EWL student seminar in Utrecht 17- 20 March 2015

The theme of the 2015 is conference is

Changes in the organization of collective bargaining

Introduction

In many, if not all countries of our working group, we can see a growing diversity in collective bargaining. The number of collective agreements (CLAs) on enterprise level is growing, either supplementing agreements per sector or industry or by replacing sectoral agreements. There is also a growing diversity as to the parties involved in the collective bargaining process, particularly on the employees' side. (Relatively) small trade unions often exclusively representing specific groups of employees (by profession or by level of positions – middle and higher personnel) have entered the field, which can result in competition between trade unions. Even so-called 'yellow unions' have entered the bargaining field (yellow unions are unions established by employers or unions not independent from employers). And lastly works councils are operating in this field, at least in some countries, concluding (a kind of) agreements on employment conditions supplementary to collective agreements or even deviating from collective agreements. If previously the negotiations and collective agreements were at a national level, the developments described above are forms of decentralization of collective bargaining. This year's seminar is meant to describe and analyse whether and to which extent decentralization trends can be found in the countries of our working group.

The National Reports – France

The reports will address the following topics.

1- What is the practice of collective bargaining in your country?

Collective bargaining first officially appeared in 1919 in France in order to diminish the social disorder that was growing stronger in the wake of WW1.

Theoretically, unions cannot participate in political activities, since their only purpose is the study and defense of the rights as well as the material and moral interests of the persons mentioned in their statutes.
But in real-life unions always take a political stand, and voice their opinions about bills for example.

-which are the major unions and organizations?

There is a wide range of unions, which is sometimes problematic because of the division existing between unions on different matters, rendering unification around a project complicated. Furthermore, union membership has been diminishing for years.

Trade unions were first authorised with the "Waldeck-Rousseau" law of 1884 and were mainly revolutionnary unions. However, nowadays, french trade unions have mainly embrassed a reforming trend.

There are 5 main representative trade unions and 3 main representative employers' unions on a national level.

On the employees' side:

-Confédération Générale du Travail (CGT); General Confederation of Labour

-Confédération Générale du Travail – Force Ouvrière (CGT-FO); General Confederation of Labour – Worker's Force

-Confédération Française Démocratique du Travail (CFDT); French Democratic Confederation of Labour

-Confédération Française des Travailleurs Chrétien (CFTC); French Confederation of Christian Workers

-Confédération Française de l'Encadrement – Confédération Générale des Cadres (CFE-CGC) French Confederation of Management – General Confederation of Executives

On the employers' side:

-Mouvement Des Entreprises de France (MEDEF); Movement of the Enterprises of France

-Confédération Générale des Petites et Moyennes Entreprises (CGPME); General Confederation of Small and Medium Enterprises

-Union Professionnelle Artisanale (UPA). Professional Artisanal Union

There are however many smaller unions that exist but aren't representative on a national level, such as l'Union Nationale des Syndicats Autonomes (UNSA), Fédération Syndicale Unitaire (FSU) and l'Union syndicale Solidaires (SUD).

-are collective agreements mainly concluded for sectors, for the whole country or for particular enterprises?

Collective agreements can be concluded for sectors (accord de branche), on a national basis (accord national interprofessionnel) or regional basis.
Collective agreements can also be concluded in a particular enterprise (accord collectif d'entreprise), establishment (accord d'établissement) or corporate group (accord de groupe).

-what is the unionization rate?

7.7% in 2012 according to statistics of the OECD.
http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN&Lang=fr

-what is the percentage of employees covered by collective bargaining?

15, 4 million employees are covered by 715 sectorial agreements (2009) (agricultural agreements are excluded).

-is and, and if so, how is, representativity of a union determined?

The most important criterion is the audience, calculated every 4 years through professional elections.

A law of the 20th of August 2008 explains how the representativity of a union is determined.

There are several criteria to determine the representativity of a union. These cumulative criteria are set down in the article L2121-1 of the French Labor Code:

"1°Respect of republican values;
2° Independence;
3° Financial transparency ;
4° A two years minimal age in the geographical or professional field covered by the bargaining The age is considered with regards to the date of the legal deposit of the statuts ;
5° The audience, established according to the level of the bargaining in compliance with the following articles: L.2122-1, L. 2122-5, L. 2122-6 et L. 2122-9 ;
6° The influence, characterised by the activity and the experience ;
7° The number of members and the subscriptions."

On the level of the enterprise or the establishment, the article L2122-1 is applicable:

"To be representative on the level of the enterprise or establishment, a trade union must satisfy the criteria of the article L2121-1 and ***collect at least 10% of the recorded votes at the first round of the last elections of the members of the works council****, or failing that, of the staff representatives, whatever the number of voters."*

On the sectorial level, the article L2122-5 is applicable:

"Trade unions on a sectoral level must fulfill the following conditions to be representative:

1° Meet the criteria of the article L2221-1;

2° Have a balanced territorial implantation within the sector;

3° ***Collect at least 8% of the recorded votes on the sectorial level at the first round of the last elections of the members of the works council****, or failing that, of the staff representatives, whatever the number of voters. In the enterprises with less than 11 employees, a vote is organized every 4 years on a regional level and the results are added to the results of the enterprises with 11 employees or more. The measure of the audience is done every 4 years."*

On the national and interprofessional level, the article L2122-9 is applicable:

"Trade unions on a national and interprofessionnal level must fulfil the following conditions to be representative:
1° Meet the criterias of the article L2121-1;

2° They must be representative in the fields of industry, construction, commerce and services;

3° ***Collect at least 8% of the recorded votes on the national and interprofessionnal level at the first round of the last elections of the members of the works council****, or failing that, of the staff representatives, whatever the number of voters. In the enterprises with less than 11 employees, a*

vote is organized every 4 years on a regional level and these results as well as the results of the elections of the workers' representatives of the departemental chambers of agriculture are added to the results of the enterprises with 11 employees or more. The measure of the audience is done every 4 years."

-what is the relation between unions and works councils?

The first round of works council elections is reserved to union representatives. If there aren't enough votes to constitue a works council, a second round will be held, at which any eligible worker of the enterprise can present himself to become a councilmember.

There can be two situations following the elections:

- a shop steward can be an elected member of the works council, in which case he has the powers of a works council member as well as the powers of a shop steward;
- a shop steward is appointed by a trade union without being a works council member.

In the second case, when an employee is a shop steward he is a member of the works council. It means he can represent the interests of his trade union and of the workers in the economic and social management of the enterprise. He acts as a representative of his trade union. He assists the sessions and has a consultative voice only. He can freely express his opinon on every discussed matter. The time spent during sessions in the works council is paid as working time.

The Labour Code distinguishes according to the size of the enterprise (more or less than 300 employees). In enterprises of 300 employees and more, each representative trade union can designate a shop steward (C. Trav. Art. L 2324-2).

Prior to the law n°2014-288 of March 5th 2014, the ability to designate a shop steward in the works council was restricted to trade unions who had elected representatives in the works council. Now it is independent from the result which was obtained during the election for each trade union.
In the enterprises of less than 300 employees the shop steward is by law a member of the works council. (C. trav. art. L. 2143-22).

The shop steward at the works council must be chosen among the staff members of the enterprise and fulfill the following eligibility criteria (C. trav. art. L 2324-2 et L 2324-15) :

- be an elector
- be at least 18 years old
- must have worked in the enterprise since at least one year
- must not be married, nor be in a civil partnership, nor be a partner, nor be an ascendant or descendant, nor be a brother or sister of the employer.

2. Answer the following questions in order to give a short synopsis of the legal system:

a) Does your country's legal system, case law or practice contain a formal definition of 'collective bargaining'?

There is no formal legal definition of "collective bargaining".

The principles of the right of collective bargaining are formulated in the preamble of the

Constitution of the 27th of October 1946 "*Tout travailleur participe, par l'intermédiaire de ses délégués, à la détermination collective des conditions de travail ainsi qu'à la gestion des entreprises*. » (Each worker participates through his elected representatives, in the collective determination of the working conditions as well as the management of the enterprise).

There is a list of matters which can be subject to collective bargaining at the article L2221-1: employment conditions, lifelong learning, work conditions and social guarantees.
According to article L2221-2, the "convention collective" concerns all four matters, whereas an "accord collectif" only concerns one or more of these matters.

b) Which are the parties that can participate in the bargaining process?

The parties that can participate on the employers' side are either the representative employer's union, an employer's organization (groupement patronal), or one or more employers, depending on the level of negotiation.
The parties that can participate on the employees' employees are the representative trade unions. In case of a works council's agreement, if an enterprise has elected a shop steward he must participate in the negotiation. Since the law of the 20th of August 2008, the employer of an enterprise which has less than 200 employees, that does not dispose of a shop steward and is not covered by a collective sectorial agreement providing specific rules on negotiation can negotiate with the elected members of the works council, or in absence of a works council with the workers' representatives (articles L.2232-21 to L.2232-23 of the Labour Code). In the absence of workers' representatives, an employee can be appointed by a Trade Union.

c) Are there any conditions on the possible contents of collective agreements?

A collective agreement cannot contain discriminatory clauses, the sanction is nullity. It cannot provide for an economic sanction prohibited by the law. A collective agreement cannot dispose clauses who bend the rules of public order in an advantageous or disadvantageous way for the employee.
For example a collective agreement cannot set a collective wage that is lower than the legal minimum wage, or set dismissal rules that are less protective than the legal rules. Concerning the rules of public order, an example is the percentages required for the representativity of a Trade Union. This means that a collective agreement cannot provide for a percentage different from the percentage provided by the law (for example 10% of the votes on the level of establishment or enterprise), even if it could be more advantageous for the employees.

d) Which procedures have to be followed in the bargaining process, in adopting a collective agreement and ensuring that this agreement has full legal effect?

All the representative trade unions must be invited to enter into negotiations

The employer must have informed them on the date, time and location of the meeting.

The employer must communicate all necessary information to the representative trade unions. Those informations will allow the representative trade unions to negotiate with a full background knowledge and to respond in a motivated manner to the proposals of other trade unions.

The collective agreement must be written in French (L2231-4 and bear the signatures of the parties (Cass. N°00-10.886). It can't contravene to public order (L2251-1).

It must necessarily contain certain clauses:
-it must determine its professional and territorial field of application (L2222-1);
-a clause must provide in which form and when it may be renewed or revised (2222-5);
-a clause must provide the conditions in which it may be revoked and in particular the length of the notice preceding the revocation (L2222-6);
-a clause must provide the method to take into account at the sectorial or enterprise level the bargaining demands from a representative trade union (L2222-3).

In order to ensure the full legal effect of a collective agreement, the collective agreement must bear the signature of one or several representative trade unions which have received at least 30% of the votes at the first ballot of the last election of the members of the works council or failing that of the workers' representatives and there must be an absence of objection from one or several representative trade unions which have received the majority of votes at the first ballot (the objection must be expressed in writing within 8 days from the date of the notification of the collective agreement).
The law of the 14th of June 2013 has created a negotiated Employment Protection Scheme (Plan de Sauvegarde de l'Emploi) which must receive at least 50% of approval.

The employer must deposit the collective agreement to the Direction régionale des entreprises, de la concurrence, de la consommation, du travail et de l'emploi (Direccte), which is an administration of the Labour Ministry.

A negotiation protocol must also be joined to the Direccte (the labor administration) – it certifies that the employer has seriously and loyally opened negotiations

The deposit by the most diligent party of a copy of the collective agreement has to be done to the court clerk of the Conseil de prud'hommes (Employment Tribunal).

The nullity is incurred if all the trade unions could not discuss the terms of the project submitted for signature.
The nullity is also incurred if separate negotiations took place.

3. Do legal criteria exist for qualifying as a bargaining party (in the sense of being able to conclude collective agreements), if so, what are they?

For instance:
- independence (in which way? Independent of …….?)
- legal personality;
- unionization rate (social power);
-sufficient financial resources;
- representativity (elections);
- are measures taken to exclude yellow unions, and by whom?

For Trade Unions:

Only representative Trade Unions can take part to the bargaining. Representativity is defined by article L2121-1 of our Labor code:

- **Respect of republican values** (meaning = respect of freedom of thoughts, political freedom, freedom of religion or philosophy). Also, the prohibition of discriminations, fundamentalism and intolerance.) "Cannot claim the status of a trade union a group that is the instrument of a political party who is the source of its creation and who only serves interests and objectives by promoting distinctions based on race, color, descent, or national or ethnic origin "(CASSATION, MIXED CHAMBER 10/04/98, arrêt Front national pénitentiaire).

- **Independence:** the law is silent on the meaning of the independence. However, according to case law it seems to be interpreted as independent from the employer. This criterion is created in order to ban for example Trade Unions financed by the employer, Trade Unions established by representatives of the management or "les syndicats maison" which means the yellow unions.

- **Financial transparency:** closely related to the independence criteria, in the sense that funds can't come from the employer. Financial transparency is a guarantee of independence. Since a 2009 decree unions are required to publish their accounts (D2135-1 D2135-9 articles of the Labour Code) which must be produced to justify their representativity: the Supreme Court demonstrated flexibility concerning the mode of proof even though the union has not complied with the letter of the legal provisions (lack of production of the simplified schedule): February 29 2012 judgment of CGT / Institute of social Management of hosts.

- **Seniority :** the TU must exist from at least two years in the geographical and professional area covered by the negotiation (2 years from the legal registration of the articles of association)

- **Influence:** according to case law, influence is determined according to the activities and experience of the trade union**.**

- **The number of members and contributions**

- **The political audience/ election hearing (the most important criteria)**

  - **At the le level of the company or the establishment : 10%**

  - **At a sectorial level : 8%**

Regarding the legal criteria for the employer's organizations, the legal requirements are the same but with different percentages for the audience according to the level of negotiation.

For all the bargaining parties, there are some TU/ employers organizations who are presumed to be representative at a national or sectorial level.

Concerning yellow unions, we have no legal text directly excluding yellow unions, but independency from the employer is one of the criteria for the representativity of the bargaining party.

4. <u>What is the binding effect of collective agreements in your country?</u>

<u>a) What are the requirements for binding effect in legislation and in case law?</u>

The collective agreement that fulfills the validity requirements is legally binding.

<u>b) Who is (directly or indirectly) bound and who is not bound by a collective agreement?</u>

Collective agreements directly bind the trade unions and employer organizations and/or employers who signed the agreement, and indirectly bind the employer whose organization signed the collective agreement and his employees.

c) Is there a system of extending the binding effect by means of a decision of the government/minister or other public authority: who is bound by such extension and in which way?

An extended collective agreement is a type of collective agreement which has been extended by the Ministry of Labour (L.2261-25 Code du travail). This agreement binds every single enterprise within the scope of the agreement. Even those which did not join a signatory employers' union. In order to be applicable, an extended collective agreement must be published in the "Journal Officiel de la République Française" and there are two other conditions to be met:
*the agreement must have been negotiated and concluded in a Joint Committee composed of representatives of representative trade unions of employers and employees;
*the agreement must not have been subjected to opposition (L.2231-8) from one or several professional and representative organisations of employers.

The Ministry of Labor can also enlarge the binding effect through the procedure of "élargissement": this consists in rendering obligatory in a certain sector or a certain territory a collective agreement which was not intended to be applied to this sector or territory but which has already been extended.

d) Is deviation from acts statutes or collective agreements by other collective agreements or works councils agreements possible in a way that is detrimental to the workers?

Yes, it is possible. The favorability principle remains between the law and a collective agreement, except if the law expressly authorizes a collective agreement to be less favorable. For example, concerning overtime pay, the law provides for an overtime pay of 125% for the 8 first weekly hours of overtime, and then from the 9th hour on an overtime pay of 150%. However, a collective agreement can provide for a lower overtime pay, although it cannot be inferior than 110% (L3121-22).

Regarding the articulation between collective agreements, a collective agreement with a smaller field of application can exempt from the provisions of a collective agreement with a wider field of application, except if:
-the latter expressly forbids it;
-the enterprise agreement concerns one of the following matters: minimum salary, classification, collective guarantees regarding complementary social protection, mutualization of funds for professional development.

e) Does the favorability principle apply in case of concurring instruments?

Regarding the collective agreement and the contract of employment:

In case of a conflict of norms there is a fundamental labor law principle, according to which the most favorable norm applies to the worker: Soc 15 février 2002 N° 10-27.397 and L.2254-1 of the French Labor Code (when the employer is bound by the provisions of a collective agreement those

provisions apply to the contract of employment except if there are more favorable clauses).

Automatic effect :
When the provisions of the collective agreement are more favorable than those of the contract of employment, they automatically replace the corresponding provisions of the contract of employment.

Imperative effect:
The provisions of the collective agreement prevail over those of the contract of employment. The contract of employment applies only in its more favorable provisions.

5. Do works councils have any formal role in the collective bargaining?

a) Are works councils legally allowed to bargain with the employer and conclude agreements on employment conditions or other issues related to the interests of the employees?

Yes but it is an alternative system. Normally the shop stewards have a priority regarding negotiation. According to the law of the 20th of August 2008 a collective agreement may be negotiated and signed by members of the work council in an undertaking with less than 200 employees and without shop stewards. But the scope of the negotiation is restricted to measures whose implementation is subordinated by the law. The members of the works council must obtain the majority of the votes cast during the last professional ballot and the collective agreement must receive the approval of a sectorial joint committee (commission paritaire de branche). If one of those conditions is not fulfilled the collective agreement is deemed unwritten.

b) What is the legal effect of agreements by the works councils?

They can conclude collective agreements that are binding for their enterprise.

c) What is the relationship between works councils and trade unions in the context of collective bargaining?

Trade Unions have the most important role in collective bargaining. Works council will negotiate in the absence of representative Trade Unions and of shop stewards and for the enterprises who employ less than 200 employees. This type of collective agreement must receive the approval of a sectorial joint committee in order to be valid.

Regarding collective dismissals, there can exist a concurrence between trade unions and the works council. The works council must be informed and consulted of such a plan. Afterwards the employee can proceed in a negotiation with the Trade Unions and conclude an agreement if the signatures achieve 50% or he can choose to not negotiate with the Trade Unions and conclude a unilateral decision for which only the information and consultation of the Works council is required and the Trade Unions do not interfere.

d) Can works councils agreements be invoked or challenged by individual employees?

Individual employees can invoke provisions included in the work's council agreement but they cannot challenge this agreement.

e) Can works councils agreements deviate from collective agreements?

If the works council agreement is valid, it will have the value of an enterprise agreement, which can be more or less favorable than another collective agreement.

f) Are there examples of issues that have been addressed by works council's agreements (if possible at all)?

One of the most addressed matters by work council's agreements is the issue of working hours and more specifically the flexibility concerning working hours. It was the "loi Fillon" of 2004 which encouraged this type of negotiation.

6. **Can two (or more) collective agreements (on sectorial or company level) be applied simultaneously in the same company?**

Yes more than one collective agreement can be applied simultaneously in the same company.

a) **If so, is there a solution of possible concurrence of collective agreements?**
- **How is the concurrence solved?**

In case of concurrence of collective agreements, the advantages having the same nature and cause cannot be cumulated, only the most favorable for the employee will be applied. If the advantages are not of the same nature and cause they can be cumulated (Assemblée Plénière 18th of March 1998).

Regarding the articulation between collective agreements, a collective agreement with a smaller field of application can exempt from the provisions of a collective agreement with a wider field of application, except if:
-the latter expressly forbids it;
-the enterprise agreement concerns one of the following matters: minimum salary, classification, collective guarantees regarding complementary social protection, pooling of funds for professional development.

b) Does a hierarchy exist between the collective agreements involved?

In principle a collective agreement with a wider level of negotiation prevails on the agreements which are negotiated in a narrower level of negotiation. This hierarchy does not mean that a collective agreement with a more narrow scope cannot deviate from a collective agreement with a wider scope.

7) To what extent has your collective bargaining system changed or has it been changing in recent years (are there, in particular, decentralisation trends?

Since the Auroux laws of 1982 there is an obligation to negotiate each year on salaries, working time and the organization of work time, which produced a major change in French collective bargaining.

The law of the 14th of June 2013 has introduced major changes in French labor law regarding the handling of employment by companies. Bargaining was made easier on matters such as workers' mobility (accord de mobilité) and the safeguarding of jobs (accord de maintien de l'emploi). Concerning major redundancies, bargaining has also been favored by this new law for the parties to reach an agreement on the way to handle the redundancy.

Recently, the law of the 5th of March 2014 has defined employers' representativity and introduced a unique negotiation on the quality of work life.

In the answers to these questions attention has to be paid to legislation and to case law (if available).

Subject for one of the working groups:
Taking into account that also in this field the borders between the EU member states are disappearing, is there a need of European regulation on this topic? What kind of regulation could that be?

There may be a need for European regulation in order to harmonise the legislations and guarantee a minimum of protection to every employee working in the EU's territory. On the other hand, unifying the collective bargaining procedures is not within the competence of the EU. What is more, the systems differ considerably among member states and the national social partners will resist to the system being changed.