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A NEW JUDICIAL REMEDY FOR EMPLOYEES IN FRANCE

As of March 1, 2010, litigants are granted the right to use a new judicial remedy in the context of court proceedings: they now may refer a law to the French Constitutional Court if they consider its provisions to be detrimental to their rights and freedoms under the French Constitution. Formerly, the constitutional validity of a law could be challenged only by the President of the French Republic, the Prime Minister, and certain members of the government and Parliament, and such a challenge had to be brought before the law was definitely promulgated. The new law significantly broadens the role of the Constitutional Court.

When an action is pending, the court first decides whether a case raises a serious constitutional question warranting referral to the Constitutional Court. The judges decide whether the law whose provisions are being challenged is applicable to the facts of the case and whether the constitutional validity of the disputed provisions is seriously questionable. The challenged law must not have been referred to the Constitutional Court in the past and must be detrimental to the claimant's personal rights or freedom.

If the court considers these conditions fulfilled, the request to file a claim before the Constitutional Court is then submitted to the judiciary or administrative Supreme Court ("*Cour de Cassation*"), which in turn makes sure that the above-mentioned conditions are met. Only then can the Constitutional Court examine the validity of the disputed law with regard to the French Constitution and constitutional principles.

If its provisions are deemed unconstitutional, they will be abrogated. If, on the contrary, the constitutional validity of the law is confirmed, the disputed provisions may not be referred to the Constitutional Court in the future unless the situation has changed radically.

This new remedy is of particular interest in labor and employment litigation, as the laws in this field are so profuse that many of them were not subjected to review by the Constitutional Court before being promulgated. For example, consider the June 25, 2008 Law authorizing termination of the employment contract by mutual agreement (in addition to resignation and dismissal). This termination requires formal approval by the Labor Ministry. Yet in case of dispute, this law provides that the competent jurisdiction is not the administrative but the judiciary court. This provision may well be on borrowed time until it is challenged before the Constitutional Court, since its compliance with French constitutional principles upholding the independence of the administrative and judiciary authorities may be questionable. Similarly, Article 19 of the August 20, 2008 Law, which allows management-level employees whose working time is computed in days to waive their rights to some of their rest days in order to work more than the annual legal maximum of 218 days, might well be deemed contrary to the constitutional right to health, rest, and leisure.

Even before this new avenue for constitutional challenge, courts were receptive to challenges to law because of alleged noncompliance with international treaties and European regulations. A famous example of this power of the courts dates back to 2008, when the French Supreme Court ruled against the validity of a French ordinance passed in 2005 that had allowed a more flexible form of employment contract deemed inconsistent with the International Labour Organization's Convention, therefore driving Parliament to immediately abrogate it.

This new remedy before the Constitutional Court now constitutes an additional means for the courts to make sure that constitutional rights are actually observed.

GERMANY INCHING TOWARD MORE THAN ONE COLLECTIVE BARGAINING AGREEMENT PER WORKFORCE?

Under German law, collective bargaining agreements are concluded by unions and either an employer's organization or an individual employer only on behalf of his own company. As a rule, those collective bargaining agreements become binding within an individual employment relationship only if the employee is a member of the respective union and the employer is a member of the employer's organization or concludes the agreement for himself.

However, cases may arise in which an employer almost inevitably is potentially bound to several collective bargaining agreements concluded with different unions. In order to prevent applicability of different labor agreements purporting to cover the same workforce within a single facility, German labor courts have applied the principle of collective bargaining unity (*Tarifeinheit*), according to which only the most specific set of collective bargaining agreements applies. Thus, for example, within a metal company not only the metal workers but all employees fall under the metal agreements, but at the same time otherwise potentially relevant collective bargaining agreements may be excluded.

Established in the late 1950s by the case law of the Federal Labor Court, the principle has been subject to criticism—namely, that it could not be directly derived from statutory law, that it negatively affected the constitutional right to form coalitions, and that it made it more difficult for minor unions to gain importance. On January 27, 2010 (File No. 4 AZR 549/08 (A)), one of the senates of the Federal Labor Court indicated that it no longer wishes to adhere to the principle of collective bargaining unity. The senate is prevented from

eliminating or modifying the principle on its own because that would diverge from the case law of other senates. However, it is very likely that the principle's days are numbered. If the senates remain in disagreement, the issue may be presented to the Big Senate of the Federal Labor Court to be decided in a binding way for all the senates.

Assuming that the principle of collective bargaining unity will no longer be applied, significant changes in the labor relations of many companies can be expected. We are likely to encounter the applicability of a larger group of diversified collective bargaining systems. Further, minority unions for specialized groups of employees are likely to form and gain strength, and if this occurs, we are likely to see more strikes called by smaller groups of employees. Employee groups with less bargaining power may be the losers, as they will not be able to come under the protective umbrella of the unitary operative collective agreement.

DISCRIMINATION LAWS AND PROTECTION FOR THOSE WORKING PARTLY IN GREAT BRITAIN AND PARTLY ELSEWHERE

Employees working only partly in Great Britain may, in certain circumstances, be protected by British anti-discrimination legislation. This is because all the anti-discrimination laws are worded in such a way as to protect employees who work "wholly or partly in Great Britain." A case in the Employment Appeal Tribunal ("EAT"), *British Airways plc v Mak and others* UKEAT/0055/09, held that "partly" simply means "more than *de minimis*." In *Mak* the EAT had to decide whether a Chinese cabin crew employed by British Airways ("BA") could be said to have been employed "partly" in Great Britain and whether they were therefore able to bring age and race discrimination claims in the U.K. against BA relating to their forced retirement and absence of pension provision.

The Chinese cabin crew lived and were domiciled in Hong Kong. Their work in Great Britain included flying 28 return trips to London each year, a 45-minute debriefing in London

per trip, a 58-hour rest break in the U.K. per trip, occasional exceptional London-based duties, a one-off six-week training program in London at the beginning of their employment, and an annual two-day training course in the U.K. BA argued that these contacts with the U.K., even cumulatively, were *de minimis* in the context of the employment as a whole and that the crew could not be said to have been employed "partly" in Great Britain.

The EAT ruled that the cabin crew were employed partly in Great Britain. It stressed that the proportion of time spent in Great Britain needs to be more than minimal but that an analysis of working time spent in this jurisdiction is not the only relevant factor of the "partly" test. The nature of the work done in Great Britain is also relevant. In *Mak* the tribunal highlighted the debriefing and training sessions as "absolutely essential" to the employees' work in the airline industry, where safety is paramount. Even though that crew spent only 5 percent of their total working time in Great Britain, the EAT held that the cabin crew were employed "partly" in Great Britain due primarily to the importance of the work undertaken in the U.K.

The *Mak* decision has potentially far-reaching implications for employers with staff based mainly abroad but whose employment involves regular visits to the U.K. The employees in *Mak* had a regular and enduring connection with the U.K. (rather than, for example, a temporary, project-based connection requiring regular but short-term visits). A tribunal would have to be satisfied that the purpose of the trip was "work" (and employers should remember that training will be regarded as such) and that the work involved was significant to the job as a whole. Employers with staff whose working patterns are similar to those in *Mak* may wish to consider whether it is possible to change those patterns. If they are able to change arrangements to diminish, or make less regular, the link to the U.K., then the risk of potential claims here will similarly diminish.

LABOR ARBITRATION BEING CONSIDERED IN ITALY

Arbitration of disputes under collective bargaining agreements is a common feature of U.S. and Canadian labor law but has not yet taken hold in Europe. A bill pending in the Italian Parliament may introduce some elements of labor arbitration into that country. The bill provides that the applicable national collective labor agreement ("NCLA") can allow the inclusion, in individual employment agreements, of arbitration clauses to be applied to possible future disputes between the relevant employer and employee. A specific commission shall certify the arbitration clause and verify the actual intention of the parties to devolve the dispute to an arbitration panel. In the absence of an NCLA, the Italian Labor Ministry would have the authority to introduce an arbitration clause even without the consent of the relevant labor unions. The arbitration panel would consist of three arbitrators, one appointed by each party, with the third appointed jointly by the parties. The arbitration would be completed within 140 days, and the losing party would have the right to appeal the decision before the competent labor court.

Interestingly, the inclusion of an arbitration clause in the individual employment agreement would not prevent any of the parties from commencing a litigation before the competent labor court—in effect making the arbitration a permissive option that either party can avoid.

The proposed arbitration bill has been strongly criticized by labor unions on the grounds that an arbitration procedure would necessarily favor the employer and that employees would effectively be coerced into agreeing to arbitration for fear of losing their jobs. This critical view appears to be shared by the President of Italy; on March 31, 2010, he decided not to promulgate the bill and sent it back to the Italian Parliament for further review, in order to better protect employee rights.

Notwithstanding the rejection by the Italian President and any amendments made to the bill in order to comply with the objections raised by him, it appears that Italian labor law will undergo major changes in the near future.

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NEW TAX TREATMENT FOR SEVERANCE PAYMENTS IN SPAIN

On December 31, 2009, the Spanish Congress approved Law 27/2009, which improves the tax treatment of severance payments to dismissed employees.

Before this tax improvement, the legal severance that corresponded to an employee involved in a collective dismissal or affected by an individual dismissal was nontaxable, up to an amount equivalent to 20 days of salary per year of service at the company, with a limit of 12 months of salary. After the approval of Law 27/2009, this threshold increased to 45 days of salary per year of service at the company, with a maximum limit of 42 months of salary. This new tax treatment applies to all dismissals from March 8, 2009, on.

CRISIS MEASURES IN BELGIUM—FOLLOW-UP

The Belgian government is concerned about unemployment growth resulting from the ongoing financial crisis. Therefore, it has introduced a set of measures that allow companies to cut personnel costs with as few layoffs as possible, as we explained in our previous publication.

On top of these measures, the Belgian Ministry of Employment has now launched the “win-win plan,” which entered into force as of January 1, 2010.

The win-win plan applies to three target groups:

(i) Unemployed job seekers younger than 26 years old.
(ii) Unemployed job seekers of 50 years old or more.
(iii) Long-term-unemployed job seekers (unemployed for a minimum of one year but no more than two years).

The win-win plan implies a reduction of the employment cost, which will be subsidized by the Belgian state (which is beneficial for Belgium, as the Belgian employment cost is generally considered to be among the highest in Europe). Indeed, in application of the win-win plan, the Belgian Unemployment Services will subsidize the employment cost for a maximum of €1,100 per month for a period of 12 to 24 months. In addition, employers will enjoy a reduction of the social security contributions for these employees. In total, the application of the win-win plan can represent monthly savings for the employer of €1,500 or even €1,600.

By introducing this win-win plan, the Belgian government hopes to support the economy and Belgian industry. The other goal pursued is to stimulate the hiring of workers and to stop, or at least reduce, the growth in unemployment due to the financial crisis.

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