded through collective negotiation. It is the result of consensus reached through negotiation between an enterprise and its employees on the main items in the collective contract. The draft of a collective contract or the draft of a specialized collective contract agreed upon by the representatives of both parties should be submitted to the employees' representative assembly or all employees for discussion. When the employees' representative assembly or all the employees discuss the draft of a collective contract or the draft of a special collective contract, at least two-thirds of the members of the employees' representative assembly or of all the employees should be present. The draft of the collective contract may not be adopted unless it is agreed upon by at least half of the members of the employees' representative assembly or of at least half of all the employees.[16]

5. Effects of a collective contract

According to Article 54 of the Labour Contract Law, a collective contract concluded between an enterprise and its employees in accordance with the law is legally binding on the enterprise and the employees. An industrial or regional collective contract is binding on all enterprises and their employees in the industry or region covered by the contract. To ensure the practical significance and substantive fairness of collective contracts, the Labour Contract Law provides in Article 55 that the standards for remuneration, working conditions and the like as stipulated in a collective contract should not be

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[14] Article 51 of 中华人民共和国劳动合同法 [Labour Contract Law of the People's Republic of China] 2007.

[15] Article 20 of 集体合同规定 [Provisions on Collective Contracts] 2004.

[16] Article 36 of 集体合同规定 [Provisions on Collective Contracts] 2004.

lower than the minimum criteria as prescribed by the local people's government. The standards for remuneration, working conditions and the like as stipulated in the labour contract between an employer and an employee should not be lower than those specified in the collective contract.

6. Dispute resolution under a collective contract

Once concluded, a collective contract becomes legally binding. According to Article 56 of the Labour Contract Law, where an employing unit breaches the collective contract and infringes upon the labour rights and interests of the workers, the trade union concerned may, in accordance with the law, demand that the employing unit assume liability. If a dispute arises over performance of the collective contract and cannot be resolved through consultation, the trade union may apply for arbitration or bring a lawsuit in accordance with law.

IV. Improving the collective contract system in China

Collective contracts have been widely applied in labour law practice and are playing an important role in upholding workers' rights and interests and in constructing a harmonious and effective labour relationship in China. However, the current mechanism governing labour relations in China, although basically complete in terms of its formal elements, is still immature in terms of its substantive content.[17] Therefore, further improvements need to be made both to the current legal system of collective contracts and to the mechanism for their implementation.

1. The legal nature of a collective contract

Here, the nature of a collective contract mainly refers to the nature of the effects of a collective contract, namely whether a collective contract is a contract or an administrative regulation. Discussion of this issue serves two purposes: to determine the main difference between the effect of a collective contract and that of an individual contract and to determine the procedures for dispute resolution concerning a collective contract. The debate on this issue in Chinese labour law circles has been conducted along the following two lines of thought: the first one is to reject the privity of a collective contract. For example, some scholars argue that a collective contract is not governed

[17] 王全兴/谢天长 [*Wang Quanxing/Xie Tianchang*], 我国劳动关系协调机制整体推进论纲 [Outline of Theory on Promoting a Mechanism for Adjusting the Labour Relationship in China], 法商研究 [Studies in Law and Business] 3 (2012).

by the principle of privity of contract.[18] The second approach is to recognize that a collective contract has the effect of a legal norm and to regard the collective contract as one of the legal sources of labour law.[19]

In my opinion, a collective contract has the dual nature of both a contract and a self-governance norm. On the one hand, as far as the parties to a collective contract are concerned, the collective contract is of the nature of a contract and is governed by the principle of privity. For example, Article 56 of the Labour Contract Law provides that where an employing unit breaches the collective contract and infringes upon the labour rights and interests of the workers, the trade union concerned may, in accordance with law, demand that the employing unit assume liability. If a dispute arises over performance of the collective contract and it cannot be resolved through consultation, the trade union may apply for arbitration or bring a lawsuit in accordance with law. If the collective contract were not governed by the principle of privity, the party entitled to bring a lawsuit against the employer for breach of a collective contract should not be limited to the trade union; instead, any employee covered by the collective contract should be entitled to bring a lawsuit. However, an individual employee in the enterprise or industry covered by a collective contract who believes the collective contract itself is unlawful or unreasonable does not have a justiciable right to independently request the revocation or annulment of the contract. On the other hand, as far as the relationship between a collective contract and an individual contract is concerned, the collective contract has the effect of a self-governance norm, in that individual contracts may not contradict the provisions of a collective contract and a collective contract can be used as the basis of decision in the settlement of disputes arising from implementation of an individual contract.

2. Mechanism for forming a collective contract

At the institutional level, arrangements have already been made in China on all the essential elements of collective contracts. For example, institutional arrangements have been made in laws and regulations on the contracting parties, content, procedure for conclusion, and effect of collective contracts. The real problem lies in the implementation of the collective contract system, namely how to use collective contracts to effectively safeguard workers' rights and interests. In the Chinese context, the question is how to ensure the effective operation of the mechanisms for concluding collective contracts and collective negotiation. China has already made considerable efforts and achieved great results in this respect.

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[18] 鲁叔媛 [*Lu*] (fn. 13) 91.

[19] 常凯 [*Chang*] (fn. 10) 25 (28).

Nevertheless, many problems still exist in the practice of concluding and implementing collective contracts in China. One of the problems is the formalism of a collective contract. Currently the provisions in many collective contracts in China are either directly copied from the provisions of relevant laws and regulations or are duplications of so-called model collective contracts. As such, they are unable to reflect the characteristics and the actual needs of the specific enterprise or industry concerned. Almost all collective contracts in China are duplications of the model collective contract provided by a higher level trade union or local labour administrative department, but very few of them reflect the actual circumstances of the enterprise.[20] A second problem concerns a lack of diversity in the types of collective contracts. Currently, collective negotiation in China is mainly limited to enterprise-level negotiation. Regional and industrial collective negotiations are very few and limited.[21] As a result, industrial or regional collective contracts are underdeveloped in China. Lastly, there are problems with the subjects of collective negotiation. Currently an urgent problem faced by China in the field of collective contracts is how to cultivate subjects of collective negotiation.

As far as workers are concerned, the core issue is to improve the collective negotiating power of trade unions. The key to doing so is to strengthen and build the negotiating capacity of grassroots trade union organizations, especially those in non-public enterprises. In addition, in order to raise the level of regional and industrial collective contracts, local and industrial federations of trade unions should also improve their capability for collective negotiation.[22] Another problem is the role played by union officials, most of whom work for the trade union on a part-time basis. They must represent the interests of the employees while at the same time upholding the interests of the enterprise and, as such, are often faced with a dilemma in practice.[23] In particular, some trade union officials are simultaneously senior managers of the enterprise, which leads to the serious problem of confusion of roles in collective negotiation.[24] There are two solutions to this problem: first, to reform the legal structure of the trade union system so as to improve the status and the voice of ordinary employees in the decision-making process of the trade union; and second, to prevent senior enterprise managers from becoming representatives of employees in collective negotiation.

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[20] 王全兴/谢天长 [*Wang/Xie*] (fn. 17).

[21] 郑桥 [*Zheng Qiao*], 中国集体合同制度法律建设的思考 [Reflections on Constructing the Collective Labour Contract System in China], 中国劳动关系学院学报 [Journal of China Institute of Industrial Relations] 2 (2011), 8.

[22] 王全兴/谢天长 [*Wang/Xie*] (fn. 17).

[23] 程延园 [*Cheng Yanyuan*], 集体谈判制度在我国面临的问题及解决 [Problems Faced by China in the Collective Negotiation System and Their Solutions], 中国人民大学学报 [Journal of Renmin University of China] 2 (2004), 136.

[24] 程延园 [Cheng] (fn. 23).

As far as the enterprise is concerned, it is easy to determine the representatives of the management in collective negotiation held within the enterprise. However, it is not easy to determine the representatives of enterprises or employers in negotiating industrial or regional collective contracts. For example, despite great efforts made by the China Association of Enterprises in strengthening its ability to represent different types of employers, most enterprise managers still tend to regard the Association as a channel for contacting and cooperating with the government, rather than a representative of employers in the field of labour relations, which, to some extent, impedes the development of collective contracts.[25] Therefore, one of the important approaches for improving the mechanism for formation of collective contracts is to strengthen the development of industrial and regional enterprises' and employers' organizations and giving full play to their role as representatives of enterprises' and employers' interests in collective negotiation.

Another important aspect for improving the mechanism for the formation of collective contracts is the need to increase the negotiating capacity of both parties in negotiating and concluding collective contracts. In this respect, many concrete measures can be taken, such as giving more room to the leading role of trade unions in negotiating and concluding collective contracts, ensuring that the provisions in a collective contract are reasonable and fully embody the rights and interests of employees, giving more room to the role of professionals in the negotiation of collective contracts, and effectively implementing the provisions of collective contracts.

3. Improving the collective contract system

Some improvements also need to be made to the collective contract system itself. For example, according to the Labour Contract Law, in an enterprise in which a trade union has not yet been set up, a collective contract should be concluded with the employing unit by representatives elected by the workers. However, the Law does not contain any clear provision on how the employees in such an enterprise can bring a lawsuit against the enterprise in case it breaches the collective contract. As a result, it is very difficult to hold such an enterprise accountable for breaching a collective contract because, according to the Law, only a trade union can bring a lawsuit against an enterprise for breach of a collective contract. Another question is how to determine the basis, standard and method for the revision of an existing collective contract in the case of a major change in the economic situation or management of the enterprise. When such changes occur within the term of the contract, revision of the contract is necessary. A third question concerns the situation in which an existing collective contract has already expired and its content has become

[25] 程延园 [Cheng] (fn. 23).

seriously incompatible with the new situation, but negotiation of a new collective contract has failed. It is not clear what kind of remedial measures, such as third party intervention or a temporary collective contract, could be taken. All these questions need to be carefully studied and answered in the process of further improving the collective contract system in China.

Currently, there is also a strong demand in Chinese labour law circles for the adoption of a specialized law on collective contracts. Although the Chinese Labour Contract Law contains special provisions on collective contracts, which show a certain degree of systematization, some scholars hold that the provisions on collective contracts in the Labour Contract Law show that Chinese labour law fails to clarify the related status and functions of labour contracts and collective contracts. The collective contract system and the labour contract system should be in a parallel relationship with each other.[26] Therefore, one of the important objectives of developing the labour law system in China is to adopt an independent Collective Contract Law. Such a step would make the collective contract system more complete in terms of its institutions, more reasonable and sufficient in terms of its content, and more effective in terms of its implementation mechanism, and it would allow it to assume a significance equal to the labour contract system in the labour law system.

[26] 集体合同法立法可行性研究课题组 [*Research Team on the Legislative Feasibility of the Law on Collective Contracts*] (fn. 2) 84.

Part II:
Specific Issues of Collective Labour Law

B. Collective Organizations, Collective Bargaining and Collective Labour Conflicts

Collective Agreements in Europe: European Social Dialogue and Contractual Autonomy

Etienne Pataut

Autonomy is a concept that is both complex and somewhat ambiguous. Different meanings can be ascribed to the word autonomy: the autonomy of states with regard to the Union, the autonomy of individuals with regard to states, the autonomy of stakeholders with regard to each other and, of course, the contractual autonomy of private individuals authorised by law in certain circumstances to determine the standards by which they are to be governed.[1]

In social law, autonomy has a very particular meaning: the autonomy of the social partners. Broadly defined, this refers to the powers given to the social partners, essentially trade unions, to develop labour rules. The legislature gives way to private parties whose legitimacy is not derived or is not solely derived from elections but from their representation of a specific section of society.

This type of autonomy is considerably narrower than those contemplated in the other definitions, and it is not specifically European. It is, first, a national reality, and current events show that it is alive and well. More specifically, this type of autonomy is both close to and distant from contractual autonomy in the conventional sense of the word, i.e. an individual's ability to choose his or her own rules.

[1] On this question, in an international context, see the fundamental contribution of *Jürgen Basedow*, The Law of Open Societies – Private ordering and public regulation of international relations, Recueil des cours 360 (2013), 9, 135 et seq.

Behind the same term, there are therefore two different realities, which are almost never reconciled. The autonomy of the social partners and contractual autonomy are two very different issues that cover different realities. The first relates to the manner in which a standard is developed; the second involves determining which legal regime applies to a given situation, in most instances a contractual one. Behind the common usage of the same concept – contractual autonomy and autonomy of the social partners – there are therefore two significantly different legal mechanisms.

Approximating both viewpoints involves looking beyond these obvious differences. In this context, the European perspective appears to be particularly fruitful. From the perspective of standardising relations between Member States and the Union and between Member States themselves, the autonomy of social partners and contractual autonomy are perhaps less distant than it first appears.

At the risk of restating the obvious, we will look at the different meanings from the standpoint of national law. In terms of a national system, contractual autonomy is used to develop the legal framework for single contracts and this in turn is affected by the relativity of agreements under civil law: such agreements are effective only between the parties bound by them. For example, Article 1134 of the French Civil Code allows contracting parties to draw up their own rules: "Agreements lawfully entered into take the place of the law for those who have made them." Transposed into private international law,[2] contractual autonomy allows parties to choose the law governing their contract, where it relates to more than one legal system. In contrast, the autonomy of social partners is a method of developing a standard and far exceeds the contractual framework, through a range of rules that allow a private agreement between private persons to be referred to as a "collective agreement", which has effects extending beyond the signatories to it.

And yet, this distinction, which is relatively well established in national law, is far less clear in European law. The distinction between drafting a legal framework for a particular contract and a general standard is very complex due to the normative entanglement of the European Union. Therefore, the distinction between the legislature's position and that of the contracting party is also far less clear. After close analysis, it seems even paradoxical.

First, the Union has a number of instruments that allow social partners to become veritable legislators. However, these efforts have not resulted in a satisfactory, unified legal system – far from it. Second, the contractual autonomy enjoyed by social partners is of considerable assistance when it comes to the task that the Union as a whole has set itself: the unification of law.

[2] We know that the very idea of contractual autonomy certainly appeared earlier in private international law – for more on this, see the classic analyses by *Véronique Ranouil*, L'autonomie de la volonté – Naissance et évolution d'un concept, 1980.

It seems as though the social partners are not able to abandon their positions as contracting parties when they asked to act as legislators, while at the same time they are being given a quasi-legislative role when they are viewed as contracting parties.

It is this paradox – a typical feature of the reconsidering of categories entailed by Union law – that will be set out here. We will see that there is significant progress to be made before the European social partners can be set up as legislators (I), but that the national social partners have already been entrusted with an essential role in drawing up the mechanisms for standardising social law in Europe (II).

I. European social partners as legislators?

Meetings between social partners at the European level date back to the 1980s. These meetings became known as the Val Duchesse meetings. Val Duchesse is a symbolic place for Union law, because this poetically named Belgian castle was the location for the intergovernmental conference that gave rise to the European Economic Community. It also gave rise to the idea of bringing together the social partners in Europe to develop a European social standard.[3] These regular meetings have taken on a more institutional format since 2003, with the establishment of the "tripartite summit for growth and employment", resulting from a Council decision,[4] and whose remit is to "ensure, in compliance with the Treaty and with due regard for the powers of the institutions and bodies of the Community, that there is a continuous conversation between the Council, the Commission and the social partners."

Beyond these meetings, whose political objective is obvious but whose legal achievements are more elusive, the treaties provide for a unique place for social partners within the legal order of the Union,[5] slightly altered by the Lisbon Treaty.[6] But turning the social partners into legislators is not a simple process; this process, which will briefly be outlined (1), gives rise to a number of legal difficulties (2).

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[3] For more on the history of these Val Duchesse meetings, see *Pierre Rodière*, Droit social de l'Union européenne, 2008, 87 et seq.

[4] Council Decision 2003/174 of 6 March 2003, [2003] OJ L 70/31.

[5] However, it should be noted that the social partners, who are the sole focus of this paper, are in a pre-eminent but not exclusive position, due to the willingness of the European institutions to involve various elements of civil society in developing Union standards. For more on this, see *Christophe Vigneau*, Partenaires sociaux européens et nouveaux modes communautaires de régulation: la fin des privilèges?, Droit Social 2004, 883.

[6] *Bruno Veneziani*, The role of social partners in the Lisbon Treaty, in Niklas Bruun et al. (eds.), The Lisbon Treaty and Social Europe, 2012, 123 et seq.

1. Collective agreements at European level

The treaties acknowledge the key role of the social partners. This is clearly stated in Article 152 TFEU, according to which "The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy."[7]

This declaration of principle is significant. More than simply wishing to promote the role of the social partners, two requirements emerge: first, the diversity of national systems must be respected – a true *leitmotiv* of all competence in social matters which, more than any other, engenders suspicion in some Member States. It is this reticence that warrants the repetition several times in the Treaty of the necessity of respecting the diversity of Member State legislative systems[8] as well as ensuring that social standards do not impede economic activity.[9] The reference to the autonomy of the social partners should be understood in the conventional sense of the term: i.e. they can participate in drafting legislation. However, as we will see, the reference to autonomy in a specifically European context is quite ambiguous in that, to be guaranteed, it must be built on a number of rules for organising social dialogue which do not yet exist in Europe.

Be that as it may, this declaration is not just a question of principle. To implement it, the Treaty outlines negotiation procedures, set out in Articles 154 and 155 TFEU. First, Article 154(1) TFEU, tasks the European Commission with promoting the consultation of the social partners at European level and facilitating their dialogue by ensuring balanced support. More specifically, paragraphs 2 and 3 of Article 154 TFEU require the Commission to consult the social partners before implementing any proposal relating to social policy. There are, therefore, two consultations here, first on whether any action should be taken (para. 2) and, second, on the content of it (para. 3).

Next, under Articles 154(4) and 155 TFEU, the social partners may inform the Commission that they intend to conduct negotiations themselves without the Commission which, should this happen, will withdraw; it is only if the

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[7] On the Treaty as a whole, see in particular *Antoine Lyon-Caen*, La négociation collective dans ses dimensions internationales, Droit Social 1997, 352. See also *Jean-Philippe Lhernould*, La négociation collective communautaire, Droit Social 2008, 34.

[8] See also, in particular, Article 151 TFEU which sets out the social objectives of the Union while stating that: "To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy." See also Article 165 TFEU on education and training which confers jurisdiction on the Union "[…] while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity".

[9] Article 151(2) and Article 153(2)(b) TFEU.

social partners cannot reach agreement that the Commission will resume its role and draft the text itself. In this case, as we can see, the Treaty sets up a procedure that is unmatched anywhere else in the conventional legal order of Union law: one of the fundamental powers of the Commission, the right of legislative initiative, is devolved to the social partners.

The results of these negotiations are "agreements". According to Article 155(1) TFEU: "Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements."

The choice of wording is somewhat ambiguous: it is difficult to determine exactly what the expression "contractual relations" means. It is also difficult to ascertain what is meant by "agreement". The sparse wording of the text nevertheless provides an insight into the fundamental goal of the Union legislature. This is extremely clear: it is to render agreements under European Union law equivalent to collective agreements under national law. In particular, the process of drafting such agreements underlines the fact that they have two features characteristic to collective agreements: they are negotiated directly between the social partners and they are designed to supersede the law.

However, legislative enterprise has its limitations. On closer analysis it seems that these agreements give rise to many more difficulties than they solve.

2. The difficulty of implementing agreements at European level

The legal nature of these agreements is still the subject of much debate, which focusses on two main difficulties. The first, theoretical in nature, raises the question of the legitimacy of the social partners in Europe. The second, which is a consequence of the first, is more technical and relates to the issue of the precise legal nature of these agreements.

a) Legitimacy of the social partners

The issue of legitimacy is at the core of any discussion on how to determine which representatives will be entrusted with the power to develop standards.[10] Evidently, some justification must be provided to make it legally and politically acceptable that a person can hold such wide-ranging powers, namely adopting rules that will apply to others. Essentially, this legitimacy is acquired through election, even though it is now evident that this is not the only yardstick.[11]

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[10] On the issue of political representation, see *Pierre Brunet's* major work: Vouloir pour la Nation – Le concept de représentation dans la théorie de l'Etat, 2004.

[11] *Pierre Rosanvallon*, La légitimité démocratique, 2008.

The same legitimisation must be provided to justify why trade unions, through collective agreements, should be allowed to adopt general standards and, more generally, to defend collective interests.[12] Legally, this legitimacy may be subject to different rules, which are often highly complex and vary from country to country.[13]

In order to claim the right to replace a European legislature whose own legitimacy is frequently contested, similar rules need to be established under European law. Such rules, however, are at the embryonic stage. First of all, the Treaty remains silent on this issue. It restricts itself to referring to "the social partners" without defining them (Article 152 TFEU) and also excludes from the scope of application of the Treaty any jurisdiction relating to the "right of association" (Article 153(5) TFEU). The exact content of this exclusion is not defined, but the obstacle has been deemed significant enough for some to deduce that no specifically European regulation on trade union representativeness could be adopted.[14]

Nevertheless, some rules have been established, based on proposals made by European trade unions themselves, specifically the European Trade Union Confederation and Business Europe (formerly UNICE). These rules were formalised in a 1993 Commission Communication,[15] regularly restated in subsequent communications on the organisation of social dialogue.[16]

Three main criteria were retained. Organisations must:

"(1) be cross industry or relate to specific sectors or categories and be organised at European level; (2) consist of organisations which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible; (3) have adequate structures to ensure their effective participation in the consultation process."

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[12] On trade union legitimacy, see in particular *Pierre Rosanvallon*, La question syndicale, 1998. On the more specific legal nature of the links between representativeness and bargaining, see *Georges Borenfreund* et al., Dossier "Représentativité syndicale et négociation collective", Droit Social 2013, 300.

[13] *Antoine Jeammaud/Martine Le Friant*, Démocratie sociale, droit et représentation collective: enjeux théoriques, in Marie-Ange Moreau, La représentation collective des travailleurs, 2012, 15.

[14] *Rodière* (fn. 3) 103.

[15] European Commission Communication concerning the application of the Agreement on social policy, COM(93) 600 final.

[16] European Commission Communication, European social dialogue: a force for innovation and change, COM(2002) 341 final. In this communication, the Commission refers to previous documents setting out the conditions for representativeness – see in particular the communication on "adapting and promoting the social dialogue at Community level", COM(98) 322 final.

These rules fall under general guidelines and are in any case very far off the precise, detailed regulations that apply to the organisation of trade unions in Member States. They are, it is true, clarified by a list of the relevant organisations, provided in an appendix to the 2002 Communication and, on occasion, compliance with them may be verified by European judicial institutions.[17] The fact remains that European rules (and the reality of trade union action at European level) are as yet too underdeveloped to meet legitimacy requirements which alone can justify entrusting the power to draft laws to the social partners.

This somewhat lop-sided legitimacy explains why there are not very many agreements per se, and why the terms "recommendations", "declarations" and "common opinion" have often been preferred.[18] The use that the social partners at European level have made of their powers has often been strongly criticised, insofar as the expansion of their role has not been reflected in a corresponding expansion of the Union's social dimension,[19] to the extent that it is sometimes suggested that institutionalisation of the social dialogue may well have served the objective of falling back on regulatory minimalism.[20]

Although they might be few and far between, such agreements do exist. There are now seven framework agreements, on parental leave (1995),[21] part-time work (1997),[22] fixed-term contracts (1999),[23] teleworking (2002),[24] stress in the workplace (2004),[25] harassment and violence in the workplace (2007)[26]

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[17] *Court of First Instance* (CFI) 17.6.1998 – T-135/96 – UEAPME, on which see *Marie-Ange Moreau*, Sur la représentativité des partenaires sociaux européens, Droit Social 1999, 55; *Bernard Teyssié*, La représentativité syndicale en droit communautaire, in Mélanges Blanc-Jouvan, Société de législation comparé, 2005, 379.

[18] On these, see *Emmanuelle Mazuyer*, Les instruments juridiques du dialogue social européen, Droit Social 2007, 476.

[19] *Christophe Vigneau*, Etude critique du rôle des syndicats dans la gouvernance de l'Union européenne, in Emmanuel Dockès, Au cœur des combats juridiques, 2007, 159.

[20] *Spiros Simitis*, Le droit du travail a-t-il encore un avenir? Droit Social 1997, 655, and in particular 666. Similarly see *Vigneau* (fn. 19).

[21] Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC, [1996] OJ L 145/4; see now the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, [2010] OJ L 68/13.

[22] Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, [1998] OJ L 14/9.

[23] Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP, [1999] OJ L 175/43.

[24] Framework Agreement on telework concluded by ETUC, UNICE/UEAPME and CEEP (July 2002).

[25] Framework Agreement on work-related stress concluded by UNICE, CEEP, UEAPME and ETUC (October 2004).

[26] Framework Agreement on harassment and violence at work concluded by BUSINESSEUROPE, CEEP, UEAPME and ETUC (April 2007).

and inclusive labour markets (2010).[27] It could therefore be surmised that this set of framework agreements forms the first *corpus* of collective European agreements. However, nothing is certain. First, reading the content of these agreements is often a little disappointing. But beyond the issue of particular rules, the legal nature of these agreements is still to a large extent difficult to determine.

b) Legal nature of agreements

In national law, it is the law that allows an agreement between private persons to become a legal standard, under specific conditions. Company, branch or cross-industry agreements are all described in detail and the national rules, again very different from one Member State to another, provide clarification on the conditions of validity and above all the target audience of standards contained in such collective agreements.

European Union law has no such clarity. The Treaty merely refers to "agreements". It says nothing about the legal value of these agreements or about their effectiveness against third parties. This is indeed the fundamental question: to be comparable to a collective agreement under national law, the conditions in which these agreements can or must be applied to the relevant workers need to be clarified. No such clarification is given. Therefore, while the political value of these agreements is clear, their legal nature – the mechanism for transforming a private agreement into a general standard – is not described anywhere.

In fact, due to the lack of European regulation in this area, it is arguable whether an agreement is legally binding on parties other than its signatories, because states understandably will not accept that bodies that have not been expressly entrusted with the power to develop standards should be able to do so. For them to accept that a collective agreement is binding in nature, the Union authorities would have had to delegate their normative power to the social partners. Yet there has been no such express delegation of powers – even if it could be contemplated – and any such delegation would likely be met with resistance from states, particularly those that grant merely qualified legal value to collective agreements.

This brings us to the major difficulties relating more profoundly to the fact that the rules of social democracy presuppose legal and social mechanisms that are accepted by all. The European Union is still some way from this.

Therefore, the legal value of a collective European agreement is, in reality, more like that of a contract;[28] an unusual type of contract, with significant political weight, but a contract nonetheless, having a relative effect and which

[27] Framework Agreement on inclusive labour markets concluded by BUSINESSEUROPE, CEEP, UEAPME and ETUC (March 2010).

[28] See *Rodière* (fn. 3) 107, on which many of the analyses herein are based.

is binding only on those who have signed it, due to the general principle of privity of contract.

The Treaty attempts to circumvent this insurmountable difficulty by overlooking the issue of the legal nature of European collective agreements and focusses instead on their implementation.

There are two mechanisms for rendering these collective agreements applicable in the national law of each Member State, both of which are outlined in Article 155 TFEU. The difference between these two mechanisms lies in their level of implementation. Implementation may take place through national collective bargaining or through recourse to European rules for developing standards.

The first option open to the social partners, according to Article 155 TFEU, is to use "the procedures and practices specific to management and labour and the Member States."[29] This means that agreements negotiated at European level must be implemented in each Member State, because these agreements must be backed up by national agreements signed by national trade unions. Therefore, it is the national agreements that are afforded true legal value, which will depend on the legal value of such collective agreements in the national law of the Member State in question. This procedure has significant disadvantages. First, it in no way guarantees European standardisation, insofar as national regulations on collective agreements all vary widely and hence their legal value may be viewed very differently depending on the country. Second, this type of procedure is not necessarily effective, because there is no clear rule governing the nature of the transposition requirement. There is considerable uncertainty in this area and, beyond the political strength arising from the very existence of the framework agreement, it is by no means certain that there is a specific legal requirement to transpose it using national procedures. Hence, if the social partners were to resist the implementation of any such agreement for their own reasons, it is not at all certain that this resistance could be legally sanctioned.

Technically, the second option suggested by Article 155 TFEU is still open. While it does not solve the problem of the legal nature of collective European agreements, it is more effective. Article 155 TFEU allows the social partners to ask the Commission to propose that the Council adopt a decision incorporating the negotiated agreement. Although unusual, this mechanism is better suited to the conventional frameworks of Union law. First, the social partners propose that the Commission proceed with transposition by way of a directive. This proposal must necessarily be joint: all the parties must apply to the Commission. The Commission can then decide whether to submit the text to the Council, according to its traditional right of

[29] See *Antoine Lyon-Caen*, Le rôle des partenaires sociaux dans la mise en œuvre du droit communautaire, Droit Social 1997, 352.

legislative initiative. Finally, the Council may adopt the text proposed by the Commission. Since its 1993 Communication, the Commission has clarified that it would not modify the proposed text and the Council has followed this recommendation. The directives simply transfer the framework agreement, the text of which is listed in appendix. Finally, although the wording of Article 155 TFEU mentions a "decision", this term should be understood in the usual sense and not in the technical sense under Union law: the directives that have been adopted to transpose the first three framework agreements into Union law relate to parental leave,[30] part-time work[31] and fixed-term contracts.[32]

The solution is certainly effective and has enabled the unknown (the framework agreement) to be brought under the remit of the known (the directive). The use of a traditional procedure, however, to establish the rule of law in the European Union means that the framework agreements lose their legal specificity.

An assessment of these agreements, while not insignificant, is therefore limited: nobody has put it better than *Pierre Rodière*, who stated that "the European collective agreement, which applies to labour relations in a plurinational territorial framework, is still largely in the realm of legal planning."[33]

It must therefore be acknowledged that "the autonomy" of the social partners mentioned in the Treaty has to a large extent yet to be built. Clearly, this is not a legal issue: the legitimacy of the social partners in each national system was primarily won through confrontation and combat and there may well be insufficient historical depth to claim legal consequences.

However, while the institutional autonomy of the European social partners has yet to be established, the fact remains that others – that is, the national social partners – have an essential role to play in drafting transnational social law. But to do this we need to look at another facet of autonomy: contractual autonomy.

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[30] Directive 96/34 of 3 June 1996 concerning the framework agreement on parental leave, [1996] OJ L 145/4; see now Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave, [2010] OJ L 68/13.

[31] Directive 97/81 of 15 December 1997 concerning the framework agreement on part-time work, [1998] OJ L 14/9.

[32] Directive 99/70 of 28 June 1999 concerning the framework agreement on fixed-term contracts, [1999] OJ L 175/43.

[33] *Rodière* (fn. 3) 107.

II. Contractual autonomy of the national social partners: a factor in drafting transnational social law

The national social partners are afforded a very important role in the emergence of a specifically European approach to collective representation. The texts on informing and consulting workers, particularly the 2002 Directive establishing a general framework for informing and consulting employees,[34] have progressively developed a set of specifically European rules, key to developing national representation law.[35] Looked at from a national perspective, these texts do not entail any major changes to the autonomy of the social partners or to the theoretical nature of their role.

The issue of collective representation in an international context is, however, different. In this case, the highly territorial nature of labour law means that legal systems are firmly closed (1), a closure that recourse to contractual autonomy can to a certain extent attempt to circumvent (2).

1. Conflicts of law, territoriality and collective labour relations

It is highly difficult to avoid territoriality in collective representation and bargaining; it is therefore challenging to take account of the transnational character of the social organisation of a company operating simultaneously in several countries. Even the example of international mandatory rules selected in *Grands arrêts de la jurisprudence française de droit international privé* is taken from a decision relating to collective representation.[36] On this occasion, the *Conseil d'Etat* confirmed that a company registered abroad and operating in France could not avoid the application of French law requiring it to set up staff representation bodies. This solution is not without consequence, as it leads to the imposition of French law despite the terms of the contract of employment in relation to the dismissal of employees exercising their representation mandate on a site located in France.[37] Here again, there is little room for conflicts of law.

As regards collective representation, the number of cases where foreign laws have been applied are extremely low and they are in practice limited to

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[34] Directive 2002/14 of 11 March 2002, [2002] OJ L 80/29.

[35] *Sylvaine Laulom*, Le rôle de l'Union européenne dans la transformation des modes de représentation à partir de l'expérience comparée (Royaume-Uni, Italie et France), in Moreau (fn. 13) 113.

[36] *Conseil d'Etat* 29.6.1973 – 77982, Compagnie internationale des wagons-lits, in Grands arrêts de la jurisprudence française de droit international privé, 5th ed. 2006, no. 53.

[37] *Cour de cassation* 10.7.1992, La semaine juridique (JCP) 1993, II, 22063, note by *Pierre Rodière*, Dalloz 1993. 67, note by Chauvy, Revue Critique de Droit International Privé (Rev. Crit. DIP) 1994, 69, note by *Bernard Audit*. See also *Cour de cassation* (Chambre sociale) 3.5.1988, Rev. Crit. DIP 1989, 63, note by *Gérard Lyon-Caen*.

determining the applicability of a collective agreement concluded under foreign law to individual labour relations.[38] The issues of conflicts of laws are also highly complex and can also raise significant difficulties in Union law.[39] In any event, case law regularly highlights the temptation of compulsory application.[40]

Regardless, such territorialism can be backed by many arguments, one of the strongest being the need to ensure that the mechanisms for collective worker representation are identical throughout French territory. There are powerful reasons for the uniform application of French law to all companies located on French territory, without considering the particular situation of the worker in question or the company's organisation.

This solution, however, necessarily leads to the same treatment being meted out to a company with all its branches located in France and a company with operations in several states including France. The drawback to this type of assimilation, which at times also involves adapting French law,[41] is that it ignores the fundamental economic realities of corporate globalisation.

From the perspective of worker protection, particularly, the assimilation masks a significant disconnect in corporate powers. A group that has a transnational structure has a great deal of power because it is able to play different sites within the same group off against each other, according to the legal environment in which each site operates. In other words, the employer can benefit from legislative competition, including on social issues, a benefit denied to employees, who are all, in one fashion or another, attached to a site in one particular state. The example of relocations and the impact of these on collective bargaining in a particular state shows the extent to which globalisation has increased the power of the employer.[42]

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[38] On this point, see, in addition to *Pierre Rodière's* classic text, La convention collective de travail en droit international, 1987, *Fabienne Jault-Seseke*, La détermination des accords collectifs applicables aux relations de travail internationales, in Mélanges Paul Lagarde, 2005, 455.

[39] *Marie-Ange Moreau*, Mobilité des entreprises dans l'Union européenne et protection conventionnelle des salariés, Revue de Jurisprudence Sociale (RJS) 2002, 207, and *Jault-Seseke* (fn. 38) 460–462.

[40] For example, on the collective agreement for journalists, applied in a compulsory manner abroad to a French newspaper whose contract was however subject to foreign law, see *Cour de cassation* (Chambre sociale) 31.1.2007, Revue de Droit du Travail (RDT) 2007, 398, note by *Hélène Tissandier*.

[41] See for example *Cour de cassation* (Chambre sociale) 14.2.2001, Droit Social 2001, 639, study by *Marie-Ange Moreau*, where the concept of site was extended to the entire territory to ensure representation for workers with no specific site working on behalf of a Dutch company throughout French territory.

[42] On all these points, see *Marie-Ange Moreau*, Normes sociales, droit du travail et mondialisation, 2006, 83 et seq. and 309 et seq.

One solution to these increased employer powers would be to facilitate transnational social dialogue at company level. The ability to access information exceeding the national legal framework, to negotiate at group level and to apply pressure on the employer globally regardless of the home site are all collective responses, adapted to the group's economic and geographic dimensions.

National law, however, is incapable of providing this response. National rights can only reduce a transnational situation to a national situation through the conflict of laws rule. The quality of connections leading to it being located predominantly in one particular state mean that the law of that state will continue to apply to that situation. While appropriate when it comes to individual labour relations, subject to some adjustments, the solution is, however, wholly inadequate with respect to collective relations. Not taking the transnational nature of collective labour relations into consideration amounts to denying its specificity and leads to inadequate legal treatment.

Therefore, the response must involve the drafting of substantive transnational legal instruments. Only instruments that can cross state borders will allow the implementation of truly transnational bargaining. These instruments do exist, and they place a major focus on contractual autonomy, which is progressively becoming a major source of international social law.

2. Substantive law, social harmonisation and contractual autonomy

This section deals with the issue of contractual autonomy in its most conventional sense, stated at the start of this paper: stakeholders' (primarily co-contractors) ability to develop their own legal system.

It is precisely this ability which is applied by the two instruments for organising transnational social dialogue. The first is a purely contractual mechanism: the example of international company agreements. The second is legal in origin: the European Works Council.

a) International company agreements

First, these instruments may be purely conventional in nature, like international company agreements. These agreements are undergoing spectacular growth, as seen in the recent framework agreement concluded by the Renault group on 2 July 2013.[43] These agreements are now a major source for developing transnational social and environmental rules and are attracting sus-

[43] Global Framework Agreement on social, societal and environmental responsibility between the Renault Group, the Renault Group Works' Council and IndustriALL Global Union, "Committing Together for Sustainable Growth and Development", 2 July 2013.

tained attention from legal theorists.[44] This is unarguably a future source for developing globalised social law, regulated by its stakeholders.

Contractual autonomy plays a key role here: this is a form of agreement, even though it is a collective agreement that necessarily involves significant qualification difficulties[45] and, more widely, raises sensitive questions of private international law[46]. This agreement allows stakeholders to overcome difficulties linked to the territoriality of rules governing collective labour relations through the development of specific standards, by imposing compliance with labour standards across the group and, most often, by organising procedures for consulting representatives beyond national borders.

Although important and a source of new and intriguing legal questions, the specific contribution of these international company agreements must, however, be qualified as regards their ability to create true transnational bargaining institutions within the company.

The legal value of these agreements is undermined by the push by stakeholders to turn them into simple obligations of best endeavours, non-binding commitments falling within the purview of soft law rather than straightforward contractual obligations. In most cases, these agreements relate to a relatively specific purpose: compliance with fundamental social (and sometimes environmental) rights and a commitment to implementing social dialogue procedures. In this respect, the ILO standards play a decisive role, because what characterises these agreements above all (in the most important organisational agreements) is a commitment to comply with these rules. However, the very general nature of these agreements indicates that they will rarely lead to solutions that deviate significantly from national law – at least from the perspective of French law. The specific imperative of the law of collective relations means that national law will prevail over the company's commitments if the company intended to rely on a framework agreement to evade its obligations under the applicable national law.

Furthermore, the handling of disputes in the majority of these agreements is dealt with in a manner that demonstrates an explicit desire on the part of negotiators to avoid public legal proceedings as far as possible. The most

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[44] See in particular *Marie-Ange Moreau*, Négociation collective transnationale: réflexions à partir des accords cadres internationaux du groupe Arcelor Mittal, Droit Social 2009, 93; *Claire Marzo*, Les risques juridiques créés par les accords-cadre internationaux: opportunités, dangers, stratégies, in Marie-Ange Moreau/Horatia Muir-Watt/Pierre Rodière (eds.), Justice et mondialisation en droit du travail, 2010, 207.

[45] See in particular *Marzo* (fn. 44) 211 et seq., which discusses agreements, unilateral commitments, common law and collective agreements.

[46] On this point see the study submitted to the European Commission: *Aukje van Hoek/ Frank Hendrickx*, International private law aspects and dispute settlements related to transnational company agreements, 20 October 2009, available at <ec.europa.eu/social/BlobServlet?docId=6677&langId=en>.

common clauses in this respect are arbitration clauses or, even more common, clauses defined as dispute settlement clauses, which are simply internal company procedures. An example of this is the clause on "dealing with potential difficulties" in Chapter 6 of the framework agreement concluded by the Renault group, worded as follows:

"The signatories agree to inform one another as soon as possible in the event that any difficulty is identified with regard to the implementation of this agreement so that an action plan can be adopted quickly and a solution found as soon as possible.

Local issues notified to the signatories shall firstly be handled within the context of local social dialogue. Renault undertakes to provide the right conditions for this kind of dialogue. If necessary, a solution may be sought at country, region, then Renault Group level.

Keen to engender a climate of confidence in these circumstances, the signatories will endeavour, as a priority, to find a solution by means of dialogue, as opposed to any other action, ensuring at all times the confidentiality of any such discussions."

The aim here clearly is to avoid recourse to the national courts, and more generally, to find new ways of settling disputes within the company.[47]

Contractual autonomy is used here to set up common rules for the company that exceed the national framework. In this sense, it is indeed an original response to a major difficulty relating to the territoriality of labour law. This being said, even the most cursory analysis shows that these agreements are not sufficient. While they make a contribution to creating transnational social law, the fact that their contents are limited to basic rights and to a manifest determination to avoid the national courts shows that they cannot replace an ineffectual legislature. Finally, their contents show that they only rarely create a structure of social dialogue, preferring to make use of an organisation previously set up, usually through legal means, most notably the European Works Council.

What this shows is that, while contractual autonomy should not be excluded, in practice it is insufficient on its own to create entirely new structures for social dialogue. To do this, legislative intervention seems preferable. This is what has happened in the European Union.

b) The legislature and trade unions: the example of the European Works Council

As we have seen, Union law has set up common rules for informing and consulting workers. These rules are intended to apply to all companies in the EU and as such therefore undeniably contribute to the approximation of national laws. But once transposed, they are no longer any different from national

[47] On this general trend, and on the settlement of labour disputes within multinationals, see, in particular, *Renée-Claude Drouin*, Procédures de règlement interne des différends de droit du travail dans l'entreprise multinationale, in Moreau et al. (fn. 44) 185.

regulations and therefore are subject to the same constraints as regards the territoriality of labour laws.

Texts on worker representation in transnational structures are more relevant for our purposes. The adoption of specifically European social structures was accompanied by specific rules on worker representation within these structures.[48] But the ambition of Union authorities went much further than these particular social forms, because a strong, original institution was progressively set up, common to all Europe-wide groups regardless of legal form: the European Works Council.[49]

This is not the place to provide an exhaustive overview of these texts, which have been extensively discussed in the literature already. We will discuss only one point in this paper: method. Of particular interest is the extent to which trade unions have been asked to shoulder the dual difficulty of legislative diversity and the strict territoriality of labour law.

The directive establishing the European Works Council is highly ambitious, because the aim is to create a body uniting various sites within a group distributed in several parts of Union territory. As the recitals show, national procedures "are often not geared to the transnational structure of the entity which takes the decisions affecting those employees." Creating this type of structure therefore presupposes intervention at European level.

The works council, central works council and corporate works council were therefore supplemented by the European Works Council, a new body for informing and consulting workers and with the aim of playing the same role as its counterparts in national law. Despite its extreme brevity, the directive, comprising just twelve articles, is striking when compared to the multiple provisions of the French Labour Code concerning the various types of works councils.

This brevity is explained by a fundamental political choice by the European legislature to avoid setting up a fixed structure with prerogatives definitively laid down but, on the contrary, to leave the fundamental issues on the operation and powers of this council almost fully open. This choice is due to a number of reasons. One of the most profound reasons is doubtless political. The very widely divergent national legislations on these issues explain why only a very unrestrictive text could have been adopted (despite which the United Kingdom refused to sign up for some time).

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[48] On SE status, see Directive 2001/86 of 8 October 2001 supplementing the statute for a European company with regard to the involvement of employees, [2001] OJ L 294/22; see also Directive 2003/72 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, [2003] OJ L 207/25.

[49] Directive 94/45 of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, [1994] OJ L 254/64. This directive was amended by Directive 2009/38 of 6 May 2009, [2009] OJ L 122/28.

Obviously, this difficulty in coming to agreement on such fundamental texts also explains the increased recourse to the autonomy of the parties, which has now been set up as a defining principle by Union law in general, and by the text on European Works Councils in particular. This autonomy principle was firstly expressed institutionally through the consultation of the social partners on the drafting on the text on European Works Councils. As no agreement was reached, it was the European legislature which effectively drafted this text. Nonetheless, the text remains deliberately vague on the very make-up of this council, as attested once again by the recitals:

"*In accordance with the principle of autonomy of the parties*, it is for the representatives of employees and the management of the undertaking or the group's controlling undertaking to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures so as to suit their own particular circumstances."

In this sentence, the notion of "autonomy of the parties" covers both institutional autonomy and contractual autonomy. What is envisaged here is the option to create a particular corporate agreement, applicable to all its structures. A power is provided that goes beyond the contracting parties alone, while entrusting these parties with the task of drafting the contents of standards themselves.

Nonetheless, the consequence of this is that almost all the effective content of the newly created institution is open to negotiation, except in a number of cases, essentially employer resistance, where a certain number of minimum provisions, or "subsidiary requirements", apply.

This approach explains why the text of the directive is short and essentially procedural in nature: its purpose is not to describe the European Works Council but to lay down the conditions for setting one up. To this end, lengthy delimitation work is required to define, for example, what is a Europe-wide company, the thresholds for setting up a council and the notion of central management. These substantive rules are then supplemented by other provisions aimed at framing the conduct and purpose of negotiations (setting up a special negotiating body, list of questions to be agreed, etc.). The contents of the agreement (indeed the very possibility of arriving at agreement) are, on the other hand, left wholly to the discretion of the negotiators.

Setting up a European Works Council seems therefore to bring into play a mix of substantive European rules, identifying a very general objective and the means of achieving it, and contractual autonomy, because specifying the precise content of any future agreement is left to negotiation.

In addition to these two extremes, substantive Union law and contractual autonomy, another must be added: state rules. The directive makes intensive and surprising use of rules that could hardly be termed rules of conflict of laws but are in fact rules for determining applicable national law.

The recourse to national laws happens mainly on two levels: first, setting up the special negotiating group assumes that the law of each state in which a company operates is considered for determining who in the group should be sent, and if a representative should be elected or appointed (and, in both cases, if so, by whom). Next, the law of the state where the company's central management is located will to a large extent determine the powers of the European Works Council. The role of conflict of laws rules and, through them, national laws, therefore remains decisive.[50]

This observation is striking. While conventional instruments of private international law seemed inadequate for resolving the legal problems posed by international collective labour relations, the conflict of laws rule is here given a decisive role in implementing a major example of secondary legislation.

The difference, however, from the conventional conflict of laws rule is important. While, traditionally, conflict of laws is used to determine which national law should prevail in solving a particular legal issue, the directives in question here, in contrast, demonstrate a remarkable combination of methods.

Substantive provisions of international law require the creation of an information and consultation procedure; these substantive provisions remain vague, however, and are supplemented by a reference to contractual autonomy, which is given extensive scope; the conflict of laws rule, finally, is to be used to somehow coordinate between substantive provisions and contractual autonomy in order to achieve the stated goal, which is to create a new body.

From the perspective of private international law, it must be acknowledged that the method is highly innovative and envisages a significantly different role for the conflict of laws rule. It is no longer a case of simply determining which law applies to a legal issue. Several national laws are used as a basis for organising negotiations, and then to define how a body will operate, with only the principle and a handful of guidelines defined by European Union rules.

The mechanism is daring and takes the conflict of laws rule out of its usual role. This rule is here given a novel coordinating role and is combined with substantive European law and contractual autonomy to overcome a seemingly irreducible diversity of legislative approaches.

This is a novel way of articulating national and European rules that shows that the conflict of laws rule can play a part in creating a European arena for social dialogue, despite the dual fundamental obstacles of the territorialism of rules in this area and profound political opposition among the different countries in the European Union.

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[50] For more on this, see also *Johan Meeusen*, Directive 94/45 concernant les comités d'entreprise européens: aspects de droit international privé, in Marc Rigaux/Filip Dorssemont (eds.), Comités d'entreprises européens, 1999, 239, and in particular 244 et seq.

Consequently, it is easy to see how social partners' agreements could eventually almost replace the legislature: agreements that are not in the least prescriptive as European Works Councils are company-wide, not industry-wide agreements.

The existence of an institution like the European Works Council could not have been made possible by the national legislature. It was to overcome this difficulty that Union law turned to national trade unions to set up this novel institution. Contractual autonomy here serves as a quick fix and as a complement to a novel manner of drafting and implementing the standard.

This brings us back to the initial paradox. While the autonomy of the social partners is intuitively understood as an institutional autonomy, under Union social law it is contractual autonomy in its most classical sense, albeit under a new assumption, that gives the most intriguing results. In allowing those affected by the standard to draft it, Union law overcame a number of seemingly insurmountable obstacles, from legislative diversity to the territoriality of labour law. This is an impressive result, which undoubtedly has not yet realised its full potential.

Collective Contracts and Trade Unions in China

LI Jianfei

I. Introduction

Chinese collective contracts include special collective contracts, industrial collective contracts and regional collective contracts. A special collective contract is a written agreement specific to certain issues, often the protection of female employees' rights and interests. An industrial collective contract is a written agreement between the confederation of trade unions and companies in a particular industry. A regional collective contract is a written agreement between a regional trade union and the relevant economic organizations or companies in a specific area. Recently, regional collective contracts have been developing, although they cannot be expected to be concluded in a wide range of activities. Their advantage lies in reaching agreements on special situations and the special needs of certain small regions.

There had been no collective consultation system during the planned economy period in China until the early 1990s. The Labour Law of 1994 set out the principal rules on collective consultations and collective contracts. It is both a precondition for, and an essential stage in, signing a collective contract. A collective contract is not only a means of implementing the law but also a way to remedy lacunae in the law. In this sense, collective consultation lays a foundation for the future improvement of legislation.

According to Chinese law, trade unions are mass organizations formed by the working class of their own free will, whose basic duty is to represent and protect employees' rights and interests, including their democratic rights. The organization of trade unions in China follows the principle of combining industries with regions. Every industry has its trade unions at the state and local levels. The highest leading trade union bodies are the National Congress of Chinese Trade Unions and the All-China Federation of Trade Unions Executive Committee. In China, the organizational system of trade unions is to establish local and industrial trade unions under the unified leadership of the All-China Federation of Trade Unions. Local confederations of trade unions are divided into three levels, corresponding to the state administrative division. If grassroots trade unions are weak and non-functioning, such as some of those in private enterprises, it is the basic unions at the local level that undertake the relevant responsibilities. Industrial trade unions are set up in industrial sectors, the number of which currently is ten. The trade unions sign collective contracts with the employing units on behalf of the employees, and are entitled to apply for arbitration or initiate legal action on their own behalf. The Employment Contract Law provides trade unions with the right to institute legal proceedings as the claimant in disputes over collective contracts.

According to Chinese law, collective negotiations should adhere to the following principles: to observe laws, regulations and rules and the relevant provisions of the state, such as to show mutual respect and conduct negotiations on an equal footing; to act in good faith and cooperate fairly; to take into consideration the legitimate rights and interests of both parties; to refrain from taking extreme action; and to maintain normal production or working procedures. In China, reinforcement of the equality principle is now a key issue, as equality is the primary principle of collective negotiation. This means that the power of employee representatives should be strengthened so that they can counterbalance the employer.

Collective contracts are binding upon both the employing entity and the workers. The standards for working conditions and labour remuneration and other terms agreed upon in individual employment contracts cannot be lower than those stipulated in collective contracts.

As to the normative hierarchy among collective contracts, employment contracts and the internal rules of employing units, the Supreme People's Court gives priority to employment contracts and collective contracts. Where

the contents of the internal rules formulated by an employer are inconsistent with the agreed contents of a collective contract or an employment contract, workers may request preferential application of the collective or employment contract, and the court is obligated to uphold the request.

In China, most labour disputes over collective contracts are settled by administrative means. Few cases are tried by an arbitration institution or a court. This relates to the confusion as to whether disputes over collective contracts are to be classified as labour disputes, which is unclear under existing law. According to Chinese law, disputes over collective contracts are generally treated as a special type of case distinct from labour disputes.

Rights protection for trade union chairmen includes restricting job changes and protecting them from arbitrary termination of their employment contracts. Several cases involving the dismissal of chairmen of trade unions show the necessity of offering special protection in statutes and demonstrate difficulties faced in judicial practice.

II. Relevant definitions

1. Collective contract

According to Article 3 of the Provisions on Collective Contracts, the term "collective contract" refers to a written agreement concluded between an employing entity and the employees of that entity on matters relating to work remuneration, working hours, rest and vacations, work safety and health, professional training, and insurance and welfare.[1] Chinese collective contracts include special collective contracts, industrial collective contracts and regional collective contracts.

A special collective contract is a written agreement – reached through collective consultation according to the relevant laws and regulations – that has specialized terms on certain issues, e.g. a special agreement on female employees' legal rights and special interests that is binding on both the employing unit and all female employees. Such a special collective contract usually stipulates as follows: the company should make contracts with female employees and ensure that females receive equal pay as males for equal work; the company should ensure a proportion of female employees in respect of

[1] See Article 3 of 集体合同规定 [Provisions on Collective Contracts], 劳动和社会保障部令第 22 号，2004 年 1 月 20 日 [Order of the Ministry of Labour and Social Security (2004) No. 22, 20 January 2004]: "For the purposes of these Provisions, the term 'collective contract' shall refer to a written agreement concluded between an employing entity and the employees of the entity on matters relating to work remuneration, working hours, rest and vacations, occupational safety and health, professional training and insurance and welfare through collective consultation in accordance with laws, regulations and rules".

the trade union committee, employees' democratic management, further education, training, study trips aboard and temporary secondment for obtaining experience; according to female employees' physiological characteristics, they should be specially protected during the menstrual period, pregnancy, the perinatal period and the lactation period; the employing entity should neither reduce their wages nor terminate their contracts during pregnancy, the perinatal period or the lactation period; and the employing unit should arrange a gynaecological examination for each female employee(including retirees).

An industrial collective contract is a written agreement made through equal consultation by the confederation of trade unions and companies in a specific industry that involves, for instance, work remuneration, working hours, rest and vacation, work safety and hygiene, and insurance and welfare. For example, on 27 March 2006, the chief delegates of the Shandong Mechatronics Trade Union and the Shandong Engineering Industry Office signed the *Industrial Collective Contract for the Machinery Industry in Shandong* in Jinan, which gave birth to the very first industrial collective contract in China. The contract involves employee wages, working hours and vacations, insurance and welfare, labour disputes, and the like. The contract is binding on more than 3,000 companies and research institutes and on more than three million employees in Shandong, including migrant workers and casual workers. There are many highlights in the contract, including: the explicit stipulation that an employee's lowest wage should be raised by 20%–50% based on the local statutory minimum wage; wages should increase in pace with corporate profitability and be not less than 3% of the profit increase; the company should pay the wage fully and monthly in the form of currency; and if an employee who has worked continuously for eight years proposes to enter an unfixed-term employment contract, the company should agree.

A regional collective contract is a written agreement made between the regional trade union and the relevant economic organizations or companies in the area, through equal consultation, dealing with matters such as labour remuneration, rest and vacation, labour safety and hygiene, and insurance and welfare. In the development of a regional collective contract system, attention should be paid to the following factors: the institution of a regional collective contract does not apply widely because of the variety of features in the companies at issue and the diversity of workers' needs. Therefore, it is usually difficult to consult and sign a collective contract in a large region. Even if concluded, the contract might be hard to implement for lack of relevance. Secondly, the advantage of regional collective contracts lies in the better appreciation of special situations and needs by the local trade unions in small regions such as districts, villages and communities. Through regional collective contracts, some special needs across the region might be better addressed.

2. Collective consultation

The term "collective consultation" refers to consultations held prior to the signing of an agreement and conducted – on an equal footing – between the representatives of employees and the representatives of an enterprise on matters relating to work remuneration, working hours, rest and vacations, work safety and health, professional training, and insurance and welfare.

There was no collective consultation system during the planned economy period in China. In the early 1990s, the collective consultation system was first introduced by the Labour Law of 1994, which provides only several general rules on collective consultation and collective contracts. In 1994, labour dispute arbitration committees at all levels throughout the country heard 19,098 cases in total, involving 77,794 workers. Since then, as labour disputes keep increasing, people have increasingly recognized the division of interests between workers and employers in the labour market. As the employee tenure system practised in the planned economy period no longer applies, and direct administrative interventions in labour relations are reduced, an effective system governing labour relations is expected to meet the needs of both societal and economic transition. Given that, collective negotiation is becoming increasingly important in China.

Collective consultation is a precondition for, and an essential stage in, signing a collective contract. Collective consultation requires constant bargaining, which is actually a process of seeking common ground, reaching agreements, settling disputes and resolving differences. In practice, during implementation of the collective contract system in some places, collective consultation is not properly understood as the means of achieving the aim of coordinating labour relations: instead, it is seen as the end itself. It is not uncommon to pay much attention to the conclusion of a contract and to ignore the process of collective consultation. The bargaining mechanism actually becomes formalistic. As a consequence, the collective consultation system in practice fails to function and collective contracts exist only on paper.

A collective contract is not only a means of implementing the law, but also a way to remedy lacunae in the law. In this sense, collective consultation lays a foundation for the future improvement of legislation. Participation by employees in collective consultations and enterprise management helps to advance the modern enterprise management system. However, high-level consultation and cooperation can be achieved only when the trade unions can be the real representatives of the workers' interests. All the above are the targets of our efforts.[2]

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[2] See 黄昆 [*Huang Kun*], "工资集体协商"为何成走过场？ [Why is Collective Consultation on Wages Not Effective?], in 金陵晚报 [Jinling Evening News], 22 October 2014. In Nanjing the first enterprises with a collective consultation mechanism were foreign-funded enterprises which settled there in the early years. Every spring, the Nanjing federa-

On 28 September 2014, the Guangdong People's Congress Standing Committee published *The Guangdong Enterprise Collective Contract Regulations*, an updated version of a previous instrument promulgated in 1996. The amended regulations established a system of collective consultation on wages for the very first time and obliged the company to respond to a request for collective consultation on wages when more than half the employees ask for it. The amendment to the regulations resulted in many controversial opinions, among which was some companies' strong objection to such a system. Usually, local regulations only need to be considered and reviewed twice, but the Guangdong regulations were reviewed three times before being approved. According to information from the legislative affairs committee of the Guangdong People's Congress, disputes on employees' requests for pay raises happen occasionally. In practice, some companies ignore employees' reasonable appeals, causing work stoppage or slowdown measures. As a result, both the companies' and employees' rights and interests are damaged. A revision of the regulations would be helpful in making the collective consultation system standard and efficient.[3]

In order to guarantee proper application of the collective consultation system, three aspects should be appropriately dealt with. The first is the gap between the strong group consciousness of workers and their weak bargaining skills. In the situation of a serious strength imbalance between employers and employees, it is necessary that the unions' role be played more effectively and that workers' group interests be protected and developed professionally and legally. Second, it is desirable to pay attention to the interaction between the workers' appeal mechanism and the dispute mediation mechanism. To solve this, we should combine the systems of interest coordination and rights protection organically. Thirdly, the difficult balance should be sought between efficiency and fairness in the settlement of labour disputes. As for the formulation of company regulations that directly concern workers' vital interests and basic rights, it is necessary to ensure that both employers and employees accept the fairness of terms through collective consultation and negotiation.

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tion of trade unions launches mass offers of collective consultation on wages throughout the whole city. But as the relevant legal relations are not sufficiently enforceable and employers are not willing to talk honestly with employees, consultation faces numerous difficulties. The Jiangsu Provisions on Collective Contracts provide that when one party offers to consult, the other party should reply in writing within 20 days of receiving the offer. If the other party refuses or delays in replying, it will be subject to a penalty of between 3,000 and 30,000 RMB. But in practice, no enterprise has been punished and many employers do not let employees know of their operating conditions.

[3] Further information available at: <http://www.ilo.org/beijing/information-resources/public-information/speeches/WCMS_334667/lang--en/index.htm>.

3. Trade union

a) General remarks

Article 2 of the Trade Union Law of the People's Republic of China defines trade unions as mass organizations formed by the working class on their own free will, whose basic duty is to represent and protect employees' rights and interests as well their democratic rights. At a general level, trade unions mobilize and organize employees to take an active part in construction and reformation; improve development of the economy, politics, culture and society; represent and organize employees in regard to participation in the management of national affairs and social issues and in the democratic management of enterprises, public institutions and governmental organs; and educate employees to further their ideological thoughts and ethics as well as their scientific, cultural, technological and professional qualities and enable them to become workers with ideals, ethics, education and discipline. At a practical level, trade unions have the right to supervise implementation of labour laws, guarantee employees' lawful rights of democratic participation, and help, guide or represent employees in the conclusion of collective contracts with companies.

Trade unions in China follow the principle of combining industries with regions. Every industry sets up its trade unions at the state and local levels. The local federations of trade unions in provinces, autonomous regions, municipalities, cities and counties are the leading organizations of industrial trade unions and local unions. The highest leading organs of trade unions are the National Congress of Chinese Trade Unions and the All-China Federation of Trade Unions Executive Committee. Every five years the All-China Federation of Trade Unions Executive Committee holds a national congress. When the congress is not in session, the executive committee takes charge of implementing decisions by the national congress, discusses and decides on important issues concerning employees, and leads the work of trade unions nationwide. The executive committee elects a presidium, under which a secretariat is set up, that is in charge of the daily work of the All-China Federation of Trade Unions.

The organizational structure of trade unions in China is made up of the local trade union system and the industrial trade union system, under the unified leadership of the All-China Federation of Trade Unions. Local trade union congresses are the organ of authority of local trade union federations. The meeting of the local trade union congress is organized by the executive committee at corresponding levels every five years. When the congresses are not in session, the local federations of trade union executive committees carry out decisions of higher-level trade unions and congresses, guide the local trade unions' work and regularly report to the higher federation of trade unions. According to working needs, the local federations of trade unions of

provinces or autonomous regions can set up local representative organs in specific regions. Likewise, local federations of trade unions at the municipality and city level can set up local trade unions or representative organs in districts.

The setting of local federations of trade unions corresponds with state administrative divisions, which are divided into three levels, these including (i) federations of trade unions of provinces, autonomous regions and municipalities directly under the State Council, (ii) federations of trade unions of cities or prefectures, and (iii) trade unions at county level. In some towns in certain economically developed areas, trade unions are also established to perform the dual roles of both local unions and grassroots unions. In the case of imperfect and weak trade unions of private enterprises, foreign-funded enterprises and township enterprises, the trade unions at township level play more the role of grassroots unions, dealing with troubles and problems that enterprise trade unions fail to tackle.

Industrial trade unions are set up in industrial sectors and include national industrial unions and local industrial unions. National industrial unions are set up with the approval of the All-China Federation of Trade Unions. There are currently ten national industrial trade unions, and grassroots industrial trade unions are under the dual leadership of industrial unions and local unions. The industrial unions hold the principal leadership in railways, civil aviation and finance, while the local unions provide the principal leadership in the remaining seven industrial unions.

According to the Regulations of Chinese Trade Unions, the national committees of industrial unions are set up with the approval of the All-China Federation of Trade Unions in accordance with the system of federation and representation. They may also be elected by the national congress of industrial unions. National committees are elected for a term of five years. The setting up of local industrial union organizations at all levels is determined by their corresponding trade union federations in the light of actual conditions in their respective localities. In practice, there are some prominent problems. For example, the chairmen of most enterprise trade unions are appointed by employers or they are even employers' relatives. Democratic election is merely pro forma. This means that the chairman cannot represent employees and fight for their rights and interests properly. Private entrepreneurs do not regard the trade unions as necessary and are not willing to support trade unions' work and activities. They do not pay for the expenditures, which leaves trade unions to exist in name only. Most activities organized by trade unions are usually in the form of recreational and sports activities, welfare payments, support for needy workers, etc. But the unions are excluded from participation in important issues such as the formulation of regulations and rules affecting employees' vital interests. When employees' lawful rights and inter-

ests are violated, they prefer to find help from their fellow-villagers or friends because trade unions lack reputation and attraction.

In order to change all of this, the workers' will should be respected fully in the election of trade union chairmen. Candidate nomination could adopt various forms such as self-nomination by union members, joint recommendation by more than ten members or recommendation by enterprise trade unions or superior trade unions. Additionally, the qualities of those potential candidates should be examined strictly with only those having fulfilled the conditions being eligible for candidacy. After publicity, the chairman should be elected directly by secret ballot from among several candidates.

As to the work mechanism of trade union chairmen, the trade unions' duty, the president's authority, the trade union leadership system and the work mechanism have to be further defined in law. All chairmen lawfully elected through a legitimate procedure should enjoy the status and treatment equivalent to deputy managers of the enterprise. In their capacity as the legal representative of the trade unions according to the regulations of the Provisions on the Work of Enterprise Trade Unions, trade union chairmen should fulfil their duty to protect employees' lawful rights and interests. A regular reporting system and democratic appraisal system should be established to oversee the performance of trade union chairmen. In turn, trade union chairmen should report their work to members (representatives) and be appraised democratically by members' (representatives') secret ballot; in that way, chairmen can be evaluated and supervised by employees. Only those chairmen who are satisfactory to workers should remain in office while unqualified ones should be dismissed.

As to the regulatory mechanism in respect of trade union chairmen, a differentiated system should be adopted. Adjustment and dismissal of full-time enterprise trade union chairmen should be discussed and approved by the members' (representatives') conference, then approved by the local county (district) federation of trade unions and finally reported to the city federation of trade unions for approval. Adjustment and dismissal of part-time enterprise trade union chairmen should be discussed and approved by the members' (representatives') conference and then reported to the local county (district) federation of trade unions for approval. The wages and treatment of trade union chairmen should be calculated as equivalent to that of enterprise deputy managers, to be collected along with the trade union fee by the local taxation bureau according to the average wage of enterprise deputy managers in the previous year and paid monthly by the county (district) federation of trade unions. Bonuses, social insurance subsidies and other welfare benefits of enterprise trade union chairmen are to be paid by enterprises themselves.

The collective contract system originates from employment contracts but differs considerably: a collective contract is made by an employer or a group of employers and the trade union representing all the employees, while an

employment contract is made between an employer and an individual employee, thus between the employing unit and an individual worker. A collective contract stipulates not only the general working and living conditions but also all aspects involving labour relationships, while the employment contract stipulates the rights and obligations of the employee and the employing unit. A collective contract's effectiveness ranks higher than an employment contract; thus the former is applicable to all the employees of the company while the latter is for individual employees and should not conflict with a collective contract. If a collective contract stipulates the company's lowest labour standard, then no labour standard in the employment contract should be lower than as stipulated by the collective contract. If the employing unit violates a collective contract, harms the trade union and all the employees' legal rights and interests and causes losses, it should assume liability for material compensation, whereas, generally, the trade union does not bear material compensation liability for its violation of a collective contract. Unlike a collective contract, each party to an employment contract that is in breach of the contract and causes financial losses for the other party owes compensation according to the actual damage.[4]

b) A typical case: A signature on a collective contract cannot take the place of the conclusion of an employment contract

aa) Details of the case

The appellant (plaintiff in the first instance): Beijing Criss-cross Universal Technology Co., Ltd (hereafter referred to as CUTC); the appellee (defendant in the first instance): Mr. Yu.

On 11 November 2009, Mr. Yu was employed by the CUTC as a quality inspector at a wage of 1,500 RMB per month. But they did not conclude an employment contract. From April 2009, Mr. Yu's wage had risen to 1700 RMB a month. On 26 October 2010, Yu submitted his resignation for the reason of low pay. CUTC accepted the application but did not pay Yu's wages for September and October 2010. So, Yu appealed to Daxing Arbitration Committee, asking CUTC to pay unpaid wages of 2,700 RMB, an overtime fee of 10,656 RMB, a severance allowance of 3,400 RMB, compensation for violation of the probation period agreement in the amount of 1,000 RMB, twice his wages for no employment contract totalling 18,700 RMB and insurance expenses paid by Yu of 6,000 RMB. On 6 April 2011, Daxing Arbitration Committee decided: (1) CUTC should pay Yu's wages (2,700 RMB); (2) CUTC should pay a part of the double wages for no contract (16,872.42 RMB); (3) Yu's other claims were to be rejected. Yu agreed

[4] 黎建飞 [*Li Jianfe*i], 劳动与社会保障法教程 [Labour and Social Security Law Tutorial], 2007, 197.

to the decision but CUTC opposed the second item, so it sued in the Daxing Court.

During the first trial, CUTC presented the following evidence:

(1) Company management rules, including the collective contract rules proving it had adopted a collective contract system, meaning new employees should observe the collective contract; (2) The conference registration form, proving Yu learned of the above-noted rules; (3) The decision of the congress of workers and staff on the conclusion of the collective contract, proving that on 3 August 2007 the congress of workers and staff decided by vote to conclude a collective contract; (4) The collective contract, proving the company had concluded a collective contract whose term was from 4 August 2007 to 13 November 2010; (5) The notice of acceptance of the collective contract filing application, proving the collective contract had been put on record with the labour administration department.

Yu denied the first piece of evidence for the reason that there was no official seal on it and he never saw it. He confirmed the authenticity of the second piece of evidence but said it could not prove he had learned about the collective contract system. He also denied the third and fourth pieces of evidence for the reason that he never saw them and that even if they did exist, when the collective contract was concluded he did not work for CUTC, so the contract had no effect on him. As to the fifth piece of evidence, he confirmed its authenticity.

Yu presented Yang Kunming's employment contract to prove CUTC should conclude a contract like that with him because Yang was also a quality inspector. CUTC confirmed the authenticity of Yang's contract but said that according to Article 1 of the collective contract rules, the company did not conclude employment contracts with its employees in principle, except if the employee asked for it.

The facts above are established by the Daxing Arbitration Committee No. 0234 arbitral award in 2011, Yang Kunming's employment contract, the conference registration form, the notice of acceptance of the collective contract filing application, the collective contract, the decision of the congress of workers and staff on the conclusion of a collective contract and the statements of both parties.

bb) Trial and decision

The Daxing Court held that although CUTC and Yu did not conclude a written employment contract, they had factual labour relations. As to CUTC's agreement to pay wages of 2,700 RMB, the court had no objections. CUTC claimed that the collective contract should be effective for Yu and the company should not be held liable for paying compensation of twice the wages for not signing an employment contract. According to Article 55 of the Em-

ployment Contract Law: "The rates for labour compensation, standards for working conditions, etc. stipulated in a collective contract may not be lower than the minimum rates and standards prescribed by the local People's Government. The rates for labour compensation, standards for working conditions, etc. stipulated in an employment contract between an employer and an employee may not be lower than those stipulated in a collective contract". Thus, even if a collective contract existed, the employer had to conclude an employment contract with its employees. As CUTC did not conclude an employment contract, it should pay Yu twice his wages according to Article 82 item 1 of the Employment Contract Law.

Therefore, according to Article 50 of the Labour Law, Article 55 and Article 82 item 1 of the Employment Contract Law, the trial court decided: (1) CUTC should pay Yu wages of 2,700 RMB within 10 days of the decision going into effect; and (2) CUTC should pay Yu 16,872.42 RMB, half of the twice wages compensation figure for the absence of an employment contract, within 10 days of the decision going into effect. If CUTC failed to fulfil its payment obligations in the period stated, it would be punished by having to pay twice the debt interest for the period of delay in performance pursuant to article 29 of the Civil Procedure Law.

After the decision, CUTC refused to accept the first trial judgment and appealed, seeking that: (1) the second item of the first judgment be reversed; (2) it be relieved of its obligation to pay the twice wages difference of 16,872.42 RMB; and (3) the litigation fee should be borne by the appellee. The appeal alleged that since the appellant adopted a collective contract system and had concluded a collective contract with the trade union, and since, according to Article 34 and Article 35 of the Labour Law, the appellee, an employee of the appellant, had learned of the company's management rules (including the collective contract system) and signed to confirm his agreement, the collective contract was legally binding on both the appellant and the appellee. The appeal concluded that, consequently, there was neither a factual nor a legal basis for the first judgment.

The court of second instance reviewed the case and decided that both parties agreed with the facts affirmed by the first trial, and thus the court adopted them accordingly. The facts above are established by the parties' statements during the second trial.

The Beijing First Intermediate People's Court held that under Article 55 of the Employment Contract Law: "The rates for labour compensation, standards for working conditions, etc. stipulated in a collective contract may not be lower than the minimum rates and standards prescribed by the local People's Government. The rates for labour compensation, standards for working conditions, etc. stipulated in an employment contract between an employer and an employee may not be lower than those stipulated in a collective contract"; thus, even if the employer concluded a collective contract with the trade un-

ion, it had to conclude an employment contract with its employees. CUTC should pay twice the wages according to Article 82 item 1 of the Employment Contract Law for not concluding a contract with Yu. The court thus did not uphold CUTC's claim under which its being required to pay twice the wages was not in accordance with relevant laws. Hence the court of second instance decided that the appeal should be rejected and the original judgment sustained.

The decision that a collective contract cannot take the place of an employment contract is to be welcomed. There are many differences in the subject, content and effectiveness between a collective contact and an employment contract. In terms of the worker's rights and interests, the conditions provided in a collective contract form the baseline for the employment contract, setting minimum standards for all the worker's rights and interests in the employment contract. An employment contract can only set a higher protection standard and establish more rights and interests than a collective contract. What is more, the employment contract can come into force only after the worker signs the contract. In this regard, it shows that an employee can benefit from a collective contract but a collective contract cannot take the place of an employment contract.

III. The connection between collective consultations and collective contracts

According to the Labour Law, collective consultations form part of the conclusion of a collective contract and a collective contract is the result of collective consultation. Yet, collective consultations are not necessary for the purpose of signing a collective contract, and the results of collective consultations are not limited to the conclusion of a collective contract.[5]

The Guangdong Labour and Social Security Department recently revealed that implementation of collective bargaining over wages encounters resistance because employers do not want to negotiate, because the employees dare not negotiate, and are incapable of negotiating, and because the trade unions cannot negotiate. This is a common situation that exists more or less all over China. Employers do not want to negotiate because they worry that collective

[5] See 子言 [*Zi Yan*], 别让"工资集体协商"只是看上去很美 [Beware of Wage Collective Bargaining Deception], 人民网 [People's Daily Online], 12 June 2014. In June 2014, during a review of the Guangdong Enterprise Collective Contract Regulation (Revised Draft), six chambers of commerce in Hong Kong strongly voiced their disagreement in newspapers; because the regulation was bound to reduce the enterprise owners' interests, it was no surprise that they are against collective bargaining, see <http://acftu.people.com.cn/n/2014/0612/c67502-25139537.html> (in Chinese).

bargaining will increase costs and reduce profits. Employees dare not negotiate because they are afraid of being fired. Employees are, furthermore, incapable of negotiating because they are not acquainted with the relevant laws and policies. Trade unions cannot negotiate because they are not well organized or their staffs are in an awkward position, caught between representing employees and working as members of the leadership.[6]

The recent *Shanghai Federation of Trade Unions 2014–2018 Working Plan on Promoting Implementation of Collective Contracts* states that during implementation of a collective contract system and promotion of industrial collective contracts and regional collective contracts, the *Shanghai Collective Bargaining Quality Evaluative Criteria (Trial Version)* are to be applied and that companies which do not satisfy the basic standard are not eligible to participate in competitions such as the Harmonious Labour Relationship Company, the National Labour Medal and the Labour Model. The Plan proposes that from 2014 to 2018, in all companies that meet the bargaining requirements and have trade unions in Shanghai, the rate of establishing the collective contract system should be maintained at 90%, and the rate of establishing the wage collective bargaining system should be maintained at 80%; and, what is more, that employing units which have more than 50 employees and their own trade unions should establish collective bargaining systems for wages. In order to promote the quality and effectiveness of collective bargaining in Shanghai in the coming five years, guidance should be tailored to companies of different types. Thus there are different key points of bargaining for different companies. Companies with normalized production, orderly operation and good benefits should determine the proportion of managers' incomes and employees' wages through collective bargaining so as to realize a reasonable increase in the employees' wages and benefits. The company and employees should strictly abide by the statutory procedures, such as election of collective bargaining representatives, offers to bargain, holding consultation conferences, deliberation and approval, submission and filing, and publicity and notification. The superior trade unions should guide and support the local unions to initiate collective consultation according to the law. If the company's trade union has difficulties in initiating bargaining, the superior trade union can initiate the procedure instead. And if the company refuses without a justified reason, the superior trade union should actively mediate on its own initiative.[7]

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[6] See 打破工资集体协商阻力需要“多管齐下” [Breaking the Resistance of Wage Collective Bargaining Needs Multitasking], available at: <http://www.acftu.org/template/10001/file.jsp?cid=801&aid=63071> (in Chinese).

[7] See 张路 [*Zhang Lu*], 上海推动集体协商制度，协商不过关评先将“一票否决” [Shanghai Promotes the Collective Bargaining System, Companies without Qualified Bargaining Will Lose in Competitions], 30 July 2014, available at: <http://www.acftu.org/template/10001/file.jsp?cid=104&aid=89870> (in Chinese).

IV. The principles of collective consultations

The Provisions on Collective Contracts and Tentative Measures for Trade unions Participating in Equal Consultations and Signing Collective Contracts specify that collective consultations should be in line with the following principles: to observe laws, regulations and rules and the relevant provisions of the state; to show mutual respect and conduct consultations on an equal footing; to act in good faith and cooperate fairly; to take into consideration the legitimate rights and interests of both parties; to refrain from taking extreme action; to maintain normal production or working procedures.

Reinforcement of the equality principle is currently a key issue for China to deal with. If a collective contract is made through negotiation but manipulated or dominated by one party, the content is against the principles of fairness, reasonableness and consensus, such that the contract cannot be expected to be observed by the parties and loses its effectiveness in practice. Therefore, equality is the primary principle of collective negotiations. This means that the power of employee representatives should be strengthened so that they can stand equally with the employer. According to Chinese law, if there is no trade union in the company, the employees can elect their representatives to negotiate with the employer and sign a collective contract. Currently there are two kinds of companies without a trade union: (i) private enterprises or small collective enterprises where employee numbers do not meet the statutory requirement for establishing a trade union and (ii) foreign-funded enterprises. In these kinds of companies, as the employees' representatives are limited in their economic position and specialized knowledge, they can hardly acquire equal status so as to negotiate adequately with employers. Thus, in companies without trade unions, the local federation of trade unions and relevant industrial trade unions should represent the employees and, together with employee representatives, negotiate with employers. In addition, the employees should also be allowed to hire lawyers and economists as their representatives in order to have the support of financial, material and human resources and to benefit from other specialized knowledge and skills.[8]

[8] 沈同仙 [*Shen Tongxian*], 中外集体合同制度的比较和评析 [Comparison and Analysis of Chinese and Foreign Collective Contract Systems], 中国法学 [China Legal Science] 4 (1996), 81.

V. The effectiveness of collective contracts

1. General remarks

Collective contracts are binding upon both the employing entity and its workers. An industrial or regional collective contract is binding upon both the employing entity and the workers in the local industry and the region. The standards for working conditions and labour remuneration and other terms agreed upon in an employment contract should not be lower than those stipulated in collective contracts.

2. A typical case: Normative priority of collective contracts

Mr. Qu made an agreement in his employment contract that his wage would be paid monthly, which meant he could be paid 12 times every year. During performance of the contract, the company and its trade union concluded a collective contract stipulating that all employees can receive their 13th month's wages at the end of the year. But Mr. Qu did not get his 13th wage. The company replied that according to the agreement in Qu's employment contract, he could only receive 12 wage payments every year.

The court held that, according to Article 35 of the Labour Law: "Collective contracts concluded in accordance with the law shall have binding force on both the enterprise and all of its staff and workers. The standards on working conditions and labour payments agreed upon in employment contracts concluded between individual workers and the enterprise shall not be lower than those as stipulated in collective contracts". Thus, when an employment contract differs from a collective contract, the standards on working conditions and labour payments in the employment contract should not be lower than those in the collective contract, and if the former is lower than the latter, the standards in the collective contact should be applied. Although Qu's employment contract did not prescribe for him a 13th wage, based on the collective contract and the provisions of the Labour Law, the court ultimately decided that the company should pay Qu the 13th wage.

Relatedly, the question regarding the priority of application between a collective contract, an employment contract and the internal regulations of the employing unit is also a hot issue. On 1 October 2006, the *Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labour Dispute Cases (II)* gave priority to the employment contract and the collective contract. According to Article 16 of the interpretation, where the contents of the internal rules and systems formulated by an employer are inconsistent with the agreed contents of a collective contract or an employment contract, and the worker concerned requests a preferential application of a contract agreement, the people's court concerned will uphold

the request. The head of the Supreme People's Court explained the intention of this interpretation as follows: The purpose of affirming the priority of a collective contract is to prevent misuses of labour management authority by the employing unit, in violation of employees' lawful rights. They aim to build harmonious labour relations and standard procedures for labour market management through advocacy of the collective consultation system and practice of the collective contract system.

VI. Settlement of disputes related to collective consultations and collective contracts

In the event that both parties fail to settle disputes arising in the course of collective consultations, either or both of the parties may file a written application with the administrative department of labour and social security for mediation and settlement. If no application is filed, the administrative department of labour and social security may, if deemed necessary, settle disputes through mediation.

If the parties concerned fail through consultations to settle disputes arising in connection with the signing of a collective contract, the administrative department of labour of the local government may arrange for them to settle their disputes through mediation. If the parties concerned fail through consultations to settle disputes arising in connection with performance of a collective contract, they may settle their disputes through arbitration.

Currently, Chinese labour disputes under collective contracts are usually settled administratively. Few cases are tried by arbitration institutions or courts. This relates to confusion as to whether disputes over collective contracts are to be classified as labour disputes, which is a product of legislative defects. On 5 December 1994, the original Labour Ministry of the People's Republic of China published the Collective Contract Provisions, which state that disputes under a collective contract are to be settled according to the Regulations on Settlement of Labour Disputes. Thereafter, many provincial regulations on collective contracts have followed that provision. However, there is no such provision on whether disputes over collective contracts are to be categorized as labour disputes, either in the Labour Law published on 5 July 1994 or in the Trade Union Law of 2001.

The Notice of the Supreme People's Court on Issuing a Decision on Amending the Provisions on the Cause of Action of Civil Cases came into force on 1 April 2008, enumerating several major causes of action under the entry of disputes of employment contracts, including disputes over acknowledgement of labour relations, collective employment contracts, labour dispatching contracts, part-time employment, disputes over claims for labour

remuneration in arrears, and economic compensation. As the decision uses the term "disputes over collective employment contracts", instead of "disputes over collective contracts", it is uncertain whether "disputes over collective employment contracts" connotes "disputes over collective contracts" or "group lawsuits on disputes over employment contracts". The *Interpretations of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labour Dispute Cases* of 2001 and 2006 give a clear definition on the range of labour disputes for the purpose of determining its own scope of application, without having disputes over collective contracts included.

It varies from country to country whether disputes over collective contracts belong to labour disputes. As disputes over collective contracts feature a large number of people involved and a wide range of their social influence, mishandling will lead to social problems such as strikes, shut-downs and demonstrations. Therefore, according to current legislation in China, disputes over collective contracts are generally not considered as labour disputes but as a special type of case.

VII. The trade union and collective contracts

According to Article 51 of the Employment Contract Law,[9] a collective contract is concluded by a trade union on behalf of the employees with the employing unit. For an employing unit without a trade union, the superior trade union should guide the representative selected by the workers to conclude a collective contract with the employing unit.

Where an employing unit violates a collective contract and infringes the legitimate rights and interests of employees, the trade union may order the unit to bear responsibility consistent with the law. If the parties concerned fail through consultations to settle disputes arising in connection with performance of a collective contract, the trade union may apply for arbitration or may initiate legal action in accordance with the law.

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[9] "[T]he employees may conclude a collective contract with the employing entity through fair consultation on matters such as labour remuneration, working hours, rest time, labour safety and health and insurance benefits. The draft collective contract shall be submitted to the employees' assembly or all employees for deliberation and adoption. A collective contract is concluded by a trade union on behalf of the employees with the employing entity. Where there is no trade union in the employing entity, the trade union at a higher level shall guide the representative selected by the workers to conclude a collective contract with the employing entity."

The Employment Contract Law further ensures trade unions the right to institute legal proceedings as the claimant in disputes over collective contracts. From the substantive rights of trade unions, this right is generally considered as the right of representation.[10] Another opinion asserts that trade unions are similar to the litigation representative in a collective contract legal action.[11] In a collective contract, the trade union is the only body representing the workers, so only trade unions can institute proceedings against the employing unit, while an individual worker does not have the right. In this sense, the trade union is the litigation heir. The litigation heir takes legal action for the rights and interests of others but in its own name, based on law or express authorization. The litigation heir can take action only according to legal provisions. From the perspective of substantive law, trade unions are not the bearer of substantive rights and obligations, but the representatives of workers' interests entitled to sign collective contracts. From the perspective of procedural law, although trade unions are not the actual bearer of entity rights and obligations, they bear the obligation to supervise the implementation of collective contracts. On this basis, trade unions can engage in lawsuits as the claimant, but the litigation outcome is borne by the workers.

The ultimate concern remains how trade unions play their role. From the perspective of trade unions themselves, the need is to improve the quality of trade union officials. With the deepening of reform, the range of trade unions' work is expanding, so union officials have to know about enterprise production and management as well as state policies and laws, especially the Trade Union Law, the Enterprise Law and the Corporate Law. Thus they should be well informed of the basic components and features of laws and regulations, and build legal consciousness. The other issue is to enhance trade unions' informational function. Trade unions should be kept informed of employees' ideas and needs in a timely manner and identify problems occurring in enterprise reform. Trade unions should establish an information network so as to ensure that they can better investigate and research in a timely manner, effectively express employees' wishes and desires more exactly and better perform their role as mass organizations.

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[10] 杨汉平 [*Yang Hanping*], 论工会的代表权 [On the Representative Rights of Trade Unions], 工会理论与实践 [Theory and Practice of Trade Unions], 2 (2002), 25.

[11] 孙德强 [*Sun Deqiang*], 工会提起集体合同争议处理的程序及在其中的地位与作用 [The Procedure for Settlement of Disputes over Collective Contracts Instituted by Trade Unions and their Position and Functions], 中国劳动 [Chinese Labour] 12 (2004).

VIII. Rights protection for the trade union chairman

1. Restrictions on demotion

The terms of office of a trade union chairman or vice-chairman should not be arbitrarily changed. Because of the need to mobilize, a chairman's job should obtain the consent of the trade union committee and correspond with the grade level of the union.[12]

Restriction of demotion not only protects the will of worker voters, but also respects the democratic rights of these voters. Additionally, according to the Trade Union Law, the election results for the union president and the vice-chairman should be approved by the next-higher-level trade union. In order to protect the interests of the president and the vice-chairman when the position of union president or vice-chairman is going to be changed, the move should be reported to the next-higher-level trade union. If the company fails to perform these procedures for demotion or the withholding of wages and other benefits, the personnel department should order correction, while the higher level organizations of the enterprise unions can jointly urge enterprises to revoke the decision and restore the union president to his or her original position and compensate the economic losses he or she has suffered. If the enterprise refuses to rectify the situation, the higher organization should be advised, prompting the organization to resolve the issue through several channels or in conjunction with business and industry authorities; or the situation can be brought to the personnel department to ask the company to correct it.[13]

2. Protection from employment contract termination

a) General remarks

In order not to interrupt the union president's work with the expiration of the employment contract, the employment contract is automatically extended for a period equivalent to the period of the president's tenure if the employment contract is shorter than the outstanding term of tenure. However, an individ-

[12] See Article 33(2) and Article 28(1) of 工会法 [Trade Union Law]; Article 17 of 中国工会章程 [Chinese Trade Union Constitution]; see 企业工会工作条例 [Provisions on the Work of Enterprise Trade Unions]; see also Article 20 to Article 21(1) of 企业工会主席产生办法 [Measures for the Election of the Trade Union Chairman of an Enterprise].

[13] See Article 51 of 企业工会主席合法权益保护暂行办法 [Interim Measures for Protection of the Legitimate Interests of Trade Union Chairmen]; Article 4 of 工会法 [Trade Union Law].

ual cannot be dismissed during this period of tenure except for gross negligence or for having reached the statutory retirement age.[14]

If a company discharges the union president only because he or she performs union duties and without other justification, or if a company terminates his or her employment contract because of economic layoffs, the union president is legally eligible to ask the company to restore his or her original job and cover the salary he or she could have earned during this period, plus other losses. If it is impossible for the company to do that, the company must double the economic compensation as an alternative step. The next-higher-level union has the right to urge the company to act and supervise it in performing these duties to ensure that the interests of the union president are well protected.

If a company refuses to correct the situation, the next-higher-level union should bring to the company's the attention their obligation to do so. If the union president files for arbitration or litigation, the union should provide legal aid to pay all arbitration and court costs.[15]

b) A typical case: The first case on firing a union president in Beijing

This was regarded as the first case in Beijing of a union president having his employment contract terminated. It happened on 2 September 2004. When Mr. Tang walked through the plant gate, a security janitor stopped him. Tang

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[14] See Article 18 of 工会法 [Trade Union Law]; see Article 22 of 企业工会主席产生办法 [Measures for the Election of the Trade Union Chairman of an Enterprise]; see also Article 28(2) and (3) of 企业工会工作条例 [Trade Union Work Regulations]. For identification of individual gross negligence, according to the Office of the Ministry of Labour and Social Security, see BMA Hall letter (2005) No. 24 and Article 2 of 最高人民法院关于在民事审判工作中适用《中华人民共和国工会法》若干问题的解释 [the Highest People's Court on the Interpretation of Several Issues in Civil Trial Work during the Application of "People's Republic of China Trade Union Law"]: it provides that "serious negligence" means: (i) the term in People's Republic of China Labour Law Article 25(b), a situation provided for in paragraph (c) or (d) above, or something that is a serious violation of the employer's labour discipline regulations; (ii) a serious dereliction of duty, malpractice, causing significant harm to the interest of the employer; or (iii) being subject to investigation for criminal responsibility under the law. In these events, the employer may terminate an employment contract. However, for practical operation it should be noted that terminating an employment contract should also be in accordance with Article 44 of 劳动合同法 [Employment Contract Law] and Article 21 of 工会法 [Trade Union Law], and the employer should notify the trade union of the reasons for termination. If the union believes that the employer is violating the law, regulations and relevant contracts, and that the treatment requires re-examination, the employer should take into account the views of the union. In addition, the union should be informed of the results by written notice.

[15] See Article 52 of 企业工会主席合法权益保护暂行办法 [Interim Measures for Protection of the Legitimate Interests of Trade Union Chairmen]; see also Article 5 of 工会法 [Trade Union Law].

was told that he no longer belonged to the plant, with the result that he could not enter at the gate. At that point, Tang realised he had been fired. The issue quickly became the centre of attention and many opinions emerged. The employee representatives considered him a very competent union president. However, the employer said that Tang, while acting as the union president, had been guilty of misconduct. According to Chinese law, if a union president is guilty of misconduct or reaches the statutory age of retirement, the employer is entitled to terminate his/her contract. Legal experts, however, believe that this practice violates the Trade Union Law. A long time was needed to try the case. After arbitration, the case was brought to court. On 20 April 2007, the first trial court ordered the company (i) to revoke its "decision on the termination of the employment contract with Tang Xiaodong", (ii) to continue to engage in labour relations; and (iii) to pay Tang lost wages of 606,000 RMB.[16]

The many twists and turns of the case show that in practice protection of enterprise trade union chairmen's rights and interests does not run smoothly. This is especially the case when conflicts arise between protection of trade union chairmen's rights and their accountability for violation of labour law regulations or duties in employment contracts; accordingly, precedents and more theoretical discussion are needed from judicial practice.

3. Removal of protection

a) General remarks

To recall or replace a union president, the vice-president must convene the Members' (Representatives') Assembly; the decision to replace a union president must be discussed by all members or representatives and approved by at least half of the members or representatives, who vote in secret.[17]

This protection is part of the programme for the removal and replacement of supervision, through a democratic voting procedure fully reflecting and respecting the will of the members.

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[16] See 北京首例工会主席被合资企业开除案引发关注 [The First Case about a Trade Union Chairman Fired by a Joint Venture Enterprise in Beijing Attracts Attention], in 法制晚报 [Legal Evening News], 6 September 2004, available at: <http://news.sina.com.cn/c/2004-09-06/12014243984.shtml>; 北京一工会主席替工人维权被炒，打官司败诉 [A Trade Union Chairman Was Fired for Protecting Workers' Rights and Lost the Lawsuit], 河北新闻网–燕赵都市报 [Hebei News Website – Yanzhao Metropolis Daily], 30 December 2008, see <http://news.sohu.com/20081230/n261491922.shtml>.

[17] See Article 17(2) of 工会法 [Trade Union Law], Article 28(2) of 企业工会主席产生办法 [Measures for the Election of the Trade Union Chairman of an Enterprise] and Article 22(3) of 企业工会工作条例 [Provisions on the Work of Enterprise Trade Unions].

b) A typical case: Trade union chairmen fired during their terms of office

On 21 May 2007, two employees became the trade union chairmen of a plant. Their tenure was three years. However, their employment contract signed with the plant was only for six months. So, on 5 December 2007, they were dismissed as their contracts had expired. The case was brought to court and on 19 January 2011. The judge decided: "In order to ensure they perform duties in the trade union, their employment contracts are cancelled." Finally, they signed their names on a mediation agreement. Each of them took 26,000 RMB paid by the plant as compensation ordered by the Shenzhen Court. This meant their employment contract was discontinued.

The decision to pay money instead of protecting chairmen from dismissal is noteworthy. The legislative intent of laws guaranteeing protection of chairmen's work is to prevent a violation of their right to work and not merely pay compensation after they lose their jobs. Adequate protection under law should be available so that workers have the right to work the term of their contract, and so that trade union chairmen have both the right to work during their tenure as chairmen and the right to continue working after the expiration of their contract or tenure.

IX. Conclusion

Among collective contracts, special collective contracts, especially collective contracts on wages, have in recent times been developing most aggressively in China. Through collective consultation on wages, a special collective contract can be concluded as to the enterprise internal wage distribution system, wage distribution form, income levels, and so on. This special collective contract can either exist individually and be legally effective on its own or it can be an appendix to a collective contract already concluded and share equal effectiveness with the collective contract. A collective contract on wages involves various content and has a wide range, including matters such as the wage distribution system, wage rates, the wage distribution form, an employee's annual average wage level and adjustment range, distribution rules for award, subsidy and allowance, wage payment rules, the procedure for changing or removing the wage contract, termination conditions for the wage contract, and responsibility for breach of the wage contract.

On 14 October 2014, the All-China Federation of Trade Unions held the National Trade Unions Work Conference on Collective Consultation, in particular to discuss and arrange implementation of the *All-China Federation of Trade Unions Work Plan on Improving Collective Consultation (2014–2018)* and the functions of collective consultation in increasing workers' income and narrowing the income distribution gap. According to statistics of the

All-China Federation of Trade Unions, by the end of 2013, 80% of enterprises with trade unions have established a collective consultation system. What is more, a pool of more than 149,000 collective consultation instructors, out of which 4,000 work full-time, has been set up to help improve collective consultation work in every industry and enterprise.[18] As time goes by, we believe the special collective contract system will develop considerably.

The problems of collective consultation are that the grassroots unions are too weak to negotiate and trade union officials do not have enough negotiation skills. In this respect trade unions at all levels are working to deal with these problems. The Beijing Federation of Trade Unions has decided to invest 3.8 million RMB each year to build a team of 100 full-time collective consultation instructors. It selects and hires retired persons who are familiar with relevant specialized knowledge on collective consultation and have organizational ability, coordination ability and social practice experiences. Then, it offers induction training, such as intensive classes featuring simulations at the scene, specialists' comments, exchange and discussion, in order to help instructors become familiar with macroeconomic policies on wages (e.g. industry wage guidelines, guidance wage levels in the labour market and standards of production quotas) and to gain first-hand information (e.g. economic development levels, price index movements, and the level of increase of employees' average wages). All the above measures can improve the quality of collective consultation and promote implementation of collective consultation and the conclusion of collective contracts.

Chinese legislation does not distinguish rights disputes from interests disputes, but the Law of the People's Republic of China on Labour-dispute Mediation and Arbitration regulates rights disputes as an object, and Article 84 of the Labour Law also covers disputes caused by fulfilment of collective contracts as one kind of rights dispute; by comparison, disputes caused by the conclusion of collective contracts fall under collective consultation disputes, which is a kind of interests dispute. In judicial practice, the definition of collective labour disputes relies only on the number of people involved in a dispute (thus, the employees must include at least 10 people who claim jointly); dispute content is still about rights. In practice, mass labour disputes arising from disputes on collective contracts seldom happen, and the government plays an important role in dealing with mass labour disputes. Before disputes happen, the government's function is dispute prevention and promotion of collective consultation between employers and employees. After a dispute arises, attention should be paid to the design of the dispute settlement system and how the government approaches and handles mass industrial actions.

[18] See 全总《五年规划》聚焦提高集体协商实效 [ACFTU Five-year Plan Focuses on Improving the Effectiveness of Collective Consultation], 第一财经日报(上海) [First Financial Daily News (Shanghai)], 14 October 2014.

All the solutions for these problems demand an accumulation of practical experiences and a strengthening of the rule-of-law spirit.

Special protection for the fulfilment of trade union chairmen's duties should be strengthened in practice. It is an abnormal phenomenon that monetary compensation works to replace reinstatement. Additionally, there was a disturbing case where a trade union chairman who had just resumed his position was fired a second time.[19] Therefore, this is not only a legislative issue but also a judicial issue, namely how to protect trade union chairmen effectively so that they can fulfil their duties normally and faithfully protect employees' lawful rights and interests. Further consideration should be given to how to rectify malicious behaviour violating trade union chairmen's lawful rights and interests and how to hold unprincipled employers accountable for their violation of trade unions chairmen's rights and interests.

[19] In April 2011, Xinyang Precision Mould Limited Company in Shanghai terminated the employment contract of its HR supervisor and trade union chairman Ms. Zhang. Ms. Zhang opposed the termination and asked to restore labour relations. Through the arbitration, first trial and final trial, her request was supported. The company sent notice of her restored employment in December and after receiving the notice, Ms. Zhang went back to work on 22 December. On her first day back to work, the company held a HR meeting involving middle-level officers. After reading the verdict, it informed all the participants of Ms. Zhang's supposed evidence on secret disclosure. At the same time, it arranged a certain person to film and record her activities. At the meeting, the company arranged for Ms. Zhang alone to work in subordinate factory E, citing as a reason that Ms. Zhang's office had been occupied by her colleagues in the HR department. In Ms. Zhang's new office, two new camera probes were installed, but there was no computer, telephone or other necessary office equipment and supplies; what is more, she could not answer the phone at all. The notice sent on 23 December 2011 told Ms. Zhang that she had to make a written application and fill out an exit application form if she wanted to leave factory E during working hours, and that she could leave only after obtaining approval. She could not enter the workshops and warehouses without written approval. When Ms. Zhang received visiting employees, held trade union meetings and dealt with insurance issues of seriously ill employees, the company not only assigned a certain person to film and record her but also asserted that she was in serious violation of the rules and sent her five punishment tickets. Finally, Ms. Zhang was fired again, see 工会主席刚复职又遭解雇事件始末 [The Whole Story about a Trade Union Chairwoman Fired Again Just after Resuming Her Work], 东方网–劳动报 [Eastern Website, Labour News], 1 March 2012.

The Right to Strike in the International and European Context – *Viking*, *Laval* and Beyond

Ulla Liukkunen

I. Introduction

In recent years, the legal framework of the right to strike has gained increasing attention internationally. Europe has witnessed regional regulatory developments where the major actors have been two powerful European courts, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), presenting different and remarkably differentiated approaches by European regulatory actors. The development can also be characterised as demonstrating a certain tension between European Union (EU) law and the European Convention on Human Rights (ECHR).[1] Despite growing emphasis on fundamental labour rights at the EU constitutional level, EU law has come to encompass elements that impose restrictions on the right to strike under certain conditions. In contrast, the interpretation of the ECHR has developed in a direction which has strengthened the status of the right to strike by including it in the normative system of the Convention.

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, 4 November 1950, ETS No. 5.

The CJEU has infringed upon the right to strike in its landmark *Viking*[2] and *Laval*[3] judgments, where the right to strike was considered to violate the fundamental economic freedoms of EU internal market law. In these judgments, the Court opposed the right to strike, on the one hand, and championed EU fundamental economic freedoms, on the other. It set restrictions on the right to strike by giving priority to fundamental economic freedoms. The judgments have prompted a vast debate, at the heart of which lies the question of assessing these restrictions, which apply to the exercise of the right to strike in certain situations, and their adverse effects on established international human rights standards on the right to strike.

The purpose of this article is to explore international regulation on the right to strike, in broader terms the right to industrial action, with particular attention being paid to recent European developments and the related imbalance between the economic and social dimension of European integration. In what follows, the European framework of the right to strike is also analysed by examining differences between approaches of the ECHR and the EU. The analysis begins with an overview of the basic principles of international regulation. These, to a considerable extent, enable diverse national approaches to regulating the right to strike and its limitations. As discussed elsewhere in this volume, national regulatory models on the right to – or, in the case of Ireland and the UK, on the freedom to – strike vary between European countries. The differences are largely explained by the specific features of the national industrial relations systems of the countries concerned and their particular historical, political and socio-economic contexts.[4]

II. International regulation and the right to strike

International labour standards play a crucial role in protecting fundamental labour rights in the global economy. In an era of globalisation, their relevance is emphasised by the increasing power of multinational enterprises and other economic actors, and by the related imbalance between labour and capital. A counterforce to the adverse effect of globalisation of the economy has increasingly been sought from the potential involved in fundamental labour rights, not least the possibility of workers' cross-border collective action.

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[2] *European Court of Justice* (ECJ) 11.12.2007 – C-438/05 – International Transport Workers' Federation and Finnish Seamen's Union/Viking Line ABP and OÜ Viking Line Eesti.

[3] *ECJ* 18.12.2007 – C-341/05 – Laval un Partneri Ltd ./. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet.

[4] See *Bernd Waas*, Collective Labour Conflicts in Europe, in this volume, 147 et seq.

International human rights instruments set the international legal framework for the right to strike with the purpose of guaranteeing respect for this human right at the state level. The right to strike is generally acknowledged as belonging to the core of collective labour rights together with the right to form and join trade unions and the right to collective bargaining. The collective basis of these rights is essential for their efficient exercise, but it is also emphasised by the strong interdependence between fundamental labour rights. Understanding the system of international labour law requires an understanding of the central importance of the principle of freedom of association, which is one of the founding principles of the International Labour Organisation (ILO). The ILO has emphasised this and highlighted that actors in the labour market must abide by certain fundamental values. These values include human dignity and employee independence – values that are manifested at workplaces through collective labour rights. A closely related right is the right to form and join trade unions.

According to Article 23 of the Universal Declaration of Human Rights, everyone has the right to form and to join trade unions for the protection of their interests. This statement was followed first by ILO standards on the issue and later by two United Nation Covenants, the International Covenant on Civil and Political Rights (ICCPR)[5] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[6], both adopted in 1966. According to Article 22 of the ICCPR, everyone has the right of freedom of association with others, including the right to form and join trade unions for the protection of their interests. The only permitted restrictions to this right are those prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), protection of public health or morals, or protection of the rights and freedoms of others.[7] However, while the Covenant guarantees the right to freedom of association, it does not include provisions on the right to strike. In *J.B. et al. v Canada*, the Human Rights Committee (HRC) stated that Article 22 does not govern the right to strike.[8]

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[5] International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171. Entered into force 23 March 1976.

[6] International Covenant on Economic Social and Cultural Rights of 16 December 1966, 993 UNTS 3. Entered into force 3 January 1976.

[7] According to Article 22, it does not prevent imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. Article 22.3 states further that "nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention".

[8] *Human Rights Committee* (HRC) 18.7.1986 – Case No. 118/1982 – J.B. et al. ./. Canada.

The ICESCR contains an explicit provision in Article 8 on the right to strike, stating that everyone has the right to strike and that the right to strike is guaranteed if it is exercised in accordance with national legislation. The Covenant allows limitations on the right to strike in the military, police forces and government administration. All rights based on the Covenant are subject to Article 4, according to which a state may limit them as follows:

"The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

In its Concluding Observations to States parties to the Covenant, the UN Committee on Economic, Social and Cultural Rights (CESCR) has so far provided only a general overview of the scope of the right to strike provided by the Article and permitted limitations to it. The Committee has not yet given a general comment on the interpretation of Article 8.[9] However it is important to note that national laws cannot set the limits of lawful strikes as far as states wish, otherwise the right would be deprived of its content. The CESCR has taken the view that permitted limitations should be strictly necessary for promoting general welfare in a democratic society, for protecting the interests of national security, public safety, public order or public health, or for protecting the rights and freedoms of others, where no other alternative is to be found.

The regulatory framework set out by the ILO has been central to not only defining but also elaborating fundamental labour rights. Due to its tripartite nature, the ILO has played a unique and principal role in developing international labour standards. In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, where it defines fundamental principles and rights at work, these being: freedom of association and effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labour; effective abolition of child labour; and elimination of discrimination in respect of employment and occupation. The Declaration is based on eight core, or fundamental, ILO Conventions.

ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise, which is one of the eight core Conven-

[9] In its General Comment No. 18, on Article 6 of the ICESCR, on the right to work, the Committee stated that the collective dimension of the right to work is addressed in article 8, which enunciates the right of everyone to form trade unions and join the trade union of his/her choice as well as the right of trade unions to function freely. The Committee is presently working on a General Comment on Article 7 on just and favourable conditions of work.

tions, does not contain an express provision on the right to strike.[10] However, as early as in 1952, the ILO Committee on Freedom of Association confirmed the principle of the right to strike, considering it as "an essential [element] of trade union rights".[11] The ILO supervisory bodies have regarded the right to strike as "an intrinsic corollary to the right to organize protected by Convention No. 87".[12] The right to strike has been held as an essential means for workers and their organisations to promote and defend their economic and social interests.[13] Workers' organisations should be able to use strike action to support their position in a search for solutions to problems related to major social and economic policy questions.[14]

The practice of the ILO supervisory organs has developed a clear stance on the nature of restrictions which can be set on the right to strike. According to the Committee on Freedom of Association, a general prohibition of the right to strike is not permitted: it would constitute a considerable restriction on opportunities for trade unions to advance and defend their members' interests.[15] The right to strike can be restricted or prohibited in essential services, which have a particular meaning in ILO practice.[16] The right to strike can also be restricted because of an acute national emergency for a limited period of time and in certain other situations where it concerns officers exercising public authority in the name of the state, in certain essential services whose interruption would endanger life, public health or safety. In certain sectors, strikes can be banned altogether. Sympathy strikes cannot be forbidden if the strike that is being supported is lawful.[17] According to the Committee, a general prohibition on sympathy strikes could lead to abuse and workers should have

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[10] The eight core Conventions are the Forced Labour Convention No. 29, the Freedom of Association and Protection of the Right to Organise Convention No. 87, the Right to Organise and Collective Bargaining Convention No. 98, the Equal Remuneration Convention No. 100, the Abolition of Forced Labour Convention No. 105, the Discrimination (Employment and Occupation) Convention No. 111, the Minimum Age Convention No. 138, and the Worst Forms of Child Labour Convention No. 182.

[11] See *Committee on Freedom of Association* (CFA), Second Report, Case No. 28 (Jamaica), in ILO, Sixth Report of the International Labour Organization to the United Nations, 1952, 210 para. 68.

[12] See *International Labour Organization* (ILO), Freedom of association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed. 2006, para. 523.

[13] See *ILO* (fn. 12) para. 522.

[14] See *ILO* (fn. 12) para. 527.

[15] *ILO Committee of Experts*, General Survey on the Application of the Conventions on Freedom of Association and on the Right to Organise and Collective Bargaining, International Labour Conference 58th Session, Report III (Part 4B), 1973, para. 107.

[16] *ILO* (fn. 12) para. 573.

[17] *ILO* (fn. 12) paras. 498, 508–511.

the right to take such action provided that the initial action is lawful.[18] Purely political strikes are not allowed according to the Committee on Freedom of Association. However, strikes with mixed economic and political objectives may in certain circumstances be legitimate.[19]

In many legal systems, the right to strike and the right to collective bargaining are strongly interrelated. The existence of the latter may presuppose the former. The right to strike can be considered so important in terms of complete fulfilment of the right to collective bargaining that its non-existence would make workers' right to collectively bargain inefficient and useless. The Committee on Freedom of Association has not limited the right to strike only to industrial disputes which relate to collective bargaining. According to the Committee, it would be contrary to the principles of freedom of association to ban strikes which are not related to a collective dispute to which the employee or union is a party.[20] It has also been acknowledged that it is important to ban any discrimination based on strike action. According to the Committee, workers should be protected against discrimination because of strikes, and they should be able to form trade unions without being exposed to anti-union discrimination.[21] It is also noteworthy that the Committee has taken a stance on obligations which can be set on resorting to a strike. It has accepted an obligation of giving prior notice as well as an obligation to have a conciliation or arbitration procedure prior to a strike.[22]

Altogether, the ILO supervisory organs have played a significant role in specifying the content as well as the substantive and procedural limitations on the right to strike. They have developed a body of principles which has been held as well established.[23] However, recently the interpretation of Conven-

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[18] *ILO Committee of Experts*, Freedom of Association and Collective Bargaining: General Survey, International Labour Conference 69th Session, Report III (Part 4B), 1983, para. 217.

[19] *ILO* (fn. 12) paras. 529–530.

[20] See *ILO Committee of Experts*, General Survey of the Reports of the Freedom of Association and the Right to Organize Convention (No. 87), 1948, and the Right to Organize and Collective Bargaining Convention (No. 98), 1949, International Labour Conference 81st Session, Report III (Part 4B), 1994, para. 165. See also *ILO*, Freedom of association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 4th ed. 1996, para. 489. See also *Bernard Gernigon/Alberto Odero/Horacio Guido*, Collective Bargaining: ILO Standards and the principles of the supervisory bodies, 2000, 59–60.

[21] See *ILO* (fn. 12) para. 524.

[22] See *ILO*, Freedom of association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 3rd ed. 1985, paras. 381, 390.

[23] See for example *Nicolas Valticos*, Les méthodes de la protection internationale de la liberté syndicale, (1975) 144 Rec. des Cours, 77; and *id.*, Droit international du travail, 2nd ed. 1983. See also *Paul F. van der Heijden*, Internationaal stakingsrecht onder spanning, Nederlands Juristenblad (NJB) 2013, 1638, English version ("International Right

tion 87, according to which the right to strike is derived from the Convention, has been challenged by the employers' representatives at the ILO. In 2012, the Employers' Group at the ILO challenged the interpretation of Convention 87 by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR). It considered that the CEACR had exceeded its mandate when it interpreted Convention 87 as governing the right to strike.[24] The disagreement on the status of the supervisory system has prompted a broader debate over the relevance of the role and work of the ILO supervisory organs.[25] As a result, the overall role of the ILO supervisory system has come under pressure. However, in 2015 the Workers and Employers Groups gave a joint statement where they held that the right to take industrial action by workers and employers in order to support their legitimate interests is recognised by the constituents of the ILO.[26]

III. European regulatory framework

International regulation on the right to strike at the European level forms a complicated and heterogeneous, and to some extent even contradictory, entity. Article 11 of the ECHR, which protects freedom of assembly and association, has recently been interpreted by the ECtHR as also governing the right

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to Strike Under Stress") available at: <http://www.thehagueinstituteforglobaljustice.org/cp/uploads/downloadsprojecten/International-Right-to-Strike-Under-Stress_1372942440.pdf>.

[24] See *ILO Committee on the Application of Standards*, Extracts from the Record of the Proceedings, International Labour Conference 101st Session, 2012; *ILO*, Final Report of the Meeting: Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (Geneva, 23–25 February 2015), 2015. See also *Tonia Novitz*, The Internationally Recognized Right to Strike: A Past, Present and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?, International Journal of Comparative Labour Law and Industrial Relations (IJCL) 30 (2014), 357.

[25] Recently, ILO supervisory bodies practice has increasingly been characterised as being merely 'soft law jurisprudence' which can be considered a sign of serious challenges to the ILO in maintaining its original role as a developer and defender of labour rights. See also *Claire La Hovary*, The ILO's supervisory bodies' 'soft law jurisprudence', in Adelle Blackett/Anne Trebilcock (eds.), Research Handbook on Transnational Labour Law, 2015, 316.

[26] See *ILO*, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (Geneva, 23–25 February 2015), TMF APROC/2015/2, 2015, Appendix 1.

to strike. In addition, both the European Social Charter of 1961[27] and the revised Social Charter of 1996[28] recognise the right to strike.

In the EU, the social model of the Union has come to encompass respect for and promotion of human and fundamental rights. Although the social model of the Union has remained somewhat unstructured as a concept, it can be considered as governing a joint effort by the Union and its Member States to strengthen the status of the values to which the Union is committed. At the constitutional level of the EU, the social model of the union has been strengthening as a result of recent developments.

To illustrate, the Amsterdam Treaty started a new developmental phase where fundamental rights are promoted within the Union.[29] Article 6(1) of the Treaty of European Union (TEU) states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, all principles which are common to the Member States. In 2009, the Lisbon Treaty[30] significantly strengthened the status of fundamental social rights at the Treaty level, the constitutional level of EU law. First of all, with the Lisbon Treaty, the Treaty came to include the values of the EU. Under Article 2 of the Treaty:

> "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Secondly, the Charter of Fundamental Rights of the European Union (EU Charter),[31] which became an integral part of EU law with the TEU, includes the right to collective action. According to Article 28 of the EU Charter, workers and employers, or their organisations, have the right to negotiate and conclude collective agreements at the appropriate levels. In cases of conflict of interest they also have the right to take collective action to defend their interests, including strike action. These rights must be exercised in accordance with Community law and national laws and practices.

In the *Viking* and *Laval* judgments, the CJEU has interpreted EU law so that restrictions are imposed on the right to strike while strengthening the

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[27] See European Social Charter of 18 October 1961, CETS No. 35. Entered into force 26 February 1965.

[28] European Social Charter (revised) of 3 May 1996, CETS No. 163. Entered into force 1 July 1999.

[29] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, [1997] OJ C 340/1.

[30] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, [2007] OJ C 306/1.

[31] Charter of Fundamental Rights of the European Union, [2000] OJ C 364/1.

status of fundamental economic freedoms set out by the Treaty on the Functioning of the European Union (TFEU). Although the EU has no competence to legislate on the right to strike, the interpretation that the CJEU has given to fundamental economic freedoms, the right to exercise freedom of establishment and to provide services as enshrined in the TFEU means that in certain cases exercise of the right to strike can be limited.[32] This integration-based limitation on the right to strike has caused tensions between the EU and ECHR approaches and also between the EU and ILO approaches on the right to strike.

The right to strike is limited in cases entailing use of EU fundamental economic freedoms by virtue of the *Viking* and *Laval* judgments. These rulings should be seen in a broader framework of European legal integration and its objectives. The Union seeks to strengthen the internal market by facilitating the fundamental economic freedoms forming the basis of the market. Dismantling obstacles to free movement of workers, services and capital lies at the heart of developing the internal market. However, these CJEU rulings show that the strengthened status of fundamental economic freedoms endangers building a sustainable social model for the EU.

1. European Council regulation

Previously, the ECtHR had been reluctant to extend the principles of the ECHR to govern collective labour rights. From the 1990s forward, however, the ECtHR has increasingly extended protection of the principles of the ECHR to collective labour rights. In so doing, the Court has largely paid attention to the ILO Conventions and related practice of the ILO supervisory organs. It is noteworthy that in recent years the sphere of rights protected under the ECHR has come to cover economic and social rights which traditionally have been viewed as belonging more under the European Social Charter.[33] In *Demir*, the ECtHR confirmed that Article 11 governs the right to collective bargaining, which is one of the essential aspects of the right to form and join trade unions, and it also stated that limitations on freedom of association should meet the regulations of Article 11(2) of the Convention.[34]

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[32] In order to resolve the issue, the European Commission made a Proposal for a Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (Monti II) which intended to clarify the relation between the right to strike and the EU fundamental economic freedoms, but the Proposal was not accepted by the Member States. See Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final.

[33] See *Philip Alston*, Labour Rights as Human Rights: The Not So Happy State of the Affairs, in Philip Alston, Labour Rights as Human Rights, 2005, 20.

[34] See *European Court of Human Rights* (ECtHR) 12.11.208 – 34503/97 – Demir and Baykara ./. Turkey.

Later, in *Enerji Yapi-Yol Sen* the ECtHR broadened protection under Article 11 to govern the right to strike.[35]

Hence, not only has the Court recognized the right to strike as a part of the right of association, including the right to form and join trade unions, as referred to in Article 11 of the ECHR, but it has also addressed the question of permitted restrictions on the use of this right. Placing the right to strike within Article 11 also means that the grounds for restriction provided by Article 11(2) have to be respected. So any restriction has to be prescribed by law and it has to be necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The recent Court decision in the *RMT* case has marked a new phase in regulatory development as the Court accepted the prohibition of sympathy action set by UK law, deviating from the interpretation of the lawfulness of sympathy action adopted by the ILO. The ECtHR held a statutory ban on secondary action as a restriction which is acceptable within the margin of appreciation which states enjoy under Article 11 of the ECHR.[36] This decision also means that the ECtHR does not fully follow the principles of ILO practice and has a more flexible approach to the restrictions that can be set on the right to strike.

The European Social Charter of 1961 was the first international instrument to contain an explicit provision on the right to collective action. The European Committee of Social Rights (ECSR) has played a significant role in interpreting the provision on the right to collective action, for example by stating that it governs both strikes and lock-outs.[37] Article 6(4) of the revised Social Charter of 1996 guarantees the right to strike to all employees regardless of whether they are members of a trade union or not. Industrial action can only be taken in cases of conflict of interest. Article 6 on freedom of association belongs to the so-called 'hard core' articles of the revised Charter, and it is noteworthy that the regulatory context of the right to strike emphasises the linkage between collective bargaining and the right to strike. General exceptions set out in Article 31 of the Charter apply to it. According to the ECSR, within the system of values, principles and fundamental rights embodied in the Charter, the right to collective action is essential in ensuring the autonomy of trade unions and protecting rights at work. If the substance of this right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and the

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[35] *ECtHR* 21.4.2009 – 68959/01 – Enerji Yapi-Yol Sen ./. Turkey.

[36] See *ECtHR* 8.4.2014 – 31045/10 – National Union of Rail, Maritime and Transport Workers ./. United Kingdom.

[37] See European Social Charter (fn. 28) 95.

scope of the right to strike should not be limited by legislation to attaining minimum conditions.[38]

The ECSR has considered that neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of rules of the EU with the European Social Charter.[39] Facilitating free cross-border movement of services and promoting freedom of an employer or undertaking to provide services in other states – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights. These rights include the right to use collective action to demand further and better protection of the economic and social rights and interests of workers.[40]

It should be noted, however, that the status of the ECSR differs remarkably from that of the ECtHR in terms of the strength of protection they have been capable of affording to human rights. The efficiency of protection of rights within the ECHR and the European Social Charter systems also differs due to a difference in available complaints procedures. The latter is based on a specific collective complaints procedure, established in 1998 in order to strengthen and complement the monitoring mechanism, which was based on a reporting obligation of the signatory states. The Protocol to the European Social Charter, however, gives the right to make a complaint only to certain kinds of international and national employers' and trade unions' organisations as well as non-governmental organisations, whereas the ECSR is accompanied by a stronger procedure allowing complaints by individuals to the ECtHR in cases where their rights have been violated by a signatory state.

Nevertheless, it is noteworthy that a certain consistency can be recognized between the practice of the ECtHR and the ECSR. There is, however, a noteworthy difference in the EU's attitude to these two instruments, demonstrated by the fact that, according to the TFEU, the Union will accede to the ECHR. Moreover, while Article 6(3) of the TEU states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions which are common to the Member States, shall constitute general principles of EU law, the ECSR is not even mentioned in the Treaty. However, the Charter has contributed to the overall development of fundamental rights in the EU. It largely affected the content of the EU Charter, which has become a part of the TEU.

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[38] See *European Committee of Social Rights* (ECSR) 3.7.2013 – 85/2012 para. 120 – Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) ./. Sweden.

[39] *ECSR* – 85/2012 para. 74 – Swedish Trade Union Confederation.

[40] *ECSR* – 85 2012 para. 122 – Swedish Trade Union Confederation.

2. *Limitations on the right to strike in the EU* – Viking, Laval *and beyond*

In the EU, the right to strike has been set against the right to exercise fundamental economic freedoms in the internal market. In the two landmark cases of *Laval* and *Viking*, the CJEU has taken a stance which makes the right to industrial action subordinate to the doctrine of the conditions under which the fundamental economic freedoms can be restricted. The Court imposed certain restrictions on the right to take industrial action in cross-border situations that involve the exercise of fundamental economic freedoms. These restrictions, which derive from the doctrine the Court has created in order to assess compatibility with the fundamental economic freedom concerned, derive from the pronounced status given to fundamental economic freedoms within the EU internal market.

The *Viking* case concerned the intention of the ferry operator, Viking Line, to register its Finnish ship, M/S Rosella, in another EU country, Estonia. The case involved the question of the relation between freedom of establishment and the right to take industrial action. The Finnish Seamen's Union, which was against the reflagging, demanded conclusion of a collective agreement under which M/S Rosella would still be under Finnish law and the employment of the crew would not be terminated. The industrial action took place in Finland but the case was taken to court by Viking Line in the UK, the location of the headquarters of one of the parties to the industrial action, the International Transport Workers' Federation (ITF). The Finnish union of seamen, which was affiliated to the ITF, was supported by the ITF which sent a circular to all members asking them to support the trade union and not enter into negotiations with Viking.

The CJEU held that collective action aimed at protecting the jobs and conditions of employment of the union members liable to be adversely affected by the reflagging of M/S Rosella could fall within protection of workers. However, this view was not tenable if jobs and conditions of employment were not jeopardised or under serious threat. Collective action has to be suitable to ensuring achievement of the objective but cannot go beyond what is necessary to attain the objective. If the trade union had other means at its disposal it should exhaust those means before initiating collective action.[41]

The *Laval* case involved a collision between the freedom to provide services and the right to take industrial action. The case was about a Latvian construction company which posted employees from Latvia to work in Sweden under free movement of services. The Swedish trade unions launched negotiations in order to make the pay of the Latvian posted workers be based on Swedish law and to apply Swedish collective agreements for the construction industry to the Latvian company. After negotiations failed, the Swedish

[41] See *ECJ* – C-438/05 paras. 81, 84, 87 – Viking.

building workers union began a blockade of Laval's building sites. The CJEU held that collective action undertaken for the protection of host state workers against social dumping may constitute an overriding reason of public interest which justifies a restriction on fundamental economic freedoms. In principle, blockading action of the trade union which aimed at ensuring that posted workers have their terms and conditions fixed at a certain level would fall within the objective of protecting workers. However, collective action with the aim of forcing an employer to enter into negotiations on pay could not be justified by the public interest objective.[42]

Referring to ILO Convention No. 87, the European Social Charter and Article 28 of the EU Charter, the Court held in *Viking* and *Laval* that the right to take collective action must be recognised as a fundamental right forming an integral part of the general principles of EU law.[43] The Court confirmed that rights under the TFEU on free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, *inter alia*, improved living and working conditions, proper social protection and dialogue between management and labour.[44] Although the Court ruled that the Union also has a social aim and not just an economic one,[45] it set certain conditions on industrial action which must be met in order for action to be lawful when exercising fundamental economic freedoms within the EU. In doing so, the Court ended up limiting the right to strike despite recognition of ILO Convention No. 87, the European Social Charter and Article 28 of the EU Charter.

When setting these conditions in *Viking* and *Laval*, the CJEU followed its doctrine on conditions concerning restricting fundamental economic freedoms. The doctrine is based on assessing whether restrictions on freedom of establishment and freedom of services can be permitted under conditions set by the CJEU. Thus, industrial action has to have a legitimate aim compatible with the Treaty and it has to be justified by overriding reasons of public interest. In addition, it has to fulfil the criteria of necessity and proportionality. These criteria, which Member State courts are obliged to apply, deviate from the criteria established, for example, by the ILO supervisory bodies for legitimate restrictions on the right to strike. As regards the question whether the collective action in question goes beyond what is necessary to achieve the objective pursued and the question whether the action is in line with the proportionality principle, an assessment is thus required from the national court when the strike under consideration is related to the exercise of fundamental

[42] See *ECJ* – C-341/05 paras. 103, 108–109 – Laval.
[43] See *ECJ* – C-341/05 paras. 90–91 – Laval. See *ECJ* – C-438/05 paras. 43–44 – Viking.
[44] See *ECJ* – C-438/05 para. 79 – Viking; and *ECJ* – C-341/05 para. 105 – Laval.
[45] See *ECJ* – C-438/05 para. 58 – Viking; and *ECJ* – C-341/05 para. 105 – Laval.

economic freedoms. These assessments fit poorly with the nature of the right to strike.[46]

With *Viking* and *Laval*, the question of determining the legality of cross-border industrial action has become more complicated and difficult to resolve. It is difficult to make a prior assessment of the conformity of industrial action involving fundamental freedoms with the conditions set by the CJEU on permitted restrictions on free movement of services and freedom of establishment. This, in turn, means a serious de facto restriction on the right to strike. As effects of the conditions and compliance with them are difficult to assess beforehand, for employees this also means a possibility of facing court proceedings and legal liability for damages caused by strike action when the strike does not comply with EU law.[47] Importantly, with such restrictions on the right to strike that cause legal uncertainty and unpredictability, the *Viking* and *Laval* judgments in practice touch upon employees' ability to bargain collectively, which is supposed to be backed up by an efficient possibility of strike action. Hence, EU law has resulted in weakening the right to strike, and this in turn has had an adverse effect on the right to bargain collectively as these two fundamental labour rights are closely interrelated.

Despite references to international human rights treaties in both *Viking* and *Laval*, the content of these treaties did not play a significant part in the reasoning of the CJEU. The Court failed to recognise workers' human rights as an independent sphere which cannot be subordinated to the internal market law sphere. If we weigh the line of reasoning of the CJEU against the international human rights treaties that bind all EU Member States, a clear contradiction starts from the point of departure adopted when taking a stance on permitted restrictions. From the international human rights standards perspective, it is important to assess what kind of limitations on the right to strike are permitted, whereas in the *Viking* and *Laval* judgments the point of departure adopted by the CJEU was on what conditions can freedom of establishment and free movement of services be restricted by strike action.

The ECSR has examined the compatibility of the Social Charter with limitations on the right to strike based on facilitation of free cross-border movement of services and is of the opinion that it cannot be treated as having greater a priori value than fundamental labour rights. The ILO supervisory bodies have also reacted to the EU development, taking a stand on the type of discretion required in case strike action is used when EU fundamental eco-

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[46] See also *Catherine Barnard*, A proportionate response to proportionality in the field of collective action, European Law Review (E.L.Rev.) 37 (2012), 117; *Brian Bercusson*, The Trade Union Movement and the European Union: Judgment Day, European Law Journal (ELJ) 13 (2007) 304; and *Phil Syrpis/Tonia Novitz*, Economic and social rights in conflict: Political and judicial approaches to their reconciliation, E.L.Rev. 33 (2008), 425.

[47] See also *Syrpis/Novitz* E.L.Rev. 33 (2008), 425.

nomic freedoms are involved. ILO practice does not recognise the type of discretion that the CJEU has applied to determining exercise of the right to take industrial action in cross-border cases involving exercise of fundamental EU economic freedoms. The CEARC has stated that when elaborating its stance on restrictions on the right to strike provided by ILO Convention No. 87, it has never included the need to assess the proportionality of interests while bearing in mind the notions of freedom of establishment or freedom to provide services. According to the CEARC, the judgments in *Viking* and *Laval* create a situation where rights under Convention No. 87 cannot be exercised. Moreover, the doctrine in these judgments is likely to significantly limit the right to strike and hence they are in breach of Convention No. 87.[48]

3. Observations on imbalances in the EU regulatory approach

Despite constitutional regulation of the right to strike in the EU, the present regulatory approach can be considered to reflect lack of sufficient legal protection for this right. Although by virtue of Article 153(5) of the TFEU the EU does not have competence to regulate the right to strike, the *Viking* and *Laval* judgments amount to an intervention by the CJEU in the realisation of that very right. The Court has used EU regulation on fundamental economic freedoms to intervene in an area of Member States' national law which falls outside Union regulatory competence.[49] This affects the ability of the Member States to comply with their international human rights commitments.

Significantly, the judgments of the CJEU have led to a situation where cross-border strikes can be divided into two groups as regards the protection afforded to the right to strike. In cases which do not relate to the exercise of fundamental economic freedoms, the right to strike enjoys protection afforded by international human rights documents binding the EU Member States without EU-specific limitations. In contrast, in cases which relate to the exercise of fundamental economic freedoms, the use of the right to strike has to satisfy the criteria set out by the CJEU. As a result, industrial action can only be taken under conditions that, in certain respects, depart from the body of principles developed by the ILO supervisory organs and the regulation of the ECHR as well as the European Charter of Social Rights.

A particularly noteworthy feature of the recent development derives from the linkage of internal market regulation to EU regulation on jurisdiction and applicable law concerning strike disputes that have connections to more than one country. The court of the state where the industrial action has been taken does not have jurisdiction in disputes involving the action, although the law of that country is applicable to the case.

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[48] *ILO Committee of Experts*, General Report and observations concerning particular countries, International Labour Conference 99th Session, Report III (Part 1A), 2010, 209.

[49] *Barnard* E.L.Rev. 37 (2012), 117.

The regulatory approach of the Rome II Regulation on non-contractual obligations[50] is based on the general principle of application of the law of the place where industrial action is taken. As party autonomy in determining the applicable law enabled by Article 14 of Rome II may only be used after industrial action has taken place, it can be presumed to play a narrow role in industrial action disputes. Hence, the applicable law would be determined under the Article 9 rule, which states that the law applicable to damages caused by industrial action is the law of the place where the industrial action was taken. However, in cases where the responsible party and the injured party have their habitual residence in the same country where the damage was suffered, the law of that country applies. Otherwise, the applicable law is that of the country where the industrial action was taken. However, the regulatory framework which affects the outcome of the rulings on industrial disputes is complicated, as the rules on jurisdiction to be found in the Brussels I Regulation (recast)[51], the rules on determination of the applicable law to be found in the Rome I Regulation[52] and the Rome II Regulation do not form a coherent entity. Consequently, a possibility of *forum shopping* exists in the EU.

It has been argued that the situation in Europe might change, as the Treaty of Lisbon provides a legal basis for EU accession to the ECHR.[53] However, accession requires a unanimous decision by the Council of the European Union, which means that all EU Member States have to agree on the issue. Accession would nevertheless mean that the existing interpretations of the EU on the right to take industrial action would need to be reassessed to match the interpretation of the ECHR. The ECtHR is not bound to the fundamental economic freedoms which have been placed at the core of the EU legal order and whose promotion has become central to the EU. The CJEU has rejected accession in its opinion of December 2014, according to which the draft agreement on accession is not compatible with EU law.[54]

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[50] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40.

[51] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1.

[52] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177/6.

[53] Under Article 6 of the TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[54] See *ECJ* 18.12.2014 – Opinion 2/13 – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

IV. Concluding remarks

The right to strike belongs to the core area of labour rights. Although the principles discussed above concerning the right to strike adopted by different international human rights instruments do not form a uniform entity, they embody a regulatory approach which is based on guaranteeing the right to strike as an internationally protected fundamental labour right. The fundamental rights nature of the right to strike is explicitly acknowledged by the EU Charter, but this has not prevented the CJEU from establishing internal market law-based restrictions on the exercise of this right in certain situations. These restrictions, which concern cases where the exercise of fundamental economic freedom is involved, are not in line with international human rights standards discussed above. They can also be seen as demonstrating a developing trend where the economic dimension of the EU poses a threat to preserving a social model of the Union based on promotion of human and fundamental rights.

The imbalance between the economic and social dimensions of European integration becomes visible in the outcome of CJEU case law subordinating the right to strike to restrictions deriving from the doctrine which it has created on facilitation of fundamental economic freedoms. The possibility of trade unions bearing legal liability for damages caused by a strike falling within the free movement of services or freedom of establishment and not fulfilling the restrictions doctrine set out by the CJEU in the *Viking* and *Laval* judgments is likely to hamper exercise of the right to strike. As workers' negotiating power in relation to their employer presupposes their right to strike, the interrelation between the right to collective bargaining and the right to strike is also touched upon.[55]

Both the CJEU and the ECtHR have come to play a significant role in developing the regulatory framework of the right to strike at the European level. However, these courts have used their power in remarkably different ways. The ECtHR has taken a stance that protection of Article 11 of the ECHR governs the right to strike. In so doing, it has contributed to increasing an understanding of labour rights as human rights that are not of limited significance due to their belonging to the sphere of social and economic rights.[56] In

[55] As *Bercusson* ELJ 13 (2007), 304 has put it, "Workers only have negotiating power because of their ability collectively to withdraw their labour. Courts in the Member States, very sensibly, have been extremely cautious in invoking any test of proportionality as regards the right to strike. It is a right inextricably linked to the collective bargaining process and must be assessed in the context of that process".

[56] See also *K. D. Ewing/John Hendy*, The Dramatic Implications of Demir and Baykara, Industrial Law Journal 39 (2010), 2. As long ago as 1979, the *ECtHR* 9.10.1979 – 6289/73 para. 26 – Airey ./. Ireland stated that "Whilst the Convention sets forth what are essentially civil and political rights many of them have implications of a social or economic nature.

the EU, emphasis on the fundamental rights nature of the right to strike can be found at the constitutional level especially in the provisions of the EU Charter. Yet the direction in which the CJEU has been taking the regulatory framework of fundamental labour rights is based on a policy of increasing intervention in this right through strengthening the position of internal market freedoms. This direction has met with criticism, for example, from the ILO supervisory organs and the ECSR.

Emphasis on EU fundamental economic freedoms has led to a situation where the right to take industrial action becomes part of considerations which do not follow the principles of international human rights treaties. Facilitating the exercise of fundamental economic freedoms has come to have an adverse influence on fundamental labour rights development in the union.[57] CJEU interpretations of the right to strike are incompatible with the international human rights commitments of the Member States. The human rights instruments on which these commitments are based form a context in which the EU regulatory approach should be assessed not only from outside EU institutions but also within them.

The Court therefore considers like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention".

[57] See also *Ulla Liukkunen*, Collision Between the Economic and the Social – What Has Private International Law Got to Do with It?, in Pia Letto-Vanamo/Jan Smits (eds.), Coherence and Fragmentation in European Private Law, 2012, 125.

Collective Labour Conflicts in Europe

Bernd Waas

I. Introduction

An examination of strike law in European countries reveals that there are major differences even between countries that are members of the European Union. This contribution seeks to address the major legal issues that arise in the context of strikes and lock-outs and to discuss the differences as well as the similarities. As the paper examines legal questions only, it is necessary,

by way of caveat, to state that in quite a few countries the *practice* of industrial conflicts differs from the legal position in one way or another.

II. Legal definitions

In many countries in Europe, including *Germany*, no legal definitions of strike and lock-out exist and it was left to legal doctrine and the courts to arrive at definitions. In *Ireland*, on the other hand, the term "strike" is defined in different Acts for different purposes. The definition contained in Section 8 of the Industrial Relations Act 1990, for instance, defines "strike" as "a cessation of work by any number or body of workers acting in combination or a concerted refusal or a refusal under a common understanding of any number of workers to continue to work for their employer done as a means of compelling their employer, or to aid other workers in compelling their employer, to accept or not to accept terms or conditions of or affecting employment". In some countries, statutory definitions of the term "strike" are even more elaborate. For instance, in the *Czech Republic*, the definition of the term "strike" does not only refer to a "work stoppage", but explicitly mentions the possibility of a "partial work stoppage". In most countries one would find definitions that essentially comprise two elements: first, a stoppage of work and, second, concerted action. In most cases these two elements are also defined in terms of their ends, based on the objective of inducing employers to accept or reject terms or conditions of employment.[1]

III. Legal basis of the right to strike

1. European Union and Council of Europe

With regard to EU law, it should be noted that according to Article 153(5) of the Treaty on the Functioning of the European Union[2] the EU has no competence to legislate on "pay, the right of association, the right to strike or the right to impose lock-outs". Nonetheless, there are constitutional guarantees of freedom of association and the right to strike. According to Article 12 para 1

[1] *Bernd Waas*, The Right to Strike: A Comparative View, in Bernd Waas (ed.), The Right to Strike – A Comparative View, 2014, 3 (3 et seq). This contribution is largely based on this book or, more specifically, the general report and the underlying country reports that are part of it. Drawing on their expertise, I warmly thank all my colleagues who participated in that effort and provided such valuable information and insight.

[2] See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union of 13 December 2007, [2012] OJ C 326/1.

of the Charter of Fundamental Rights of the European Union,[3] "everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests". More specifically, Article 28 of the Charter states that "workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action". As regards the Council of Europe, Article 11(1) of the European Convention on Human Rights[4] states that "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". According to Article 11(2) of the Convention, "no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State". Finally, Article 6 no 4 of the European Social Charter[5] enshrines a "right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into".[6]

2. *Constitutional guarantees*

a) Explicit and implicit guarantees

In most European countries the right to strike is guaranteed by the Constitution. A case in point is *Poland*, where the right to strike is enshrined in Article 59(2), according to which "trade unions shall have the right to organize workers' strikes or other forms of protest […]". The Polish Constitution also fixes the limits to the right to strike. According to Article 31(3) "any limitation upon the exercise of constitutional freedoms and rights may be imposed

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[3] Charter of Fundamental Rights of the European Union, [2010] OJ C 83/389.

[4] European Convention on Human Rights as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos 1, 4, 6, 7, 12 and 13, available at: <http://www.echr.coe.int/documents/convention_eng.pdf>.

[5] European Social Charter, as adopted in 1961 and revised in 1996.

[6] It may be interesting to note that in the Netherlands the right to strike is directly derived from the European Social Charter; see *Mijke Houwerzijl/Willemijn Roozendaal*, The Right to Strike: The Netherlands, in Waas (fn. 1) 413.

only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". In a few countries, the right to strike is implicitly guaranteed. For instance, in *Germany*, the Constitution's Article 9(3), on freedom of association, amounts to a "circumlocutory" constitutional guarantee of the right to strike. Under Article 9(3) sentence 1, "the right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession". This is understood by the courts as meaning that not only individuals may establish associations and become members of them, but that also the associations as such are protected. Though the right to bargain collectively is not expressly mentioned, it is generally understood as forming an essential element of freedom of association. And though the right to collective action is also not mentioned in Article 9(3), it is understood as being included in the freedom of association, insofar as such a right is necessary to ensure an effective right to collective bargaining.[7]

b) Bearer of the right to strike

Differences exist in relation to the bearer of the right to strike. If the right to strike is perceived as an individual right of every worker, there are two options: First, the right to strike could be an exclusive right of every individual person. Second, the constitutional guarantee of the right to strike could assume the form of a "double fundamental right". Legal protection of individual workers and the protection of trade unions may then be interrelated. Such a relationship may entail that the individual right of workers is based on the protection of trade unions, or it may entail that the individual rights of workers are, in one way or other, conditional upon group action.[8] According to the prevailing opinion in *Germany*, the right to strike as guaranteed by Article 9(3) of the Constitution forms a "double fundamental right" with the position of the individual worker derived from and dependent on the collective right. In *France* and *Italy*, on the other hand, the right to strike is regarded as an individual right that is exercised collectively.[9]

c) Content of the right

In most countries, including *France*, *Italy* and *Germany*, the right to strike is a (positive) right. In the *United Kingdom* and *Ireland*, the position is different

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[7] See the judgment of the German Constitutional Court *Bundesverfassungsgericht* (BVerfG) 26.6.1991 – 1 BvR 779/85, BVerfGE 84, 212.

[8] *Waas* (fn. 1) 3 (7 et seq.).

[9] See *Waas* (fn. 1) 3 (7 et seq.).

as there is no *right* to strike but a mere *freedom* to strike. This means that trade unions, when calling on their members to absent themselves from work, *prima facie* commit a series of civil law wrongs. There are statutory provisions designed to enable trade unions to organise industrial action if a series of conditions have been fulfilled.[10] If a trade union meets these requirements the law grants immunity against particular tortious claims.[11]

d) Limitations of the right to strike

Different limitations on the right to strike exist. In *Germany*, the right to strike is acknowledged because such a right is required for collective bargaining to take place in practice. That the right to strike is based on the right to bargain collectively has an important consequence, however: that the right to strike is guaranteed *only insofar* as the strike is related to that very purpose. The need to ensure collective bargaining both justifies and limits the right to strike. In other words, a strike is lawful in *Germany* if and only if its underlying objective is the reaching of a collective bargaining agreement.[12] This implies, inter alia, that the strike demands must be viable and fall within the competence of the parties to the envisaged collective agreement.[13]

IV. The right to call a strike

As previously mentioned, in *Italy* and *France* individual workers are regarded as the owners of the right to strike, though this right may only be exercised collectively.[14] As a result of this view even a loose or spontaneous association of workers can declare a strike. In *Germany*, the position is completely different. There, only trade unions are empowered to call a strike and, since strikes must be related to collective bargaining, only those trade unions which enjoy the so-called "capacity to bargain collectively"[15] (meaning that they can

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[10] See, in particular, Section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the so-called "golden formula").

[11] *Jeremias Prassl*, The Right to Strike: United Kingdom, in Waas (fn. 1) 550 (556), with a critical assessment of this position.

[12] In the past, the European Committee of Social Rights repeatedly found that the ban on all strikes not aimed at achieving a collective agreement is contrary to Article 6 no. 4 of the European Social Charter, see *Council of Europe*, European Committee of Social Rights Addendum to Conclusions XV-1 (Germany), 2001, 27, available at: <https://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/XV1Add2_en.pdf>.

[13] *Waas* (fn. 1) 3 (10).

[14] As for Italy see *Paolo Pascucci*, The Right to Strike: Italy, in Waas (fn. 1) 331 (335).

[15] See *Bernd Waas*, Who is allowed to represent the employees? The capacity of trade unions to bargain collectively in German Law, in Tomas Davulis/Daiva Petrylaitė, Labour Regulation in the 21st Century: In Search of Flexibility and Security, 2012, 149.

conclude viable collective bargaining agreements) can call a strike. "Wildcat strikes", in any event, are prohibited.

V. The right to participate in a strike

In *Italy* and *France*, as the right to strike is understood to belong to the individual worker, every worker, irrespective of any union membership, can participate in a strike. In *Germany*, though the conceptual basis is different, non-union members may also participate in a strike. There are two main reasons for allowing non-union members to participate in a strike that was called by a trade union. First, without participation of "outsiders", many strikes would stand little chance of being successful. Second, though non-union members are not legally bound to collective agreements, they still profit from the conclusion of collective agreements as collective agreements are often referred to by the parties to the employment contract resulting in the provisions of the agreement becoming implied terms of the contract.[16]

VI. Lawful strikes according to their purpose

The lawfulness of a strike may depend on its purpose. Strikes conducted with a view to concluding collective agreements are, generally, lawful in all countries in Europe. In *Germany*, the very purpose of granting the right to strike is to provide a means for exerting pressure on employers and, by doing so, to induce the employer's willingness to conclude a collective agreement. On the other hand, strikes that arise from disputes over rights essentially are unlawful. In *Hungary*, statutory law expressly prohibits strikes if they are called in response to measures taken by the employer or to acts committed by the employer, whose lawfulness is to be decided by the courts. In *Ireland*, the law provides that where the trade dispute relates to an individual worker and if procedures for the resolution of individual grievances have been agreed, the statutory immunities will only apply where those procedures have been resorted to and exhausted. Strikes that aim at enforcing a collective agreement qualify as illegal strikes in most countries. In *Sweden*, collective action to enforce a collective agreement is prohibited in principle, with the exception of collective action to recover unpaid wages.[17]

Political strikes are generally unlawful in most countries. A closer look reveals, however, that the courts frequently take a flexible approach. In *Spain*,

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[16] See the judgment by the Federal Labour Court *Bundesarbeitsgericht (BAG)* 22.3.1994 – 1 AZR 622/93, NZA 1994, 1097.

[17] *Waas* (fn. 1) 3 (17 et seq.).

for instance, the Constitutional Court considers strikes to be "political" only if there is no connection with workers' interests.[18] In *Italy*, the courts draw a line between "economic-political" strikes (measures directly affecting workers' interests) and "pure political strikes", with only the latter being unlawful. Industrial action in the context of inter-union disputes also will often fail to qualify as legitimate action.[19] In *Greece*, political strikes are lawful as long as they have a mixed nature with only one element being political.[20]

In *Ireland*, strikes arising from inter-union disputes would not fall within the scope of statutory immunities, because the definition of "trade dispute" is restricted to disputes between employers and workers and, accordingly, does not apply to disputes between workers.

VII. Procedural requirements

1. Exhaustion of all means of negotiation

Major differences exist among the European countries with respect to procedural requirements. In some countries, (almost) no such requirements exist. In *Germany*, for instance, it was held by the courts that the principle of proportionality requires the exhaustion of all means of negotiation before rightfully calling a strike.[21] This amounts to very little, however, since a trade union is not even required to formally declare that negotiations have failed. In *Turkey*, on the other hand, a 60-day negotiation period is provided by law. If either of the parties fails to appear at the place, date and time fixed for negotiations or fails to attend the meetings after the commencement of negotiations, the competent authority shall initiate a mediation process without any obligation to await the lapse of the 60-day negotiation period. If no agreement has been reached 60 days after the commencement of collective negotiations, the competent authority must initiate the mediation process.[22]

2. Balloting

In *Germany*, most trade unions have established so-called guidelines which provide for a ballot; however, failure to follow these guidelines does not affect the lawfulness of industrial action. In the *United Kingdom* and *Ireland*, on the other hand, the requirement of holding a ballot follows from statutory

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[18] *Tribunal Constitucional de España* 8.2.1993, sentencia 36/1993, BOE núm. 60/1993, 11; *Magdalena Nogueira Guastavino*, The Right to Strike: Spain, in Waas (fn. 1), 509 (512).

[19] *Pascucci* (fn. 14) 331 (336).

[20] *Effrosyni Bakirtzi*, The Right to Strike: United Kingdom, in Waas (fn. 1) 259 (267).

[21] *BAG* (GS) 21.4.1971 – GS 1/68, BAGE 23, 292.

[22] *Tankut Centel*, The Right to Strike: Turkey, in Waas (fn. 1) 537 (541).

law which makes detailed provision for the execution of a ballot.[23] If industrial action is not supported by a ballot it is not protected under the law and the union may face tortious claims. In *Turkey*, not only the trade union's rank-and-file, but *all employees* in an establishment which will be affected by a strike have to approve the strike, irrespective of trade union membership. Moreover, there are statutory provisions according to which a strike ballot must be held as soon as a quarter of all employees who work in the establishment request one.[24]

3. Obligation to notify the other party

In *Germany*, the other party to the conflict must be informed about the decision to call a strike. There is no obligation to give advance notice on individual measures aimed at a particular employer. In *Poland*, *Slovenia* and *Spain*, on the other hand, notice of a strike must be given five days in advance. In the *Czech Republic*, such notice, to be given within three days, requires information about the start of the action, the reasons and objectives of the strike, the number of employees participating and a list of workplaces which will not operate during the strike. In the *United Kingdom*, trade unions have to obey an array of information and communication duties both towards employers and trade union members. The union must, for example, inform the employer that it will hold a ballot and provide a sample voting paper, and give notice to the employer of pending industrial action, including detailed figures and dates.[25]

4. Cooling off periods

In some countries cooling off periods exist. A statutory cooling off period of seven days applies, for instance, in *Hungary*. In *Poland*, there is a statutory cooling off period of 14 days.[26]

VIII. Peace obligations

Major differences exist with regard to restrictions on the right to strike that are based on collective agreements themselves. In *Germany*, so-called "relative peace obligations" are understood to be inherent in all collective agreements, even if there is no explicit provision in the agreement. A strike that

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[23] As regards the *United Kingdom*, see Sections 226–234 of the Trade Union and Labour Relations (Consolidation) Act 1992.

[24] *Centel* (fn. 22) 540.

[25] *Prassl* (fn. 11) 558.

[26] *Waas* (fn. 1) 3 (31 et seq.).

aims at modifying an existing collective agreement is in breach of that peace obligation and hence illegal. In *Sweden*, the peace obligation also prohibits collective action relating to a concluded collective agreement. Thus, it is in principle lawful to take collective action relating to issues that have not yet been regulated in a collective agreement. According to settled case law, however, collective agreements also regulate issues that are considered to fall within the scope of the employer's prerogative. The same applies to issues that are considered to fall within the general framework of the collective agreement (so-called "invisible clauses"). This means that there are, in practice, very limited possibilities for claiming that issues are not regulated by the collective agreement. The most relevant exception is the possibility of taking sympathy action, since such action is lawful as long as the primary action is lawful.[27]

In the *United Kingdom*, the position is completely different. Since collective agreements are not generally enforceable, there is no general concept of an "industrial peace" obligation.[28] In *France*, no peace obligation exists. Since the right to strike is guaranteed by the Constitution, no collective agreement can legally restrain it.[29] In *Italy*, no implied peace obligation exists. A peace obligation cannot be valid unless it is expressly agreed. And if it is expressly agreed by the parties to the collective agreement, a peace obligation only binds the union, not its members, since the right to strike is a right that is vested in individual employees, although it must be exercised collectively.[30] Similarly, no (relative or absolute) peace obligation exists in *Slovenia*. Even if a no-strike clause were to be agreed upon by the parties to a collective agreement, such a clause could not prevent workers from striking.[31]

In many countries, a peace obligation not only entails that the parties bound to it must abstain from calling or otherwise supporting industrial action (passive side), but also implies that the parties must see to it that their members abstain from such action (active side). Such "double-edged" peace obligations can be found, for instance, in *Finland*, *Greece* and *Germany*.

Major differences exist with regard to the legal effects of a peace obligation. In *Turkey*, only the signatories to a collective agreement are bound. In *Finland*, the peace obligation binds the trade union and employers' association as parties to the collective agreement, as well as affiliate associations and individual employers. It does not bind individual employees. In *Germany*, individual employees are not bound, either. However, under the doctrine of

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[27] *Jonas Malmberg/Caroline Johansson*, The Right to Strike: Sweden, in Waas (fn. 1) 525 (530 et seq.).

[28] Section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992.

[29] *Francis Kessler*, The Right to Strike: France, in Waas (fn. 1) 207 (220).

[30] *Pascucci* (fn. 14) 338.

[31] *Waas* (fn. 1) 3 (34).

so-called "contracts for the benefit of third parties", rights may arise from a peace obligation not only for the signatories of the agreement (mostly trade unions and employers' associations), but also for individual employers (and employees) if they are members of the associations that concluded the agreement. In *Spain*, employees and trade unions are bound by a peace obligation while rights arising from such obligation can also be invoked by individual employers.[32]

IX. Other limitations to strikes

In *Germany*, industrial action must pass a proportionality test that has been developed by the courts.[33] Several years ago, the Federal Labour Court even went so far as to hold that proportionality represents the key criterion when evaluating the lawfulness of industrial action. According to the court, such action is illegal if it is evidently neither necessary nor appropriate when taking the aim of the industrial action into account. By assessing the lawfulness of a strike according to these standards, the courts exercise a considerable measure of self-restraint and are prepared to grant trade unions significant discretion. In the view of the court,

"the principle of proportionality lends itself as a benchmark […] because any action taken forms part of exercising a fundamental right (freedom of association) and necessarily collides with legal positions of the counterpart as well as of third parties which are also protected by the Constitution. Therefore, a balancing of conflicting legal positions is needed".[34]

It must be noted that a different proportionality test was applied on the EU-level. In two cases that were decided in 2007, the European Court of Justice had to balance the right to strike with what essentially amounts to the freedom of entrepreneurship. The Court held that collective action constitutes a restriction of the latter right and went on to state that such restriction "can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it".[35] The decisions of the ECJ have been the subject of significant academic criticism.[36]

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[32] *Waas* (fn. 1) 3 (35).

[33] *Waas* (fn. 1) 3 (36).

[34] *BAG* 19.6.2007 – 1 AZR 396/06, BAGE 123, 134 para. 25.

[35] See *European Court of Justice* (ECJ) 11.12.2007 – C-438/05 para. 75 – International Transport Workers' Federation and Finnish Seamen's Union/Viking Line ABP and OÜ

X. Public sector and "essential services"

In some countries, nearly all workers in the public sector enjoy the right to strike. *Ireland* offers an illustrative example. There, the possibility of workers striking is not restricted by law, except in the case of members of the police and the defence forces. In quite a few countries, essentially two categories of workers exist in the public sector: employees and civil servants. While the former may, in principle, enjoy the right to strike, the latter may be prevented from engaging in industrial action. In *Germany*, so-called "civil servants" are denied the right to strike while workers in the public sector enjoy the right to strike. This is due to Article 33(5) of the German Constitution, according to which "the law governing public service shall be regulated with due regard to the traditional principles of the professional civil service". The ban on strikes is seen as representing one of these principles. However, the European Court of Human Rights under Article 11 of the European Convention on Human Rights (freedom of assembly) granted Turkish civil servants the right to join a union (and conclude collective agreements) as well as the right to strike.[37] This position is very likely to prompt modifications of the German law since there is obviously a legal conflict between German constitutional law and the Convention which the federal legislature is called upon to resolve by further developing the legal status of civil servants under Article 33(5) of the Constitution. One of the options would be to define areas of sovereign state administration to which a general ban on strikes applies.[38] In some countries, although most civil servants enjoy the right to take industrial action, this right is significantly limited. For instance, in *Finland*, a so-called permanent peace obligation applies to the civil service. It is based on the relevant statute and applies irrespective of any collective agreement. According to the law, when there is no collective agreement on matters concerning the terms of employment of civil servants, the only permissible forms of industrial action are strikes and lock-outs. Wildcat strikes are prohibited. Sympathetic action or political action is also not permitted. When a collective agreement is in force, the individual civil servant is also bound by the peace obligation.[39]

Viking Line Eesti; see also *ECJ* 18.12.2007 – C-341/05 para. 101 – Laval un Partneri Ltd ./. Svenska Byggnadsarbetareförbundet.

[36] See, for instance, *Anne Davies*, One Step Forward, Two Steps Back? The Viking and Laval cases in the ECJ, Industrial Law Journal (ILJ) 37 (2008), 126; see also *Mark Freedland/Jeremias Prassl*, EU Law in the Member States: Viking and Laval, 2014.

[37] *European Court of Human Rights* (ECtHR) 21.4.2009 – 68959/01 – Enerji Yapi-Yol Sen ./. Turkey; *ECtHR* 12.11.2008 – 34503/97 – Demir and Baykara ./. Turkey.

[38] Federal Administrative Court *Bundesverwaltungsgericht* (BVerwG) 27.2.2014 – 2 C 1/13, NVwZ 2014, 736.

[39] *Johannes Lamminen*, The Right to Strike: Finland, in Waas (fn. 1) 193 (198 et seq.).

In many countries there is the notion of "essential services". In *Hungary*, in the case of employers who perform activities of fundamental public concern, the right to strike must be exercised in a way that does not impede the performance of the services at a minimum level. The extent and conditions of a strike may be subject to legal regulation. In absence of such law, the extent and conditions of a strike must be agreed upon during pre-strike negotiations. Calling a strike against an employer who carries out an activity that serves the basic interest of citizens is unlawful, unless the parties agree on a minimum service level and its conditions in advance.[40] In *Turkey*, there is no overall definition or concept of "essential services". Strike bans exist, however, in many sectors ranging from water supply to banking and from educational and training institutions to cemeteries.

In some countries, it seems that legislators trust in the ability of the "social partners" to arrive at solutions that suit the needs of a specific "essential services". For instance, in *Ireland*, those engaged in "essential services" are subject to a (voluntary) Code of Practice on Dispute Procedures.[41] In the *Netherlands*, although the concept of "essential services" is not specified, the courts may require strikers to exercise restraint.

XI. Specific emanations of strikes

1. Strikes in sympathy

National legal orders differ when it comes to "solidarity strikes", "sympathy strikes" or "secondary strikes". In the *United Kingdom*, a strike can only be directed by workers against their immediate employer. A strike is unlawful when it is in support of workers taking action against another employer. In the *Czech Republic*, a solidarity strike is only permitted on the condition that the employer of the employees engaged in the solidarity strike may influence the course and result of collective bargaining to which the main strike is related. In *France*, sympathy strikes are lawful if the employer of the sympathising workers is also able, at least in part, to meet the underlying demands.

In *Germany*, the legal situation was similar for a long time.[42] Some time ago, there has been a change of course. Since then, the courts approve "sympathy strikes" as long as they are "proportional". In assessing whether that is the case, many factors must be taken into account. One factor to be considered is whether employers who are affected by primary and secondary

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[40] *Waas* (fn. 1) 3 (46 et seq.).

[41] Industrial Relations Act 1990, Code of Practice on Dispute Procedures (Declaration) Order, 1992 (S.I. No. 1/1992); *Anthony Kerr*, The Right to Strike: Ireland, in Waas (fn. 1) 303 (309).

[42] See *BAG* 5.3.1985 – 1 AZR 468/83, BAGE 48, 160.

action belong to the same group of companies. Another factor is whether one single trade union is party to both the "main strike" and the strike that supports it.[43] In *Italy*, the Constitutional Court has held that the right to strike includes the right to initiate sympathy strikes, provided that strikers are bound together by common interests.[44] Similarly, in *Spain*, "sympathy strikes" are permissible as long as there is a bond of solidarity between the supporting workers and the workers being supported. In *Hungary*, sympathy strikes are, in principle, lawful (although this is subject to specific rules). For instance, while strikes, in principle, may not be initiated by a trade union, sympathy strikes can only be organised by a union.[45]

2. *Warning strikes*

Warning strikes which accompany negotiations over a new collective agreement are unlawful if negotiations take place at a time when a collective agreement is still in force and a peace obligation still exists. Problems arise, however, if the peace obligation has elapsed. In such cases it is necessary to ask whether a trade union is prevented from calling a strike by the mere fact that the parties are still negotiating with an aim of reaching agreement. In *France*, there is no specific regulation on warning strikes. As a result, warning strikes are lawful irrespective of their duration. In *Germany*, case law on warning strikes has been modified several times. Over time, however, the position of the courts has become concrete: Warning strikes that are initiated during the duration of a collective agreement are illegal, as they are in breach of the relative peace obligation. A warning strike which is initiated by a trade union thereafter is not privileged over other forms of strikes. That means that, as is the case with other strikes, the so-called "*ultima ratio*-principle" is to be applied to warning strikes. Since initiating a warning strike as such amounts to a statement that negotiations have broken down which, in principle, cannot be verified by the courts, there are almost no limitations to warning strikes.[46] In the *Netherlands*, on the other hand, warning strikes are regarded as violating both the *ultima ratio*-principle and the rules of "fair play" (which requires the potential strikers to warn the opposite party of their intention to call a strike in as timely a manner as possible, so that the counterpart may take precautionary measures to limit damages). In some countries, the ability of trade unions to call a warning strike is significantly limited. In *Hungary*, for instance, during the period of the so-called coordination (or "cooling-off") period only one single strike may be initiated, the duration of which may not

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[43] *BAG* – 1 AZR 396/06, BAGE 123, 134.

[44] *Corte costituzionale* 2.3.1962, n. 13/1962, G. U. n. 65 del 10 marzo 1962; *Pascucci* (fn. 14) 341 et seq.

[45] *Waas* (fn. 1) 3 (49 et seq.).

[46] *BAG* 21.6.1988 – 1 AZR 651/86, BAGE 58, 364.

exceed two hours. In *Poland*, a warning strike may only be conducted once and for no longer than two hours, provided that the course of mediation justifies the assessment that there will be no settlement of the dispute.

3. Rotating strikes

In *Italy*, under the so-called doctrine of "equivalence of sacrifices", the courts used to hold that strikes are illegal since they unfairly cause additional and excessive damage to the employer. Some time ago, however, the Supreme Court modified this position. Since then, rotating strikes are considered lawful as long as they only harm the output of the company ("damage to production") without "damaging productivity" in the sense that the employer is not able to resume operations after the strike.[47] In *Spain*, rotating strikes are explicitly deemed to be illegal.[48] The legal presumption may be rebutted, however, by proving that any damages caused were not excessive and that the rights of other workers and third parties were not compromised. In *France*, rotating strikes are prohibited in the public sector. In *Germany*, rotating strikes are lawful in principle. However, the employer is under no obligation to maintain business operations during a strike. Instead, he may (partly) close down the plant. Even if the strike is called off by the union, the workers lose their right to pay if the employer cannot reasonably be expected to reverse his decision to close down business operations.[49]

4. Other forms of industrial action

In some countries sit-ins or the occupation of premises may be lawful at least under certain circumstances. In *Spain*, the occupation of premises is admissible provided that the workers do not endanger the rights of others or disturb production.[50] In *Germany*, the Federal Labour Court delivered a ruling on so-called "flash mobs" several years ago, in which participants in a coordinated action put numerous low value goods in their shopping trolleys and left them behind, and consequently considerably disrupted business in a retail store. The court ruled that the constitutional guarantee of the right to strike has not irreversibly specified all weapons that can be employed in industrial conflicts. Rather, the parties have the right to adapt them to changing circumstances in order that a sufficient equality of arms between them exists. The court expressly acknowledged that flash mob actions significantly differed from traditional industrial action as they represented an "active" disruption of

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[47] *Pascucci* (fn. 14) 331 (342).

[48] Art. 7(2) Real Decreto-ley 17/1977, de 4 de marzo, sobre relaciones de trabajo, BOE núm 58/1977, 5464 (5465).

[49] *Bernd Waas*, The Right to Strike: Germany, in Waas (fn. 1) 235 (248).

[50] See also *Waas* (fn. 1) 3 (54).

business operations and were not detrimental for participants, the latter being the case with a strike since it usually entails wage losses. Even so, the court was of the opinion that flash mob actions, if merely "accompanying" a strike, were not necessarily disproportionate and, as a consequence, no rule exists whereby they are deemed illegal.[51]

XII. Legal consequences of lawful/unlawful strikes

1. Legal consequences of lawful strikes

In most countries in Europe, participating in a lawful strike leads to a suspension of the contract of employment. In *Germany*, for instance, there is neither an obligation to work during the strike action nor an entitlement to remuneration during that period. Secondary obligations remain unaffected by participation in a strike, however. Apart from that, strikers are protected from dismissal. Similarly, the law in *Turkey* clearly states that employment contracts are suspended during a strike. Strikers are protected from dismissal, but they have no right to payment of wages or other benefits. In *Poland*, the law also explicitly states that participation in a strike which is lawfully conducted leads to an automatic suspension of the individual contract of employment. The position in the *United Kingdom* is different. As there is no right to strike but a mere freedom to strike, those participating in the strike action will generally be regarded as having committed a breach of their contract of employment even where a strike might be qualified as "lawful".[52]

The legal position of non-strikers also differs from one country to another. In *Italy*, non-strikers lose their right to pay if their continued employment is impossible as a result of the strike. In *Spain*, the employer may suspend the contracts of non-strikers if business operations cannot continue because of the strike. In *Germany*, non-strikers may claim wages as long as the employer does not close down the entire (or part of his) business in response to the strike.[53] Because multi-employer bargaining prevails in *Germany*, the question often arises as to how to deal with pay claims addressed to employers who are indirectly affected by a strike (for instance, car manufacturers in case of a strike directed against suppliers). In such a case, the courts hold the view that the burden of further pay cannot be imposed on third parties without restriction. Instead, the causes and consequences of those indirect effects of labour disputes must be considered with regard to the underlying "battle

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[51] *BAG* 22.9.2009 – 1 AZR 972/08, BAGE 132, 140. A constitutional complaint against this decision was unsuccessful; see *BVerfG* 26.3.2014 – 1 BvR 3185/09, NJW 2014, 1874.

[52] *Prassl* (fn. 11) 560.

[53] *BAG* 22.3.1994 – 1 AZR 622/93, BAGE 76, 196; *Waas* (fn. 39) 235 (252).

strategy" of the unions. The crucial factor, in other words, is whether pay claims against secondary employers in these cases affect the "balance of power" between the parties to the conflict.[54]

In many countries, replacing striking workers is prohibited or, in any event, restricted. In *Greece*, employers are legally prohibited from hiring strike-breakers as replacements for strikers during a lawful strike. Under the law in the *Czech Republic*, an employer cannot hire other employees to replace the strikers. In *Slovenia*, employers may not recruit other workers to replace those on strike, either. Nor may employment agencies temporarily provide employees to replace the workers on strike.[55] The law in *Germany* expressly provides that a temporary agency worker can refuse to work in a user undertaking that is directly affected by a strike. The hirer-out has to inform the temporary worker about that right.[56] If the temporary agency worker refuses to work for the undertaking, the temporary work agency has to continue to pay his wages.

2. *Legal consequences of unlawful strikes*

In many countries, employees are protected from liability for damages when participating in an illegal strike, at least to some extent. For instance, in *Germany*, if a trade union was responsible for the strike and if the strike aimed at bringing about a collective agreement, then the strike is presumed to be lawful. This presumption also applies with regard to the employment relationship. Whether termination is justified depends on the facts of the individual case.[57] In *Italy*, participants in illegal strikes enjoy far-reaching protection against dismissal. In the *Netherlands*, participants in unlawful strikes that were organised by unions are protected as long as they immediately terminate their actions once the judge has determined the strike's unlawfulness.[58]

As regards the relationship between the employer and the trade union that called upon their members to strike, in *Germany* an employer has a claim for injunctive relief against the responsible trade union. Moreover, the employer can claim damages on the basis of either tort law or the breach of the peace obligation. A trade union can be liable for damages because of a violation of the peace obligation. There may also be a claim under tort law (which protects not only property but also, to some extent, the right to run a business). Since the lawfulness of a strike may be difficult to determine, there is no liability if, at the time of calling the strike, there were substantial reasons for the union leadership to believe that the strike would be found lawful. A strike

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[54] *BAG* 22.12.1980 – 1 ABR 2/79, NJW 1981, 937.

[55] *Waas* (fn. 1) 3 (61).

[56] See § 11(5) *Arbeitnehmerüberlassungsgesetz*, BGBl. 1995 I 158.

[57] *Waas* (fn. 39) 235 (255).

[58] *Waas* (fn. 1) 3 (63 et seq.).

that is called by a trade union is presumed to be lawful.[59] With regard to the position of an employers' association there may also be a claim or injunctive relief against the trade union, either on the basis of tort law (as freedom of association is also protected by it), or arising from a breach of the peace obligation.[60]

XIII. Dispute resolution

In most countries, strikes can only be declared illegal by a judge. While in some countries conciliation is a mandatory stage of collective dispute resolution, mandatory arbitration plays a very limited role in the national systems. In *Germany*, mandatory arbitration would be considered inconsistent with both the freedom of association and the obligation of the state to remain neutral.[61]

XIV. Support of strikers

In *Slovenia*, as workers have the right to wage compensation for the duration of the legal strike, if so agreed in a collective agreement, the strike funds reserved by trade unions are practically not necessary. In many countries, no strike funds exist. In *Lithuania*, for instance, there is no financial support for participants in a strike by trade unions. In *Austria*, *Finland* and *Sweden*, trade unions regularly (partly) compensate for lost wages. In *Turkey* and *Hungary*, some unions have strike funds. The same applies in *Germany*, where union members regularly are eligible for support after three months of membership. The exact amount depends on the duration of payment of membership dues.

XV. Conclusion

As this short overview has shown, strike laws in the countries in Europe are characterized by major differences. In most countries, a right to strike exists. In a few other countries, there is a mere freedom to strike. In some countries, strikes are essentially understood as being related to collective bargaining. In others, such a relation is not required. Though the concept of a peace obligation is widespread, there are countries where a peace obligation is either unknown or does not, in any event, bind individual employees. In many countries, it is provided that a strike must be preceded by serious negotiations

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[59] *BAG* 19.6.1973 – 1 AZR 521/72, BAGE 25, 226.

[60] See, for instance, *BAG* 27.6.1989 – 1 AZR 404/88, BAGE 62, 17.

[61] *Waas* (fn. 39) 235 (257).

(and possibly even mediation) and hence represents a means of last resort. Moreover, in many countries the requirement of holding a ballot is directly based on statutory law. In other countries, there are almost no procedural requirements that must be fulfilled in order to call a strike. All these differences (and many others) exist in Europe and, given the European Union's lack of competence in this particular area, will persist in the future.

Part II:
Specific Issues of Collective Labour Law

C. Employee Participation

Workplace Representation in the EU

Robbert H. van het Kaar

I. Introduction

The aim of this chapter is to give an overview of workplace representation in the EU (or more precisely: the EEA). The focus is on representation through works council types of employee bodies. However, because in many countries the main channel is representation by unions, there will be ample attention to their role and especially their relation to works councils.

The purpose is not so much to give a detailed overview of the different arrangements in a vast number of countries, but rather to address some more fundamental issues and investigate the outer fringes of the landscape before us. There is sufficient material on the basic settings of information and consultation (I&C) in the EEA.[1]

After a preliminary background sketch (embeddedness in national industrial relation systems, Part II), in Part III I present an idealized type of works council (the average works council, so to say).

Parts IV and V cover the goal, function and legal basis of I&C, and the main actors, respectively.

The establishment, election, and composition of works councils are the subject of Parts VI and VII. At first sight, the rules on establishment seem rather straightforward. However, two fundamentally different approaches can be distinguished. In the first, the responsibility to create an I&C mechanism rests with the employer, usually when a certain threshold (number of employees) is crossed. In the second approach, the initiative (trigger) lies solely on the employee side. This may be the unions or a certain proportion of the employees. The difference between the two approaches is not technical in nature; principal issues are involved here.

We then turn to *the composition* of works councils. The most fundamental question here is whether works councils are employee bodies only or consist of representatives of employees and management. With regard to the employee side, the section investigates to what extent different categories of employees have specific rights of being represented (blue- and white-collar, the upper strata, women, minorities, handicapped, young and – last but not least – flexible workers.

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[1] *Thomas Blanke/Edgar Rosen/Herman Voogsgeerd/Wijnand Zondag* (eds.), Recasting Worker Involvement? Recent trends in information, consultation and co-determination of worker representatives in a Europeanized Arena, Groningen, 2009; *Eurofound*, Information and consultation practice across Europe five years after the EU Directive, 2011, available at: <http://www.eurofound.europa.eu/publications/report/2011/industrial-relations/information-and-consultation-practice-across-europe-five-years-after-the-eu-directive> (through this link, also the underlying country reports can be addressed); *European Commission*, Employee representatives in an enlarged Europe, vol. 1, Luxembourg 2008.

Parts VIII and IX cover the scope (range of subjects) and intensity (from weak to strong) of I&C rights. The next part investigates the addressee of I&C rights: in normal circumstances this is the employer/manager of the relevant establishment, but I focus on the more exceptional situation where the parent company (either in the country, the EEA, or outside), shareholders (or groups thereof) or others are involved.

In the final parts we look at the effects of internationalization and the future of I&C in the EEA in a fast changing environment. What are – in classical terms – the strengths, weaknesses, threats and opportunities?

One final introductory remark is appropriate here. Although I have tried to be neutral with regard to the attention paid to individual countries, there is a slight Dutch bias in this chapter. Part of this may be explained by the very special characteristics of the Dutch system, but the remainder is solely due to a lack of in-depth knowledge of many of the other countries.

With regard to terminology and concepts, I will use workplace representation as an umbrella concept, covering both union representation and works council type bodies. In talking about rights, I will speak of information and consultation rights (I&C rights).

II. Workplace representation is embedded in national systems and traditions

One should always take account of the surroundings in which national I&C systems operate. Without being exhaustive, I want to draw attention to at least the following crucial factors:

- The dominant view of the company. Although there may be no clear-cut division between the two systems, distinguishing shareholder- and stakeholder societies (or sometimes companies) is still useful. In a shareholder setting, the company is run in the interest of the shareholders. Even in the so-called enlightened shareholder model, in the end all interests are subservient to the creation of shareholder value. This approach is still very much dominant in Anglo-Saxon countries, but not only there. In contrast, in the stakeholder model the company is seen as consisting of different stakeholders, including of course the shareholders, but also others (including of course the employees) with an interest in the continuity and the results of the company. Commonly, I&C has a longer history and stronger position in stakeholder societies and companies.
- The industrial relations settings. Important elements are union density, the dominant level of collective bargaining (national, sector, company) and the levels of industrial action.

- Connected to the former: the atmosphere in industrial relations, on a scale ranging from antagonistic (them and us) to more or less neutral (business-like) and also including different degrees of polarized/antagonistic relations.[2] It should be noted that this atmosphere may show large variations per sector (ports, public transport) and over time.
- The recent past. In Eastern Europe, due to the post-war communist system, many inhabitants distrust unions and other forms of worker involvement.

III. An ideal type of works council

For the sake of analysis, I start with a sketch of the type of works council which in my view more or less represents the normal type, as a kind of average. This average works council closely resembles a major part of the 2002 Framework Directive.[3] Its main features are the following:

- It consists of employees only.
- It has information and consultation rights, and maybe some co-decision rights on social arrangements; on major issues (like restructuring) the employer has the final say.
- It is not involved in collective bargaining, especially on pay issues.
- It does not have the right to strike.
- Its main concern is collective personnel matters, not individual employee issues.

There are exceptions to all of the features mentioned above, and some member states are miles away from them in almost all respects. Nevertheless, this type represents a kind of average, and it will play a useful role when looking at some of the more exceptional features we will encounter in the following paragraphs.

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[2] *Martin Euwema/Lourdes Munduate/Patricia Elgoibar/Erica Pender/Ana Belén García* (eds.), Promoting Social Dialogue in European Organizations, 2015.

[3] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L 80/29.

IV. Goal, function and legal basis of I&C

1. Goal and function

Two more or less contrasting approaches dominate the debates on the goal and function of I&C. The first is rooted in human resources (HR) culture and can be called instrumental. I&C is useful for the company because it motivates employees, dampens (potential) tensions and conflicts, may increase the quality of decision making and – eventually – may result in better performance of the company (and possibly even higher returns for shareholders). The second approach stresses I&C as a part of industrial democracy: employees have the right to influence their work and work environment, comparable to the right of citizens to have an influence on political decision-making. I&C contributes to reduce the power gap between employer and employees.

Although these different approaches are not mutually incompatible, in practice they have given rise to almost completely separate discourses, with only limited overlap. The instrumental approach is far more popular among management, HR-practitioners and psychologists, while the industrial democracy approach figures mainly among unions, socialists and industrial relations scholars.

Sometimes the two approaches have explicitly been laid down in the relevant legislation. One example is the Dutch works council act, which states that works councils are to be established for the proper functioning of the undertaking in all respects *and* for the representation of the employees.

Linked to the different approaches are the (perception of the) issues of the costs and benefits of I&C. There is a growing body of research on this topic. The costs are generally more visible than the benefits, which are more diffuse and less tangible. Direct costs mainly consist of time not worked, costs of travel and other facilities for I&C practitioners. Other costs may pertain to slowing down decision making, although this is a contested subject. Some of the major benefits have been mentioned above (better decisions, more employee support for decisions), but they may also consist of faster implementation once decisions have been taken and higher productivity levels due to better motivation of employees.

2. The legal basis of I&C

Historically, I&C practices were often initiated by socially minded individual employers, starting in the nineteenth century. Later on, in most countries I&C was based on legislation, with boosts in the 1950s and especially the 1970s. It should be noted however that in several countries (Norway, Denmark, Belgium, Italy, Cyprus, and Finland) not legislation, but (national) collective agreements have traditionally been the main foundation of I&C.

EU legislation has laid down minimum standards for both systems (legislation and collective agreements), starting with the I&C paragraphs in the directives on collective redundancies,[4] transfer of undertakings[5] and insolvency,[6] and (for the transnational dimension) the EWC Directive.[7] A more comprehensive bottom line of I&C rights came to life with the 2002 Framework Directive on information and consultation. Since then, we have witnessed, again on the transnational level, the emergence of I&C rules in the SE[8] and SCE Directives[9] and in the recasting of the EWC Directive.[10]

In more recent times, the distinction between legislation and collective agreements has become (slightly) more blurred. In several countries there is room to deviate from legislation by way of collective agreement, and sometimes also (or alternatively) by way of an agreement with the works council. These often only allow for deviation in favour of employees, but this is not always the case.

This brings us to the more fundamental issue of whether worker involvement could or should (partly or entirely) be based on legislation, or on contractual arrangements. Many economists support the latter view, with the main argument that if there is a market for workplace representation, it would come into existence more or less spontaneously. Proponents of the former view point to market imperfections (including free-rider problems and the need for a level playing field), and to the intrinsic value of economic democracy.

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[4] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, [1998] OJ L 225/16.

[5] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2001] OJ L 82/16.

[6] Originally Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, [1980] OJ L 283/23; now Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version), [2008] OJ L 283/36.

[7] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, [1994] OJ L 254/64.

[8] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, [2001] OJ L 294/22.

[9] Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, [2003] OJ L 207/25.

[10] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), [2009] OJ L 122/28.

Interestingly, the European legislature has opted for the middle way. The directives on the EWC, SE and SCE (and to some extent the regulation on cross-border mergers) starts from the premise that the employer and employees negotiate an arrangement on worker involvement (the contractual approach). If the parties fail to reach an agreement, there is a fall back mechanism (the legislative approach).

V. Excursion: workplace representation and corporate governance

Two systems of worker involvement can be distinguished. This chapter deals with I&C. The main characteristic of I&C is that it is rooted in the establishment/plant, usually independent of the legal form this establishment has (single owner, limited company, foundation etc.).

By contrast, employee board level representation (EBLR) is fully linked to the legal form of the undertaking. Worker participation gives employee representatives (or in its absence, employees) a say in the running of company affairs through influence on the composition of company organs (supervisory board or, in one-tier systems, the board).

Because of its being disconnected to the legal form of the company, at first sight I&C seems also disconnected from the corporate governance arena. This view however stems from a narrow view of corporate governance, as solely pertaining to the relation between shareholders and executive management. In this narrow view corporate governance is seen as a set of mechanisms by which shareholders can discipline managerial behaviour, curbing opportunistic behaviour and aligning management behaviour with shareholder interests. In a broader approach, the goal of curbing opportunistic behaviour by management is unchanged, but the range of mechanisms taken into account is widened to include, amongst others, I&C.

VI. The actors: who act as employee representatives?

There are major variations across countries (and sometimes in one and the same country) with regard to the main I&C actors. These can be:

- Only or virtually only union delegates (in the majority of the EU countries).
- Works councils (either with or without management representation) as the sole or dominant representation at workplace level.
- Both unions and works councils. Often, in practice, the unions are the main channel, but sometimes it is the works council (Spain).

- Either unions or works councils, the latter sometimes only when unions are absent.
- Employees themselves, usually in the absence of systems of representation.[11]
- Health and safety committees.
- Separate mention should be made of countries that have opted for no representative body as the default mechanism. The UK is the most important example in this category.

Where representation by both unions and work councils exists, there are generally two types of solutions (demarcation of rights) for possible conflicts between those representations. Several countries treat unions and works councils as alternatives (e.g. Czech Republic, Lithuania, and Romania). Other countries have developed a division of tasks and responsibilities, usually along the lines of information and consultation (works councils) and collective bargaining issues (unions).

The boundaries between works council and union representation are sometimes blurred, and may show overlap. An example is found in Bulgaria. Employees may establish I&C bodies but may also transfer the I&C rights to the unions. A similar system exists in Croatia. Rules which said that a works council had to be dissolved once a local union existed had previously been in place in the Czech Republic but were deemed unconstitutional in 2008. In other countries (France is an example) virtually all systems mentioned above co-exist simultaneously. In Malta, if the employee representation consists of non-union representatives and later on a union representation is recognized by the employer, the former representation will be replaced.

Works councils, even when elected by all employees, in practice often consist of a majority of union members. In many countries, the (non-)involvement of the unions is not a neutral issue. Especially in countries with more or less antagonistic industrial relations, unions may perceive works councils as unwanted competition on the employee side, and sometimes even as a fifth column among the employees, helping the employer against the unions. In the 1970s in the UK, at least some of the unions were very much opposed to I&C. On the other hand, in quite a few countries one will (almost) only find works council type bodies where union structures exist. Examples include Greece and Portugal.

In several countries, the composition of the government influenced the type of worker representation. In Hungary in 1998, the then right-wing government swung the balance away from the unions towards the works councils. This was reversed by the socialist government elected in 2002. The position

[11] *Roger Blanpain/Nikita Lyutov* (eds.), Workers' Representation in Central and Eastern Europe, Challenges and Opportunities for the Works Councils' System, 2013, 72.

of the unions was again weakened in 2012 by the present right-wing government (although works councils lost rights as well). Comparable developments took place in Slovakia.

VII. The establishment of works councils

1. Thresholds

The obligation (or the right) to create a works council occurs at different thresholds. 50 or 100 employees is a fairly common figure, but other, usually lower, thresholds exist, even as low as five in Germany.

2. Occurrence, compliance

There may be a huge gap between the legal obligation (or possibility) and the actual compliance with this obligation. Only a very small proportion of the small enterprises in Germany actually have established a works council. Compliance increases with the size of the company.

Thresholds may lead to remarkable practices of employer avoidance: in France the number of firms with just below 50 employees is significantly higher than would be expected. Many commentators explain this phenomenon by pointing to extensive rights and facilities for employee reps once the threshold of 50 employees has been crossed. In some countries, like Latvia and also Lithuania, workplace representation seems to be virtually non-existent.

In many countries a labour inspectorate is responsible for compliance with law, but this does not guarantee universal compliance, especially in smaller firms. In Belgium, inspections only cover firms with more than 100 employees, with the result that only about a third of the employees are covered by a works council.

Differences may exist between sectors, partly due to differences in legislation concerning the private and the public sectors. In the Netherlands, the government sector (with some exceptions) has been covered by I&C legislation since 2001 and shows a compliance rate of almost 100%.

3. Establishment of works councils: right or duty?

There are two contrasting approaches to the establishment of works councils. The first is that there is a duty for the employer to create a works council, once certain thresholds (usually the number of employees) have been passed. The alternative approach is that – again given the crossing of certain thresholds – employees have the right (but not the duty) to establish a works council.

One rationale behind the first approach is that given the hierarchical relationship between the employer and individual employees, it may be risky for (a group of) individual employees to take the initiative for creating a works council. Therefore, the legislature lays the responsibility on the employer's side. A second rationale is the notion, sometimes laid down in law, that it is (also) in the interest of the employer to establish an I&C mechanism and therefore logical to give him also the responsibility.

There are two main arguments for the second approach. The first is rather straightforward. In countries where I&C is predominantly seen as an employee affair, the logical consequence is that the initiative should also rest with the employees. The second argument is of a different order and is mainly advocated by the employee side. According to this view, the initiative should lay with the employees to avoid situations where the employer controls the process and may set up a works council that is subservient to him, possibly with the aim of undermining union influence.

In both systems, the question of compliance arises, albeit in slightly different ways. What happens when the employer refuses to start the process of establishing a works council (first approach)? Or when the employer resists the employee initiative (second approach)?

There may be penal sanctions for the employer but also mechanisms to make sure that employees can enforce their rights. One such mechanism is that both individual employees and unions can go to court. Another mechanism may consist of monitoring activities by the labour inspectorate. A more indirect mechanism is that the employer can encounter problems in court when implementing certain decisions (restructuring, dismissal) and not having fulfilled his obligation to install a works council.

VIII. Election and composition of works councils

1. Election systems

In some countries, there are simultaneous elections for all works councils. Examples include Belgium, Croatia and France. One of the perceived advantages of this system is that the subject of worker involvement gets more publicity in the period during the election period, maybe resulting in higher voter turnout and more candidates. From the perspective of individual organizations, however, there may be some loss of flexibility. Simultaneous elections often have a function in determining the popularity and representativeness of different trade unions.

In other countries, every firm organizes the elections itself, depending on the particular circumstances (for first-timers crossing the relevant threshold, period elapsed since the last elections, structural changes in the organization etc.).

2. Candidates

As a standard, candidates can be proposed either by (a certain number of) individual employees and/or the unions. Usually candidates have to be employed in the company for a certain minimum period of time. However, across Europe we see a range of variations, which may, moreover, well change over time.

As mentioned before, the proportion of union members in works councils is far higher than the union density in society as a whole. This may be partly due to legal arrangements (monopoly for union candidates or other mechanisms), but it also reflects the active role union members often play in the firm. In some countries only unions can nominate candidates. An example is Belgium. The same was the case in Poland, but in 2008 this was deemed unconstitutional by the Supreme Court. In Italy, two-thirds of the candidates are elected by the employees (usually all or almost all union candidates), the remaining third is appointed by the relevant unions (the three main confederations and other unions that have signed the national collective agreement for the industry) in proportion to the votes the unions received in the election from the employees.

3. Composition of the works council

The rules and practices with regard to the composition of works councils show large differences across countries (and sometimes within countries as well):

- In most countries, the works council is an employee-only body (in the Netherlands, legislation forbids the employer from being a member of the works council), but there are also countries where management takes part in the works council. Examples include Denmark (the Cooperation Committee), Belgium and Norway.
- Several countries distinguish between blue- and white collar workers, with specific rules on their representation in works councils (Belgium).
- There may be reserved seats for specific categories of employees (young, handicapped, flexible workers (see more below on flexible workers)). There may be seats reserved for higher personnel.
- There may also be reserved seats for unions. Even where this is not the case, union members are usually overrepresented in works councils (e.g. in 2010, 77.3% of German works council members were linked to German Trade Union Confederation (*Deutscher Gewerkschaftsbund – DGB*) unions). In Norway, even though all employees can vote, unions are guaranteed a role in the composition of works councils.
- There may be representativeness criteria to assure that different categories (and their specific interests) are sufficiently represented. Germany recently introduced gender criteria.

4. Works councils and flex-workers

a) Situation in Europe

All over Europe, the number and proportion of flexible workers is rising. In a legal sense, flexible employment may take diverse forms: temporary agency work, fixed-term contracts, payroll, on-call work, (bogus) self-employment etc.

These rising numbers of flex-workers pose an increasing problem to systems of worker involvement that are explicitly and/or implicitly built on the assumption that organizations only or mainly employ employees under a permanent contract.

There are different ways in which different categories of flexible workers can to a greater or lesser extent be incorporated in the I&C systems. These include:

- Equal rights for full- and part-time employees.
- Granting I&C rights to temporary workers, either in the temporary workers' agency, the firm where they are employed, or both.
- Granting, under certain conditions, I&C rights to categories of self-employed workers.
- Reservation of seats in the works council for flexible employees.

b) The debate in the Netherlands

In the Netherlands, I&C rights for flex-workers have been an issue since at least 1998. In that year, the so-called Flexicurity-Act was passed, with one of the aims being to strengthen the position of flex-workers. Part of this Act was granting I&C rights to temporary agency workers, who were granted I&C rights in the temporary agency. When they had, through the agency, worked for 24 months in one and the same company, they were granted I&C rights in that company as well. Every now and then the debate starts anew. In 2013, the standing Social and Economic Council Committee on the furthering of worker involvement (CBM) devoted part of its annual congress to this issue. Several organizations (the tax authority, the largest temporary workers' agency Randstad) gave presentations on how they dealt with the problem. One of the criticisms was the length of the 24-month waiting period; in Germany this period is only three months. At the same time, several speakers made clear there is an inherent tension between (often short-term) flexible work on the one hand and long term commitment and involvement in decision making in organizations.

IX. The scope of I&C issues

1. Employee issues

The Framework Directive 2002/14/EC gives an indication of the subjects which should, at a minimum, be included in the I&C involvement of employees and/or their representatives.

It is important to note that the basic idea behind this directive, and other directives with I&C provisions, is that employees and their representatives should be enabled to voice opinions on important management decisions *if and to the extent* that they have an impact on the employees and their interests. In other words: not the (strategic) decisions as such, but their impact on employees is the delimitation of the I&C terrain. The decisions as such, like a merger or acquisition or a major investment, are not the subject of I&C rights, as long as (and to the extent that) they have no impact on employee interests. The background here is what is referred to as the principle of management prerogatives, which is especially strong in Anglo-Saxon countries but is also dominant in continental Europe.

A notable exception is the Netherlands, where works councils have a right to challenge major management decisions, even if these decisions have no major impact on the employees.

The issue of managerial prerogatives is of course less present in the field of social arrangements, like working time arrangements, health and safety issues, training and education etc. However, when it comes to pay and the duration of working time (not rosters, but the number of hours per day of the week), we run into another limitation. In many countries these issues are either reserved for the unions or, alternatively, a matter for the individual employment contract.

2. Works councils and terms of employment; works councils and individual employees; the right to strike

The relation between I&C bodies and terms of employment is in many countries a contested one. Especially subjects like pay and the length of the working week are traditionally negotiated with the unions or, alternatively, are not negotiated by any employee representative but either are negotiated between the employer and the individual employee or are unilaterally (within the bounds of legislation, especially with regard to maximum working hours and minimum wages) fixed by the employer. In many countries works councils are explicitly excluded from negotiation on pay (like in Denmark). In other countries, however, works councils can negotiate binding collective agreements covering pay (like in Spain). In yet other countries, works councils

may negotiate, but the results are in principle not binding on individual employees.

When analysing the role of works councils in collective bargaining, two issues deserve attention and some elaboration. The first is the dependent position of works council members in their relation to the employer. In deciding on the levels of the terms of employment, there are bound to be winners and losers, so it is not a neutral or win-win situation. When unions conduct the negotiations, it is a fight between more or less equal parties. Because of the hierarchical relation between the employer and the employee works council members, there is a fundamental inequality when works councils conduct the negotiations, notwithstanding the legal protection – against dismissal and harassment by the employer – of works council members.

The second issue is related to the continuing preference of many, mainly larger, employers for some kind of collective arrangement, avoiding time-consuming negotiations with a host of individual employees (economists would use the concept of transaction costs as the explanatory factor). Given the long-term downward trend in union density across Europe, the presence of unions is in many cases not self-evident anymore.

Moreover, in cases where to some extent the problem of lower union presence is solved by sector agreements (possibly with an extension mechanism), sector agreements are often deemed to be too general and inflexible, thus preventing tailor-made arrangements suited to the needs of individual companies and maybe also employees. One solution is to develop framework agreements at the sector level that can be elaborated in more detail at the company level by the employer and (representatives of) employees. These representatives may be the local or district union department but may also include the works council.

This finally brings us to the relation between I&C and the individual employment contract. The issue at hand is whether agreements between the employer and the works council (or a comparable employee representative body) carry over to the individual employment contract. This is different for different countries and different subjects. As stated above, especially pay issues more often than not remain outside the scope of action of the works council, not least because unions oppose works council rights on pay. However, it seems that in several countries the pressure to grant works councils a say on pay has increased, mainly due to falling union membership levels. In Germany, works councils play an increasing role with regard to the opening clauses in collective agreements.

In the majority of countries, works councils do not have the right to strike; this is usually reserved to the unions. There are some notable exceptions however for non-union worker representatives, including in Latvia, Lithuania and Romania.

X. Classification of I&C rights: from weak to strong

Although much has already been written on the classification of I&C rights (from weak to strong), the subject needs some elaboration, mainly in relation to the issue of managerial prerogatives.

1. Positive and negative rights

Before we turn to the more traditional classification of I&C rights, I would like to present an alternative classification, between what are termed positive and negative rights. The latter one is rather straightforward and can be translated as the right to say no.[12] The former one is more blurred, but more or less starts from the presumption that employers and works councils are supposed to work together to reach the optimal or at least satisfactory solutions. Of course, we are looking here at a continuum, with negotiation situations probably somewhere in the middle.

The purpose of this classification is to draw a clear line between I&C rights that start from the presumption that employees are (or should be) an inherent part of the company and I&C rights that draw a sharp line between the employer on the one hand and employees on the other.

The classification is also very much linked to other division lines (some already mentioned above). Examples include:

- Systems/arrangements which stress the managerial prerogative vs. systems which allow (some) infringement of these prerogatives by I&C rights.
- Systems/arrangements in which employees to some extent participate in the management of the company (mainly in countries with some form of EBLR), vs. systems where employees do not take part (and do not want to take part either).
- Systems/arrangements in which employee representatives are (alongside employee interests) supposed to take account of the interests of the company as a whole vs. systems where employee reps solely advocate employee interests.

2. Information rights

The right to information is the starting point of any form of meaningful I&C. The concept of information has been defined in several I&C directives, including the Framework Directive, the recast EWC Directive and the directives on worker involvement in the SE and the SCE. As with I&C in general,

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[12] *Robbert H. van het Kaar*, The right of inquiry (*enquêterecht*) in the Netherlands – a feature for trade unions for adjusting management decisions from outside a company?, 2008, 132–136.

information rights, apart from general information on the running of and the forecasts for the firm, are more or less restricted to issues that have an impact on worker interests. The Netherlands are an exception, with information rights covering all-important (strategic) issues, whether they have a (direct) impact on the employees or not, and including management remuneration.

Directly related to information rights is the possibility to make use of external experts, to explain and validate information issues, especially complex legal and financial issues. Interesting examples of such rules can be found in Belgium and France.

In all EU directives, as in almost all EU jurisdictions, the right to information does not include information that may cause damage to the company (business secrets). The decision to withhold information is in the hands of management but may under certain circumstances be challenged in court. Again, the Netherlands are an exception to this rule, entitling the works council to all relevant information.

Moreover, the right to information may be restricted by securities law. The background here is the fear of insider trading. This has generally resulted in member states not allowing employee representatives to be informed earlier and more broadly than the general public. In several countries, this has resulted in the curbing of existing I&C rights, although the thirteenth Directive on Public Offers[13] explicitly allows for maintaining these rights.

Counterpart to the right to information is the duty of confidentiality for employee representatives. These duties may be divided in three categories:

- Business secrets.
- Information that has been qualified as confidential by management.
- Information (whether or not related to the second category) which may be deemed confidential by common sense (in other words: employee reps should themselves realize that the confidentiality duty applies.

There is virtually no discussion on the first category. The second category is more contentious: employee reps often complain that management more or less automatically invokes the confidentiality clause. Although this may be challenged in court, legal proceedings take time and at least some measure of courage from the employee side, which taken together may be a bridge too far. The number of court cases where employee reps challenge the confidentiality clause invoked by management seems to be very limited.

The third category is contentious as well. There are two opposite views. The first is that all information that has not been explicitly labelled confidential can be shared by all. The second is that employee reps should behave in a responsible way and make their own valuation as to whether making infor-

[13] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, [2004] OJ L 142/12.

mation public may cause damage to the company. It is hardly surprising that the first view prevails in countries with relatively polarized industrial relation systems and the second one in countries with relatively smooth relations between management and labour.

3. Consultation rights

a) Consultation rights in general

Like information rights, consultation rights have been defined (and sometimes redefined) in several EU directives on worker involvement. Over the years, legislation and jurisprudence have come to stress the importance of *timely* and *meaningful* consultation, with a view to an agreement being reached between management and employee reps. However, there is no *duty* to reach an agreement; in the end, the managerial prerogative prevails. As with information, consultation is in principle restricted to issues that have an impact on the employees. In practice, a large portion of the consultation focuses on limiting the number of dismissals and on redundancy payments.

Consultation rights follow a continuum, from relatively weak to quite strong:

- Mere consultation rights (which have been taken as the starting point, see above). Although there is no duty to agree, this consultation right is not toothless. In case of serious infringement of (information and) consultation rights, the relevant court may declare certain management decisions null and void.
- Consultation rights. Here, management has to postpone execution of the decision for a specified period after consultation has ended (varying from 10 days to much longer; in Bulgaria, on certain issues the information period is two months and the consultation period is 45 days before execution of the decision in case of redundancies). In Finland, in cases of dismissals, cooperation negotiations must last six weeks (less in smaller companies), but in the end management decides.
- Consultation. Failing an agreement between management and employee reps, management has to postpone execution of the contested decision and the employee reps can go to court to challenge (parts of) the decision. Alternatively, if the works council and the employer fail to reach an agreement, the issue may be brought to an external conciliation specially set up for the occasion, which then decides. An example of this is in Austria. This may delay decision up to four weeks. Failing to comply with the consultation duties may lead to decisions being declared void or annulled (Netherlands) or may open the road to court where a duty can be imposed on the employer to comply (Czech Republic) or, alternatively, to pay substantial damages (Sweden) or fines (Croatia). With regard to

fines, the magnitude may be of prime importance for the employer decision to comply or not.

b) Consultation in the Netherlands

In several respects, the Netherlands stand out in the I&C landscape. Several elements of the Dutch system have already been mentioned in earlier sections of this chapter.

- There is no management right to withhold confidential information.
- The right to information and consultation covers both the decisions as such and the consequences for the employees.

When it comes to consultation on strategic decisions, the following characteristics stand out:

- Again: consultation rights pertain to both the decisions as such and the (possible) consequences for the employees. Subjects include, apart from the usual subjects like restructuring, mergers and acquisitions, also major loans, investments and the granting of guarantees.
- When the consultation process does not result in an agreement, management has to postpone executing the decision for one month (unless the works council decides otherwise).
- During this month, the works council can challenge the decision in court.

At first sight, the right to challenge decisions in court, given the extended scope of the information and consultation rights, seems a fundamental infringement on the managerial prerogative. However, further investigation shows that this is not the case. An analysis of the jurisprudence (period 1979–present, some 300–400 court decisions) shows the following outcomes:

- The works council wins when there has been no consultation at all.
- The works council also wins when information is rendered too late (not in due time), when information is insufficient and/or incomplete, and when the underpinning of the decision is inconsistent or unclear.
- The works council wins when management has not paid sufficient attention to the possible effects of the intended decision on the employees and ways to cope with these effects.
- Finally, the works council wins when management infringes on promises/agreements made at an earlier stage.
- In all other cases, management wins and can execute the intended decision, thus upholding the principle of managerial prerogative.

4. Right of consent/veto

This is the strongest I&C right, wholly or partly transferring management rights to labour, in the sense that labour can block management decisions. In Slovakia, the employer needs the consent of the works council for decisions on annual leave and decisions on performance systems. This right, if existing, usually pertains to working time arrangements (rosters, breaks etc.), training and education arrangements and health and safety issues. However, there are several reasons why this right does usually not result in absolute power for labour:

- Labour can block certain (categories of) management decisions, but not initiate or take measures itself.
- There may be court mechanisms that entitle management to challenge the works council veto, like in the Netherlands. In other countries, different forms of arbitration are used.

XI. Addressee of I&C

1. Who decides?

An (often implicit) assumption of the I&C mechanism is that management and labour are involved in a consultation process, enabling labour to influence (to a certain extent) management decision making, especially where decisions have a major impact on labour. This presupposes that management is in the formal and, moreover, factual position to actually *take* decisions.

However, in the real world, management often does not have the power to take decisions by themselves, but is partly or wholly dependent on others. The main example of course is group structures: management of a subsidiary is subordinate to the head office. But there are other situations where decisions that have an impact on labour are wholly or partly in the hands of others. The main examples are:

- Decisions taken by the annual general meeting (AGM) of shareholders (also outside group structures).
- Decisions needing approval of a supervisory board, or the AGM, or maybe government authorities.

This raises the question if and to what extent I&C rights and practices cope with these types of situations.

2. *Group structures*

Many jurisdictions have introduced some type of umbrella works council structures to cope with group structures. Examples include Finland, the Netherlands and Germany. However, matters often remain complicated, especially in cross-border groups and even more so when the headquarters is located outside the EU (inside the EU EWCs may bring some relief at least).

Sometimes, legal techniques may bring solutions. Primary examples include different ways of piercing the corporate veil and transferring I&C obligation to higher levels in the group.

3. *Decisions by organs other than management*

One of the basic features of worker involvement is the assumption that management makes the decisions and that the employees can influence these decisions through I&C mechanisms. However, there are decisions which cannot be taken by management because the authority lies elsewhere. Examples include the transfer of shares by shareholders, changes in the articles of association of the company (competence of the AGM), or remuneration of management (AGM and/or supervisory board).

In countries with systems EBLR, part of this problem is solved because labour is itself a part of the company organs. However, in this chapter we do not deal with EBLR, but solely with worker involvement through I&C mechanisms.

In some countries the works council has (limited) rights allowing it to influence decision making in the AGM. In the Netherlands, the works councils of larger public limited companies have the right of speech in the AGM as to management remuneration policy, appointment and dismissal of members of the executive and supervisory boards and major decisions that need to be approved by the AGM. The same is true for Bulgaria.

4. *Rights with regard to other companies*

In several countries, works councils are entitled to receive information on other companies that is of relevance to them, mainly in the case of impending mergers or acquisitions. Usually, this information should be provided by their own employer. Examples include Germany (since 2008).

XII. Internationalization and I&C

1. General characteristics of internationalization and I&C

This chapter focuses on national I&C, and not on transnational systems, due to lack of time and space. However, given the ever-increasing internationalization of companies, at least some remarks need to be made.

Two related legal systems exist: the EWC Directive and the SE/SCE Directive. The systems have a lot in common:

- I&C bodies consisting of representatives from different countries.
- A basis on the principle of negotiations, with a fall back mechanism when no agreement can be reached.
- I&C rights that are more or less comparable to those defined in the Framework Directive.

The main differences are the thresholds for establishing the I&C body or mechanism (EWC only in the case of large companies) and the maximum duration of the negotiations (much longer in the case of an EWC).

Notwithstanding the fact that the directives mentioned above solve some of the problems of internationalization, for several reasons major gaps continue to exist between the increasing cross-border operations of companies and the still mainly national sets of I&C rules:

- The relatively high thresholds of the EWC Directive, excluding a large number of companies; the SE Directive is no solution for this problem because only few companies with a sizable number of employees create SEs.
- In some countries, national I&C rules are much stronger than the rules in the directives.
- Compliance: as is the case with national I&C bodies, in many international groups no cross-border I&C mechanism exists, notwithstanding the legal obligation to establish such a system.
- The scope of the directives is self-evidently restricted to the EEA, leaving out major global players from countries like the USA, Japan, China, Korea etc. (even when acknowledging that the EWC Directive contains a provision to somewhat allow for this problem).

2. Some interesting examples

When we consider the set of rules in the Framework Directive as specifying more or less standard (or normal) I&C rights (and probably practices), it is an interesting exercise to search for the needles in the haystack, i.e. the remarkable exceptions to the rule:

- French works councils have the same information rights as shareholders and are entitled to receive the auditor's report.
- The right to address the AGM on several strategic issues (Netherlands); a comparable right for worker representatives in the AGM of joint stock companies and in the AGM of limited liability companies on employment and social insurance issues (Bulgaria).[14]
- Reservation of seats in the works council for certain categories of employees (apart from the traditional distinction between white- and blue-collar employees in several countries) such as the young, the handicapped or flex-workers.
- The right to challenge strategic decisions in court (Netherlands).
- The right to speak to the potential buyer of a firm (Norway).
- Extended training leave for works council members (Austria); works council members are entitled to three weeks paid training leave during their four-year period in office. In larger (200+ companies), one works council member is entitled to up to one year's unpaid training leave.
- Making use of external expertise (Austria Chamber of Labour, France).
- In Norway, union representatives have the right to meet the directors of the company. These meetings are meant to give unions the opportunity to present their views to the owner's representatives on the board of directors.
- The right of consent/veto in Sweden with regard to the use of sub-contractors (unless there is a genuine need for this type of work).

XIII. The future of I&C from an EU perspective

It seems that at least at the EU level, I&C has become a less contested subject than it has been in the past. There is no debate on I&C as a fundamental right as such. Many debates seem to have a rather more technical character, focusing on simplification of rules and streamlining procedures. Examples include the debate on the recast of the EWC Directive and the "fitness check" of three directives that contain I&C provisions (Transfer of Undertakings Directive, Framework Directive and Collective Redundancies Directive).[15] However, some critics – mainly on the union side – have challenged the concept of simplification as an instrument to attack worker rights.

A second observation is that there are no signs of impending (important) initiatives for change at the European level either. One can also doubt

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[14] *Blanpain/Lyutov* (fn. 11) 28.

[15] 'Fitness check' on EU law in the area of Information and Consultation of Workers, SWD (2013) 293 final, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=707&newsId=1942&furtherNews=yes>.

whether such changes will take place in individual member states. Either the government (especially right-wing governments) are reluctant or outright opposed, or employers' organizations are an obstacle to far-reaching changes in I&C rights.

It seems therefore fair to conclude that no major changes in the legislative field are to be expected with regard to I&C in the near future.

I&C legislation is commonly independent of the legal form of the company: usually only the size of the undertaking matters. This is its strength, but it is also the weakness of I&C at the same time. Given the spread of all kind of company forms (some from the EU, but most from other member states) to other member states, pressure on participation systems that *are* tied to specific legal (usually some type of EBLR) forms is increasing. To what extent companies actually try to avoid those types of participation is unclear, but the effect is a certain erosion of systems that mainly depend on the legal form, like the German system of *Mitbestimmung*.[16] The accompanying weakness, of course, is that the average I&C arrangements do not enter the area of hard-core corporate decision making (with the possible exception of some parts of Dutch legislation).

XIV. Concluding remarks

The I&C landscape across Europe is in many respects very diverse with regard to actors, structures, subjects, (strength of) rights and even presence or absence. Still, the differences, however large, seem to have somewhat narrowed in recent years, partly due to the European legislature, but also because of the process of internationalization.

Any (further) convergence will in all probability not be initiated by the EU: initiatives do not figure high (if at all) on the agenda. The chance of national initiatives does not seem large either.

Any move forward will therefore have to come mainly from practice, especially in countries where the occurrence of I&C is still scattered or even virtually non-existent.

[16] For the economic aspects of *Mitbestimmung* see *Alexander Dilger*, Ökonomik betrieblicher Mitbestimmung: Die wirtschaftlichen Folgen von Betriebsräten, 2002.

Employee Participation at Workplace Level in China

XIE Zengyi

I. Introduction

Employee participation in China is also called "democratic management of enterprises". The two have roughly the same connotation and denotation. The latter mainly summarizes its content from the perspective of enterprise governance while the former mainly summarizes its content from the perspective of the right of employees to participate in enterprise management.

As in Germany and other European countries, the employee participation system in China consists of two levels: workplace level and board level. At workplace level, the main mechanism of employee participation is the employees' congress system. The Chinese employees' congress is a special body

made up of employees' representatives, which is highly similar to a works council in Germany and other European countries. At board level, the Company Law provides for a system of employee representation on the board of directors and board of supervisors. The mechanisms for employees' participation at these two levels are closely related, although they differ in terms of the background of their creation and operational mode. This article mainly discusses the employee participation system at workplace level, focussing on the employees' congress system.

II. The evolution of the employees' congress system

1. The employees' congress system under the planned economy

During the early years of the People's Republic, China implemented a highly centralized planned economic system, under which almost all enterprises were state-owned or collective and employees were considered the "masters" of their enterprises. Employees' congresses at that time, as organs of "power" through which employees participated in enterprise decision-making, management and supervision, played an important role in enterprises.[1] In the mid-1980s, China began to implement a system of planned commodity economy,[2] and the enterprise management system gradually began to change. At that time, state-owned enterprises implemented a highly concentrated "system of overall responsibility by enterprise head (*changzhang fuze zhi*)", whereby "the head played a central role in an enterprise" as the top manager of the enterprise.[3] Meanwhile the regulations also provided for the employees' congress system so as to give full play to the role of employees in "deliberating on major decision-makings of enterprises, supervising administrative leaders, and upholding their own lawful rights and interests."[4] From these legal provisions we can see that although employees' congresses are given broad functions and powers,[5] from 1986 they are no longer defined as "organs of power"

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[1] See Article 2 of 国营工业企业职工代表大会暂行条例 [Interim Regulations on Employees' Congresses in State-Owned Enterprises].

[2] In October 1984, 中国共产党第十二届中央委员会第三次全体会议 [3rd Plenary Session of the 12th CPC Central Committee] adopted 关于经济体制改革的决定 [Decision to Reform the Economic System], which stated that the socialist economic system was a system of planned commodity economy and that the key to reform of the economic system was to invigorate enterprises.

[3] See Article 45 of 全民所有制工业企业法 [Law on Industrial Enterprises Owned by the Whole People] 1988.

[4] Article 2 of 全民所有制工业企业职工代表大会条例 [Regulations on Employees' Congresses in Industrial Enterprises Owned by the Whole People] 1986.

[5] See Article 52 of 全民所有制工业企业法 [Law on Industrial Enterprises Owned by the Whole People] 1986.

but as "bodies through which employees exercise the power of democratic management". With the reform of the economic system, the dominant position of the employees' congress changed. From the historical perspective, the emergence and development of the employees' congress system was an institutional arrangement adapted not only to the public ownership structure of enterprises and the socialist system, but also to the governance structure of state-owned enterprises at that time. Since at that time state-owned enterprises implemented and operated the system of "overall responsibility by enterprise head" (where the heads of the enterprises were very powerful), rather than the modern corporate governance system, there were no shareholders' meetings, boards of directors or supervisors, or other monitoring bodies; it was, therefore, necessary to control and supervise the power of enterprise heads and other managers through the employees' congress.[6] In that light, the employees' congress system and other systems of employee participation were important mechanisms supplementing and balancing the system of "overall responsibility by enterprise head". Therefore, profound economic, political and social backgrounds existed for the emergence and development of the employees' congress system in China.

2. The employees' congress system after the establishment of the market economy

In 1992, China declared that the goal of economic reform was to establish a socialist market economy. Establishing a modern corporate system was also an important component of economic reform.[7] It was against this background that in 1993 China promulgated the Company Law, which established a modern enterprise system. Influenced by the existing system, the 1993 Company Law provided that a democratic management system should be established only in wholly state-owned companies and other state-owned limited liability

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[6] See 谢增毅 [*Xie Zengyi*], 职代会的定位与功能重塑 [The Role and Function of Employees' Congresses], 法学研究 [CASS Journal of Law] (3/2013), 111. In 1986, the central government issued three regulations at the same time, including the Regulations on the Work of Enterprise Heads in State-Owned Enterprises (SOEs) and the Regulations on Employees' Congresses in SOEs, which also indicated the close relationship between "the system of overall responsibility by the enterprise director" and the employees' congress system.

[7] 中共中央关于建立社会主义市场经济体制若干问题的决定 [The Decision of the Central Committee of the Communist Party of China on Some Issues Concerning the Establishment of the Socialist Market Economy], adopted at 中国共产党第十四届中央委员会第三次全体会议 [3rd Plenary Session of the 14th CPC Central Committee] in November 1993, clearly set the goals of further transforming the management mechanism of state-owned enterprises and establishing a modern enterprise system adapted to the market economy, with clearly-established ownership, clearly-defined rights and responsibilities, separation of government functions from the enterprise, and scientific management.

companies which were required to set up employees' congresses.[8] The Law did not require other types of company to set up an employees' congress. However, since the introduction of the system of shareholders' meetings, boards of directors and boards of supervisors, employees' congresses no longer enjoy all the functions and powers provided for in the 1988 Law on Industrial Enterprises Owned by the Whole People, which was adopted in the era of the planned economy system.[9] Therefore, the scope and method of the functioning of employees' congresses have changed in the market economy system after the promulgation of the Company Law. In 2005, China revised the Company Law. In the 2005 Company Law, a general article provides that a democratic management system should be implemented not merely in state-owned companies, but in all types of company. However, the relevant provisions of the Company Law indicate that companies no longer have the obligation to set up employees' congresses,[10] which become an optional, rather than a compulsory, body of a company. This is a significant change.

In 2007, the Labour Contract Law was promulgated. Article 4 sets out the employer's obligation of consultation:

> Where an employer formulates, amends or decides rules or important matters concerning the remuneration, working time, break, vacation, work safety and sanitation, insurance and welfare, training of employees, labour discipline, or management of production quota, which are directly related to the interests of the employees, such rules or important matters shall be discussed at the meeting of employees' representatives or the general meeting of all employees, and the employer shall also put forward proposals and opinions to the employees and consult with the labour union or the employees' representatives on an equal basis, to decide on these rules or matters.

Despite the above provision, the Law does not provide for the establishment or the organizational structure of an employees' congress. Apart from the Labour Contract Law, the Labour Law and the Trade Union Law also contain general provisions on employee participation and the employees' congress system.

As major changes have taken place concerning the overall economic system in the country, the ownership structure and management system in enterprises, and the role of employees' congresses in enterprises, the rules relating to the employees' congress in Regulations on Employees' Congresses in Industrial Enterprises Owned by the Whole People of 1986 and the Law on Industrial Enterprises Owned by the Whole People of 1988 seem outdated

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[8] Article 16 of 公司法 [Company Law] 1993.

[9] 王保树 [*Wang Baoshu*] and 崔勤之 [*Cui Qinzhi*], 中国公司法原理 [Theory of Chinese Company Law] (2000), 29.

[10] Article 18 of 公司法 [Company Law] 2005 provided that: "In accordance with the Constitution and other relevant laws, a company shall adopt democratic management in the form of employees' congress or in other forms."

and do not fit into the realities of employees' congresses. Because the role of these two important pieces of legislation is extremely limited and the Company Law on the status and functions of employees' congresses is rather vague, many provinces have adopted local regulations on employees' participation or employees' congress. For example, some local governments have adopted comprehensive regulations on the democratic management of enterprises (employee participation),[11] while some others have adopted regulations on the employees' congress.[12] However, the contents of these local regulations are not identical.

As an old and traditional system in China (although the related rules and realities have changed considerably in the past several decades), in recent practice employees' congresses have been established and are playing a positive role in many enterprises. According to statistics published by the All-China Federation of Trade Unions, by 2012 the employees' congress system had been established in 4.049 million enterprises and public institutions, covering 80.8% of all enterprises and public institutions that had established grassroots trade unions and a total of 213.1 million employees in the whole country.[13]

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[11] Examples are: 内蒙古自治区职工民主管理条例 [Regulations of the Inner Mongolian Autonomous Region on Democratic Management of Enterprises by Employees] 2002; 山西省企业民主管理条例 [Regulations of Shanxi Province on Democratic Management of Enterprises] 2005; 江苏省企业民主管理条例 [Regulations of Jiangsu Province on Democratic Management of Enterprises by Employees] 2007; 天津市企业职工民主管理条例 [Regulations of Tianjin Municipality on Democratic Management of Enterprises by Employees] 2007; 河南省企业职工民主权利保障条例 [Regulations of Henan Province on Protection of Democratic Rights of Employees] 2007; and 湖北省企业民主管理条例 [Regulations of Hubei Province on Democratic Management of Enterprises] 2007. By June 2011, the provinces, autonomous regions and municipalities directly under the Central Government that had adopted regulations on democratic management of enterprises included Fujian, Inner Mongolia, Shanxi, Jiangsu, Tianjin, Henan, Hubei, Guizhou, Qinghua, Zhejiang, Jilin and Ningxia.

[12] Examples are: 河北省企业职工代表大会条例 [Regulations of Hebei Province on Employees' Congresses in Enterprises] 2003, 新疆维吾尔自治区职工代表大会条例 [Regulations of Xinjiang Uygur Autonomous Region on Employees' Congresses] 2005, 山东省企业职工代表大会条例 [Regulations of Shandong Province on Employees' Congresses] 2005, and 云南省职工代表大会条例 [Regulations of Yunnan Province on Employees' Congresses in Enterprises] 2007. By June 2011, regulations on employees' congresses had been adopted by the following provinces, autonomous regions and municipalities directly under the Central Government: Hebei, Xijiang, Shandong, Jiangxi, Yunnan, Heilongjiang, Hunan, Sichuan, Tibet, and Shanghai.

[13] 中华全国总工会研究室 [Research Office of the All-China Federation of Trade Unions], 2012 年工会组织和工会工作发展状况统计公报 [2012 Statistical Bulletin on the Development of Trade Union Organizations and Trade Union Work], 15 March 2013.

As far as enterprises are concerned, by September 2012 there were 2.036 million grassroots enterprise trade unions in the whole country;[14] by the end of 2012, among enterprises that had already established trade unions, 88.08% of public enterprises and 85.53% of non-public enterprises had implemented the employees' congress system.[15] Although most enterprises that have established trade unions have also implemented the employees' congress system, the percentage of enterprises that have trade unions is not high. By 2012, there were 13.666 million enterprises in the whole country.[16] If we compare the number of enterprises that have trade unions with the total number of enterprises in the country, we will see that the percentage is actually very low. Correspondingly, the percentage of enterprises that have already established employees' congresses is also very low – lower than 15% of the total number of enterprises in the whole country.

III. The role and significance of the employees' congress

Although many theories justify the system of employee participation in western countries,[17] in China there is still significant debate on employee participation including the role of the employees' congress. Although great changes have taken place concerning the economic system, enterprise ownership and the system of enterprise management, the employees' congress system is still of great significance and will play a positive role in enterprises in China.

First, the employees' congress system is conducive to communication between labour and management, thereby improving corporate governance and promoting scientific decision-making and its implementation. The system of employees' congresses not only enables employees to better understand the

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[14] 中华全国总工会研究室 [Research Office of the All-China Federation of Trade Unions], 2012 年工会组织和工会工作发展状况统计公报 [2012 Statistical Bulletin on the Development of Trade Union Organizations and Trade Union Work] (15 March 2013).

[15] 陈豪 [*Chen Hao*], 努力开创厂务公开民主管理工作新局面 [Making an Effort to Create a New Situation in Democratic Management of Enterprises], in 工人日报 [Workers' Daily], 12 October 2013.

[16] See 2012 年全国市场主体发展情况 [Development of Market Subjects in China in 2012], available at: <http://www.saic.gov.cn/zwgk/tjzl/zxtjzl/xxzx/201301/P020130110600723719125.pdf>.

[17] The theories include "enterprise-in-itself (*Unternehmen an sich*)" theory, corporate social responsibility theory, stakeholder theory, human capital theory, and economic democracy (industrial democracy) theory, which have all demonstrated from different perspectives the legitimacy and reasonableness of democratic management of enterprises or employee participation. See 谢增毅 [*Xie Zengyi*], 职代会的定位与功能重塑 [The Role and Function of Employees' Congresses], 法学研究 [CASS Journal of Law] (3/2013), 112–115.

reasons for and objectives of corporate policy-making, operation of the company, and where the interests of the company lie, but also enables company investors and managers to better understand the working conditions of front-line employees and the concrete conditions of company operation, thus promoting communication between labour and management, correct corporate decision-making and effective implementation of corporate policies. In Germany, some also argue that worker representation improves the decision-making process and improves the chance of workers accepting decisions taken by management.[18]

Moreover, employees' congresses are conducive to employees' participation in democratic supervision and to giving full play to the information advantages of employees as insiders in supervising the making and implementation of corporate policies, thereby avoiding or reducing mistakes in decision-making or acts harming corporate interest by the management. One research paper shows that labour representation on corporate boards brings valuable first-hand operational knowledge to corporate board decision-making. This information improves the monitoring capability of the board and reduces agency costs within the firm.[19]

Second, the employees' congress system is conducive to improving the system of grassroots democracy and safeguarding the democratic rights of employees. In China, the employees' congress system is not only an economic system or enterprise management system, but also an important system of grassroots democracy. It can be said that the employees' congress system is one of the practical forms of the democratic system in enterprises in China. Therefore, the employees' congress system has important political significance that transcends its economic functions.

Third, the employees' congress system is conducive to safeguarding the rights of employees and constructing a harmonious labour relationship. The employees' congress system enables employees to express their views and participate in decision-making on matters that directly concern their own interests and to learn about the future of the enterprise through communication and dialogues with the enterprise management. This, therefore, is conducive to realizing cooperation and is beneficial to both labour and management, reducing misunderstandings and conflicts between employees and enterprises, and constructing a harmonious labour relationship.

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[18] *Bernd Waas*, Employee Representation at the Enterprise in Germany, in Hiroya Nakakubo/Takashi Araki, Systems of Employee Representation at the Enterprise, 2012, 71 (90).

[19] *Larry Fauver/Michael E. Fuerst*, Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards, 82 Journal of Financial Economics (2006), 673.

Of course, the employee participation system including the employees' congress system has always been a controversial issue, both in China and in other countries. Even in Germany, critics argue that the system of employee participation has been too rigid and gives employees too many rights.[20] Indeed, from economic and empirical points of view, it is difficult to find evidence to prove whether employee participation has a positive or negative impact on corporate performance. Even in Germany, which has a well-developed employee participation system, it is generally believed that there is no statistical evidence showing that an employee participation or co-determination system has any negative or positive impact on corporate performance.[21] Therefore, assessment of an employee participation system including the employees' congress system should not be based on economic considerations only; historical, social and cultural factors should also be taken into account.

IV. Characteristics of the employees' congress system

Due to the historical background and other reasons, the Chinese employees' congress system has the following characteristics:

First, the employees' congress system is closely linked to the enterprise ownership structure. Since the employee participation system in China was established at a time when publicly owned enterprises were in a dominant position, it has a greater influence and role in state-owned and collective enterprises (especially in state-owned enterprises) than in other types of enterprises. Currently, the influence of both the employees' congress system and the system of employee representation on boards of directors and supervisors is much greater in publicly owned enterprises than in non-publicly owned enterprises. Particularly in current legislation and policy documents at both central and local levels, employees' congresses in state-owned and collective enterprises still enjoy much bigger power than those in other types of enterprises.

Second, trade unions are closely related to the employees' congress system and other employee participation systems. In terms of relevant legislation and practice, although trade unions and employees' congresses differ from each other in nature and status, the two are closely related to and highly integrated with each other.

In practice, the employees' congress is an important platform for trade unions to perform their functions. For example, the Trade Union Law provides

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[20] See *Waas* (fn. 18) 71 (91).

[21] 谢增毅 [*Xie Zengyi*], 职代会的定位与功能重塑 [The Role and Function of Employees' Congresses], 法学研究 [CASS Journal of Law] (3/2013), 114.

that trade unions shall organize employees to participate in democratic decision-making, democratic management and democratic supervision through the employees' congress system or other democratic management system. If an enterprise violates the provisions of the employees' congress system or other democratic management systems, the trade union can request corrections and ensure that employees exercise their rights of democratic management pursuant to the law.[22] In terms of the above provision, without a trade union, it would be highly difficult for the employees' congress to function well. Moreover, the daily working body of the employees' congress and trade unions is shared. The Trade Union Law provides that: "The working committee of the trade union of a state-owned enterprise is also the working body of the employees' congress, in charge of the daily work of the employees' congress and checking and supervising the implementation of the resolutions passed by the employees' congress."[23] The 2012 Provisions on the Democratic Management of Enterprises take a step further by providing that the working committee of trade unions in an enterprise, whether state-owned or not, shall be the working body of the employees' congress, and is responsible for the routine work of the employees' congress.[24] Thus, the organization of the trade union and employees' congress is highly integrated. In addition, employees' congresses also participate in drafting and adopting collective agreements. For example, the Labour Contract Law provides that the draft of a collective contract shall be presented to the employees' congress or all the employees for discussion and approval.[25] This is significantly different to the model in most European countries, where works councils are legally excluded from the possibility of negotiating collective agreements even if there are some exceptions.[26]

Therefore, in China the trade union and the employees' congress are integrated and complement each other. In practice, the existence of a trade union is an important basis on which the employees' congress plays its role, whereas the employees' congress is an important platform for the trade union to play its role; without the former, it would be difficult for the latter to exist; without the latter, it would be difficult for the former to play its role.

Third, the employees' congress system goes hand in hand with the employee participation system at board level. Compared with the employee participation system in western countries, Chinese law has provided not only for

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[22] Articles 6 and 19 of 工会法 [Trade Union Law] 1992.

[23] Article 35 of 工会法 [Trade Union Law] 1992.

[24] See Article 22 of 企业民主管理规定 [Provisions on the Democratic Management of Enterprises].

[25] Article 51 of 劳动合同法 [Labour Contract Law] 2007.

[26] *Sylvaine Laulom*, System of Employee Representation in Enterprises in France, in Nakakubo/Araki (fn. 18), 51 (56).

employees' congresses as an important platform for consultation and co-determination by employees and management, but also a system of employee participation at board-of-directors and board-of-supervisors levels. One of the important characteristics of the Chinese system of employee participation is that all enterprises are required to have employee representatives on the board of supervisors and all state-owned enterprises are required to have employee representatives on the board of directors.[27] This shows that employee representation at board level is relatively strong in China in comparison to other countries.

V. The powers and organizational structure of employees' congresses

As there is no national law or regulation specifying the general powers or functions of an employees' congress, according to current provincial legislation, in general, employees' congresses have the following functions and powers: (i) to deliberate on and approve draft collective agreements; (ii) to elect employees' representatives on boards of directors and supervisors; (iii) to discuss draft internal rules and regulations of the enterprise or other major issues that directly concern the interests of employees; and (iv) to supervise implementation by the enterprise of labour laws and regulations, collective agreements and labour contracts, and other employment-related laws and regulations.[28] Therefore, the functions and powers of employees' congresses mainly concern matters directly related to employees. Employees' congresses do not intervene in matters that do not directly concern employees, such as corporate decision-making relating to business, capital and market operations. Therefore, the main functions of employees' congresses can be summarized as "consultation" and "supervision". According to some local legislations and practices in China, the functions and powers of employees' congresses of state-owned and collective enterprises are not the same as those of non-public enterprises. Apart from those enjoyed by employees' congresses in all enterprises, employees' congresses in publicly-owned enterprises also have the power to: (i) deliberate and put forward suggestions on major corporate decisions; (ii) deliberate on and approve corporate decisions on matters that directly concern employees' interests, such as pay, working time, rest and holiday, life welfare, rewards and punishments, redundancy, employ-

[27] Articles 45, 52, 68, 109, 118 of 公司法 [Company Law] 2005.

[28] See Article 6 of 江苏省企业民主管理条例 [Regulations of Jiangsu Province on Democratic Management of Enterprises] 2007, and Article 14 of 湖北省企业民主管理条例 [Regulations of Hubei Province on Democratic Management of Enterprises] 2007.

ee arrangement in corporate restructure, and the like; and (iii) supervise and appraise the work of senior executives.[29]

As for election of members of an employee's congress, according to local legislations and practices at provincial level, representatives of an employees' congress are usually elected directly by all employees and their number is determined by the number of employees in an enterprise. The election of representatives is similar to election of representatives of works councils in Germany and France.[30]

VI. Major problems in the current employees' congress system

Although the institution and practice of the employees' congress have a long history in China, many problems still exist in current laws and regulations, which have not been revised and improved along with the economic reforms and change of the enterprise management system in recent decades.

1. Dispersed and unsystematic legislation

The provisions on employee participation in China including the employees' congress system are dispersed among a large number of laws, regulations, and policy documents, such as the Labour Law, the Trade Union Law, the Company Law, the Labour Contract Law, the Law on Industrial Enterprises Owned by the Whole People, Regulations on Employees' Congresses in Industrial Enterprises Owned by the Whole People, and Regulations on the Democratic Management of Enterprises. The disadvantages of such a decentralized system of law are clear: first, the dispersed content of legislation is not conducive to its dissemination and implementation and often leads to contradictions and conflicts between different provisions; and, second, the relevant pieces of legislation have not been revised and updated in a timely manner along with the change of situation. For example, the Regulations of 1986 and the Law of 1988 are far outdated both in terms of general principles and in terms of concrete contents to be able to meet the new situation brought about by reforms in enterprise ownership and corporate governance. The slow development in national laws indicates that the method for establishing an employee representation system including the employees' congress system in

[29] See Articles 6 and 7 of 江苏省企业民主管理条例 [Regulations of Jiangsu Province on Democratic Management of Enterprises] 2007, and Articles 7, 8 and 9 of 天津市企业职工民主管理条例 [Regulations of Tianjin Municipality on Democratic Management of Enterprises by Employees] 2007.

[30] See *Waas* (fn. 18) 71 (76). See also *Laulom* (fn. 26) 51 (56–57).

the market economy system in China remains a difficult and controversial topic.

2. Fragmentation and inconsistency of the employees' congress system

Because no unified and complete national legislation on employees' congress exists, a large number of local regulations have been adopted in this field by governments at provincial level. However, the contents of these local regulations are not consistent with, and are even significantly different from, each other. Since these regulations involve the governance structure and mode of operation of enterprises as well as the rights of employees, these differences in legislation are unfair and unreasonable to both enterprises and employees in different areas.

3. Weak enforcement mechanism

Although current legislations in China provide for various systems of employee participation, enforcement of these systems is still weak. Some of these systems lack a basis for enforcement or corresponding legal liability. Although some local regulations require enterprises to establish employees' congresses, if the enterprise fails to do that, it seems that it is difficult to force the enterprise to comply with the regulations.[31]As a result, employees' rights to participation are not widely implemented.

VII. Issues that need to be solved in the employees' congress system

1. The relationship between the employees' congress and trade unions

The relationship between the system of employee participation and the trade unions is complex, whether in China or in western countries: generally speaking, it is both a relationship of cooperation and complementarity and a relationship of competition and counterbalance.

The above analysis shows that in China a close relationship exists between the employees' congress system and the trade union system. However, in theory, a distinction between them must be made because of the different

[31] For example, in Jiangsu Province, the local Regulations on Employee Participation in 2007 provide that if an employer refuses to organize an employees' congress, the local labour agency can send an order to the enterprise and if the employer refuses to follow the order, the labour agency can fine the employer and the management. See Article 28 of 江苏省企业民主管理条例 [Regulations on Employee Participation in Enterprises of Jiangsu Province] 2007.

nature of these two systems. First, the foundation of the two systems is different: the employees' congress is a system based on the status of all employees of an enterprise and, in theory, every enterprise can have an employees' congress and every employee can be elected as a representative, whereas a trade union is not established in all enterprises, nor does its membership necessarily cover all employees in an enterprise. Therefore, the employees' congress system and the trade union mechanism should not be confused with each other. Second, as far as legal relationship and legal status are concerned, a trade union is mainly an external mechanism by which employees carry out collective negotiation with enterprises on working conditions and terms. Moreover, the trade union and the enterprise are in an equal relationship with each other. A trade union itself may become a legal person in China.[32] In contrast, the employees' congress system is mainly an internal mechanism by which employees participate as members of their enterprise in the internal management and supervision of the enterprise. Importantly, employees' representative bodies rather than trade unions usually should not participate in collective bargaining. In addition, as internal organs of an enterprise, employee representative bodies usually lack independence from the enterprise. Third, the ways by which the two mechanisms play their roles are different. When a trade union fails to reach an agreement with the enterprise in collective bargaining, it may take action, such as calling for a strike. However, the main purpose of the employee participation mechanism is to promote cooperation and communication between management and employees. Therefore, employees' representative bodies must act peacefully and may not take industrial action.

Although trade unions and other employees' representative mechanisms are different in that respect, a review of foreign systems and practices shows that there is also a relationship of cooperation and complementarity between trade unions and other mechanisms for the representation of employees. For example, although works councils are legally independent from trade unions in Germany, in reality there are many interactions between works councils and trade unions.[33] In that light, considering the special nature of the trade union system and the employees' congress system in China, it is still currently necessary to maintain a relationship of a high degree of integration and cooperation between the two systems. Of course, in the long term, attention should be paid to the differences, and further exploration of the relationship between the employees' congress and the trade union is needed.

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[32] See Article 14 of 工会法 [Trade Union Law] 1992 in China.

[33] *Waas* (fn. 18) 71 (73).

2. The relationship between the employees' congress system and corporate ownership structure

Currently, employee participation systems in China, especially the employees' congress system, are mainly implemented in state-owned enterprises. However, some provinces have adopted local regulations that require all enterprises to set up employees' congresses. For example, the 2007 Regulations on Employee Participation in Enterprises in Jiangsu Province provide that all enterprises must establish an employees' congress system.[34] Similar provisions can be found in other local regulations. However, as mentioned above, these local regulations have provided for the functions and powers for employees' congresses in state-owned and collective enterprises and for those employees' congresses in non-publicly owned enterprises, with the former being broader than the latter.[35] Since the functions and significance of the employees' congress system are to ensure employees' participation in and supervision over the operation of the enterprise, appropriate participation by employees can raise the operational efficiency of an enterprise, and corporate governance structures established by enterprises of different types of ownership in accordance with the Company Law are almost identical, it seems that an identical system of employees' congress should be implemented in all enterprises regardless of their ownership structure. Moreover, different systems of employees' congress in enterprises with different types of ownership seems unfair to employees of different enterprises.

On the other hand, there are also justifications for giving special functions and powers to employees' congresses in publicly owned enterprises, especially state-owned enterprises. First, they are conducive to overcoming the situation in which the owners of state-owned enterprises exist only in name. The shareholders' rights in state-owned enterprises are often exercised indirectly by the government or agencies authorized by the government. In the absence of enterprise owners, giving employees' congresses more power to participate in policy-making is conducive to strengthening supervision over management, by giving full play to the employees' information advantage, and in upholding the interests of both state-owned enterprises and the state as the enterprise owner. Second, the functions and powers of employees' congresses of state-owned enterprises, as a traditional institutional arrangement, have their institutional inertia and therefore should not and cannot be easily changed. Although many traditional state-owned enterprises have been restructured and

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[34] Article 5 of 江苏省企业民主管理条例 [Regulations of Jiangsu Province on Democratic Management of Enterprises] 2007.

[35] See Articles 6 and 7 of 江苏省企业民主管理条例 [Regulations of Jiangsu Province on Democratic Management of Enterprises] 2007, and Articles 7, 8 and 9 of 天津市企业职工民主管理条例 [Regulations of Tianjin Municipality on Democratic Management of Enterprises by Employees] 2007.

incorporated, no fundamental change has been made to their mode of ownership. Only their organizational modes and governance structures have changed. Correspondingly, it is also difficult to fundamentally change the functions and powers of employees' congresses in state-owned enterprises. Third, foreign experience shows that it is not necessary to implement exactly the same mode of employee participation mechanism in all industries or enterprises. For example, in Germany, modes of codetermination at board level are determined by the number of employees in the enterprise.[36] In France, similar rules exist concerning the duty of employers to organize a works council election.[37] In addition, in Germany, the mode of codetermination in the supervisory board for the coal and steel industries is different from that for other industries.[38] Therefore, it is reasonable for state-owned and collective enterprises to implement a special employees' congress system in light of their historical tradition and their own particular conditions.

3. The position of the employees' congress in the enterprise

A core question relating to the operation of the employees' congress system is exactly what role the employees' congress should play under the modern enterprise system. The above analysis shows that the main functions of employees' congresses are "consultation" and "supervision". Such a role is in line with the structure and trend of development of modern corporate governance.

It is also a mainstream approach in other countries to make "consultation and supervision" the main functions of employees' representative bodies. The OECD Principles of Corporate Governance 2004 point out that where stakeholders participate in the corporate governance process, they should have access to relevant, sufficient and reliable information on a timely and regular basis and that stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practices to the board.[39] From the above, we can see that the Principles also stress access to information and supervision over companies as the main powers of stakeholders. Therefore, future Chinese legislations should adopt this principle that the main functions of the employees' congress are consultation and supervision, namely to have access to relevant information, to put forward their opinions and suggestions, and to supervise corporate management. The extent of the power of the employees' congress

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[36] *Waas* (fn. 18) 71 (85–86).

[37] *Laulom* (fn. 26) 51 (56).

[38] *Manfred Weiss/Marlene Schmidt*, Labour Law and Industrial Relations in Germany, 2008, 250–251.

[39] OECD: OECD Principles of Corporate Governance 2004, 47, available at: <http://www.oecd.org/corporate/oecdprinciplesofcorporategovernance.htm>.

should not subvert the general power configuration of the shareholders' meeting, the board of directors, the board of supervisors, and managers of an enterprise provided for by company law. In other words, the employees' congress should not intervene excessively in decisions on the business operation of an enterprise. Even in Germany, which has a highly developed employee participation system, employees' representative bodies, namely works councils, still follow the principle of "non-interference in the decision-making autonomy of the enterprise".[40] China should also follow this principle in designing the powers and functions of employees' congresses. Only in this way can we ease the concerns of enterprises about employees' congress and encourage more of them to establish one and give fuller play to its role.

4. The unification and consistency of legislation

As mentioned above, currently no national unified legislation exists in relation to the employees' congress system in China. The relevant provisions are dispersed among different laws, regulations and policy documents, making the system highly difficult to implement. Therefore, China needs to adopt a national law or regulation on employment participation or the employees' congress so as to create consistency in the applicable laws, which is conducive not only to unity of the corporate governance structure, but also to the equal protection of employees' rights.

5. Strengthening the implementation mechanism and improving the legal liability system

As mentioned above, the percentage of enterprises with an employees' congress is low, which is partly because of the weak implementation mechanism of the system. Whether or not an enterprise has established an employees' congress does not affect the enterprise in any way. As result, legal provisions on the employees' congress system have become optional provisions for enterprises. In adopting future legislations on employee participation or employees' congresses, China should strengthen the mechanisms for restraint and legal liability so as to give more legal binding force to the employees' congress system.

[40] See *Rüdiger Krause*, Employee Participation System in Germany (lecture given at the Law School of Renmin, University of China, on 19 October 2009), available at: <http://www.cnlsslaw.com/list.asp?unid=5950>.

VIII. Conclusions

China has a long history of employee representation systems at the workplace level since the foundation of the People's Republic, and the employees' congress is the main body of representation. In the planned economy system, the employees' congress played an important role in the operation of enterprises. With reform of the economic system, and changes of corporate ownership and corporate governance, the role and function of the employees' congress have become weak and vague. In the background, there is no uniform national law or regulation concerning employees' congress, which leads to inconsistency of legislations in different areas. In reality, and due to historical reasons, employee's congresses in publicly owned enterprises have played a greater role than those in private enterprises.

In recent years, China has adopted a series of laws to protect the individual rights of employees, such as the Labour Contact Law, the Labour Dispute Mediation and Arbitration Law, the Employment Promotion Law, and so on. But there has been less development of legislation about collective labour relations. In China, many issues in the system of employee participation need to be solved, particularly the employees' congress system. These issues include the question of how to handle the relationship between employees' congresses and trade unions, whether the same or different modes of representation should be adopted in enterprises with different types of ownership, and the role and function of the employees' congress in the enterprise. At present, the urgent priority is the adoption of a national law or regulation (and its implementation mechanism), on employee participation or the employees' congress, based on the old laws and local rules, in order to overcome differences and inconsistencies between local regulations and further clarify the power and organization of the employees' congress.

Employee Participation at Board Level in Europe

Achim Seifert

I. Introduction

Employee participation in company boards gives employees a voice in the corporate structure of companies and is therefore embedded in corporate law. According to the definition in Article 2(k) of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees[1], the term "participation" not only covers "the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ", but also the employees' "right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ." Although still highly controversial, many EU Member States have instituted a model of employee participation: in two-tier board structures such as in Germany, it takes place in the supervisory boards, whereas, in one-tier board systems, it is integrated into the boards of directors of bigger public limited companies or private limited companies. By using corporate law as a legal tool to give employees a voice in the company, corporate law has made an

[1] [2001] OJ L 294/22.

important step toward a company law recognizing not only the interests of the shareholders but also those of employees as company stakeholders.

Employee participation in company boards must be distinguished from other forms of employee involvement. In contrast to employee representation through works councils (*Betriebsräte*), workers' delegates (*délégués du personnel*) or joint committees (e.g. *comités d'entreprise* or *conseils d'entreprise*), which primarily deal with workplace-related issues such as discipline, working time schemes or restructuring processes, board level employee participation gives employees the power to participate in the decision-making process of the company and thereby in the determination of the company's strategy.[2] Board level employee representation is also to be distinguished from forms of employees' financial participation that provides them with influence in the management of the company of their employer:[3] the bundling of the voting rights of employee shareholders may give them a representation on the company's supervisory board or board of directors.[4] French law even guarantees representation of employee shareholders on the supervisory board or the board of directors when they hold at least 3% of the company's capital.[5] But even in these cases financial participation of employees needs to be distinguished from employee participation in boards: as a matter of fact, representatives of employee shareholders in boards primarily act in the interest of the group of employee shareholders and not for the sake of the company's workforce as a whole. Furthermore, financial employee participation schemes differ from employee participation systems in that the latter follow the principle "one man, one vote" whereas employee stock ownership plans allow an accumulation of voting rights in the hands of one employee shareholder.

This paper aims to provide a short overview of this type of employee voice at the company level that has developed in Europe since the end of World War II. First (II.), the existing types of this form of collective voice of employees in boards, and their involvement in different corporate governance

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[2] For a more detailed assessment of the differences between workplace related employee involvement and employee participation in boards, see *Manfred Weiss/Achim Seifert*, Der europarechtliche Rahmen für ein "Mitbestimmungserstreckungsgesetz", Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2009, 542 (564 et seq.).

[3] The EU recommends the promotion of financial employee participation: see Council recommendation 92/443/EEC of 27 July 1992 concerning the promotion of participation by employed persons in profits and enterprise results (including equity participation), [1992] OJ L 245/53.

[4] E.g. in 1992 Krupp AG established an employee stock ownership plan and guaranteed its employee shareholders one seat on the supervisory board. See *Theodor Fabri*, Die Kleinaktie, 1959, 85, and *Richard Passow*, Die Aktiengesellschaft, 2nd ed. 1922, 261 et seq.

[5] Cf. Article L. 225-23 French Commercial Code. For a more in-depth analysis of this model, see *Bernard Saintourens*, Actionnariat salarié et gouvernement de l'entreprise en droit français, Bulletin de droit comparé du travail et de la sécurité sociale 2001, 149 et seq.

structures and national industrial relations settings shall briefly be outlined. The second part of the paper (III.) will deal with the impact of the establishment of a European internal market on employee participation in boards. In this context, the impact of the European Company, cross-border mergers, and the European Court of Justice's (ECJ) new interpretation of freedom of establishment under Article 49 TFEU on systems of employee involvement in the boards shall be examined in more detail.

II. Board-level employee participation in the EU Member States

Employee participation in company boards was established, for the first time in Europe, in Germany. It goes back to § 70 of the German Works Council Act (*Betriebsrätegesetz*) of 1920[6] and has been considerably intensified in the aftermath of World War II in the Federal Republic of Germany. First and foremost, it was an isolated national experiment. However, this German experience was picked up by several initiatives of the European Economic Community (EEC) in the late 1960s and early 1970s contributing to its dissemination in Europe (1.). As a result, a number of Member States established a regime of employee participation in boards (2.), whereas other Member States such as the UK have refused to institutionalize board level participation, after intense debate (3.). These national models vary with respect to the corporate governance system (4.) as well as with respect to the system of industrial relations in which they are embedded (5).

1. The European (Economic) Community as "transmission belt"

From the late 1960s the EEC has served as a "transmission belt" to set in motion a debate in the Member States on whether a form of board-level employee participation should be established in their national legal orders. Both the debate on the European Company Statute, in particular since the Commission's Proposal of 1970 that included employee participation in supervisory boards,[7] and on the 1972 Draft of a 5th Directive on company law,[8] providing

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[6] RGBl. 1920 I 147 et seq. This provision was concretized by the Act on the posting of Works Council Members in the supervisory board (*Gesetz über die Entsendung von Betriebsratsmitgliedern in den Aufsichtsrat*) of 15 February 1922 (RGBl. 1922 I 209).

[7] Cf. Vorschlag einer Verordnung (EWG) des Rates über das Statut für europäische Aktiengesellschaften, [1970] OJ C 124/1. For a fuller analysis see *Sandra Schwimbersky/ Michael Gold*, The European Company Statute: A tangled history, in Jan Kremers/Michael Stollt/Sigurt Vitols, A decade of experience with the European Company, 2013, 49 et seq.

[8] Kommission, Vorschlag einer fünften Richtlinie zur Koordinierung der Schutzbestimmungen, die in den Mitgliedstaaten den Gesellschaften im Sinne des Artikels 58 Absatz 2

board-level employee participation of one-third in public limited companies of 500 or more employees, have furthered the discussion in many EEC Member States on board-level employee participation. Thus, the Netherlands implemented the so-called *Structuurregeling* in 1971,[9] Denmark[10] and Sweden[11] adopted Companies Acts providing board-level representation for employees in 1973, and Luxembourg adopted, in 1974, an Act establishing board-level representation in public limited companies employing more than 1,000 employees.[12] In other Member States the debate did not result in the recognition of a system of board-level employee representation: in the UK,[13] for instance, the question was discussed under the label of "industrial democracy", but did not lead to the enactment of a board-level representation model (although there have been some experiments of employee involvement in the boards of privatized companies and the so-called *Bullock* Commission favoured the establishing of board-level employee representation). As to France,[14] an extensive debate took place in the 1970s, but it was only in the 1980s, under the Presidency of François Mitterand, that a (weak) model of employee representation in boards was established.[15]

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des Vertrages im Interesse der Gesellschafter sowie Dritter hinsichtlich der Struktur der Aktiengesellschaft sowie der Befugnisse und Verpflichtungen ihrer Organe vorgeschrieben sind, [2005] OJ C 131/49. For an assessment of the political debate around the 5th Directive on Company law cf. *Thomas E. Abeltshauser*, Strukturalternativen für eine europäische Unternehmensverfassung, Eine rechtsvergleichende Untersuchung zum 5. Gesellschaftsrechtlichen EG-Richtlinienvorschlag, 1990, 20 et seq.

[9] The *Structuurregeling* will be analyzed *infra* 1. b).

[10] For an overview of the Danish example, see *Paul Krüger Andersen*, Employees' Co-Determination in Danish Companies, in Theodor Baums/Peter Ulmer, Unternehmens-Mitbestimmung der Arbeitnehmer im Recht der EU-Mitgliedstaaten – Employees' Co-Determination in the Member States of the European Union, 2004, 11 et seq.

[11] On the Swedish Model of employee representation in the boards, see *Anders Victorin*, Employee participation on the company board: The Swedish experience, in Baums/Ulmer (fn. 10) 125 et seq.

[12] *Loi instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes* (Mémorial A No. 35 of 10 May 1974, 620 et seq.); since the Act of 31 July 2006 (*Loi portant introduction d'un code du travail*) (Mémorial A No. 149 of 29 August 2006, 2456 et seq.), the adoption of the Luxembourg Labour Code, employee co-determination is now regulated by Articles L. 426-1 et seq. Luxembourg Labour Code.

[13] For the example of the UK see *infra* 3. with further references.

[14] A first extensive debate took place after the publication of the so-called "Sudreau-Report" that recommended the establishment of board-level representation for employees ("ouvrir une voie nouvelle de participation: la cosurveillance"): cf. *Pierre Sudreau*, La réforme de l'entreprise, 1975, 95 et seq.

[15] For an overview of the historical development of board-level employee representation in France, see *Achim Seifert*, Mitbestimmung im monistischen Leitungssystem: Frank-

2. Examples for countries with employee participation in boards

As a result of this debate in the 1970s, and later developments, 19 of the 27 EU Member States had by 2007 institutionalized a system of employee involvement in boards.[16] Thus, the idea of giving employees a voice in the management of the company has become widespread in Europe. It is beyond the limits of this paper to outline all national models that exist in the EU Member States. The following analysis needs therefore to reduce complexity and is, for this reason, limited to two different models of employee involvement in boards: the model of board employee representatives (who are directly or indirectly elected by the company's workforce), that goes back to the German example (a), and the Dutch system that gives works councils the right to propose candidates for a certain number of members of the supervisory board (b).

a) Employee representation on boards: the German example

In most of the EU Member States that provide a form of employee participation in boards, this involvement takes the form of employee representation. The workforce of the company shall directly or indirectly elect a certain number of representatives to defend their interests within the company's supervisory board or board of directors. Pursuing this model, employee involvement in boards is structured according to the representation principle.[17] As a general rule, employee representatives acquire the same rights and duties as the shareholders' representatives when becoming a member of a supervisory board or a board of directors. However, the national models vary considerably regarding the level of employee participation and the way the employee representatives are elected. The most prominent and far-reaching example in this context is the German system of employee participation in boards. As mentioned above, it has served as a point of reference for the debate on employee participation in boards in other European countries. This may justify expanding on it in the present context.

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reich und Luxemburg als Beispiele, in Christoph Teichmann, Verhandelte Mitbestimmung, 2015 (forthcoming).

[16] Cf. *Berndt Keller/Frank Werner*, Arbeitnehmerbeteiligung in der Europäischen Aktiengesellschaft (SE) – Eine empirische Analyse der ersten Fälle, WSI-Mitteilungen 2007, 604 (609 et seq.).; see also *Berndt Keller/Frank Werner*, Arbeitnehmerbeteiligung in der Europäischen Aktiengesellschaft (SE) – Empirische Befunde und (un-)erwartete Konsequenzen, WSI-Mitteilungen 2009, 416 (419 et seq.).

[17] For a fuller analysis of the implications of this representation model, see *Otto Kahn-Freund*, Industrial Democracy, Industrial Law Journal (ILJ) 6 (1977), 65 (77 et seq.).

Since the end of World War II, three different models have been brought into practice in Germany.[18] The Act on Co-Determination in the coal and steel industry of 1951[19] provides for an equal number of shareholder and employee representatives in the supervisory board of companies of the coal and steel industry, which employ 1,000 or more employees and are organized in the legal form of a public or private limited company. The shareholders bench, as well as that of the employees, consists of five seats. The election of the supervisory board's chairperson ("the eleventh man") follows a complex procedure aimed at ensuring that he or she is neutral and impartial. Both sides shall agree upon a candidate. If there is no agreement, a conciliation procedure shall take place. Only the shareholders' meeting can reject the elected candidate, and only for a substantial reason. A shareholders' refusal may initially be reviewed by the competent Court of Appeal, but a second shareholders' meeting may decide autonomously on the basis of a substantial reason confirmed by the court. Today, only few companies are covered by this sector specific model, established in the aftermath of World War II.

The second model has its roots in the 1952 Works Constitution Act (*Betriebsverfassungsgesetz*), which in 2004 was replaced by the Act on board-level representation by one third.[20] It applies to all companies employing more than 500 persons and organized in the legal form of a public limited company, a private limited company, a partnership limited by shares, a mutual insurance company, or a co-operative. It allows employees to elect one third of the members on the supervisory board and thereby gives employees only a limited influence in the board.

A third model has been established by the 1976 Act on Co-Determination (*Mitbestimmungsgesetz*)[21] that applies to companies organized in the legal form of a public limited company, a private limited company, a partnership limited by shares, or a co-operative, and employing more than 2,000 employees. The shareholders as well as the employees have an equal number of representatives on the supervisory board. The employees' bench is composed of employees of the company and union representatives. All employees' representatives are elected by the company's workforce. At first sight, this model guarantees full equality between "labour and capital". Despite this parity

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[18] For a brief summary of the key elements of the German system of board-level representation, cf. *Manfred Weiss/Marlene Schmidt*, Labour Law and Industrial Relations in Germany, 2008, paras. 248–260. For a more in-depth analysis of the German model, cf. *Otfried Wlotzke/Hellmut Wißmann/Wolfgang Koberski/Georg Kleinsorge* (eds.), Mitbestimmungsrecht, Kommentar, 4th ed. 2011.

[19] Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie of 21 May 1951, BGBl. 1951 I 347.

[20] *Drittelbeteiligungsgesetz* of 18 May 2004 (BGBl. 2004 I 974).

[21] *Mitbestimmungsgesetz* of 4 May 1976 (BGBl. 1976 I 1153).

of representation, the shareholders are predominant, however, because the board's chairperson, elected by the majority of the shareholders' representatives, has a second vote in the event of any ballot resulting in a tie. The chairpersons' casting vote allows the shareholders to take the final decision as long as they vote in unison.

Further, most of the other European countries that have instituted a system of employee participation in boards follow the representation principle. In France, for instance, the company's workforce elects its representatives on the boards of public limited corporations (*sociétés anonymes*).[22] In Luxembourg, the company's personnel delegation(s) are entitled to appoint one-third of the members of the board of directors or – in a dualistic corporation – of the supervisory board of public limited corporations (*sociétés anonymes*) employing at least 1,000 employees.[23] § 110 of the Austrian Works Constitution Act (*Arbeitsverfassungsgesetz*) even goes further by entitling the Works Council to occupy one-third of the seats in the supervisory board of public or private limited corporations by sending a corresponding number of its members to the board.[24] In Sweden, board-level employee involvement does not rely on elections of the workforce or the appointment of works councils or other bodies but on trade unions: they shall appoint the employee representatives on the boards.[25]

b) Employees' right to submit proposals for board members

Not all national models of board level participation establish a direct or indirect representation of employees on boards. The Dutch model of employee participation in the supervisory boards (*Raad van commissarissen*) of large companies (*Structuurregeling*) differs from this model in that it does not give employees the right to elect their representatives, but only the right to propose to the shareholders' meeting a certain number of candidates for the supervisory board. Thus, this system only guarantees employees a certain influence in designating some of the members of the supervisory boards of large companies. The model has its roots in an Act of 1971 and was significantly reformed in the year 2004.[26]

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[22] For France, cf. Articles L. 225-1 et seq. Commercial Code and Act on the democratization of the public sector.

[23] Cf. Article L. 426-1 et seq. Luxembourg Labour Code.

[24] For more details see *Susanne Kalss*, Die Arbeitnehmermitbestimmung in Österreich, in Baums/Ulmer (fn. 10) 95 et seq.

[25] See *Reinhold Fahlbeck*, Employee Participation in Sweden, in Ulrich Jürgens/Dieter Sadowski/Gunnar Folke Schuppert/Manfred Weiss, Perspektiven der Corporate Governance – Bestimmungsfaktoren unternehmerischer Entscheidungsprozesse und Mitwirkung der Arbeitnehmer, 2007, 132 (146 et seq.); *Victorin* (fn. 11) 125 et seq.

[26] For an analysis of the Dutch model of board-level participation, cf. *Antoine Jacobs*, Collectief Arbeidsrecht, 2nd ed. 2005, 267 et seq.

The *Structuurregeling* applies to all public limited companies (*Naamloze Vennootshap*) and to private limited companies (*Besloten Vennootschap*) whose capital exceeds 16 million Euro, in which a company council (*Ondernemingsraad*) has been established, and which employs at least 100 employees in the Netherlands.[27] The members of the supervisory boards of public and private limited companies are elected by the shareholders, who vote on the proposal of the supervisory board. The influence of the employees in this procedure essentially consists in the company council's right to propose candidates for one-third of the board seats.[28] The supervisory board may object to the company council's proposal if the proposed candidate(s) do not have the necessary aptitude. In this case, the company's council and supervisory board shall try to find a compromise and, if necessary, a representative of the Amsterdam Court's Company Chamber[29] will be involved in order to mediate between the parties. In the end, the Company Chamber takes a compulsory decision on whether the supervisory board's objections against one or several candidates proposed by the company council are justified. Once the candidates of the employees' side are accepted by the supervisory board, it remains for the shareholders' meeting to elect the members of the supervisory board. In the event that the shareholders' meeting does not elect the proposed candidates, the company council needs to present other candidates who can obtain the approval of the majority of the shareholders.

Thus, the candidates elected after having been proposed by the company council are not employee representatives and differ therefore from most of the other systems of board-level participation in Europe, where employees directly or indirectly elect a certain number of board members. As all the board members are elected upon the company council's proposition and accepted by the majority in the shareholders' meeting, the Dutch model tends to avoid conflicts within the supervisory board resulting from the one-sided pursuit of employees' interests by their representatives. Consequently, board-level representation and trade union activity are separated from each other (see *infra* 5.a). The Dutch model therefore relies much more on the idea of cooperation in the company than, for example, the German model.

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[27] Cf. Article 2:153(2) and 2:263(2) Civil Code (*Burgerlijk Wetboek*).

[28] In order to facilitate the selection process for company councils and supervisory boards of companies covered by the *Structuurregeling*, the Dutch social partners have established a register with persons who are susceptible to become board members (*Nationaal Register voor stimulerend toezicht*): see <http://www.nationaalregister.nl/>.

[29] The Company Chamber (*ondernemingskamer van het gerechtshof te Amsterdam*) is part of the Court of Amsterdam and has judicial functions in the field of corporate law.

3. The UK as an example of a country resisting participation in boards

The UK probably is one of the best examples of a European country that rejects the idea of employee board-level participation. As a matter of fact, the institutionalization of board-level representation by one-third was envisaged in the 1970s. For this purpose, the government established a commission that rendered its report in 1977 (Bullock report).[30] Moreover, it established, during the 1970s, employee representation on the board of the British Steel Corporation (which gave the unions a right to nominate a number of worker directors to the board of directors and which existed for only a few years).[31] The British Post Office also introduced employee representation at board level.[32] Both companies were under the dominant influence of the then government.

It is interesting to note that these experiments failed and that the UK has never established a system of employee involvement at board level, even though the Bullock report (1977) recommended the creation of an employee representation of one-third in the board of directors of companies employing more than 2,000 employees.[33] The main reasons for such reticence, or even resistance, towards employee board-level participation have been the employers' reluctance to share their management power with employee representatives and a widespread fear (also on the employees' part) that employee involvement in boards may subordinate employee representatives to the company interest and, by this, restrain them from representing the employees' particular interests in boards: hence, the objection has been that involvement in boards may expose employee representatives to a "conflict of duties", thereby diminishing solidarity among employees and undermining the unions' collective bargaining power.[34] Thus, industrial relations in the UK essentially relies on collective bargaining and the idea of countervailing powers in the labour markets, but not on the idea of a cooperation of unions and management within the company. Another reason for the failure of board-level employee participation in the UK was the coming to power of the Conservative Party under Margret Thatcher in 1979, who were hostile towards the idea of incorporating the employee voice into the company. However, it is interesting

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[30] See the Report of the Committee of Inquiry on Industrial Democracy, London 1977 ("Bullock report"); the Trade Union Congress (TUC) also favoured, at that time, the establishment of board-level representation under the label of "industrial democracy"; cf. *TUC*, Industrial Democracy: A Statement of Policy, 1974.

[31] See also *Bernd Atenstaedt*, Mitbestimmung der Arbeitnehmer im Board britischer Kapitalgesellschaften, 1987.

[32] For an assessment of these worker or employee directors, see *Eric Batstone/Anthony Ferner/Michael Terry*, Unions on the Board: An Experiment in Industrial Democracy, 1983. See also *Atenstaedt* (fn. 31).

[33] Cf. Report of the Committee of Inquiry on Industrial Democracy (fn. 30) 92, 128 et seq.

[34] In this sense, cf. in particular *Kahn-Freund* ILJ 6 (1977), 65 (77 et seq.).

to note that in recent times the question of board-level employee participation is being resurrected as the British Trade Union Congress (TUC) has again placed it on its political agenda.[35]

4. The embedding in different corporate governance structures

Employee participation in boards is embedded in the structures of corporate law. Its concrete form and impact therefore varies according to the corporate governance structure in which it is integrated. Corporate governance may differ from country to country. In order to avoid getting lost in different national corporate governance systems, it seems sensible to generalize in the present context and to distinguish between systems that integrate employee involvement in two-tier board structures and those embedding the employee voice in a one-tier board structure.

a) Board-level employee participation in two-tier board structures

The ideal example of the embedding of board-level representation in a two-tier board structure is probably the German *Mitbestimmung* that institutionalizes the employee voice in the supervisory board (*Aufsichtsrat*). The Austrian and the Dutch models are also integrated in a dualistic board structure and take place in the supervisory board.[36] Other national systems allow both board structures, the one and two-tier systems, and leave it to contractual freedom to make the choice between the two corporate governance models.[37]

Content, as well as extent, of employee influence in a two-tier board structure essentially depends on the competences the supervisory board has in a given (national) corporate governance system. A few remarks on the German example may illustrate the functions of supervisory boards. As the name indicates, the supervisory board shall control the board of directors.[38] This control is realized by the board of directors' reporting duties vis-à-vis the supervisory board, and also by the inspection of books and other company documents by the supervisory board.[39] Additionally, some business affairs that are determined by the articles of the company or by the supervisory board's by-laws require the approval of the supervisory board (preventive

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[35] See *TUC*, Workers on board: The case for workers' voice in corporate governance, September 2013, available at: <https://www.tuc.org.uk/sites/default/files/Workers_on_board_0.pdf>, requiring a mandatory system for the representation of workers on company boards.

[36] For the Dutch model cf. supra 2. b); for the Austrian system see § 110 of the Works Constitution Act (*Arbeitsverfassungsgesetz*).

[37] E.g. France (Article 225-57 et seq. Commercial Code) and Luxembourg (Article 60bis-1 et seq. Act on commercial corporations [*Loi concernant les sociétés commerciales*]).

[38] Cf. § 111(1) German Stock Corporation Act (*Aktiengesetz – AktG*).

[39] Cf. § 111(2) *AktG*.

control):[40] in the event that the supervisory board refuses its approval, the board of directors may invoke a shareholders' meeting that may overrule the supervisory board's refusal (this requires majority of at least three-quarters of the votes). Moreover, the supervisory board is authorized to convene a shareholders' meeting if this the company interest requires this.[41] Regarding the company's financial reporting, the supervisory board examines the annual accounts as well as the Management Discussion and Analysis (MD&A).[42] And, finally, the supervisory board commissions the auditor, elected by the shareholders' meeting, to carry out the audit.[43] Beyond these rights, the supervisory board shall appoint the members of the board of directors and is entitled to revoke their appointment (but only for a substantial reason [*wichtiger Grund*]).[44] This brief overview of the German system shows that the supervisory board performs an important role in the company's management even though it does not conduct the day-to-day business of the company. Hence, employee representatives on supervisory boards may play an important role.

However, this employee influence may be reduced by the supervisory board's internal organization. In practice, the boards are normally subdivided into committees[45] in which employees are not represented or are underrepresented in relation to the statutory percentage of seats they have in the supervisory board.[46] This is not only the case for Germany where the courts have accepted the complete exclusion of employee representatives from board committees as long as there are substantive reasons justifying that employees have no representative within a board committee; in case that such

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[40] Cf. § 111(4) *AktG*. According to 3.3 of the German Corporate Governance Code, these business affairs shall refer to transactions of fundamental importance and shall "include decisions or measures which fundamentally change the asset, financial or earnings situations of the enterprise."

[41] Cf. § 111(3) *AktG*.

[42] Cf. § 170 and 171 *AktG*.

[43] Cf. § 111(2)(iii) *AktG*.

[44] Cf. § 84(1) and (3) *AktG*.

[45] Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC, [2005] OJ L 52/51) even recommends the creation, in listed companies, of a Nomination Committee, a Remuneration Committee and an Audit Committee.

[46] An exception is provided by Article 95(1) Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and investment firms etc. ([2013] OJ L 176/338) for the financial sector. According to this provision, financial institutions that are significant in terms of their size, their internal organization and the nature, scope and the complexity of their activities must establish a remuneration committee within its board of directors or its supervisory board. This committee shall include one or more employee representatives if employee representation on the management body is provided for by national law; cf. Article 95(2)(iii) Directive 2013/36/EU.

a substantive reason is missing, a complete exclusion of employee representatives is not in line with the purpose of employee participation law. [47] But also the national laws of other EU Member States such as France and Luxembourg do not require an employee representation within board committees.[48] Through this widespread corporate practice, employees may be excluded from the preparation of the board's important decisions and may suffer an information deficit in their decision-making. This may considerably affect the efficacy of employee participation in supervisory boards.

The implementation of employee involvement in supervisory boards does not prevent employees from having an influence on the composition and activity of the board of directors. In Germany, for instance, boards of directors submitted to the 1951 Act on Co-Determination in the mining and steel sector shall have a works director (*Arbeitsdirektor*) who cannot be elected against the votes of the majority of the employees' representatives in the supervisory board in the supervisory board and whose main function is to deal with the human resources management of the company.[49] Also the German Act on Co-Determination of 1976 requires that a works director be appointed in the board of directors of every co-determined corporation.[50] But contrary to the 1951 Act, the appointment of a works director does not require the approval of the employees' representatives. As far as can be seen, other national legal systems have not extended employee participation in the supervisory boards to the boards of directors.

b) Board-level employee involvement in one-tier board structures

In one-tier board structures employee participation is implemented in the board of directors. In many Member States this structure is the only existing legal model[51] or is at least the predominant in practice.[52] The national systems vary considerably. The French public limited company's structure is traditionally highly centralized in the hands of a *Président-Directeur-Général* (PDG) whose dominant influence on decision-making in the board may considerably

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[47] Cf. *Bundesgerichtshof* (BGH) [Federal Supreme Court] 17.5.1993 – II ZR 89/92, BGHZ 122, 342, 355 et seq.; see also *BGH* 25.2.1982 – II ZR 102/81, BGHZ 83, 144 et seq.

[48] For an analysis of the French practice, see *Bénedicte Bertin-Mourot/Marc Lapôtre* (Observatoire des dirigeants LSCI – CNRS), Gouvernement d'entreprise: fonctionnement des organes de contrôle et rôle des représentants des salariés – Rapport d'étude, Paris 2003, 52 et seq., who differentiate employee representation in board committees according to different types of committees.

[49] Cf. § 13 of the 1951 Act on the Co-Determination in the mining and steel industry (*Montan-Mitbestimmungsgesetz*).

[50] Cf. § 33 Act on Co-Determination (*Mitbestimmungsgesetz*).

[51] This is e.g. the case for the UK: cf. *Paul Davies*, in Laurence Gower/Paul Davies, Principles of Modern Company Law, 8th ed. 2008, Chapter 14.

[52] E.g. in France and Luxembourg.

limit the role of the other directors and, consequently, the employee voice in the board. Despite these differences, employee participation in one-tier board structures seems to give employee representatives a more powerful position than in a dualistic company structure: indeed, they are not only involved in the control of management in supervisory boards, but also participate in the management company's day-to-day business. Some authors therefore presume a surplus value that one-tier systems concede to employee representatives on boards compared to participation in the supervisory board.[53]

Despite these fears, it appears that employee representation in one-tier board systems is very close to employee representation in the two-tier system as it has been summarized above (*supra* a). In fact, there are mechanisms which limit the influence of employee representatives on the board of directors on the day-to-day business of the company. Thus, employee representatives normally only have the status of non-executive directors and therefore do not take the day-to-day decisions that executive directors do. Moreover, empirical evidence from some countries shows that employees are, as in the case of two-tier board structures, not represented or under-represented in the board committees.[54] In practice, employee participation in one-tier board structures therefore often differs in an insignificant way from employee representation in supervisory boards as in the German system. As the effects of the one-tier and two-tier board structures are increasingly converging,[55] employee participation in one-tier and two-tier board structures also seems to be on the way to converge.

5. The embedding in different national industrial relations systems

The effects of employee participation in boards also depends on the national industrial relations setting in which it is integrated. As much as the national landscape of collective labour relations differs considerably from one country to the other, the concrete role and weight of board-level employee representation may also differ considerably according to the relationships between employee representatives and representative bodies of other levels. Two of these interactions with other institutions of collective labour law merit special attention: the relationship between employee participation in boards and trade unions on the one hand, and the interaction between employee representatives

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[53] For the German context see e.g. *Martin Henssler*, Unternehmerische Mitbestimmung in der Societas Europaea – Neue Denkanstöße für die Corporate-Governance-Diskussion, in FS Peter Ulmer, 2003, 193 (201), and *Roland Wolf*, Zukunft der Mitbestimmung – eine Skizze, in Arbeitsrecht im sozialen Dialog, FS Wißmann, 2005, 489 (501).

[54] For the French and Luxembourg examples cf. *Seifert* (fn. 15).

[55] See *Peter Böckli*, Konvergenz: Annäherung des monistischen und des dualistischen Führungs- und Aufsichtssystems, in Peter Hommelhoff/Klaus J. Hopt/Axel v. Werder, Handbuch Corporate Governance, 2nd ed. 2009, 255 (267 et seq.) with further references.

on boards and other elected employee representatives within the company such as works councils or joint committees on the other.

a) Interaction with trade unions

Employee participation in boards gives employees an additional channel to defend their interests, beside freedom of association and collective bargaining. The interactions between these two levels of collective voice are very complex. An integration of unions into the boards may diminish solidarity among employees and by this may affect the collective bargaining system. But, from the company's perspective, this may also lead to serious conflicts of interest. As a result of these frictions between both levels of employee involvement, every system of employee participation must determine the relationship between unions and employee participation in boards.

aa) The risk of conflicts of interest

In a number of national systems, trade unions are integrated into employee board-level representation. In the Swedish system, for instance, the unions represented in the company even have the right to appoint the employees' representatives on the board. In this model, board-level employee representation is conceived as a tool in the hands of unions to control management. At first sight, this system appears to lack legitimacy given the fact that not all employees are unionized in Sweden. But, because union density in Sweden amounts to 80%, Swedish unions are almost a closed shop. Also, in other national systems, trade unions are integrated into the boards (although to a lesser extent). Under the German Act on Co-determination of 1976, for instance, unions represented in the company are entitled to propose a certain number of seats of the employees' bench union representatives for election by the whole workforce;[56] in practice, these union representatives often are union officials or, for large companies such as Siemens or Volkswagen, even members of the unions' national board. In the steel industry in Luxembourg, the most representative unions even have the right to appoint three of the employee representatives on the board:[57] the provision goes back to the times of ARBED.[58]

It is readily apparent that this linkage between unions and employee representation in the company boards may create conflicts of interest. This is clearly the case when a union represented in the board goes on strike against the company. From a corporate law point of view, all members of a board shall pursue the company interest, which implies the duty to avert damage to the company. On the other hand, the right to strike, as a key element of free-

[56] Cf. § 7(2) Act on Co-Determination (*Mitbestimmungsgesetz*).
[57] Cf. Article L. 426-5 Labour Code.
[58] Aciéries Réunies de Burbach, Esch et Dudelange.

dom of association, is constitutionally guaranteed in most of the EU Member States and by Article 11 of the European Convention on Human Rights.[59] A famous German case may illustrate the problem. The president of the services' sector union ver.di, Frank Bsirske, was, at the same time, vice-chair of the supervisory board of *Lufthansa AG*. In 2003, the union organized a strike against the owner of Frankfurt International Airport (*Fraport AG*) which had the effect that many Lufthansa flights had to be cancelled. Although *Lufthansa* was not the direct addressee of the strike, the work stoppage caused considerable damage to the company. The case did not go to the courts. The legal commentary remains divided on whether the behaviour of Bsirske was in breach of his loyalty duty vis-à-vis *Lufthansa*.[60] The only thing that is agreed is that union officials who are board members in companies also have the right to strike. However, whether the right to strike prevails even when a union official organizes the strike against the company in whose board he is employee representative is still controversial. Although this case is from the German context, each national system of employee representation on boards, with respect to integrating union officials, needs to find a balance between freedom of association, particularly the right to strike, and the company interest.

bb) Exclusion of unions from board-level participation

In other national models, trade unions are not integrated into the boards. One probable reason is to avoid the above-mentioned conflicts of interest. Only two examples will suffice in this context.

The Dutch model (see *supra* 2.b) excludes conflicts between trade unions and the company interest *a priori* by preventing employees and/or union officials from sitting on the company's board.[61] Consequently, employees have no representatives on supervisory boards *stricto sensu*. A conflict between board-level representation and the right to strike cannot arise in this context. Collective bargaining and co-determination are strictly separated.

Another example of such a reticence vis-à-vis integration of the unions is the French model. The French legislature on board-level representation explicitly bars employees' representatives from, at same time, being union delegates (*délégués syndicaux*), members of the company committee (*comité d'entreprise*) or personnel delegates (*délégués du personnel*).[62] In the event that

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[59] See *European Court of Human Rights* (ECtHR) 21.4.2009 – 68959/01 – Enerji Yapi-Yol Sen ./. Turkey.

[60] For a more detailed analysis of this case, see *Peter Hanau/Ulrich Wackerbarth*, Unternehmensmitbestimmung und Koalitionsfreiheit, 2004.

[61] Cf. Article 2:160 and 2:270 Dutch Civil Code (*Burgerlijk Wetboek*).

[62] Article L. 225-30 of the French Commercial Code for board-level representation in the private sector and Article 23(1) of the Act on the democratization of the public sector (*Loi sur la democratization du secteur public*) for employee participation in the public sector.

an employees' representative fulfils one of these mandates at the moment of his election, he shall step down, otherwise his membership of the board of directors or the supervisory board ends automatically.[63] This incompatibility rule is not undisputed since it, by disconnecting different levels of employee representation, considerably limits the possibility of employee representatives in boards defending employees' interests in the company.[64] Thus, the countervailing power of trade unions in the company is disconnected from participation in the management. It must be doubted, however, whether this aim really is reached. In practice, empirical evidence shows that employee representatives on boards are often unionized and have been union delegates, personnel delegates or members of the company committee before.[65] Thus, the loss of their representative mandates often will not have the effect that they do not pursue union interests or the interests of representative bodies such as the personnel delegates in the co-determined supervisory board or board of directors.

b) Interaction with other employee representatives

Employee participation in boards may also interact with other employee representative bodies such as works councils, personnel delegates or joint committees. In some countries (for example, Germany and Luxembourg), employee representatives are often board members as well as members of a works council.[66] In Austria, the works council even sends some of its members to the supervisory board.[67] This accumulation of representation mandates allows employee representatives to consolidate and add coherence to their activities on the different levels of representation. Furthermore, in the event that there is no accumulation of mandates, the exchange of information between employee board members and other employee representatives may be useful for both sides in order to better coordinate activities and make employee representation more effective. However, such information channels on the employees' side may come into conflict with the company's interest in confidentiality.

The exchange of information between employee representatives on the board and other employee representative bodies has played a significant role in German law. The following observations therefore will be limited to the

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[63] Cf. Article L. 225-30 of the Commercial Code and Article 23 of the Act on the democratization of the public sector.

[64] For a critical view on this provision, see *Bernard Saintourens*, Revue des Sociétés 2006, 73 et seq., and *Quentin Urban*, Revue de droit du travail 2013, 689 et seq.

[65] See *Bertin-Mourot/Lapôtre* (fn. 48) 38 et seq.

[66] For the case of the German Mitbestimmung cf. *Kurt Biedenkopf/Wolfgang Streeck/Hellmut Wißmann*, Bericht der wissenschaftlichen Mitglieder der Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung, 2006, 27.

[67] Cf. § 110 Austrian Works Constitution Act (*Arbeitsverfassungsgesetz*).

German example, in particular to the relationship between employee representatives on supervisory boards and works councils. § 79(1)(iv) of the German Works Constitution Act (*Betriebsverfassungsgesetz*) explicitly authorizes works council members to disclose confidential information to the employee representatives on the supervisory board. In this way, communication between employee representatives on plant and company level is authorized. However, employee representatives on supervisory boards shall respect their confidentiality duty[68] in communications with works councils or other employee representatives: the Federal Labour Court[69] does not recognize an exception in this case, even though works council members are also subject to a specific confidentiality duty.[70] As a result, employee representatives on boards are, in practice, not authorized to communicate with other employee representatives or employees in respect of their work in the supervisory board. This may lead to a disconnection between the different levels of employee representation and may hinder a coherent and effective defence of employee interests in the company.

Additionally, it should be mentioned that this question may also have a capital markets law dimension in respect of listed companies, as the disclosure of information on board meetings to other elected employee representatives such as works councils or trade union representatives may come into conflict with the prohibition of insider dealing under Article 3(a) of Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation.[71] Even in the event that the national law of a Member State allows such an information disclosure (in Denmark, for example), the disclosure of inside information to any third party is forbidden, "unless such disclosure is made in the normal course of the exercise of the employment, profession or duties" by the person in question. The Grand Chamber of the ECJ has ruled in its famous *Grøngaard*[72] judgment that Article 3(a) of Directive 2003/6/EC does not exclude *per se* the disclosure of inside information to other employee representatives. In this case, however, the Member State has to ensure that "there is a close link between the disclosure and the exercise of the employment, profession or duties, and that disclosure is strictly necessary for the exercise of that employment, profession or duties."

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[68] Cf. §§ 116, 93(1) *AktG*.

[69] Cf. *Bundesarbeitsgericht (BAG)* 23.10.2008 – 2 ABR 59/07, NZA 2009, 855 et seq.

[70] Cf. § 79(3) of the German Works Constitution Act (*Betriebsverfassungsgesetz*).

[71] [2003] OJ L 96/16.

[72] *European Court of Justice* (ECJ) (Grand Chamber) 22.11.2005 – C-384/02 – Knud Grøngaard and Allan Bang.

III. Board-level employee participation in the European internal market

With the establishment of the European internal market, the legal environment for employee participation in boards has changed considerably. The European integration process brings the various national regimes of employee participation several challenges. On the one hand, the internal market gives companies exit options allowing to them to circumvent employee participation according to the laws of the Member States or at least to modify them as required (1.). On the other hand, the trans-nationalization of companies falling within the scope of a national employee participation regime excludes the workforces in foreign subsidiaries and challenges the legitimacy of employee participation (2.).

1. Exit options

a) The case of the European Company (SE)

One option for leaving a national employee participation regime is through establishing a European Company (Societas Europaea – SE).[73] The SE is a corporation under European law and is therefore recognized as such in each EU Member State. The legal framework for the SE is provided by Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company[74] and by Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.[75]

By and large, Directive 2001/86/EC transfers the EWC negotiation model for the establishment of a European Works Council under Directive 2009/38/EC[76] to employee involvement in the SE. Thus, the employees work-

[73] The same applies to the European Cooperative Society (Societas Cooperativa Europaea – SCE) under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), [2003] OJ L 207/1, and Council Directive 2003/72/EC of 22 July 2003, [2003] OJ L 207/25, supplementing the Statute for a European Cooperative Society with regard to the involvement of employees. However, only a few SCE have been established, for none of them an agreement on employee participation has been concluded; the SCE as a legal form of EU law has therefore only little relevance. Cf. European Commission, Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: the application of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society, COM(2002) 72 final, 15.

[74] [2001] OJ L 294/1.

[75] [2001] OJ L 294/22.

[76] Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, [2009] OJ L 122/28.

ing in the SE shall form, much like the model of the EWC-Directive, a Special Negotiating Body (SNB) that negotiates with the management or administrative organs of the participating companies for an agreement on the involvement of employees.[77] These negotiations cover the establishment of a transnational information and consultation procedure, as well as board-level participation. The management or administrative bodies of the participating companies have a strong interest in negotiating in good faith with the SNB since the SE cannot be registered unless negotiations have been conducted in accordance with the provisions of Directive 2001/86/EC.[78]

Three different outcomes to these negotiations are possible. In the event that the SNB takes a decision (with a qualified majority vote of two-thirds of its members, who represent at least two-thirds of the employees) not to open negotiations with management or to terminate negotiations already opened, the SE will have no cross-border employee representation at all.[79] Secondly, the negotiations may have been successful and the parties can agree upon an information and consultation procedure as well as on a system of board-level employee participation. In this case, the parties are in principle free to design the information and consultation body and the degree to which employees shall be involved in the decision-making of the company's board. If the parties want to reduce the level of board-level participation that exists in at least one of the companies participating in the establishment of the European Company, the decision of the SNB shall be taken with a qualified majority vote of two-thirds of its members representing at least two-thirds of the employees.[80]

The third possible outcome is that the negotiations have failed over a period of six months.[81] In this latter case, Directive 2001/86/EC provides for the application of a set of standard reference rules. These subsidiary rules provide information and consultation rights to a specific employee representative

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For an overview of the Directive cf. *Catherine Barnard*, EU Employment Law, 4th ed. 2012, 663 et seq.

[77] For details cf. Article 3 Directive 2001/86/EC.

[78] Cf. Article 12(2) Regulation 2157/2001/EC.

[79] Cf. Article 3(6)(i) and (ii) Directive 2001/86/EC. In this case, the SNB shall be reconvened on the written request of at least 10% of the employees of the SE, its subsidiaries and establishments, or their representatives, at the earliest two years after the above-mentioned decision, unless the parties agree to negotiations being re-opened sooner. If the SNB decides to re-open negotiations with the management but no agreement is reached as a result of those negotiations, the subsidiary provisions do not apply (cf. Article 3(6)(v) Directive 2001/86/EC).

[80] Cf. Article 3(4) (iii) Directive 2001/86/EC.

[81] According to Article 5 Directive 2001/86/EC, the negotiations may continue for six months unless the parties decide, by joint agreement, to extend negotiations beyond that up to a total of one year from the establishment of the SNB.

body, replacing the function of an EWC.[82] The conditions for the application of the subsidiary rules on board-level employee representation depend on the way in which the SE is set up.[83] In the case of an SE established by transformation, the subsidiary rules only apply if the company transformed into an SE has been covered by a national system of board-level participation. As to SEs established by merger, they only apply if one or more forms of employee participation applied in one or more of the participating companies covering at least 25% of the total number of employees in all the participating companies; in case that the existing employee participation system(s) covered less than 25% of the total number of employees in all the participating companies, the SNB may decide that the subsidiary rules shall apply. As to SEs established by setting up a holding company or establishing a subsidiary, the subsidiary rules shall apply if one or more forms of participation applied in one or more of the participating companies covering at least 50% of the total number of employees in all the participating companies; in case that the quorum of 50% is not fulfilled, the SNB may take a decision on the application of the subsidiary rules.

As to the board level, the standard rules only require the establishment of employee representation in accordance with the so-called "before-and-after" principle. Thus, the standard rules essentially aim at safeguarding a board-level participation standard which has existed in at least one of the companies that established the SE. This means that in the case of an SE established by transformation, all aspects of board-level participation shall continue to apply to the SE. In all other cases of the establishment of an SE (through a merger, for example), "the employees of the SE […] shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the supervisory body of the SE equal to the highest proportion in force in the participating companies concerned before registration of the SE." Consequently, the standard rules do not provide compulsory employee board-level representation in the SE if none of the participating companies was governed by participation rules before the SE's registration. As a result, Directive 2001/86/EC only aims at maintaining the *droits acquis* in the field of employee participation.

By 1 October 2014, 2,234 SEs had been registered,[84] from which only 316 corporations were actively operating. The vast majority of SEs are so-

[82] The standard rules concerning information and consultation resemble therefore those of Directive 2009/38/EC on the Establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

[83] Cf. Article 7(2) Directive 2001/86/EC.

[84] Most operating SEs are registered in Germany, whereas in the Czech Republic many so-called "shelf-companies", not actively doing business but on sale for other companies which might wish to use them, have been established. For German companies under a statutory board-level participation regime, the establishment of an SE is a way to move

called "shelf companies", employing less than five employees or nobody. Of the operating 316 SEs, 135 had their registered office in Germany: well-known companies such as the reinsurer *Allianz*, the chemical companies *BASF* and *Fresenius*, the construction company *Bilfinger* and the car manufacturer *Porsche* are organized as SEs. In relation to the content of these agreements, some trends can be seen.[85] In general, the existing agreements do not reduce the level of employment participation. Thus, the employees have maintained the percentage of seats on the board they had before the establishment of the SE in one or more participating companies. However, often, the number of seats on the board has been reduced:[86] this may have the effect that unions lose their representation in the board,[87] or that minorities on the employees' bench in the board such as the executive staff are no longer represented.[88] In some cases, the establishment of a SE has been used to "freeze" the *status quo ante* in terms of employee representation on the board in order to prevent the situation whereby a company that was not (yet) covered by a regime of board-level representation grows into a statutory regime of employee participation in the boards.[89]

In addition to these tendencies, there is however a more fundamental change linked with these SE-agreements. As a result of their conclusion, employee representation at board-level passes on from a statutory scheme under the law of a Member State to a negotiated issue: hence, it is no longer a part of an *ordre public* or public policy under the national law of a Member State, but is susceptible to future change, possibly to the detriment of employees.

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from a statutory scheme to a negotiated employee regime (which is much more flexible and susceptible to further [contractual] modifications by the parties).

[85] The SE Agreements on employee involvement and further information on them are available at the website of the European Trade Union Institute (ETUI) at <http://de.worker-participation.eu/>.

[86] E.g. § 7(1) of the German Act on Co-determination (*Mitbestimmungsgesetz*) provides a mandatory size for co-determined supervisory boards. Thus, the establishment of a SE in the cases of Allianz, BASF and Bilfinger has been used to reduce the size of the supervisory board from 20 to 12 members; cf. *Keller/Werner*, WSI-Mitteilungen 2009, 416 (421).

[87] For this trend in SEs with their registered office in Germany see *Keller/Werner*, WSI-Mitteilungen 2009, 416 (421). According to § 7(2) *Mitbestimmungsgesetz*, a certain number of employee representatives shall be proposed by the union(s) represented in the company.

[88] According to § 15(2), second subparagraph *Mitbestimmungsgesetz*, at least one seat of the employees' bench in the supervisory board is reserved for the executive staff.

[89] For concrete examples, see *Keller/Werner*, WSI-Mitteilungen 2009, 416 (421 et seq.).

b) Cross-border mergers

Another option for companies wishing to leave a national employee participation regime is a cross-border merger. In practice, a company may evade a statutory board-level representation regime by merging with a corporation governed by the law of another Member State which does not have a board-level employee representation system (e.g. a foreign subsidiary in a group of companies). This fear is also the reason why the adoption of a European Directive on cross-border mergers has been blocked (in particular by Germany) since the 1970s.[90] However, Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees changed the situation considerably since the "negotiation model" provided by the Directive smoothed the way to the adoption of Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies.[91]

The point of departure of Directive 2005/56/EC is, however, the principle that the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation in the Member State in which it has its registered office.[92] Under certain conditions, set out in Article 16(2) Directive 2005/56/EC, the model of negotiated board-level participation applies in its essential traits.[93] Additionally, in the event of a cross-border merger of corporations, an SNB representing all employees of the merging companies shall be set up and will seek to negotiate an agreement with the management or administrative organs of the participating companies. However, according to Article 16(2) Directive 2005/56/EC, there is only a duty to negotiate an agreement with the employees in three cases:

(i) At least one of the merging companies *has* an average number *of 500 employees or more* and is operating under an employee participation system; or
(ii) the national law applicable to the company resulting from the cross-border merger does not provide for at least the same level of employee participation as operated in the relevant merging companies; or
(iii) the national law applicable to the company resulting from the cross-border merger does not provide for employees of establishments of the

[90] For a more in-depth analysis of the debates on a cross-border merger Directive, see *Adriaan Dorresteijn/Tiago Monteiro/Christoph Teichmann/Erik Werlauff*, European Corporate Law, 2nd ed. 2009, 240 et seq. Freedom of establishment under Article 49 TFEU requires that cross-border mergers involving corporations registered in different Member States are possible: cf. *ECJ* 13.12.2005 – C-411/03 paras. 11 et seq. – SEVIC Systems AG.

[91] [2005] OJ L 310/1.

[92] Cf. Article 16(1) Directive 2005/56/EC.

[93] For an overview cf. *Achim Seifert*, L'implication des travailleurs dans une fusion transfrontalière, in Pierre-Henri Conac, Fusions transfrontalières de sociétés – droit luxembourgeois et droit comparé, 2011, 121 et seq. with further references.

> company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.[94]

As to the negotiation procedure, Article 16 of Directive 2005/56/EC essentially refers to the provisions of Directive 2001/86/EC.[95] There are, however, differences between the two Directives: in fact, the subsidiary rules only apply when at least 33% of the employees of the merging companies are covered by one or more forms of participation covering at least 33% of the total number of employees in all the participating companies, whereas Article 7(2)(b) of Directive 2001/86/EG provides for the application of the subsidiary rules when 2% of the whole workforce of the participating companies are already covered by one or more forms of employee participation.[96] Thus, the application of the subsidiary rules in the case of cross-border mergers is more limited than under Directive 2001/86/EC.

Undoubtedly cross-border mergers under Directive 2005/56/EC are a frequent phenomenon. Nonetheless, cases in which the procedure in Article 16 of Directive 2005/56/EC has been used are rather rare. However, the number of cases is growing.[97] Between 2007 and 2012, 22 of the 381 cross-border mergers in which at least one corporation with its registered office in Germany has participated have had an impact on systems of board-level representation that existed in the participating companies.[98] The first case in this respect has been the cross-border merger of the German reinsurer, Münchener Rückversicherung Aktiengesellschaft, with an Italian subsidiary.[99] Another recent example has been the cross-border merger of UniCredit in 2010: through this transaction, the Austrian subsidiary UniCredit CAIB was merged with the German subsidiary Hypovereinsbank.[100] In all these agreements, the pre-

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[94] See Article 16(2) Directive 2005/56/EC.

[95] See Article 16(3) Directive 2005/56/EC.

[96] See Article 16(3)(d) Directive 2005/56/EC.

[97] Cf. the empirical research carried out by *Walter Bayer*, Grenzüberschreitende Verschmelzungen im Zeitraum 2007 bis 2012, Gutachten erstellt im Auftrag der Hans-Böckler-Stiftung, 2013, according to which only 22 out of 381 cross-border mergers with German corporations in the period between 2007 and 2012 (i.e. 6%) had an impact on the existing board-level representation regime.

[98] Cf. *Roland Köstler/Lasse Pütz*, Neueste Fakten zur SE und zur grenzüberschreitenden Verschmelzung – Mitbestimmte Unternehmen sind zufrieden, Die Aktiengesellschaft (AG) 2013, R 180 et seq.; for an empirical research on cross-border mergers see *Bayer* (fn. 97).

[99] Cf. *Vereinbarung über die Mitbestimmung der Arbeitnehmer in der Münchener Rückversicherungs-Gesellschaft Aktiengesellschaft*.

[100] For an analysis of this case, see *Ingmar Höhmann*, Fusion mit Hintertür, Die Mitbestimmung 10/2011, 26 et seq.

existing standard of board-level employee participation has been maintained. However, they have reduced the number of board seats. Moreover, the agreements have changed the legal nature of employee involvement in the boards: much like the SE-Agreements, employee involvement is no longer a part of a statutory *ordre public* but is susceptible to re-negotiation in the future. Despite this, cross-border mergers have not become a relevant legal tool for undermining employee involvement in the boards of the participating companies.

c) The new understanding of freedom of establishment

A third option for circumventing employee representation on boards under national law has been created by the ECJ in its recent case law on freedom of establishment under Article 49 TFEU. In its seminal decisions in the cases of *Centros*,[101] *Überseering*[102] and *Inspire Art*[103], the Court has recognized the principle of mutual recognition also in the scope of freedom of establishment.[104] Thus, the new case law of the ECJ on Article 49 TFEU has effectuated a shift from the real seat theory to the incorporation theory. As a result, Member States shall fully recognize corporations that have been established in accordance with the rules of another Member State. This has considerably increased the mobility of companies that have been established under the law of one of the Member States. Thus, a limited company under English law or a French *société à responsabilité limitée* (*Sàrl*) may transfer its seat to the Federal Republic of Germany and will be treated as a *Gesellschaft mit beschränkter Haftung (GmbH)* under German law without losing its legal identity.

The potential impact on board-level employee participation of this new understanding of freedom of establishment is obvious. Indeed, the new ECJ case law opens the door for a circumvention of employee participation. German companies, for instance, may acquire the legal form of a corporation under the law of another Member State that does not provide a system of board-level employee participation and may thereafter transfer the corporation's registered office to Germany. In the event that the assets of a company bound to statutory employee participation regime are transferred to a corporation established under foreign law, the employees would lose their right

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[101] *ECJ* 9.3.1999 – C-212/97 – Centros Ltd ./. Erhvervs- og Selskabsstyrelsen.

[102] *ECJ* 5.11.2002 – C-208/00 – Überseering BV ./. Nordic Construction Company Baumanagement GmbH.

[103] *ECJ* 30.9.2003 – C-167/01 – Kamer van Koophandel en Fabrieken voor Amsterdam/ Inspire Art Ltd.

[104] For an assessment of this case law of the ECJ cf. *Dorresteijn/Monteiro/Teichmann/ Werlauff* (fn. 90) 34 et seq.; see also *Matthias Habersack/Dirk Verse*, Europäisches Gesellschaftsrecht, 4th ed. 2011, § 3 paras 12 et seq. with further references.

to participate at board level because the German legislation on board-level employee participation only applies to corporations established under German law.[105] The same problem arises when a company established under the law of another Member State dominates a company established in accordance with German law (to which a German board-level employee representation regime applies): in that event, the dominant company is not covered by German co-determination law since this only applies to companies organized in a legal form under German law.

It appears however that this exit option has not been used by companies in any significant way.[106] Nonetheless, there is an increasing number of examples of a bypassing of board-level representation regimes: according to empirical research conducted by the *Wirtschafts- und Sozialwissenschaftliche Institut* of the German Trade Union Federation (DGB), 43 companies used this strategy to bypass German board-level representation requirements.[107] This recent development has furthered a political debate in Germany on whether this option for circumventing the German board-level participation model should be limited by extending the German co-determination acts to corporations established under the law of other EU Member States and registered in Germany.[108] Draft resolutions of the Social-Democrat Party[109] and left wing LINKE,[110] asking the Federal Government to present a draft bill for an "extension act", could not, however, gain majority support in the German Parliament. Such an extension of statutory board-level representation to corporations established under foreign law would be in line with EU law, in particular with freedom of establishment under Article 49 TFEU.[111] Nonetheless, the German legislature has not pursued this option.[112] Hence, this exit option still exists and may be used by companies.

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[105] See *Wolfgang Koberski* in *Wlotzke/Wißmann/Koberski/Kleinsorge* (fn. 18) Mitbestimmungsgesetz § 1 paras. 16 et seq. with further references.

[106] For an empirical analysis cf. *Sebastian Sick/Lasse Pütz*, Der deutschen Unternehmensmitbestimmung entzogen: Die Zahl der Unternehmen mit ausländischer Rechtsform wächst, WSI-Mitteilungen 2011, 34 et seq.

[107] Cf. *Sick/Pütz*, WSI-Mitteilungen 2011, 34 et seq.

[108] For an in-depth analysis of the compatibility of an extension of German codetermination law to corporations under foreign law, see *Weiss/Seifert*, ZGR 2009, 542 et seq.

[109] Antrag der Fraktion der SPD „Demokratische Teilhabe von Belegschaften und ihren Vertretern an unternehmerischen Entscheidungen stärken", BT-Drs. 17/2122.

[110] Antrag der Fraktion DIE LINKE, „Unternehmensmitbestimmung lückenlos garantieren", BT-Drs. 17/1413.

[111] For a fuller analysis of this question, see *Weiss/Seifert*, ZGR 2009, 542 et seq. with further references.

[112] As far as can be seen, the question is not on the agenda of the German Federal Government: The "Coalition-Agreement" of December 2013, concluded between the Christian-Democrat and the Social-Democrat parties, does not consider the problem: cf. *SPD/CDU/*

2. *The growing legitimacy problem in transnational companies*

The internal market and the growing internationalization of the economy are increasingly challenging the legitimacy of board-level employee representation. As a matter of fact, the national systems of board-level representation only apply to the workforce employed in the respective country: employees of the same company or group of companies who are employed in foreign subsidiaries have therefore no right to vote for their representatives on boards and have consequently no representation in the co-determined supervisory board or board of directors. This lack of representation may have a significant impact, particularly in corporate restructuring processes:[113] as boards will often take a decision on the closure of production sites or their relocation to other countries, the national workforce may have a representational advantage over the employees of the foreign subsidiaries; they may seek to benefit from this situation by bargaining for less extensive or indeed no changes to their production sites (as opposed to those of the foreign subsidiary) during the course of a corporate restructuring process.

In rare cases, companies have solved this problem in a pragmatic way. In the case of *DaimlerChrysler*, for instance, the German metal-industry union (*IG-Metall*) renounced one of its seats on the supervisory board of the group parent company in favour of *United Auto Workers* (UAW), the US car manufacturers' union. In addition, the establishment of an SE, or the negotiation procedure under Article of Directive 2005/56/EC in the case of a cross-border merger, alleviates the legitimacy problem because the subsidiary rules of Directives 2001/86/EC and 2005/56/EC and the agreements between the SNB and the participating companies produce a trans-nationalization of the employees' bench in the boards.[114]

Since recently, this lack of legitimacy of employee participation in boards has been challenged as being in violation of EU law.[115] The fact that employees cannot exercise their right of free movement without losing their voting right to a co-determined board in their company would not be in line with the principle of free movement of workers under Article 45 TFEU. Workforces employed in a Member State other than that providing for board-level partici-

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CSU, Deutschlands Zukunft gestalten Koalitionsvertrag zwischen CDU, CSU und SPD. 18. Legislaturperiode, 2013.

[113] See e.g. *Friedrich Kübler*, Aufsichtsratsmitbestimmung im Gegenwind der Globalisierung, in The International Lawyer, FS Döser, 1999, 237 (240 et seq.).

[114] Cf. Part 3 of the Annex to Directive 2001/86/EC ("Standard rules for participation"), [2001] OJ L 294/30.

[115] Report of the Reflection Group on the Future of EU Company Law, 2011, 53 et seq. For the German context, see: *Clemens Latzel*, Gleichheit in der Unternehmensmitbestimmung, 2010, 160 et seq.; *Hans-Jürgen Hellwig/Caspar Behme*, Gemeinschaftsrechtliche Probleme der deutschen Unternehmensmitbestimmung, AG 2009, 261 et seq.

pation would be indirectly discriminated against on the basis of their nationality. Furthermore, the risk of losing their voting rights would restrict their right to free movement in an illegitimate way. It is, however, more than doubtful that this may be considered to be a breach of freedom of establishment since employee participation at board level does not hinder access to the labour markets of other Member States.[116] The inclusion of the workforces of foreign subsidiaries only can be realized by a harmonization of the national laws of the Member States.[117] Yet, as of now, there is no such harmonization project in the EU.

IV. Concluding remarks

Employee participation in the boards of large companies was developed in West Germany in the aftermath of World War II. The main idea of this form of employee representation (which is realized in law through corporate law) is to give employees the power to participate in the decision-making process of the company. Through this integration of employees into the management of the company, employee representation on boards serves at the same time as a tool for furthering the "social partnership" between labour and capital in the company. Unlike collective bargaining, board-level employee participation does not rely on a countervailing power but on a narrow cooperation between both sides in the management of the company.

Since the late 1960s, a number of other European countries have established a system of employee board-level representation, or at least have had a debate on whether it would be useful to establish such a system. The existing national models vary considerably according to national corporate governance systems and the industrial relations setting in which they are embedded. Despite the effort made to adopt a fifth Directive on corporate law providing for, *inter alia*, employee participation in boards, the EU has not been able to harmonize board-level employee representation. As a result, the adoption of the SE statute, as well as Directive 2005/56/EC on cross-border mergers of limited liability companies, was only possible through a paradigm shift from a uniform statutory model of employee board-level representation to negotiated employee participation. Even though the SE is increasingly used as a legal form for companies in the internal market, there has not been an escape from national employee board-level representation systems: in most cases, the existing participation level has been maintained although the parties have

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[116] For a fuller discussion of this argument, see *Rüdiger Krause*, Zur Bedeutung des Unionsrechts für die unternehmerische Mitbestimmung, AG 2012, 485 (489 et seq.) with further references.

[117] In this sense also *Krause*, AG 2012, 497.

modified the *status quo ante* here and there. The same applies to cross-border mergers.

In this legal context, it is interesting to note that the idea of employee participation in boards is experiencing something of a renaissance during the current economic and financial crisis in Europe. Indeed, some EU Member States have strengthened their board-level employee representation model or are re-approaching the idea of implementing such a system. In this vein, France has strengthened its board-level representation system for the private sector through an Act of 2013,[118] and Italy, traditionally rather hostile towards the idea of social partnership within the company, has adopted (in the frame of the *Fornero* Act of 28 June 2012) a provision which allows for the establishment of co-determined boards of directors private sector corporations.[119] Of course, it remains to be seen how far board-level employee representation is going to be recognized by unions and companies in these countries. Nonetheless, there is no doubt that the idea of employee representation within the management bodies of large companies has gained ground over the last years.

[118] For an overview of the reform realized by Article 9 de la *Loi n° 2013-504 relative à la sécurisation de l'emploi* (JORF 2013, 9958) see: *Gilles Auzero*, La représentation obligatoire des salariés dans les conseils d'administration et de surveillance, Droit social 2013, 740 et seq.; *Raymonde Vatinet*, Représentation des salariés dans les conseils d'administration ou de surveillance – Article 9 de la loi n° 2013-504 du 13 juin 2013, Revue des sociétés 2014, 75 et seq.; *Bernard Teyssié*, Loi n° 2013-504 du 14 juin 2013: vers un nouveau droit du travail?, La Semaine Juridique – Social (JCP S) 2013, 1257 et seq.

[119] Cf. Article 4 No 62 f) *Legge 28 giugno 2012 "Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita"* (G. U. 2012 n. 153). For a fuller analysis of the *legge Fornero* cf. *Marco Biasi*, Il nodo della partecipazione dei lavoratori in Italia: evoluzioni e prospettive nel confronto con il modello tedesco ed europeo, 2013, 220 et seq.

Employee Involvement at Board Level in China: The Present, the Problem and the Development

ZHANG Hui

I. Introduction

Employee involvement at board level is a very lively subject in China's academia. Democratic management by employees in China has a long tradition and has proved to be very successful. However, the coexistence of democratic management by employees and employee involvement at board level actually causes some problems. For example, it is surely a realistic and urgent problem as to how to coordinate the function of the trade union, the workers' congress, the shareholders' meeting, the management board and the supervisory board. This paper aims to provide some suggestions in its second part.

As is well known, employee involvement at board level was introduced to the Company Law of China more than 20 years ago. In this paper an overview of employee involvement at board level will be presented, with the focus on the changes in different versions of the Company Law of China.

Then an analysis and summary will be made with respect to the problems of the system itself and those that have appeared in practice. In the main part of the paper some suggestions will be given on improving employee involvement at board level in the Company Law.

In the concluding part, the paper raises an interesting subject, specifically the function of Company Law in protecting employee interests. Undoubtedly, it is a difficult issue as to how to define employee interests based on the concept of the company's interests and how to protect employees' interests through the system of directors' duty. All these need to be studied continuously.

This paper also analyses the history and the present state of the employee representative system and draws a comparison between them. Through comparison, we can find progress in legislation and understand the background of systemic change. The paper examines the problems of employee involvement on the board that have appeared in practice and provides suggestions for solving these problems.

II. Stakeholders and the legal basis of employee involvement at board level

The concept of stakeholders includes all groups or social interests that may be affected by a company or are related to the company. Some illustrative interests are related closely to the company, for example, the interests of employees, clients and suppliers are developed through contracts with the company. Therefore they are, in the first place, contractual interests which may be protected in labour law, contract law, consumer protection law, and so on. In this way, the company should shoulder the legal duty it owes to employees, clients and suppliers in accordance with these areas of legislation. Other interests, such as community interests and environmental interests, are not contractually binding on the company and are only loosely connected to the company. However, the company should also recognize some kind of legal duty in respect of these interests, such as protecting the environment and social stability. All legal interests should be protected: this is no more than common sense.

However, the concept of stakeholders brings protection of employees, clients and suppliers into the Company Law. Stakeholders should have a chance to be involved in corporate governance, especially taking part in the management board and supervisory board under the status of directors and supervisors.

Stakeholders are defined as a group and should be treated as a group, that is to say, a certain amount or proportion of stakeholder representatives should

be on the management board or supervisory board, rather than representatives of employees, clients, suppliers, the community, the environment, and so on. The spectrum of stakeholders can be extended infinitely, but they must be treated as one entirety when involved at board level. Therefore, we must elect the stakeholders' representatives when designing the mechanism of stakeholders, which, however, seems to be an impossible mission. On the one hand, the representative mechanism is based on the homogeneity of the interests or the group represented, while, on the other hand, stakeholder is a concept embodying various interests having different, even conflicting requirements. So the concept of stakeholders has unlimited uncertainty. Clearly, as a legal concept, it lacks certainty. Therefore, no matter how one designs and perfects the corporate governance structure, it is difficult to cater to the value orientation of all stakeholders. For example, it is the company instead of the stakeholder that aims at value maximization of the company itself, and thus it is impossible to realize all stakeholders' interests in that value maximization of the company is not equal to the value maximization of stakeholders.[1]

The heterogeneity of stakeholders makes it impossible for stakeholders as a group to be involved in corporate governance. However, it is possible for one non-shareholder group or for limited non-shareholder groups. China has a historical tradition and institutional heritage of employee involvement, with employees having a single identity and uniform interests. All these factors make employee involvement at board level a typical occurrence; this is the result of its operability in practice

III. Employee involvement in China: past and present

China has a long tradition of employee involvement. In the enterprise legislation era, employees were involved in the management of enterprises with the status of owner and through a workers' congress or trade union. This tradition has been extended from the enterprise legislation era to the modern company legislation era, but the nature and contents of employee involvement have changed with social development. In the company legislation era, although employee involvement through the workers' congress has been partially maintained, the main form of employee involvement has been transformed into placing a certain number or proportion of employee representatives on the management and supervisory boards. More details will be presented next.

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[1] 杨瑞龙/周业安[*Yang Ruilong/Zhou Ye'an*], 企业的利益相关者理论及其应用 [The Theory and Application of Stakeholders in Enterprises], 2000, 131.

1. Democratic management: past and present

In China's enterprise legislation era, employee involvement used the concept of democratic management. The workers' congress was the basic way for the enterprise to implement democratic management and for employees to exercise their power of democratic management. The 1988 Law of Industrial Enterprises Owned by the Whole People of the People's Republic of China illustrates the authority of the workers' congress, specifically:

(1) to hear and deliberate on the factory director's reports on the policy of operation, long-term and annual plans, programmes for capital construction and major technical transformation, plans for the training of staff and workers, programmes for the distribution and use of retained funds and programmes for contract and leasing systems of managerial responsibility, and to put forward opinions and suggestions;
(2) to examine and endorse or to reject the enterprise's programmes for wage adjustment, programmes for bonus distribution, measures for labour protection, measures for awards and penalties and other important rules and regulations;
(3) to deliberate and decide on programmes for use of the staff and workers' welfare fund, programmes for allocation of staff and workers' housing and other important matters concerning the well-being and benefits of the staff and workers;
(4) to evaluate and supervise the leading administrative cadres at various levels of the enterprise and put forward suggestions for rewarding or punishing them and for their appointment or removal; and
(5) to elect the factory director according to the decision of the competent department of the government and report to that department for approval.[2]

In China's enterprise legislation era, the enterprise was state-owned or collectively owned; there was no concept of the investor but only the concept of owner. The owner controlled the main power of the enterprise. The employee was the owner of the enterprise. Therefore, in the traditional enterprise, democratic management had the special function of filling the absence of investors in state-owned and collectively-owned enterprises, implying that employees managed enterprises under the status of 'prospective owners'.[3]

The concept of democratic management has been transplanted into modern company law. The 1993 Company Law of China stipulates that democratic management should be exercised through the workers' congress as well as other forms in state-owned companies, limited liability companies contribut-

[2] See Article 52 of 中华人民共和国全民所有制工业企业法 [Law of Industrial Enterprises Owned by the Whole People of the People's Republic of China] 1988.

[3] 叶林 [*Ye Lin*], 公司民主管理的法律解释 [The Legal Explanation of Company Democratic Management], 河北法学 [Hebei Academic Journal] (4/2010), 130.

ed to by two or more state-owned enterprises and other state-owned organizations according to the Constitution Law and relevant legislations. With the Company Law of 2005, democratic management has been extended to all companies.

However, the nature and contents of democratic management in the company legislation era has changed considerably in comparison with the enterprise legislation era. Firstly, the concept of owners has been replaced by the concept of investors. Corporate governance is designed with investors as the centre, not employees. Secondly, almost all the authority of the workers' congress in the 1988 Law of Industrial Enterprises Owned by the Whole People of the People's Republic of China has been transferred to the shareholders' general meeting, so that democratic management through the workers' congress has been limited to a very small scope, and its decision-making power of the workers' congress has been changed to providing opinions and suggestions.[4]

2. Employee involvement in the company legislation era

The Company Law promulgated by China in 1993 not only kept the traditional democratic management institutions such as the workers' union and workers' congress, but also established employee involvement on management and supervisory boards.

Employee representatives must be on the management board in China's state-owned companies and in limited liability companies contributed to by two or more state-owned enterprises or other state-owned organizations. The representatives are democratically elected by employees. However, the supervisory board of the company is composed of shareholders and employee representatives, the proportion of which is set in the charter of the company. Some small limited liability companies or those with few shareholders may not have a supervisory board: one or two supervisors are enough.

The amended Company Law of China of 2005 keeps the main part of employee involvement on the management and supervisory boards and makes some amendments and improvements. Other limited liability companies and companies limited by shares may arrange employee representatives on the management board. The proportion of employee representatives on the supervisory board should not be lower than one-third, while the company charter can set a specific rate above one-third. Employee representatives on the man-

[4] See Article 18 of 公司法 [Company Law] 2014: "The company should seek advice from the trade union and should seek advice and suggestions from the employees through the workers' congress or other forms when discussing and deciding upon important issues on the restructuring or operation of the company, or in formulating important rules and regulations".

agement board and supervisory board are elected by all employees through the workers' congress, the workers' meeting or in some other democratic way.

In 2013 the Company Law of China saw major amendments to the registered capital system but no change to employee involvement on management and supervisory boards.

The system of employee involvement at board level is based on the concept of stakeholders, reflecting employee needs through the corporate governance mechanism, which serve to realize the aim of employee protection. Professor *Zheng Xianhua* asserts that this kind of involvement in decision and supervision is really employee involvement, as well as the source and guarantee of other forms of employee democratic management.[5] In my opinion, employee involvement at board level is different from traditional democratic management, although the aim is to solve the problem of employee protection. In China, employee involvement at board level is to introduce a new election system (election by employees) alongside the system of election by shareholders (shareholders electing directors and supervisors). From the viewpoint of information acquisition, this is surely a beneficial addition to traditional democratic management. However, it is another matter as to how to make employee representatives play their roles, which requires much thought and development.

3. Employee involvement: legislation, past and present

China's Company Law keeps the basic idea of democratic management by employees as created by the Law of Industrial Enterprises Owned by the Whole People. The Company Law of 2005 enlarged the scope of democratic management from "state-owned companies and limited liability companies contributed to by two or more state-owned enterprises or other state-owned organizations" to "company", and its contents have also changed significantly.

The significance of democratic management in the Law of Industrial Enterprises Owned by the Whole People is generally equal to the significance of the shareholders' general meeting. So it is impossible to maintain employee power under the Law of Industrial Enterprises Owned by the Whole People without some arrangement concerning the shareholders' general meeting. The system of employee shares that was carried out in the late 1980s and in the early 1990s, when China attempted a systemic reform involving enterprise shareholding, is a form of employee involvement which is designed on the basis of preserving traditional corporate governance. Employees are also contributors and can be involved in the management and supervision of com-

[5] 郑显华 [*Zheng Xianhua*], 对职工(代表)大会的法律思考 [Legal Considerations on Workers' Congress], 现代法学 [Modern Law Science] (2/1997), 66.

panies as contributors. This kind of employee involvement is based on the idea of capital democracy, so it needs no special argumentation. Professor *Jiang Daxing* even asserts that the mode of all employee shareholding will unify the workers' congress and the shareholders' general meeting. It will be beneficial in solving the problem of operational chaos resulting from the coexistence of the workers' congress and the shareholders' general meeting, because in addition to making employees participate in democratic management in their own capacity through the workers' congress over the long term, it will also allow them to exercise voting power in the shareholders' general meeting under their status as contributors. The exercise of these two rights conforms to the corporate idea and has a solid legal basis.[6] Employee involvement at board level realized in this way is surely good in theory but is difficult to operate in practice since many problems will arise, such as the source, price and transferability of employee shares, the form of employee shareholding and the voting method for employee shares.

At present, the property right of the company has become clear. The status of shareholders solves the problem of the owner's absence; employees have lost the status of quasi-owner and the power of direct management; and shareholders and employees have become company members having different natures. Under such conditions, although the label of democratic management has not changed, the contents differ considerably from traditional democratic management.[7] Employees' democratic management is different from shareholders' democratic management; the latter being based on the idea of capital democracy (contributors electing directors and supervisors) with the majority decision rule as the basic form. This means that employees' democratic management cannot easily fit into the legal system of modern corporate governance or affect the decision-making power regarding all company affairs. Employees' democratic management can be limited to the right of information and the right of making suggestions.

Employee involvement has been introduced to company law in order to solve the problem of employee protection after employees lost the status of being owner and the direct managerial power stipulated in the Law of Industrial Enterprises Owned by the Whole People. Subsequent to the Company Law's having established the basic form of employee involvement – employee director and employee supervisor – the discussion on the legal value and practical effect of such involvement has not stopped. In general, employee involvement on the management and supervisory boards enables employees to participate in company management and supervision in a wider and deeper

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[6] 蒋大兴 [*Jiang Daxing*], 公司法中的职工参与公司管理制度比较研究 [A Comparative Study of Employees' Involvement at Board Level in Company Law], 法制现代化研究 [Study on Legal System Modernization] (7/2001), 513.

[7] 叶林 [*Ye*] (fn. 3).

way, which is beneficial in motivating employees' activities and creativity, establishing harmonious and steady relations between employers and employees and promoting company reform, development and steadiness.

IV. Overview of employee involvement on boards in China

1. Company type

Employee involvement on the management board is mandatory in China's state-owned companies and in limited liability companies contributed to by two or more state-owned enterprises or other state-owned organizations. The management board of these companies should have employee representatives. As to other limited liability companies and companies limited by shares, having employee representatives is voluntary.

Employee involvement on the supervisory board is mandatory in all companies in China, but some small limited liability companies or those with few shareholders may not have a supervisory board, so that only one or two supervisors are required.

2. Qualifications of employee representatives on the board

China's Company Law contains no special stipulations as to the qualifications of employee representatives on management and supervisory boards. But a person must meet certain conditions illustrated in China's Company Law in order to serve as a director and supervisor. These stipulations will apply to employee representatives. For example, a director and senior manager of a company must not serve concurrently as a supervisor. A person falling in any of the following categories may not serve as a director, supervisor, or as the general manager of a company:

(1) [a person] without civil capacity or with limited civil capacity;
(2) [a person] having been sentenced to prison for the following crimes and completion of the sentence being less than five years: embezzlement, bribery, conversion of property, misappropriation of property, sabotage of the social economic order; or having been deprived of political rights as a result of a criminal conviction and completion of such sanction being less than five years;
(3) [a person] having served as a director, the factory chief, or the general manager of a company or enterprise which underwent bankruptcy liquidation, and being personally responsible for such bankruptcy, and completion of the bankruptcy liquidation being less than three years;

(4) [a person] having served as the legal representative of a company or enterprise whose business licence was revoked due to violation of the law, and being personally responsible for such revocation, and completion of such revocation being less than three years;
(5) [a person] in default of personal debt with a significant amount.[8]

So a system for checking on the qualifications of employees' representatives on management and supervisory boards is needed to ensure that they can perform their duties well.

3. Election of employee representatives to the board

According to China's Company Law, employee representatives on the board should be elected by company employees by way of the workers' congress, workers' meeting or other democratic methods. However, the Company Law contains no regulations as to the details of democratic election, such as election of a candidate or the decision-making procedure of the workers' congress and workers' meeting.

4. Ratio of employee representatives on the board

China's Company Law contains contrasting regulations on the ratio of employee representatives on management and supervisory boards. The company can decide the ratio of employee representatives on the management board by itself. But the ratio of employee representatives on the supervisory board is mandatory and should not be lower than one-third of the whole number of the supervisory board.

V. Rights and duties of employee representatives on the board

The Company Law of China contains no special regulations on the rights and duties of employee representatives on boards, so we may conclude that employee representatives on the board should have the same rights and shoulder the same duties as those directors and supervisors elected by the shareholders.

The rights of directors are exercised through the management board. In China, the management board is accountable to the shareholders' general meeting and exercises the following powers:

(1) being responsible for convening shareholders meetings and presenting reports thereto;
(2) implementing resolutions adopted by the shareholders general meeting;

[8] See Articles 51 and 146 of 公司法 [Company Law] 2014.

(3) determining the company's operational plans and investment programmes;
(4) preparing annual financial budget plans and final accounting plans of the company;
(5) preparing profit distribution plans and plans to cover company losses;
(6) preparing plans for increasing or reducing the registered capital of the company or issuing company bonds;
(7) drafting plans for merger, division, change of corporate form or dissolution of the company;
(8) determining the structure of the company's internal management;
(9) appointing or removing the general manager of the company, appointing or removing, upon the general manager's recommendation, deputy managers of the company and the officer in charge of finance, and determining the remuneration for those officers;
(10) formulating the basic management scheme of the company; and
(11) exercising other powers stipulated by the charter of the company.[9]

The directors should undertake two kinds of duty: the duty of care and the duty of loyalty. As to the duty of care, there are no particular stipulations in China's Company Law. The duty of care is a kind of management duty which requires that directors manage the company in the interests of the company by exerting their skills, knowledge, experience and judgement. As to the duty of loyalty, the stipulations in the Company Law are very comprehensive. First, directors should not misappropriate company funds; second, directors should not deposit company assets into an account in their own name or in any other individual's name; third, directors should not loan company funds to other people or make company assets security for the debt of any other individual without the approval of the shareholders' general meeting or the management board in violation of the charter of the company; fourth, directors should not execute any contract or engage in any transaction with the company in violation of the charter of the company or without the approval of the shareholders' general meeting; fifth, directors should not use favourable conditions and conveniences to seek business opportunities that belong to the company to engage in the same business as the company in which they serve as directors or senior officers either for their own account or for any other person's account without the approval of the shareholders' general meeting; sixth, directors should not accept and possess commissions paid by others for transactions conducted with the company; seventh, directors should not disclose confidential information of the company without authorization; eighth, directors should not engage in other activities in violation of their fiduciary duties.[10]

[9] See Article 46 of 公司法 [Company Law] 2014.
[10] See Article 148 of 公司法 [Company Law] 2014.

VI. Problems with employee involvement on boards in China

The controlling power of the shareholder and the higher status of the shareholders' general meeting lessen the function of the management and supervisory boards to some extent, which in turn may affect the employee representatives on the board.

The system of employee involvement on management and supervisory boards in China's Company Law has been implemented for more than 20 years, but there are still some faults or problems in the regulations which make employee involvement on the board difficult to realize in function. These faults or problems can be summarized in the following regards:

First, regulations for employee involvement on the management board are made according to companies' different types of ownership. This not only leads to inequality but also limits the scope of employee involvement. Employees of companies limited by shares and non-state-owned companies cannot participate in their company's management board. This kind of regulation is obviously affected by the traditional mode of rights distribution and is the legal reflection of different political treatment, something which will harm the activities of employees in companies with other types of ownership.[11]

Secondly, the articles in the Company Law on employee involvement on management and supervisory boards are weak in practice. The ratio of employee representatives on the management board is not mandatory in the Company Law of China, which makes it easy for it to become formalistic. There is a gap in prescribing special qualifications of employee representatives, the stipulations on the procedure for election and dismissal of employee representatives are not specific and the working mechanism is not sound; all of these issues will make practical application difficult and affect its function.

Third, the legal safeguards for employee representatives on management and supervisory boards are weak. Employee representatives on boards are parties to an employment contract with the company, and they are rewarded, punished and dismissed by the shareholders or those assigned by the shareholders. Consequently, they may cater to the ideas of shareholders or managers when performing their duties and cannot represent and protect the interests of employees fully. China's Company Law contains no articles on legal safeguards for employee representatives on boards, which thus makes it difficult for them to exercise their rights.

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[11] 蒋大兴 [*Jiang*] (fn. 6).

VII. Improving employee involvement on boards in China

In academia, the question has also been raised about the necessity and efficiency of the system of employee involvement on the board. From the perspectives of trends in company law and China's economic development, employee involvement on the board plays an active role in protecting employees' interests and establishing harmonious labour relations, and it is beneficial for building a modern enterprise system and improved corporate governance. It cannot be denied, however, that there are some problems in employee involvement on boards, a situation which we should improve upon by checking the effect of the current system and by taking stock of our experiences thus far.

First, we should give up the practice of having employee involvement on the management board vary according to companies' different types of ownership. Professor *Zhao Wanyi* proposes that all companies which have employees reaching a certain minimum number should have employee representatives on the management board. This would make employee involvement more efficient and provide institutional arrangements for improving the corporate governance structure.[12] Professor *Shi Shaoxia* asserts that employee representatives should be on the management board in state-controlled companies.[13] Professor *Peng Zhenming* goes further by suggesting that all types of companies should have employee representatives on the management board, with improved regulations on their powers and responsibilities that make them play their roles by participating in company decisions and protecting employee interests.[14]

In my opinion, the system of employee representatives on the management board should be applied according to the number of company employees, that is, all companies that hire employees reaching a certain number should arrange for employee representatives on the management board according to the regulations under the Company Law and pursuant to the charter of the company.

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[12] 赵万一/李秀文 [*Zhao Wanyi/Li Xiuwen*], 论职工(劳动者)在公司治理中的地位和作用 [The Status and Function of Employees in Corporate Governance], 北京论坛 全球化趋势中跨国发展战略与企业社会责任（下）[Beijing Forum (2007): Global Strategy of Enterprises and Corporate Social Responsibility (II)], 554.

[13] 石少侠/王福友 [*Shi Shaoxia/Wang Fuyou*], 论公司职工参与权[Employees' Involvement Rights], 法制与社会发展 [Law and Social Development] (3/1999), 43.

[14] 彭真明/江华 [*Peng Zhenming/Jiang Hua*], 论利益相关者理论与公司治理结构 [Stakeholder Theory and Improving China's Corporate Governance], 浙江师范大学学报 [Journal of Zhejiang Normal University] (1/2007), 23.

Moreover, we should amend and improve the regulations in the Company Law in respect of the ratio of employee representatives on the management board. Professor *Yang Dongmei* suggests that we should consider the following when stipulating the ratio of employee representatives on the management board:

- First, to reflect on the level of employee involvement – a lower ratio will make it a mere ornament.
- Second, to envisage the tension between shareholders' interests and employees' interests: a higher ratio will deviate from the centre of power distribution.
- Third, to check the scale of the management board: if the scale is relatively small, the ratio of employee representatives should not be too high in order to take into account the diversity of all interested parties' participation.
- Fourth, to determine the feasibility of the structure of the management board.[15]

As to a specific standard, *Hao Lei* proposes that, analogous to the supervisory board system, we stipulate that all companies should arrange for employee representatives on the management board but that the ratio of employee representatives should not be lower than one-third, whereby the company charter may provide for a specific ratio above one-third.[16]

The Company Law makes a unified stipulation on the ratio of employee representatives on the supervisory board, but some scholars propose different approaches. Professor *Yu Zhengping* suggests that the composition, ratio and source of the supervisory board of listed companies, companies with 200–500 or more employees, wholly state-owned companies and companies with state controlled shares reaching a certain proportion should be treated in a different way. The supervisory board of listed companies should be composed of the representatives of shareholders, employees and social representatives having no stake in management (corresponding to an independent director), with each component constituting one-third. As to limited liability companies (including non-listed companies) which must have a supervisory board since they hire employees reaching a certain number of employees, the supervisory board should be composed of half representatives of shareholders and half representatives of employees. As to wholly state-owned companies and companies limited by shares, having state controlled shares reaching a certain

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[15] 杨冬梅 [*Yang Dongmei*], 职工董事职工监事制度立法现状及前瞻 [The Present and Future of Employees' Involvement], 中国劳动关系学院学报 [Journal of China Institute of Industrial Relations] (6/2008), 79.

[16] 郝磊 [*Hao Lei*], 利益平衡视野下我国公司的职工参与权制度研究 [A Study on Employees' Involvement in China from the View of Interest Balance], 国家行政学院学报 [Journal of China National School of Administration] (2/2011), 59.

proportion, the supervisory board should be composed of representatives appointed by the state and employee representatives. The board members should be appointed and dismissed by an electing or appointing institution or organization.[17]

A suitable proportion might be based on the legislative intent behind the system of employee involvement at board level. A higher proportion would affect shareholders' status and be contrary to the corporate governance mechanism and idea, while a lower proportion would result in the system becoming formalistic. According to the voting system of the management board and supervisory board, the ratio should be at least one-third, which can avoid an asymmetry in the conception of corporate governance and preserve enough seats for experts on the management board.

Third, we should refine the necessary qualifications of employee representatives on the management board, especially professional qualities and ethics. For example, employee representatives should have professional knowledge of company management, be well informed of company affairs and should demonstrate basic ethical qualities, such as loyalty, integrity and honesty. We should also improve the election procedure, including the generation of candidates and democratic election rules, strengthen the function of the workers' union and the workers' congress, and ensure the employees' right to elect and dismiss employee representatives on the board.

Professor *Hu Gairong* is of the view that the employee representatives on the management board should be employees at the grassroots level. To ensure that the employee representatives on the management board play their roles, we should set a specific threshold for access. The employee representatives on the management board should conform to the following conditions in addition to the basic regulations in the Company Law:

- First, to abide by the law, act with good faith and be faithful, have a good professional reputation and strong communication skills.
- Second, to have been working for more than a set minimum number of (at least two) years in the company.
- Third, to have a bachelor degree or higher or a relevant professional title or qualification.
- Fourth, to have knowledge of the basic matters regarding the management and main business of the company, and be familiar with the relevant laws.[18]

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[17] 虞政平 [*Yu Zhengping*], 构建中国多元化公司治理结构新模式 [The Construction of China's New Mode of Pluralism in Corporate Governance], 中外法学 [Peking University Law Journal] (1/2008), 74.

[18] 胡改蓉 [*Hu Gairong*], 国有公司职工董事制度之不足及其补正 [The Defect and Correction of Employees' Representatives on Management Boards in State-owned Companies], 社会科学 [Journal of Social Science] (11/2010), 99.

Hao Lei suggests that employee representatives on the management board should be limited to front-line employees but that the management, especially the senior management, should not be employee representatives.[19] Arguably, it is not feasible to limit the employee representatives on the management and supervisory boards to front-line employees since this goes against their participation in management and supervision. It would be better to specify the professional qualifications and moral qualities of employee representatives, and to introduce a democratic election procedure, as discussed before. In this way, only those employees who satisfy these criteria can be elected as employee representatives. This is beneficial since it would ensure that they can represent and reflect employees' interests better. What is more, we should set positive (as opposed to negative) qualifications for employee representatives and explicitly exclude employees from the senior management.

Fourth, special articles on the protection of employee representatives' interests should be added to the Company Law. The current Company Law does not provide special protection for employee representatives on management and supervisory boards. As already discussed, employee representatives may not embrace their responsibility well since they have a contractual relation with the company. This means that special articles of protection are needed to provide them with security and facilitate a sphere of activity.

Professor *Shi Shaoxia* suggests that there should be specific stipulations that employee representatives on the management board should not be dismissed solely on account of exercising their duties to the company under the Company Law and that the workers' congress and trade union should protect the legal interests of employee representatives when they are dismissed or are threatened with dismissal.[20] Professor *Liu Junhai* proposes that it is necessary to provide special protection to employee representatives in order to ensure the truth, efficiency and equality of employee representatives' status. Employee representatives should not be discriminated against in the company simply because they perform their duties. Their wages should not be reduced when they participate in meetings of the company. These are necessary conditions which allow employee representatives to perform their duties. As to the stability and salary of employee representatives, there should be stipulations that employee representatives will not be dismissed because of their active involvement in company matters. The company should not dismiss employee representatives at random without just causes, or threaten them with dismissal or force their resignation.[21] All these special articles of protection are aimed at employee representatives' identity as workers and are also effective mea-

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[19] 郝磊 [*Hao*] (fn. 16).

[20] 石少侠/王福友 [*Shi/Wang*] (fn. 13).

[21] 刘俊海 [*Liu Junhai*], 新公司法的制度创新:立法争点与解释难点 [Institutional Innovations of New Company Law: Legislative and Judicial Controversies], 2006.

sures to ensure that they perform their duties. Therefore, the Company Law should stipulate explicitly that the company should not discharge employment contracts with employee representatives or cause them to suffer unreasonable treatment just because they perform their duties. The workers' congress and trade union should actively safeguard employee representatives' interests, and employees or their trade union should be able to bring suits against the company when their rights are infringed.

VIII. Further considerations

It seems that employee representatives on the board should be more mindful of employee interests. However, this conflicts with the duty to the company which is owed by directors and supervisors. How to make the system of employee involvement on management and supervisory boards and the system of traditional corporate governance coexist harmoniously in the Company Law is surely a difficult question. In fact, the essence of the question is: to whom do employee representatives on the board owe a duty? However, the answer is difficult to find, since the question of whom directors owe their duty to is still under discussion.

The number of articles on employee representatives on the board in China's Company Law are few and the regulations are relatively simple and roughly formulated. Does this mean that China's Company Law is somewhat passive as to implementing the system of employee involvement or that it aims not to be too active in implementing the system of employee involvement? One phenomenon deserves to be mentioned, namely that employee protection legislation is having an ever more significant and substantive influence on employee involvement in China, especially in employee involvement through workers' congresses and trade unions. The National Federation of Trade Unions also plays an important role and is drafting Provisions on the Democratic Management of Enterprises as well as other provisions which are also used to guide the implementation of employee involvement. Against such a background, the function of company law will be weakened gradually in the system of employee involvement.

IX. Summary

China has a long tradition and institutional heritage of employee involvement, with employees having a single identity and sharing the same interests. All these factors make the institution of employee involvement at board level a typical occurrence that is also operable in practice. The tradition of employee

involvement in China has been extended from the enterprise legislation era to the modern company legislation era, but the nature and contents of employee involvement have changed dramatically and need to be analysed further. Employee involvement has been introduced to company law to solve the problem of employees' protection after their having lost the status of owner and the power of direct management, which was stipulated in the Law of Industrial Enterprises Owned by the Whole People. However, some problems with employee involvement on the board need to be addressed. First, the practice by which employee involvement on the board varies with different types of company ownership needs to be abolished. Second, amendments should be made to the Company Law regarding the ratio of employee representatives on the management board. Third, more work should be done to refine the qualifications of employee representatives on the board (especially professional qualities and ethics), improve the election procedure, strengthen the function of trade unions and workers' congresses, and ensure employees' right to elect and dismiss their representatives on the board. Fourth, special articles should be added to the Company Law to protect the interests of employee representatives.

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