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HANOI LAW UNIVERSITY

HOANG THI MINH

**COLLECTIVE AGREEMENTS -
A COMPARATIVE STUDY OF SWEDISH AND
VIETNAMESE LABOUR LAW SYSTEMS**

Supervisors:

- Prof. BIRGITTA NYSTROM
- Prof. DAO THI HANG

HANOI -2011

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I would very much appreciate receiving any further constructive opinions and comments on this study. I can be reached at minhminhdhl@yahoo.com.

Hanoi. December, 2010.

Minh Thi Hoang

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Abbreviations

BUSINESSEUROPE	Confederation of European Business (former UNICE)
CEEP	European Centre of Enterprises with Public Participation
EC	European Community
EEC	European Economic Community
EMU	Economic and Monetary Union
ETUC	European Trade Union Confederation
EU	European Union
Eurofound	European Foundation for the Improvement of Living and Working Conditions
FDI	Foreign Direct Investment
GUF	Global Union Federation
ICFTU	International Confederation of Free Trade Union
IFA	International Framework Agreement
IFBWW	International Federation of Building and Wood Workers
ILO	International Labour Organization
LO	Swedish Trade Union Confederation
MOLISA	Ministry of Labour - War Invalids and Social Affairs
OECD	Organization for Economic Co-operation and Development
SACO	Swedish Confederation of Professional Association
SAF	Swedish Employers' Confederation
SOEs	State-owned enterprises
TCO	Swedish Confederation of Professional Employees
UEAPME	European Association of Craft, Small and Medium-sized Enterprises
UK	United Kingdom
UN	United Nations
UNICE	Union of Industrial and Employer's Confederation of Europe
US	United States
VCCI	Vietnam Chamber of Commerce and Industry
VCI	Vietnam Cooperative Union
VGCL	Vietnam General Confederation of Labour
WTO	World Trade Organization

Chapter 1: Introduction

1.1. Background

Labour relations are established by the choice of the two parties concerned. When engaging in labour relations, the parties always start from the basis of their own economic interests and if they do not benefit, no one will force them to be involved in any particular employment relationship. However, employment relations are also governed by the law of supply and demand for jobs or labour; and thus, concluding individual labour contracts may put employees at a disadvantage, due to their weak economic position. Nevertheless, there is an important way for the two parties to balance their interests and encourage profitability: collective agreements. Once a collective agreement is properly concluded, it will become an effective instrument for regulating labour relations while it will also provide substantial support for the State's labour laws.

Since Vietnam shifted to market mechanisms, it has seen many changes in labour relations, some tending towards more cooperation but others encouraging severe competition. In order to develop a sound labour relations system, the labour market needs to have collective agreements with intrinsic value which will genuinely assist the parties in establishing their relationship.

Despite the fact that the Labour Code of the S.R. of Vietnam provides an entire chapter giving a framework for collective agreements, the application of those regulations at grassroots level remains very weak and formalistic. A recent report by the General Confederation of Labour of Vietnam (VGCL) shows that, among enterprises *with grassroots trade unions*, the ones that had collective agreements accounted for 65.22 %. In particular, the rate in the state-owned sector was 96.33%; in the foreign-invested sector: 57% and in the non-state sector: 59.21%.¹ Notably, enterprises with grassroots trade unions in the foreign and non-state sectors accounted

¹ VGCL (2009), Resolution No. 01/NQ-DCT on "*Reforming, improving quality of negotiation, conclusion and implementation of collective labour agreements*", dated 18 June 2009, p.2

Note: Unlike Sweden and many other countries where there are statistics showing the rate of workers and employees covered by collective bargaining, in Vietnam, no similar statistics were reported. This are only the data showing the rate of enterprises having collective agreements, compared with the entire number of existing enterprises in the same sector.

for only some 20%². This means that the enterprises that had collective agreements only made up approximately 11 to 12% of the existing businesses in respective sectors. For the years 2004, 2005, 2006, the rates were even lower: in the non-state sector, enterprises having collective agreement only account for 4.55%, 4.87% and 3.36%, respectively.³ Most collective agreements signed were of limited value; they were formalistic, containing nothing more than minimum standards provided for by the labour law.⁴ Only about 40% of collective agreements contained provisions offering better working conditions.⁵ The fact that collective agreements of low quality were signed is one consequence of the inadequate awareness of the role and importance of collective agreements, the role of industrial actions; the shortcomings of current legislation (not clearly defined, not adequate, not rational), powerless trade unions (due to shortcomings in both the related laws and mechanisms allowing trade union to develop and act) and the imperfection of the enforcement mechanisms relating to collective agreements.

The lack of genuine, strong collective agreements has been an impediment to the improvement of a labour relations system which has not yet mobilized the potentials of society in an optimal manner which will boost economy and promote social equality and progress in labour relations. In recent years labour disputes have been widespread (In 2006, the number of disputes filed at the court was 820, in 2007: 1022, in 2008: 1709)⁶, strikes have been increasing (for example, the number of strikes arising in 2007 increased by 41% compared with 2006; in 2008 the number increased by 30% compared with 2007)⁷. Working conditions are poor: workers' face

² VGCL (2010), Report No. 17/BC-TLD assessment of 19 years of implementation of the Trade Union Law, dated 09/3/2010, p.10

³ Nguyen Nang Khanh (2009), "*Collective agreements in Vietnamese labour law*" PhD. thesis, Institute of State and Law (2009), see: Appendix No. 2 (the data provided by the Institute of Labour and Social Affairs – MOLISA)

⁴ VGCL (2009), Resolution No. 01/NQ-DCT on "*Reforming, improving quality of negotiation, conclusion and implementation of collective labour agreements*", dated 18 June 2009 p. 3, see also: VGCL (2010) Report No. 17/BC-TLD assessment of 19 years of implementation of the Trade Union Law, dated 09 March, 2010, p.10

⁵ Resolution No. 01/NQ-DCT of VGCL on 18/06/2009 on "*Reforming, improving quality of negotiation, conclusion and implementation of collective labour agreements*", p.2

⁶ Annual report of Supreme People's Court in relevant years: 2006, 2007, 2008.

⁷ MOLISA (2008), Report of annual conference on the plan of implementation of labour, Invalids and Social Affairs in 2009, p.45

many difficulties due to long working hours and low pay⁸, especially problematic in a time of high inflation. Labour relations contain many contradictory elements. The importance of harmonizing labour relations and enhancing the economy thus become more and more evident. In the current context, to meet the demands of globalization and international economic integration, Vietnam needs to improve the current legal system to provide a healthy and dynamic business environment to enterprises which need to strengthen their productive forces, competitiveness and initiatives on the market. But they also need to apply international standards in the management of the quality of goods and of their social responsibilities. In such conditions, studying other countries' experiences with collective agreements, with a view to strengthening the cooperation of the labour market parties and harmonizing labour relations as well as supporting production at grassroots units and boosting innovation in Vietnam, becomes a very practical and theoretically significant activity.

In Sweden, highly developed, centralized collective agreements have become a significant feature of its labour market. Owing to the existence of an effectively-operated collective agreement mechanism, labour relations are adequately regulated without any great need for the State to intervene in the labour market. Thus, relevant legislation has remained almost unchanged in recent years, as dynamic collective agreements are always changing in parallel with changes on the market. It can be said that over a period of many decades, collective agreements have made a substantial contributions to Sweden's sustainable economic development.

With a view to learning about Sweden's experience in establishing and operating a self-regulated economy and in making and enforcing laws on collective bargaining and collective agreements, I decided to select the subject "Collective Agreements – A comparative study of Swedish and Vietnamese Labour Law Systems" as my doctoral thesis. This study is to enhance awareness of the importance of collective agreements and the key conditions needed for a collective agreement system to work. At the same time, this study seeks ways to improve the laws regarding collective bargaining and collective agreements and the quality and implementation of collective agreements in Vietnam.

⁸ For example, in 2008 the workers' average income was 2,500.000 VND/person/month - an equivalent to 150 USD. Ibid, p.45

1.2. Previous researches

Currently, there are works in the form of undergraduate papers and essays, such as "*Collective agreements- The situation of conclusion and enforcement in Vietnam*" (By Tran Hong Van-1996), "*Collective agreements- The situation of conclusion and enforcement in Vietnam*" (By Bui Thi Huong-1997), "*Collective agreements- The reality of application in Vinh Phu province*" (By Nguyen Thi Hong Viet-1997). There is one work at the master's level, namely: "*Collective Agreements in the Market Economy - Theories and Practical Application*" by Tran Thi Thuy Lam (in 2001). The previously mentioned works each examined some aspect of collective agreements such as their concept, nature, current Vietnamese law on the content of collective agreements, the procedures for concluding collective agreements and invalid collective agreements. They provide some recommendations on how to improve the law, thereby improving quality of conclusion and implementation of collective agreements. But, due to the limited scope and the requirements that need to be met at the levels where the research was conducted, such works tend to be rather superficial. A doctoral dissertation entitled "*Collective agreements in Vietnamese labour law*" by Nguyen Nang Khanh was published in 2009. This work is also limited by its scope and just focuses on the statutory regulation on collective agreement of Vietnam. Of theoretical issues, only the concept, features and categories of collective agreements were examined. Of works in the press, too, the ones dealing with collective agreements account for a very small proportion. Regarding research conducted in Sweden, I have found some doctoral theses, as follows: "*Lokala kollektivavtal: om lokala parters rättsliga ställning inom fackliga organisationer* (Collective bargaining on the plant level)", by Kent Källström, Stockholm: LiberFörlag, (1979)⁹; "*Collective wage bargaining and the impact of norms of fairness: an analysis based on the Norwegian experiences*" by Geir Høgsnes, Oslo: Univ. of Dept. of Sociology, Institute for Social Research (1994) and "*Organising cooperation bargaining, voting and control*", by Bård Harstad, Publisher: Stockholm: Institute for International Economic Studies, Stockholm University, (2003); "*Redundancy and the Swedish model: Swedish collective agreements on employment security in a national and international context*" by Gabriella Sebardt, publisher: Uppsala Iustus, (2005). I have not found any master theses (in English) regarding collective agreements in the

⁹ This dissertation was written in Swedish. I could only look at the introduction.

studies managed by the library of the Law Faculty of Lund University (some 400 copies made since the 1990s in total). Only a short article summarizing the practical situation of collective bargaining (*The Rise and Fall of the Restricted Swedish Model* by Lars Svensson in 2010 and others on such issues as flexible working time, job trainings, the absence of labour from work etc. As the development of the market economies in Vietnam, Sweden and other countries are not on the same level, together with the variety of national/regional contexts and the facts presented and the different approaches used for the researches etc, I do not regard such works as ones that can be widely understood in Vietnam, so I can only see them as reference sources, providing new insights into collective agreements concluded outside Vietnam. As a more comprehensive and comparative study of collective agreements, conducted at the doctoral-level, my work can be seen as the first work on the whole field to appear in Vietnam.

1.3. Research tasks, delimitation and definitions

As I have mentioned in section *1.1. Background*, collective agreements in Vietnam have not developed for various reasons. In order to improve the situation, the awareness of collective agreements in Vietnam should be enhanced; the related laws and mechanisms should be considered and improved. Thus, to make some contribution to this, my study should fulfill the following tasks: *First*, to draw an overall picture of collective agreements and clarify the role and significance of collective agreements in a market economy. *Second*, to study international standards in the field of collective agreements and the history of collective agreement development and the law on collective agreements in Sweden and Vietnam. *Third*, to analyze and evaluate the current laws on collective agreements in Sweden and in Vietnam and their application in practice, acknowledging the achievement and pointing out problems, defects, unsuitable provisions and mechanism that needs to be improved. *Fourth*, to suggest solutions for improving the Vietnamese law on collective agreements, enhancing people's awareness and improving the effectiveness of the concluding and implementing of collective agreements.

To perform the above-mentioned tasks, *first*, fundamental theoretical issues relating to collective agreements will be reviewed. They include: definition, features, form, contents, duration, legal effects, different categories of collective agreements, the relationship between collective agreements and other legal phenomena (e.g. labour

laws, employment contracts, work rules, work agreements, company practices) etc. Other directly related issues such as how to recognize bargaining agents, what conditions are needed for a sound collective agreement system, the status of collective agreements in some major market economies are also important to consider. To clarify the content of the above substantial issues, the examples used in this study will not only be selected from Sweden or Vietnam, but also from other countries. As research works and books concerning industrial relations and collective agreements often group market economies in the world into major regional economies: EU, (sometimes individual Nordic countries), US, Japan and developing countries¹⁰, those attempts will accordingly be mirrored in this study. This means theoretical issues of collective agreements will be demonstrated by examples representing such economies.

Second, studying collective agreements also includes examining international laws relating to collective agreements, the histories of collective agreements and the law of collective agreements in Sweden and Vietnam. These issues are important to consider as they reflect the legal environment and background for the current collective agreement systems; studying them will allow us to better understand the situation in which the collective agreements and labour markets of the two countries are placed. Regarding international laws on collective agreements, the main concerns are: the origin and the rise of international laws, their purposes, bodies issuing regulations applying internationally, the related international legal documents and the main content of international labour standards on collective bargaining. Besides, the influence of international labour laws on legislation on collective agreements in Sweden and Vietnam will also be considered. International labour standards form a body of law, including various sections of regulation, each of them has certain meanings to collective agreement development. This study will only examine labour

¹⁰ Here are some of researches and books grouping market economies in that way: Roberto Pedersini (2007) *Industrial relations in the EU, Japan, US and other global economies, 2005–2006*, published by Eurofound 2007; Mark Carley (2005) *Industrial relations in the EU, Japan and USA, 2003–2004*, published by Eurofound; Mark Carley (2001) *Industrial relations in the EU, Japan and USA, 2000*, published by Eurofound; Ole Hasselbalch (2002) *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, pp.11-35; Ruth Nielsen (2002) *Europeanization of Nordic Labour Law*, Scandinavian Studies in Law Vol. 43, Stockholm 2002 p 37-75; Anthony Ferner, Richard Hyman (1998) *Changing industrial relation in Europe*, Blackwell publishing; European Commission (2008) *Employee representatives in an enlarge Europe*, Vol. 1; John H. Pencavel (1996), *The legal framework for collective bargaining in developing economies*, Stanford Institute for Economic Policy Research (SIEPR) etc.

standards directly relating to collective agreements. They include: international standards concerning the right to freedom of association and collective bargaining, collective bargaining and collective agreements. Regarding the histories of collective agreement and the development of the two legislative systems, some important aspects such as the movement and efforts of the working classes, the attitude and activities of the states, the subjective and objective conditions affecting the development of collective agreements and related legislation will be taken into account.

Third, current law on collective agreements is also the central issue of this study. Key contents of the existing laws in Sweden and Vietnam include the procedures for collective bargaining, relevant issues and problems occurring in the course of concluding and implementing collective agreements (bargaining in good faith, supportive measures used in case of bargaining deadlock, revising collective agreements, handling invalid collective agreements, implementing collective agreements in case of ownership transfer or enterprise reorganization, breach of collective agreements and corrective measures). The question of how the laws regulate the termination of collective agreements and how labour disputes are settled will also be examined. While statutory provisions are presented, the actual activities of the social partners are also evaluated. Sometimes, experiences of other nations may be referred to, if some comparison is needed, but the only purpose is to make the Swedish or Vietnamese regulations be better understood.

Above all, this study is to find out solutions to make the Vietnamese labour market healthy. So the lessons/experiences extracted from the study and the specific solutions covering the defects of the Vietnamese labour market will be fully presented.

In this study some concepts will be mentioned regularly:

- “*Collective bargaining*” means “the process by which an employers or a group of employers and one or more workers’ organizations or representatives voluntarily discuss and negotiate mutually acceptable terms and conditions of employment which are valid for a given period of time”.¹¹

¹¹ This is the official definition used in the ILO’s legal documents. See: ILO (1996), *Glossary of Industrial Relations and Related Terms*, p. 8

- “*Negotiation*” defined by ILO, means “a process in which two or more parties with common and conflicting interests come together and talk with a view to reaching an agreement.”¹² In this study, it will be interpreted as an activity or a step of the process of concluding collective agreements.

1.4. Methods and materials

1.4.1. Methods

Regarding methodology, the thesis is based on both dialectical and historical materialism and other research methods such as the comparative, analytical, descriptive and predictive methods. Such methods are more or less interrelated and tend to overlap.

1.4.1.1. Dialectical materialism

Dialectical materialism is the world outlook of the Marxist-Leninist party.¹³ It provides the most general laws of nature, society and thinking¹⁴, is an overall and universal approach and common methodology for consideration and explanation of different phenomena of the nature and society.

While recognizing that “the universe is not a disconnected mix of things isolated from each other, but an integral whole, with the result that things are interdependent” (principle of the unity of world), “Phenomena are connected through causality” (the principle of causality) and “Nature is in a state of constant change: development,

¹² Ibid, p.10

¹³ Dialectical materialism is the world outlook of the Marxist-Leninist party. It is called dialectical materialism because its approach to the phenomena of nature, its method of studying and apprehending them, is dialectical, while its interpretation of the phenomena of nature, its conception of these phenomena, its theory, is materialistic (J. V. Stalin (1938), *Dialectical and Historical Materialism*). This methodological approach shows some reasonable elements that could be used in studying many legal phenomena in this study.

¹⁴ In related literature, the concept of dialectical materialism may be expressed more or less concrete. One original expression is that “*Dialectical materialism attempts to formulate the general law of motion and development in nature and society, and the human knowledge that reflect them*”. See: Walter Hollitscher (1953), *Dialectical materialism and the Physicist*, Bulletin of the Atomic Scientists Journal, Educational Foundation for Nuclear Science, Inc. March 1953, p.53; See also: Michael Curtis (1997), *Marxism: the inner dialogues*, Transaction Publishers, Vol.1, p.3; Erwin Fahlbusch, Geoffrey William Bromiley (2003), *The Encyclopedia of Christianity*, Vol. 3, p.429, Wm. B. Eerdmans Publishing, 2003; T. B. Bottomore (1991), *A dictionary of Marxist thought*, Wiley-Blackwell, p142-145; Ted Honderich (2005), *the Oxford companion to philosophy*, Oxford University Press, 2005, p.560 etc.

disintegration, dying away and arising” (law of development) etc.¹⁵ a general implication of these principles is that, to understand the nature, characteristics and content of a legal phenomenon, the phenomenon must be placed in its specific context, meaning that it should be studied in relation to other specific events and processes where it exists. Thus, to understand the law of a country it is necessary to understand the broader context in which that law operates.

In my research, this methodology is regarded as a principle to be used when dealing with a large range of legal phenomena, processes and facts of the labour market. For example, to study the rise and the development of collective agreements, laws on collective agreement, labour law and international labour standards (in chapter 2 and 3) one should connect the situation of the labour market where there exists the need for regulating labour relations by mean of collective agreements/legislation on collective agreements and the movements/events leading to their emergence. Similarly, to investigate the interrelation between collective agreements and other instruments regulating labour market (chapter 2) one must base one’s viewpoint on a ground that these instruments do not exist in isolation, but closely connect, complement each other and work together. Such close connection and complementation, in turn, explains that these instruments may not develop on the same level and at the same time; sometimes the strong development of one instrument may go together with a lesser development of the others.¹⁶

The principle of “causality” (law of “cause and effect”), together with such factors as “conditions” or “environment” allows us to explain the possible results brought about by applying collective agreements or laws on collective agreements or any mechanisms relating to collective bargaining in the workplace. Thank to these tools, we can explain the positive role collective agreements can play, why the strikes occurring in the past years in Vietnam were all illegal, why the quality of collective

¹⁵ See: “*Dialectic and its law*”, <http://prepod.info/ru/article/dialectic-and-its-laws/>; see also: “*Dialectical materialism*”, http://www.newworldencyclopedia.org/entry/Dialectical_materialism, Joseph Stalin (1938), “*Dialectical and Historical Materialism*”, <http://www.marx.org/reference/archive/stalin/works/1938/09.htm>; ; The Institute for the Study of the Science of Society, “*How and Why Things Change*,” Institute Resource Paper No 3; <http://www.scienceofsociety.org/inbox/res3.html>, etc.

¹⁶ This interrelationship exists in the case of collective agreements and labour contracts; collective agreements and work agreements. In particular, a strong development of a collective agreement system may not go together with a strong development of employment contracts and vice versa as these two instruments can, to certain extent, mutually replace each other.

agreements remains low etc. Similarly, many other issues need to be considered in the light of the above principles, such as the influence of international standards on legislation in the two countries (chapter 3), the current status of law on collective agreements and the situation of concluding and implementing collective agreements in Sweden and Vietnam (chapter 4), the limited social awareness of different aspects of labour relations in Vietnam, the powerless trade union and so on (chapter 4 and 5).

While recognizing some other laws such as the law of development¹⁷, one should also see the role and ability of human beings in influencing the world, accelerating or constraining the process of development. This is a rational basis on which to put forward solutions to improve the laws regarding and the quality of collective agreements in Vietnam. As the Vietnam socio-economic context is different from those in Sweden and other countries, the experiences and lessons learned through the study will be interpreted and apply flexibly, to suit the Vietnamese conditions.

1.4.1.2. Comparative method

Generally speaking, the comparative method is of paramount importance. “Thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research.”¹⁸ It is naturally true: “where a problem in the law of obligation is solved in different ways in various countries, the value and importance of the comparison becomes apparent”.¹⁹ Nowadays comparative approach in studying law becomes very regular. For a legal comparative research, this method has been seen as the basic specialized one.²⁰

As this is a comparative study, and one of the goals is learning experiences from foreign country (especially from Sweden) to find solutions to overcome the situation

¹⁷ The law is as follows “everything is in a constant process of change, motion and development. Even when it appears to us that nothing is happening, in reality, matter is always changing”. See: *Dialectical materialism*, <http://www.marxist.com/science-old/dialecticalmaterialism.html>;

¹⁸ Guy E. Swanson (1971), “*Frameworks for Comparative Research: Structural Anthropology and the Theory of Action*,” in Ivan Vallier, ed. *Comparative Methods in Sociology*, University of California Press –Berkeley Los Angeles London, 1971, p. 145

¹⁹ H. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research*. CUP Archive, 1971, p.33

²⁰ Djalil I. Kiebaev (2003), *Comparative law: Method, Science or Educational Discipline?* Electronic Journal of Comparative Law, vol.7.3, Sep.2003.

of underdeveloped collective agreements in Vietnam, the comparative method will also be the leading one and is widely used. In chapter 2, fundamental theoretical issues of collective agreements will be presented. While analyzing these issues, examples illustrating such theoretical issues will be collected not only from Vietnam, Sweden, but also from other typical/global market economies as they represent different fashions of labour relations and collective bargaining regimes in the world. The comparisons made in this section are intended to show the similarities and differences of the selected systems and to identify the dominant form, the mainstream of such legal phenomena as well as variants in different specific conditions. Also by this process, I am able to detect differences between the collective agreements of other countries and those of Vietnam. I also consider the standard features, so that I can, to certain extent, evaluate the collective agreements and the laws on collective agreements of the involved systems. In chapter 2, the comparative method will be used to study the concept of collective agreements, their features, form, content, legal effect and duration, different types of collective agreement, recognition of bargaining agencies and other theoretical matters.

The comparative method should also be applied in Chapter 3, where the effect and influence of international standards on the Swedish and Vietnamese labour law will be considered. I intend to compare the levels of development and prevalence of collective agreements in the two labour markets while trying to explore the major factors that made up such differences. For example, through comparing the impact and outcomes of different policies for labour relations, one may find that “self-regulation” seems to be a more effective way to develop the labour market as it has successfully promoted the active role of the Swedish employees’ organizations, and trade unions have thus become powerful; Also, while avoiding involving itself too much in the social partners’ problems, the state can create favorable conditions for collective agreements and make them become a powerful instrument.

Looking at other systems allows us to understand one’s legal system and its possible deficiencies or reasonableness.²¹ One of the values of legal comparison can be explained by the fact that, experiences and ideas of a legal system can be

²¹ James Gordley (1998), “*Is Comparative Law a Distinct Discipline?*”, The American Journal of Comparative Law, Vol. 46, No. 4 (Autumn, 1998), pp. 607-615 (The main argument in Gordley’s article is that domestic lawyers and judges should look at foreign law when it provides a solution to a similar issue).

transplanted (borrowed or copied). It is admitted that foreign systems may be treated by lawmakers as very valuable tools for changing their own system.²² Doing the comparison between the Swedish and Vietnamese regulations, I intend to seek experiences for solving some problems of our laws and mechanisms on collective agreements. In Chapter 4, the current laws of Sweden and Vietnam are examined; the comparative method will be used to handle most of its content. Regarding the parties to collective agreements, I will look at different aspects such as organizational structure, personnel, financial conditions and operating principles and policies. By this way, one could explain their ability to present and protect their members. Procedures of conclusion, implementation and termination of collective agreements, the resolution for dispute settlement and the correcting of violations are also presented and compared. Through comparison, together with explanations for the current regulations, shortcomings/defects in the laws will also be exposed. Any differences in the ways of handling the practical situations will be reviewed, if they seem to be reasonable and applicable in the context of Vietnam, I will use them to form solutions for developing collective agreements in Vietnam.

A difficulty challenging the comparison method in this research is that the statistical data provided in Sweden and Vietnam are sometimes not measured by the same tools/criteria, or the information offered does not relate to the same categories. For example, to present the prevalence of collective agreements in the labour market, the Swedish side provides the rate of employees covered by collective agreements while Vietnamese side uses the rate of enterprises having collective agreements compared to the total enterprises in the same sector (state-owned, foreign or private enterprises).

1.4.1.3. Analysis and synthesis method

At the most elementary level, analysis concerns the separation of a whole into its component parts, whereas synthesis is the reverse process of combining parts to form

²²Alan Watson (2000), "Legal Transplants and European Private Law", paper delivered 18 May, 2000, at the conference The Contribution of Mixed Legal Systems to European Private Law, held at Maastricht University under the auspices of the Ius Commune Research School.

a complex whole.²³ Analysis and synthesis, as scientific methods, often go hand in hand; they complement one another. Every synthesis is built upon the results of a preceding analysis, and every analysis requires a subsequent synthesis in order to verify and correct its results.²⁴

For legal research, generally speaking, many concepts (of legal phenomena, issues, problems or relations etc.) may not be easily understood or not understood correctly. Such concepts need to be analyzed and clarify properly. This is the reason why analysis is often used as an indispensable tool in many researches and is also used in this study. In chapter 2, the analytic method will be used for examining and clarifying the concept of collective agreements, nature, characteristics and role of collective agreements, the interrelation between collective agreements and some other instruments regulating labour market. In chapter 3, this method will be used to study the details, meanings or implications of the content of international standards relating to collective agreements. In chapter 4, the situation of the parties to collective agreements will be examined. This method will be very useful for investigating various aspects and features of labour market parties in each country Sweden and Vietnam. In chapter 5, the conditions for the development of independent trade unions as well as improvement of union capacity need to be investigated concretely. Analysis will play an important role in dealing with such issues.

Using analysis in this research as explained above is only one side of what should be done. The other is generalizing various issues or problems presented in the study. The results of such a process often appear under the form of concluding remarks, conclusions or summaries.

1.4.1.4. Descriptive method

The descriptive method “develops knowledge by describing observed situations, events and objects”.²⁵ The goal of the descriptive method is to learn about something

²³ Source: Analysis and synthesis- Discourse on Method, Opticks, Great Scientific Experiments, A Historical Introduction to the Philosophy of science; <http://science.jrank.org/pages/48829/analysis-synthesis.html#ixzz1JAQPfkth>

²⁴ Tom Ritchey (1991), *Analysis and Synthesis: On Scientific Method - Based on a Study by Bernhard Riemann*, Originally published in: Systems Research Vol. 8, No. 4, pp 21-41. Thesis Publishers, 1991, revised 1996.

²⁵ Source: <http://uk.ask.com/question/what-does-research-methods-mean>

as it already exists without causing any changes to it.²⁶ Descriptive research answers the questions “who”, “what”, “where”, “when” and “how”²⁷ of a situation but not what caused it.²⁸ In my research, it is sometimes necessary to present certain data (such as the number of labour disputes, strike, collective bargaining coverage, trade unions population etc.) or a process prescribed by laws (such as the procedures of concluding collective agreements, registration of collective agreements, termination, amendment of collective agreements, the handling labour disputes and the correcting of violations (chapter 4). In this case, the descriptive method is suitable and useful. Notably, because the goal of this method is merely to prescribe, a “disadvantage” of this method is that, there is no way to analyze the results²⁹ This means there is always some “demarcation” between the issues that can be dealt with by descriptive method and those issues treated by analysis.

1.4.1.5. Predictive method

A predictive method is not often used alone but in combination with others and uses the results obtained by other methods. The predictive method encompasses a variety of techniques from statistics, data mining, and game theory that analyze current and historical facts to make predictions about future events.³⁰ This method will sometimes be resorted to in chapter 5, where I shall make certain predictions relating to the development of the Vietnamese labour market, trade unions, and the results of applying my recommendations for improving the law.

1.4.2. Materials

Regarding materials, my research relies on a large range of sources including legal documents, legal literature, books, articles, national reports, research, surveys and webpages, both in English and Vietnamese. In relation to the Swedish system, English sources written by Swedish scholars are mainly used. Books on international comparative labour law written by authors of different countries are also an important

²⁶ *What is the meaning of the descriptive method in research?* http://www.answerbag.com/q_view/2045654

²⁷ Source: <http://www.globalshiksha.com/content/descriptive-research-definition>

²⁸ *Descriptive research*, <http://www.kidscorner.com/pemonitorhosted/ws/results/Web/DescriptiveResearch/1/302362/RightNav/Relevanc>

²⁹ *Descriptive Research is Also Called Statistical Research*; <http://www.scribd.com/doc/28863089/Descriptive-Research-is-Also-Called-Statistical-Research>

³⁰ Source: <http://www.hrmtoday.com/featured-stories/success-stories-and-predictive-analytics/>

source. As for Swedish legal texts regarding collective agreements, some translations can be found.³¹ Some webpages introducing industrial relations and collective bargaining in Sweden and in some other market economies, such as those produced by ILO, Eurofound and the Swedish National Mediation Office are readily available. However, the translation of Swedish labour cases is not so common. A handful of cases (some 40) could be found in International Labour Law Report³² (volume 1 to 28, published annually from 1978 to 2009), but most of them relate to implementation of certain provisions in collective agreements, involving only individual employees. Some other legal documents of Sweden are not easily found in English either, especially those documents that have expired and collective agreements.³³ As I cannot read books in Swedish or any other language, except those books in English and Vietnamese, in this case, the publication referred to such legal documents is the only sources that I can use. In addition, since the value of any legislation must be reflected by its practical results, while my understanding of the legislation system and its relation to the socio-economic development is very limited, any material discussing or assessing Swedish labour laws will be essential. This does mean that using secondary sources was sometimes unavoidable, especially when I investigate the historical development of collective agreements and legislation on collective agreements in Sweden.

For the Vietnamese legal system, I use materials in both Vietnamese and English. Legal documents could be easily found. Legal literature in the labour field, writings in specialized journals and books comprises an important part.³⁴ But my

³¹ Some of them such as Co-Determination Act 1976 (SFS 1976:580) including amendments up to and including SFS 2000:166, Labour Disputes Act (SFS1974:371) including amendments up to SFS 2000:177; Trade union Representative Act (SFS 1974:358) including amendments up to and including SFS 1990:1039; Employment Protection Act (SFS 1982:80) including amendments up to and including SFS 2000:763 etc.

³² The "*International Labour Law Reports*" (ILLR) is a series of annual publications of labour law judgments by the highest courts in a number of jurisdictions. ILLR is intended primarily for the use of judges, labour law practitioners, industrial relations specialists and students who need or desire ready access to authoritative information of a comparative nature on problems arising in the field of labour law and industrial relations.

³³ Some of them such as: the Penal Code (1899), Act establishing Central Arbitration Board 1920, Collective Bargaining Agreements Act 1928, The December Compromise 1906, The Saltjobaden Agreement 1938, the other collective agreements in 1946, 1964, 1982 etc.

³⁴ Some important reference sources of this kinds include: Students' books (*The Vietnamese Labour Law*, with different versions up to 2009; Diep Thanh Nguyen (2005), Basic knowledge on labour law, student book - Can Tho University; different important journals such as Jurisprudential Review, Legislative Studies Journal, State and Law Review, Democracy and Law Journal etc.

research has also been conducted in a situation where accessing certain sources is rather limited. For some issues such as the politicization of the Vietnamese trade union, only materials in English are found.³⁵ In this case, the reliability of the sources must be taken into consideration. In general I select the documents and studies published by the ILO, especially those materials issued by the ILO agency in Hanoi and the ILO office for the Asia and Pacific region, or by research centers belonging to universities in Australia and Japan. A large number of short articles on different aspects of labour relations in Vietnam are to be found on the webpage of MOLISA, different journals, papers etc. have been used. On issues which have been broadly studied or where material is freely and easily available, I do not mention reference sources here.

1.5. Dissertation outline

My research is composed of five chapters.

Chapter 1 focuses on commentaries by other authors on the topic selected, research methods and materials to be used; research questions and a brief introduction to the work as a whole.

Chapter 2 is used for systematically presenting and explaining fundamental issues of collective agreements and their formation and development in order to clarify their nature, roles, form, content and legal effect and the significance of such agreements for labour relations. The chapters aim at achieving a comprehensive worldwide overview of collective agreements and the legislation on them.

³⁵ Some of them: Clarke, S., Lee, C.H. and Do, QC (2007). 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam', Journal of Industrial Relations, 49:4; Tim Pringle (2008) *Trade Union Renewal in China and Vietnam?*, paper prepared for 26th International Labour Process Conference, 18th-20th March 2008, University College, Dublin; Tim De Meyer (1998) *The Ratification of International Labour Conventions in the Asian - Pacific Region: Up To The Standard?* p.13,14; Simon Clarke (2007), *Trade Unions in Russia, China and Vietnam*, Historical Materialism Conference, London, 9 November 2007; Do Quynh Chi (2007) *Independent workers activism in Vietnam and its influence on the strategy of the government and traditional union-* Analytical report, Nov. 2007; John H. Pencavel (1996) *The legal framework for collective bargaining in developing economies*, Stanford Institute for Economic Policy Research (SIEPR); Ying Zhu and Fahey (2000) *The Challenges and Opportunities for the Trade Union Movement in the Transition Era: Two Socialist Market Economies China and Vietnam*, Asia Pacific Business Review, Vol. 6, No. 3 and 4, pp.282-299, Routledge, part of the Taylor & Francis Group; Youngmo Yoon (2009) *A comparative study on industrial relations and collective bargaining in East Asian countries*, Industrial and Employment Relations Department - ILO, Geneva November 2009.

Chapter 3 is intended to give an overview of international labour standards regarding collective agreements, the extent of their influence on legislation on collective agreements in Sweden and Vietnam. Another task of this chapter is to briefly present the history of the development of collective agreements and related legislation in the two countries.

Chapter 4 focuses on the current laws and the reality of negotiating and implementing collective agreements in Sweden and Vietnam; clarifying the differences and similarities between the two systems; pointing out problems and restrictions existing in the legal system in Vietnam as well as in the practical application of the law on collective agreements; analyzing the main socio-economic factors leading to this situation and extracting the lessons to be gained from my research.

Chapter 5 is reserved for recommendations. With the knowledge acquired in my research activities and on the basis of an analysis of the actual situation of and the specific requirements of developing collective agreements in Vietnam, proposals will be put forward which cover both shortcomings in the law on collective agreements and the quality of law enforcement. The ultimate goal is to make some contribution to the establishment of a healthy environment for the development of collective agreements in Vietnam.

Chapter 2: Some basic issues on collective agreements

2.1. Concept of collective agreements

In a market economy, labour relations are built on the basis of the freedom of the parties concerned. When engaging in a labour relationship, each participating party is motivated by its own interests. Employees look forward to receiving income. The employer's business aims at a profit. Because cooperation between labour and capital is likely to be beneficial for both sides, this could be seen as the practical basis for establishing an equal and mutually beneficial relationship between the parties which may assume the nature of a symbiotic one.

However, there is no absolute equality in this relationship because each party has a different socio-economic status. Employees are virtually always being driven to find or hold onto employment to satisfy their economic needs and the requirements of family life. In a context where there is severe competition on the labour market, it can be difficult to find jobs. An employee has only one employment but the employer can choose among many employees. That is the reason why employees are always worried about not being recruited or losing their jobs. This psychological aspect has been used by employers when buying work capability.

The negative aspect of the situation where equality in labour relations is not adequately secured is that the weaker party, and normally this is the employee side, risks being put at a disadvantage in the negotiation process and it is difficult for him to achieve satisfying terms and working conditions. Failure to reach a balanced agreement may be reflected in provisions fixing a low salary, prolonged working hours and poor working conditions.

However, employees eventually found a way to overcome the disadvantages caused by their unequal economic status in the relationship with the employer. To make themselves stronger in their dealings with the employer and their fight for better working conditions, employees united and acted as a group. The strength of the many individual employees is thereby aggregated and their position is significantly improved. Employees have learnt that collective actions are more effective than dealing individually. This process led to the formation of trade unions, the emergence of collective bargaining and certain new forms of industrial action that were not seen before.

By acting collectively, working conditions for employees have indeed been improved. Working through trade unions or other collective actions gradually became the preferred means to handle labour relations issues and they have been used as employees' common defensive "weapon". For employers, working through trade unions is also an effective channel for communicating with their employees.

The first collective agreements appeared quite some time ago, in the late 18th and early 19th century when the capitalist economies, such as those in England, the United States, Germany and the Nordic countries were at the height of their development and in many countries they have since made an important contribution to building a prosperous modern society.

As they are based on the same foundations and existential conditions, collective agreements tend to play a similar role and have the same nature, even if they arise or arose in different regions. The definitions of a collective agreement in different countries are thus similar, in that, every collective agreement is considered as an agreement concluded between an employer (or employers' associations) and a trade union (or a number of trade unions, or employee representatives) on terms and working conditions which also creates a set of rules regulating the relationship between employer and labour collective (normally represented by trade unions).

Economies which have rather different socio-economic conditions such as the United States, Japan, and the EU member states have virtually the same understanding of collective agreements³⁶. However, some countries differ in the details, for example, in Britain collective agreements do not need to be in writing. They can be unwritten and informal.³⁷ In Denmark too, collective agreements can take the form of verbal agreements, or even be tacit. Further, a labour collective (of at least 2 persons) can conclude collective agreements, employees do not need to be represented by a trade

³⁶ In Germany and the United States, there are no statutory provisions giving a definition of "collective agreement". However, the concept of collective agreement can still be understood through the literature on German and US labour laws. See: Manfred Weiss and Dr. Marlene Schmidt (2000), *Federal Republic of Germany*, Kluwer, para. 347-348; Alvin L. Goldman, (1996), *United States of America*, ELL, Kluwer, paragraph 549; for Japan, see: Articles 14 Japanese Trade Union Law.

³⁷ See: Lewis Silkin (2005), *United Kingdom*, in "Collective bargaining agreements", Jus Labouris 2005, p.27; See also "Collective agreements", *United Kingdom*, Eurofound 2009.

union.³⁸ Other systems such as those of Britain, Romania, Estonia, Latvia, Lithuania and France also accept non-trade union representatives of the employees.³⁹

Sweden and Vietnam are not exceptional cases. Section 23 of the Swedish Employment Act (Co-Determination Act) 1976 defines a collective agreements as follows: *The term "collective bargaining agreement" means an agreement in writing between an employers' organization or an employer and an employees' organization in respect of conditions of employment or otherwise about the relationship between employers and employees.*

As for Vietnam, a similar definition of collective agreements is provided in Section 44, Vietnamese Labour Code, according to which a collective agreement is *a written agreement between labour collective and employer in respect of working conditions and utilization of labour and the rights and obligations of both parties in respect of labour relations.* This definition is rather general and does not define the parties to collective agreements in any detail. The reason may be that in Vietnam the representative institutions of the labour market parties have not yet been fully established for the purpose of collective bargaining. Consequently, collective agreements have only been concluded at plant level and this fact is to an extent reflected in the above definition of the term.

ILO Recommendation N^o91 provides a remarkably broad yet open definition which takes into account the different national socio-economic contexts of member states. According to this definition *collective agreements mean all types of written agreements regarding working conditions and terms of employment which are concluded between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more representative workers' organizations, on the other.* In case of absence of organizations representing the employee side as afore-mentioned, *the representatives of the workers duly elected and*

³⁸ See: Norrbom & Vinding (2005), *Denmark*, in "Collective bargaining agreements", Jus Labouris 2005, p.8; See also: "Collective Agreement", *Denmark*, Eurofound 2009.

³⁹ For the UK, see "Collective bargaining", Published in 2009 by ETUI (European Trade union Institute) - the case of UK; For Romania, Estonia, Latvia, Lithuania and France, see: Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

*authorized by employees in accordance with national laws and regulations shall qualify.*⁴⁰

Generally, collective agreements have these main characteristics:

- First, they are agreements concluded between the two sides in labour relations. On the employer side, the signatory may be an individual, an employer or an employers' association. However, on the employee side, only a labour collective can be the subject.

Employees are in most cases represented by trade unions. Employees' representatives can qualify if elected in the due procedure prescribed by national law and regulations.

- Second, what is covered by collective agreements is diverse, and may include everything the parties need to cover to help run the business and maintain (and improve) their relationship. Terms of employment and working conditions and the rights and obligations of participating parties, are matters falling within the sphere of either individual or collective labour relations.

- Third, collective agreements may appear in different forms. They do not have to be in writing but the requirement that there be a writing is more common. Oral or tacit collective agreements are rather rare.

To sum up, apart some minor differences, the notion of collective agreement is understood and defined in a homogeneous manner in both international labour law (mainly in documents issued by the ILO) and national laws, including Sweden, Vietnam and many other countries.

2.2. Interrelation between collective agreements and other legal instruments regulating the labour market

A labour market may be governed by various instruments such as international labour standards, national labour laws, collective agreements, work agreements, work rules, company customs and employment contracts. The following subsections will examine the interrelation between collective agreements and the other instruments and

⁴⁰ See Section II. *Definition of Collective Agreements* - ILO Recommendation No.91.

will also say a little about the extent of collective agreement usage in some typical legal systems.

2.2.1. Collective agreements and international labour law

Collective agreements are influenced by international labour laws. International legal instruments do not directly affect collective agreements; but because member states ratify international labour standards and transform them into domestic legislation, collective agreements will be effectively subject to the international standards, once the nation ratifies them. The influence of international law on national collective agreement may take two forms:

First, international law provides a legal foundation for collective agreements. Such influence is linked to the development of the collective agreement system of the nation as a whole but the question of how the collective agreement system is to develop is answered by the environment in which it is placed. This means that international standards give the fundamental conditions for collective agreements but the question of how much collective agreement benefits from international standards depends on the member state's practices by way of national legislation and union activities.

An important sector of international labour standards directly addresses the primary conditions for the subsistence and development of collective agreements. Provisions relating to representative institutions or collective bargaining fall into this group. These normally recognize such rights as the right to freedom of association, the right to establish representative organizations and conduct representative activities, the right to freedom of collective bargaining and collective agreements.

Other prescriptions promote collective bargaining and collective agreements in member states more indirectly. These provisions consist of those forbidding or restraining all types of action interfering or obstructing with labour market parties seeking to enjoy their collective rights.

Such provisions compose the core content of international labour standards on collective bargaining and collective agreements.

Secondly, international law provides a framework enabling parties to a collective agreement to agree to various matters relating to the employment relationship. From

this angle any influence is linked to certain parts of the contents of the collective agreement. International laws influence collective agreement in this manner by determining labour standards covering the terms and conditions of individual labour relations, determining which matters shall be dealt with in collective agreements and how to deal with them (principles and procedure, for example) (some relevant issues are analyzed in Chapter 3, Section 3.1.3. “*The influence of international labour law on the Swedish and Vietnamese systems*”).

2.2.2. Collective agreements and national labour law

The interrelationship between national labour law and collective agreements takes place in two areas:

2.2.2.1. Collective agreements and individual labour relations law

Individual labour relations law is a part of labour law which regulates the employment relationship between employer and individual employees. More specifically, the matters regulated in this law may include labour recruitment, wages, hour of work, suspension from work, maternity rights, layoff etc. The main function of individual labour relations law tends to be to protect the employee.

It seems that national labour law and collective agreement are rather similar legal sources so far as individual labour relation affairs are concerned. They both function as a legal framework for the employment relationship.

Among legal instruments regulating individual labour relations, national labour law always occupies a central position. It is the legal source by which the State imposes its requirements on the labour market parties. National law just underpins the legal framework, setting minimum measures and policies concerning the labour market and labour relations, leaving detailed matters to be regulated by the labour market parties themselves. But national labour law naturally takes precedence over collective agreements and other such private instruments.

While the state and the labour market parties both issue standards for labour relations, their aims are not the same. The state mainly concentrates on public security and the public benefit while the labour market parties pursue their own interests. The state concerns itself with social order while the parties think about their mutual

coordination and improving their respective strengths so as to be able to better and guarantee both their mutual and their individual interests.

Due to such divergent aims, the contents of state laws and of collective agreements are somewhat different, even when they cover the same topics. For example, the law attempts to generalize legal problems, while the collective agreements attempt to concretize them. A collective agreement may often have greater flexibility in order to meet the requirements of a changing market and the specific conditions of the parties involved. From the state's perspective, as it has to treat all issues very generally, it sets up standards for the entire labour market and whole areas of the economy, so national labour law cannot focus on particular situations existing at the level of the individual enterprise; it can only mention a limited number of typical situations. Therefore, although labour market regulation originates from the state laws and statutory regulation takes priority and controls the standards emanating from collective agreement, the latter is still an important and irreplaceable legal instrument because of its precision and adaptability to changes in the labour market.

There is still close co-operation between national labour law and collective agreements in regulating the labour market. A collective agreement concretizes national law, but it does not need to mention or clarify every national labour standard. National provisions that relate to employee's working conditions might be improved and some provisions might need to be further elaborated on to make them fit the actual conditions of the parties involved. But many provisions of national law do not need to be repeated as they are already applicable. In this case, parties to a collective agreement accept them as indicating default positions.

Thus, although a collective agreement is a rich and detailed document, it is not an isolated legal instrument, but is coordinated with national law.

2.2.2.2. Collective agreements and collective labour relations law

In the previous part, I mentioned the interrelation between collective agreements and statutory regulation from the individual employment relations perspective. The relation between collective agreements and state law is, however, mainly served by collective labour relations law. This is another exceptionally important part of labour legislation, particularly in nations with fully industrialized economies.

Traditionally the individual employment relationship is the primary concern of labour law. However, it is not enough to balance the power and interests of parties involved by way of individual labour law since this deals only with individual cases and lacks systemic regulations. With the development of industrialized societies, collective labour law, as a part of labour law, gradually took on a more significant role. Collective labour law is primarily concerned with workers' legitimate collective rights, such as the right to form and participate in trade unions, the right to collective bargaining, the right to strike action and the like, and therefore directly determines how the collective agreement system is to function. It can thus be said that collective agreements indeed originate from state law, particularly collective labour law.

State law is the corner-stone for the existence of the collective agreement system itself. However, we still need to consider whether the collective agreement system completely depends on state law and if not, what further factors impact its existence and development? Naturally national collective labour law is not all that is needed for a sound collective agreement system: an effective supportive mechanism is also needed. The status of a collective agreement system and its characteristics and level of development are likely to reflect the actual effect of the state's activity on, say, trade union activity and collective bargaining in general. Through statutory regulation and other supportive actions, the state can, however, recognize, set forth, facilitate and guarantee trade union rights and collective bargaining and thus foster and nourish the collective agreement system.

2.2.3. Collective agreements and individual contracts

Besides collective agreements, there is another important instrument of regulating labour relations at the workplace: the employment contracts signed between employer and employee. An employment contract is an agreement on the terms and conditions of employment agreed to by both the employer and the individual employee.⁴¹ Employment contracts and collective agreements are closely connected. They have some similarities, in that both of them contain terms relating to the working conditions of the employee, they are normally in writing and they may be

⁴¹ The definitions of “employment contract” can vary between the different systems in term of word order, but they are basically homogeneous. This is only a rather general statement.

concluded for a definite or indefinite term. But they also differ from each other in several basic respects:

Regarding their nature, collective agreements and individual contracts are not compatible as the former has the nature of a real “legal norm” while the latter does not. The collective agreement operates as a protective law; it may be repeatedly referred to. An individual contract is merely an application of protective law to a specific case, so only the individual employee and employer are concerned in it. The individual contract is not used as the basis for establishing any further legal document relating to the labour market.

As for coverage, an employment contract obviously covers a smaller sphere. A collective agreement can cover all or some of the employees within a business or all employees across multiple businesses.⁴² Collective agreements prescribe the obligations of the participating parties, the terms and working conditions for the labour collective and are capable of covering the entire workforce of the bargaining unit while an employment contract consists of obligations, terms and working conditions applying to specific employees only. A part of the content of a collective agreement is addressed to the collective labour relationship between employer and trade union itself whereas the employment contract does not cover this kind of relationship.

An employment contract concretizes a collective agreement; it refers to the working conditions, rights and duties of employees. However, the individual contract does not need to touch on every matter provided for in the collective agreement. Some clauses of collective agreement are applied to the entire labour collective such as those on traditional holiday leave, enterprise welfare and the like, and do not need to be repeated in individual contracts. Obviously, each individual contract only concretizes a small portion of the contents of the collective agreement and only focuses on regulations relating to the employment of the individual employee in question.

Regarding effect, a collective agreement has greater legal value than an employment contract. In general, the terms and conditions in an employment contract must not be contrary to the terms and conditions provided by a collective, unless the

⁴² *Employment contracts and enterprise agreements*, available at www.centralcoastbusinesslawyers.com 2009.

collective agreement provides otherwise.⁴³ When a new collective agreement is set up and comes into force, it will automatically modify individual contracts. Where an employment contract is not compatible with the collective agreement, the latter prevails.⁴⁴ Since employees are normally in a weak position and employers could lord it over powerless workers, legislation usually does not allow the parties to derogate from collective agreements in a way disadvantageous to the employee. They can, however, provide more favourable terms and conditions. This is derogation subject to the "principle of favour". In some special cases, a collective agreement may be mandatory in both directions. Derogation for better or worse is always disallowed in such a case, unless the collective agreement expressly allows it, or the parties to the national collective agreement have consented to a different practice.⁴⁵ It is also possible that clauses of individual employment agreement override certain clauses in a collective agreement, but this can only happen in very special circumstances.⁴⁶

Even if it has been worked out in detail, a collective agreement still functions as a framework document only. Parties to an employment contract may continue to concretize or depart from its terms as they see fit. An employee may seek an adjustment to bring about improvements in pay or working conditions, for instance, by requesting additional holidays or leave, or to change certain working conditions so that they suit him or her better.

Collective agreements and employment contracts mutually facilitate each other in regulating individual labour relations. A collective agreement may be supplemented by the individual contract and an individual contract is complemented by a collective agreement. Where there is a strong and effective collective agreement system, the employment contract system may be less developed, and vice versa. Practically, when a collective agreement has been concluded in a reasonable and systematic manner, it has more capacity to replace individual employment contracts in an enterprise.

⁴³ Reinhold Fahlbeck (2001), *International Labour and Employment Law*, Volume II, American Bar Association (2001), p. 10-49

⁴⁴ See also Section 2.8. *Legal effect of collective agreements*.

⁴⁵ See: Swedish labour case AD 1989 No 112.

⁴⁶ ILO, *Digest of Decisions* 1996, (*collective bargaining*), para. 910.

The level of respective usage of collective agreements and employment contracts varies from country to country and from time to time, depending on the status of collective agreements and the state's capacity for dealing with labour matters. In some countries, the individual contract is a purely secondary matter as the collective agreement is dominant and freely available. In this system, beside those employment contracts which are in writing and signed, there may well be numerous individual contracts which might be oral or even tacit. A strong collective agreement system will be able to find remedies to settle individual labour conflicts or disputes as they arise. So, should there is a difference between the two sides regarding the individual contract and their obligations under it, the corresponding clauses of the collective agreement will be taken into account and may well resolve the matter.⁴⁷ On the contrary, in countries where the collective agreement system is undeveloped, the individual contract is the central tool for settling labour relations and there is a plethora of such individual contracts. To foster or nourish such a system, state labour law often prescribes more concretely the conditions and the procedures for adopting an individual contract. All other issues relating to individual labour relations are also stipulated in a more detailed way. The "active" role and the deep participation (or intervention) of the state in labour market is thus clearly visible. Simultaneously, and in contrast, the law-making role and the supportive activities of labour market parties as collectives are less significant. There is not much for collective labour market parties to do in such systems: the freedom and flexibility to act of labour market parties may indeed even be explicitly restricted.

It is worth-while to look at the relationship collective agreement-employment contract from another angle: there is a two-way influence. The employment contract originates from the collective agreement, but it is not a purely dependent document. It may, to some extent, have a return influence on the collective agreement. Certain details agreed by employer and employee in individual contracts may become a matter for subsequent collective bargaining. Any collective agreement must be revised or updated rather frequently to better suit the parties' conditions or to deal with new conditions arising in the running of the business. That is why after a period of implementation, the two sides need to renegotiate and set up new terms and

⁴⁷ See the Swedish labour case AD 2000 No 29.

conditions. In this process, recent employment contracts may give parties to the new collective agreement valuable hints and suggestions.

Generally speaking, collective agreements and individual employment contracts, *inter alia*, co-operate in settling labour issues. Depending on the policy of the state, there will always be more of one and less of the other.

2.2.4. Collective agreements and work rules

At company level, as well as any collective agreement there may well be a further legal document drawn up for the purpose of regulating labour relations, namely work rules. This also plays quite an important role in practice.

Work rules are commonly regarded as specific rules for the workplace covering conditions such as working hours and any rules that employees must comply with during working time.⁴⁸ Some enterprises regard work rules as "golden rules", which need to be carefully set up and applied. A set of good work rules will ensure that the enterprise operation is conducted in an orderly and disciplined way. Work rules are often jointly created by the two sides to labour relations but may also be promulgated by the employer as within its discretion.⁴⁹ They mainly regulate the personal conduct of employees in the undertaking. If national law so provides, they may also be submitted to a competent institution for approval or confirmation. For example, in Japan the competent body is the Labour Inspection Office, in Vietnam the competent agency is the Provincial Labour and Social and Invalid Department. However, in other systems, such as those of Sweden, Germany and the United States, approval is not required. In some systems, setting up work rules in an establishment is a statutory requirement. In Japan, Thailand or Vietnam, for example, companies with 10 or more

⁴⁸ There are numerous definitions of work rule but there is little difference between the different systems.

⁴⁹ Work rules may be set up by both sides, as in Germany (employer and works council) and Vietnam (between employer and trade union). However, a more common pattern is that the employer is the person who has the prerogative to draw up work rules as in the United States and Japan. The Swedish pattern is somewhere between those two forms: work rules are laid down by the employer and this can be seen as his prerogative, however, according to the Co-determination Act 1976, a procedure of information and consultation with trade unions is needed.

regular employees must draw up work rules.⁵⁰ The work rules must not be contrary to law or relevant collective agreements.

The employer's right to organize his business does include his right to expect his or her employees to conform to a reasonable standard of conduct. Specifically, such conduct must be in compliance with labour standards, and must not contravene company regulations on security or orderliness at work (for instance: manner, dress, travel, language.). Employees who act in an inappropriate or unreasonable manner not only disturb customers or clients and adversely affect their view of the quality of service provided but may also create less desirable routines for coworkers.

Work rules are similar to collective agreements as they have normative effect but they are somewhat more proactive. Work rules should be made available to employees to remind them to act properly at work. A written work rule not only indicates what the employer expect employees to do, but also gives notice of the consequences of not meeting expectations.⁵¹ An employee who has been put on notice that some types of conduct are unacceptable can not claim ignorance when he or she engages in the prohibited conduct.⁵² Work rules thus tend to prevent employee's misconduct and that is why they are needed to maintain the normal flow of company business. It is even said that work rules assume de facto the status of the "law of the workplace"⁵³ and play an exceptionally large role in actual employment relations. Proper work rules will effectively support the business of the employer but they do not necessarily harm the interests of employees. If productivity and profitability are secured by orderliness, both sides, including employees, are likely to benefit.

Compared with collective agreements, work rules have a narrower scope and content. Collective agreements provides a mass of clauses relating to all obligations of the participating parties and all terms and working conditions governing workers while work rules focus on the rather specific obligations of the parties involved.

⁵⁰ For Japan: see: Hideyuki Morito (2006), *Decentralizing Decentralized Industrial Relations? the Role of Labour Unions and Employee Representatives in Japan*, JILPT Report, No.3 (2006), p.5; for Thailand, see Article 108, Labour Protection Act (B.E. 2541 - 1998); For Vietnam, see: Article 82 (1) Labour Code.

⁵¹ See Article 82 and Article 83 of the Vietnamese Labour Code on the definition and the contents of work rules.

⁵² SME Toolkit Vietnam, *Sample Work Rules*, available at: www.hrm.msstate.edu/work_rules,

⁵³ Yasuo Suwa (1993) *Relation of Collective Agreement to Rules of Employment*, Japan Labour Bulletin, Vol. 32 No. 3.

Further, a collective agreement is viewed as expressing the desire of the both sides whereas work rules mainly express the authority and demand of the individual employer regarding employee conduct. The collective agreement is addressed to the basic, long-term relationship between employer and employees while work rules deal with specific daily activities and ensure they fit in with the necessary requirements of the business.

Collective agreements also have broader aims such as harmonizing labour relations and facilitating business management in general. Work rules only function as a tool for a specific goal: establishing orderliness at work. However, this is a key condition for increase of labour productivity, product quality, decrease of production costs and the like. From the employees' perspective, work rules help to train employees to acquire a proper working manner and this is advantageous for them if they are to retain stable jobs and income.⁵⁴ In this regard, work rules also serve to harmonize the labour relationship. Conformity with work rules will also ensure the implementation of duties in the collective agreement and vice versa, compliance with the duties and obligations under the collective agreement will support the work rules.

There is one difference between collective agreements and work rules, however, though this is only a secondary consideration/concern: work rules apply to all employees in the workplace, regardless of the status of employees, including their membership in a trade union, while collective agreements are in principle only applied to trade union members.

2.2.5. Collective agreements and work agreements

In some systems, running parallel to any collective agreement regulating labour relations in enterprises, we may observe the existence of work agreements. Germany, Holland, France, Belgium, Spain, and the Netherlands are some examples of systems providing for these.⁵⁵

A work agreement is a type of contract concluded by employers and works councils⁵⁶ containing general rules regarding the working conditions of the individual

⁵⁴ Ha Noi Law University (2004), *Vietnamese Labour Laws*, Student book, p. 212.

⁵⁵ Thorsten Schulten, (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

⁵⁶ A works council is a "shop-floor" organization representing workers, which functions as the local-level complement to national labour negotiations. Work councils exist under different names, for example,

employees.⁵⁷ A work agreement is normally signed at the company level, based on the respective collective agreement at branch or industry level.⁵⁸ Work agreements have immediate and binding effect on the individual employment relationships of all employees in the establishments covered in the same way as does statute law. Germany has been known as a country which has a remarkably highly-developed and strong works council system.⁵⁹ The work agreement is therefore also used as an important way of controlling the labour market. However it is necessary to note that, according to the viewpoint of most legal systems that adopt the work council pattern, including Germany, the work agreement is not a document it is compulsory to adopt.⁶⁰ The works council itself is not an institution established pursuant to statutory requirement.⁶¹ Employer and work council also have no obligation to lay down work agreements. They may well establish a work agreement, but only on the basis of their complete autonomy.⁶²

Similar to collective agreements, works agreements have a normative effect on individual employment relationships. The biggest difference between them is that works agreements cover the employment relations of the entire workforce while collective agreements, in principle, cover only the employment contracts of those who are member of the union which signed such agreements.⁶³ Since collective agreements and work agreements have quite similar functions, harmonizing them is often an issue.⁶⁴ To co-ordinate collective agreements and work agreements, the states adopting the work council model have to draw a borderline between them and, in particular, identify both their respective boundary so far as contents are concerned and the sphere of their coverage. They also have to provide principles to combine them so

Betriebsrat (Germany), *Comité d'Entreprise* (France), *Conseil d'Entreprise*(Belgium), *Comité de empresa* (Spain).

⁵⁷ Stefan Linggemann, Robert von Steinau-Steinruck, Anja Mengel (2008), *Employment and Labour law in Germany*, Verlag C.H.Beck, Ant. N. Sakkoulas, Athens (2008), p. 61

⁵⁸ Professor Wolfgang Daeubler's lectures on German labour laws at Hanoi Law University 18 Sep.2008.

⁵⁹ For further details, see: Stefan Linggemann, Robert von Steinau-Steinruck, Anja Mengel (2008).“*labour and employment law in Germany*”, Verlag C.H.Beck, Ant. N. Sakkoulas, Athens (2008), pp. 55, 61.

⁶⁰ Professor Wolfgang Daeubler's lectures on German labour laws at Hanoi Law University 18 Sep.2008.

⁶¹ Marita Körner (2005), *German Labour Law in Transition*, German Law Journal No. 4 (1 April 2005).

⁶² Professor Wolfgang Daeubler's lectures on German labour laws at Hanoi Law University 18 Sep.2008.

⁶³ Manfred Weiss and Dr. Marlene Schmidt (2000), *Federal Republic of Germany*, Kluwer. Para 76.

⁶⁴ Ibid.

that they regulate the entire labour market while limiting the loopholes or other shortcomings of the system. This is a rather complicated and difficult task for the labour legislative system to deal with.

We are going to examine the case of Germany as a typical example of a system using work agreements to help clarify the relationship between collective agreement and work agreement and to learn how they work together in the system. According to German law⁶⁵, in order to protect collective bargaining autonomy, it is unlawful for works agreements to contain provisions on *remuneration and other employment conditions* which are regulated, or usually regulated, by collective agreement.⁶⁶ This also means that the contents of works agreements are rather limited. Since non-union members are not covered by collective agreements, their employment relationship basically depends on the works agreements. And problems arise here. How can work agreements assume this task when they do not cover basic matters as *remuneration*? In principle, this is an unsolvable problem.

Interestingly, however, the shortcomings are handled by a general rule of practice: Because the employer often does not know who is a member of the union (nobody is obliged to declare it), *First*, if there is a collective agreement in the establishment, the employer tends to refer to it in individual contracts with all workers. This can be explained by the fact that if he treats non-unionized workers worse than the members of the union, most of them would join the union. That is not in his interest and so he gives the same rights to non-unionized people.⁶⁷ *Second*, where there is no collective agreement in the establishment, but there is a work council, the work agreement plays the role of the legal basis for individual employment contracts. In that case, a work agreement may contain more terms, even in the sphere of salaries and working times (similar to a company-level collective agreement).⁶⁸

⁶⁵ Works Constitution Act, Section 77(3).

⁶⁶ Notably, collective bargaining in Germany takes place at the branch and regional levels between trade unions and employers' organizations. Works councils, which are formally independent from trade unions, also have bargaining powers which must be strictly separated from what happens at the trade union level. Works councils only deal with a limited range of matters at company level (see Marita Körner (2005), *German Labour Law in Transition*, German Law Journal No. 4 (1 April 2005).

⁶⁷ Professor Wolfgang Daeubler's lectures on German labour laws at Hanoi Law University 18 Sep.2008.

⁶⁸ Ibid.

In terms of the sphere of effect, a collective agreement is supposed to be superior to a work agreement⁶⁹; it will take precedence over work agreements where any conflict between them exists. It also plays the role of a framework legal document and could be used as the basis for setting the work agreement's terms and contents. Exceptions are possible if the collective agreement contain opening clauses for works agreements or if work agreements are more favorable for employees.⁷⁰ A collective agreement can even expressly permit the conclusion of works agreements to supplement it.

Further, in some countries, such as Austria, the Netherlands and Spain, works councils can renegotiate certain collectively agreed standards at company level or can conclude complementary works agreements, if entitled to do so by collective agreements at the sectoral level.⁷¹

Generally speaking, a work agreement operates rather flexibly, partly as a secondary document, partly as an alternative to the collective agreement, depending on actual needs at the company level.

2.2.6. Collective agreements and company practices

Due to the diversification of labour market parties' activities, numerous practices may be created at the workplace. It is possible that a certain way of dealing with an issue arising within the context of labour relations is repeated several times and then becomes a company practice. For example, if an employer gives his workforce a Christmas bonus and repeats this in the following years without explicitly stating that such benefits have been made on a voluntary basis, the employer's action may form a company practice.⁷² In reality, this is a rather common situation and the employees will then claim the benefit as a right.

Nevertheless, some questions must be clarified here in order to determine whether such a practice exists. *First*, the employer's action must contravene neither state law nor existing collective agreements. *Second*, the action must be conducted on

⁶⁹ Dr. Horst Kusters Mai's lecture (2008), *Collective agreement system in Germany* (Provided by VGCL).

⁷⁰ Marita Körner (2005), *German Labour Law in Transition*, German Law Journal No. 4 (1 April 2005).

⁷¹ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

⁷² Stefan Linggemann, Robert von Steinau-Steinruck, Anja Mengel (2008), *Employment and Labour law in Germany*, Verlag C.H.Beck, Ant. N. Sakkoulas, Athens (2008), page 5.

a regular basis. The question is then: how many times must the action be done for it to qualify as a company practice? The answer depends upon state law, or upon juridical interpretation. In Germany, for instance, when an employer repeats a certain action on a regular basis, at least 3 times, employees can conclude that the employer intends to continue such action in the future.⁷³

To a certain extent, company practices appear similar to a term of a collective agreement, in that they are applied to the labour collective. Because of this similarity, some legislative systems treat company practices as tacit collective agreements at company level, Denmark is an example of this.⁷⁴ Company practices also give employees the opportunity to make a claim which is in their own interest, where the collective agreement may not have explicitly covered the matter. Normally, company practices indeed relate to matters which are not handled in the collective agreement, because only in such a case will employer and employees look at what has actually happened instead of what is written. If the matter had already been laid down in the collective agreement, the issue of a practice would never have arisen. In this regard, company practices complement the existing collective agreement.

There is also the case where an employer offers certain benefits which are better than those provided for in the collective agreements. In this case company practices function as supplemental terms.

Both Sweden and Vietnam do not recognize company practices as tacit collective agreements, though they are seen as having a positive role in regulation of labour relations. In Vietnam company practices are in fact hardly regarded as a legal phenomenon. A small fraction of labour issues can be handled by company practices, but merely on the basis of voluntariness. Should there be a disagreement between the parties relating to implementation of a company practice, such company practices would not be seen as a legal basis allowing the aggrieved party to claim any entitlement to the benefit of such company practices. However, in Sweden, company practices still have legal force and a party can use them to claim benefits when necessary.

⁷³ Ibid.

⁷⁴ Eurofound (2009), *Collective Agreement, Denmark*, Available at: www.eurofound.europa.eu/emire/DENMARK/COLLECTIVEAGREEMENT-DN.htm

2.3. Features of collective agreements

The most prominent feature of a collective agreement is “collectiveness” which is reflected in the following aspects:

First, regarding the parties to a collective agreement, at least one of them must be an association. The employee side can not be a single individual. Depending on national laws, the organization representing employees may be a trade union, or an association of trade unions or simply employee representatives who have been properly selected. On the employer side, depending on the level where collective bargaining takes place, the party may be an employer, an employers’ association or an employers’ federation. However, it can only be the individual employer in the case of a collective agreement at company level.

On top of that, each party involved in collective agreement may number more than one person, for example, a local collective agreement may be concluded between an employer and all trade unions whose members are employed by the employer. Collective agreements entered at industrial or national level are often multi-partite. There are also cases where several employers’ associations are linked as parties. For example, the Swedish Industrial Agreement is concluded between 12 employers’ associations within SAF⁷⁵ (now SN⁷⁶) and 8 Unions belonging to LO⁷⁷, TCO⁷⁸ or SACO⁷⁹.⁸⁰ In Sweden, due to the well developed nature of the representative organizations of both labour market parties, it is not unusual for collective agreements to be entered into by a number of parties. In the Vietnamese case, since the representative organizations of the labour market parties have neither developed enough nor been set up in such a way that they can assume the task of collective bargaining, collective agreements have only been concluded between individual employers and the local trade unions (this issue will be further explored in Chapter 4, Section 4.1.1. Parties to collective agreement).

⁷⁵ SAF - Swedish Employers’ Confederation.

⁷⁶ SN was formed in 2001 by a mergence of SAF and the Federation of Swedish Industry.

⁷⁷ LO- The Swedish Trade Union Confederation.

⁷⁸ TCO - Swedish Confederation of Salaried Employees (Tjänstemännens Centralorganisation).

⁷⁹ SACO Swedish Confederation of Professional Associations (Sveriges Akademikers Central- Organisation).

⁸⁰ Eurofound (2009), *Collective Agreements, Sweden*, available at: <http://www.eurofound.europa.eu/emire/SWEDEN/ANCHOR-KOLLEKTIVAVTAL-SE.htm>

Second, in term of contents, a collective agreement is an instrument regulating the collective labour relationship between the signatory parties. So, it must contain a set of rules dealing with this type of relationship that is, the collective rights, obligations and responsibilities of the two sides and provisions relating to their subsequent common activities such as the peace obligation, negotiating procedure, disputes settlement procedure, collective agreement termination, notice and the like.

Third, regarding application, a collective agreement always serves a labour collective. The main part of any collective agreement consists of provisions relating to terms and working conditions which regulate individual employment relations, such as wages, hours of work, leave etc. The point is that even when collective agreement gives rules applying to individual labour relations, they do not deal with specific cases or specific employees. All workers within the labour force of the bargaining unit who are members of trade unions are bound by collective agreements, irrespective of their personal identity or the position occupied by them. Collective agreements usually cover an indeterminate number of employees which is often large (possibly amounting to several hundred or several thousand employees), though they may also relate to a smaller number of employees, a single class of employee or even a single employee. Once a collective agreement comes into effect, its contents are automatically applied to the employment contracts of all employees subject to its terms.

With a collective agreement entered into at national or industry level, the number of persons involved is usually very large. In this case, the “collectiveness” of collective agreement is clearly going to be more visible.

2.4. Nature of collective agreements

2.4.1. The "contract" nature

Any collective agreements are formed on the basis of *free negotiation and agreement (voluntariness)*, an exceptionally important quality for all contractual relationships, and they do indeed have the nature of a contract.

Voluntariness is an important principle for concluding collective agreements. Without this element of voluntariness, collective bargaining would be distorted; agreements signed would loss their significance and the regulatory effect would be seriously reduced. National labour law may establish this principle as a legal

requirement for recognizing the validity of a collective agreement.⁸¹ In countries whose labour laws have no such prescription, the legal literature still repeatedly mentions it. For example, Denmark is a typical example which has little formal legislation on the topic. There is almost no legislation on collective labour law issues⁸² and there is consequently no regulation of this principle. However, the Danish Model of collective bargaining has rightly been described as a strong *voluntary system*, and there are numerous documents discussing this.

This principle of voluntariness is understood as follows: The parties can not be forced to conclude collective agreements. When engaging in such a collective agreement, they should commence and motivate themselves by being clearly aware of their own benefits. However, each party has *the obligation to accept the counterpart's demand for collective bargaining*: in this case the parties' activity is lawful and will not be interpreted as a breach of the principle.⁸³ If the element of voluntariness is lacking for any reason (deceit, force...) the coerced party would have the right to refuse to apply the collective agreement despite having signed it. In practice this happens very rarely, but a "collective agreement" in such a case would still be regarded as null and void.

Collective agreements also have a contractual aspect since in the course of bargaining, the partners are capable of exercising their respective rights of *self-determination*. Although the entire content of any collective agreement must be under the control of State law - or limited by the national legal framework - a collective agreement will also manifest the desires (and creativeness) of the parties. Basically, national standards can be adjusted by the parties in the ways they wish, so as to make them suitable for the specific conditions of their case, and their particular requirements. The flexibility (in giving demands and eventually accepting the counterpart's requirements) exhibited in the course of bargaining reflects the *nature* of a *civil transaction* between parties. There are no fixed answers in labour matters,

⁸¹ For example, in Vietnam the principle of "voluntariness" is stated in Article 44, para. 2 - Labour Code.

⁸² Ruth Nielsen (2004), *The evolving structure of Collective Bargaining in Europe 1990-2004*, Denmark, national report, Research Project Co-financed by the European Commission and the University of Florence, p.10.

⁸³ In Vietnam the obligation of accepting a demand for a collective agreement is provided for in Article 46 of the Vietnamese Labour Code.

provided only that the consensus or the commitment of the participating parties is within any boundaries imposed by law.

To further understand this capacity of self-determination, it is worth stressing that the parties involved have no obligation to accept any counterpart's demands nor are they even obliged to reach a collective agreement in any case. Even when some commitments are agreed to, in principle, the parties still have the right freely to decide whether finally to be bound by a collective agreement.⁸⁴

From this we see also that a collective agreement bears another contractual mark: it is a document recording the rights and obligations of the participating parties and should reflect a *mutually-beneficial (two-way) relationship*. For instance, the employer has the duty to pay a salary and has the corresponding right to receive services from employees and vice versa, employees receive wages while they have an obligation to work in accordance with the conditions agreed.

Comparing the relationship between the parties involved in a labour relation with a pure civil contractual relationship (such as contracts transferring assets, commodities, materials...), one does see some differences. In many such relations, the socio-economic position of the parties tends to be equal. But in the labour relation, the parties are not so equal until the employees unite at such a level that the initial weakness of their individual economic positions is basically set aside and is not an obstacle to fair bargaining and agreements favourable to both sides. In a collective labour relationship, the parties reach a relative balance; this is the result of combining the strength of numerous individuals, but is not an "inherent" or "original" characteristic of the labour nexus. Only when "equality" has been arrived at, do the parties have full scope freely to determine what they want and need.

National law may give considerable freedom to the labour market parties to define the specific conditions they wish to bind themselves by, or it may limit their discretion. However, in either case, a document built on *voluntariness* and *self-determination*, with a *mutually-beneficial* character will always bear the core marks of a civil contract.

⁸⁴ For Sweden, see: Birgitta Nystrom (2005), *The evolving structure of collective bargaining in Europe 1990-2004*, Sweden, national report, p. 7; For Vietnam, see: Hanoi Law University (2009), *Vietnamese Labour Law*, p.271

2.4.2. The “legal norm” nature

A collective agreement has a contractual nature as discussed above, but that is just one side of it. We will now look at another side - one that makes a collective agreement different from any other type of contract: the *legal norm nature*.

Though a collective agreement is formed on the basis of equality and mutual agreement, it is very different from a simple labour contract on account of its legal norm nature. The collective agreement operates as a “law”. It has normative effect. Once in force, the clauses of a collective agreement will become mandatory requirements not only for the signatory parties but also for their respective members. A collective agreement signed at a higher-level is equally a mandatory framework for collective agreements signed at a lower level.⁸⁵

The legal norm nature of a collective agreement is also demonstrated in other ways. Collective agreements lay down the rights and obligations of related persons. They operate *like a protective statute*, because the relevant rights and obligations are stated explicitly and are a legal basis allowing parties to claim damages when necessary. In labour relations as in other legal relationships, the rights or obligations of one party are understood in terms of the obligations or rights of the opposite party. Thank to the regulations of the rights and obligations, the parties can on the one can be aware of and properly discharge such responsibilities and obligations and on the other hand, they can be aware of, realize and protect their rights.

Collective agreements apply *en masse* and cover numerous persons but do not identify specific individuals. In principle, the sphere of application (the coverage) of a collective agreement is only limited to the employees who are members of the trade unions involved. However, in reality collective agreement coverage is even less narrow. In many countries, applying equivalent working conditions for employees who are not members of involved trade unions is also a mandatory requirement on employers.⁸⁶ The reason for this is quite delicate in that the employer must not take unfair advantages and fail to be bound by collective agreements by recruiting the cheaper labour of non-unionized employees. This is a preventive measure used to

⁸⁵ See also Section 2.8. *Legal effect of collective agreements*

⁸⁶ See also: Section 2.8. *Legal effect of collective agreements*.

avoid unionized employees, in particular employees who are bound by collective agreements losing job opportunities and advantages .

Generally, *repeated application* and *wide coverage* are typical characteristics and paint a “portrait” of any collective agreement - which is typical of a legally protective document.

2.5. Role of collective agreements

2.5.1. Implementing labour legislation

2.5.1.1. The coexistence of collective agreements and labour law

In the primary stage of the industrialization process, labour relations in many countries developed quite freely, and even outside of state control. The labour market was characterized by self-regulating mechanisms involving the parties alone. In some places, collective agreements developed in this way to quite high levels. Many clauses determined then by labour market parties are regarded as so critical that they still set the standard in the labour market.

However, a free market economy has some defects and needs laws to correct them. Since collective agreements developed spontaneously, labour standards were not uniform. In some workplaces, trade union and collective bargaining activity was still weak and employees were not yet adequately protected. It became time for the parties involved in labour relations to accept the idea of the State’s participation in helping to stabilize the labour market. The idea was that, the State, with its political power and social management functions, would play the role of neutral party, and participate in the labour relationship in such a way as would lead to the issue and recording of common criteria or labour standards. These standards would be used as a framework within which the further agreements of particular parties could be realised.

Ultimately, labour laws were created because the workers demanded better working conditions, the right to organize while, simultaneously, employers sought to restrict the powers of employee’s organizations and keep labour costs low⁸⁷ The launch of such laws was the practical end-result of struggles between social and economic interests.

⁸⁷ Source: *Labour and Employment law - The Function and Origin of Labour law-* Encyclopedia II, See also: Lawyer and jurists, *Labour Law*, available at www.lawyersjurists.com/index.php%3Fo, 2011

In those countries which took the lead in the development of market economies, labour laws were adopted during the period lasting from the beginning of 19th century to the beginning of the 20th. In Britain, the first statute regulating labour relations was contained in the 1802 *Factory Act*. The next statute was enacted only 30 years later, namely the 1832 *Master and Servant Act*. Among the countries which adopted labour laws soon after Britain, Germany was the first in Continental Europe to do so: the *Health Insurance Act* was enacted in 1883 while the *Accident Insurance Act* was passed in 1884. In France, *Waldeck Rousseau's laws* were promulgated in 1884. In the United States, the first statute which gave workers the 8-hour working day was passed in 1912. Regarding Japan, the *Factory Law* which was enacted in 1911 can be seen as the first statutory regulation of the field of labour relations though the scope of the law was rather limited (it only covered establishments continuously employing 15 employees or more).⁸⁸

At the global level, to pursue the goals of ensuring social stability, equality and poverty alleviation while encouraging economic development, an international level institution responsible for labour standards (the ILO) was founded in 1929; international labour standards were also subsequently launched.⁸⁹

2.5.1.2. Implementation of labour legislation via collective agreements

Collective agreements have been governed by the law since national labour laws were adopted by States. The process of implementing national labour legislation should not be too complicated because collective agreements directly elaborate on the laws and make them conform to the specific conditions of the individual workplace. For international labour standards, to have a real impact, they must be adopted by member States, transformed into national law and again applied to labour markets by way of collective agreements. Many countries have to varying extents effected this international standard transformation. In such a case, collective agreements are not only regarded as a means to concretize the requirements of the State and materialize national labour policies, but are also viewed as instruments for achieving sustainable development and reaching such social targets as democracy, equality and general progress.

⁸⁸ Kazuo Sugeno (2002), *Japanese employment and labour law*, Carolina Academic Press, p. 6.

⁸⁹ See also: Section 3.1.1.2. *The rise of international labour law*.

But, the actual results obtained from the implementation of the international labour standards by way of collective agreements are different from country to country. *First*, the interest in using such agreements in the regulation of the labour market is not the same in all countries. In some, the collective agreement is the central means but in others, collective agreements have not developed and have not been able to be an important tool in implementing international or national labour law standards.⁹⁰ *Second*, the differences in level of socio-economic development, political situation and cultural features etc, create differences in the capacity for implementing international labour standards. For certain countries, enforcing international labour standards requires more than their existing conditions allow. For example, the difficulties including political unrest, lack of state funds, poverty and illiteracy were invoked by countries such as Angola and Burkina Faso as obstacles not allowing them to apply international labour standards in a satisfactory manner.⁹¹ Within such systems, obviously, only a very limited number of international labour standards influence collective agreements.

Yet other countries are characterized by an already existing highly developed collective agreement system and fair working conditions. In this group, enforcing international labour standards is, to a certain extent, not seen as a useful or valuable thing to do.⁹² Notably, in these countries, democracy, justice and many other factors reflecting social progress have been achieved at a fairly high level.

In general, though the significance and impact of international and national labour standards have been variously evaluated, to equally varying extents, collective agreements have been used as a means to implement them, especially in those countries where such standards still appear meaningful to the labour market parties and help them to secure desired rights and benefits.

2.5.2. Balancing social partners' interests, stabilizing labour relations

⁹⁰ See also: Section 2.12. *Conditions for collective bargaining and status of collective agreement development in some major market economies*

⁹¹ Bureau for Workers' Activities, ILO (1998) *Standard-setting policy: Ratification and promotion of fundamental ILO Conventions*. Available at: www.ilo.org/.../ilostand.htm

⁹² See: Section 3.1.3.1. *The influence of international labour law on the Swedish system*.

As labour relations are economic in nature, the mutual satisfaction of the parties involved is the precondition for the continuance of their linkage. The interests of the parties are, from certain angles, opposed, since they are confined to the financial capacity of the enterprise, and thus, the excessive distribution of benefits to one party might cause a loss for the other – though such sharing is not necessarily a zero-sum gain.

However, the respective parties' need no longer be in such opposition if a fruitful co-operation is established. In such a case, a positive and friendly mutual support system will be created between the parties which will develop their common benefit, or make the “benefit cake” bigger. If the company makes more profit, the employer has both the means and the economic incentive to improve payment policy and working conditions for the workforce. Simultaneously, the employees can stabilize or improve their employment and income. However, the precondition for resolving this situation is that benefits are reasonably shared between the parties. In this process, a collective agreement is needed to balance the interests of the labour market parties for these reasons:

First, a collective agreement is produced via collective bargaining - the most important form of co-operation by the social partners' and it naturally *derives numerous advantages from the process itself*. The bargaining process involves a sharing of rule-making power between employers and unions in areas which in earlier times were regarded as management prerogatives e.g. transfer, promotion, redundancy, discipline, modernization, production norms.⁹³ When negotiating a collective agreement, both parties participate in deciding what proportion of the “interest cake” is to be shared between them. This process has the advantage of settling all questions through dialogue and consensus rather than through conflict and confrontation.⁹⁴ The bargaining products are also likely to satisfy both sides. In this regard, a collective agreement has advantages that individual negotiations lack.

Second, a collective agreement is the *legal basis for applying equal working conditions* in the establishments concerned and thereby benefits (harmonizes) labour relations in general. When an agreement is approved and comes into effect, its terms

⁹³ Sriyan de Silva (1996) *Collective Bargaining Negotiation*, Bureau for Employers' Activities (ILO).

⁹⁴ Ibid.

and working conditions are to be applied uniformly over the whole labour collective. Principles of “no discrimination” or “equal pay for equal work” are to be complied with. Such equal treatment will create a friendly working environment in the two following ways: One, *restricting confrontation between employer and employees*, improving confidence and mutual acceptance between them. Two, *reducing negative competitiveness, bad attitudes and dissatisfaction among workers* via the policy of equal treatment. A peaceful working environment where employees enjoy a feeling of safety is always an important element in keeping labour and obtaining peoples’ commitment to their work.

It is obvious that contradiction and conflicts will arise from the application of unequal working conditions.⁹⁵ Employees who are treated worse than others, receiving a lower salary, for example, will not be willing to serve the enterprise to the best of their efforts. Their attitude towards work may be poor, and involve low responsibility and a high potential for negligence while performing duties. With such working manners, they will not bring the fullest benefit to the enterprise, not to mention that their poor working habits and negative attitude can adversely affect other employees.

In many European countries such as Sweden, Belgium, Denmark, Norway and Germany, collective agreements serve as *peace documents*.⁹⁶ Concluding a collective pay agreement puts the responsibility on trade unions to ensure industrial peace. Once such an agreement comes into effect, the labour collective has the obligation to stabilize labour relations. Employees must not go on strike during the lifetime of a collective agreement, except in special cases, such as the *sympathy strike*. In Sweden, protecting and maintaining stable and harmonized industrial relation has been seen as the chief function of the collective agreement.⁹⁷ In general, since collective agreements have such an important role, both international labour law and the labour law of many countries tend to support their development and promote the quality of

⁹⁵ What I mention here (application of unequal working conditions between employees) is a hypothetical situation where there is no regulation by collective agreement and the implicit negative consequence of this may appear.

⁹⁶ The *pacta sunt servanda* principle (meaning: *fulfil your promises and contracts*).

⁹⁷ According to “*Labour Relations in Sweden*”, Swedish Institute, February 2005, p.3.

collective agreements concluded with a view to effectively securing the benefits discussed above.

The Swedish experience shows the importance of collective agreements for business activities. With a powerful trade union system which is capable of conducting collective bargaining with high efficiency, collective agreements containing reasonable provisions have been able to handle labour relationships very effectively. For many years, enterprises and labour collectives have had a harmonious relationship and have worked well together. Prominent features of this situation were significant mutual trust between parties, industrial peace and good working discipline, labour productivity and less disputes. These have been regarded as key factors boosting business and contributing to Sweden's sustainable and sound economic development, especially during the period of the 1950s and 60s⁹⁸.

In general, as collective agreements have an important role, the international agencies and many countries encourage to enlarge the coverage of collective agreements, enhancing quality of collective bargaining, in order to effectively secure interests of the parties.

2.5.3. Creating equally competitive environment for enterprises

In countries with a highly-developed collective agreement system, industry-wide and national collective agreements also have the role of establishing standard prices in the labour market. They create a fair legal environment for all employers within a branch, a region or an industry, thereby contributing to the prevention of unfair competition between employers regarding wages and other working conditions. That is the reason why despite the trend towards bargaining decentralization, some employers are still supporting the idea of centralizing the bargaining systems. For example, in Slovenia, employers are defending the existing system of intersectoral bargaining.⁹⁹ In France and Spain, the employers' associations representing large companies, which compete with small ones in the same sector, also feel that the centralization of collective bargaining should be reinforced.¹⁰⁰ For the countries where

⁹⁸ Ibid.

⁹⁹ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

¹⁰⁰ Ibid. See the Table 8. Social partners' views and proposals on the future development of national bargaining systems.

collective agreements were never signed at a high level, developing such collective agreements, especially those at the sector level, will be more meaningful to establish common standards for the relevant sectors, guiding collective bargaining at grassroots units.

2.5.4. Consolidating discipline at work and supporting production

Labour discipline is of great importance for any workplace. It ensures that operations will be conducted in an orderly way, thereby boosting productivity, quality and efficiency while decreasing unnecessary extra cost (such as loss, leaking of business secrets, waste, accidents at work and occupational diseases). Labour discipline is basically preserved by regulations confirming the duties, obligations, and responsibilities of both parties in labour relations, together with provisions concerning the remedies for improper conduct.

A collective agreement is the primary document to control activities in the workplace. The positive outcome of applying a reasonable collective agreement which matches the demands of the labour collective is to create an active attitude towards work and stabilize the psychology of the labour force. A collective agreement thereby encourages them to respect and comply with orderly labour procedures; generates a consciousness of the need to preserve assets; protects the interests of the enterprise and restricts employee misconduct. The implementation of the obligations called for by a collective agreement is thus entirely compatible with the requirements of labour discipline.

For a country which has a multi-tier collective agreement system, the influence of collective agreements upon labour discipline at the undertaking level is even stronger. The reason for this is that fixing wages and certain other working conditions outside the enterprise is likely to enhance social peace inside it.¹⁰¹ High rank collective agreements are often set up to stabilize the wage-cost level. Since any company collective agreement must be based on industry and national collective agreements (if any), this means its core contents have already been decided by competent forces outside the enterprise and employees bound by such an agreement

¹⁰¹ European Commission (2003), *Quality industrial relations: Some facts and reflections about the costs and benefits of having or not having social dialogue*, Reflection paper on the 'Costs of not having social policy', Background note for the conference on the mid-term review of the Social Policy Agenda: Achievements and perspectives, 19-20 March 2003, Brussels, p.15.

tend to accept certain provisions which might not otherwise be entirely to their benefit.

From a manager's perspective, afore-mentioned orderliness has some special significance. As the enterprise operates in order, the managers' workload is reduced and labour supervision becomes easier. Managerial expenses can this also be reduced.

2.6. Forms of collective agreements

2.6.1. Written form

In most countries, collective agreements have to be in writing. A written collective agreement may still appear under different names. For example, in Japan the name of a collective agreement could be "wages agreement", "memorandum" or "confirmation of collective bargaining proceeding" among others.¹⁰² Generally, a written collective agreement will include numerous commitments.

A written collective agreement has two advantages: *First*, the clauses of a collective agreement clearly express what the parties have achieved in the course of a negotiation. They confirm the basis underlying their obligations, responsibilities and interests which will assist in their later implementation. *Secondly*, written clauses enable the parties to protect their rights and interests and to handle conflicts where there are incompatibilities between the commitments expressed and the actual actions of the parties. In contrast to oral or tacit form agreements, written provisions can be readily used to prove the existence of the rights or benefits claimed by the aggrieved party. Bearing this key advantage in mind, a written collective agreement is always the best option. That is why the labour laws of most countries specify that a collective agreement must be in writing.

The parties may agree to *one or more* written collective agreements. If there are several, each will address specific matters. For example, there may be a separate collective agreement on wages and working conditions apart from a collective agreement on pensions. A written collective agreement may also be supplemented by default rules, those specified in labour law, which parties do not need to specify or repeat. Default rules normally consist of general principles and overall or background conditions which are commonly accepted in the labour market.

¹⁰² See: Kazuo Sugeno (2002), *Japanese employment and labour law*, Carolina Academic Press, p.585.

Both the Swedish and the Vietnamese labour laws specify that collective agreements must be in writing (see Section 23 of the Co-determination Act and Article 47 of the Labour Code 2002, respectively). A written collective agreement can also be complemented by national default provisions. For instance, in Sweden, these consist of the “32 prerogatives”¹⁰³, the employee's basic obligations and the employer's obligation to apply collective agreements to employment contracts with employees who are not members of trade unions and the like. In Vietnam, as the labour law specifies some issues in detail, the parties do not need to add clauses on these matters to their collective agreements. Such provisions include those regulating the basic rights and obligations of parties, the procedures for settling labour disputes and the conditions for going on strike.¹⁰⁴

2.6.2. Oral form

Collective agreements sometimes appear in oral form. An oral collective agreement usually exists where parties have special and simple agreements; they assume that a written text is not called for. An oral collective agreement may also appear when parties are only making a minor amendment, supplementing the provisions of an existing collective agreement or prolonging the duration of a collective agreement just before its termination.

Oral collective agreements have certain advantages such as being simple, easily and quickly set up at small cost. However, their disadvantages are that they lead to arguments and disputes as they are so difficult to verify. They are, therefore only accepted by a few nations, the United States¹⁰⁵ and Denmark¹⁰⁶ being the main ones.

¹⁰³ The Section 32 rights refer to the employer's prerogatives established in 1906 for employers belonging to SAF, as accepted by LO and include, for example, the right to hire and fire employees at will and the right to “direct and organize operations”. In the early years of its existence the Labour Court upheld these prerogatives as general principles of law. Nowadays, the relevant Section has been amended and the name is less widely used. These employer rights have been greatly eroded after being transformed into new regulations on employment protection, employee participation rights (see the Co-Determination Act) and protection against discrimination. (Source: Hakan Goransson (1990)- *Hidden clause in collective agreements, the case law of Swedish Labour Court*, Scandinavian Studies in Law, Vol. 34, p.93-113 Stockholm 1990, p. 97).

¹⁰⁴ For these matters, state law provides mandatory regulations and labour market parties cannot change anything.

¹⁰⁵ In US, Section 158 (d) of the National Labour Relations Act (1935) (covering most collective agreements in the private sector) does not require contracts between employer and the union to be in any particular form. The Court has been seen as the law-maker here and has assumed the role of interpreting the law - case by case, the courts have confirmed this - the case 597 F.2d 1269 is an example.

As for the United States, oral collective agreements can only be accepted in cases of mutual consent. If only one party wants an oral collective agreement, the collective agreement will not be recognized.¹⁰⁷ When disputes arise, the Labour Courts, the administrative authorities or other competent bodies will find themselves having to settle issues on the form of a collective agreement.¹⁰⁸

In both Sweden and Vietnam an oral agreement will not be officially accepted. In fact, oral agreements between trade unions and employers can still sometimes be found in Sweden, and can be brought forward before dispute settlement bodies, though they will not be regarded as collective agreements as such. In Vietnam an oral agreement might give some feeling for the duties and obligations undertaken, but it is in no way legally binding. When disputes arise, the parties cannot rely oral collective agreements to prove their rights. As collective agreements must also be registered with a competent provincial authority, there can in fact be no legitimate oral collective agreements at all.

2.6.3. Tacit-consent form

In some countries, a tacit-consent form of collective agreements may also be accepted. Denmark is an example here: a collective agreement does not need to be in written form. It is even possible for an agreement to exist solely as an implied contract. The commitment of the parties may be inferred from conduct or signs and need not be formulated in words.¹⁰⁹ It is also possible for a written agreement to be supplemented by unwritten rules and tacit assumptions regarding its application.¹¹⁰ Such tacit collective agreements often exist in the form of company practices

¹⁰⁶ Ruth Nielsen (2004), *The evolving structure of Collective Bargaining in Europe 1990-2004*, Denmark, national report, Research Project Co-financed by the European Commission and the University of Florence, p.14.

¹⁰⁷ Oral collective bargaining collective agreements is permitted under Title 29 on Labour issues - United States Code (29 U.S.C.) Sec. 158(d) where neither party requests a written instrument.

¹⁰⁸ Countries which accept oral collective agreements sometimes have to deal with these types of labour disputes. For instance, in the US: see case 945 F.2d 889 handled by the Court of Appeals for the Seventh Circuit 27.9.1991 concerning the legal significance of secret oral negotiations between union officials and company management that modified central terms of a collective bargaining agreement.

¹⁰⁹ For example, established practice (custom) between employer and his employees in the enterprise can be deemed to assume the nature of a collective agreement (as a local agreement). (Source: *Collective agreement - Denmark*, Eurofound 2009. The article is available at : <http://www.eurofound.europa.eu/emire/DENMARK/COLLECTIVEAGREEMENT-DN.htm>).

¹¹⁰ Ibid.

(customs). In case there is a difference of interpretation between the two sides, the Labour Court decides the question of whether a collective agreement is deemed to exist.¹¹¹ For Sweden, tacit rules can also be valid; but they are not seen as collective agreements. In Vietnam, tacit rules are not regarded as binding; they can only be implemented on the basis of a choice to that effect by the parties concerned.

2.7. The content of collective agreements

The content of a collective agreement may include any issues agreed to by contracting parties and recorded in the agreement so as to form their commitments. The subject matter of a collective agreement is wide, and can include virtually all issues relating to the employee and employer relationship and relations between the organizations on either side. Generally, the following questions have been seen as central and most frequently taken into account in the collective bargaining process:

2.7.1. Employment security

This covers matters such as: different kinds of job and the pay system; establishment and termination of the employment relationship¹¹²; measures for job preservation and job creation, training and human resources development activities, principles of redundancy policy; and severance pay for employees losing jobs.

As having a stable job - and consequently a stable income - is vital for most employees, the employment clauses, those relating to *job security* become a central concern of many collective agreements. This holds true especially for those at company level, where such clauses will have an immediate effect on employees working in the firm as the workers who benefit from such clauses can also immediately demand their fulfillment. Various specific clauses are often seen in collective agreements. These include rules for converting temporary contracts into permanent ones; the maximum period for the duration of temporary contracts, the maximum percentage of temporary contracts in the total workforce, ways of avoiding

¹¹¹ Ibid.

¹¹² This includes: probation, recruitment, circumstances where employment contract may be terminated, prior-notice period, labour replacement and so on.

unfair dismissals and special measures facilitating atypical employment¹¹³. An agreement may also contain special rules created by the parties themselves with the same overall objective, such as no dismissals during the period of validity of the agreement, except for disciplinary reasons.¹¹⁴ Sometimes ways of overcoming temporary difficulties and securing jobs that are at risk may also be negotiated and included.

Redundancy is a related matter that has been in issue for several decades. Here, reducing the extent of collective redundancy has been the main concern. The parties normally agree to alternative measures for collective dismissals and seek a balance between employment clauses and other work conditions. For instances, in Norway the use of temporary lay-offs by employers has been an option in many private sector collective agreements though this is not regulated by legislation.¹¹⁵ In Denmark, training and parental leave schemes have been used.¹¹⁶ In Germany the social partners has sought the right balance between employment clauses and both working time and other working conditions. As a result, some agreements contain clauses on the temporary reduction of working time, with a commitment not to resort to redundancies, or clauses on working time flexibility aimed implicitly at defending jobs.¹¹⁷

In Sweden, unemployment and redundancy prevention was traditionally not the main concern of the collective parties so there have been relatively few collective

¹¹³ "Atypical employment" implies temporary and part-time employment that is also regulated by collective agreements. In Italy, for example, parties to collective agreements are offered the possibility of temporary work, particularly in sectors that are subject to strong seasonal fluctuations (e.g. agriculture, construction, tourism) on an experimental basis. (See: Jacques Freyssinet and Hartmut Seifert and the research group (2001), *"Negotiating collective agreements on employment and competitiveness"*, Eurofound 2001, p.33).

¹¹⁴ A study on the treatment of employment in Spanish collective bargaining at company level, issued in May 2000 shows this finding. See: María Caprile (2000), *"Employment gains importance in company-level bargaining"*, Eurofound 2000.

¹¹⁵ See: Kristine Nergaard (2003), *Thematic feature - redundancies and redundancy costs*, Eurofound 2003.

¹¹⁶ Peter Auer (2001), *Labour market policy for socially responsible workforce adjustment* - Published by ILO, Employment Sector, p.7. Available at: www.ilo.org/.../index.htm

¹¹⁷ Source: Jane Pillinger (2006), *"Challenging times - Innovative ways of organizing working time: the role of trade unions"*, The Report of ETUC Conference 'Challenging Times: Innovative Ways of Organizing Working Time', held in London, 17-18 November 2005. See also: Jacques Freyssinet and Hartmut Seifert and the research group (2001), *"Negotiating collective agreements on employment and competitiveness"*, Eurofound 2001, p. 13.

agreements on these issues.¹¹⁸ However, in some sectors, the labour market parties have sought to find ways to prevent redundancies. For example, the agreements concluded in the maritime shipping sector have permitted the hiring of foreigners from non-EU countries for a fixed term. In return, the employers in question must undertake not to use this workforce to make established workers redundant. This arrangement gives ship owners the possibility of using their manpower more flexibly and economically, while providing core members of the workforce with some job guarantee.¹¹⁹ In Vietnam, the securing of employment has mainly been achieved through statutory regulation limiting the employer's right to the unilateral termination of employment contracts and prescribing an employer's duty to provide vocational training and rearrangement of employment.

Vocational training is also an important issue. Providing vocational training aims at adapting workers to new demands imposed by internal structural changes. In the medium and long term, improving employees' skills makes the workforce become more productive. This is a condition for boosting companies' competitiveness and it allows it to exert a positive influence on the demand for labour. On the social scale, vocational training benefits employees. It enhances employee adaptability to a changeable labour market, making workers ready for varying job demands so that they are capable of undertaking more of the possibilities available both inside and outside their current company. In Sweden, Denmark and Finland, for instance, vocational training has long been a prominent feature in collective agreements.¹²⁰

Some recent studies reveal that there has been a growth of negotiation on employment security in Europe.¹²¹ The issue has become an important aspect of collective agreements concluded not only between social partners but also between social partners and the government. In the EU countries, an overwhelming proportion

¹¹⁸ One explanation for this is that the government has always pursued an active labour market policy, so that, traditionally, unemployment has been a matter for the State. Another explanation is that, since high unemployment rates are a new experience in Sweden, trade unions have, as a consequence, modified several of their traditional standpoints. (See: Stefan Zagelmeyer (2000), *Innovative Agreements on Employment and Competitiveness in the European Union and Norway*, Official Publications of the European Union, Luxembourg).

¹¹⁹ See: Jacques Freyssinet, Hartmut Seifert and the research group (2001), *"Negotiating collective agreements on employment and competitiveness"*, Eurofound 2001, p. 35.

¹²⁰ See: Ibid, p. 31.

¹²¹ Ibid - p.9

of collective agreements at plant-level regulate employment security. A slightly smaller number of collective agreements at industry and national level deal with this question.¹²² In the Asia - Pacific region the coverage of collective agreements is limited. Going along with a strong tradition of direct government intervention in the labour market, the role of collective agreement in determining employment conditions has not been so distinct.

2.7.2. Working time and leave

This subject includes clauses on: duration of working time (e.g. working hours per week or per month, maximum overtime and break time during a work shift), rules on adjustment of working time to relieve temporary peaks in the workload or to deal with temporary employment shortages (e.g. extending or shortening working hours, allowing part-time work, overtime work, night work, work at weekend etc.), flexibility in operating the working time scheme in order to make it suit workers better, working time limitations for young persons and women and for older and disabled workers, annual leave, holiday and paid leave, unpaid leave.

Historically, the regulation of working time has been at the centre of the labour movement's struggle.¹²³ Over time, the determination of working time by way of collective agreements has expanded due primarily to results gradually achieved by unions on the issue. In the 19th century, unions in both North America and Western Europe organized to regulate the length of the working day.¹²⁴ After World War II, the standard work week, with additional compensation for overtime hours started to be provided for.¹²⁵ In recent decades working time has also been a core issue for collective negotiation. During the 1990s and early 2000s, there was much debate on working time reduction and working time flexibility as a way of both boosting the competitiveness of companies and improving the security of employment for workers in Europe.¹²⁶

¹²² Ibid, p.12

¹²³ Thomas, Mark (2008), *Collective Bargaining on Working Time: Recent European Experiences*, Relations industrielles / Industrial Relations, Vol. 63, n° 1, 2008.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ In the 1990s, to respond to the ongoing employment crisis and the growing problems associated with competition, the parties to collective agreements in the EU Member States adopted a new approach to

In recent years, however, the working time regulation issue has changed. In a political and economic context unfavorable to trade unions, employers and a number of governments have been pushing for both working time extensions and further flexibilisation.¹²⁷ Trade unions have sought to defend the achievements of previous years but their success has been limited in such countries as Finland, Spain, Switzerland and the UK.¹²⁸ The report of a recent Conference on Innovative Development in Working time of ETUC¹²⁹ shows that there have been substantial changes in the thinking on working time and this has been confirmed by numerous new provisions in collective agreements. The report also notes that at the start of the 21st Century, there are once again enormous pressures to lengthen working hours.¹³⁰

2.7.3. Wages and remuneration

This may consist of: general rules on salaries and personal incomes; recurring wage increases; minimum wages; rules on wage adjustment responding to changes in the cost of living; piecework wages; monthly/weekly/hourly wages for each category of work; overtime payments, pay for work during holidays; pay for work in inconvenient conditions or at inconvenient hours; pay for risky work; severance payments in the event of collective redundancies, bonuses and other welfare payments.

His wage often comprise the majority of an employee's income and is the main reason why a worker has to work. His wage secures a decent human life not only by guaranteeing his daily immediate needs but also by allowing him to foster his other spiritual interests and preserve his human dignity. The more the employee earns, the more security he has. There is no question that an employee will naturally wish to have as high a salary as he deserves.

employment policy that almost always links to working time adjustments. See: Jacques Freyssinet, Hartmut Seifert and the research group (2001), *"Negotiating collective agreements on employment and competitiveness"*, Eurofound 2001, p.1 and pp.25-30.

¹²⁷ See: Thomas, Mark (2008), *Collective Bargaining on Working Time: Recent European Experiences*, Relations industrielles / Industrial Relations, Vol. 63, n° 1, 2008.

¹²⁸ Ibid.

¹²⁹ ETUC Conference 'Challenging Times: Innovative Ways of Organizing Working Time', held in London, 17-18 November 2005.

¹³⁰ Report. p.11

For the employer, wages and salaries are a production expense though even though he may wish to give his workers good remuneration. Wages and salaries may be used as incentives for boosting production or promoting competitiveness. But labour cost also need to be strictly managed and well balanced so as to secure profit and employers are naturally cautious in establishing or adjusting wage policy.

Accordingly, wage regulation is always of keen interest to both sides in the labour relation. National laws may set forth basic rules on wages. But in most countries that have multi-tier bargaining systems, such rules have been traditionally regulated by national or sector collective agreements. In Belgium, Finland and Ireland, for example, the intersectoral level is the most important bargaining level for regulating wages. In some other countries, in particular those in northern and western Europe such as Denmark, Germany, Greece, Italy, the Netherlands, Norway, Spain and Sweden, where the bargaining structure underwent a significant decentralization in recent decades, the sector has become the dominant level for wage setting.¹³¹ Elsewhere in Denmark, sectoral agreements determine only minimum wages while actual wages are determined at the enterprise level.¹³²

Recently slow economic and productivity growth and high unemployment have had a strong impact on wage negotiations and limited the possibilities of trade unions obtaining large wage increases. In most EU countries, the unions have been under tremendous pressure from both employers and governments to engage in wage moderation and to reduce wage demands.¹³³

In the Asia - Pacific region the impact of collective bargaining on wages remains very limited as the portion of the workforce covered by collective bargaining agreements is small; further, union bargaining capacity remains weak and the link between economic growth and wage increase has not been as close as it should be. Real wages have been lagging behind economic growth, and this problem may be

¹³¹ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005. Available at: www.eurofound.europa.eu/.../2005/.../tn0503102s.htm.

¹³² Ibid.

¹³³ See: Maarten Keune (2005), *"The Coordination of Collective Bargaining in Europe"*, Annual Report, ETUC 2005, pp. 7-8

linked to weak collective bargaining.¹³⁴ In some cases, real negotiation on wages does not even take place.¹³⁵

2.7.4. Occupational safety and health

These clauses cover matters relating to cooperation between the parties so as to handle safety and health issues, the duties of the parties to comply with occupational health and safety standards and preventive and corrective measures for occupational illness and industrial accidents.

Governments are responsible for drawing up occupational health and safety policies and making sure that they are implemented. But state regulation can not cover all workforce risk. That is why, along with legislation, there should be other instruments handling this issue of which collective agreements are the most important.

Normally the parties must negotiate and make clear provisions on the following issues:

- Employer responsibility for providing his workers with safe working conditions and personal protective equipments.

Generally the employer has the obligation to equip employees with qualified machines, tools and other facilities for work. He must ensure that hazardous chemicals used in production are appropriately labeled. Warnings must be given about unsafe chemicals or equipment with a high risk of occupational accidents or illness. The employer must provide detailed information about such hazardous chemicals or unsafe machines and also give detailed usage instruction to the relevant employees.

- Employee duty to work in a safe manner. Workers must observe labour discipline and the production process and have the right to refuse to work in a workplace with hazardous or dangerous working conditions.

- The estimated time needed for periodic training or education on occupational safety and hygiene in the enterprise¹³⁶ and for the examination of the workers' health and physical condition.

¹³⁴ See: Sangheon Lee, Co-author ILO Global Wage Report 2008/9, *What's ahead for wages in Asia Pacific?*, published by ILO Regional Office for Asia and the Pacific.

¹³⁵ According to Dr. Chang-Hee Lee - Senior Specialist on Industrial Relations and Social Dialogue, ILO, Beijing Office (see his preparation paper for the lecture at the Central Office of VGCL on 7 July 2008).

- Measures to minimize hazards or reduce risk at work.
- Scheme of compensation for injuries.

Safety and health issues have become a major concern for both employers and union representatives. The cost of workers compensation and health care benefits, the long-term effect of exposure to health hazards, the premature loss of future years of employment, and the prevention of human suffering are some of the reasons for this concern.¹³⁷ In recent decades new technologies e.g. robotics and automation have been increasingly used in the production process, especially in industrialized economies like those in the EU, and this generally reduces workers' exposure to direct hazards, physical risks and also the number of accidents at work, but in many parts of the world working conditions for workers remain poor and consequently the issue of preventing occupational illness and accidents remains a central topic in both social debates and collective negotiation.

2.7.5. Social security and welfare

Social security and welfare are not issues of employee working conditions as such; they are not central to the employment relationship either, but they directly impact employees' overall conditions and affect their relationship to their work. In order to ensure stable living conditions allowing them to work full-heartedly, their personal difficulties and related problems should not be ignored.

Many issues facing an employee in his or her personal life such as sickness or giving birth may occur during the life time of an employment contracts. When a worker leaves work for such reasons, he/she will have no wages to rely on. In this case creating an alternative source to sustain life is a necessity. Welfare schemes covering such problems often consist of: child care, canteens, recreation, transport and

¹³⁶ Employers may have to provide necessary education and training in respect of health and safety at work such as education to improve employee awareness of health and safety needs; training in safe work habits e.g. giving instruction how to handle hazardous chemicals, how and when to use personal protective clothing and other equipment, what to do in the event of accident etc.

¹³⁷ George R. Gray, Donald W. Myers, and Phyllis S. Myers-*Collective bargaining agreements: safety and health provisions*, Monthly Labour Review, USA, published May 1998 Vol.121. No 5.

- The Article investigated union cooperation on the matter of occupational safety and health and the prevalence and types of safety and health provisions included in a large number of existing collective bargaining agreements that expired between August 1997 and July 2007 in private-sector U.S. firms.

special leave or payments e.g. dependents' allowances, maternity/paternity leave, leave for weddings or funerals, retirement benefits and sick leave.

In a market economy, the need to boost production and competitiveness in order to sustain and increase profit compels enterprises to foster effective cooperation between labour and management. Enterprises wish to maintain a reliable and productive labour force and are aware of the significance of both material and non-material incentives to employees. This is why an employer often tries to develop welfare schemes for the employees in the enterprise.

Along with the development of production, welfare for workers has also expanded and this has contributed to enhancing living standards, security and the stability of society. It has also become an ever more important topic both in labour statutes and for collective negotiation.

2.7.6. Cooperation and communication between the trade union and the management

Besides regulating employment conditions as mentioned above, the collective agreement also regulates the overall relationship between the parties that concluded it. In this regard the collective agreement may stipulate how further collective negotiation is to proceed and other relevant issues. Some key clauses here are those on the peace obligation; the procedure for industrial action when the disputes procedure has been exhausted; estimated time and procedure for re-negotiation of the collective agreement; the constitution of the bodies set up for collective bargaining purposes and so on.

Beside the rules regulating the procedure of collective bargaining, another category of clauses regulates the relationship between collective parties, guiding their more ordinary daily activities.¹³⁸ They consist of making explicit the rights, duties and responsibilities of the management and the trade unions concerned that must be observed during their cooperation such as management prerogatives; employers' duties to consult and inform the respective unions before giving a decision; confidentiality clauses; trade union immunity and the employers' duty to support trade union functioning. These clauses aim at striking the right balance between

¹³⁸ The clauses in the first group can be seen as procedural while the clauses belonging to this group can be seen as substantive ones.

management and labour interests and sustaining a sound relationship between the two sides over the long turn.

2.7.7. Resolution of conflicts

Depending on any statutory principles guiding dispute settlements, the collective parties can agree on topics like mediation procedure, structure of any arbitration board, choice of conciliator(s) or arbitrator(s), qualifications of arbitration board members and their chairperson, the procedure for the appointment, reappointment, replacement and dismissal of the members, time limit for bringing a case to the mediation board and the possible ways to continue handling the case in the event of failure to reach an agreement on the dispute.

There may be different procedures applied to different types of disputes such as individual or collective labour disputes; disputes over rights or disputes over interests and disputes relating to unionized or non-unionized employee. In this case, collective parties may negotiate and separately agree on the procedure for each type of dispute.

2.7.8. Clauses of Application scope and effect of collective agreement

A statement on the scope of its application is an inevitable part of any collective agreement though it is not usually the actual object of negotiation. A collective agreement normally devotes its initial (or closing) sections to determining its scope and effect. The parties to a collective agreement must make clear who will be bound by it and who excluded from it; the question of affiliation, postponement, denunciation or withdrawal from the collective agreement of the parties concerned and the way to refer to the collective agreement in particular employment contracts.

National law may also determine whether or not collective agreements have binding effect and thus control employment contracts, whether they only have an effect on the members of the parties signing them or whether should be applied to all employees working in the enterprises concluding a collective agreement. Such differences in national law regulation are also often reflected in specific provisions of collective agreements.

2.7.9. General remarks

*In the science of labour law, the matters dealt with in collective agreements as discussed above can be grouped into two major categories: normative and contractual (obligatory) clauses.*¹³⁹ The former contain detailed rules regulating the conditions of employment that must be observed in all individual employment contracts concluded in the enterprises or industries concerned. They aim at providing protective standards for individual employees.¹⁴⁰ The latter contain rules regulating the relationship between the parties to the collective agreement. Such clauses provide stability to industrial relations and act both as a counter and a stimulus to the expansion of normative clauses.¹⁴¹ Such contractual provisions in some cases, however, also have a normative effect. For example, the peace obligation implies that both the trade unions involved and the individual employees have the duty to maintain industrial peace. Further, there are other clauses found in collective agreements that are neither normative nor contractual¹⁴²; examples are those defining concepts/terms or those on union security. Collective agreements may also contain statements of or references to relevant statutory provisions.

Collective agreements concluded at different levels may cover all the aforementioned subjects, but differ from one another in their level of concreteness. Central or branch collective agreements play the role of framework, giving the most general regulations and guiding clauses. In other words, they mainly deal with fundamental principles, basic requirements and minimum standards. The conditions laid down will not take account of particular circumstances in individual companies. Thus, "of necessity, the standards must be vague and ambiguous".¹⁴³ Further, because the agreements may cover a huge number of enterprises and employees, public attention and public pressure must be considered. "Parties to collective agreements hence have no choice but to act in an economic and responsible manner".¹⁴⁴ This means that, at least in general, the minimum standards laid down in collective agreements can not

¹³⁹ Roger Blanpain (2007), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, p.619.

¹⁴⁰ Ibid, p.619

¹⁴¹ Ibid, p.619.

¹⁴² Ibid , p.619

¹⁴³ Manfred Weiss and Marlene Schmidt (2000), *Federal Republic of Germany* , Kluwer, para. 350.

¹⁴⁴ Ibid.

exceed the possibilities acceptable to small companies within the respective industry.¹⁴⁵

Depending on the collective parties' flexibility, central and branch collective agreements may include provisions like hardship clauses and small enterprise clauses in order to give member companies more room to act in response to exceptional circumstances or to overcome temporary difficulties which may challenge them.¹⁴⁶ Collective agreements entered at company level, on the contrary, do not often provide such minima, but work with the conditions actually prevailing. They improve the employment terms regulated by collective agreements at higher level in most cases, but are under certain conditions allowed exemptions from those standards and can differ from higher collective agreements. In recent decades many market industrialized economies have witnessed a trend of decentralization in collective bargaining. Contracting parties at plant level have been gradually given more freedom and flexibility to regulate working conditions and their provisions have been correspondingly enriched.¹⁴⁷

The content of collective agreements varies from one country to another, although there tend to be similarities where basic matters are concerned. Because each country has adopted its own approach to the framework for collective bargaining systems and as the focus of the social partners also varies, there is a corresponding variation regarding the levels where collective bargaining takes place, the central matters dealt with and the ways issues are resolved by collective agreements. For example, in terms of the key matters dealt with by collective agreements, wage structures have been on the centre of attention in Germany¹⁴⁸ while in France working

¹⁴⁵ Ibid.

¹⁴⁶ For instance, in Germany some industry collective agreements pay special attention to the often more difficult economic situation of small enterprises by allowing these companies to reduce wages below the collectively agreed level without any veto rights by trade unions or employers' associations. In the eastern German retail trade, companies with up to 15 employees may pay 6 per cent less than the collectively agreed wage rate, and for companies with up to 5 employees the maximum reduction is as large as 8 per cent. See: Quit, Ires (1999), *Industrial relations in SMEs*, Eurofound 1999.

¹⁴⁷ See also Section 2.10.2.3 *Company-level collective agreement*.

¹⁴⁸ In Germany there are extremely varied wage structures in the sectoral agreements that have been concluded. The sector-specific agreements cover the full range of different wage-related issues. See: Jacques Freyssinet, Hartmut Seifert and the research group (2001), *"Negotiating collective agreements on employment and competitiveness"*, Eurofound 2001, p. 24

time has been more discussed.¹⁴⁹ A particular issue may be mentioned at different bargaining levels. For example, minimum wages has been the subject of intersectoral level bargaining in Belgium, Finland and Ireland. while they are the subject of sector level bargaining in Germany, Italy, the Netherlands, Norway, Spain and Sweden. and of plant level bargaining in some special cases in Denmark.¹⁵⁰

Generally, most countries adopting collective agreements give the labour market parties the possibility of negotiating and agreeing to any matters relevant their relationship, both on the collective and the individual level, provided that the national labour standards are observed. But a small number of countries, including Singapore and Malaysia limit the issues regulated by collective agreements.¹⁵¹ Others explicitly provide what must be involved in the collective agreement, examples here being Luxembourg¹⁵², Thailand and Indonesia.¹⁵³

The range of subject matters covered by collective agreements has been expanding. As society develops, living standards tend to increase and workers have become more and more aware of their economic and social interests. Employers have also played an active role in this process. They are keen to use collective agreements as an effective means to govern the workforce. The collective agreement has been perceived as a peace document, a means for providing labour discipline and other employee obligations.¹⁵⁴ In earlier periods, collective agreements concentrated mainly

¹⁴⁹ As the 35-hour week work legislation (applied to companies with more than 20 employees from 2000 and to small companies from 2002), was launched and came into force, every related matter such as the definition of legal working time, over time, part-time, reduction of working time for different categories of employees etc. must be renegotiated and the details made clear.

¹⁵⁰ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005. Available at: www.eurofound.europa.eu/.../2005/.../tn0503102s.htm.

¹⁵¹ In Singapore, the matters are not regulated by collective agreements include those relating to the career promotion of employees, the transfer of employees, the employment provided an employer to workers, the termination employment contract with reason of redundancy or reorganization of an employer's profession, business, trade or work, the dismissal and reinstatement of employees, the assignment or allocation of duties or specific tasks to an employee that are consistent or compatible with the terms of his employment (See para. 2 Section 18 - Industrial Relation Act 1960). A similar regulation can be found in Malaysian law. See para 3, Section 13 Industrial Relation Act 1967 of Malaysia.

¹⁵² See the Article 20 of the Law of 30 June 2004 on Collective Work Relationships.

¹⁵³ For Thailand, see Section 11 - Labour Relation Act - BE2518 (1975); For Indonesia, See Article 124 - Act No 13 -2003 concerning Manpower - Indonesia.

¹⁵⁴ This is a general perception about collective bargaining systems in the Nordic countries and some other early industrialized economies. See: Jonas Malmberg (2002), *The Collective Agreement as an Instrument for*

on labour remuneration, hours of work and other economic issues vital to employees.¹⁵⁵ Over time, other issues such as the reduction and flexibility of working time, job security, vocational training and career development, equal opportunity at work, quality of working life, occupational health and safety, child care and employee participation in management decisions have become increasingly important and have been the subject of negotiation between the labour market parties.¹⁵⁶ In Germany, remuneration remained the main subject of collective bargaining until the beginning of the economic crisis in the mid -1970s.¹⁵⁷ In Sweden, a primary duty to bargain which made nearly everything negotiable was only established by the Co-determination Act in 1976.¹⁵⁸

This development in the content of the collective agreement (both in terms of the variety and the quality of regulation) reflects the socio-economic progress achieved at the moment the collective bargaining takes place but is also directly subject to the actual results and quality of the negotiation between the parties involved. Where labour market parties have sufficient bargaining autonomy, a strong motivation to reach better conditions than existing ones and negotiation capability, they will have meaningful bargaining. The content of a collective agreement reached by such a negotiation process will be realistic and practical and will also be further developed as expected. This also implies that employee interests will be secured and improved. On this issue, Sweden stands as an impressive example.¹⁵⁹

Collective agreements can also exist in public sector, as in Denmark, Norway, Sweden among other countries. In general, the content of public collective

Regulation of Wages and Employment Conditions, Scandinavian Studies in Law, Volume 43, p. 190; see also: Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para. 67.

¹⁵⁵ Bob Hepple QC, Sandra Fredman and Glynis Truter (2002), *Great Britain*, ELL, Kluwer, para. 456.

¹⁵⁶ From approximately 1940 to 1980 there was a trend towards the expansion of bargaining scope. Unions challenged numerous traditional management prerogatives. They put forwards many of these arguments (see: Blanpain (2007), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, p.617).

¹⁵⁷ Manfred Weiss and Marlene Schmidt (2000), *Federal Republic of Germany*, Kluwer, para. 353

¹⁵⁸ see: Blanpain (2007), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, p.617

¹⁵⁹ In the Swedish labour market, it is perceived that the strength of trade unions is based on the trust and commitment of their members. If trust disappears, the trade union loses its legitimacy. This is why the collective agreements must be continuously developed. And the trade unions play a positive role as protectors of collective agreement model. See "The Swedish model" published in 2008 by TCO -page 4- webpage www.tco.se/FileOrganizer/TCOs.

agreements is established on a similar legal basis to those in the private sector. But there are naturally some differences.

Because laws on public sector bargaining must reflect the essential nature of public services, the collective agreement must be subject to certain distinctive features. Several restrictions exist owing to the fact that agreements must not encroach on democracy and the exercise of public authority.¹⁶⁰ This is true for Sweden and for many other countries as well.

To protect the public and ensure the provision of essential services, certain categories of public employees such as police, firefighters, doctors in hospitals and guards at prisons have been prohibited from striking. This implies that a number of special regulations will accordingly be introduced as alternative instruments to handle any disputes involving such classes of workers. For example, a binding arbitration procedure may be required to resolve conflict and to rapidly bring problems to a meaningful conclusion. Similarly, other restrictions on public employees that derive from mandatory rules applied to state officials will be expressed in public collective agreements.

Further, the distinction in the content of collective agreements between the public and the private sector is also reflected at a more delicate level due to a further distinction in nature. Collective bargaining in the public sector is not generally speaking subject to the same economic pressure as is the private sector. The private sector is mainly concerned with the profit motive - according to a legislative analyst of Civitas Institute - UK, Chris Hayes, "a union cannot be overly aggressive in its contract demands or work stoppages because it runs the risk of financially harming or bankrupting the corporation it is bargaining with. Private sector unions must at least moderate their demands of what they claim is best for employees in light of the well being of the employer."¹⁶¹ "No such balance exists in the public sector where unions know that the government can go out and raise as much revenue as needed (through

¹⁶⁰ Source: *Collective agreement- Sweden* , Eurofound 2009. Available at: www.eurofound.europa.eu/emire/SWEDEN

¹⁶¹ Chris Hayes (2007), *Public Employee Collective Bargaining: Bad Policy for North Carolina*, Civitas institute's publication.

taxes) to meet the demands of union leaders".¹⁶² On the other hand, unions in private sector do not have to submit their demands to voters and so are not as vulnerable to public opinion as are state officials.¹⁶³ This is the reason why, distinct differences between public and private sector collective bargaining still exist, even though labour unions have attempted to draw a parallel the two¹⁶⁴. It seems that the public sector often offers better treatment to its employees.¹⁶⁵

In Vietnam, there is no collective bargaining in the public sector while in Sweden public collective bargaining involves a relatively strong system. There is no big difference between the content of collective agreements in the public and the private sector in Sweden. Civil servants and private employees enjoy relatively similar working conditions.¹⁶⁶ Since 1965, civil servants and other public employees have the same rights of association, negotiation or to take industrial actions as all other employees on the labour market.¹⁶⁷ Rules on bargaining, dispute resolution and the right to take industrial action have been governed by collective agreements for some time. However, a special basic agreement protecting the social interest was signed in 1976. According to this, the parties shall strive for peaceful solutions and avoid taking industrial actions in issues which could infringe on democracy.¹⁶⁸ The parties have now decided to exclude certain employments from industrial actions and

¹⁶² He says that in the private sector, consumers have a choice of where to purchase a product. If a unionized company has higher prices, consumers can choose to take their business elsewhere. In the public sector, no such choice exists. Taxpayers cannot choose to go to lower-cost public schools or drive on lower-cost roads, but consumers can choose to buy a less expensive car. See: Chris Hayes (2007), *Public Employee Collective Bargaining: Bad Policy for North Carolina*, Civitas institute's publication.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ It is said that, the state - a 'good employer' - may not offer the highest rates of pay, but provides stability and continuity of employment, consults with employee representatives on changes that affect their remuneration and conditions of work, provides adequate training and opportunities for advancement and carries out a range of practices that today would constitute good management, whether they be in the form of joint consultation along civil service lines, fairness and equal opportunities etc. see: Philip Morgan, Nigel Allington (2003), *Private Sector 'Good', Public Sector 'Bad'? Transformation or Transition in the UK Public Sector?* Scientific Journal of Administrative Development Vol.1 No.1 I.A.D. 2003, p.25

¹⁶⁶ It is possible to come to an agreement locally on all issues except pensions. Negotiations and wage formation in the state sector are currently carried out in the same way as in the rest of the labour market. See: "*The Swedish model*" published in 2008 by TCO-page 6- webpage www.tco.se/FileOrganizer/TCOs.

¹⁶⁷ See Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.79

¹⁶⁸ *Collective Bargaining in the State Sector in Sweden*, published by ST- The Union of Civil Servants 2008, p.7.

this is one restriction reflected in existing public sector collective agreements in Sweden.

Collective agreements may cover all the above-mentioned subjects but there is no need for one collective agreement to embrace all of them. Some agreements cover only one of the above areas; others combine individual elements of various areas into more complex structures.

In Vietnam, each enterprise normally establishes one and only one general collective agreement. There is no statutory requirement to this effect but, in practice, the parties often negotiate every issue relating to labour relations and record all their commitments in one document. The problem lies in the fact that the stability of the solutions varies. When a new collective agreement is entered into, renegotiating every issue each time will make the process more complicated and heavier. This may hinder renegotiation. In order to encourage collective bargaining, time-consuming meetings should be avoided. Dividing the subject matters between different groups who negotiate separately may be a good solution.

2.8. Legal effect of collective agreements

2.8.1. Binding or not binding?

Collective bargaining agreements are wide-spread and can be found in many parts of the world but the way of using them and their legal effect are not the same in every country. Collective agreements are established voluntarily, but they are generally respected, binding and enforceable. While collective agreements mostly give rise to the desired effect, some of them are not binding in law and even cannot be enforced by any of the usual administrative procedures.

Currently, almost all collective agreement systems have binding effect. Theoretically, agreements with binding effect will serve as a better guarantee of the implementation of the parties' obligations and thereby guarantee their interests. Many countries in Europe, the US, Japan and many developing countries follow this pattern.¹⁶⁹ By contrast, in certain systems collective agreements are non-binding and

¹⁶⁹ For EU countries, see European Commission (2008), *Employee representatives in an enlarge Europe*, vol. 1, pp.36-41 (the table 2: *Obligation to negotiate, legal binding and compulsory nature*); For the US, See: A. W. R. Carrothers (1970) *The Legal Status of Collective Agreements in England, the United States and in Canada*, Queen's Industrial Relations Centre, 1970, p.295; For Japan: See: Kazuo Sugeno (2002), *Japanese employment and labour law*, Carolina Academic Press, p. 588; For developing countries, see: Sean Cooney, Richard

must be incorporated into employment contracts if they are to become binding. Ireland, the United Kingdom, Cyprus and Italy are examples here.

In Ireland, collective agreements have no legal effect, and are not applied nationally.¹⁷⁰ An exception would be where a collective agreement is registered with the Labour Court. In this case, the agreement obliges all employers, including those who do not recognize trade unions, to meet the terms of the registered agreement.¹⁷¹ However, collective agreements which are registered with the Labour Court are very rare. In the vast majority of cases, collective agreements are not binding, and completely depend on the goodwill and commitment of both unions and employers to ensure compliance.¹⁷²

In the United Kingdom, the fact that collective agreements are not legally binding has been seen as a distinguishing feature of industrial relations there.¹⁷³ In any case, where industry level agreements exist they are considered to be legally binding neither on the signatory parties nor on their members.¹⁷⁴ To be binding a collective agreement must be made in writing and specify that it is intended to be legally enforceable.¹⁷⁵

In Cyprus, though some efforts have been made from the union side to make collective agreements binding, not much success has been achieved so far.¹⁷⁶ However, it is recognized that though collective agreements are not legally binding, their terms have been effectively observed by both sides.¹⁷⁷ Collective agreements are

Mitchell, Zhu Ying (2002), *Law and labour market regulation in East Asia*, Published by Routledge, p.191 (the case of Taiwan), p.234 (the case of South Korea) etc.

¹⁷⁰ European Commission (2008), *Employee representatives in an enlarge Europe*, Vol. 1, pp.38.

¹⁷¹ Kevin Duffy (2006), *Collective agreements*, National report, (document at XIVth Meeting of European Labour Court Judges 4 September 2006), p.4; See also: Anthony Kerr (2005), *The evolving structure of Collective Bargaining in Europe 1990-2004*, National report, Ireland, p. 6

¹⁷² For further details, see: *Collective bargaining* - Published by ETUI (European Trade union Institute) 2009, see also: Anthony Kerr (2005), *The evolving structure of Collective Bargaining in Europe 1990-2004*, National report, p. 6

¹⁷³ See: Charles Barrow (2002), *Industrial relations law*, 2nd edition, Cavendish Publishing Limited, p151.

¹⁷⁴ *Collective bargaining* - Published by ETUI (European Trade Union Institute), 2009.

¹⁷⁵ This is contained in Article 179 (1) of the Trade union and Labour relations Act 1992. See: Charles Barrow (2002), *Industrial relations law*, 2nd edition, Cavendish Publishing Limited, p151-154.

¹⁷⁶ See: Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound. 2005. Available at: www.eurofound.europa.eu/.../2005/.../tn0503102s.htm.

¹⁷⁷ See: *Collective bargaining* - Published by ETUI (European Trade union Institute), 2009.

thus seen as gentlemen's agreements, in which the social partners demonstrate a high degree of social responsibility by faithfully observing their provisions.¹⁷⁸

In Italy, for political reasons related to the relative ineffectiveness of trade union representation, the procedure contained in the Constitution was never implemented.¹⁷⁹ Consequently, trade unions do not need to be registered but collective bargaining agreements are not binding on everyone. They have been viewed as nothing more than a private contract, binding only the contracting parties.¹⁸⁰ As there is no law regulating the normative effects of collective agreements, they are often considered as being regulated by the normal civil law provisions regarding contracts.¹⁸¹

Where collective agreements have binding effect, some further legal issues such as their normative effect and how far they extend must be taken into consideration. The following sections consider these issues.

2.8.2. Normative effect

The content of the normative effect

The normative effect of a collective agreement has generally been explained by saying that it controls the content of subordinate legal documents: any stipulation of an individual employment contract which contravenes the standards in a covering collective agreement is null and void, and it is governed by those standards¹⁸²; unless the collective agreement provides otherwise, the parties have no power to agree to

¹⁷⁸ See: *Questionnaire for EIRO comparative study on changes in the national collective bargaining systems since 1990* – case of Cyprus, Eurofound 2005, available at: www.eurofound.europa.eu/eiro/2005/03/word

¹⁷⁹ The Italian Constitution has a rule (art 39) whereby unions have the right to conclude collective agreements (c.a.) which are binding on all workers. But this rule has not yet been implemented. See: Filippo Curcuruto, Consigliere della Corte di Cassazione - Sezione Lavoro (2006), *Collective agreements*, Italy, national report at XIVth Meeting of European Labour Court Judges 4 September 2006.

¹⁸⁰ See: Toffoletto e Soci, (2005), *Italy*, in "Collective bargaining agreements", Jus Labouris (2005), p.20

¹⁸¹ See: Bruno Caruso, Loredana Zappalà (2005), *The evolving structure of Collective Bargaining in Europe 1990-2004*, Italy, national report, p.23.

¹⁸² This is the common perception of normative effect according to different sources: Keiichiro Hamaguchi (2009), *Human resource management*, presentation paper, Chapter 3, Section 6: Trade Union and Labour-Management Consultation; Stephen Deery, Richard Mitchell (1999) *Employment relations*, The Federation Press, p. 173; Jeroen M. J. Chorus, P. H. M. Gerver, E. H. Hondius, Nederlandse Vereniging voor Rechtsvergelijking (2006), *Introduction to Dutch law*, Kluwer, p.489.

terms and conditions inconsistent with those in the collective agreement.¹⁸³ The same rule applies to matter as to which the individual employment contract contains no provision.¹⁸⁴ In this case, the respective provisions of the collective agreements will apply directly.¹⁸⁵ Collective agreements thus both take priority over and complement the contents of any underlying individual contracts of employment.¹⁸⁶

The fact that collective agreements have binding effect also means, that the parties to them can freely decide the extent to which individual employers may contract with their employees (or, in the case of an industry-wide collective agreement, the extent to which employers can contract with the local union).¹⁸⁷ When handling labour disputes, labour courts will look at the terms and conditions provided in the relevant collective agreements as a point of reference to help them determine how to decide the disputed issues.

Due to their normative function, collective agreements serve as a parallel or an alternative to directly protective employment legislation.¹⁸⁸ This effect establishes a *de facto* hierarchy between collective agreements and individual employment contracts with the former as the higher ranking *lex superior*.¹⁸⁹

Some legal scholars raise a basic question concerning the mandatory effect of collective agreements: Are the terms and conditions of employment established by a collective agreement merely minimum standards or do they effectively invalidate

¹⁸³ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-58

¹⁸⁴ Stephen Deery, Richard Mitchell (1999) *Employment relations*, The Federation Press, p.173.

¹⁸⁵ Ruth Nielsen (2004), *The evolving structure of Collective Bargaining in Europe 1990-2004*, Denmark, national report, p. 15; Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006; And see: *Collective Agreements - Netherlands*, Eurofound August 2009.

¹⁸⁶ See: Kazuo Sugeno (2002), *Japanese employment and labour law*, Carolina Academic Press, p. 588; A. T. J. M. Jacobs (2004), *Labour law in the Netherlands*, Kluwer, para. 208; Jeroen M. J. Chorus, P. H. M. Gerver, E. H. Hondius, Nederlandse Vereniging voor Rechtsvergelijking (2006), *Introduction to Dutch law*, Kluwer, p.489.

¹⁸⁷ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, pp.19-58.

¹⁸⁸ Ruth Nielsen (2004), *The evolving structure of Collective Bargaining in Europe 1990-2004*, Denmark, national report, Research Project Co-financed by the European Commission and the University of Florence, p.15.

¹⁸⁹ Ibid. "*lex superior*" is a Latin phrase and basically means "higher law". The word "*lex*" means "law".

individual employment contracts which are more beneficial to employees? ¹⁹⁰

In Germany, since the 1918 Collective Agreement Law, the terms and conditions of employment established by collective agreements constitute no more than minimum standards.¹⁹¹ This is a clear expression of the so-called "advantageous principle" validating individual contracts of employment that provide better conditions than collective agreements. This is also referred to as a traditional approach to interpretation and application that can also be observed in many systems, including those of Finland, Norway, Sweden and Denmark.¹⁹² Since a viewpoint that has regularly been approved is that the main function of collective agreements is to protect employees against pressure from their employer, the provisions in collective agreements are readily seen as minimum standards in the sense that lower levels of protection are regarded as conflicting with the agreement. This soon became a general rule on the interpretation of collective agreements and has been widely recognized. In doubtful cases, the question of whether or not a clause in an individual contract is in conflict with a collective agreement has to be resolved in accordance with it.¹⁹³

But, this is an earlier opinion. Later, when collective agreements came to be accepted by employers, and – to some extent – regarded as a way of preventing competition for labour between employers, the approach to their interpretation started to change. Against this background, it was asked if the provisions of collective agreements, in dubio¹⁹⁴, do allow for better conditions. In other words, does the collective agreement provide only a floor or does it also erect a ceiling?¹⁹⁵ In some countries such as Denmark and Finland, collective agreements are not seen as an instrument for protecting employers from competition on the labour market.¹⁹⁶ But

¹⁹⁰ See: Kazuo Sugeno (2002), *Japanese employment and labour law*, Carolina Academic Press, p. 589.

¹⁹¹ Ibid, p. 589.

¹⁹² This is understood as an aspect of mandatory effect -principle "inderogability" of collective agreements in Finland, Norway Sweden and in Denmark (following case law) (Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p. 199)

¹⁹³ Ibid, pp.199-200.

¹⁹⁴ "in dubio" is a Latin phrase, means "in doubt", undetermined. Here it probably means, in doubtful cases where there is no express provision on the point.

¹⁹⁵ Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p.200.

¹⁹⁶ Ibid, p.200.

some other systems like the Norwegian have taken the contrary position and in certain cases, for example, higher pay might not be allowed.¹⁹⁷ This standpoint has also started to be recognized in Sweden.¹⁹⁸ But in general, the use of this approach is limited since it may harm the parties to collective agreements, especially the trade unions involved as they would experience greater difficulty in monitoring compliance with the agreement.¹⁹⁹

In some systems like those of the United States or Japan, where collective agreements mainly take place at local level, flexibility of application is demanded and the second approach seems to be more frequently approved.

It was argued in Japan that enterprise-based collective agreements normally deal with the actual working conditions of union members, and are not merely setting minimum standards.²⁰⁰ If the parties to collective agreements so intend, they can create minimum enterprise standards in their agreements. But, standards are likely to be interpreted as ceiling standards and may not be further improved. This flexible approach has been widely accepted in Japan. It was initiated by the Supreme Court in the course of settling labour cases and has convinced many legal scholars.²⁰¹

The approach of the United States is a little different. In the United States the right to individual bargaining has been rejected.²⁰² Collective bargaining is typically carried out by local unions and the "majority rule" governs the matter of representation. One consequence of the system of exclusive bargaining

¹⁹⁷ This interpretive approach has been taken by the *Norwegian Labour Court*, at least in some older cases. The trend in Norwegian collective agreements is explicitly towards the setting of a minimum standard, it might even be asked whether this case law still reflects *lege lata*. ("*lege lata*" = what the law is - as opposed to what the law ought to be). Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, *Scandinavian Studies in Law*, Volume 43, p.200.

¹⁹⁸ The Swedish labour court has not elaborated any standard interpretation concerning whether, in dubio, paying higher wages is permissible or not. Instead, every collective agreement has to be individually interpreted in this respect. Collective agreements providing for a maximum wage level are typically found among groups of employees that easily move from one employer to another, such as construction workers and chimney sweeps. *Ibid*, p.200.

¹⁹⁹ *Ibid*, p.200.

²⁰⁰ Kazuo Sugeno (2002), *Japanese employment and labour law*, Carolina Academic Press, p. 590.

²⁰¹ The basis of this approach is that collective bargaining is a "give and take" exchange between employer and trade union. The terms of collective agreements are viewed as the final set of concessions by the parties involved after balancing their short-run and long-run interests. (*Ibid*, p.591; see also: Takashi Araki, *The System of Regulating the Terms and Conditions of Employment in Japan*, in JILPT report No 1 (2004), p.11)

²⁰² Kazuo Sugeno (2002), *Japanese employment and labour law*, Carolina Academic Press, p. 590.

representation²⁰³ prevailing in the United States is that an employer may commit the unfair labour practice of violating its duty to bargain in good faith if it grants individual workers terms and conditions that are better than those prescribed by a collective agreement.²⁰⁴ According to the interpretation of the labour court, once a valid representative has been selected, even workers who do not belong to the union are bound by the collective bargaining agreement and cannot negotiate individual contracts with the employer.²⁰⁵ So there is no chance for parties to an employment contract to improve working conditions provided by collective agreements (if any).

In many developing countries, the binding effect of collective agreement has been interpreted on the basis of the advantageousness principle. In China, for example, collective agreements only specify minimum standards (Article 35 Labour Law). Similarly, in Thailand (see Article 20 Labour Relations Act 1975), Cambodia (see Article 98, Labour Code 1997) and Vietnam (see Article 166: 4 and Article 16 of Decree N0 44) it is possible to deviate from collective agreements in favour of the employees and this approach has widely been accepted.

The sphere of a collective agreement's effect depends on the three dimensions of time, locality and beneficiaries (individuals and organizations). They are answers to the questions *when*, *where* and *to whom* the collective agreements apply, respectively.

The temporal dimension of binding effect

The commencement of normative effect can be the day on which the agreement is signed, the day agreed by the signatory parties or any day prescribed by law (e.g. from the day the collective agreement is registered by an authority). A collective agreement shall not cease to have binding effect until it is properly terminated.

Theoretically collective agreements lose their binding effect upon their expiry or termination. But, in reality it remains for some time after the expiry date. The

²⁰³ See the explanations of "majority rule" and "exclusive bargaining representation" in Section 2.11. *Recognition of collective bargaining agents*.

²⁰⁴ Kazuo Sugeno (2002), *Japanese employment and labour law*, Carolina Academic Press, p. 589-590.

²⁰⁵ See *J. I. Case Co. v. NLRB*, 321 U.S. 332, 64 S. Ct. 576, 88 L. Ed. 762 [1944]. According to "Collective bargaining" <http://legal-dictionary.thefreedictionary.com/Collective+Bargaining>.

prolongation of its application despite termination is a particular character of collective agreements when functioning as a source of law.²⁰⁶ This effect is often explained by the terms of the collective agreement having been incorporated into the individual employment agreements, which may continue to be valid after the collective agreement has expired.²⁰⁷ Expiration of such a date does not entail an automatic change to the content of any contract of employment derived from the terminated agreement. The conditions of these contracts are still valid until they too are terminated in accordance with their terms.²⁰⁸ In such a case, until a new collective agreement enters into force, the provisions of the previous agreement are still applied, unless the parties to the agreement have set up an alternative termination date.²⁰⁹

Labour laws or collective agreements themselves may include clauses providing for the prolongation of their binding effect in the event of their expiry; labour court cases also affirm this rule. In Denmark, for example, it is stated in the Basic agreement that even if notice of termination has been given, the agreements continue to be binding on the parties until they are replaced by new collective agreements between the same parties.²¹⁰ It is also stated in the case law that individual stipulations in an agreement cannot be terminated by notice independently of the other stipulations in the agreement.²¹¹ When a collective agreement is terminated by a notice, it is the agreement as such which is terminated.²¹² In Sweden a similar rule has also been confirmed by the courts.²¹³

Locality of binding effect

A collective agreement has its binding effect within a locality determined by

²⁰⁶ Michał Seweryński (2003), *Collective agreements and individual contracts of employment*, Kluwer, p.194.

²⁰⁷ Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para 568.

²⁰⁸ Michał Seweryński (2003), *Collective agreements and individual contracts of employment*, Kluwer, p.194.

²⁰⁹ Ibid.

²¹⁰ Article 7.2. Basic Agreements 1992.

See: Ole Hasselbalch, Monica Smith, Sylvia van Oosten-Rosman (2005), *Labour Law In Denmark*, Kluwer (2005), para. 758.

²¹¹ Ibid, para. 762.

²¹² Ibid, para. 761.

²¹³ See the labour court cases NJA 1958 p. 196, NJA 1959 p. 562, cf. AD 1978 No. 134. (Source: Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para 568).

the bargaining level at which it is entered into. For example, a plant-level collective agreement generates its binding effect within the respective company. However, this could be extended under certain conditions (see: *Extension of normative effect* below).

Beneficiaries of collective agreements

Collective agreements are first of all binding on the parties to them and to those employers and employees that belong to such a party, normally, the members of employers' associations and trade unions.²¹⁴ In many countries, the *membership rule* governs the issue of personal effect. According to this rule, collective agreements only apply to the parties to collective agreements and their members. In particular, within the area of application, those workers who are members of a trade union party to a collective agreement are covered by it regardless of whether they became members of the trade union before or after its conclusion, and a worker who is not a member of the trade union is not so bound.²¹⁵ Similarly, on the employer side, anyone who is a member of any employers' association signing the collective agreement, is also obliged to implement the contents of the agreement in favour of all the respective unionized employees in his or her undertaking.

Not every union member is bound by collective agreements. According to Swedish law, if a member has already been bound by another collective agreement, he/she may be exempt. A member who withdraws from his/her organization may not free him/herself from being bound by the collective agreement until the agreement has expired or has been terminated by proper notice if there is no provision to the contrary.²¹⁶

Sometimes, "outsiders" may be covered too. Many countries follow some kind of "erga omnes" principle. Even in those countries which do not adopt an extension mechanism, "outsiders" may also appear in an indirect way. (this will be discussed later, see: "*Extension of normative effect*".)

"Outsiders" on the employees' side may be employees that are members of other unions, or not members of any unions at all. "Outsiders" on the employer side,

²¹⁴ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound. Available at: www.eurofound.europa.eu/.../2005/.../tn0503102s.htm.

²¹⁵ See: Keiichiro Hamaguchi (2008), *Lecture memorandum on human resource management*

²¹⁶ See: Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para 552.

similarly, are individual employers that are not members of the employers' organization which is the party to the agreement, or employers who do not belong to any employer's organizations. But in certain conditions they may also be bound by a collective agreement and have to apply its conditions to the workers working in their enterprises.

Is there then any distinction between inside employees and outside employees when they are both bound by a collective agreement? Theoretically, the insiders are the "incumbent" employees whose positions are protected by various devices.²¹⁷ The insiders are much more influential than the outsiders, since they have market power as well as power based on regulations.²¹⁸ They have the strength of their unions and the fact that they are experienced collabourators.²¹⁹ It is costly for an employer to dismiss them and replace them with someone else. The outsiders lack similar protection.

In some countries, especially the Nordic ones, the issue of the employment conditions of outside employees is a sensitive one for trade unions: On the one hand, it is important for a trade union that an employer does not undercut the collective agreement by employing outside employees with lower pay. On the other hand, it is regarded as a problem if outside employees receive all the benefits of the collective agreement without making any financial contribution to the union.²²⁰ This has been mentioned as a so-called "free-rider" problem. Thus, an opinion is that it may be in the interests of a trade union to reserve the benefits of its collective agreements for their own members.²²¹ In practice, however, there is no sharp distinction between the insiders and the outsiders.²²²

It should also be mentioned that it might be regarded as illegal for an employer to pay outside employees better than members of the trade union. In Denmark this might, depending on the circumstances, be regarded as anti-union behaviour and

²¹⁷ Tore Sigeman (1999) *Insiders and Outsiders in the Labour Market - Experiences of a Nordic Welfare State in Labour Law Perspective*, Scandinavian Studies in Law, volume 38, p.265

²¹⁸ Ibid, p.265

²¹⁹ Ibid, p.265

²²⁰ Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p.204

²²¹ Ibid, p.204

²²² Tore Sigeman (1999) *Insiders and Outsiders in the Labour Market - Experiences of a Nordic Welfare State in Labour Law Perspective*, Scandinavian Studies in Law, volume 38, p.265

constitute a breach of a collective agreement.²²³ In Sweden the same behaviour might be considered as a violation of the freedom of association.²²⁴

When an individual member is bound by a collective agreement, it also means that he is both liable for damages if he acts in contravention of the collective agreement and entitled to assert a claim based on the collective agreement, e.g. to claim wages according to the rates in it.²²⁵ Normally he is subordinate to his organization in this respect, but if the organization does not wish to support the action, he is free to bring an action by and for himself.

Extension of normative effect of collective agreements

National law sometimes extends the coverage of collective agreement to employers and/or workers who are not members of the parties that have concluded the collective agreement. This is called the "erga omnes" mechanism which results in the extension of the normative effect of a collective agreement to "outsiders".

In Europe, the coverage of collective agreements has remained remarkably high due to the erga omnes mechanisms in use.²²⁶ Most EU Member States as well as the accession countries have provisions for extending collectively agreed bargaining results to other firms, sectors or regions.²²⁷ In Austria, Germany, and Slovenia, provisions on public procurement require all contractors to comply with the terms of any relevant collective agreements.²²⁸ In Belgium, collective agreements bind employers who conclude them or who have agreed to them as well as the members of the organizations who have concluded them or agreed to them.²²⁹ In France, there has long been a tradition of active State intervention in assisting weak and divided organizations by way of a system of general applicability or, in other words, an erga

²²³ Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p. 204

²²⁴ Ibid, p.204

²²⁵ Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, para 554.

²²⁶ Tore Sigeman (1999) *Insiders and Outsiders in the Labour Market - Experiences of a Nordic Welfare State in Labour Law Perspective*, Scandinavian Studies in Law, volume 38, p.11

²²⁷ European Commission (2003), *Employment in Europe 2003-Recent Trends and Prospects*, Luxembourg: Office for Official Publications of the European Communities, Sep. 2003, p.77

²²⁸ Ibid, p76

²²⁹ Marinette Mormont (2005), *Questionnaire for EIRO comparative study on changes in the national collective bargaining systems since 1990 – case of Belgium* - p.2, published by Eurofound.

omnes approach to collective agreements. The coverage of the sectoral collective agreements in France is thus very high, almost on a Nordic level. The same is true for the Netherlands and Spain.²³⁰

An extension of a collective agreement's effect is normally provided for by law with an appropriate order made by a competent authority.

In order for a collective agreement to bind employers other than those who are parties to it, legislation or administrative intervention may be required. Most EU Member States have such a system.²³¹ In Belgium and Poland, for example, the Labour Code guarantees the extension of collective agreements to all employees at a firm that has concluded an agreement. Multi-employer agreements may be extended by the Ministry of Labour (in Belgium) and the Ministry of Economics and Labour (in Poland) to cover unaffiliated employers in a particular sector, once requested to do so by one of the signatory parties (in Belgium) or if such extension is considered "a vital social interest" (in Poland).²³² In France, collective agreements have been capable of being extended at the discretion of the Ministry of Labour since 1936.²³³ In Germany, the Ministry of Economics and Labour can declare an agreement generally binding.²³⁴ In Slovenia and Croatia the Minister of Labour has the competence to extend a collective agreement to all the employers within the relevant sector.²³⁵ In the Netherlands, the Minister of Social Affairs and Employment has had the power to do so since 1937.²³⁶ In Portugal the Minister of Labour, usually at his own initiative, can broaden the scope of application of a collective agreement by means of extension throughout the respective economic sector or geographical area, or by enlargement to different geographical areas.²³⁷

²³⁰ Niklas Bruun (2002), *The autonomy of collective agreement*, General report presented to the VIIth European Regional Congress of the International Society for Labour Law and Social Security (Stockholm September 2002), p.11

²³¹ Ruth Nielsen (2002), *Europeanization of Nordic Labour Law*, Scandinavian Studies in Law Vol. 43, Stockholm 2002, p.53

²³² OECD, *Employment Outlook 2004*, OECD Publishing, 2004 p.148.

²³³ *Ibid*, p. 148

²³⁴ *Ibid*, p. 148

²³⁵ European Commission (2008), *Employee representatives in an enlarge Europe*, Vol. 1, p.40

²³⁶ OECD, *Employment Outlook 2004*, OECD Publishing, 2004 p.148

²³⁷ *Ibid*, p. 148

The extension of collective agreements' normative effect often takes place in certain special situations. For example, in Norway, an extension may be made in cases where it is evident that foreign workers are subject to substandard wages and working conditions.²³⁸ But one of the most common conditions leading to the extension of the normative effect of collective agreements is dominance in the number of employees bound by collective agreements in an enterprise or a sector. In Finland, if a collective agreement covers about half of the employees in a sector, it is automatically an erga omnes applicable agreement.²³⁹ In Greece, an agreement can be extended when more than 50% of employees in a sector or occupation are already covered by it.²⁴⁰ In the Netherlands, the respective rate is 60%.²⁴¹ In Japan, trade union law allows two types of extension:²⁴² a “plant level extension” takes place when at least three-quarters of the workers regularly employed in an establishment come under the application of a particular collective agreement, in which case it must also be applied to the remaining workers. The second type of extension is called the “regional extension”. When a majority of the workers of the same kind, in a particular region, are covered by a particular collective agreement, the Ministry of Health, Labour and Welfare or the prefectural governor may decide that the terms of that collective agreement should apply to the remaining workers of that kind employed in the region and to their employers.²⁴³ In Spain, extension throughout the agreement's domain is automatic if signed by the majority of the representatives of each party. A special extension by the Ministry of Labour can be made upon the request of an employer or a trade union association in cases where no appropriate bargaining parties exist.²⁴⁴ In this case, collective agreements can be extended to other undertakings,

²³⁸ Kristine Nergaard (2008), *Controversy over law on extension of collective agreements*, Eurofound, available at: <http://www.eurofound.europa.eu/eiro/2008/08/articles/no0808019i.htm>

²³⁹ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound. Available at: www.eurofound.europa.eu/.../2005/.../tn0503102s.htm.

²⁴⁰ OECD, *Employment Outlook 2004*, OECD Publishing, 2004 p.148.

²⁴¹ *Collective bargaining* - Published by ETUI 2009, the case of Netherland.

²⁴² This extension is laid down in Article 17 and 18 of the Trade Union Law. See also: Takashi Araki (2007), *A comparative analysis of security, flexibility, and decentralized industrial relations in Japan*, Comparative Labour Law & Policy Journal, Vol. 28, No. 3, 2007 p.444

²⁴³ See: Article 17, 18 Trade union Act No 174, 1949.

²⁴⁴ OECD, *Employment Outlook 2004*, OECD Publishing, 2004 p.148

sectors or territorial levels.²⁴⁵

Sometimes, there is even no need of any special conditions. In Lithuania, while national and sectoral agreements cover trade union members only, company agreements are valid for all employees.²⁴⁶

Unintentional extension of legal effect

In the previous part we have discussed those systems which adopt collective agreements with "erga omnes" effect. In such countries, there is always some legislative basis for this extension. However, such a mechanism for extending collective agreements does not exist in those countries with a voluntary system²⁴⁷, in United States²⁴⁸ and only exists to a very limited extent in the Nordic countries²⁴⁹.

However, this does not mean that collective agreements in these systems cannot have an effect on outsiders. There are ways for outside employees to be involved. For example, in Sweden, there are still two basic situations resulting in the extension of the legal effect of a collective agreement: first, an employer who is not a member of an employers' organization can join a collective agreement through a separate agreement which would be based on industry-wide labour standards²⁵⁰. Second, following an old principle well-known on the Swedish labour market, an employer must provide non-member employees no less in wages and other benefits than the agreement provides for those directly covered by it (the reason behind this principle was originally that it should not be possible for an employer to hire cheaper

²⁴⁵ European Commission (2008), *Employee representatives in an enlarge Europe*, Vol. 1, p.41

²⁴⁶ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound. Available at: www.eurofound.europa.eu/.../2005/.../tn0503102s.htm.

²⁴⁷ European Commission (2008), *Employee representatives in an enlarge Europe*, Vol. 1, p.36

²⁴⁸ OECD, *Employment Outlook 2004*, OECD Publishing, 2004 p.148

²⁴⁹ See the overview in the Commission's report on Industrial relations in Europe COM(2000)113 p. 41.

²⁵⁰ It is a principle often held by courts that industry-wide agreements in any sector set standards that will be applicable at all workplaces in that sector unless there is an agreement to some other effect in force at the particular place of work. (see: Reinhold Fahlbeck, Bernard Johann Mulder (2008), *Sweden, Int'l Labour & Emp. Laws* Vol. IIA, p.19-59). A union could conclude an agreement with an individual employer who does not belong to a signatory employers association. Then, the employer undertakes to apply the collective agreement which sets standards that will be applicable in the branch of activity in question. This is called an "application agreement". In this case the unorganized employer becomes a party to a collective agreement and there is a contractual relationship between the employer and the trade union. (See: Birgitta Nystrom (2005), *The evolving structure of collective bargaining in Europe 1990-2004*, Sweden, national report, p.11).

non-organised labour).²⁵¹ It can thus be seen in many systems that even where agreements are binding only on trade union members, in practice the employers often provide the same or similar conditions for all employees.²⁵²

2.8.3. Conflicting collective agreements

Where there are different levels of bargaining, there is always a possibility of conflicts between national and local agreements. When this occurs, the issue arises of which agreement has legal priority. The few cases directly on this point have tended to suggest that national agreements have priority.²⁵³ This is the traditional approach and is largely accepted. The reasons for this could be: first, in many countries, collective agreements have binding effect; the hierarchical principle governing such agreements is already clear (see above - normative effect) and should be followed in this case. Secondly, it seems reasonable to think that collective agreements at a higher level are entered into by more powerful and objective parties, so they do not suffer any of the shortcomings that agreements entered at enterprises may have.

But some scholars of labour law have felt that this was too simplistic an approach to the problem. In their view, the intent of the parties is the crucial issue to consider. If the local agreement was made after the national agreement (as a supplement or addition to it), then the parties might reasonably expect that matters in the local agreement which depart from nationally agreed terms would have priority over the national agreements.²⁵⁴ Also, it has been argued that since the local agreement is usually closer to the local situation, there is a presumption that it should have priority, whether negotiated before or after a national agreement, unless there is a clear inference from the evidence that the intention of the parties was for the national agreement to take precedence.²⁵⁵

These arguments are likely to arise in a labour market where the binding effect of collective agreements is not so strong, as is the case in Britain. As there exist

²⁵¹ See: Birgitta Nystrom (2005), *The evolving structure of collective bargaining in Europe 1990-2004*, Sweden, national report, p.11

²⁵² Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

²⁵³ Charles Barrow (2002), *Industrial relations law*, 2nd edition, Cavendish Publishing Limited, p160.

²⁵⁴ Ibid, p.260.

²⁵⁵ Ibid, p161.

different viewpoint on this issue, we also find differing judgments resolving conflicts on the effect of collective agreements.²⁵⁶

2.9. Duration of collective agreements

After a period of implementation, collective agreements need to be updated with market changes. Depending on the stability of the issues handled in the agreement, the contracting parties can define a specific period during which the collective agreement will have its effect. Since the matters dealt with by collective agreements are various and are also different in term of stability, the lifetime of such collective agreements will be specified differently. The attempts that have been made to group collective agreements in terms of duration often distinguish two categories: fixed/definite term and permanent/indefinite term. When collective agreements regulate specific matters which are subject to change, the duration should be definite. Contrarily, collective agreements laying down the fundamental principles and conditions of labour market, thus addressing more general and stable issues such as the rights and obligations of the parties, working environment, equal opportunities and the like, are often covered by agreements with an indefinite term.

The life times of fixed-term collective agreements vary. Agreements on wages are often rather short. In many countries, collective agreements regulating wages have a duration of only one year. Examples here are Germany, South Korea, Belgium²⁵⁷ and France²⁵⁸. But this need not hold true in every case and a collective agreement on wages may last for a longer term. Further, a collective agreement can also regulate other matters beside wages. In the UK, for example, many collective agreements are open-ended regardless of whether they include clauses on wages or not. Issues calling for changes may be dealt with as they arise.²⁵⁹

²⁵⁶ See judgements for these cases: *Clift v. West Riding County Council* (1964) and *Gascol Conversion Ltd v. Mercer* [1974] ICR 420 .

²⁵⁷ Blanpain (2007), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, p.621

²⁵⁸ Each year, the employer must negotiate with the trade unions on the compulsory issues (i.e. salary and working hours and work organization). See: Barthélémy & Associés (2005), *France*, in "Collective Bargaining Agreement", Jus labouris (2005), p.12

²⁵⁹ Blanpain (2007), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, p.621

Normally a fixed term collective agreement will run for a period of one to three years. In Japan, most agreements are entered into for one year at a time and renegotiated each spring.²⁶⁰ In the US collective agreements are often for a duration ranging from one to three years.²⁶¹ This span of duration appears in the statutory regulation of many countries, such as Singapore²⁶², Thailand²⁶³ and China²⁶⁴.

Sometimes collective agreements are signed for shorter or longer periods. For example, collective agreements with a duration of four years have been seen in Italy (all sectors), Latvia (in some industries e.g. energy and electricity)²⁶⁵ Denmark (in some industries in the private sector)²⁶⁶, or of up to five years, as can be found in France²⁶⁷ and Switzerland²⁶⁸. Collective agreements with the longest duration have been seen in Canada. As an example, a collective agreement with a 117-month duration was signed in the public sector and some collective agreements with a 72-month duration were signed in the private sector.²⁶⁹ Collective agreements with the shortest duration could be found in France: 4 months (chemical industry) and 6 months (pharmaceutical industry).²⁷⁰

In Sweden the duration of a collective agreement is for the parties to decide. In practice, collective agreements on wages and working conditions are often concluded

²⁶⁰ Ibid, p.621

²⁶¹ Ibid.

²⁶² See Article 25 Industrial Relations Act (1960) of Singapore.

²⁶³ See Article 12 - Thai Labour Relations Act 1975.

²⁶⁴ See Article 38 China's 2004 Collective Contract Provisions.

²⁶⁵ Vera Glassner and Bela Galgoczi (2008), *Eucob@n Collective Bargaining Report 2007 - updates and latest trends in CB*, Presentation at the Seminar "How to improve collective bargaining in Europe" Research Department, ETUI, Budapest 17-19 October 2008.

²⁶⁶ See: Norrbom & Vinding (2005), *Denmark*, in "Collective Bargaining Agreement", Jus labouris (2005), p.9

²⁶⁷ Jacques Rojot (2004), "Collective agreements in France" in "Collective Bargaining in Europe", Ministerio de Trabajo y Asuntos Sociales-Spain (2004), p. 125.

²⁶⁸ Blanpain (2007), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, p.621

²⁶⁹ Source: *Innovation Workplace Practices in 2008*, published by Department of Human Resources and Skill Development Canada.

²⁷⁰ Vera Glassner and Bela Galgoczi (2008), *Eucob@n Collective Bargaining Report 2007 - updates and latest trends in CB*, Presentation at the Seminar "How to improve collective bargaining in Europe" Research Department, ETUI, Budapest 17-19 October 2008.

for a specific period, such as one or two years.²⁷¹ In Vietnam, such a collective agreement is signed for a duration of one to three years. When an enterprise enters a collective agreement for the first time, the duration of the collective agreement may be less than one year.²⁷²

Determining the duration of a collective agreement is basically dependent on the matters handled by it, but economic circumstances also have a strong impact. For example, during the period of prosperity of the industrialized market economies, agreements tended to be of shorter duration since trade unions sought to exploit the tighter labour market and the employers' greater ability to pay.²⁷³ But in periods of recession, unions prefer longer-term guarantees and protection. The inflation level also affects the duration of agreements because high inflation introduces an element of uncertainty and the need to keep up with increases in the cost of living, all of which result in shorter periods of validity.²⁷⁴

In principle a fixed term collective agreement will terminate at the end of its term without any special procedure having to be followed. However, the expiry date just expresses the earliest day on which the agreement may be terminated because in many countries collective agreements can still remain valid after the expiry date. Normally, prior notice is required in order to make a collective agreement terminate. Sometimes, too, the original collective agreement can not terminate until a new collective agreement has come into force. In Luxembourg, once a collective bargaining agreement's term has expired, if it has been neither terminated nor revised, it is deemed renewed by tacit agreement between the parties, and continues in force until terminated by the parties.²⁷⁵ In Spain, similarly, without a written termination, collective agreements are renewed year by year²⁷⁶ In Germany, collectively agreed

²⁷¹ See: Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.534; Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-59.

²⁷² Article 50(1), Vietnamese Labour Code (amended 2006).

²⁷³ Blanpain (2007), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, p.621

²⁷⁴ Ibid, p.621

²⁷⁵ See: Castegnaro Cabinet d'Avocats (2005), *Luxembourg*, in "Collective Bargaining Agreement", Jus labouris (2005), p.26

²⁷⁶ See: Juan García Blasco and Ángel Luis de Val Tena, Zaragoza (2004), "Collective bargaining in Spain" in "Collective Bargaining in Europe, Ministerio de Trabajo y Asuntos Sociales-Spain (2004), p.291.

provisions keep their validity as long as no new agreement has been signed.²⁷⁷ In Denmark, only when either of the parties initiates industrial action or when another collective agreement comes into force may the original collective agreement be terminated.²⁷⁸

In Sweden, on the other hand, there is no statutory regulation regarding either the termination date or any lengthening of the life time of a collective agreement. The parties can agree to whatever they wish and the presence of a period of notice of termination is a matter strictly for the parties.²⁷⁹ In Vietnam, before the date at which a collective agreement expires, both parties can negotiate an extension of its duration or enter into a new one. If the collective agreement expires but negotiation between the parties is still ongoing, the original agreement will continue to be fully binding. Three months after the expiry of the agreement, however, the collective agreements will automatically become invalid regardless of whether or not negotiations between the parties have been conclusive.²⁸⁰

A fixed-term agreement may also be ended before the total agreed duration has elapsed by the mutual consent of the parties. A collective agreement may also be terminated unilaterally where there has been a serious breach of the agreement by any of the parties involved and other parties wish to terminate the contract relationship. In such cases the appropriate procedure for terminating the agreement must be followed. For example, a court may have to declare that the collective bargaining agreement is no longer applicable to the aggrieved parties.²⁸¹

Beside fixed term collective agreements, agreements with indefinite duration also exist in many countries. Generally, agreements regulating matters which are considered as being of central importance and constitute the framework for the conclusion of regular agreements will often be designed to remain in force for a lengthy period, even for an indefinite one. Such agreements are especially common in

²⁷⁷ See: Heiner Dribbusch (2009), *Germany: wage formation*, Eurofound, Available at: <http://www.eurofound.europa.eu/eiro/studies/tn0808019s/de0808019>.

²⁷⁸ Norrbom & Vinding., *Denmark*, in *"Collective Bargaining Agreement"*, Jus labouris (2005), p.9

²⁷⁹ *Per Norberg and Ann Numhauser-Henning (2004), "Collective Bargaining in Sweden" in "Collective Bargaining in Europe*, Ministerio de Trabajo y Asuntos Sociales-Spain (2004), p.249.

²⁸⁰ Article 51, Vietnamese Labour Code (amended 2006).

²⁸¹ See Section 4.4. *Termination of collective agreements*.

economies that have highly developed collective bargaining systems and they are often intersectoral or national collective agreements.

For example, in Denmark, Finland and Sweden, basic agreements are often concluded for an indefinite period.²⁸² The first Danish "General Agreement" concluded in 1899 has lasted for a very long time. It is also the oldest collective agreement in the world²⁸³ which is still in force.²⁸⁴ In Norway, the first Basic Agreement signed in 1935 is also for an indefinite term.²⁸⁵ In Sweden, the basic agreements signed between LO and SAF in 1938, 1946 and 1982 were concluded for long periods²⁸⁶ and are essentially still in force.

A permanent collective agreement can not be terminated automatically: a predetermined procedure has to be followed. An indefinite-term collective agreement may be ended by the parties' consent or by unilateral termination. In case of unilateral termination, a period of prior notice must be fixed. In Finland or in France, for instance, the statutory notice period is three months.²⁸⁷

In Sweden, a period of prior notice may be freely agreed between the parties. They can withdraw from the collective agreement at will and no specific cause is required, but the clause on giving notice must be respected. Where one party has given a termination notice, the other parties also have the right to terminate the effect of collective agreement. If the agreed period of notice is six weeks or more, the other parties must give notice within three weeks of the time at which the notice of

²⁸² Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p.193

²⁸³ Anthony Ferner, Richard Hyman (1998) *Changing industrial relation in Europe*, Blackwell publishing, p.75

²⁸⁴ The Agreement really covers the entire Danish labour market and was not revised until 1960. Although minor amendments have been adopted since then, the original agreement remains as it was originally concluded. The General Agreement was revised again in October 1973 with further amendments in January 1993. See: *The General Agreement, 1993*, Webpage: <http://www.da.dk/default.asp>

²⁸⁵ ILO (1994) *Political transformation, structural adjustment and industrial relations in Africa: English - Speaking Countries*, Volume 78, p. 44.

²⁸⁶ Birgitta Nystrom (2005), *The evolving structure of collective bargaining in Europe 1990-2004*, Sweden, national report, p 25; For more details about these agreements, see section 3.2.1. *Collective Agreement legislation and collective agreement development in Sweden*.

²⁸⁷ For Finland: See: Niklas Bruun, *Collective agreements in Finland*, in "Collective Bargaining in Europe", published by Ministerio de Trabajo y Asuntos Sociales, Spain in 2004, p.89; For France, see Jacques Rojot, "collective agreements in France", in "Collective Bargaining in Europe" - published by Ministerio de Trabajo y Asuntos Sociales, Spain in 2004, p.126.

termination should have been given. If the agreed period of notice is less than six weeks, the other parties must give notice within one half of the agreed period of notice.²⁸⁸ In Vietnam and in many Asian countries, permanent collective agreements are illegal. Thus, such notice provisions are not mentioned in any statutory regulation.

Generally speaking, national regulation on the duration of collective agreements varies since the national approach to the issue and the methods for resolving it also vary. The period of validity of a collective agreement may range from a few months to a few years or even be open-ended. Further, the life time of a collective agreement can also be lengthened or shortened subject to the particular needs of the parties involved.

2.10. Classification of collective agreements

In the theory of labour law, some attempts have been made to classify collective agreements. Using criteria such as subject matter or duration and the like, collective agreements can be grouped into various categories. A standard way of grouping collective agreements is the one pertaining to the bargaining levels where the collective agreements are concluded. With this approach, the collective agreements with the broadest scope consist of two main groups: international collective agreements and national collective agreements. In the former, two sub-categories of agreements are included: Global collective agreements and Regional collective agreements. In the latter, there are three main types: Intersectoral collective agreements, Industry-wide collective agreements and Company level collective agreements.²⁸⁹ This section will pay attention to certain legal aspects of each group, their foundation and how they have developed and some further discussion is also included.

2.10.1. International collective agreements

²⁸⁸ Section 29 - Co-Determination Act.

²⁸⁹ This way of classifying collective agreements has been used in various labour law literatures and reference sources, such as: Bob Hepple QC, Sandra Fredman and Glynis Truter (2002), *Great Britain*, ELL, Kluwer, para. 455; *Collective Bargaining in Europe*, Ministerio de Trabajo y Asuntos Sociales, Spain (2004), pp. 54, 80, 279; Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p. 192.

In many others, it is used without mentioning the criterion that it is based on, as it has been widely accepted. For examples: Ole Hasselbalch, Monica Smith, Sylvia van Oosten-Rosman (2005), *Labour law in Denmark*, Kluwer 2005, p 43

International collective agreements are documents that are entered into by trade union federations and employer's organizations on an international level. International collective agreements may be either global or regional.

2.10.1.1. Global collective agreements

There are no global collective agreements that cover the entire workforce of the world as such. There are only agreements that are concluded between individual transnational companies and the trade unions of its workforce at the global level. They are referred to under the name "International Framework Agreements" (IFAs) in relevant documents. IFAs are negotiated and signed by the senior management of multinational corporations and the relevant Global Union Federation (GUF). Many of the IFAs have been organized and negotiated through the European Works Councils (EWCs)²⁹⁰, with multinational companies headquartered in Europe.²⁹¹ This has done with the obvious purpose of ensuring fundamental workers' rights in all of the target company's locations as well as those of its suppliers.²⁹² The International Confederation of Free Trade Unions (ICFTU)²⁹³ has claimed that the framework agreements "*can be seen as the start of international collective bargaining*".²⁹⁴ In order to avoid any confusion or misunderstandings, it worth mentioning again that IFAs will hereafter be treated as the only currently existing global collective agreements.

The rise of International Framework Agreements

²⁹⁰ European Works Councils (EWCs) are standing bodies providing information to and consultation with employees in Community-scale undertakings and Community-scale groups of undertakings as required by the 1994 European Works Council Directive (Directive 94/4/EC).

²⁹¹ All existing IFAs have been signed by at least a global union federation organized at sector level. Some have been co-signed with other workers' representatives, either by the European Works Council, by national unions or by both. For example, the IFA signed in 2000 between company Hochtief of Germany with global confederation (BWI), the IFA signed between SCA of Sweden in 2004 with ICEM, the IFA signed between company Renault of France in 2004 with IMF etc. all have the signatures of the European Work Council and national unions. (See the table 1, Andre Sobczak (2007), "*Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility*", Relations industrielles/ Industrial Relations, Vol. 62, n° 3 (2007), p. 467).

²⁹² Jenny Holdcroft (2006), *International Framework Agreements: A Progress Report* (an IMF special report 2006).

²⁹³ The International Confederation of Free Trade Unions (ICFTU) is a confederation of 215 national trade union centers, representing 125 million trade union members in 145 countries and territories in the world.

²⁹⁴ Euan Gibb (2005), *IFAs: Increasing the Effectiveness of Core Labour Standards*, The Global Labour Institute

IFAs have been seen as a continuation of a process that started in the 1980s with some pressure in favour of international collective bargaining.²⁹⁵ In the new circumstances of globalization, social regulation through labour law norms faced several challenges however.²⁹⁶

The first challenge relates to the limited scope of application of labour law.²⁹⁷ Labour law norms, imposed by the public authorities or negotiated by the social partners, continue to be deeply embedded in the appropriate national context, whereas companies and thus their *de facto* labour relations are increasingly international. Furthermore, labour law only regulates relations between employers and the workers bound to them through a contract of employment, ignoring the relations between the headquarters and those working for subsidiaries or suppliers and subcontractors. *The second challenge* pertains to the need for social regulation to include issues that are not directly related to working conditions and correspond to much broader social or even environmental issues linked to the life of the workers and their families.²⁹⁸ *The third challenge* is linked to the lack of effectiveness of labour law. There is a gap between the development of legally binding texts in all parts of the world and their concrete effectiveness within the companies.²⁹⁹

In the 1990s developments were accelerated with the appearance of numerous other initiatives, in particular Codes of Conduct that generally included commitments by enterprises to achieve or observe certain standards in the social field.³⁰⁰ There are hundreds of types of Codes but not all of them cover labour rights. *First*, codes of conduct suffer from a lack of legitimacy in continental Europe where national labour laws have always aimed at limiting the unilateral powers of the employer and favoured regulation either imposed by public authorities or negotiated between the social partners. *Second*, codes of conduct often have a limited content that does not

²⁹⁵ International Organization of Employers (2007), *International Framework Agreements-an employers' guide*. Available at: www.ioe-emp.org/.../guides/.../guide_2007august_ifasrevi.pdf

²⁹⁶ Andre Sobczak (2007), "Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility" *Relations industrielles / Industrial Relations*, Vol. 62, n° 3 (2007), p. 469 -470.

²⁹⁷ For further detailed, see: Ibid, p. 469.

²⁹⁸ Ibid, p. 470.

²⁹⁹ Ibid, p. 470.

³⁰⁰ International Organization of Employers (2007), *International Framework Agreements-an employers' guide*. Available at: www.ioe-emp.org/.../guides/.../guide_2007august_ifasrevi.pdf

always refer to the ILO. *Finally*, codes of conduct do not always include provisions on their implementation, and are thus often considered as window-dressing or part of companies' marketing strategies.

IFAs seemed to be a more legitimate form of social regulation and provided a better guarantee for effectiveness. They have much broader and more precise contents and contain detailed provisions on monitoring and implementation. IFAs systematically include provisions on the four fundamental social rights, including the recognition of the freedom of association. In many codes of conduct, this issue is not covered at all. Furthermore, all IFAs refer to the ILO conventions for the definition of the social norms they contain rather than adopt specific standards whose legitimacy may be questioned. Certain IFAs explicitly mentions the eight ILO core conventions.³⁰¹ Codes of Conduct have been a useful tool allowing trade unions to focus attention on labour practices. However, because they are not negotiated with unions but unilaterally constructed and implemented by employers, they have not been an adequate substitute for either direct trade union influence in a company or collective bargaining. In certain cases unions even see them rather negatively where companies have used them as an alternative to direct industrial relations.³⁰²

IFAs on the one hand seem to have the potential to face the three above-mentioned challenges for social regulation in the era of globalization and to contribute to effective regulation within international groups and global supply chains, thus complementing national, European and international labour law standards without replacing them.³⁰³ They can, on the other hand, still retain some of the limitations of the Codes of Conducts.³⁰⁴ Further, while codes of conduct represent unilateral initiatives, the negotiation of IFAs can be seen as the start of collective bargaining at the transnational level.³⁰⁵

³⁰¹ See: Andre Sobczak (2007), *"Legal Dimensions of IFAs in the Field of Corporate Social Responsibility"* Relations industrielles / Industrial Relations, Vol. 62, n° 3 (2007), p. 473

³⁰² International Organization of Employers (2007), *International Framework Agreements-an employers' guide*. Available at: www.ioe-emp.org/.../guides/.../guide_2007august_ifasrevi.pdf

³⁰³ Andre Sobczak (2007), *"Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility"* Relations industrielles / Industrial Relations, Vol. 62, n° 3 (2007), p. 470.

³⁰⁴ Ibid, p. 468.

³⁰⁵ *International Framework Agreements*, Eurofound Nov. 2008. available at: www.eurofound.europa.eu/areas/.../internationalframeworkagreement.htm

The first IFA was signed in 1989 by the International Union of Foodworkers with the Danone group.³⁰⁶ Following this agreement, the number of IFAs increased rather slowly during the 1990s but growth has been more rapid since the early 2000s.³⁰⁷ The key sectors where IFAs have been signed are services, utilities, energy, mining and manufacturing sectors.³⁰⁸ By October 2008, 72 IFAs had been signed. Of them those were signed in transnational enterprises with headquarters in the EU and Norway accounts for about 90%.³⁰⁹ Only one American and no Japanese or British transnational firms have signed IFAs.³¹⁰

Within Swedish territory, some IFAs have been entered into including those between IKEA³¹¹ (Furniture) and IFBWW³¹² in 1998, covering some 70,000 workers;³¹³ Skanska³¹⁴ (Construction) and IFBWW in 2001, covering 79,000 workers, SCA³¹⁵ (paper) and ICEM³¹⁶ in 2004, covering 46,000 workers; H&M³¹⁷ (Retail) and

³⁰⁶ See: Dave Spooner (2003), *International Framework Agreements: Implementing Workers' Rights in Global Corporations*, Global Labour Institute.

³⁰⁷ Before 2000 only 5 IFAs had been signed. Since 2000 over 60 IFAs have been concluded by Global Union Federations. See: Udo Rehfeldt and Isabel da Costa (2008), *Transnational Collective Bargaining at Company Level: Historical Developments in the Automobile industry*, in *Cross-border social dialog and agreements: An emerging global industrial relations framework?* ILO, International Institute for Labour Studies.

³⁰⁸ Source: International Organization of Employers (2007), *International Framework Agreements-an employers' guide*. Available at: www.ioe-emp.org/.../guides/.../guide_2007august_ifasrevi.pdf

³⁰⁹ *International Framework Agreements*, Eurofound Nov. 2008. available at www.eurofound.europa.eu/areas/.../internationalframeworkagreement.htm

³¹⁰ See: Udo Rehfeldt and Isabel da Costa (2008), *Transnational Collective Bargaining at Company Level: Historical Developments in the Automobile industry*, in *Cross-border social dialog and agreements: An emerging global industrial relations framework?* ILO, International Institute for Labour Studies.

³¹¹ IKEA was founded in 1943 by Ingvar Kamprad in Sweden. IKEA is an international home-products retailer that sells flat pack furniture, accessories, and bathroom and kitchen items in their retail stores around the world. Now it has branch companies in 36 countries/territories. For more information about IKEA group companies, see webpage www.ikea.com.

³¹² International Federation of Building and Wood Workers.

³¹³ See: Voss, Eckhard; Wilke, Peter; Sobczak, André; Schömann, Isabelle (2008), *"Codes of conduct and International Framework Agreements: New forms of governance at company level"* Case study: IKEA, Eurofound, March 2008.

³¹⁴ Skanska was founded in 1887 and started by manufacturing cement products. It quickly diversified into a construction company. Skanska has played a key-role in building up Sweden's infrastructure including roads, power stations and housing. For more information, see webpage: www.skanska.com

³¹⁵ SCA is a global consumer goods and paper company that develops, produces and markets personal care products, tissue, packaging, publication papers and solid-wood products in more than 90 countries around the world. For more information, see webpage www.sca.com.

³¹⁶ The International Federation of Chemical, Energy, Mine and General Workers' Unions.

UNI³¹⁸ in 2004 covering 40,000 workers; Securitas³¹⁹ (Security Services) and UNI in 2006, covering 225,000 workers.³²⁰ No IFAs have been signed in Vietnam to date.

IFAs are of significance in developing sound industrial relationships as they do serve as a way to prevent conflicts and foster industrial peace through the deepening of dialogue between employees and trade unions. But IFAs are not designed to resolve all conflicts that inevitably arise in enterprises from time to time. That said, by supporting working life and facilitating the exchange of information and letting workers know what the long term plans of the company are, the company and the workers will be able to see potential problems in advance – before they become problems – and help prevent conflict arising. Even when conflict occurs, the dialogue between unions and company and the mutual confidence built up thereby can help resolve conflicts more quickly.³²¹ Intervention by global management acting with a global union entity is relatively beneficial to local labour relations.

Despite these values which are clearly recognized, IFAs suffer from some limitations and thus face unavoidable criticisms.³²² *First*, the core standards of the ILO that form the center piece of the agreements are not universally valid or accepted. The use of labour standards for protectionist purposes have been rejected by some nations, and the push for global standards is regarded as a misguided attempt to force inappropriate developed-country labour institutions on less developed countries. *Second*, many of the IFAs are negotiated within the European Works Councils and so

³¹⁷ H&M was established in 1947, is a Swedish clothing company, known for its fast fashion clothing offerings for women, men, teenagers and children. H&M has more than 1,700 stores in 34 different countries. For more information, see webpage: www.hm.com.

³¹⁸ Global Union for Skills and Services.

³¹⁹ Securitas was found in the beginning of 1900s. At first it did little more than keep watch for fires and guard entrances and gates. Today the security services provided by Securitas have been much expanded and it is one of the top companies providing such services for a variety of businesses and industries. For more information, see webpage www.securitas.com.

³²⁰ Source: International Organization of Employers (2007), *International Framework Agreements-an employers' guide*. Available at: www.ioe-emp.org/.../guides/.../guide_2007august_ifasrevi.pdf

³²¹ Source: UNI Global Union: *Global Framework Agreements*, published 2009; www.uniglobalunion.org/UNIsite/In_Depth/Multinationals/GFAs.html

³²² Euan Gibb, in his article, presents several concrete arguments about these limitations. See: Euan Gibb (2005), *International Framework Agreements: Increasing the Effectiveness of Core Labour Standards*, The Global Labour Institute.

they are bound by the limitations of these bodies.³²³ *Third*, the reach of IFAs is very small: only a few dozen agreements have been signed. This seems like a low number of agreements when the total number of transnational companies is much more significant. Further, no agreements have been signed in the garment, textile or footwear industries, which are known to be structured in a manner that promotes high degrees of exploitation. *Fourth*, IFAs are relatively weak because they are not legally binding. It is essential for the unions to be able to show that their support contributes to providing concrete advantages for the workers at a local level and that the flouting of IFAs may lead to some sanctions.³²⁴ Otherwise, unions may be seen as simply being used in the companies' marketing strategies.³²⁵ A company which has signed an IFA may fear adverse court decisions as NGOs or private citizens may bring actions against them if the provisions guaranteed by the IFA are not respected by any of the subsidiaries or subcontracting companies, even if it has tried to use its economic power to force the latter to conform to the principles included in the agreement.³²⁶ Another study points out other problems, such as the asymmetry in the positions of the parties signing IFAs³²⁷ and this constitutes an obstacle to the recognition of IFAs as true collective agreements as already existing in labour law.

Contents of International Framework Agreements

As the title indicates, these documents are designed to establish frameworks. There is some variance between the IFAs, but almost all of them use the ILO Core Labour Standards as a basis.³²⁸ This has even been viewed as the central feature of the

³²³ The limitation, e.g. the European Work Councils only formally provide a mechanism for consultation with workers and potentially their trade unions. They do not provide workers with rights to codetermination or bargaining. For more details, see: Euan Gibb (2005), *International Framework Agreements: Increasing the Effectiveness of Core Labour Standards*, The Global Labour Institute.

³²⁴ Euan Gibb (2005), *International Framework Agreements: Increasing the Effectiveness of Core Labour Standards*, The Global Labour Institute.

³²⁵ Andre Sobczak (2007), "Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility" *Relations industrielles / Industrial Relations*, Vol. 62, n° 3 (2007), p. 469.

³²⁶ This means, it is important for companies to evaluate the legal risk of the signature of an IFA. It is also essential for them that those companies that sign an IFA without respecting it are sanctioned in order to avoid all IFAs suffering from discredit. *Ibid*, p. 469.

³²⁷ It has been argued that where the workers' representatives are organized at the global-sector level whereas their partner is an individual company, this is an incompatibility in the position of the actors involved in the process. *Ibid*, p. 483

³²⁸ Euan Gibb (2005), *International Framework Agreements: Increasing the Effectiveness of Core Labour Standards*, The Global Labour Institute.

IFAs.³²⁹ Clear commitments to respect the key regulations of ILO such as those on freedom of association and collective bargaining, non-discrimination, abolition of forced labour, prevention and elimination of child labour, equal pay, decent wages and working conditions and a safe and hygienic environment. have been made in the majority of the existing agreements.

According to a recent ILO study, freedom of association and collective bargaining are covered in more than 95% of IFAs, forced labour is covered in more than 90%, employment discrimination in about 85%, and child labour in more than 75%.³³⁰ Almost half contain clauses on working hours and overtime.³³¹ Many IFAs contain a commitment to inform the workers' representatives on future changes in the structure of the company in a timely manner. To limit the social impact of restructuring, some IFAs also include commitments in terms of continuous training of the workers. Certain IFAs explicitly mentions the creation of a special task force in charge of helping the workers who have lost their jobs to find new ones within the group or on the labour market.³³² Only a few IFAs do not include these core labour standards.³³³

But the content of IFAs is not limited to international labour standards. Some IFAs contain norms that go beyond the scope of labour law and cover other social issues linked to the impact of the company's activities on the living conditions of the workers, their families or even the citizens in general. For example, another recent study reveals that almost 20% of existing IFAs include provisions on the company's policies in the fight against AIDS.³³⁴

Beside the main subjects mentioned above, there are numerous agreements

³²⁹ See: Dave Spooner (2003), *International Framework Agreements: Implementing Workers' Rights in Global Corporations*, Global Labour Institute.

³³⁰ See: Dimitris Stevis, Terry Boswell (2007), *Globalization and labour, Democratizing global governance*, Rowman & Littlefield Publishing 2007, p.126

³³¹ See: Torsten Müller, Hans-Wolfgang Platzer, Stefan Rüb (2008), *International Framework Agreements – Opportunities and Limitations of a New Tool of Global Trade Union Policy*, ITUC, Briefing Paper N° 8 / 2008

³³² Andre Sobczak (2007), "Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility" *Relations industrielles / Industrial Relations*, Vol. 62, n° 3 (2007), p. 474.

³³³ See: Dimitris Stevis, Terry Boswell (2007), *Globalization and labour, Democratizing global governance*, Rowman & Littlefield Publishing 2007, p.126

³³⁴ Andre Sobczak (2007), "Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility" *Relations industrielles / Industrial Relations*, Vol. 62, n° 3 (2007), p. 474.

which specify the process by which their content is to be communicated to the workforce and the suppliers.³³⁵ By October 2008 nearly half of the agreements required that transnational enterprises inform their subcontractors and suppliers and encourage them to respect the principles laid down in the Agreement. About 14% of the IFAs contained measures to ensure that suppliers comply with the Framework Agreement; however, only 9% were obligatorily applied to the whole supply chain, with the enterprise assuming full responsibility.³³⁶

Additionally, to be effective, all IFAs must include provisions on systems for monitoring, verification and the handling of complaints and disputes. Many IFAs establish complaint procedures enabling the workers to act if there is a violation of the rights conferred by the agreement.³³⁷ There can be agreement on the regular dissemination of company information to the unions, the establishment of regular channels of global negotiation between management and unions and social auditing procedures.³³⁸

Duration and effect of International Framework Agreements

IFAs may be both for a fixed or an indefinite term. The majority of IFAs have been concluded for an indefinite period. Only a small fraction have a definite term. Of the IFAs with a definite term, some examples are: the agreements signed by ICEM³³⁹ are usually for a two or three-year term (five-year term in the case of the AngloGold agreement); the five-year agreements concluded between UNI³⁴⁰ and Telefonica and International Sanitary Services; an agreement for a duration of 2 years concluded by the IFBWW³⁴¹ with Ballast Nedam and an agreement with a 3 year term concluded

³³⁵ See: Torsten Müller, Hans-Wolfgang Platzer, Stefan Rüb (2008), *International Framework Agreements – Opportunities and Limitations of a New Tool of Global Trade Union Policy*, ITUC, Briefing Paper N° 8 / 2008.

³³⁶ Source: *International Framework Agreements*, Eurofound Nov. 2008. available at: www.eurofound.europa.eu/areas/.../internationalframeworkagreement.htm

³³⁷ Andre Sobczak (2007), *"Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility"* Relations industrielles / Industrial Relations, Vol. 62, n° 3 (2007), p. 478

³³⁸ Dave Spooner (2003), *International Framework Agreements: Implementing Workers' Rights in Global Corporations*, Global Labour Institute.

³³⁹ The International Federation of Chemical, Energy, Mine and General Workers' Unions.

³⁴⁰ Global Union for Skills and Services.

³⁴¹ International Federation of Building and Wood Workers.

between IUF³⁴² and Club Méditerranée.³⁴³

In term of binding effect on the parties to the agreement, IFAs are not traditional legally binding instruments. They cannot be relied on before national courts or lead to enforceable decisions or the adoption of legal sanctions in the case of non-implementation.³⁴⁴ The power to enforce an IFA lies in the ability of unions and GUFs to assemble enough political and moral pressure on a multinational to induce the desired response.³⁴⁵

Whereas the agreements are voluntary and not binding in any national or international court, failure to respect them puts the company's relationship with its workers at stake and brings negative media attention.³⁴⁶ The fact that IFAs are not intended to be relied on by the parties in judicial proceedings does not mean that they do not intend to be bound in good faith by their commitments as reflected in these agreements.³⁴⁷ From an ILO viewpoint, the willingness of the parties to be so bound would be an important indication that the IFAs have in practice a binding effect.³⁴⁸

Regarding the IFAs' beneficiaries, the general principle that everyone possible is covered by an IFA means that unorganized workers will be included.³⁴⁹ This is an important difference to traditional agreements and is an advantage of IFAs. Usually, workers who are members of trade unions gain the direct benefits of membership, while those who are not members gain only indirect benefits. A few advanced capitalist countries engage in sectoral bargaining where workers who are not organized are provided with the same working conditions as those who are members

³⁴² International Union of Food workers.

³⁴³ See: Reynald Bourque (2008), *International Framework Agreements and the future of collective bargaining in Multinaional Companies - Just Labour* (a Canadian Journal of Work and Society), Volume 12, 2008 p.35

³⁴⁴ Euan Gibb (2005), *International Framework Agreements: Increasing the Effectiveness of Core Labour Standards*, The Global Labour Institute.

³⁴⁵ Ibid.

³⁴⁶ *International Framework Agreements* - published by UNITE (the largest trade union in the UK).

³⁴⁷ Konstantinos Papadakis, Giuseppe Casale and Katerina Tsotroudi (2008), "*International Framework Agreements as elements of a cross-border industrial relations framework*", in *Cross-border social dialog and agreements: An emerging global industrial relations framework?* ILO, International Institute for Labour Studies

³⁴⁸ See: Giuseppe Casale (2008), "*International Framework Agreements as elements of a cross-border industrial relations framework*", <http://www.ilo.org/dial>

³⁴⁹ Euan Gibb (2005), *International Framework Agreements: Increasing the Effectiveness of Core Labour Standards*, The Global Labour Institute.

of trade unions, but these are exceptional.³⁵⁰ The IFAs inclusion of all workers, organized or not, is much broader than any of the nationally based legal class compromises.

In general, IFAs possess some of the essential constitutive elements of industrial relations instruments akin to collective agreements though they are distinguishable from the traditional ones. IFAs have the potential to contribute to the creation of effective social regulation within international groups and global supply chains. They have, however, an unclear legal status that may weaken this potential. Being the only global documents that do provide a general framework and support the basic principles of the labour field, they are still currently regarded as the most advanced industrial relations instrument at the cross-border level, despite their limitations.

2.10.1.2. Regional collective agreements

The only existing international collective agreements that operative at the regional level are the collective agreements at EU level. So, in this section the European collective agreement is the true subject.

The rise and development of the European collective agreement

The legal basis for the rise of collective agreements at the EU level is the provisions in the Treaty establishing the European Community (EC Treaty 1993) on industrial relations and the European social dialogue in general. Besides that, the European institutions have also played an active role (as effective coordinators) in the progress of establishing and developing collective agreements between the social partners at the European level.

The Article 138 and 139 of the Treaty provides, among other things, that the Commission should promote consultation between management and labour (the social partners) at Community level and should support any related measures to help their dialogue;³⁵¹ and, the social partners may undertake a dialogue at Community level, which may lead to contractual relations, including agreements.³⁵²

³⁵⁰ Ibid.

³⁵¹ See Article 138 EC Treaty.

³⁵² See Article 139 EC Treaty.

But the presence of this provision is not the only reason for the emergence of European collective agreements. There was, to a certain extent, an existing relationship between the European social partners which favoured the setting up of labour standards. But the European trade union side did not have sufficient power to push the employers to the European bargaining table. That lack of power was, fortunately, compensated by political pressure from the European institutions.³⁵³ The European Commission, for instance, will invite the European social partners to enter into a dialogue and negotiate an agreement on a given issue. In such a situation, the parties, the employers in particular, are put under some pressure because there is always a possibility that if no agreement is reached, the Commission will push for European legislation.³⁵⁴ To prevent possible legislation or, in other words, escape from its regulation to some extent, employers have no better choice but than to join the bargaining and negotiate with the trade unions on the issue.³⁵⁵

Since the middle of the 1990s a number of framework agreements have been concluded within the EU social dialogue at both sectoral and inter-sectoral levels. Some of them have been transformed into sources of Community law through binding Directives.

Of the various types of collective agreements, multi-sector agreements are predominant. They are negotiated and signed by the European social partners representing more than one sectors. One or more European Confederal trade unions or groupings of national confederation could be a party to such a multi-sector agreement. Similarly, on the employer side one or more European confederations of employer's associations or the national confederations themselves may be a party.³⁵⁶ To date, three multi-sector agreements, entered into by UNICE³⁵⁷, CEEP³⁵⁸ and ETUC³⁵⁹ have

³⁵³ Roger Blanpain (2008), *European labour law*, Kluwer 2008, p.699

³⁵⁴ Ibid, p.699

³⁵⁵ It is necessary to add that the Commission generally wants the social partners to take complete responsibility for collective bargaining and let them make their own arrangements and will not force them into an agreement, unless Community rules are urgently needed. Additionally the social partners can also engage in voluntary agreements which are not only not legally binding but the parties also leave it up to their members to decide whether to integrate the agreement in their own national system, as they see fit (Roger Blanpain (2008), *European labour law*, Kluwer 2008, p.700).

³⁵⁶ Roger Blanpain (2008), *European labour law*, Kluwer 2008, p.705

³⁵⁷ The Union of Industrial and Employers' Confederations of Europe (UNICE) represents almost all the main national intersectoral confederations of private sector employers and business in the EU Member States (and

also become law by way of EU Directives:

- The framework agreement on parental leave signed on 14 December 1995, was transformed into Council Directive 96/34/EC of 3 June 1996; A revised agreement was concluded on 18 June 2009 and put into effect by Council Directive 2010/18/EU of 8 March 2010.

- The framework agreement on part-time work was concluded on 6 June 1997 and transformed into Council Directive 97/81/EC of 15 December 1997 and;

- The framework agreement on fixed-term work was reached on 18 March 1999 and transformed into Council Directive 1999/70/EC of 28 June 1999.

The Treaty has opened the possibility for the European social partners not only to come to an agreement after initial pressure from outside but also to introduce their own agreements autonomously. Some voluntary framework agreements were later signed between ETUC, UNICE, CEEP and UEAPME. A voluntary agreement will, in principle, impose no legal obligation whatsoever and depend completely on the positiveness or goodwill of the member organizations, which may implement the agreement at will.³⁶⁰ Within this group, the Framework Agreement on Telework was concluded in July 2002 and the Framework Agreement on Work-related Stress was signed in October 2004. Nearly three years later, in April 2007 the Framework Agreement on Harassment and Violence at work was signed by the General Secretaries of the European social partner organizations.

As voluntarily concluded, these agreements were not put before the Council for

elsewhere in Europe). It acts as both an employers' organization (in that it engages in dialogue and, in specific circumstances, negotiations with ETUC) and as a trade/industry association (in that it is involved in promoting its members' interests in a range of areas, and in seeking to influence EU decision-making in areas of relevance). From 23 January 2007, UNICE has changed its name to BUSINESSEUROPE, the Confederation of European Business (see below).

³⁵⁸ The European Centre of Enterprises with Public Participation - This is one of the three European cross-sectoral Social Partners. CEEP includes enterprises and organizations which are either public employers or providers of services of general interest from across Europe, both public and private, at national, regional and local levels,.

³⁵⁹ The European Trade Union Confederation (ETUC) was set up in 1973 to promote the interests of working people at European level and to represent them in the EU institutions.

³⁶⁰ Roger Blanpain (2008), *European labour law*, Kluwer 2008, p.198

a decision.³⁶¹ But they are somewhat different in their terms and there have been discussions about their legal effect. The first agreement is purely voluntary and autonomous while the two last agreements are arguably binding to some extent.

The existence of the first voluntary collective agreement on Telework raises many legal questions relating to both the whole conception and its legal value.³⁶² It has been argued that all such agreements are essentially voluntary. Voluntariness presumably means that the agreement is not legally binding, so that it has only "moral consequences" for the parties involved and is not enforceable before the courts. In this case the agreement would constitute a sort of voluntary code of conduct.³⁶³ No legal action would be possible against a signatory member if the member did not comply with the agreement. One further question has been put forward: Can the signatory parties oblige their constituent members to adopt the agreement? The answer is yes, but this will depend on the mandate the signatories have from their members.³⁶⁴

Among the European collective agreements, sectoral agreements also constitute an important part. Dialogue taking place at sectoral level consists of negotiations between the European trade union and the employer organizations in a specific sector of the economy. A range of joint texts and agreements have been produced to support flexible work organization. Some of them have been transformed into directives, for example, the Agreement on the organization of working time of seafarers³⁶⁵, the Agreement on the organization of working time of mobile workers in civil aviation³⁶⁶, the Agreement on certain aspects of the working conditions of

³⁶¹ Source: *Collective Industrial Relations*; Eurofound 2009. Available at: <http://www.eurofound.europa.eu/areas/industrialrelations/.../dictionary3.htm>

³⁶² For further details, see: Roger Blanpain (2008), *European labour law*, Kluwer 2008, p.198

³⁶³ Ibid, p.198

³⁶⁴ Ibid, p.198

³⁶⁵ This agreement was concluded on 30 September 1998 between the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST), has been transformed into Council Directive 1999/63/EC of 21 June 1999.

³⁶⁶ This agreement was concluded on 22 March 2000 between European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carriers Association (IACA). It has been transformed into Council Directive 2000/79/EC of 27 November 2000).

mobile workers assigned to interoperable cross-border services (COM(2005)0032)³⁶⁷ among others. Some agreements have also been concluded in the agricultural sector but these agreements have not been transformed into directives.³⁶⁸

Content of European collective agreements

There is no restriction regarding subject matter in collective bargaining at the European level. The European social partners can conclude agreements on wages and working conditions in the broadest sense of word.³⁶⁹ If the subject matter does not fall within the areas covered by the EC treaty (Article 137), the parties are autonomous and are not bound at all.³⁷⁰ The Treaty explicitly lists a large range of social policy areas where the activities of the social partners will be supported and complemented by the Community.³⁷¹

A collective agreement signed at European level can contain both clauses on conditions for individual employees (wages, benefits, working hours and holidays.) and clauses on the collective labour relationship (a sectoral collective agreement can include provisions on the establishment, competence and functioning of work councils, procedures for dispute settlement, establishment of certain funds and the like).³⁷² European collective agreements may also include clauses determining the obligations between contracting parties, for instance, those concerning its interpretation or the peace obligation. These obligations can be either explicit or implicit.³⁷³ To some extent, European collective agreements are thus similar to traditional collective agreements.

Duration of European collective agreements

European collective agreements are concluded either for indefinite or fixed

³⁶⁷ This agreement was signed between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) and has been transformed into Council Directive 2005/47/EC of 18 July 2005.

³⁶⁸ For further details, see: *Framework agreements*, Eurofound 2010. Available at: <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/frameworkagreements.htm>

³⁶⁹ Roger Blanpain (2008), *European labour law*, Kluwer 2008, p.707

³⁷⁰ See para 2 Article 139 EC Treaty

³⁷¹ See Article 137 of the EC Treaty 1993.

³⁷² Roger Blanpain (2008), *European labour law*, Kluwer 2008, p.701

³⁷³ Ibid, p.702

duration. When negotiating, parties will have to set up rules concerning duration and termination of the agreements. In case of an indefinite duration, a period of notice and formalities might be provided for. Then the national law applying to the agreement will have to be followed.³⁷⁴

The agreements on parental leave, part-time work and fixed term work and many others were signed for an indefinite period. They do not contain provisions to denounce the agreement partly or totally. They all have a clause that parties will review the application of the agreement after the date of the Council decision if requested by one of the parties.³⁷⁵ This does not take away that either party has the right to denounce the agreement at any time.³⁷⁶

Scope of effect of European collective agreements

The territorial scope of effect of European collective agreements is not limited to the EU Member States. One reason for this is that social partners, e.g. UNICE and ETUC have membership outside the Community.³⁷⁷ The personal scope of application of the agreement depends on the content of the agreement itself. In principle this includes all employers and employees who fall within the territorial and professional scope of the agreement. The professional scope is determined by the sectors of activities for which the contracting parties are competent. The agreement can apply to all undertakings which operate in the common market regardless of whether they are private or public. The only important factor is whether they affect the functioning of the common market. However, the agreement will not apply to certain areas of public sector, e.g. the institutions which involve direct or indirect participation of the exercise of power conferred by public law in the discharge of functions whose purpose is to safeguard the general interests of the state or of other public authorities.³⁷⁸

Implementation of European collective agreements

There are two possible ways to implement an agreement resulting from the

³⁷⁴ Ibid, p.709

³⁷⁵ See the para. 7 of Clause 4, para. 6 of Clause 6, para. 6 of Clause 8, respectively.

³⁷⁶ Roger Blanpain (2008), *European labour law*, Kluwer 2008, p.709

³⁷⁷ Ibid, p.707

³⁷⁸ Ibid.

European Social dialogue in accordance with Article 139(2) EC Treaty:

First, the social partners can rely on their members to implement the agreement in accordance with the procedures and practices specific to management and labour and the law of the respective Member States. This would mean that EU collective agreements would not be subject to any explicit restriction either as to substantive content or legislative procedure. They may be concluded (and complemented) outside the procedure provided by Article 139 EC treaty.

Second, in cases where the agreement relates to matters covered by Article 137, the social partners can jointly ask the Commission to refer their agreement to the Council, where it may be transposed into EU legislation. In such a case, upon the request of the social partners to the agreement, the Commission provides an explanatory memorandum on any proposal presented to the Council, giving its comments and an assessment of the agreement concluded by the social partners. The Council will then decide whether to incorporate the collective agreement into a Council Directive or not.³⁷⁹

If this route is followed, it seems that the content of the collective agreement can not be modified by the Council. The Council can only accept or reject it completely. In order to respect the autonomy of the social partners, the Commission has stated that it would withdraw the proposal for implementation in case the Council intended to change the content.³⁸⁰

If the collective agreement is implemented by a Council Directive, its effects will be extended *erga omnes* and the Member States will have to ensure the implementation of the directive.³⁸¹ This means that the European collective agreement will supersede national legislation and national collective agreements. Naturally it is also superior to work rules, individual agreements and the like.³⁸² It seems possible that *a multi-sector agreement* implemented by a Council directive could also supersede *sectoral, regional or company agreements* that are also implemented by a

³⁷⁹ *European social dialogue and implementation of agreements*, Eurofound 2007. Available at: www.eurofound.europa.eu/.../europeansocial

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Roger Blanpain (2008), *European labour law*, Kluwer 2008, p.710

Council decision.³⁸³ In principle a higher collective agreement will contain minimum standards which agreements at lower level have to respect though they can expand upon them.³⁸⁴

As democratic rules have to be respected, no agreement can be reached at European level without the full support and acceptance of the member states. Similarly, each European organization participating in the Social Dialogue must be composed of strong national representative organizations, independent, democratic and well organized, able to proceed with their own consultations at national level and furthermore able to guarantee the full implementation of any agreements reached at the European level.³⁸⁵

Generally speaking, as an instrument regulating industrial relations at the international level, European Framework Agreements share some features and qualities with IFAs; but there are differences in their scope and content. While IFAs are global instruments with the main purpose of ensuring adherence to international labour standards in all of the target company's locations, European Framework Agreements are limited to the European context and may cover a broader range of topics.³⁸⁶ According to some specialists in international industrial relations, European Framework Agreements are more diverse, substantial, concrete and focused than IFAs.³⁸⁷

2.10.2. National collective agreements

This section will examine collective agreements that are concluded and applied within the territory of a single nation. National collective agreements may be put into three categories, corresponding to the three bargaining levels where they are likely to

³⁸³ Ibid

³⁸⁴ In such a case, the Council can use its key power: it always has the last word and can at all time withdraw its decision implementing the agreement or adopt another instrument., which simply amends or abolishes the collective agreement completely or partly.

³⁸⁵ *The European Social Dialogue*, Background factsheet No.1, UEAPME (the European Association of Craft, Small and Medium-sized Enterprises) -October 2003, www.ueapme.com/enter/dwnlds/IsSocD_0A.doc

³⁸⁶ Source: *International Framework Agreements*, Eurofound 2008. available at: www.eurofound.europa.eu/areas/.../internationalframeworkagreement.htm

³⁸⁷ See: Ibid; See also: Udo Rehfeldt and Isabel da Costa (2008), *Transnational Collective Bargaining at Company Level: Historical Developments in the Automobile industry*, in *Cross-border social dialog and agreements: An emerging global industrial relations framework?* ILO, International Institute for Labour Studies.

be concluded: intersectoral collective agreements, industry-wide collective agreements and local/company collective agreements.

2.10.2.1. Intersectoral collective agreement

Within a nation, intersectoral collective agreements are of the highest rank. Intersectoral collective agreements are entered into by umbrella union organizations and central employer organizations. They can appear under different names such as economy-wide collective agreements, central collective agreements and basic collective agreements. Collective agreements at intersectoral level aim at providing a floor for lower-level bargaining on the terms of employment, often taking macroeconomic goals into account.³⁸⁸ In Sweden, for instance, agreements signed at this level represent a way both of making rules and of establishing machinery for subsequent lower-level negotiations and they are almost as important as the laws themselves.³⁸⁹ Some of them are meant to be accepted at the national level without alterations, others will be subject to adaptation at the national or local levels. In the latter case, the agreement is referred to as a "framework agreement".³⁹⁰

Not every country has intersectoral collective agreements. In many, collective agreements are only established at grassroots units; in some others, collective agreements appear at industry-level too. Highly-structured bargaining, going along with high-level collective agreements, including intersectoral ones, takes place mostly in the advanced economies that most of the old EU Member States belong to. They are characterized by relatively strong multi-employer bargaining institutions and relatively high bargaining coverage.³⁹¹ For instance, in each of the Nordic countries there are basic agreements concluded at the national intersectoral level.³⁹² This rather strong and centralized system of collective bargaining differs fundamentally from the bargaining systems in most countries outside Europe such as the USA, Japan or the developing countries.

³⁸⁸ See: *Collective bargaining, levels and coverage*. p.170. Available at: <http://www.oecd.org/dataoecd/3/52/2409993.pdf>

³⁸⁹ Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.112

³⁹⁰ Ibid, para.112

³⁹¹ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

³⁹² Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p.193

An intersectoral - level collective agreement may be bipartite -involving the participation of two sides of social partners, or tripartite - a “concertation” between union confederations, central employer associations and government agencies.

Bipartite-based central collective agreements can be found in Belgium³⁹³, Estonia, Greece, Denmark, Sweden and Norway.³⁹⁴ The relative balance of power between capital and labour and the strong tradition of collective bargaining autonomy may explain the presence of such agreements in these countries.

Intersectoral collective agreements concluded on a tripartite basis seem more common. A recent study conducted by Eurofound on collective bargaining in the EU Member States showed that tripartite agreements between government, trade unions and employers are the most common form in this region. Of the countries covered by the study, in more than three fifths (16 out of 26), tripartite concertation at the national level has a regular influence on wage bargaining.³⁹⁵ In some countries such as Finland, Ireland and Slovenia, the state even sits directly at the bargaining table so that collective agreements at intersectoral level are always concluded on a tripartite basis.³⁹⁶

In contrast to the EU countries, the US appears to have little or no tradition of bipartite or tripartite dialogue at national level. There is no bargaining or dialogue between intersectoral social partner organizations.³⁹⁷ There is also little evidence of any employer organization playing an active role in industrial relations in the US.³⁹⁸ One could even say there is a general lack of understanding, trust and willingness to compromise.³⁹⁹ Japan has a different pattern, though it appears somewhat familiar to US in that there is no practice of bipartite negotiations at national level setting working conditions. In Japan the active role of the labour market parties is mediated

³⁹³ Marinette Mormont (2005), *Questionnaire for EIRO comparative study on changes in the national collective bargaining systems since 1990 – case of Belgium*, Eurofound -p.1

³⁹⁴ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ See: Mark Carley (2001), *Industrial relations in the EU, Japan and USA, 2000*, Eurofound.

³⁹⁸ Roberto Pedersini (2007), *Industrial relations in the EU, Japan, US and other global economies, 2005–2006*, Eurofound, p11.

³⁹⁹ Reinhold FahlBeck -*The American way of life*, Some point of departure for a lecture on the American labour law and industrial relations vista.

in other way: the government's labour policy itself can be regarded as the result of prior agreement between labour and management.⁴⁰⁰ Compared to the EU member states' and the US system, it seems that the Japanese pattern is somewhat in-between, but probably closer to the EU countries than the US.

In many other countries, including developing ones, there is no co-operation of labour market parties leading to the setting of labour standards at national level and no intersectoral collective agreements.

Subject matter of intersectoral collective agreements

Intersectoral collective agreements contain provisions that are considered to be of central importance.⁴⁰¹ They provide a permanent foundation for relations between the parties and constitute a framework for the conclusion and development of regular agreements on pay, employment conditions or on any matters within their areas of coverage such as the procedure for the establishment or termination of ordinary collective agreements, the circumstances in which the parties can exert industrial action, the notice of the intention to take industrial action, the settlement of conflicts constituting a public danger and rules considered to be of special importance for individual contracts of employment like unfair dismissal.⁴⁰²

Specific intersectoral collective agreements may deal with specific questions such as wages, social insurance and pensions. In Belgium, Finland and Ireland, the intersectoral level is the most important bargaining level for the determination of wages.⁴⁰³ In Greece, Estonia, Hungary and Lithuania, this bargaining level determines the national minimum wage.⁴⁰⁴ In Belgium, for example, many interprofessional

⁴⁰⁰ Japan has a relatively high level of tripartite dialogue and consultation, with the enactment or amendment of labour legislation or major labour policy changes first being discussed in tripartite deliberative councils and a certain level of consensus reached beforehand between the parties concerned. See: Mark Carley (2001), *Industrial relations in the EU, Japan and USA, 2000* - Eurofound.

⁴⁰¹ Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p.193

⁴⁰² *Collective Agreements*, Denmark, Eurofound August 2009. The article is available at: www.eurofound.europa.eu/emire/DENMARK/COLLECTIVEAGREEMENT-DN.htm; see also Jonas Malmberg (2002), *The collective agreements as an Instrument for Regulation of Wages and Employment conditions*, Scandinavian Studies in Law, Volume 43, p. 193

⁴⁰³ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

⁴⁰⁴ Ibid.

agreements⁴⁰⁵ on specific issues have been entered: the interprofessional agreement of 1971-1972 relating to maternity leave;⁴⁰⁶ the collective agreement N° 25 relating to the equality of pay for male and female workers, (this agreement was concluded on the 15 October 1975 and was renegotiated on 9 July 2008); the interprofessional agreement of 1975-1976 relating to equality of working conditions; an interprofessional agreement was signed in 1991 with reference to maternity leave and training of workers from vulnerable groups, particularly women. Up to 2005, 84 collective agreements have been concluded within National Labour Council. Some of these have been modified on one or several occasions.⁴⁰⁷ In Sweden, three types of collective agreements have been concluded at the central level: (1) wage regulation agreements (2) agreements on special benefits and (3) collaboration agreements.⁴⁰⁸ Until the early 1980s the intersectoral level bargaining was also important for wage determination.⁴⁰⁹

2.10.2.2. Industry-wide collective agreements

Industry-wide collective agreements are often found under different names such as national sector, sectoral or branch collective agreements. They are entered into by employee's and employer's organizations at industry-level. Parties to industry-wide collective agreements are often the affiliated members of the central organizations of the labour market parties. For example, they might be affiliated members of LO and DA⁴¹⁰ (Denmark) or the Confederation of Swedish Enterprise (SAF before 2001), LO, TCO and SACO (Sweden). Sometimes collective agreements are created by a competent industry-level body, such as a *joint committee* in Belgium.⁴¹¹ Industry-

⁴⁰⁵ In Belgium, "interprofessional agreements" are equivalent to intersectoral agreements.

⁴⁰⁶ Enrique Moro (2004) *Gender equality plans at the workplace : Belgium*, Eurofound 2005

⁴⁰⁷ Marinette Mormont (2005) *Questionnaire for EIRO comparative study on changes in the national collective bargaining systems since 1990 – case of Belgium* - p.4

⁴⁰⁸ See: Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.112

⁴⁰⁹ From 1956 to 1981 LO and SAF co-ordinated bargaining at national level. The levels of wage increases laid down in the agreements reached between LO and SAF were to a large extent regarded as guidelines for other sectors of the labour market. However, since the early 1980s wage agreements in Sweden have no longer been concluded at inter-sectoral level.

⁴¹⁰ They are the Confederation of Danish Trade Unions and the Danish Employers' Confederation, respectively.

⁴¹¹ In Belgium, sector level collective bargaining takes place in the joint committees of industry set up per sector of industry. These joint committees are mostly set up separately for blue and white-collar workers. There are hundreds of these joint committees in Belgium. See: Chris Engels (2004), *The evolution of labour law in*

wide collective agreements aim at the standardization of the terms of employment in their industry.

Industry-wide collective agreements exist in countries with a multi-tier bargaining system but the extent of their use varies from country to country and time to time. The tendency towards decentralization of collective bargaining which has been growing since the 1980s in many countries has weakened bargaining activities at central-level but simultaneously strengthened collective bargaining at lower levels. Collective bargaining by national unions at the industry-level has increasingly replaced centralized agreements, and even where central agreements do exist, sectoral bargaining is important in adapting their provisions to each industry.⁴¹² Germany, the Netherlands, Denmark and Sweden are systems where industry-wide agreements are now prevalent.⁴¹³ In Sweden, for example, industry level has been the focus of bargaining and there are currently industry-wide collective agreements in every sector of the Swedish economy.⁴¹⁴ Belgium is a system with a fairly strong central bargaining tier, but wages and working conditions for a large number of employees are currently set at the level of the joint committee for the relevant industry.⁴¹⁵ A similar situation can be observed in Norway and Finland.⁴¹⁶ In Britain, where collective bargaining takes place mainly at the company level, industry-wide agreements are still relatively common in the public sector – accounting for around three-quarters of all workplaces, according to a 2004 survey.⁴¹⁷

Content of industry-wide collective agreements

The primary purpose of collective agreements concluded at industry level is to

Belgium 1992-2002, Final report 2003-06-04, Country studies assigned by the European Commission, Director General for Employment and Social Affairs to the national experts, p.8

⁴¹² Anthony Ferner, Richard Hyman (1998) *Changing industrial relation in Europe*, Blackwell publishing, p.77

⁴¹³ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005. (See the Table 5. National collective bargaining systems - levels and relationships between them).

⁴¹⁴ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-47

⁴¹⁵ Chris Engels (2004), *The evolution of labour law in Belgium 1992-2002*, Final report 2003-06-04, Country studies assigned by the European Commission, Director General for Employment and Social Affairs to the national experts, p.8

⁴¹⁶ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005. (See the Table 5. National collective bargaining systems - levels and relationships between them).

⁴¹⁷ *Collective bargaining*, Published in 2009 by ETUI (European Trade union Institute), available at: <http://www.worker-participation.eu/national-industrial-relations/countries/united-kingdom/collective-bargaining>

regulate employment conditions in the workplace.⁴¹⁸ Collective agreements at sector level usually regulate the relationship between the employer and the employee in a comprehensive manner – covering most of the questions that may arise, such as pay, working hours, holidays, periods of notice, leave, traveling costs and so on.⁴¹⁹

One of the main concerns at sectoral level is setting wages. There is no statutory regulation on minimum wages in many European countries. In these systems, collective agreements are the way of dealing with the question. Germany, Denmark, Bulgaria, Greece, Italy, the Netherlands, Norway, Spain, Slovakia and Sweden are some countries where the sector is the most important level for wage determination.⁴²⁰

Working hours and other terms of employment are the second main concern. In Nordic countries, virtually all collective agreements at sector level regulate working hours.⁴²¹ Traditionally collective agreements at this level have contained rather detailed regulations on working hours per week, maximum overtime, rates for overtime payment, and so on.⁴²² Currently, much of this detailed regulation has been left to local parties to decide as a result of the decentralization tendency which spread over Europe during the 1980s and 90s (see below).

In Sweden and some other countries such as Finland, Denmark, Norway, Germany and Spain, labour statutes offer an opportunity for derogation through collective agreement, providing even less favorable terms for employees.⁴²³ Legislation allowing such derogation is described as semi-mandatory but it has appeared in many labour law statutes.⁴²⁴ Such statutory provisions only allow for

⁴¹⁸ Jonas Malmberg (2002), , *The collective agreements as an Instrument for Regulation of Wages and Employment conditions*, Scandinavian Studies in Law, Volume 43, p. 194

⁴¹⁹ Ibid, p. 195

⁴²⁰ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

⁴²¹ Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p.195

⁴²² Ibid, p.195

⁴²³ See: Ibid, p.195; See also: Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

⁴²⁴ For example, in Sweden semi-mandatory regulation can be seen in the Working Time Act, the Annual Holidays Act, and the Employment Protection Act. In Finland such provisions are found in legislation regarding holidays and working time etc.

derogation by way of sector level negotiations,⁴²⁵ or through approval by an industry-wide union.⁴²⁶ So, some of the so called "opening-clauses"⁴²⁷ will be found in higher-level collective agreements, including industry-wide ones.

The decentralization of collective bargaining has brought about some changes, one of which relates to a fundamental change in character: in the absence/or relative infrequency of central collective bargaining, industry-wide agreements are becoming less detailed and increasingly serve more as frameworks for local bargaining.⁴²⁸ This change is reflected in the concreteness of the clauses in collective agreements concluded since early 1980s. This is the case for many countries such as Austria, Denmark, Finland, Germany, Italy, the Netherlands, Norway and Sweden, where the new approach to higher-level agreements has widened the scope for additional bargaining at company level.⁴²⁹

2.10.2.3. Company-level collective agreements

Company-level collective agreement may be found under other names such as plant-level or local collective agreements. Company-level collective agreements are generally concluded between individual employers and the labour collective - which is normally represented by the local trade union(s). In some other cases, company collective agreements are made between trade unions at branch level and individual employers which do not belong to any employers' organizations. This kind of collective agreement usually takes the form of an accession agreement, which refers to and perhaps adopts the collective agreement that the trade union has concluded

⁴²⁵ The main reason why the derogation power is located in the hands of national sector trade unions is to ensure a strong counterpart to employers during negotiations. See: Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p.196

⁴²⁶ Birgitta Nystrom (2005), *The evolving structure of collective bargaining in Europe 1990-2004*, Sweden, national report, p.10

⁴²⁷ Opening clauses may have different names such as. hardship clauses, opt-out clauses, discount clauses etc.

⁴²⁸ Reinhold Fahlbeck (2002), *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, Scandinavian Studies in Law, Vol.43, p.122

⁴²⁹ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

Collective bargaining decentralization took place in many industrialized economies due to the fact that central regulation has sometimes been seen as too rigid for regulating working conditions at grassroots units. The Social partners, which both suffer from membership losses, had to accept that they must give firms more freedom and flexibility to regulate working conditions at company level.

with the employers' organisation at national sector level.⁴³⁰ This kind of collective agreements is common in all Nordic countries.

Collective agreements at company level are the most common form of co-operation between social partners. They exist in both developed or developing economies, with highly centralized or decentralized bargaining systems. Collective agreements at company - level are widespread in European countries and are the dominant form in most developing countries as well as in Japan and the US.

In many developing countries including the Asian ones, relatively low rates of unionization have militated against national and industry level bargaining, and enterprise level bargaining has been more common. This accounts for the relative non-involvement of some Asian employers' organizations in collective bargaining.⁴³¹

Content of company-level collective agreements

It is fairly evident that collective agreements concluded at company level cover a very wide range of topics that are linked to most elements of life at work. This holds true for both developed and less-developed bargaining systems though the practical value of company agreements varies and is difficult to estimate.

In systems with highly-developed level-bargaining structures, bargaining at local level must cover topics not dealt with in sector agreements and also localize the labour standards set by them. For instance, so far as wages and remuneration are concerned, minimum rates are determined by industry level negotiations but actual earnings will depend on negotiations in the company and at the workplace. In term of working time and leave, company agreements can allow shorter working hours, flexible working time for certain kinds of workers, employment or extra holidays. Sometimes, the parties at plant level agree to certain progressive elements of company social policy and expressly recognize them in collective agreements. For example, these could include a gradual increase in the employer's contributions to workers' pensions and life insurance as well as an increase in redundancy pay during the life

⁴³⁰ See: Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p.196

⁴³¹ Sriyan de Silva (1996) *collective bargaining negotiation*, Bureau for Employers' Activities, ILO.

time of the collective agreement.⁴³²

In countries having relatively decentralized bargaining systems such as Japan, US, some of the new EU member states and the developing countries, company level collective agreements often follow statutory regulation rather closely. In some developing countries in particular, there is a deep involvement of the states in trade union affairs and collective bargaining. Sometimes the trade unions are powerless, trade union activities are suppressed or distorted, and collective bargaining does not develop, or else bargaining is formalistic and the actual value of any collective agreements remains small. For example, there will be very little difference between minimum benefits fixed by law and those achieved in collective agreements and the wage differentials between union/nonunion employees will small, or even non-existent.⁴³³

The trend towards decentralization in collective bargaining

The last decades witnessed a movement in favour of collective bargaining decentralization taking place among those industrialized countries with highly centralized bargaining systems.

Originally collective bargaining at the national or the industry level was viewed by employers as a means of reducing competition based on labour costs by way of standardizing wage rates. Almost all employers no longer view collective bargaining from this perspective. Instead, centralized and industry level negotiation is considered as depriving enterprises of the flexibility needed to compete by way of adjustments at the enterprise level in relation to pay, working hours and conditions, work organization, manpower utilization and so on.⁴³⁴ The efficiency gains are considerably greater - and more easily realizable - when negotiations take place at the enterprise level. Employers took the initiative in this process, replacing the pattern of national or industry level bargaining with enterprise bargaining. Not all unions favour

⁴³² This is the case in the Czech Republic, but it is also the cases in many other countries. See: National report of Trade Union of Employees in Postal and Telecommunications Services and Newspaper Distribution of the Czech Republic.

⁴³³ For further details, see: John H. Pencavel (1996) *The legal framework for collective bargaining in developing economies*, Stanford Institute for Economic Policy Research (SIEPR), Abstract and p. 8, 13, 14, see footnotes No. 16, 17 of the document; See also: 2.12. Conditions for collective bargaining and status of collective agreement development in some major market economies

⁴³⁴ Sriyan de Silva (1996) *Collective Bargaining Negotiation*, Bureau for Employers' Activities (ILO).

this trend: their power position can thereby be eroded, but they have gradually accepted it.⁴³⁵ Currently the trend of decentralization is probably still continuing. In a number of countries, such as Finland, Germany, Italy, Norway and Romania employers - sometimes supported by the governments or leading political opposition parties - are demanding further decentralization of collective bargaining systems.⁴³⁶

A number of European countries, most of them in central and eastern Europe such as the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania but also Cyprus, Malta and the UK, already have relatively decentralized bargaining systems with company bargaining dominant.⁴³⁷ The trade unions here have been seeking to establish higher-level bargaining structures. But experience has shown it is difficult to achieve this. Attempts by the trade unions to introduce sectoral bargaining have made small progress so far. The employers in these countries have shown little interest in such a centralization of collective bargaining and often openly reject the unions' demands.⁴³⁸

2.11. Recognition of collective bargaining agents

In a bargaining unit, the employees' representatives need to be recognized for the purposes of collective bargaining. The existence of freedom of association does not necessarily mean that there will automatically be recognition of unions for bargaining purposes.⁴³⁹ There need to be some pre-determined objective criteria operative within the industrial relations system to decide when and how a union should be recognised (to qualify as a bona fide trade union). Where multiple unions exist, such a recognition mechanism has even greater meaning as it will serve not only for recognizing the bona fide bodies but also for selecting one of them from the existing employees' representative bodies in the undertaking for the purpose of bargaining.

Generally speaking, the criteria (and also procedures) used for trade union recognition vary from time to time and from country to country. Historically, trade

⁴³⁵ Ibid.

⁴³⁶ Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ De Silva, S.R. (1998), *“Elements of a Sound Industrial Relations System”* International Labour Organisation ACT/EMP Publications, p18

unions extracted recognition from reluctant employers on the basis of their strength and use of economic pressure. Gradually, in many countries the state has imposed legal obligations upon the employers to recognise trade unions as part of the general policy of ensuring employees the right to bargain collectively.⁴⁴⁰ In some legal systems the issue is determined by requiring a union to have not less than a stipulated percentage of the workers in the enterprise or category in its membership. Representativeness may be decided on by a referendum in the workplace or by an outside certifying authority.

If the legal conditions for qualifying as a trade union are met, the management has to recognise the representative union, or else it will be recognized by another competent authority. In practice, voluntary recognition by employers of bargaining agents and the units they represent is always possible.⁴⁴¹ A voluntarily recognized union can negotiate a collective agreement with an employer, and fulfill other labour relation duties in the same manner as a certified trade union.⁴⁴² Once certified as the bargaining agent, there should be no change for a prescribed period in order to ensure the stability of the process.⁴⁴³ As long as it is recognised (for, say, a two or three-year period), the union enjoys the right to speak and act on behalf of the entire body of employees in the workplace, including the right to negotiate and conclude collective agreements.

Normally the union should be representative of a minimum percentage of employees, as the employer cannot reasonably be expected to conclude an agreement with a union which is not numerically representative.⁴⁴⁴ Labour law in the various countries enables the trade unions with majority support to become bargaining units. In the US, Canada and Britain, legal recognition is attained through a statutory system

⁴⁴⁰ See: Sinha (2006), *Industrial Relations, Trade union and Labour Legislation*, Publisher: Dorling Kindersley Pvt. Ltd. p.143.

⁴⁴¹ ILO document, 2000, *Freedom of association and the effective recognition of the right to collective bargaining*, Country baselines under the ILO Declaration Annual Review p.23

⁴⁴² Ibid, p.23

⁴⁴³ De Silva, S.R. (1998), *"Elements of a Sound Industrial Relations System"* International Labour Organisation ACT/EMP Publications, p18

⁴⁴⁴ Sriyan de Silva, 1996, *Collective bargaining negotiations*, Bureau for Employers' Activities (ILO).

based on the majority principle.⁴⁴⁵ They are systems providing for exclusive bargaining representation⁴⁴⁶

In the US, under the National Labour Relations Act 1935 (NLRA), a union can approach the employer and ask to be recognised. If the employer refuses or if there is some question as to representativeness, the union may petition the National Labour Relations Board for legal certification as the bargaining agent of the workers.⁴⁴⁷ To gain this certification, a union must be able to demonstrate that a majority (50 per cent plus one) of eligible workers wish it to represent them for purposes of collective bargaining.⁴⁴⁸ Whether voluntarily recognized or certified by election, a labour organization is required to represent all of the employees in the bargaining unit.⁴⁴⁹ There is no requirement of registration for a union in order to be recognized, nor are there any general conditions that must be fulfilled by workers' and employers' organizations when they are being established.⁴⁵⁰ Canada takes a rather similar approach to that in the US.⁴⁵¹

In Britain, though also based on majority rule, the procedure for trade union recognition is more complicated. The Employment Relations Act 1999 introduced a statutory procedure for trade union recognition in firms with more than 20 workers.⁴⁵² The procedure aims to secure voluntary agreement between employer and trade union on the question. But, if this fails (e.g. the employer does not respond to the union's

⁴⁴⁵ Majority rule is understood in that the choice of union or no union is made by a majority of employees in a unit. If the majority select representation, the employees in the unit are represented by a union; If the majority do not select representation, the employees in the unit are not represented by a union. (According to "*Collective bargaining*" <http://legal-dictionary.thefreedictionary.com/Collective+Bargaining>).

⁴⁴⁶ Exclusive representation with majority rule means: Workers in an explicitly defined bargaining unit - which may be defined by occupation, work group or employer - can only be represented by a single trade union. This union is the exclusive representative of the workers in this bargaining unit when there is majority support. Employers are required to bargain with a union only when there is majority support among employees. See: John W. Budd (2006), *Employment with a Human Face: Balancing Efficiency, Equity, and voice*, Publisher: ILR Press, p.127

⁴⁴⁷ See Section 9 (c) National Labour Relations Act 1935

⁴⁴⁸ Ibid, Section 9 (a).

⁴⁴⁹ Ibid, Section 9 (a).

⁴⁵⁰ ILO document, 2000, *Freedom of association and the effective recognition of the right to collective bargaining* Country baselines under the ILO Declaration Annual Review p.151

⁴⁵¹ For detailed information, see: ILO document, 2000, *Freedom of association and the effective recognition of the right to collective bargaining* Country baselines under the ILO Declaration Annual Review p.22

⁴⁵² The Employment Relations Act 1999, schedule 1, para 7(1).

request or rejects it), unions will be able to apply to the Central Arbitration Committee (CAC) to decide both the appropriate bargaining unit and whether a majority of the workers in that unit support recognition.⁴⁵³ The Act provides for a number of tests which need to be satisfied before the CAC can proceed with an application for recognition.⁴⁵⁴ Where the CAC is satisfied that a majority of the workers in the bargaining unit are members of the union making the recognition application, it can issue an immediate declaration of recognition without the need for a ballot.⁴⁵⁵ Where a recognition ballot is required,⁴⁵⁶ a union will only achieve recognition status if the majority of those who voted support recognition and at least 40% of the workers in the bargaining unit support recognition.⁴⁵⁷

In some other systems the percentage of union membership required is lower, but there may be some additional legal requirements. For example, in Algeria a union with 20 per cent of the workers in an enterprise could be recognised as a representative body. But the law bans unions from associating with political parties and receiving foreign funding. Further, in order to have the right to form trade unions, workers must have had Algerian nationality for at least ten years.⁴⁵⁸

In some countries, there is no need for a trade union to have as members a minimum percentage of employees within the bargaining unit, but other conditions still need to be met. For example, in Germany, to be recognized, an association must first of all qualify as an organisation under Art. 9 section 1 Basic Law (*Grundgesetz*, GG).⁴⁵⁹ The Federal Labour Court has also established a number of criteria to be met by parties to collective agreements. First, the association has to be established for an

⁴⁵³ Ibid, para 11, (2).

⁴⁵⁴ Ibid, para 14, 15.

⁴⁵⁵ Ibid, para 22.

⁴⁵⁶ Ibid, para 23 (2)

⁴⁵⁷ Ibid, para 29, (3).

⁴⁵⁸ ITUC (2009), *Annual survey of violations of trade union rights*. Available at: survey09.ituc-csi.org/, p.13

⁴⁵⁹ A legal definition of how to classify an organisation in this sense is provided for by section 2 subsection 1 of the Law of Organisations (*Vereinsgesetz*, *VereinsG*). According to this, the existence of a legally recognised organisation, therefore also of an association, is conditional on three requirements: (1) The association must be entered into deliberately and be governed by the rules of civil law; (2) the association must be intended on a permanent basis, (3) it must be a association of a corporate nature, with the prospect of forming a joint will. Further requirements are independent of the opposing side and third parties.

indefinite time.⁴⁶⁰ Second, the association must have corporate structure.⁴⁶¹ Third, an association can only participate in collective bargaining if it is independent of the opposite side.⁴⁶² Fourth, the association may only consist of members belonging to one side, either the employees' or the employers' side. Fifth, an employees' association may not be confined to one establishment but must exceed this scope.⁴⁶³ Sixth, the association must be independent of the state and from political parties. Neither government nor any political party may be in a position to influence the strategies of such an association.⁴⁶⁴ Seventh, the association has to follow the principles of democratic decision-making in their collective policy decisions.⁴⁶⁵ Another practical two prerequisites are also obviously involved: the willingness to engage in industrial action and the power to exert pressure on the counterparty in collective bargaining.⁴⁶⁶

Sweden has no rules on the recognition of unions.⁴⁶⁷ All unions enjoy basic representation rights as bargaining agents for their members by force of statutory fiat.⁴⁶⁸ So, in principle, a union which organizes a majority of the employees in a bargaining unit can equally well be classed as a minority union. Every union is the

⁴⁶⁰ It has been argued that an ad-hoc association is not sufficient for the simple reason that there should be a guarantee that the association continues to exist, at least for the period for which the collective agreement has been concluded, otherwise there would no party liable for the execution of the agreement. See: Manfred Weiss and Marlene Schmidt (2000), *Federal Republic of Germany*, Kluwer, para.357

⁴⁶¹ This means that the association must be organized in a way which guarantees its continuity even if members leave and new persons join the association. See: Ibid, para.357

⁴⁶² This criterion is mainly a reaction to experiences of the Weimar Era when so-called "yellow unions" turned out to be mere employers' instrument undermining the labour movement. See: Ibid, para.357

⁴⁶³ The roots of this attempt to prevent so-called company unions again date back to the Weimar Era when company unions too turned out to be "yellow unions". The solidarity basis relying on the coherence of external links and exceeding the scope of one establishment is supposed to be the best guarantee of independence. See: Ibid, para.357

⁴⁶⁴ This requirement does not disallow an association from aiming at political goals similar to a political party. The political orientation of an association is its own autonomous decision. Hence, the requirement of independence from the state and from political parties intends nothing other than to guarantee this autonomy. See: Ibid, para. 357

⁴⁶⁵ This criterion focuses on the inner structure of the association. Since associations are acting on behalf of their members, there should be a guarantee that members are able to influence the activities of their association. See: Ibid, para.357.

⁴⁶⁶ Ibid, para.356-358

⁴⁶⁷ Reinhold Fahlbeck, Tore Sigeman (2001), *European employment and industrial relations glossary: Sweden*, Publisher: Office for Official Publications of the European Communities, para. 408

⁴⁶⁸ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-52.

exclusive representation for its members but only for its members.⁴⁶⁹ There is indeed no state agency that deals with matters such as union recognition or certification in Sweden. The matter is one of bipartite or unilateral self-regulation.⁴⁷⁰ No elections to decide whether or not to have a bargaining agent are needed.⁴⁷¹ Swedish employees express their preferences by joining the union of their choice. But a practical point is that there is little real choice for employees since generally only one powerful union represents any particular group of employees.⁴⁷² An employees' association which takes charge of negotiation with the employer side (the so-called "established union") is also bound to be a powerful representative body. Generally speaking, the established unions organise the majority of employees in their sector of the labour market. Though Swedish law does not provide for exclusive representation, established unions de facto often speak for the entire employee community.⁴⁷³ Matters discussed by the employer and the established union often concern all employees.

In Vietnam there are no special conditions for a trade union to be recognized, except that any trade union formation is subject to VGCL guidance and ruling. Thus, once formed and functioning, a trade union will have the full legal status to carry out collective bargaining. Further, there is always no more than one local trade union body in each establishment, so there is no need to deploy procedures or methods to select one of them to play the role as a spokesperson for all employees' bodies in the bargaining unit.

2.12. Conditions for collective bargaining and status of collective agreement development in some major market economies

There are certain legal and structural pre-conditions for collective bargaining to function properly. The ILO publications sometimes mention these. According to one such text⁴⁷⁴, *first*, the democratic foundations and the appropriate legal framework with which to ensure the independence and the effective participation of social

⁴⁶⁹ Reinhold Fahlbeck (2002), *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, Scandinavian Studies in Law, Vol.43, p. 117

⁴⁷⁰ Ibid, p. 97

⁴⁷¹ Ibid, p. 117

⁴⁷² Ibid, p. 117

⁴⁷³ Ibid, p. 117

⁴⁷⁴ See: *Collective bargaining*, ILO, available at: <http://www.ilo.org/public/english/dialogue/themes/cb.htm>

partners are essential. In this regard, the ILO encourages state members to ratify Conventions No 87 and No 98 to provide a legal basis for collective bargaining. There are some other ILO Conventions and Recommendations related to collective bargaining which should be adopted as well. *Second*, there may exist an extension mechanism so that the coverage of collective agreements can be extended to those who are not directly involved in collective bargaining. *Third*, a proper enforcement mechanism is naturally needed for collective agreements to become effective. And *fourth*, regarding structural and institutional conditions, the existence of legitimate, strong, consistent and pragmatic workers' and employers' organizations on an equal footing will facilitate fair negotiation and effective bargaining.

But not all the above-mentioned pre-conditions are always met. Among those nations which have adopted collective agreements, some of them give full support in terms of both national law and supportive mechanisms and leave enough room for the labour market parties to freely conduct their business, whereas others have not yet given sufficient support and only recognize a few trade union activities or do not provide sufficient mechanisms allowing trade unions to act.

Different treatment brings different outcomes, so collective agreements also vary. In countries like Slovenia, Belgium, Finland, France, Spain, the Netherlands, Norway, Denmark, Greece, Austria, Sweden, Italy and Germany, the labour market parties enjoy conditions in which they can develop and act. In all such countries the basic rights to freedom of association and collective bargaining are recognized and guaranteed,⁴⁷⁵ so collective bargaining is conducted meaningfully and the collective agreement is the traditional means of settling labour market problems. The variety of bargaining levels, the high rate of bargaining coverage and the existence of tripartite concertation at national level are features to be found in these systems. The countries which have 3 bargaining levels consist of Slovenia (covering 100% of the workforce), Belgium, (96%), France (90%), Finland (82%), Spain (81%), Netherlands (80%), Norway (70-77%), Denmark (83%) and Greece (65%). The countries which have 2

⁴⁷⁵ See also "*Industrial relations across Europe*" - published by Federation of European Employers in 21.4.2008

(or sometimes 3) bargaining levels are Austria (98%), Sweden (92%), Italy (70%) and Germany (65%).⁴⁷⁶

In some other developed economies such as the UK, Japan and the US, collective agreements tend to be rather decentralized and less popular. Collective agreements take place predominantly at company level. In the UK, the collective bargaining coverage rate is 35% (2006)⁴⁷⁷ while in Japan, the rate is around 20% (2006).⁴⁷⁸ In the US the percentage of employees covered by collective bargaining agreements in the private sector is approximately 8.5% (2006).⁴⁷⁹ The role played by collective bargaining in the US can be very important and lead to relatively favourable differential wages for organized workers: 8% to 25% or even higher, e.g. 51% in the construction industry.⁴⁸⁰ The reasons for this bargaining decentralisation and low coverage are too complex to explore here.

As for the UK, there used to be a widespread multi-tier collective bargaining system. The UK is a special case because of the relative absence of legal regulation, but from after World War I until 1979, the state played a very positive role in facilitating collective bargaining. At the peak of collective bargaining development in 1973, 83.2 % of male manual workers and 71.7% of fulltime female workers were covered by collective agreements.⁴⁸¹ During the 1980s-90s the Conservative government made major changes in labour relations legislation. It passed six laws which greatly restricted and controlled trade union activity which in turn, reduced union membership and bargaining power.⁴⁸² Some practical consequences of such legislation e.g. the dismantling in 1987 of the well - established collective bargaining machinery for schoolteachers, the removal of the right to recognition for collective

⁴⁷⁶ Weiler, Anni; Newell, Helen; Carley, Mark (2007), *Industrial Relations Developments in Europe 2006*. Research conducted by Eurofound, pp. 53-65.

⁴⁷⁷ Ibid, p.65.

⁴⁷⁸ Roberto Pedersini (2007), *Industrial relations in the EU, Japan, US and other global economies, 2005–2006*, Eurofound (2007), p.11.

⁴⁷⁹ International Organization of Employers (2006), *Trend in collective bargaining*, report from the survey conducted between July and September 2006, p.1.

⁴⁸⁰ See: Alvin L. Goldman, (1996), *United States of America*, ELL, Kluwer, para.350, 351

⁴⁸¹ Bob Hepple QC, Sandra Fredman and Glynis Truter (2002), *Great Britain*, ELL, Kluwer, para. 449

⁴⁸² Paul Davies and Mark Freeland (2005), *The evolving structure of Collective Bargaining in Europe 1990-2004*, United Kingdom, national report, p.16

bargaining and the abolition of the procedure for the extension of collective agreements, made the coverage of collective bargaining fall sharply, especially during the period from 1984 to 1998 (e.g. 42% in 1998).⁴⁸³ From 1997 onwards, the state no longer pursued such an anti-union approach. Under the New Labour governments, some important changes to industrial relations were made such as statutory union recognition procedure for firms employing more than 20 workers, and the relaxation of strike balloting procedures. This new legislation offered significant new support to collective bargaining though the unions have yet to achieve significant gains in membership.⁴⁸⁴ Fortunately, UK employment law is very good at protecting workers' rights. The national minimum wage covers almost all workers and the rates are updated in October each year.⁴⁸⁵ Other workers' rights such as four-week annual leave, sick pay, maternity and paternity leave are guaranteed.

Japan is a special case. There is quite close employee-management cooperation at grassroots units and the relationship between employer and employee is based on loyalty. There is a strict standard of proper behavior by employers.⁴⁸⁶ Representative organizations for both sides exist but the employer faces his employee individually without either party asking for any assistance from those organizations.⁴⁸⁷ On the other hand, the Japanese Constitution and labour laws guarantee the right to organize and bargain collectively. There are various unions in Japan, which operate freely. However, unionism has not made a very strong impression. It is supposed by some scholars of labour law that the limited extent of unionism is, *inter alia*, linked to inadequate labour policy and lacunae in union responsibility. An example here is the lack of any union capacity for organizing irregular workers - an important part of the labour market which has been expanding recently but has also been largely

⁴⁸³ Bob Hepple QC, Sandra Fredman and Glynis Truter (2002), *Great Britain*, ELL, Kluwer, para. 448 and 460.

⁴⁸⁴ Paul Davies and Mark Freeland (2005), *The evolving structure of Collective Bargaining in Europe 1990-2004*, United Kingdom, national report, p.27

⁴⁸⁵ *National Minimum Wage workers: Travel and subsistence expenses schemes, 2010*; http://www.hm-treasury.gov.uk/d/consult_minimumwage_expenses.pdf

⁴⁸⁶ Reinhold Fahlbeck, *The Japanese miracle*, p. 2 - Some points of departure for a lecture on Japanese labour law and industrial relations.

⁴⁸⁷ Reinhold Fahlbeck (1996) *Guest Editorial Reflection on Industrial Relations*, *The International Journal of Comparative Labour Law and Industrial Relations*, Kluwer, Vol.12, issue 4, 1996, p.292

neglected.⁴⁸⁸ The weak development of collective bargaining may partly attach to a feeling that its role does not seem of paramount importance in a society whose labour market functions effectively thanks to wise policies regarding human resources development and other traditional factors affecting the employment relationship. The Japanese workforce is well-educated and mostly skilled, thanks to the Japanese educational system. Wages are high in comparison with many other countries, and provide a decent living standard for a worker and his family. But working time per year is supposed to be higher than in many other developed countries as the law on working time is not usually enforced in small enterprises.⁴⁸⁹

Regarding the US, there are no organizations which speak for the whole community of employer and employees.⁴⁹⁰ The United States has one of the lowest rates of unionization among the major industrialized nations. No employer's organizations exist. On the employee side, unionisation is only marginal and continues to fall.⁴⁹¹ There is a fair amount of suspicion in society at large toward the organized furtherance of individual interests, and the system has a strong flavor of individualism.⁴⁹² One of the consequence of this is that collective bargaining is less developed and remains only one of a number of alternative methods through which workers have exerted collective influence over the determination of wages, benefits and conditions of work.⁴⁹³ As far as I understand it, individualism in labour market

⁴⁸⁸ According to these scholars, the current trade unions only present the interests of secured workers and male employees in large corporations and the public sector and they have become complacent about labour-management co-operation.

Tadashi Hanami (2005), *Nothing fails like failure - trade unionism in Japan*. in B. Nystrom, A. Westregard, H. Vogel, *LiberAmicorum Reinhold Fahlbeck*, Juristförlaget i Lund 2005. pp. 285-295

⁴⁸⁹ *Japan- working conditions* (2010). Available at: www.nationsencyclopedia.com/.../Japan-WORKING-CONDITIONS.html; See also: Christine Genzberger (1994) *Japan business: the portable encyclopedia for doing business with Japan*, p.205-207

⁴⁹⁰ Reinhold Fahlbeck, *The American way of life*, Some point of departure for a lecture on the American labour law and industrial relations vista, p. 1

⁴⁹¹ Reinhold Fahlbeck (1996) *Guest Editorial Reflection on Industrial Relations, The International Journal of Comparative Labour Law and Industrial Relations*, Kluwer, Vol.12, issue 4, 1996, p.292

⁴⁹² Reinhold Fahlbeck, *The American way of life*, Some point of departure for a lecture on American labour law and industrial relations vista, p. 1

⁴⁹³ In the US, the employee determine working conditions through political unions' activities and through labour's collective actions. Political unions attempt to exert political action to gain better terms and conditions of work and economic security for workers. Economic unions attempt to achieve similar goals through direct interaction with employers. Both kinds of trade union have an economic nature. (Source: Rainsberger, Paul K.

has some good sides. For example, it gives employees relative independence in dealing with employer. Compared with Europe's industrialized nations, American workers tend to be paid less and have to work longer hours. However, American workers are among the most productive in the world. With lower taxes and a far lower cost of living in many regions compared to that in other industrialized nations, the level of disposable income of the average American worker is still among the highest in the world.⁴⁹⁴

In most developing countries, collective agreements are undeveloped.⁴⁹⁵ The common features in this group are low rank collective bargaining (mostly at company level) and low coverage rate. For instance, in China most privately owned companies and joint venture companies have no collective bargaining arrangements.⁴⁹⁶ In Malaysia only 7.5% of the workforce is covered by collective agreements.⁴⁹⁷ In other countries, collective bargaining coverage is extremely low. For example, the rate was 0.9% in the Philippines (in 2003) and only 0.5% in Thailand (in 2003).⁴⁹⁸ The coverage has slightly grown, but is still very low. According to a recent report of the ILO Regional Office for Asia and the Pacific (2009), for most countries in the region, the proportion of the workforce covered by collective agreements is still less than 15%.⁴⁹⁹ In Vietnam, the coverage rate is likely to be slightly higher, for example, as reported, of enterprises *with grassroot unions*⁵⁰⁰, about 65% enterprises signed

(2008) "*Historical Models of Collective Bargaining in the U.S.*", in "Collective Bargaining." University of Missouri (USA), Labour Education Program.

⁴⁹⁴ According to " *United States of America- working conditions*", Available at: <http://www.nationsencyclopedia.com/economies/Americas/United-States-of-America-WORKING-CONDITIONS.html> ; See also: *America's dynamic workforce* (2007), US Department of Labour, p.15

⁴⁹⁵ John H. Pencavel (1996) *The legal framework for collective bargaining in developing economies*, Stanford Institute for Economic Policy Research (SIEPR), pp.4,5.

⁴⁹⁶ International Organization of Employers (2006), *Trend in collective bargaining*, report from the survey conducted between July and September 2006, p.1.

⁴⁹⁷ Ibid.

⁴⁹⁸ See: "*Labour and social trends in Asia and the Pacific 2006 - Progress to decent work*", ILO Regional Office for Asia and the Pacific 2006.

⁴⁹⁹ (See Sangheon Lee, Co-author ILO Global Wage Report 2008/9, "*What's ahead for wages in Asia Pacific?*", ILO Regional Office for Asia and the Pacific.

⁵⁰⁰ **Note:** Enterprises with grassroots trade unions in private sector only make up about 20% of the total enterprises in the same sector (VGCL (2010), Report No. 17/BC-TLD assessment of 19 years of implementation of the Trade Union Law, dated 09/3/2010, p.10)

collective agreements (in 2008),⁵⁰¹ but the quality of collective agreements is a problem (a fact to be discussed below).

In these countries, the legal framework for trade union activity and collective bargaining is generally insufficient. The right to freedom of association, freedom of collective bargaining is not fostered, and may even be restricted. Among developing countries, only India and Bangladesh give real support to trade union and collective bargaining⁵⁰² and many other countries, known as obstructionist regimes, strictly regulate collective bargaining if they do not suppress it entirely. Unions must obtain the sanction of the state to operate as collective bargaining agents, the unionization of large sectors of the economy is prohibited, the content of collective agreements is restricted, and strikes are often illegal.⁵⁰³ In Honduras, for example, collective bargaining is not promoted by the government at all.⁵⁰⁴ In Korea, collective bargaining is not illegal but trade union activities have been heavily repressed, so the collective agreement system is not well developed.⁵⁰⁵ In Hong Kong - a more developed economy- independent, democratic trade unions are allowed and the right to strike is supported by legislation. However, legal and practical loopholes limit the exercise of these rights. For example, the right to strike is rendered ineffective by employment contract clauses stipulating that absence can be considered breach of contract potentially leading to dismissal. With no recognition of collective bargaining, workers are dependent on the attitude of employers to joint negotiation and the

⁵⁰¹ VGCL (2009), Resolution No. 01/NQ-DCT on “*Reforming, improving quality of negotiation, conclusion and implementation of collective labour agreements*”, dated 18 June 2009, p.2

⁵⁰² See: John H. Pencavel (1996) *The legal framework for collective bargaining in developing economies*, Stanford Institute for Economic Policy Research (SIEPR), p 6.

⁵⁰³ See: Ibid, p. 6.

⁵⁰⁴ International Organization of Employers (2006), *Trend in collective bargaining*, report from the survey conducted between July and September 2006, p..2.

⁵⁰⁵ According to the report of ITUC on 8-10 October 2008 (in Geneva) namely: “*Internationally recognized core labour standards in the Republic of Korea*”, this country has ratified neither of the ILO core Conventions on trade union rights. The labour law does not meet international standards. The government continues to interfere in and in some cases to repress unions’ activities. Police violence against strikers remains a problem.

A scholar of labour wrote: “*Apart from public hostility towards trade unions, repressive labour laws were the most serious impediment to union development... Labour leaders who dared to call a legal strike were likely to be arrested on charge of violating other regulations. In the first half of the 1980s when authoritarian laws were strengthened, more than 2,000 labour leaders were imprisoned. Many young and innocent workers, male and female, spent years in gaol*”. (see: Ho Keun Song (2002), *Labour unions in the Republic of Korea: Challenge and choice*, in A.V. Jose (ed.) *Organised Labour in the 21st Century*, International Institute for Labour Studies, Geneva, p.199.

implementation of agreements.⁵⁰⁶ In Thailand, the labour law lacks clear provisions protecting unions and collective activity in the workplace, compelling employers to bargain collectively or requiring the enforcement of collective agreements. In companies where there are established collective bargaining relationships, the agreements tend to be skeletal.⁵⁰⁷

Supportive institutions in these countries are often weak due to the lack of effective mechanisms. Also, unionism tends to be highly politicized. For example, many unions focus their energies upon political activities instead of representing the interests of their members at their place of work.⁵⁰⁸ Union density is sometimes relatively high but no actual trade union functions are fulfilled.⁵⁰⁹ Since trade union activities are thus somewhat distorted, collective bargaining is not adequately supported, and the consequence is less developed collective agreement systems. In these countries, working life largely depends on statutory enforcement. If this mechanism too is not sufficiently powerful, employees rights suffer and we find poor payment, poor working conditions, long working hours and unfair treatment at work.

Concluding remarks

Collective agreements are a product of a market economy, to help with imperfections in the labour market, where the parties making an employment contract are not equally strong and there is a risk for the weaker party. Since they originate from the needs of the labour market parties themselves, collective agreements emerged in some economies even earlier than state legislation on labour. But in order to ensure a fair environment allowing collective agreements to develop, some state intervention is called for.

Collective agreements connect closely with other instruments regulating the labour market. They concretizes international and national labour standards, support

⁵⁰⁶ (See: *Hong Kong Lacking Fundamental Employee Rights* -published on 21 January 2006 - the Webpage www.hrmguide.com (HRM: Human Resource Management).

⁵⁰⁷ See: Earl V Brown Jr (2008), *Thailand: Labour and the Law*, Asia Monitor Resource Center (AMRC).

⁵⁰⁸ John H. Pencavel (1996) *The legal framework for collective bargaining in developing economies*, Stanford Institute for Economic Policy Research (SIEPR), Abstract.

⁵⁰⁹ Ying Zhu and Fahey (2000), *The Challenges and Opportunities for the Trade Union Movement in the Transition Era: Two Socialist Market Economies China and Vietnam*, Asia Pacific Business Review, Vol.6, Numbers 3-4, June 2000 , Routledge, part of the Taylor & Francis Group.

work rules, they are complemented by company practices and they provide a framework for contracts of employment. Collective agreements are characterized by collectiveness and thanks to this, they are capable of balancing the social partners' interests and stabilizing and harmonizing labour relations.

Collective agreements generally have normative effect, somewhat similar to labour legislation. But because they are voluntary in nature, they are sometimes not binding. In this case, implementation depends on the sense of responsibility of the signatory parties.

Collective agreements can take various forms. Collective agreements at global level do not apply universally, their remit is limited to some supranational companies. At the regional level, collective agreements have been signed within Europe. Unlike global collective agreements which have an unclear legal status, collective agreements at the European level can be binding. This depends on whether the issues handled in the collective agreements fall within the areas prescribed by the related regional law. Once made binding (by way of being transposed into Council Directives), they will supersede both national legislation and national collective agreements.

Within a nation collective agreements can be concluded at intersector, sector and company levels. Collective agreements concluded at higher levels mainly deal with principles and long-lasting issues while collective agreements at lower level deal with the actual conditions at work. This also links to the length an agreement will be valid. An agreement covering more general issues often lasts for a longer time or may even be permanent while others are often signed for a definite, shorter time. Recently there has been a trend, stronger in some countries than others, toward an extension of the importance of collective bargaining at plant level in Europe. One reason for this is that the labour market parties need more flexibility in solving problems at the workplace.

Collective agreements, with their form varying widely, have long been strongly established in Europe, especially among the "old" member states of the EU with their multi-tier bargaining systems, though they are less developed in Japan, the US and the developing countries. In developing countries, there remains a lack of meaningful negotiation as a consequence of a number of factors such as there being no sufficient legal guarantee of freedom of association and collective bargaining and the existence

of politicized trade unions etc. Above all, the importance of collective bargaining is evident because of its advantage as a process reconciling conflicting interests in employment relations and maintaining the co-operation between the labour market parties which will help them to sustain their business activities in the context of severe competition at the global level.

Chapter 3. Collective agreement legislation-an overview

3.1. International labour law

3.1.1. Primary issues of international labour law

3.1.1.1. Concept of international labour law

Although the first International Labour Conventions were enacted over one hundred years ago (in 1906), there has not so far been an official, comprehensive definition of international labour law. I have found several definitions, though they are all rather simplified and insufficient. One definition provided by Vaticos and K.Samson in their book *“Comparative labour law and industrial relations in industrialized market economies”* is: *“international labour law covers the substantive rules of law established at the international level, as well as the procedural rules relating to their adoption and implementation”*.⁵¹⁰ Another definition provided by Neville Rubin and then Roy J. Adams, is that *“International labour law is a body of rules and principles regarding issues such as freedom of association as it manifests itself in the labour sector as the right to organize and bargain collectively, equality of employment, child and forced labour, occupational health and safety, wages and benefits and labour administration”*⁵¹¹.

Each of the above-mentioned definitions suffers from certain shortcomings. As for the first definition, though it gives an overall picture, the object of international labour law is not even mentioned. The second definition, on the other hand, provides a detailed list of labour matters, but says nothing about the international nature of the

⁵¹⁰ See: Page 77 in Chapter 5- *International labour law*; See also the revised version: Roger Blanpain (2008), *Comparative labour law and industrial relations in industrialized market economies*, Kluwer, p137.

⁵¹¹ The definition is given in: Neville Rubin (2005), *The Code of International Labour Law*, Cambridge: Cambridge University Press (2005), and Roy J. Adams (2006), *Relations industrielles / Industrial Relations*, vol. 61, n° 1 (2006), p 176.

rules in question. Even though international labour law has not been adequately defined, it is recognizable by one or more of the following features:

- First, it is a body of rules and principles established at the international level.
- Second, it concerns labour matters, the standards applicable to labour and the process of their adoption and implementation.
- Third, it only has binding effect on States after the ratification of the implementing documents.

3.1.1.2. The rise of international labour law

Moves towards the establishment of international labour law date back to the beginning of the 19th century. Robert Owen in England, Blanqui and Villerme in France, and Ducepetiaux in Belgium were the first people to propose that there should be international cooperation in the setting of labour standards.⁵¹² The rationale for international regulation of labour matters was to ensure that economic progress would go hand in hand with social justice, prosperity and peace for all.⁵¹³ It was thought that cooperation was necessary to eradicate poverty and injustice, not just to protect workers, but also to prevent the social unrest such conditions might give rise to.

Further proposals for the promotion of the international regulation of labour matters were made in the second half of the 19th century. In 1906 the first two international labour conventions were adopted after a diplomatic conference in Berne.⁵¹⁴

In 1919, the Peace Treaties ending World War 1 provided for the establishment of an International Labour Organization (ILO) which had its principle purpose as the preparation and adoption of a system of international labour standards – to be based on existing international conventions and recommendations drawn up by

⁵¹² See: *International labour law*, Bureau for Workers' Activities, ILO, <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/law/lablaw.htm>

⁵¹³ See: *The need for social justice*, ILO (2008), available at: www.ilo.org/.../socialjustice/.../index.htm

⁵¹⁴ Of these two conventions, one related to the prohibition of night work for women in industrial employment, and the other to the prohibition of the use of white phosphorus in the manufacture of matches. (Lassa Oppenheim (2006), *International Law: a treatise*, Vol. 1, The Lawbook Exchange, Ltd. (2006), p.761)

representatives of governments, employers and workers from around the world – covering all matters related to work.⁵¹⁵

The Organization's basic structure consisted of the International Labour Conference, the Governing Body, and The International Labour Office, which is headed by a Director-General. The Conference is a large deliberative body which meets regularly, normally once a year, to set policy, adopt conventions and recommendations and monitor progress in the application of labour standards.

In May 1944, in Philadelphia, the International Labour Conference adopted a Declaration (the Philadelphia Declaration), which definitively set out the aims and purposes of the Organization. This Declaration reaffirmed in particular that “*labour is not a commodity*”, that “*freedom of expression and of association are essential to sustained progress*”, that “*poverty anywhere constitutes a danger to prosperity everywhere*” and that “*all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity*”.⁵¹⁶

After the creation of the United Nations, the ILO became, in 1946, the first specialized agency to be affiliated with it. Since then, the ILO has engaged in numerous activities aimed at achieving the organization's goals as determined at its establishment. Many ILO legal documents have been recognized by ILO Member States and served as common labour standards for establishing working conditions at national level. They have also had a considerable impact on labour conditions in the world-wide labour market.

Besides the ILO, which plays the role of the primary global labour standard maker within the UN structure, several regional organizations created for different purposes since the end of World War II also cover labour issues. They are the Council of Europe, the EU, and the OECD. It is noteworthy that all these organizations are in Europe. In Asia no such organizations exist.

3.1.1.3. The purposes of international labour laws

⁵¹⁵ See: *The need for social justice*, ILO (2008), available at: www.ilo.org/.../socialjustice/.../index.htm

⁵¹⁶ See part I, principles a, b, c and part II, item a of the Declaration

A number of arguments were advanced in support of international labour law of which the central one relates to *international competition*. The idea was that international agreements in the field of labour would help prevent international competition from taking place in such a way as to lead to the disadvantage of workers, and would constitute a kind of code of fair competition between employers and between countries.⁵¹⁷

At the end of the First World War, a new argument appeared, namely that injustice in the social field endangers peace in the world, and that action against such injustice therefore serves the *cause of peace*.⁵¹⁸

Nowadays the driving force behind the idea of international labour law is the notion of *social justice*.⁵¹⁹

In addition to these basic purposes, the function of international labour law is to achieve the highest sustainable economic growth, to promote balanced economic and social progress, secure employment, raise living standards, regulate labour matters with an international character and serve as a guide to Governments, workers and employers, irrespective of national territories.

3.1.2. International framework for collective agreements

International labour standards are diverse and their significance for collective agreements varies. Some of them lay down the essential conditions for the subsistence and development of collective agreements, such as those relating to *the right to freedom of association, the right to organize and the right to collective bargaining*. Others, on the other hand, concern the contents of collective agreements, especially issues relating to working conditions.

This thesis will pay more attention to those international labour standards which create the fundamental conditions for the existence and development of collective agreements.

⁵¹⁷ It is worth noting that costs and the competitive value of products depend on many factors other than labour costs and countries that are the most successful in world markets are not those where the conditions of work are the least favorable. However the argument relating to international competition is still often invoked, particularly for countries where conditions are similar and not influenced by tariff barriers. (*International labour law* - Published by Bureau for Workers' Activities, ILO).

⁵¹⁸ Ibid.

⁵¹⁹ Ibid.

3.1.2.1. Global instruments

3.1.2.1.1. United Nations instruments

The United Nations does not deal with labour matters as such but, some UN instruments of more general scope also cover labour issues: A number of provisions touching labour rights are contained in the United Nations Universal Declaration of Human Rights, 1948,⁵²⁰ the International Covenant on Economic, Social and Cultural Rights (1966)⁵²¹ and the International Covenant on Civil and Political Rights (1966)⁵²² which are legally binding human rights agreements (naturally depending upon ratification). Because of their broad and comprehensive nature, the labour rights recognized in these documents are dealt with in a less precise and detailed way than in ILO standards.

The UN General Assembly has also adopted some legally binding Conventions more or less relating to labour matters, which may be used as part of the framework for collective agreements. The most important ones are the Convention on the Elimination of All Forms of Racial Discrimination (1969), the Convention on Elimination of all Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989), the Convention on the Status of Refugees (1954) and the Convention on the Status of Stateless Persons (1960).

3.1.2.1.2. ILO instruments

**** ILO Constitution and Declarations***⁵²³

- The ILO Constitution 1919 and the Declaration of Philadelphia 1944

The ILO Constitution was written between January and April, 1919, by the Labour Commission set up by the Peace Conference.⁵²⁴ The Preamble to the

⁵²⁰ See Article 20 on the right to freedom of peaceful assembly and association and Article 23 (4) on the right to form and to join trade unions.

⁵²¹ Article 8 (1) contains the key principles, stating the obligation of the States Parties to the Covenant to ensure the right of everyone to form trade unions and join a trade union, the right of trade unions to establish national federations or confederations and the right of the national federations to form or join international trade-union organizations, the right of trade unions to function freely and the right to strike.

⁵²² Article 22 (1) on the right to freedom of association, including the right to form and join trade unions.

⁵²³ By joining the ILO, member States agree to abide by the ILO's Constitution, which is a binding international instrument. Declarations, on the other hand, are non-binding. Nonetheless they represent the collective voice of all participants in the International Labour Conference and are therefore significant.

Constitution declares "recognition of the principle of freedom of association" to be one of the means of improving conditions of labour and of securing peace.

In 1944, a solemn Declaration of the aims and purposes of the International Labour Organization, and of the principles which should inspire the policy of its Members was adopted by the 26th Session of the International Labour Conference held in Philadelphia. It was incorporated into the ILO's Constitution, expanding the original objectives of the Organization as set out in the preamble. The Declaration reaffirms again that freedom of expression and of association is essential to sustained progress. This is also one of the four fundamental principles on which the ILO is based.⁵²⁵

- ILO Declaration on Fundamental Principles and Rights at Work, 1998

This Declaration was adopted on 18 June 1998, and aimed at establishing a social minimum for workers at the global level. The Declaration seeks to stimulate national efforts to ensure that social progress goes hand in hand with economic progress while respecting the diversity of circumstances, possibilities and preferences of individual countries.⁵²⁶ The Declaration provides that ILO Member States, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, promote and realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, including the principle of "freedom of association and the effective recognition of the right to collective bargaining"⁵²⁷

- Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977

⁵²⁴ The Commission was composed of representatives from nine countries: Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States, under the chairmanship of Samuel Gompers, head of the American Federation of Labour.

⁵²⁵ See part I, the second principle (b)

⁵²⁶ See: ILO, *Declaration of Fundamental Principles and Rights at Work*. Available at: www.ilo.org/public/english/standards/decl/declaration.

⁵²⁷ See paragraph 2 (a) of the Declaration.

This document was adopted by the Governing Body in November 1977⁵²⁸ It recognizes that, although ILO standards are intended to be applied by governments, many of the principles in these standards can be applied by businesses as well. The Declaration consists of 59 paragraphs. Some of them, such as Paragraph 43, 45, 50, 52, 57, are relevant to freedom of association and collective bargaining.⁵²⁹

*** *ILO Conventions and recommendations***

The ILO formulates International Labour Conventions and Recommendations setting minimum standards of basic labour rights.

An ILO Convention is a legal instrument regulating some aspects of labour administration, social welfare and/or human rights. When a country ratifies a Convention, it undertakes a formal obligation to apply the provisions of that Convention and to accept a measure of international supervision and monitoring.

An ILO Recommendation is similar to a Convention except that it is not subject to ratification. It provides more specific guidelines on certain subject in the field of labour (whether the subject has been mentioned in an existing Convention or not).

Since its establishment in 1919, the ILO has adopted 173 Conventions and 180 Recommendations on different matters in the labour field. Collective bargaining is one of the core subjects covered by ILO law. There are no separate Conventions dealing with collective agreements, but an ILO Recommendation (No 91) refers to collective agreements in detail.

The most important instruments concerned collective agreements consist of:

⁵²⁸ The 1970s were a decade in which the impact of corporations on developing countries was given increased attention. During this period, many called for the regulation of multinational enterprises. In this context the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ("the ILO MNE Declaration") and the OECD Guidelines for Multinational Enterprises ("the OECD Guidelines") were developed. (See: Anne Lally (2005), *Freedom of association and the right to collective bargaining* - Clean Clothes Campaign, September 2005. Available at: www.cleanclothes.org/codes/docs/CCC_FoA_Primer.pdf).

⁵²⁹ The declaration suggest that Multinational Enterprises should support representative employers' organizations; Host-country governments should not limit workers' freedom of association or the right to organize and bargain collectively; Multinational Enterprises should provide workers' representatives with facilities to assist in the development of effective collective agreements; Multinational Enterprises should not threaten to transfer the whole or part of an operating unit in order to influence negotiations or hinder organizing efforts etc.

- Convention No 87 on Freedom of Association and Protection of the Right to Organize, 1948 (adopted on 9th July 1948 by the General Conference of the ILO at its Thirty-first Session and came into force on 4th July 1950).

- Convention No 98 on the Right to Organize and Collective bargaining, 1949 (adopted on 1st July 1949 by the General Conference of the ILO at its Thirty-second Session and came into force on 18 July 1951).

- Convention No 135 on Workers' Representatives, 1971 (adopted on 23rd June 1971 by the General Conference of the ILO at its Fifty-sixth Session and came into force on 30 June 1973).

- Convention No 154 on collective bargaining, 1981 (adopted on 19 June 1981 by the General Conference of the ILO at its sixty-seventh session and came into force on 11 August 1983).

Two Recommendations enacted for the purpose of collective bargaining and collective agreements, namely:

- Recommendation No 91 on collective agreements, 1951 (adopted on 6th June 1951 by the General Conference of the ILO at its thirty-fourth Session).

- Recommendation No 163 on collective bargaining, 1981 (adopted on 19 June 1981 by the General Conference of the ILO at its sixty-seventh session).

In the collective agreement sector, the following instruments must also be mentioned: Convention No 84 on the Right of Association, 1947; Recommendation No 143 on Workers' Representatives, 1971; Recommendation No 149 on Rural Workers' Organizations, 1975; Convention No 151 on Labour Relations (Public Service), 1978; Recommendation No 159 on Labour Relations (Public Service), 1978.

- Other ILO standards, which do not deal specifically with collective bargaining or collective agreements, are also worth mentioning and affect collective agreements in different ways. These standards do not lay down the fundamental conditions for establishing collective agreements, but determine a “legal border line” or “deadline” for labour obligations or rights of labour relationship and include Convention No 105 on Abolition of Forced Labour, 1957, Convention No 111 on Discrimination (Employment and Occupation), 1958, Convention No 138 on Minimum Age of Work 1973, Convention No 182 on Worst Forms of Child Labour 1999 etc. Generally

speaking these documents are used as materials for building up the collective agreement system, determining what collective agreements are to look like and how they can balance the interests of the parties bound by such agreements.

3.1.2.2. Regional instruments

At the European level, the regional organizations created after the end of World War II have adopted a variety of legal instruments covering labour matters.

3.1.2.2.1. Council of Europe⁵³⁰ instruments

The Council of Europe was established in 1949. It is the oldest organization working for European integration. The Council's most important instruments consist of:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵³¹

The Convention was concluded in Rome in 1950. It has been amended by a number of protocols⁵³², and deals essentially with civil and political rights in general. However, it also deals with certain rights falling within the field of international labour law, especially, collective labour relations, such as the right to form trade unions (Article 11).

- European Social Charter

The European Social Charter is a more comprehensive instrument adopted by the Council of Europe in 1961. It was intended to fill the gaps left by the Convention for the Protection of Human Rights and Fundamental Freedoms, which essentially covers only civil and political rights.⁵³³

⁵³⁰ This Council should be distinguished from the Council of the European Union (one of the two legislative institutions of the European Union) and the European Council (referred to as a European Summit) which is not an official institution as such, but is the highest-ranking political body in the European Union.

⁵³¹ This Convention has another shorter name: The European Convention on Human Rights. It is the Council of Europe's most important achievement entailing the establishment of the European Court of Human Rights in Strasbourg. The Court supervises compliance with the European Convention on Human Rights and thus functions as the main protector of human rights and fundamental freedoms.

⁵³² For more details, see: www.knowledgerush.com/.../European_Convention_on_Human_Right

⁵³³ Source: www.allegedly.net/European_Social_Charter

The Charter protects numerous labour rights such as the right to work, to fair conditions of work, to safe and healthy working conditions, to fair remuneration etc.⁵³⁴ The European Social Charter was the first international document⁵³⁵ to recognize the right to strike (Article 6, paragraph 4). Some significant rights related to collective agreements such as the right to organize and the right to bargain collectively are also provided for (Article 5, Article 6, respectively).

The Charter stipulates that any State wishing to become a Party must undertake to be bound by at least 10 Articles (out of 19) or 45 numbered paragraphs of Part II of the Charter.⁵³⁶ However, of the seven Articles regarded as particularly significant, each Party must accept at least five, including the Articles on the right to work, the right to organize and the right to bargain collectively.⁵³⁷

As far as labour standards are concerned, the Charter is the most important document issued by The Council of Europe as it lays down corner-stone rules, *inter alia*, on the labour issues which need to be regulated at regional level. Since 1996 it has been gradually replaced by the Revised European Social Charter.

- The Revised European Social Charter.

Opened for signature on 03.05.1996 and coming into force on 01.07.1999, the Revised European Social Charter aims at strengthening safeguards for fundamental economic and social rights. It takes account of developments in European society since the first Charter was drawn up in 1961.

The Revised Charter adds some new labour rights to the existing ones which include the right to protection in case of termination of employment, the right to protection against sexual harassment and victimization; rights for workers' representatives, reinforcement of the principle of non-discrimination, increasing equality between women and men in all the fields covered by the Treaty; increasing social, legal and economic protection for children at work and outside work etc.⁵³⁸ The Revised Charter is to be seen as a comprehensive international treaty which

⁵³⁴ See Article 1, 2, 3, 4, 10, 12, 14 etc.

⁵³⁵ Source: www.allegedly.net/European_Social_Charter

⁵³⁶ See the Article 20, para. 1 (c)

⁵³⁷ See the Article 20, para. 1 (b)

⁵³⁸ See: Article 24, Article 26, Article 28, Article 20, Article 27 of the Revised Charter.

brings together in a single text all the rights guaranteed by the 1961 Charter and its 1988 Additional Protocol with some new rights agreed by member States.

Regarding the matter of undertakings, the Charter provides that any State wishing to become a Party must undertake to be bound by at least 16 Articles (out of 31) or 60 numbered paragraphs of Part II of the Charter.⁵³⁹ Of the nine Articles regarded as particularly significant, each Party must accept at least six, including Articles on the right to work, the right to organize and the right to bargain collectively.⁵⁴⁰

As of March 2010, 43 out of 47 member States of the Council of Europe had ratified the European Social Charter: among them 30 are bound by the Revised Charter and 13 by the 1961 Charter.⁵⁴¹

3.1.2.2.2. European Union (EU)⁵⁴² instruments

The European Union came into existence in November 1993 after the ratification of the Maastricht Treaty, though it has its origins in the period after the end of the World War II. The ECSC Treaty⁵⁴³, the EEC Treaty⁵⁴⁴ and the EURATOM Treaty⁵⁴⁵ which created the constituent organizations of the EU, were each signed in the 1950's.

The adoption of legislation aimed at improving labour standards and workers' rights is one of the Union's main achievements in the social field. Its purpose is to

⁵³⁹ See Part III, the Article A, para. 1 (c)

⁵⁴⁰ See Part III, the Article A, para. 1 (b)

⁵⁴¹ Source: www.eurocop.org/fileadmin/user_upload,

See also the table of "*Signatures and ratifications of the European Social Charter, its Protocols and the European Social Charter (revised)*" (Situation at 3 March 2010),

⁵⁴² The European Union is a *sui generis* supranational union, made up of twenty-seven member states. The main EU institutions and bodies include the European Commission, the European Parliament, the Council of the European Union, the European Council, the European Court of Justice, (the EU's supreme court) and the European Central Bank.

⁵⁴³ The Treaty establishing the European Coal and Steel Community (ECSC) was signed in Paris on 18 April 1951 by Belgium, Germany, France, Italy, Luxembourg and the Netherlands. It was concluded for a period of fifty years and, having entered into force on 23 July 1952, expired on 23 July 2002.

⁵⁴⁴ Treaty establishing the European Community.

⁵⁴⁵ EURATOM Treaty – The Treaty establishing the European Atomic Energy Community - was signed on 25 March 1957 by the 6 members of the European Community: Belgium, France, Germany, Italy, Luxembourg, The Netherlands.

ensure that the creation of the Single Market leads neither to a lowering of labour standards nor to distortions of competition. At the same time, it strives to improve competitiveness.⁵⁴⁶

The constitutional basis (primary legislation) of EU law consists of the various Treaties including: the ECSC Treaty of 1951 (Treaty of Paris), The EEC Treaty of 1957 (Treaty of Rome), the EURATOM Treaty of 1957 (Treaty of Rome), the Merger Treaty of 1965, the Single European Act of 1986, The Treaty of Maastricht of 1992 (Treaty of European Union), the Treaty of Amsterdam of 1997, the Treaty of Nice of 2001 and the Treaties of Accession of new Member States of 1972, 1979, 1985, 2003, 2005.

The Charter of Fundamental Rights of the European Union (2000/C 364/01), adopted in Nice on 7th December 2000 by the European Council (the highest political body of the European Union), was seen as being among the most important pieces of legislation issued by the EU.

The Charter contains 7 chapters with 54 Articles covering fundamental rights relating to dignity, liberty, equality, solidarity, citizenship and justice. Regarding collective agreements, the right to freedom of association and the right of collective bargaining and collective action are covered by Article 12 and Article 28.

In December 2007, a new version of the Charter of Fundamental Rights of the European Union (2007/C 303/01) was adopted. It adapts the wording of the previous Charter and replaces it from the date of entry into force of the Treaty of Lisbon⁵⁴⁷.

EU secondary legislation consist of regulations, directives, decisions, recommendations and opinions. Of these only regulations⁵⁴⁸, directives⁵⁴⁹ and

⁵⁴⁶ *International Labour Law*, Bureau for Workers' Activities, ILO, Webpage: www.ilo.org/actraw

⁵⁴⁷ The Treaty of Lisbon was signed by the Heads of State or Government of the 27 Member States in Lisbon on 13 December 2007. The Treaty is designed to streamline the workings of the EU with amendments to the 1992 Maastricht Treaty and the Treaty of Rome 1957.

⁵⁴⁸ Regulations are legislative acts which become law in all member states the moment they come into force. As a result of having direct effect in the member states, once in force their contents automatically override conflicting domestic provisions.

⁵⁴⁹ Directives are legislative acts of the EU requiring member states to change their national laws within a stated period of time in order to achieve a particular result without dictating the means of achieving that result. Directives thus have to be transposed into the national legal framework. Directives are generally used where it is thought preferable to leave the precise details of legislative implementation to national governments. When the stated time period has passed, under certain conditions provisions within a Directive may have direct effect

decisions⁵⁵⁰ are binding instruments capable of having direct effect in member states and overriding national law if any conflicts appear.

Few regulations, directives or decisions directly address collective agreements but a remarkable number of directives do concern labour matters. Some of them address collective redundancies⁵⁵¹, the application of equal pay or equal treatment⁵⁵², the safeguarding of employees' right in the event of transfer of undertaking, business⁵⁵³, promoting health and safety at work⁵⁵⁴, protection of employees in the event of the insolvency of their employer⁵⁵⁵, working time⁵⁵⁶, fixed-term work and part-time work⁵⁵⁷ etc.

These documents may directly or indirectly impact on national labour legislation or the labour market practices of the member states. Collective agreements are not an exception; they may be influenced by many kinds of regional regulating instruments.

3.1.2.2.3. The Organization for Economic Co-operation and Development (OECD)

in national law against Member States. Directives are only binding on the member states to whom they are addressed, which can be just one member state or a group of them.

⁵⁵⁰ Decisions offer an alternative to the two above modes of legislation. They may be, depending on the subject matters, issued by The Court of Justice or published by the Council and the Commission in the official journal and notified to a particular addressee. Decisions are fully binding on those to whom they are addressed; regardless of whether the decision-receiver is a Member State, a company or an individual.

⁵⁵¹ Council Directive 98/59/EC of 20 July 1998 (This Directive consolidates Directives 75/129/EEC and 92/56/EEC).

⁵⁵² Directive 75/117/EEC of 10 February 1975, Directive 79/7/EEC of 19 December 1979, Directive 86/378/EEC of 24 July 1986, Directive 96/97/EC of 20 December 1996, Directive 2000/43/EC of 29 June 2000, Directive 2000/78/EC of 27 November 2000, Directive 2004/113/EC of 13 December 2004, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 etc

⁵⁵³ Directive 77/187/EEC of 14 February 1977, Directive 98/50/EC of 29 June 1998, Directive 2001/23/EC of 12 March 2001 etc.

⁵⁵⁴ Directive 80/1107/EEC of 27 November 1980, Directive 89/391/EEC of 12 June 1989, Directive 92/85/EEC of 19 October 1992, Directive 98/24/EC of 7 April 1998 etc.

⁵⁵⁵ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 (Codified version), Council Directive 80/987/EEC of 20 October 1980, Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC.

⁵⁵⁶ Directive 93/104/EC of 23 November 1993 Directive 2000/34/EC of the European Parliament and the Council of 22 June 2000 amending Council Directive 93/104/EC, Directive 2003/88/EC.

⁵⁵⁷ Council Directive 1999/70/EC of 28 June 1999, Council Directive 97/81/EC of 15 December 1997, Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC.

The OECD was formed in 1961 as an expansion of the Organization for European Economic Co-operation. The OECD's goals are to promote economic stability and democracy in its member countries and in developing ones. The OECD also has some influence over the issue of sustainable development and looks for solutions allowing for stable economic growth without negatively impacting the survival of future generations.⁵⁵⁸

The Guidelines for Multi-national enterprises is the most remarkable legislative document to emerge from the OECD. The OECD Guidelines were first drafted in the 1970s and revised in 2000. They include recommendations jointly addressed by governments to multi-national enterprises. They provides principles and standards of good practice consistent with applicable law. The issues of employment and labour relations are covered in Section IV of the Guidelines. The OECD Guidelines call on enterprises to respect employees' right to be represented by trade unions and to engage in negotiations, provide facilities and information to employee representatives so as to allow them to develop collective agreements, not to threaten to transfer production from a country in such a way as to influence negotiations unfairly or hinder the right to organize and to enable consultation and negotiation between authorized employee representatives and management for the purposes of collective bargaining or management relations issues.⁵⁵⁹

3.1.2.2.4. Asian instruments

In Asia, none of the regional organizations has adopted any legal instruments on labour matters; there are only some recommendations, declarations and programmes dealing with these issues.⁵⁶⁰ Consequently, no Asian rules on collective agreements exist.

3.1.2.3. Main regulation of international labour law in the collective agreement sector

3.1.2.3.1. Freedom of association

⁵⁵⁸ See: What is OECD - www.wisegeek.com/what-is-the-oecd.htm

⁵⁵⁹ See paragraphs 1 (a), 2 (a), 3, 7, 8 of the Guidelines.

⁵⁶⁰ *International Labour Law* - Bureau for Workers' Activities, ILO. Webpage: www.ilo.org/actraw

Freedom of association is an essential right for labour market parties, especially on the employees' side, as collective action is an effective way for them to protect their interests against employers. No freedom of association means no real collective bargaining and no meaningful collective agreements either.

ILO Conventions and Recommendations emphasize the importance of the individual and collective freedom of workers and employers and of harmonious relations between them. Regarding the right to freedom of association, the Constitution of the International Labour Organization and the Declaration of Philadelphia affirm it as one of the fundamental principles of international labour law (see above) and the Convention N^o87 concretizes this right.

Within the scope of international labour law relating to the right to freedom of association, these aspects should be taken into account:

- Right to create and join an association

This right is always stressed in international labour law. Convention No 87 stipulates that workers (and employers) without any distinction whatsoever have the right to establish and to join organizations of their own choosing without previous authorization.

In reality there may be three kinds of restrictions (which are essentially violations of the Convention, though they may be lawful with respect to certain special types of activity), they are: limits to the right to organize for certain categories of workers, requirement of prior authorization by the public authorities, denial of the right to choose a trade union. These restrictions are however all contrary to the spirit of this provision.

At higher levels, the right to create and join an association is also understood as the right to form a federation/confederation and to join international employees' and employers' organizations. This has been made clear by Article 5 of Convention No 87.

The other side of this right is the negative right of association, meaning that an employee or an employer shall have the right not to join (right to refuse to join)

unions or associations. The matter of a negative right was controversial at first, but is now accepted by the international community.⁵⁶¹

From the viewpoint of international legislators, the right to association is of great importance; that is why it has been repeatedly mentioned in legislation coming from various international bodies. The International Covenant on Civil and Political Rights, adopted by the United Nations in 1966, states that everyone has the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests. The International Covenant on Economic, Social and Cultural rights, adopted at the same time, supplies further details in Article 8. The right is also mentioned in The European Convention for the Protection of Human Right and Fundamental Freedom (Article 11), the European Social Charter (Article 5), the Charter of Fundamental Rights of the European Union (Article 12) etc.

- Guarantees of trade union activities:

Trade union activities include: free election of representatives, planning and implementation of trade union operations, preparation of statutes and regulations and organization of management. Infringements of this right take different forms: removing elected leaders from office, freezing trade union funds, occupying their premises etc.

To guarantee activities of labour market parties' representative organizations, international labour law provides that “workers' and employers' organizations have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes”⁵⁶², and they also “enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration”⁵⁶³.

A similar spirit can be seen in other international instruments such as the European Social Charter 1996⁵⁶⁴ (revised), OECD Guidelines⁵⁶⁵ etc.

⁵⁶¹ Roger Blanpain (2001), *Labour Law, Human Rights and Social Justice*, Kluwer 2001, p.191; see also: *negative freedom of association* - www.eurofound.europa.eu/areas/.../htm

⁵⁶² Article 3 of Convention No 87

⁵⁶³ Article 2 Convention No 98

⁵⁶⁴ See Paragraph 28

- Protection of trade unions from administrative suspension and dissolution:

This is regarded as an essential condition going along with the right to freedom of association and the right to freedom for trade union activities. It ensures those rights can be exercised in the labour market and do not just exist in theory. Article 4 of Convention No 87 stipulates that workers' and employers' organizations *shall not be liable to be dissolved or suspended by administrative authority*". The public authorities are asked to "*refrain from any interference which would restrict this right or impede the lawful exercise thereof*". The Convention also calls for each member of the ILO in which the Convention is in force to take appropriate measures to ensure that workers and employers may exercise freely the right to organize (Article 11).

- Protection against acts of anti-union discrimination:

Becoming a trade union representative or even becoming a union member employee may lead to a risk of discrimination against the trade union or the employee. In order to guarantee the employees' right to organize, Convention No 98 on the Right to Organize and Collective bargaining provides that: "*Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment*"⁵⁶⁵. The Convention also requires the establishment of machinery appropriate to national conditions for ensuring respect for the right to organize as defined in the Convention.

3.1.2.3.2. Promotion of collective bargaining

The term "*collective bargaining*" is defined in Article 2 of Convention No 154. Many issues relating to collective bargaining are dealt with in international labour law:

- Principles on conducting collective bargaining

As stated by the Committee on the Freedom of Association, the ILO Constitution and ILO Conventions 98 and 154, certain important principles must be observed in any process of collective bargaining, including: *Free and voluntary negotiations; the autonomy of the social partners* (or bargaining partners), which does

⁵⁶⁵ See Part IV (1), (2)

⁵⁶⁶ Article 1 of Convention No 98

not allow for inappropriate interference by the government or others and *equal status and equal rights* for each partner involved in collective bargaining.⁵⁶⁷

- The sphere of collective bargaining:

The existence of collective bargaining is encouraged in all branches of economic activity and may also take place in the public sector. Nevertheless, Convention No 98 allows exceptions in the case of the police and armed forces and certain other classes of public servants.⁵⁶⁸

ILO Convention No 98, Convention No 154 and Recommendation No 163 call for the member States to take positive measures to enable all categories of employees and employers to negotiate at all levels.

- Measures to promote collective bargaining.

Measures promoting collective bargaining are seen as the key content of the international law on collective bargaining. Member states are requested to apply appropriate measures so as to facilitate the establishment and growth of free, independent and representative organizations of the two sides, and these organizations must also be recognized for the purposes of collective bargaining. The measures must furthermore aim at gradually extending bargaining to all questions belonging to the establishment of conditions of work and employment and other employee - employer relations, as well as regulating relations between their representative organizations. The measures taken must ensure the negotiators have opportunities to obtain appropriate training. Public authorities are to provide assistance in giving such training.

- Information for meaningful negotiations:

Recommendation No 163 calls for the parties to have access to the information they need for meaningful negotiations. Employers in both the public and the private sector have to make available information on the economic and social situation of the negotiating unit and the undertaking as a whole, when it is necessary for negotiations. Public authorities must also provide the necessary information on the overall

⁵⁶⁷ Jean-Marie Standaert (2005), *Collective Bargaining by Employers' Organizations*, published by ILO, 2005.

⁵⁶⁸ See Article 1 Convention No 154.

economic and social situation of the country and the branch of activity concerned, provided the disclosure of this information is not prejudicial to the national interest.

This provision is reiterated in other documents, both at global and regional levels, e.g. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (in Paragraph 55, 56) and The OECD Guidelines (Part IV, (2-b) of The Guidelines) etc.

3.1.2.3.3. Promotion of collective agreement

Since collective agreements help to balance the parties' interests, benefiting industrial relations, they should always be encouraged, both in terms of prevalence and effectiveness.

In the Tripartite Declaration of Principles concerning Multinational enterprises, the ILO calls for Multinational enterprises, as well as national enterprises, to provide workers' representatives with such facilities as may be necessary to assist in the development of effective collective agreements⁵⁶⁹

In The Charter of Fundamental Rights of The European Union (both in the 2000 and the 2007 version), the EU defines the right of both workers and employers to negotiate and conclude collective agreements at the appropriate levels in accordance with Community law and national law. In case of conflicts, they are entitled to take collective action to defend their interests, including strike action.⁵⁷⁰

The OECD Guidelines also recommend that multinational enterprises should provide such facilities to employee representatives as may be necessary to assist in the development of effective collective agreements⁵⁷¹.

Collective agreements are the overall subject of ILO Recommendation No 91. Aiming at the promotion of collective agreements, the Recommendation suggests *the establishment of collective bargaining machinery*, which is appropriate to the conditions existing in each country, to help negotiate, conclude, revise and renew collective agreements, or to be available to assist the parties in the negotiation, conclusion, revision and renewal of collective agreements. The Recommendation

⁵⁶⁹ See Paragraph 50, 51 of the Declaration.

⁵⁷⁰ Article 28 of the Charter.

⁵⁷¹ See Part IV (2) of the Guidelines

resolves the matter of the *binding effect of collective agreements*, such as that they should bind the signatories and those on whose behalf the agreement is concluded, they serve as the legal basis of individual employment relations etc. The Recommendation also calls for *a mechanism of collective agreements extension*. It requires that measures must be taken where appropriate to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement. The conditions subject to which national laws may extend a collective agreement are also stipulated, including: (1) The collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative; (2) The request for extension of the agreement is made by one or more organizations of workers or employers who are parties to the agreement; and (3) Prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

Certain related matters such as the interpretation of collective agreements, the settlement of disputes, and the supervision of the implementation of collective agreements are also dealt with in the Recommendation.

3.1.3. The influence of international labour law on the Swedish and Vietnamese systems

3.1.3.1. The influence of international labour law on the Swedish system

First of all, it should be noted that Sweden had a developed collective agreement system before the State ratified the first ILO labour standards; According to Professor Reinhold Fahlbeck⁵⁷², “*Sweden in several cases has taken a somewhat cavalier attitude toward ratification*”, and “*This pragmatic attitude is rooted in a (tacit) conviction that labour standards in Sweden are superior - or at least equivalent - to ILO standards, making it unnecessary for Sweden to promptly ratify every convention*”.⁵⁷³

⁵⁷² Professor at Lund University, Sweden.

⁵⁷³ Reinhold Fahlbeck (2001), *International labour and employment laws*, Volume II, American Bar Association (2001), p. 10-11

Sweden has been an ILO member since 1919, and is one of the most active members.⁵⁷⁴ Sweden has ratified 92 Conventions, of which 77 are in force (some Conventions were denounced as a result of ratification of the new ones).⁵⁷⁵ Among the conventions ratified by Sweden, the ones relating to the right to freedom of association, collective bargaining and collective agreement are the most important.

When ratifying Convention No 87 in 1949 and Convention N^o98 in 1950, Sweden became one of the first Member States to recognize the international labour standards provided by these two instruments. It was not too difficult for the State to implement Conventions No 87 and No 98 because, as mentioned above, Sweden had a sound collective agreement system and a strong framework for protecting workers' freedom of association rights before being regulated by international labour standards. The Constitution guarantees freedom of association and the right to strike, and the 1976 Co-Determination Act further enlarges on these rights.⁵⁷⁶

Under Swedish law, workers are free to form and join unions without government intervention. No statute regulates the internal activities of unions and the Government respects their independence.⁵⁷⁷ Unions have strong collective bargaining rights and, if conflicts arise, they can litigate or use collective action.

That system naturally entails very high rates of union membership (nearly 80%) and this proportion has been stable for decades - the rate has been a little lower in the last few years) and almost all employees on the labour market (more than 90% of employees) are covered by legally binding collective agreements.⁵⁷⁸ In the public sector, virtually all employees have the right to collective bargaining and are covered by collective agreements.⁵⁷⁹ Collective agreements take place at the local, sectoral and national levels and govern every economic sector. Military and police employees

⁵⁷⁴ Ibid, p. 10-10

⁵⁷⁵ ILO, *List of Ratifications of International Labour Conventions*, Sweden, Listing generated by APPLIS - International Labour Standard Dep. on 10 Jan 2011.

⁵⁷⁶ Philip Simon (2007), *Sweden - Freedom of Association and Labour Law*. Available at: www.legislationline.org/topics/country/1/topic/1/subtopic/17

⁵⁷⁷ Ibid.

⁵⁷⁸ See Section 4.1.1.1.1. Trade union in Sweden.

⁵⁷⁹ Philip Simon (2007), *Sweden - Freedom of Association and Labour Law*. Available at: www.legislationline.org/topics/country/1/topic/1/subtopic/17

are also free to organize unions.⁵⁸⁰ Trade unions and employers, rather than the state, take the lead in labour relations. Trade union representatives are well protected in the performance of their duties. In cases of unfair practices, both unions and union members may challenge discriminatory conduct in court.⁵⁸¹ Employers face the risk of punitive damages.

As a member of the EU, Sweden has to adopt the entire structure of EU legal regulations. However, the Swedish system which is based on collective labour relations, is arguably somewhat superior to the Labour Law of the rest of Continental Europe which is based more on the rights of the individual employee.⁵⁸² In his Article “Swedish labour law and the European Union”, Helmers Reinhard wrote: “*When Sweden was going to join the EU, the Swedish Labour Law had to be added to the rules laid down in the EC-Treaty and several judgments of the European Court of Justice concerning labour relations*”⁵⁸³.

On 19 January 2005, a seminar was held in Stockholm evaluating the influence of EU law on the Nordic countries (for the 10-year period from 1995, when Sweden joined the EU, to 2005). At the seminar, one issue discussed was whether Sweden had influenced EU labour law in any sense during the decade since its accession, or whether EU labour law had influenced Sweden even though it already had a strong model of collective bargaining, independent social partners and governmental support for this situation. According to Professor Niklas Bruun⁵⁸⁴, Sweden has been more passive than active in this field and that “*Sweden and Finland have experienced a “change of system” since 1995, a kind of “quiet revolution”, maybe more in theory than in practice*”.⁵⁸⁵ The role of Sweden in EU law-making has mainly involved trying to stop rules requiring too many national changes and seeking to adapt EU rules

⁵⁸⁰ Ibid.

⁵⁸¹ Ibid.

⁵⁸² Helmers Reinhard (2000), “*Swedish labour law and the European Union*”, Contemporary Review Vol.276, May 2000, see also: Reinhold Fahlbeck (2001), *International labour and employment laws*, Volume II, American Bar Association (2001), p. 10-10

⁵⁸³ Helmers Reinhard (2000), “*Swedish labour law and the European Union*”, Contemporary Review Vol.276, May 2000.

⁵⁸⁴ Professor, Swedish School of Economics and Business Administration, Helsinki.

⁵⁸⁵ Annika Berg (2005), *10 years of EU labour law examined from a Nordic perspective*, Eurofound, April 2005.

to the Swedish situation. Professor Jonas Malmberg⁵⁸⁶ also noted - among other matters - that the Swedish Labour Court tends to apply the principles of the ECJ rather narrowly. As for the conflict-resolution process including the involvement of the Swedish courts, it had remained intact.⁵⁸⁷

The duty to implement EC Directives has led to an increased role for statutory law in the governing of the Swedish labour market and at the same time decreased the role of the social partners and collective agreements at national level.⁵⁸⁸ This is because EU law in general tends to narrow the scope of the collective agreement and diminishes the functions of the social partners. There has been much discussion in Sweden about the implementation of EC Directives. According to certain labour law experts, with standards being laid down by Directives, there is less for social partners to bargain about.⁵⁸⁹ According to Professor Niklas Bruun, as the EU laws were designed to fit all Member States, “*Harmonisation brings about a huge volume of low quality regulation that does not actually fit very well in the system*” and “*The amount of legislation being adopted is not negligible, and this especially narrows the autonomy for social partners to freely negotiate their agreements*“, ⁵⁹⁰ In his work, he also comments on the great significance of autonomy for the social partners and for collective agreements and bargaining.⁵⁹¹ He also raised the question of how to retain of such autonomy.⁵⁹²

The Swedish statutory system relating to labour has also undergone some changes in order to implement EU Directives. One example is the transposition of EC

⁵⁸⁶ Professor of Labour Law - Faculty of Law - University of Uppsala, Sweden

⁵⁸⁷ Annika Berg (2005), *10 years of EU labour law examined from a Nordic perspective*, Eurofound April 2005.

⁵⁸⁸ Birgitta Nystrom (2005), *The evolving structure of collective bargaining in Europe 1990-2004*, Sweden, national report, pp. 38, 39

⁵⁸⁹ Ibid, p. 39

⁵⁹⁰ See Niklas Bruun (2002), *The autonomy of collective agreement*, General report presented to the VIIth European Regional Congress of the International Society for Labour Law and Social Security (Stockholm September 2002), p.33

⁵⁹¹ Professor Niklas Bruun, in *The Autonomy of Collective Agreement*, wrote: “*Without such autonomy there is little to bargain about, and without autonomous partners there is no real enforcement and effect of the agreements. The real power in the collective bargaining system lies in the organizations that are parties to the collective agreements. Therefore the issue of where bargaining should take place is often the object of harsh controversy. Collective agreements based on a lack of autonomy will, in the end, be dead letters*” (p 37).

⁵⁹² For detailed information, see: Ibid, p.37

Directive 77/187/EEC (now Directive 2001/23/EC) on transfers of Undertakings leading to some amendments to the Employment Protection Act and the Co-Determination Act. One further case is the implementation of the Directive on employee information and consultation which entailed a new provision in the Co-Determination Act (§ 13, 2) concerning the situation where the employer is not bound by any collective agreement at all.⁵⁹³ The new rules created a new legal basis for collective bargaining and led to certain changes in collective agreements already concluded by labour market parties.

Generally speaking, Sweden has made a great effort to accept and implement international labour law, especially EU law, though sometimes this process has not been easy. Since Sweden had from early days its own highly organized industrial relations and a developed collective agreement system, the influence of international labour standards may not be as strong as in other member states.

3.1.3.2. The influence of international labour law on Vietnamese system

By the end of 2010 Vietnam had ratified only 18 ILO conventions, of which 17 are in force.⁵⁹⁴ No documents on the right to freedom of organization, trade unions, collective bargaining or collective agreements have been ratified. The reasons for the non-ratification of Conventions No 87 and No 98 have not been stated clearly. However, a low rate of ratification of these two legal documents is common among developing states.⁵⁹⁵ An overall reason invoked for non-ratification of ILO conventions of these countries⁵⁹⁶ is the political, economic and social situation, with particular reference to political unrest and the low level of economic development (lack of state funds, weakness of the institutional capacity of ministries of labour, transition towards a market economy, weakness of national supervisory mechanisms for the application of legislation, poverty etc).

⁵⁹³ See Birgitta Nystrom (2005), *The evolving structure of collective bargaining in Europe 1990-2004*, Sweden, national report, pp. 36,37

⁵⁹⁴ Source: ILOLEX (database of International Labour Standards) 30. 12. 2010, See also: appendix 1

⁵⁹⁵ For example, among Asian States, only the Philippines and Myanmar ratified Convention No. 87 (See the report of The Committee on Legal Issues and International Labour Standards - ILO - Geneva, in November 2008 on *Ratification and promotion of fundamental ILO Conventions*).

⁵⁹⁶ These countries include: Angola, Burkina Faso, China, Ecuador, Egypt, Equatorial Guinea, Eritrea, Gabon, India, Islamic Republic of Iran, Mali, Mauritius, Mexico, Nepal, Pakistan, Peru, Philippines, Sierra Leone, Singapore, Suriname, Thailand, Uganda, Viet Nam. (see: Standard-setting policy: Ratification and promotion of fundamental ILO Conventions-by Bureau for Workers' Activities ILO 1998).

Some more specific reasons have also been pointed out. In an article entitled “*The Ratification of International Labour Conventions in the Asian - Pacific Region: Up To The Standard?*” Tim De Meyer⁵⁹⁷ wrote: “One reason may be that Convention No 87 proclaims a broad principle that has the potential of concentrating power outside the governmental circuits (i.e. the right of workers to form or join unions of their own choosing to defend their rights).⁵⁹⁸ The main difficulty preventing ratification of Convention No 87 as explicitly stated by Malaysia may also be a reason that prevents other countries in the region from ratifying this Convention: “..it would enable the formation of general unions which might be led by persons having nothing to do with the activities or interests represented by the unions and pursuing political or even subversive aims”.⁵⁹⁹

A second reason also has to be taken into account, namely the particular evolution of economic development in newly industrializing economies. Tim De Meyer noted that “Governments have played a central role in the shaping of exported/ investment-led industrialization, keeping the clout of trade unions firmly in check with regulations to establish a peaceful industrial climate through the settlement of disputes and corresponding limitations on the right to strike and control of labour unions, either directly or by encouraging close employers - workers relations (e.g. by favouring enterprise unions over industrial unions)”.⁶⁰⁰

Vietnam has to cope with other problems which are also experienced by many other countries in the regionsuch as the absence of legislation governing the recognition of trade unions while introducing a new law or modifying existing legislation is also impeded by a confrontational predisposition with a preference for deregulation.⁶⁰¹ Besides, for a country which has a largely agriculture-based economy and a vast informal sector, “high labour standards (such as job security) for a

⁵⁹⁷ Senior Specialist on International Labour Standards and Labour Law at International Labour Office Bangkok.

⁵⁹⁸ Tim De Meyer (1998) *The Ratification of International Labour Conventions in the Asian - Pacific Region: Up To The Standard?* p.13,14.

⁵⁹⁹ ILO (1994) *Ratification of Conventions: Difficulties and Prospects*, Report III, part 4B, to the 81st Session of the International Labour Conference, Geneva, 1994, para 295.

⁶⁰⁰ Tim De Meyer (1998) *The Ratification of International Labour Conventions in the Asian - Pacific Region: Up To The Standard?* p.14.

⁶⁰¹ These reasons, among others, were stated repeatedly by the Indian government. Tim De Meyer (1998) *The Ratification of International Labour Conventions in the Asian - Pacific Region: Up To The Standard?*, p.15

relatively small and well protected industrial sector brought about under the influence of the trade unions have been blamed for sluggish economic development and poverty aggravation in the informal sector”. That is why a promotional strategy for both Conventions must take these concerns into account.⁶⁰²

In 2006, the Government stated that ratification of Conventions No 87 and 98 would be considered in consultation with social partners.⁶⁰³ In 2007, the Government indicated that it was examining the relationship between the two Conventions and the draft law on associations. Ratification of both Conventions would be considered following adoption of the law.⁶⁰⁴ In 2009, the Government stated that the revisions of the Labour Code and the Trade Union Law were to be adopted in October 2010, to be followed by further examination with a view to ratification of Conventions No 87 and 98.⁶⁰⁵

Vietnam has made some efforts to transpose international labour standards into its national labour laws. The Labour Code and relevant documents contain numerous provisions that are close to international labour standards. The State has also developed some programmes and applied certain measures for improving labour conditions and the working environment. The pity is that no ILO standards regarding collective agreements have been ratified. Trade union activities, including collective negotiation, are still weak and formalistic. Collective agreements are not yet the standard way of protecting employees' interests.

As can be seen, the main international labour standards influencing the Vietnamese labour law system relate to matters other than those directly concerning collective agreements. Obviously, there remain considerable dissimilarity between Vietnamese statutory provisions on collective agreements and international labour standards. It is clear that the influence of international labour law on the Vietnamese system has been rather limited.

⁶⁰² Ibid, p.15

⁶⁰³ Committee on Legal Issues and International Labour Standards - Governing Body-ILO, *Ratification and promotion of fundamental and governance ILO conventions*, November 2006.

⁶⁰⁴ Committee on Legal Issues and International Labour Standards - Governing Body-ILO, *Ratification and promotion of fundamental and governance ILO conventions*, November 2007, 2008.

⁶⁰⁵ Committee on Legal Issues and International Labour Standards - Governing Body-ILO, *Ratification and promotion of fundamental and governance ILO conventions*, November 2009.

3.2. Collective agreement legislation and collective agreement development in Sweden and Vietnam

3.2.1. Collective agreement legislation and the development of the collective agreement in Sweden

In the early stages, Swedish trade unions and collective bargaining emerged and developed through the common practice of the labour market organizations and independently of legislation.⁶⁰⁶ There was no legal basis for the right to organize and bargain collectively.⁶⁰⁷

The appearance of trade unions together with strikes and collective agreements dated back to the second part of the 19th Century when industrialization started to expand.⁶⁰⁸ With the growth of industrialization came the desire of workers to have greater control over their destinies in this new, strange environment in which they laboured.⁶⁰⁹

By the 1880's and 1890's, many labour unions had been formed, primarily ordered and organised by craft. But gradually even unskilled workers unionized and the local unions united on the national level.⁶¹⁰ In 1898 a central trade union confederation, the Swedish Trade Union Confederation, (LO) came into being to improve the lot of its members.⁶¹¹ Employers' organizations developed in response to the growth of the unions and in 1902 the Swedish Employers' Confederation (SAF) was found.⁶¹² The creation of these two large confederations, LO and SAF, set the

⁶⁰⁶ See Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.68

⁶⁰⁷ Greg Bamber, Russell D. Lansbury, Nick Wailes (2004), *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage 2004, p.255

⁶⁰⁸ Haug, Ralph (2004), *History of Industrial Democracy in Sweden: Industrial Revolution to 1980*, International Journal of Management, Vol. 21, March 2004.

⁶⁰⁹ Ibid.

⁶¹⁰ Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.19

⁶¹¹ Prior to the establishment of the Swedish Trade Union Confederation, (LO), in 1889 the Social Democratic Labour Party was formed and functioned as a union confederation. LO was closely aligned with the Social Democratic Labour Party and strongly supported the Party's political beliefs. {Haug, Ralph (2004), *History of Industrial Democracy in Sweden: Industrial Revolution to 1980*, International Journal of Management, Vol. 21, March 2004}.

⁶¹² Greg Bamber, Russell D. Lansbury, Nick Wailes (2004), *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage 2004, p.255

stage for negotiations on a national level between labour and owners, the latter being represented by management.⁶¹³ By 1910, the concept of industry unions was dominant.⁶¹⁴

In this period, the number of collective agreements grew steadily thus providing for the uniform regulation of wages and employment conditions. The first collective agreements only regulated the most basic matters but gradually, their content became more comprehensive.⁶¹⁵ The geographical coverage of collective agreements also expanded. During the early years of unionism, collective agreements were concluded on a local basis, covering only one or a couple of enterprises in the same district.⁶¹⁶ In the 1890s collective agreements began to be used more frequently as a form of regulation. At the beginning of the 1900s, collective agreements on a national-sector level were entered into, one of them being the agreement for the metal industry which was entered into in 1905.⁶¹⁷ Before 1910 at least 15 national agreements had come into existence. They contained not only the conditions of employment but also provisions regulating other relations between the organizations, such as the right to take direct action, the settlement of disputes, etc.⁶¹⁸ During the 1920s, the system of collective agreements was well established.⁶¹⁹ The most important agreements in the labour market were concluded in the years 1906, 1938, 1946, 1964, 1982, and 1997, all between the LO and the SAF (now the Confederation of Swedish Enterprise - SN) with the exception of the 1997 agreements, which were concluded between member organizations.⁶²⁰

⁶¹³ Haug, Ralph (2004), *History of Industrial Democracy in Sweden: Industrial Revolution to 1980*, International Journal of Management, Vol. 21, March 2004.

⁶¹⁴ Greg Bamber, Russell D. Lansbury, Nick Wailes (2004), *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage 2004, p.255

⁶¹⁵ For detailed information, see: Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p. 190

⁶¹⁶ Ibid p. 190

⁶¹⁷ Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.

⁶¹⁸ see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.65

⁶¹⁹ Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.

⁶²⁰ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-48

But despite this rosy picture, the development of collective bargaining and collective agreements in Sweden still underwent severe difficulties in the early stages. There were periods when the legal system was applied in a way which was hostile to the growing union movement. It was difficult to launch a strike due to statutory restriction: this might easily lead to breach of the individual employment contracts (due to their terms of notice). The existing ban on any "crowd and rebellion" was also applied to union activities, strikes in particular. In 1899 even attempts to enforce anybody to participate in a strike were penalized under the Penal Code.⁶²¹ Additionally, the employers were hostile to the every idea of unionization - often it was even made a condition of employment that the employee did not join a union.⁶²² Consequently, the old system still survived for a considerable time: employees had to petition their employers to increase wages and improve other terms of employment. Only a few formal collective agreements were entered into.⁶²³

Notably, in such situation the statutory prohibition itself made the labour organizations see that relations with employers should be determined through negotiation rather than legislation. Collective bargaining was seen as the way for the labour movement to control its own destiny.⁶²⁴

At the turn of the century, the launch of The Danish "September-Agreement" to some extent softened Sweden's employers' hostile attitudes toward trade unions. They now accepted the idea of collective bargaining - subject to the precondition that the employer's prerogatives and his right to hire and fire according to his discretion were accepted.⁶²⁵ The "December Compromise" of 1906 was the result of the first national negotiations between LO and SAP and it is regarded as the founding stone of Swedish industrial relations.⁶²⁶ It is still in force.⁶²⁷ The 1906 "December

⁶²¹ See: Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.19

⁶²² Ibid, p.19

⁶²³ Ibid, p.19

⁶²⁴ Haug, Ralph (2004), *History of Industrial Democracy in Sweden: Industrial Revolution to 1980*, International Journal of Management, Vol. 21, March 2004.

⁶²⁵ Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p. 19

⁶²⁶ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-48

⁶²⁷ Ibid.

compromise” was the parties mutually recognition of each other's existence.⁶²⁸ The employees' right to organize was recognized by SAF; LO recognized employers' prerogatives as a general principle of the collective bargaining system.⁶²⁹ As part of its commitment, SAF also accepted collective bargaining and the regulation of employment conditions by means of collective agreements.⁶³⁰

However, the situation was still not entirely stable because the December Compromise was not fully recognized by employers, some of whom continued to implement anti-union policies.⁶³¹ Often employers tried to force solutions on local employees by threatening them with a country-wide lockout. In 1909 such a lockout was actually launched.⁶³² A series of lock-outs, strikes and sympathetic strikes, together referred to as the General Strike or the Great Strike, involving both organised labour and many non-unionised workers, took place. No final settlement was reached.⁶³³ The result was not in favour of the unions: little by little work was resumed on the conditions demanded by the employers and the dispute ended with the workers returning to work without an agreement. Support of the union movement stagnated⁶³⁴ and union membership declined steeply (by nearly 50 percent - from 162,000 members in 1908 to 85,000 in 1910).⁶³⁵ Moreover, contacts between the main organizations on each side were broken and not resumed until the 1930s.⁶³⁶

⁶²⁸ Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.19

⁶²⁹ LO recognized a SAF's principle that all affiliated members of SAF who signed collective bargaining contracts must have a management rights clause in the contract. This clause reserved to management the right to hire and dismiss workers, direct and allocate work, and employ any worker they chose etc. (the Article 23 of the Agreement).

see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.64

⁶³⁰ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-48

⁶³¹ Greg Bamber, Russell D. Lansbury, Nick Wailes (2004), *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage 2004, p.256

⁶³² Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.19

⁶³³ see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.66

⁶³⁴ Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.19

⁶³⁵ Greg Bamber, Russell D. Lansbury, Nick Wailes (2004), *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage 2004, p.256

⁶³⁶ Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.20

Legislation favouring collective agreements and restricting legal actions opposed developed rather slowly. A legislation system was created which was reactive rather than reform oriented.⁶³⁷ There were also several bills drafted, with no positive result being obtained.⁶³⁸

Thus, the concept of the collective agreement was not integrated into the legal system from the beginning. There was no clear notion of the legal status and effects of any such agreement.⁶³⁹ This uncertainty of status prevailed for a relatively long period. Further, the important question of how to sanction breaches of a collective agreement was not handled.⁶⁴⁰

The Act 1906 on Mediation in Industrial Disputes was seen as an acknowledgement of collective agreements.⁶⁴¹ Following the Act, a small mediation office was established to support industrial peace. This Act placed official conciliators at the disposal of disputing parties.⁶⁴²

During the 1910-1920 period, there was not much progress in legislation on collective agreements. Employers and conservative politicians tried on several occasion to introduce legislation that would restrict the unions' right to strike. However, these attempts were blocked by socialist and liberal interests.⁶⁴³

In 1915 the Swedish Supreme Court declared that a collective agreement was a legally binding contract and also linked its legal effect to the restriction of strikes. It

⁶³⁷ Greg Bamber, Russell D. Lansbury, Nick Wailes (2004), *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage 2004, p.256

⁶³⁸ see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.70

⁶³⁹ Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p. 190

⁶⁴⁰ Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.20

⁶⁴¹ Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.

⁶⁴² Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p. 19

⁶⁴³ Greg Bamber, Russell D. Lansbury, Nick Wailes (2004), *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage 2004, p.256

held that if a collective agreement contained an express prohibition of strikes, the trade union could be liable for damages for breach of such an obligation.⁶⁴⁴

By an Act of 1920, a Central Arbitration Board was established. The board was assigned the task of dealing with the interpretation of collective agreements. However, the jurisdiction of the Board was limited. It only heard cases where the parties had agreed to submit the issue to it.⁶⁴⁵

In 1928 the Collective Bargaining Agreements Act was adopted, and at the same time the Swedish National Labour Court was set up to replace the Central Arbitration Board. Initially there was strong labour opposition to these laws but they were soon largely accepted.⁶⁴⁶ The Act was the first legal recognition of union rights⁶⁴⁷ and it put an emphasis on the peace obligation. Since the Act only provided rather sketchy coverage on the issue of legal effect, the matter was expanded on by way of the case law of the Labour Court. The Court, in its first years, actively acted as a norm-maker, elaborating many of the principles of collective agreements, which to a large extent are still in force.⁶⁴⁸ The rules of the Collective Agreements Act of 1928 were then inserted into the Co-Determination Act without any major alterations.⁶⁴⁹

In 1932, after the election of the first Social Democratic government, the situation changed. The unions adopted a different strategy, as they no longer saw the

⁶⁴⁴ Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.

⁶⁴⁵ see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.70

⁶⁴⁶ The Collective Contracts Act of 1928 said that contracts between labour and management had to be respected. During the term of a contract, the parties could not resort to industrial actions, e.g., strikes, lockouts, slowdowns, and the like.

Initially, the labour side was apprehensive about this legislation. It created pressure on both sides to live up to their agreements and to look for peaceful solutions to disagreements. However, in the succeeding years, both parties realized that the legislation helped them accomplish most of their goals in a peaceable and efficient manner. (Haug, Ralph (2004), *History of Industrial Democracy in Sweden: Industrial Revolution to 1980*, International Journal of Management, Vol. 21, March 2004).

⁶⁴⁷ Greg Bamber, Russell D. Lansbury, Nick Wailes (2004), *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage 2004, p.256

⁶⁴⁸ For further details, see Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.19-20

⁶⁴⁹ Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p. 191

government as inevitably an ally of the employers.⁶⁵⁰ This was the beginning of a new era of labour-management co-operation which was based on greater mutual trust.⁶⁵¹

Pressure from the legislator brought an end to the standstill between the collective partners.⁶⁵² In 1936 an Act on the Rights of Association and of Negotiation was passed which protected the rights to organize and to bargain collectively and made discrimination because of trade union activity illegal.⁶⁵³ This Act completed the legal framework for self-regulation and collective bargaining covering the whole private sector.⁶⁵⁴ It imposed a legal duty on employers, even if they were not bound by a collective agreement, to negotiate with representatives of the employees' union and they were prohibited from dismissing employees or otherwise discriminating against them because of trade union membership or activity, with a consequent liability to pay damages for breach of this.⁶⁵⁵ This Act has now been replaced by the Co-determination Act of 1976.

In 1938, a basic agreement between LO and SAF - The Salttjobaden Agreement which was based upon "freedom under responsibility", was reached.⁶⁵⁶ This was the first formal collective agreement between the central organizations in the private sector, and part of it is still in force.⁶⁵⁷ The agreement was considered as a sort of "peace treaty" that regulated relations between employers and unions with regard to collective bargaining procedures and industrial actions such as strikes and lockouts. Both sides affirmed their desire to renegotiate settlements and to avoid both industrial actions and governmental interference. This desire to solve problems through

⁶⁵⁰ Greg Bamber, Russell D. Lansbury, Nick Wailes (2004), *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage 2004, p.256

⁶⁵¹ Source: *Labour relations in Sweden*, Swedish Institute February 2005, p.2.

⁶⁵² Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.20

⁶⁵³ see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.74

⁶⁵⁴ Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.

⁶⁵⁵ see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.74

⁶⁵⁶ Haug, Ralph (2004), *History of Industrial Democracy in Sweden: Industrial Revolution to 1980*, International Journal of Management, Vol. 21, March 2004.

⁶⁵⁷ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-48

collective bargaining remained the basic principle of Swedish labour relations until the codetermination movement of the 1970's.⁶⁵⁸

This basic agreement laid down a uniform set of rules on grievance procedures and on the handling of labour disputes touching on functions essential to the community. Moreover, the employers' right to terminate employments was reduced as was the possibility of involving any third party in an industrial action.⁶⁵⁹ This opened the way for further agreements between the main organizations which are often referred to as collaboration agreements. It should be added that similar agreements were entered into between SAF and the organizations of white-collar workers and those in the public sector.⁶⁶⁰

On the basis of the relations between SAF and LO resulting from the Saltsjöbaden Agreement 1938, a highly centralised system of industrial relations was built up. It was based on collective bargaining and self-government with very little further state intervention by way of legislation or otherwise.⁶⁶¹ In the field of collective labour law, there were only a few rather simple laws, in principle neutral, which left it to the trade organizations to build up their inter-relations.⁶⁶² Collective bargaining was established at three levels: central, national branch and local level.

This system worked smoothly and effectively. It led to a high degree of conformity and industrial peace. The Swedish system based on collective bargaining became a sort of model⁶⁶³ for orderly industrial relations and attracted international attention⁶⁶⁴ during the 1950s and 60s.

⁶⁵⁸ Haug, Ralph (2004), *History of Industrial Democracy in Sweden: Industrial Revolution to 1980*, International Journal of Management, Vol. 21, March 2004.

⁶⁵⁹ Ole Hasselbalch (2002), *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, p.19

⁶⁶⁰ Ibid, p.19

⁶⁶¹ see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.81

⁶⁶² Ibid, para.81

⁶⁶³ One of the characteristics of that model has been the notion that the social partners share a common responsibility toward society to act in a balanced and responsible way, in particular in handling industrial conflicts. See: Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-48.

⁶⁶⁴ see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, para.82

During the 1930s, white-collar employees had also begun to unite. The Swedish Confederation of Salaried Employees (TCO) was formed in 1944 and the Swedish Confederation of Professional Associations (SACO) in 1947. At first only university graduates were covered by the latter organization, but over the years SACO has encouraged other related groups to join.⁶⁶⁵

During the 1940s, a number of basic agreements were signed. They concerned health and safety (1942), vocational training (1944), works councils (consultative bodies with employer as well as union representatives, 1946), and time-and-motion studies (1948). During the 1950s, similar deals were concluded in the white-collar area. In the 1964 April settlement, the 1938 basic agreement was amended and just cause for dismissal for personal reasons was introduced.⁶⁶⁶ Because of these agreements and the co-operative "Spirit of Saltsjöbaden", the number of industrial actions in the Swedish labour market was very low. For some 35 years, virtually no new labour legislation was introduced.⁶⁶⁷

The 1970s was characterized by demands related to joint decision-making which led to new regulations on consultation and information as well as certain restrictions on the employer's prerogatives.⁶⁶⁸ Generally, a wide range of labour legislation was adopted to bring about the changes that labour demanded.⁶⁶⁹ The 1976 Act on Co-determination at Work (MBL) attracting the most attention.⁶⁷⁰ It replaced previous statutes dating from 1920, 1928, and 1936, and added several provisions aimed at introducing employee participation in managerial decision making. It governed virtually the entire field of collective bargaining and industrial relations.⁶⁷¹

⁶⁶⁵ Source: *Labour relations in Sweden* - Swedish Institute February 2005, p.2.

⁶⁶⁶ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-49

⁶⁶⁷ Source: *Labour relations in Sweden* Swedish Institute February 2005, p.2.

⁶⁶⁸ Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.

⁶⁶⁹ Haug, Ralph (2004), *History of Industrial Democracy in Sweden: Industrial Revolution to 1980*, International Journal of Management, Vol. 21, March 2004.

⁶⁷⁰ Source: *Labour relations in Sweden* - Swedish Institute February 2005, p.2.

⁶⁷¹ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-44

Meanwhile, following the extension of collective bargaining to the public sector in the 1960s, further steps were taken in 1976 in order to make such bargaining in the public sector more equal to the private sector.⁶⁷²

In 1982 another agreement entitled "The Development Agreement" was signed.⁶⁷³ It optimistically acknowledges the need for continuous change and stresses the need for business flexibility and the concomitant continuous process of adaptation, both for companies and for employees.⁶⁷⁴ Under the agreement the employee is treated as an individual with legitimate personal expectations of his or her own.⁶⁷⁵

The 1980s saw a wide gap grow between the views of employers and unions on quite a number of issues such as employee (or wage-earner) investment funds and pay policy, unemployment, taxes, public expenditures, immigration and social insurance benefits.⁶⁷⁶ The system also started to encounter growing criticism. Employers argued that less room was left for adapting contracts to the conditions prevailing in specific industries and companies.⁶⁷⁷ The structure of collective bargaining and the content of collective agreements underwent major changes. One prominent feature of these changes is the decentralization of collective bargaining.⁶⁷⁸ In 1990, SAF decided that it would no longer be involved in wage bargaining. Since then negotiations have been carried out at the sector level between national employers' associations and national trade unions.⁶⁷⁹

In 1997, the Industry Agreement concerned with collective bargaining was entered into. It builds on the 1938 agreement and tries to reinforce orderly procedures

⁶⁷² Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.

⁶⁷³ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-49

⁶⁷⁴ Ibid, p.19-49

⁶⁷⁵ Ibid, p.19-49

⁶⁷⁶ *Labour relations in Sweden* - Swedish Institute April 1996.

⁶⁷⁷ Some critical appraisals such as nationally mandated supplements for low-paid employees resulted in very narrow pay differentials. The system became inflationary when the pay recommendation of the national confederations was seen as a floor rather than as a ceiling etc. (See: *Labour relations in Sweden* - Swedish Institute April 1996).

⁶⁷⁸ See also Section 2.10. *Classification of collective agreements*.

⁶⁷⁹ Initially LO was strongly opposed to this decision, but LO's member unions have begun to accept—and even appreciate—the new order. In 1995 most pay rounds were held separately. See: *Labour relations in Sweden*- the Swedish Institute, April 1996.

and safeguard industrial peace. It foresees a stronger role for neutral mediators or even arbitrators in interest disputes. Hailed as a “new Saltsjöbaden agreement,” it has so far lived up to the realities of the labour market. It has proved able to withstand pressure from all sides very successfully.⁶⁸⁰ In 2000 the National Mediation Office was founded by the government, replacing the old conciliators' office. This institution plays a role in the collective bargaining process.⁶⁸¹

Sweden became a member of the European Union in 1995 and this has led to new legislation which was needed to implement the EC Directives. Some amendments of the Co-Determination Act and relevant legal documents were made⁶⁸² and some new documents on the question of collective bargaining and collective agreements were also introduced. Among the key statutes are:⁶⁸³ the 1996 Act on European Works Councils,⁶⁸⁴ the 2004 Act on Employees' Involvement in European Companies,⁶⁸⁵ the 2006 Act on Employees' Involvement in European Cooperative Societies,⁶⁸⁶ and the 2008 Act on Employee Participation in Conjunction with Cross-Border Mergers.⁶⁸⁷

In sum, over the years, the Swedish collective agreement system has developed soundly and continuously despite a rocky period at the start. Employers and unions were regarded as strong enough to reach their own agreements on pay and other conditions of employment. For many years nationwide collective agreements played an important role. The system was based on a strong tradition of self-regulation and legislation on collective agreements was only gradually established. The passing of appropriate laws moved rather slowly at first but has been happening more rapidly

⁶⁸⁰ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-49

⁶⁸¹ Source: *Labour relations in Sweden* - Swedish Institute February 2005, p.3.

⁶⁸² Birgitta Nystrom (2005), *The evolving structure of collective bargaining in Europe 1990-2004*, Sweden, national report, pp 36-37

⁶⁸³ For further details, see: Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-44

⁶⁸⁴ This Act was issued in order to implement EU directive 94/45/EC on European Works Councils.

⁶⁸⁵ This Act aims at implementing EU directive 2001/86/EC on Employees' Involvement in European Companies.

⁶⁸⁶ This implements EU directive 2003/73/EC on Employees' Involvement in European Cooperative Societies.

⁶⁸⁷ This aims to implement EU directive 2005/56/EC on Employee Participation in Conjunction with Cross-Border Mergers.

during the last few decades, especially in the 1970s. There is a close interplay between legislation and collective agreements. Case law created by the Labour Court is also of great importance.

3.2.2. Collective agreement legislation and collective agreement development in Vietnam

Unlike the case in Sweden, collective agreements only came into existence in Vietnam relatively late, primarily after the launch of a market economy in 1986. The Vietnamese Trade Union was formed in the 1920s, but due to historical conditions, until late 1980s many functions of a conventional trade union such as the collective bargaining were not performed. The trade union has been regarded as a politico-social organization, its structure integrates into the State apparatus and enterprises management (see Section 4.1.1. Parties to collective agreements below). Despite this, the legal documents dealing with labour matters and collective agreements were enacted in the 1940s when the new Government of Democratic Republic of Vietnam had just been established.⁶⁸⁸

The first body of law addressing collective agreements is Ordinance No 29/SL (1947), which was signed by President Ho Chi Minh. Collective agreements were covered by Title III of the Ordinance. The document introduced a set of rules that regulated the labour relations of *a market economy*. The Ordinance provided for various impressively progressive and practical regulations, the like of which have barely been seen in any subsequent legal documents on collective agreements. As an example, the concept of collective agreements was defined in a way very close to that to be found in the ILO document.⁶⁸⁹ The Ordinance recognised employees' delegators as actors who can conclude collective agreements, provided that they have been authorized in writing by the respective employees.⁶⁹⁰ The term of a collective agreement could be either definite or indefinite.⁶⁹¹ A grievance procedure was set up in a way that is very close to the relevant regulation of many Western countries: Trade

⁶⁸⁸ The Democratic Republic of Vietnam was proclaimed in Hanoi on September 2, 1945. After the proclamation of the new government, many laws in different sectors were soon enacted, including documents on labour relations.

⁶⁸⁹ See Article 37 of the Ordinance

⁶⁹⁰ See Article 38 of the Ordinance.

⁶⁹¹ See Article 41 of the Ordinance.

unions could, on behalf of their members (regardless of whether it was a labour collective or employee individuals), put in claims for damages.⁶⁹² Registration procedures, the day when an agreement came into effect, its sphere of application, its normative effect, collective agreement extensions, new affiliation and termination of membership were all handled in a thorough way.⁶⁹³

Generally speaking, the Ordinance was the major document controlling labour market in the early years of the new Government. It contained clear and concrete clauses covering most of the fundamental issues relating to industrial relations and collective agreements. It is a pity that in the context of a prolonged war and unrest in political and socio-economic life, it had no chance of being applied. No collective agreements were in fact signed in this period.⁶⁹⁴

In 1954, the Geneva Conference ended both the war in the North and France's colonial presence in Vietnam. The country was temporarily partitioned into 2 states.⁶⁹⁵ In the North, reconstruction was started while in the South war continued. In the new political context in which the South remained an extensive battlefield, the North started playing the role of the “rear” giving significant support to the South Vietnamese fighting against the army of the Republic of Vietnam, the new government in the South and, later, American troops.⁶⁹⁶

In order to mobilize the financial and other material resources needed for supporting the South, a centrally-planned economy was established. Almost all undertakings within the territory were under the direct governance of the state. All businesses were controlled by mandatory plans, aimed at different governmental

⁶⁹² See Article 47 of the Ordinance.

⁶⁹³ See Article 39, 40, 43, 44, 45 of the Ordinance.

⁶⁹⁴ Vietnamese labour law -2009- Hanoi Law university student book - Chapter VIII: Collective agreements, Section 2.1 Collective agreements of a centrally planned economy and the necessity of a change.

⁶⁹⁵ After the North and South were divided politically in 1954, they adopted different economic ideologies: communist in the North and capitalist in the South. In the North, Vietminh forces continued to control the old government which had been known as the Democratic Republic of Vietnam - a Communist State under President Ho Chi Minh. In the South, the Republic of Vietnam was proclaimed (in 1955). The US installed Ngo Dinh Diem as Prime Minister of the government.

⁶⁹⁶ The South Vietnamese who opposed Diem's rule and desired the reunification of Vietnam under the Hanoi government of Ho Chi Minh organized the National Liberation Front. Supported and later directed by the Vietnam People's Army in the North, they launched guerrilla attacks in the South against Army of the Republic of Vietnam military targets and, later, American troops.

targets. Such production units could be in the form of state-owned enterprises, state farms or agricultural co-operatives. Private business was excluded from the economy.⁶⁹⁷ In this period, the spirit of collective ownership was highlighted. The role of enterprises was to fulfill production tasks and, indeed achieve a higher result than called for by the quota.

In order to govern and co-ordinate individual employees' activities at work so as to fulfill production plans, collective contracts were one of the various means which were resorted to. In 1957, a Trade Union Law was passed.⁶⁹⁸ The law provided that *"In State-owned Companies⁶⁹⁹, trade unions, on behalf of the labour force of the company contribute to company control and may conclude collective contracts with the head of the company"*.⁷⁰⁰ On this basis, Decree No 172 on collective contracts which applied to employees in State enterprises was issued in 1963.⁷⁰¹ A temporary Regulation on collective contracts was attached to it.

The Decree defined the principles governing collective contracts as voluntariness and socialist co-operation between the director of the enterprise and the leading members of the executive board of the enterprise trade union. Employee consultation had to be included⁷⁰² and collective contracts had to be established based on the actual conditions and circumstances of the enterprise, with the aim of fulfilling production plans and obtain increased quantities.⁷⁰³ Collective contracts served not only as a means of boosting production, but also a way of improving the employees' working life.⁷⁰⁴

⁶⁹⁷ After the war ended in the North, during the first three years of economic reconstruction 1955-1957, 3.065 private enterprises were established (including 957 industrial units, 314 transportation services, 1714 commercial units). From 1960-1987, private enterprises were excluded from the economy (all of them were gradually nationalized and transformed into state-owned enterprises). See: Cao Ba Khoat (2004), *Uncle Ho's lesson: Treatment to entrepreneurs*, Research Center for Entrepreneurship Development.

⁶⁹⁸ The law was enacted on 05 Nov.1957.

⁶⁹⁹ During the period 1960 to 1986, no types of private enterprises were accepted in the economy (see above).

⁷⁰⁰ Article 6 of the Law.

⁷⁰¹ The Decree was issued on 21 Nov.1963.

⁷⁰² See Article 1, 4, 5 of the Temporary Regulation on Conclusion of Collective contracts in State-owned Enterprises (the Regulation was enclosed with the Decree N^o 172 dated 21 Nov.1963).

⁷⁰³ See Article 2 of the Temporary Regulation on Conclusion of Collective contracts in State-owned Enterprises.

⁷⁰⁴ Ibid, Article 2.

The subject matters of collective contract consisted of fulfilling production targets; occupational safety and health; company obligations regarding the implementation of relevant regulations in the field of labour and company responsibility for supporting employees in improving their political awareness, academic knowledge and professional skills.⁷⁰⁵

Thus, in the early stages of a centrally planned economy which was established in response to difficult circumstance, involving coping with a prolonged war in the South, the collective contract mechanism did make a contribution because it promoted co-operation between labour and management in state-owned enterprises. However, collective contracts in this period also suffered from a relatively serious limitation: they were politicised and could not serve as a tool for resolving differences and balancing the interests of the parties involved since they could not be used to depart from the defined needs of the enterprises themselves.

Due to this shortcoming, together with the lack of knowledge on collective agreements and the general difficulties facing both production and economic administration, the conclusion and implementation of collective contracts became formalistic.⁷⁰⁶ Collective contracts were in practice signed for form's sake only and had very little meaning for enterprises.⁷⁰⁷ Any movement towards the development of collective agreements had been declining since at least 1978 and soon fell into total oblivion.⁷⁰⁸ Only after the proclamation of the campaign of socio-economic innovation in the late 1980s, did the matter of using collective agreement to regulate labour relationship start to be discussed again.

Notably, under the new economic mechanism, collective agreements (although under different names) were concluded in some enterprises in the South. Some major collective agreements were the Shell agreement (concluded on 23 February 1968 between the Vietnam Shell company and the Vietnamese Labour Union of Petroleum and Chemical Engineering), the Unified Rubber Industry Collective agreement

⁷⁰⁵ Ibid, Article 2.

⁷⁰⁶ Diep Thanh Nguyen (2005), *Basic knowledge on labour law*, student book - Can Tho University, p.48

⁷⁰⁷ The fact that there was no real collective bargaining in this period can be explained by the problem of ownership. In a state-owned enterprise, the employer was not the real owner of the enterprise estate. This is also the reason why state-owned enterprises, in many instances, function ineffectively.

⁷⁰⁸ Diep Thanh Nguyen (2005), *Basic knowledge on labour law*, student book - Can Tho University, p.48

(signed on 23 May 1960), the Esso Corporation Agreement (signed on 01 January 1965), and the collective agreement covering the electrical industry (signed 21 August 1971).⁷⁰⁹

After the reunification of the nation⁷¹⁰, the country had a planned economy until 1986. Though the government introduced several plans for socio-economic development, the country remained stagnant.⁷¹¹

Realizing that socio-economic development policies which had functioned effectively in the war period, were no longer fully appropriate and should not be used in nation-building plans during peacetime,⁷¹² Vietnam in 1986 launched a political and economic renewal campaign that introduced reforms intended to facilitate the transition from a centralized economy to a "socialist-oriented market economy."⁷¹³

After the shift from a centrally planned economy to a market one, labour relations, too, started to change their character. In the centrally planned economy based on public ownership of the means of production and going along with the overall policy of control and subsidization by the State (in terms of employments, wage and insurance) the work capacity of employees was regarded as having social, human and spiritual value only and was not regarded as a commodity capable of exchange. Industrial relations thus had no need to treat issues of labour and capital. In the new context, where enterprises of all types must compete to survive and where there is a constant imbalance between the demand for and the supply of labour, differences in position (and standpoint and interests) between labour and management

⁷⁰⁹ Ibid, p.48

⁷¹⁰ In 1976, Vietnam was officially unified and renamed Socialist Republic of Vietnam, with its capital in Hanoi.

⁷¹¹ During this period, two five-year development plans were introduced: the Second Five-Year Plan (1976-1981) and the Third Five-Year Plan (1981-1985). The former set extraordinarily high goals for annual growth rates, however, the Plan's aims were not achieved: the economy remained dominated by small-scale production, low labour productivity, unemployment, material and technological shortfalls, and insufficient food and consumer goods. The latter emphasized the development of agriculture and industry. Efforts were also made to decentralize planning and improve the managerial skills of government officials. (See: Tuyet L. Cosslett and William R. Shaw (1987) "*Vietnam country study*" - Chapter III: Economy; Section 3: The Economic Roles of the Party and the Government).

⁷¹² See Le Mau Han, Trinh Muu, Mach Quang Thang (2007), "*History of Vietnamese Communist Party*" student book, Published by Ministry of Education and Training, pp.145-146.

⁷¹³ The innovation program combined government planning with free-market incentives and encouraged the establishment of private businesses and foreign investment, including foreign-owned enterprises. According to *Vietnam country profile*, December 2005, p.8 Library of Congress Federal Research Division

have become manifest, the relationship between "master" and "servant" is now more conflictual, and complicated and also harder to handle.

Thus the regulations contained in Decree No 172/CP (mentioned above) now became unhelpful and incompatible because they had only a limited scope (state-owned enterprises). Further, according to the Decree, the conclusion of a collective contract was seen a compulsory task; the regulation did not start by considering the nature and character of labour relationships in a free labour market. Collective agreements now have to be used to resolve problems and conflicts between the two parties, reinforcing their ability to cope with severely competitive conditions and sustain and develop the underlying business (and their interests). The point was no longer to highlight the spirit of collective ownership in the way that collective contracts had done in the past.

Finally, after the 1986 proclamation of economic reform and to meet the demand of the newly-launched market economy, Decree No 18 on collective agreements, among other documents, was introduced in December 1992. Unlike earlier statutes in the field, the coverage of the Decree was not restricted to the public sector but it also covered the private sector.⁷¹⁴

Collective agreements, under the new regulation, are now seen as representing a real compromise between the parties themselves with a view to balancing their rights, interests and obligations. The principles governing collective agreements are voluntary commitment and fairness, employee participation (collective agreements must be made public), statutory compliance and securing communal and social interests.⁷¹⁵ The issues covered by collective agreements were also extended and now include wages, employment and employment security, working time, social insurance, working conditions, occupational safety and health.⁷¹⁶

After the introduction of Decree No 18, a number of collective agreements were reached at plant level. In 1993, 53 enterprises in Ho Chi Minh City and 17 enterprises

⁷¹⁴ According to Article 2 of the Regulation enclosed to the Decree, collective agreements are concluded in enterprises of all form of ownership, including private and foreign-owned enterprises. This implied the Government's recognition of the existence of private-owned enterprise which had not been seen during the relatively long period before this innovation.

⁷¹⁵ See Article 3 of the Regulation.

⁷¹⁶ See Article 7 of the Regulation .

in Ha Noi had collective agreements. In 1994, some 250 company collective agreements were concluded in the country.⁷¹⁷

It is rightfully said that the change from "collective contracts" to "collective agreements" was more than a change of names but also indicated a change in nature and content.⁷¹⁸ In particular, the existence of labour disputes was again recognized in labour law documents.⁷¹⁹

Decree No 18 covered most basic issues of collective agreements, but it was still rather sketchy and did not fully meet the demand for regulating collective bargaining in a free labour market. There remained some limitations and shortcomings as well as unclear stipulations which led to misunderstandings; for example, it had been understood that the conclusion of collective agreements was mandatory.⁷²⁰ The procedure for dispute settlement provided for in Chapter III remained skeletal but still applied to all categories of labour disputes, regardless of any differences between them.⁷²¹ It was soon replaced by the Labour Code introduced in 1994.

Though the regulation provided by Decree No 18 was imperfect, it had a great significance in the development of legislation on collective agreements. It was considered as a transitional legal document⁷²² laying down cornerstones for establishing collective agreements in a market economy. Together with some other earlier legal documents, Ordinance No 29, for example, it provided the prerequisites needed for the subsequent building up of the more efficacious regulation on collective agreements that is contained in the Labour Code.

The enactment of the Labour Code in 1994 is viewed as a further important step in the history of Vietnamese labour legislation. It was the first time a high level statute

⁷¹⁷ See Annual report of the Ministry of Labour - Invalids and Social affairs in 1993, 1994.

⁷¹⁸ Hanoi law University (2009), *Vietnamese Labour Law*, student book 2009, p. 264

⁷¹⁹ Conflicts or disputes had not been recognized in a socialist society. This document recognized the existence of disputes and conflicts and this was seen as a revaluation of the way of thinking.

⁷²⁰ The Regulation provided that the administrative authority was responsible for, among others, giving instruction and supervising and speeding up the collective agreement conclusion in enterprises (see: para.1 Article 15 of the Regulation).

⁷²¹ See Article 16 of Decree No 18/CP (and Articles 21, 22, 23 of Decree 165/HDBT dated 12 May 1992, which were referred to by the Decree No 18/CP).

⁷²² Hanoi Law University (2009), *Vietnamese Labour Law*, student book, p.264.

covering nearly every aspect of the labour relationship was introduced. In the Labour Code, collective agreements are to be found Chapter V (Article 44 to Article 54).

The Labour Code does not impose any limit on the matters that can be agreed to by parties to collective agreements, provided that the spirit and standards of labour law and other relevant laws are respected. Following the issuance of the Labour Code, a number of supplementary documents have been enacted. In the collective agreement sector, we note Decree No 196/CP dated 31 December 1994 (detailing and guiding the implementation of a number of articles of the Labour Code on collective agreements), Decree No 93/2002/ND-CP dated 11 November 2002 (amending some Articles in the Decree No 196/CP) and Decree No 113/ND-CP dated 16 April 2004 (providing administrative corrective measures and liabilities for labour law infringements - including breaches of collective agreements – This document was just replaced by Decree No. 47/2010/ND-CP dated May 06, 2010).

After 8 years of implementation, the Labour Code was amended in 2002, and this involved some changes to chapter V on collective agreements.⁷²³

Based on the new regulation, many collective agreements have been established and they continue to increase in number. Up to the present, thousands of collective agreements have been concluded across the country. This is remarkable progress in the development of collective bargaining. However, compared to the total number of enterprises, the number of collective agreements is still too low. Further, many of them are of rather poor quality with wording simply copied from the legislation even though the statutory regulation only provides minimum standards. The shortcomings of the collective agreement system can be linked to various factors, such as the powerlessness of the existing trade unions, the ineffectiveness of the law enforcement and the ongoing psychological influences derived from the earlier period of state control.

Concluding remarks

⁷²³ Some adjustments have been made: i.e. The number of representatives of two sides for bargaining are not necessarily to be equal as before (Article 45); the day on which a collective agreement comes into effect is the signatory day, if the two parties have not agreed to another day (Article 47); a collective agreement remains valid irrespective of whether it has been registered (Article 48).

Over the course of many decades international labour standards have grown into a comprehensive system of instruments governing various aspects of work and social policy. The international labour standards are aimed at sustainable socio-economic development and are universal. They are designed in a way that allows all countries, regardless of their economic or social status, to ratify and implement them.

One of the most important principles on which ILO regulations are based is freedom of association and collective bargaining, which has been seen as essential to sustained progress. It is worth emphasizing that this (and other labour standards as well), was acknowledged at an international level at a time when its practical value in regulating the labour market had already been demonstrated, especially in many advanced European economies. That is why implementing the related international labour standards and adopting the measures provided for them in developing a national bargaining system may be helpful and beneficial to many less advanced economies.

The conditions and the level of socio-economic development vary from country to country, so the significance and practical impact of the international labour standards on the various national systems will itself vary. In this regard, there is a large difference between Sweden and Vietnam: For Sweden, the international labour standards seem not to have had a very significant impact on the system as national labour standards were already highly developed. Vietnam, however, is still on the path to establishing the necessary conditions for the adoption of such universal regulation.

It is obvious that Sweden and Vietnam have very different labour market histories. While in Sweden, collective agreements and the related legislation are well-established and have been operating in a healthy way for many decades, in Vietnam the legislative system on collective bargaining is still in the process of taking its form. Besides, unlike the Swedish labour market model which is based on dialogue between social partners and negotiation on collective agreements, in Vietnam, for a number of reasons, the involvement of the state remains significant. Trade union activities have a strong political flavour and the lack of meaningful collective bargaining is a big problem for the Vietnamese labour market. In order to establish a sound setting for collective bargaining in Vietnam, it will be necessary to renew the legal environment

and, above all, to enhance the practicality of the legislation governing labour relations.

Chapter 4: Current regulation on collective agreements in Sweden and Vietnam

4.1. Conclusion of collective agreements

In this section, the steps needed and other issues relevant to concluding collective agreement will be taken into account. Since there are both similarities and differences between the Swedish and Vietnamese legal systems, the content is organized as follows: for each legal issue, a general review of the common features of the two legal systems will be mentioned, after which the special features of each system will be examined. Questions relating to what in the Vietnamese legal system need to be improved will be noted but such questions will only be considered in detail in Chapter 5.

4.1.1. Parties to collective agreements

4.1.1. 1. Employee side

As trade unions are of the most influential elements, greatly affecting the quality of the collective bargaining and the materialization of collective agreements as well, this section is intended to concretely present some important legal and practical aspects that reflect their capabilities and conditions to act in the collective agreements sector.

4.1.1.1.1. Trade union in Sweden

According to the Co-Determination Act (Section 23), a collective agreement is entered between an employers' organization or an employer and an employees' organization. The concept "employees' organization" in Sweden implies trade unions or trade union associations only because Sweden has adopted the single channel system of employees' representation in which workers are only represented by a trade union. This feature makes Sweden different from some other EU countries which

have a dual channel system involving both trade unions and work councils on the employee side.⁷²⁴

The employee representative system (trade unions) in Sweden possesses very distinctive features. Each of them to a certain extent or reflects the structure of collective bargaining and the capacity of presentation of the collective agreement system. They are as follows:

Swedish trade unions are basically organized on an occupational or industry-wide basis.

There are three major labour union systems in Sweden, each dealing with a different part of the industrial or occupational structure: one for blue-collar workers, one for white-collar workers and one for professional/graduate employees. The ultimate representative organizations of each of the systems is a confederation: the Swedish Trade Union Confederation (LO), the Swedish Central Organization of Salaried Employees (TCO) and the Swedish Confederation of Professional Associations (SACO), respectively. These confederations are made up of national trade unions. The national trade unions, in turn, consist of regional or local ones.

The largest union body is the LO and its affiliated organizations, which organizes manual workers and has about 1,700,000 members. The second largest is the TCO and its affiliated organizations, which organizes mostly non-manual workers and has about 1,200,000 members. The third largest is SACO and its affiliated

⁷²⁴ Trade Unions and work councils are basically distinguished by their legal status and their functions.

A trade union must be a separate legal entity, formed freely and voluntarily, with the purpose of improving working conditions, including engaging in labour disputes. Thus, trade unions have the full legal status and function as a representative body.

Works councils are permanent elected bodies of workforce representatives. Their overall task is to promote cooperation within the enterprise for the benefit of the enterprise itself and employees. The main task of works councils is participation. (See: Epp Kallaste, Krista Jaakson, Raul Eamets (2006), *Union vs non-union representation of employees if both representatives have similar legal rights*, Tartu University Press 2006).

It should be noted that the advantage of single channel systems is their simplicity, as union and council functions are merged. The disadvantages are that non-union members, and employees in firms in which unions are not recognized, may be excluded from representation. This problem is relatively small in countries such as Sweden, Finland and Denmark, where unionization rates are high, but it is a problem where the basis of union membership is small, as in Poland and Lithuania. (see: Jelle Visser, 2004, *Patterns and variations in European industrial relations*, trong *Industrial relations in Europe*, Luxembourg, Office for Official Publications of the European Communities, 2004, p.21).

organizations, which organizes graduate employees and has over 600,000 members.⁷²⁵ The balance of membership between the three confederations has changed in recent years, with SACO growing and LO and, to a lesser extent, TCO both losing members.⁷²⁶

In order to avoid conflicts over membership (and also sweep away obstacles that may confront the process of concluding and applying collective agreements), demarcation agreements may be signed between trade unions. These have been signed between most LO and TCO unions.⁷²⁷ There has also been a tendency towards mergers between trade unions to make them become stronger and represent their members interests better.⁷²⁸

Trade unions in Sweden are highly-organized with bodies established for dealing with collective agreements at different levels.

The continuity of development of the employee representative system led to the formation of trade union organizations at national level. From the start, employee representation has taken place at local, industrial and national levels. The three-tier structure of trade unions affects labour relations and also determines the collective bargaining structure, which has at least three separate bargaining levels,⁷²⁹ equivalent to the three separate levels of collective agreements in Sweden. Central employees' organizations, industry-wide employees' organizations and local employees' organizations are parties to collective agreements at national, industrial and company level, respectively.

- At central level, the central trade union organizations (LO, TCO, SACO) are the actors. Among these, only LO concludes collective agreements. TCO and SACO have never played such a role, however. Instead, trade unions affiliated to TCO and

⁷²⁵ See: <http://www.lo.se>; <http://www.tco.se>; <http://www.saco.se>, respectively.

⁷²⁶ In number, LO has suffered most, losing 160,000 members between 2001 and 2006. TCO has lost 16,000 over the five years from 2001 to 2006. SACO's graduate membership, on the other hand, has increased by 72,000 over the same five-year period (according to "Collective bargaining", Sweden, ETUI 2009).

⁷²⁷ Roger Blanpain, Thomas Blanke (2005), *Collective bargaining and wages in comparative perspective - Germany, France, The Netherlands, Sweden and the United Kingdom*, Kluwer 2005, p.118

⁷²⁸ Reinhold Fahlbeck (1999), *Trade Unionism in Sweden*, Discussion paper, International Institute for Labour Studies, No. 109/1999, p.3.

⁷²⁹ Reinhold Fahlbeck (2008), *Employee participation in Sweden: union paradise and employer hell or...?*, Lund: Jurisforlaget 2008, p.7

SACO have joined force in cartels established specifically for collective bargaining. Examples of such cartels are the Federation of Salaried Employees in industry and Services (PTK) and the Public Employees' Negotiation Council (OFR/SPO).⁷³⁰

Since the 1980s, the LO has no longer concluded central agreement on wage increases.⁷³¹ Each union within LO signs its own agreement with its counterparts.⁷³² The same hold true for PTK (including TCO and SACO) in the private sector.⁷³³ The ending of centralized bargaining has reduced the power of the confederations and individual unions now have greater room for manoeuvre and greater influence. The LO today becomes a forum for common discussions on the scope for wage increases.⁷³⁴ Generally, the confederations still do play a role in co-ordinating union claims.⁷³⁵

- Sectoral/industrial/branch trade unions (national unions)

The parties to industrial collective agreements are member unions of the employee confederations mentioned above. Currently (2009) they consist of 15 individual unions in LO, 16 unions in TCO and 23 independent associations within SACO.⁷³⁶

⁷³⁰ Roger Blanpain, Thomas Blanke (2005), *Collective bargaining and wages in comparative perspective - Germany, France, The Netherlands, Sweden and the United Kingdom*, Kluwer 2005, p.118

⁷³¹ No collective agreements on pay have been signed by the federations as SAF pulled out of wage negotiations. However, a growing number of agreements have been concluded on other issues than wages. For example, since the 1990s there have been the following agreements signed between LO and Confederation of Swedish Enterprise: 1) Conversion support (the so-called *Omställningsavtalet* on support to workers in case of redundancies concluded in 2004). 2) Recommendation on adjustment of sector (industry) agreements for companies that become temporary members of the employers' associations within the Confederation of Swedish Enterprise (2005). 3) Collective Pension Insurance (2007). 4) Negotiations on a new basic agreement starting late in 2007 (PTK also included), although broken off in 2009 without results. See: Anders Kjellberg (2009), *Industrial Relations Foresight 2025 for Sweden: Presentation of Results and Comments*, p 16,17.

⁷³² According to LO (2007), *The Swedish Trade Union Confederation*, p.8, webpage: www.lo.se

⁷³³ In the past, the Cartel of Private Salaried Employees (PTK), entered into binding collective agreements on wages and other conditions of work, but that mandate was removed in the 1980s. The central, industry-wide mandate for PTK today is limited to matters concerning retirement, insurance and employment security, retraining and adjustment. see: Lars Gellner, Lars Sydolf (2008), *Swedish labour law*, Norstedts Juridik AB, p. 18

⁷³⁴ According to LO (2007), *The Swedish Trade Union Confederation*, p.8, webpage: www.lo.se

⁷³⁵ Collective bargaining - Published 2009 by European Trade Union Institute.

⁷³⁶ See Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, Wolters Kluwer, para. 458, 476, 478

The two largest unions of the LO are the Swedish Municipal Workers' Union, with 525,000 members, and IF Metall, which was created by the 2006 merger of the metal workers' and industrial workers' unions and has 400,000 members.⁷³⁷ The largest union within TCO is Unionen, with approximately 500.000 members, which makes it the largest white-collar union in the world.⁷³⁸ SACO's biggest union is CF, the Association of Graduate Engineers with 120,000 members, followed by another teachers' union, LR, with 80,000 members.⁷³⁹

There are some smaller unions unaffiliated with these three confederations. Some of them have their own collective agreements.⁷⁴⁰ Despite non-affiliation, some of them play an influential role in their sector, such as the unions of foremen and supervisors as well as that of airline pilots. These two unions also enjoy unchallenged majority status in their sectors.⁷⁴¹

- Local trade unions

Local trade unions are often tied to particular companies. Usually, there are three local trade unions with their own collective agreements present at each workplace - one for each confederation.⁷⁴² As these unions have different membership criteria and follow strict organizational structure, they normally work in peaceful co-existence.⁷⁴³

The Act on Co-Determination in the Workplace gives an employees' organization the right to negotiate with an employer on any matter relating to the

⁷³⁷ Ibid, para. 458

⁷³⁸ Ibid, para. 476.

⁷³⁹ Ibid, para. 478

⁷⁴⁰ Roger Blanpain, Thomas Blanke (2005), *Collective bargaining and wages in comparative perspective - Germany, France, The Netherlands, Sweden and the United Kingdom*, Kluwer 2005- p.118

⁷⁴¹ Reinhold Fahlbeck (1999), *Trade Unionism in Sweden*, Discussion paper, International Institute for Labour Studies, No. 109/1999, pp. 6-7

⁷⁴² Roger Blanpain, Thomas Blanke (2005), *Collective bargaining and wages in comparative perspective - Germany, France, The Netherlands, Sweden and the United Kingdom*, Kluwer 2005, p.118

⁷⁴³ Multi-unionism leads to the possibility of the existence of even more than three representative bodies on the employees' side. Demarcation agreements help to avoid conflicts over membership. Also, for bargaining purpose, a union, e.g. LO, has a very strict organizational plan. In principle, all organized blue-collar workers at a work-place belong to the same union. All such attempts have shown the practical significance of amicable co-existence between trade unions.

relationship between the employer and any member of the employees' organization who is employed by that employer and vice versa.⁷⁴⁴

Swedish law on the one hand ensures that a trade union can not be prevented from performing its duties and on the other hand guarantees essential conditions for trade union staff to work.⁷⁴⁵ Once elected as a local trade union representative, a worker has a right to perform his or her union duties - negotiations, administrative work - without losing pay or other rights and privileges. Where negotiations are carried out outside regular working hours, the union representative receives overtime pay. Additional costs incurred are reimbursed if they are attributable to the employer.⁷⁴⁶ Trade union representatives are also entitled to priority in continued employment in case of employment shortage or redundancy etc.⁷⁴⁷

The trade union at the local workplace is considered the most important arena for the development of trade unions nowadays.⁷⁴⁸ Further, Swedish government does not often provide detailed stipulations on business activities. This naturally requires much activity and flexibility at grassroots level.

Trade unions are powerful forces and represent an overwhelming proportion of employees on the Swedish labour market.

Sweden is one of the EU countries with a very high degree of unionization. Though the percentage of union membership had been declining for some years, in 2007 some 73% of the labour force were trade union members.⁷⁴⁹ This figure

⁷⁴⁴ Section 10 Co-Determination Act.

⁷⁴⁵ Section 3 of the Trade Union Representatives Act.

⁷⁴⁶ See Section 6, 7 of the Trade Union Representatives Act

The time off for union activities may not, however, be longer than "necessary". For example, the time taken traveling to travel to a conference and back and the time taken for meals and for a normal night's rest could be regarded as "necessary". But union workplace activities - such as meetings, union elections or political activities - are not covered. Annika Berg, Arbetslivsinstitutet (1999) *Are trade union activities expensive for employers?*, Eurofound.

⁷⁴⁷ See Section 8 of the Trade Union Representatives Act.

⁷⁴⁸ Susanne Kopsen (2008), *Overpowering demands of learning-Learning in local trade unions at the workplace level*, European Research Network in Vocational Education and Training.

⁷⁴⁹ Adlercreutz, Axel/Nyström, Birgitta (2009), *Sweden*, ELL, Wolters Kluwer, para. 456.

indicates that the great majority of employees on the labour market are covered by collective agreements (91% in the same year -2007).⁷⁵⁰

Attempts have been made to explain the impressively high percentage of trade union membership in the Nordic countries and in Sweden in particular. It is rather clear that an employee joins a trade union in the first place because of his need to seek some kind of protection. The trade union's capacity to provide a "good service" where protection is concerned is thus the most influential factor.

Swedish trade unions have a good reputation as they have in the past carried out their task wisely and played an influential role. The unions have shown remarkable adaptability to new conditions, such as the rise of female employment and the emergence of a-typical employment.⁷⁵¹ It has also been observed that unions are both willing and capable of constructive inventiveness. For example, collective agreements in Sweden cover temporary work agencies and their hiring out of employees and thus have contributed enormously to the social acceptance and the rapid increase of temporary work.⁷⁵²

The pro-activeness of Swedish trade unions has been shown in the fact that the agenda of the unions is very broad. As far as working life is concerned, the trade unions offer a total package "from cradle to grave".⁷⁵³ Unions also assist members in their capacity as consumers. For example, it is recognized that one reason for Sweden's high union membership figures compared to other countries is that, since the 1930s, the unions have run the country's unemployment benefit funds (currently numbering 40).⁷⁵⁴ The Swedish LO offers comparatively cheap insurance policies and

⁷⁵⁰ Ibid, para. 456.

⁷⁵¹ Reinhold Fahlbeck (2002), *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, Scandinavian Studies in Law, Vol.43, p.110

⁷⁵² Ibid, p.110

⁷⁵³ Ibid, p.109

⁷⁵⁴ Source: *Labour relations in Sweden*, Swedish Institute February 2005, p.4.

A similar system can be observed in other Nordic countries, except Norway where the unemployment insurance fund system is administered by the state without union involvement. The membership rate in Norway is lowest with 56% (in 1995) while in the same year the rate in Denmark was 76%, Finland 78% and Sweden 85%. In Denmark, Finland and Sweden even non-unionized employees can join the unemployment fund system and are entitled to the same benefits as unionised employees. (See: Reinhold Fahlbeck (2002), *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, Scandinavian Studies in Law, Vol.43, p.109).

loans to members and even household utilities. According to Prof. Reinhold Fahlbeck, this makes membership financially interesting to people.⁷⁵⁵ In addition, the union platform has both a public, society-oriented side and a private, member-oriented side, thus encompassing many areas that do not directly relate to the labour market. Evidence of this is the fact that the Swedish LO in 1998 listed some 450 bodies where it was represented.⁷⁵⁶ This means that unions participate in virtually all aspects of civic society. This mightily which significantly contributes to union growth.

The services provided by the trade unions are both diverse in range and concentrated in their objective. Not anything else, neither political action nor class confrontation, but the interests of union members are always at the center of trade unions' efforts.⁷⁵⁷ In line with this tradition, unions play a very important role in the administration of statutes dealing with individual employment matters, such as legislation on employment protection or working time.⁷⁵⁸

A decisive factor in trade union success is the practicality of their plans and approach. It has been recognized that union strategies in all the Nordic countries (including Sweden) are always characterized by pragmatism.⁷⁵⁹ An evidence of the pragmatism can be seen, for example, by their close relationship with a major political party. Political power supports the trade union voice and makes the presentation more effective. In Sweden, the LO demonstrates this.⁷⁶⁰ The LO has played a more important role than its equivalents in other countries over the years because the Social Democratic Party (which has had a close relationship with LO for over a century) has been in power for most of the time since the early 1930s (1932-76, 1982-91 and 1994-2006).⁷⁶¹

- Financial capacity and personnel of the trade unions

⁷⁵⁵ Ibid, p.110.

⁷⁵⁶ Ibid, p.110

⁷⁵⁷ Ibid, p.110

⁷⁵⁸ Ibid, p.110

⁷⁵⁹ Ibid, pp.110-111

⁷⁶⁰ TCO and SACO, however, stress their political independence (source: *Collective bargaining - Trade Union*, (the case of Sweden) published by European Trade Union Institute 2009).

⁷⁶¹ See Adlercreutz, Axel/Nyström, Birgitta (2009), *Sweden*, ELL, Wolters Kluwer, para 9 and 18.

The Swedish trade unions have been well known as the social partners that have strong financial power. The good job done by the Swedish trade unions leads to large membership and large membership, in turn, gives the trade union more power. Over time, Swedish trade unions have become much stronger because of both their support from union members and their resourcefulness. By using the various channels of financial investment, trade unions have enriched themselves and have become some of the wealthiest unions in the world. At the early stages, indeed from their inception, unions started building strike funds to support members on strike or on lockout. As a sound labour relationship was established, conflict levels decreased sharply and after WW II the strike funds began to swell. Currently unions have become capitalists in their own right. The investment strategies of the unions have become important not only to members but also for capital markets. Not a few upstart companies have unions among their most important stockholders.⁷⁶²

In term of personnel: in May and June 1998, a study was carried out on SAF's behalf in 981 enterprises with 50 or more workers in four industries the private sector (manufacturing, hotels and restaurants, building and transport) employing about a quarter of the total private labour force, with 650,000 workers, accounting for about half the workforce of the sector concerned. The results indicate that there is a union representative in 90% of the workplaces covered, giving a total of some 27,000 union officials, representing about 4% of the workforce. SAF estimated, the time spent on local union activities in the companies surveyed corresponds to 6,500 full-time jobs, around two people work full time - on average - on trade union matters in the workplaces covered by the survey. The rate of close to one in every 100 workers is a full-time union representative.⁷⁶³

Together with other practices such as strong organization and centralized collective bargaining, it seems that there are few serious challenges for trade unions. The fact that Swedish trade unions are so powerful has been viewed as one of the

⁷⁶² Reinhold Fahlbeck (2002), *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, Scandinavian Studies in Law, Vol.43, p.111.

⁷⁶³ Annika Berg (1999), *Are trade union activities expensive for employers?*, Arbetslivsinstitutet, Eurofound 1999.

main feature of the labour relations system. Though the unions may not be quite as influential as they used to be, they are still very much in the picture.⁷⁶⁴

- Forming a new body of trade union

Behind this fact of active, creative and powerful trade unions and a high degree of unionization one should observe the positive role played by the legal environment including an open and favorable mechanism for the natural development of the representative system. Sweden is one of those countries which has traditionally followed a policy of labour market self-regulation. There is indeed a long tradition of ensuring that labour market organizations are established voluntarily and freely on democratic principles.⁷⁶⁵ The requirements for a union to be legally recognized are minimal, making it extremely easy to form one.⁷⁶⁶ Also, to acquire the status of a legal personality it is only necessary that the organization has adopted rules and appointed an executive committee.⁷⁶⁷ No registration is necessary.⁷⁶⁸ This favorable environment alone may account for the high union density in Sweden.

- *Established union in relations to trade union rights*

Swedish trade unions are entitled to considerable autonomy and have a wide discretion as to how to act. But in order to make use of every possible right and exercise their power fully, an employees' representative body should be recognized. When a trade union has a collective agreement with the employer, it is referred to as established union.⁷⁶⁹ In 1996, an amendment to the Employment Protection Act introduced a new type of established trade union: A local union is empowered in certain cases to agree to deviations from an otherwise compulsory legal provision, provided the local parties are normally bound by a national collective agreement. In such cases, the union can be called the *locally established trade union*.⁷⁷⁰ Established

⁷⁶⁴ Source: *Labour relations in Sweden*, published by Swedish Institute February 2005, p.2.

⁷⁶⁵ See Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, Wolters Kluwer, para. 453

⁷⁶⁶ Reinhold Fahlbeck (1999), *Trade Unionism in Sweden*, Discussion paper, International Institute for Labour Studies, No. 109/1999, p 3.

⁷⁶⁷ See Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, Wolters Kluwer, para. 453

⁷⁶⁸ Reinhold Fahlbeck (1999), *Trade Unionism in Sweden*, Discussion paper, International Institute for Labour Studies, No. 109/1999, p 3.

⁷⁶⁹ See Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, Wolters Kluwer, para. 48

⁷⁷⁰ Ibid, para. 48

unions enjoy some additional rights since many statutory rules apply only to them. This is the case with almost all provisions on employee participation, information and representation.⁷⁷¹ Notably, once a union has acquired "established" status by concluding a collective agreement, it is more or less treated as the representative of all employees in the category concerned.⁷⁷²

- *The adaptation of Swedish trade unions in the development of the labour market.*

Generally speaking, a multi-union regime and the existence of different trade unions on the market on the one hand creates a competitive atmosphere between and put some pressure on them; on the other hand this encourages their development and enhances the quality of the services offered. So, employees have more chance of having access to better protection. But multi-unionism does not merely have its advantageous sides. Certain limitations of the regime need to be corrected if the system is to run smoothly. For example, in a multi-union regime with the unavoidable co-existence of different unions representing even similar groups of workers within an establishment makes the bargaining environment more complicated and it is difficult for the employer to conclude collective agreements with all the trade unions and simultaneously apply such agreements in his company. In the Swedish labour market, the problem has been handled in the following ways:

First, there demarcation agreements have given clear-cut criteria for trade union organization. This not only helps avoid to overlap and conflicts over membership but is also an element in limiting the danger of over-diversification of trade unions, which might cause trouble for bargaining and applying collective agreements.

Second, there has been an industry organizational principle according to which at any workplace there should be only one union organizing the same kind of workers.⁷⁷³

⁷⁷¹ Reinhold Fahlbeck (2008), *Employee participation in Sweden: union paradise and employer hell or...?*, Lund: Jurisforlaget 2008, p.9

⁷⁷² See Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, Wolters Kluwer, para 496.

⁷⁷³ For example, only one trade union organizing blue collar workers (belonging to LO) and one organizing white collar workers (belonging to TCO or bargaining cartels).

Third, for the purpose of simplification of the bargaining environment, trade unions representing different categories of workers (i.e. white or blue collar) have tended to cooperate and even merge.

Some other changes in the labour market can also be observed. In the absence of statutory regulation, collective agreements at central level were of paramount importance in the early stages when they were needed to set up the basic principles of the labour market. But when the system has become more stable as the basic principles are broadly accepted and appreciated in the labour market; and the social partners have adequate experience in concluding collective agreements independently, then some further flexibility in regulating labour relations at the workplace started to be called for.

In sum, powerful, highly-developed and experienced trade unions together with clear distinctions between the different groups of employees represented by different trade unions enjoy great advantages. But, in order to obtain true reasonableness in the bargaining system, necessary adjustments for the development of the Swedish labour market have been resorted to.

4.1.1.1.2. Trade union in Vietnam

In Vietnam trade unions are the only bodies that represent employees' interests and have the function of concluding collective agreements. Under the law no other employee group can be a party to collective bargaining or sign collective agreements, even if they work concertedly.⁷⁷⁴ It also means that, as in Sweden, Vietnam has a single system of employee representatives - trade unions. No work councils exist. The Vietnamese employee representative system shows some prominent features (and differences from the Swedish system), they are as follows:

No clear distinction exists between different trade union bodies (e.g. on an occupational or industry basis).

Unlike the case in Sweden, where a trade union organization may belong to one of several labour confederations, under Vietnamese law, there is the only umbrella

⁷⁷⁴ According to current regulations, only a trade union has full legal status as the employees' representative (See Vietnamese Labour Code amended 2002: item 2 Article 7, item 2 Article 17, Article 38, Article 45, Article 57, Article 60, Article 64, Article 69, Article 76, Article 82, Article 95, Article 153, Article 163, Article 169, item 1 Article 173; See also Trade Union Law, the Preamble of VGCL Constitution 2008 etc.).

body for all Vietnam trade unions: the Vietnam General Confederation of Labour (VGCL). Since VGCL is the only trade union which is legally recognized, any newly-established employee representative bodies must affiliate with VGCL (and be under VGCL leadership) to obtain the legal right to act as a trade union.

The existence of one trade union organization in a workplace has some advantages including the concentrated nature of the representative activity. But constraining every union to lie within the scope of the VGCL restricts employees' opportunity to opt for a more desirable representative organization. This is evidently also a reason for the low level of unionization.

Trade unions are organized at different levels, but not all of them are established for the purpose of concluding collective agreements.

VGCL is a single and unified organization with 4 levels:

- Vietnam General Confederation of Labour (1)
- Federation of Labour of provinces or municipalities (64 federations) and the national sectoral federation of labour (20 federations).
- Upper level unions include labour federation of wards, districts, townships or municipalities. Local sectoral unions and Corporation unions (686 unions⁷⁷⁵).
- Grassroots unions, provisional unions and occupational-based associations (99.577 unions and associations organising 6.619.069 employees⁷⁷⁶).

Not all the organizations mentioned above can be a party to a collective agreement. Only those which are established at the grassroots level (local trade unions) have this function.⁷⁷⁷ A provisional trade union - an employees' representative body which has been lawfully established pursuant to trade union law and the VGCL constitution, which has not been certified as an official local trade union - can also

⁷⁷⁵ The data were provided by Mr Nguyen Duy Vy - Vice Director of Legislative Policy Department (VGCL) at the National Workshop "The future of the labour relations and the amendment of the Labour Code and the Trade Union Law" by the Ministry of Labour, Invalids and Social Affairs and ILO's Office in Vietnam, held on 1/4/2010.

⁷⁷⁶ Source: *Report- review and assesment of 19-year implementation of the Trade union Law*, VGCL's report No 17/BC-TLĐ dated 09 March 2010.

⁷⁷⁷ See para. 1 Section 11 of The Trade Union Act.

conclude collective agreements while awaiting such certification.⁷⁷⁸ Notably, of this group, occupational-based associations are not involved in collective bargaining agreements. The main reason is that their status and their bargaining partner are unclear while they may also consist of self-employed workers.⁷⁷⁹ The bodies organized at higher level have hardly been involved in concluding collective agreements. The Trade Union Act 1990 and its successors restrict this function to local ones.

Vietnamese trade unions are strongly politicized. There is considerable integration of the trade unions into management or otherwise dependence of trade union on management. The degree of unionism remains low.

- The trade union is a politico-social organization.

The Vietnamese trade union system is highly politicized as its history has always been closely connected to the long march towards the nation's freedom. The first trade union body, the 'Red' Workers Association, was founded in Hanoi in 1929 as the result of the workers' revolutionary movement which had become quite strong in the mid 1920.⁷⁸⁰ The trade union has changed its name several times following changes in its functions and tasks during the different periods of the national liberation revolution.⁷⁸¹ Since 1988 it has been known as the Vietnam General Confederation of Labour (VGCL). Due to its special functions and the tasks assumed by it, it has unofficially been seen as one pillar of the "group of four" of political system.⁷⁸² In line

⁷⁷⁸ See: Title a, Section 45 of The Labour Code (amended 2006).

A provisional trade union has similar functions and tasks to an official trade union. Its lifetime does not exceed twelve months. When this period expires, an election is held to complete the procedure of recognition of trade union legal status as official. (see item 5 Article 7 of VGCL constitution 2008).

⁷⁷⁹ Trade Unions also play a role in the informal economy which consists of freelance workers (See item 1 Article 16 Vietnam Trade Union internal regulation 2008). By 1996, In Ho Chi Minh city, for example, there were 492 labour associations organized among pedicab drivers, cooks, market porters and the like in the non-state sector, totaling 21,800 members (see: Anita Chan and Irene Norlund (1998) *Vietnamese and Chinese Labour Regimes: On The Road to Divergence*, The China Journal, No. 40 (July), p. 193).

⁷⁸⁰ V. Largo (2002), *Vietnam, current issues and historical background*, Nova Biomedical. (July 2002), p.113

⁷⁸¹ Since the formation of the first employees' representative body, the Vietnamese trade union organization at national level has had the following names: "Red" Workers Association (1929-1935); Workers' Fellowship Association (1935-1939); Anti-imperialist Workers' Association (1939-1941); National Salvation Workers' Association (1941-1946); Vietnam General Confederation of Labour (1946-1961); Vietnam General Trade Union (1961-1988); Vietnam General Confederation of Labour (1988- present).

⁷⁸² The four pillars of the political system consist of the Communist Party, the State, the Trade Union and the Communist Youth League. These central organizations have been accompanied by other satellite political and

with this, the workplace union has representation on the “council of four” (Management, Party, Trade Union and Youth League) which seems to play a role in wage determination, the distribution of profits and approving management decisions.⁷⁸³

Presently, the political role of the Vietnamese trade union system is still nearly intact. A senior VGCL official emphasized that VGCL is a central part of the political system of Vietnam, defining its functions as being to represent the rights and interests of workers.⁷⁸⁴ VGCL is closely integrated into Party-state structures at all levels; its own organization mirrors the structure of the Party-state and its bodies at all levels collabourates closely with the local labour administrative authorities under the supervision of the relevant Party body so that there are in fact no clear dividing lines between the responsibilities of Party, trade union and state bodies.⁷⁸⁵ In practice, the development of trade union membership is seen as an aspect of strengthening the political system.⁷⁸⁶

According to both the law and its own constitution, VGCL operates under the leadership of the Communist Party.⁷⁸⁷ At the highest levels the interpenetration of Party and trade union apparatuses is very close. The Chairperson of VGCL must be a member of the Central Committee of the Communist Party, and all representatives at regional and central level should have a Party position.⁷⁸⁸ The subordination of the trade union to the Party represents the subordination of the immediate interests of

social bodies: Association of War Veterans, Farmers' Association, Women's Association etc. Among them, the Communist Party has been the leading force of the whole system.

⁷⁸³ Do Muoi's address to the congress of the VGCL, 3 November 1993. (See: Anita Chan and Irene Norlund (1998) *Vietnamese and Chinese Labour Regimes: On The Road to Divergence*, The China Journal, No. 40 (July), p. 191).

⁷⁸⁴ Clarke, S., Lee, C.H. and Do, QC (2007), 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam', *Journal of Industrial Relations*, 49:4, p.551.

⁷⁸⁵ Clarke, S., Lee, C.H. and Do, QC (2007), 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam', *Journal of Industrial Relations*, 49:4, pp.551-152.

⁷⁸⁶ Talking about the campaign to add 1 million new members to the trade unions (during the period 2003-2008), launched by the VGCL, the Chairman of VGCL- Mr Dang Ngoc Tung-affirmed that this was an important task of the whole political system, aiming at gathering forces for the Party. See: Duong Minh Duc (2007), *The whole political system jump on the bandwagon* - The Labour No. 188 dated August 15, 2007.

⁷⁸⁷ See Article 1 of Vietnamese Trade Union Law 1990, Constitution of Vietnam General Confederation of Labour 2008 - Preamble.

⁷⁸⁸ Clarke, S., Lee, C.H. and Do, QC (2007), 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam', *Journal of Industrial Relations*, 49:4, p.552.

trade union members to the wider social, economic and political goals of the Party, and at the enterprise level these generally coincide with the interests of management.⁷⁸⁹

- Establishing a trade union organization

Local trade unions are encouraged to form in those undertakings which have 5 employees or more. Local unions are established by district-level trade unions upon the request of employees. In term of procedure, there is no big difficulty to form one.

However, in practice establishing trade unions at grassroots units indicates how trade unions are integrated into management or, at least, their dependent position in many cases. It is fairly common that trade union representatives are directly appointed by management or that union officials hold management positions in the factory. Mr. Dang Nhu Loi - Vice Director of the Parliament's Committee on Social Affairs - said, a recent survey in the southern industrial hubs of Binh Duong, Dong Nai and Ho Chi Minh City showed that all labour union officials had been selected by local company leaders, not the workers.⁷⁹⁰ Most labour law experts believe that such intersection of duties compromises the independence of unions. Many workers may not even be aware that the union exists, or may not be familiar with the union's functions or duties.⁷⁹¹

In state-owned enterprises (SOEs) and former SOEs, this problem seems evident. A lately survey conducted by the ILO office in Vietnam revealed that even there is a full integration of trade unions into the management structure in certain cases.⁷⁹² It is not uncommon that the trade union leaders are also senior managers (human resource or production manager). The trade union can be very effective in such circumstances, but as an instrument of employer paternalism rather than as a representative of the employees.⁷⁹³

⁷⁸⁹ Ibid, p.552-553.

⁷⁹⁰ Source: ITUC (2009), *Annual survey of violations of trade union rights*. Available at: survey09.ituc-csi.org/.

⁷⁹¹ According to "*Freedom of Association in Vietnam*" - annual public report published by Fair Labour Association 2004.

⁷⁹² See: Clarke, S., Lee, C.H. and Do, QC (2007), '*From Rights to Interests: The Challenge of Industrial Relations in Vietnam*', *Journal of Industrial Relations*, 49:4, p.553.

⁷⁹³ Ibid, p.553

In the private and foreign-invested sector, due to the weakness of statutory enforcement, the establishment of new local trade unions again depends heavily on employer approval. A new trade union branch is typically set up at the instigation of the relevant VGCL superior organization, which appoints a temporary president and sets up a provisional standing committee through agreement with the employer.⁷⁹⁴ The nominated president is usually a manager, often the human resources manager of the company.⁷⁹⁵

Joint ventures are in a somewhat different position because they may inherit a trade union organization from the Vietnamese joint-venture partner or establish a trade union on the advice of the partner. In this case the trade union will have the possibility of enjoying some independence from the foreign manager, particularly if it has the support of a Party cell.⁷⁹⁶

- The situation of the trade union's finance and full-time union staff

At present, beside the two sources of income which include the employers' contribution and union membership fee, VGCL is also financed by the Government (receiving about 95 billion VND - equivalent to 30-35 millions Kr in 2010 - annually). It is claimed that the trade union's income is generally sufficient for its need. The problem is that the expenditure from the budget is mostly for the executive apparatus of the union,⁷⁹⁷ not for grassroots trade unions' activities. At the workplace only petty expenses are covered.⁷⁹⁸ The main items of spending comprise presents for weddings and funerals, organizing production competitions and payment for cultural and sporting activities. These are frankly unimportant fringe benefits, not relating to core trade union activities.

In principle, in enterprises with more than 500 employees there should be one or two full-time officials appointed and paid by the VGCL, but in practice VGCL does

⁷⁹⁴ Ibid, p.554

⁷⁹⁵ Ibid, p.554

⁷⁹⁶ Ibid, p.554

⁷⁹⁷ Of this 95 billion, 10 billions is paid by the Institute of Labour Protection, 10 billions by the University of Trade Unions, 70 billions for capital expenditure, another 5 billions for Vocational training. (the data was unofficially provided by VGCL 2009).

⁷⁹⁸ About membership fees and employer' contribution, see section 5.2.2.4.2. *Enriching trade union fund*

not have the funds to cover this.⁷⁹⁹ Many enterprises do not have any full-time union staff and in others full-time officials are usually paid by the employer.⁸⁰⁰ In HCMC, for example, about 200 full-time unionists at the enterprise level are paid by VGCL, mostly in the FDI sector, and about 100 more full-time unionists in non-state enterprises are paid for by the employer.⁸⁰¹ This is not a situation that is conducive to the development of an independent trade union.⁸⁰²

- Trade union membership

To date, a large part of the labour market has not been unionized, especially in the non-state sectors. As indicated above, the reasons for failure at the local trade union are diverse. First of all, employers are in many instances not willing to support the creation of trade unions in enterprises, while the employees themselves are not concerned with the issue either as it has been felt for a long time that the trade unions belonging to the VGCL are powerless. Some scholars of labour law think that the major challenge facing the trade union movement in Vietnam is credibility in its representation of labour.⁸⁰³

At its own 2003 Congress, VGCL declared its main priority to be a campaign to recruit one million new members in the private sector, which earlier had been largely neglected.⁸⁰⁴ As of December 2008, total union membership was about 30% of the country's wage-earning labour force, or 6.24 millions.⁸⁰⁵ At the 2008 VGCL's

⁷⁹⁹ Clarke, S., Lee, C.H. and Do, QC (2007), 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam', *Journal of Industrial Relations*, 49:4 p.555

⁸⁰⁰ Ibid, pp.555,

⁸⁰¹ Ibid, pp.555;556

⁸⁰² It is worth noting that Swedish trade union officials are paid by employers. (The obligation for the employer to pay for the representatives was introduced in the 1970s when the 1974 Trade Union Representatives Act was enacted. Before that this was not regulated). But the fact does not have any negative impact on the independence of the trade union. The reason for this is that Swedish trade unions were historically extremely powerful. Then, despite the lately statutory stipulation which expressly prescribes the employer's responsibility for payment, including pay for trade union officials, the former positive influence is still retained.

⁸⁰³ Ying Zhu, and Fahey (2000), *The Challenges and Opportunities for the Trade Union Movement in the Transition Era: Two Socialist Market Economies China and Vietnam*. Asia Pacific Business Review, Vol.6, No. 3&4, Routledge, part of the Taylor & Francis Group, p 290, 291

⁸⁰⁴ Simon Clarke (2007), *Trade Unions in Russia, China and Vietnam*, Historical Materialism Conference, London, 9 November 2007, p.8

⁸⁰⁵ Angie Ngoc Tran (2009), *Vietnamese labour management relations*, Stanford Programme on International and Cross-cultural Education (SPICE), Stanford University

Congress, new criteria were set out (for the period 2008-2013), which include the recruitment of at least 1.5 million new members.⁸⁰⁶ Some later surveys show that the level of unionization in non-state enterprises, especially those with foreign-investment is very poor. Even in enterprises which have already established trade unions, the level of membership is only 59%. In those enterprises which have no local trade union, there are no unionized employees, either.⁸⁰⁷ When employees were interviewed on to the desirability of joining a trade union, only 28% employees were in favour, 5.9% were not and 53% refused to give an answer to the question⁸⁰⁸ It seems that the issue of collective bargaining agreements is not even considered. Only 50% enterprises with trade unions conclude collective agreements and the quality of those agreements is poor. 10.3% of employees are uncertain whether their enterprises have collective agreements or not.⁸⁰⁹

- How are trade unions working as employees' representatives?

Different-rank trade union organizations function differently when assuming their role of representing employees'. By and large, acceptance of party leadership and the exclusion of any competition from independent unions certainly allow Vietnamese trade unions a good deal of leeway.⁸¹⁰ Further, not every aspect of the current model of trade union functioning is actually practical or workable.

The Trade Union Law and VGCL's Constitution provide enterprise trade unions with the possibility of independently representing the workers' rights and interests, but, on the one hand they provide for rather too many tasks, some of which seem

⁸⁰⁶ Source: Resolution of the Tenth VGCL's Congress (Held in Nov. 2008).

⁸⁰⁷ Dung Hieu (2007), *Grievances of labourer in FDI enterprises*, VNEconomy, Sep. 2007.

⁸⁰⁸ Ibid.

⁸⁰⁹ Ibid.

⁸¹⁰ Tim Pringle (2008), *Trade Union Renewal in China and Vietnam?*, paper prepared for 26th International Labour Process Conference, 18th-20th March 2008, University College, Dublin, p.2

excessive from the trade union perspective⁸¹¹ while, on the other hand, many circumstances conspire against this happening⁸¹²

The protective function of the trade union is not much exercised in the workplace, but mainly through participation in the political system. In practice VGCL has continued to be a very effective lobbyist for the interests of labour in the political system and remains politically powerful, with its Chairperson having ministerial rank. However, VGCL is much less concerned to ensure that there are mechanisms in place to ensure the enforcement of labour legislation, let alone to help its primary organizations to bargain effectively with the employers.⁸¹³ Little training in collective bargaining has been provided.⁸¹⁴ Local trade union officials who deal with actual situations in the workplace, who take charge of collective bargaining, rarely receive any training.⁸¹⁵ Also, they rarely receive advice or support in carrying out trade union functions in the workplace.⁸¹⁶

Such legal environment together with the formation and organizational structure of the local trade union determine the way it works. The lack of substantial conditions for the independent existence of the trade union gives rise to various problems. The trade unions turn out to be an arm of management, rather than representing workers' interests.⁸¹⁷ The role of the enterprise trade union in the non-state sector as promoted by the authorities is one where the trade union is the partner of the employer,

⁸¹¹ There has been some criticism of the Trade Union law 1990 in that it prescribes even the theoretical tasks of trade unions (see, for example, some of those provided in para 2, 3, Article 2 of the Trade Union Law 1990) This leads to problems, as a trade union's function become less concentrated and turn out to be ineffective. (see "The Labourer", 06 April 2009, *Amendment of trade union law: there should be concrete regulations protecting trade union officials*).

⁸¹² Clarke, S., Lee, C.H. and Do, QC (2007), 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam', *Journal of Industrial Relations*, 49:4, p.551.

⁸¹³ Ibid, p.552.

⁸¹⁴ Ibid, p.552.

⁸¹⁵ It is worth mentioning that the Swedish local trade union boards and representatives are expected to have the capability to learn on their own (see: Susanne Kopsen (2008), *Overpowering demands of learning-Learning in local trade unions at the workplace level*, European Research Network in Vocational Education and Training.) But, in contrast to our system, they have both the proper motivation and conditions in which they can learn, time and money being supplied, In Vietnam such conditions are of limited availability though there is the potential for the trade union to exercise greater power.

⁸¹⁶ Ibid, p.552.

⁸¹⁷ Wang, Hong-Zen (2005), 'Asian Transnational Corporations and Labour Rights: Vietnamese Trade Unions in Taiwan-invested Companies', *Journal of Business Ethics* 56(1): 43–53. Abstract.

mediating between employer and employees, rather than as the representative of the employees in opposition to the employer.⁸¹⁸ An effective trade union organization would be one that can successfully communicate the aspirations and grievances of the employees to the employer and can explain the concerns and difficulties of the employer to the employees.⁸¹⁹

In fact, some unions have created a more or less effective channel of communication to employers and do manage to provide effective representation for its members.⁸²⁰ Some local trade union leaders also carry out their union tasks well despite suffering from the hostility of management. But this is only a minority phenomenon and one that arises where the union leaders are also qualified or skilled workers (who can easily find other employment opportunities if need be. They could confront the employer and face the danger of being sacked.⁸²¹ But the system cannot rely on such efforts. If trade union leaders are to do their union job devotedly and effectively, there should be guaranteed a decent income and an independent position.

4.1.1.2. Employer side

4.1.1.2.1. The Swedish employer

In the private sector, at central level, the Confederation of Swedish Enterprise (SN) is currently the predominant employers' association.⁸²² SN, consisting of the former SAF and Federation of Swedish Industry⁸²³, represents 50 member

⁸¹⁸ Clarke, S., Lee, C.H. and Do, QC (2007), '*From Rights to Interests: The Challenge of Industrial Relations in Vietnam*', Journal of Industrial Relations, 49:4, p.554

⁸¹⁹ Ibid, p.554.

⁸²⁰ Clarke, S., Lee, C.H. and Do, QC (2007), '*From Rights to Interests: The Challenge of Industrial Relations in Vietnam*', Journal of Industrial Relations, 49:4 p.556

⁸²¹ A number of cases were mentioned in recent reports on trade union activities in undertakings. One of them is "The reliance for workers" by Thi Ngon and Vu Binh (The Youth online (webpage of Youth Communist League of Ho Chi Minh city - June 27, 2005),

⁸²² Beside SN, there are some other special organizations, such as the Employers' Organization of Banking Institutions and the Newspaper Employers' Association. Outside SN there are also KFO (the Co-operative Employers' Associations), which is a small organization for both larger and smaller companies involved in trade, manufacturing, healthcare and education and for non-profit organizations, NGOs and KFS (the Negotiating Organization of the Swedish Municipal Companies).

⁸²³ SAF, founded in 1902 merged with the Federation of Swedish Industry (founded 1910), to form SN in 2001. See Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, Wolters Kluwer, para 485

organizations (equivalent to 50 branch industries) and 54.000 member enterprises, including both big and small companies.⁸²⁴

Before 1989, the former SAF was the main actor on the employer side at central level. SAF concluded inter-sectoral collective agreements, including the *Saltsjobaden Agreement*. After the last centralized wage negotiation round in 1989, SAF refused to be involved in further negotiations at least so far as wages are concerned. This policy has been maintained by the SN.⁸²⁵ Thus, the participation of SN in collective bargaining is rather limited. SN nowadays basically plays the role of a forum where branch organizations can co-operate, exchange information and discuss and confer on matters regarding policies and employment conditions of general interest.⁸²⁶

At national branch level, in the private sector, SN affiliated organizations are the key actors. Since the early 1990s, the role of the affiliated members of the former SAF has been reinforced as they have been vested with the power of making agreements on many matters that had been the responsibility of central organizations, such as wage increases. Normally employer organizations take part in wage bargaining rounds every two or three years. Within SN, member organizations can co-operate. In 1997 almost 20 labour market branch organizations concluded the Agreement on Industrial Development and Wage Formation (Industry Agreement)⁸²⁷ which has been regarded as one of the most important accords at the sector level.

At the local level, the employers are individual undertakings. An employer may be an individual - a person in a physical sense. But in many cases an employer is an organization, such as a joint stock company or other legal entity. In such cases the employer is a legal person. A local employer may be a member of an employer's organization or not. It seems that a majority of employers on the Swedish labour market are affiliated members. Firms belonging to employer organizations in Sweden cover some 75 percent of all private sector employees.⁸²⁸ Many small employers do

⁸²⁴ Ibid, para 483-484; See also: Ronnie Eklund, Tore Sigeman and Laura Carlson (2008), *Swedish labour and employment law: cases and materials*, Iustus (2008), p.22

⁸²⁵ See Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, Wolters Kluwer, para 484

⁸²⁶ Ibid, para 485

⁸²⁷ Ibid, para.490

⁸²⁸ Reinhold Fahlbeck (2002), *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, Scandinavian Studies in Law, Vol.43, p.112

not belong to an organization but some of them are still bound by collective agreements such as adherence/application agreements.⁸²⁹ Currently the actors at local level play an increasingly important role in setting working conditions and to certain extent, remuneration.⁸³⁰

In the public sector two employers' associations are the key actors namely:

- In the state (central-government) sector the relevant organization is the Swedish Agency for Government Employers (SAGE). SAGE has 250 member agencies in the central government sector and some 20 other members with closely associated organizations.⁸³¹ In principle, SAGE is autonomous with respect to the government and enters into collective agreements on wages and working conditions binding on the state employers it represents. It can also be charged with the task of representing certain non-state employers, e.g. government-funded institutions.⁸³²

- In the local government sector, The Swedish Association of Local Authorities and Regions (SALAR), is an employers' association which is independent of the Swedish government and represents all Sweden's municipalities (290), county councils (18) and regions (2). It acts as an employer's organization and promotes the interests of its members, such as by seeking to strengthen local self-government and by developing regional and local democracy. SALAR and the central trade union organizations concludes collective agreements binding on municipalities, county councils and regions, covering more than 1.1 million employees. This makes it one of the largest employer's organizations in Sweden.⁸³³ The AB⁸³⁴ is the collective agreement entered into by the Federation of Provincial Councils and the Swedish

⁸²⁹ Ibid, p.112

⁸³⁰ Though the key level for collective bargaining on wage is industry level, more than 80% of employees have part of their pay determined by local level negotiations, and 10% have all their pay determined locally (see Collective bargaining - Published by European Trade Union Institute -2009.

⁸³¹ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-46

⁸³² For further information, see: Swedish Agency For Government Employers - updated August 2009, <http://www.eurofound.europa.eu/emire/SWEDEN/ANCHOR-ARBETSGIVARVERKET-SE.htm>

⁸³³ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-46

And see: *The Swedish Association of Local Authorities and regions (SALAR)*, SALAR's booklet, Ljungberg Tryckert, Sweden, p. 6

⁸³⁴ For further information, see: AB-Sweden, <http://www.eurofound.europa.eu/emire/SWEDEN/ANCHOR-AB-SE.htm>

Federation of Local Authorities (the two precursor organizations of SALAR) with their counterparts on the employee side (LO, TCO, SACO).

Besides the Confederation of Swedish Enterprise, the SALAR and the SAGE, there are some 10 smaller employer organizations.⁸³⁵

4.1.1.2.2. The Vietnamese employer

In contrast to the case in Sweden, in Vietnam there are no central or branch actors responsible for setting working conditions via collective agreements. The employer organizations at national or branch level are both newly-established and unrepresentative. These consist of the Vietnam Chamber of Commerce and Industry (VCCI) and The Vietnam Cooperative Union (VCI) which were established on 27th May 1998 and 2nd August 1994, respectively. VCCI only has branches in a few industries. VCI only covers some small production units⁸³⁶ and does not function as a party to collective agreements. Parties to collective agreements can only be undertakings at grassroots level which employ labour. An employer may be an individual or a legal person.

According to the Vietnamese Labour Code and relevant regulations, employers are any labour-utilization units including enterprises with all form of ownership, state agencies, social or politico-social organizations or socio-occupational associations, co-operatives of all kinds, households or individuals (who are 18 years old or more), foreign individuals and organizations and international organizations located within Vietnamese territory.⁸³⁷

Collective agreements are encouraged in the following undertakings, provided that they have had trade unions or provisional trade unions:⁸³⁸

⁸³⁵ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-46

Ans see: *The Swedish Association of Local Authorities and regions (SALAR)*. SALAR's booklet, Ljungberg Tryckert, Sweden, pp 6-7

⁸³⁶ See Do Nang Khanh (2008), *Improving and implementation of law on collective agreements*, Legislation Research Review, No 113, February 2008).

⁸³⁷ See Article 6 of the Labour Code, the explanation in student book of Hanoi law University, version 2009, p.14

⁸³⁸ Article 1 Government Decree No 93/2002/ND-CP dated November 11, 2002 determining the scope of collective agreement law application.

- Enterprises established and functioning pursuant to the Law on State-owned enterprises (state-owned enterprises), the Business Law (enterprises in private sector) and the Law on Foreign Investment in Vietnam (enterprises receiving foreign investment);

- Business units or services belonging/subordinate to an administrative authority, a state non-business unit, a political organization or a politico-social body;

- Co-operatives established pursuant to the Law on Co-operatives, which employ labour under employment contracts.

- Non-public establishments in the field of education, healthcare, culture and sport.⁸³⁹

- International or foreign institutions within Vietnamese territory employing Vietnamese labour under employment contracts, except those institutions which are entitled to exemption pursuant to international regulations.

In the government sector, unlike Sweden, there are no actors who can engage with collective agreements. The State agencies or government authorities have never been regarded as partners to collective bargaining. Wages and working conditions of government employees are set by national laws.

4.1.2. Making a demand

When it is felt that there is a need for collective bargaining, either party can take the initiative in asking for collective agreement to be concluded. According to Swedish law, a trade union has the right to negotiate not only with an employer who employs any of its members, but also with any organization of which the employer is a member (on any matter relating to the relationship between its member and such employer or employer organization). A similar arrangement covers the employer side. They also have an equivalent right to negotiation with the trade unions.⁸⁴⁰

In Vietnam the right to collective bargaining is covered in Article 46 of the Vietnamese Labour Code, but unlike Sweden, a trade union or an employer does not

⁸³⁹ These are business units established pursuant to Government Decree No.73/1999/ND-CP dated August 19, 1999 on the financial incentive regime for non-public establishments in the field of education, healthcare, culture and sports.

⁸⁴⁰ Section 10 of Co-Determination Act.

have different counterparties to negotiate with. For an employer the only trade union partner is the one which has been organized in the company and belongs to VGCL.

Any party who wishes to negotiate shall prepare and serve a demand for negotiations on the other party. In Sweden, the demand may be under oral or written form, depending on the parties' consent. According to the Co-Determination Act, the demand shall be in writing and state the matters about which negotiations are requested, if the other party so requests.⁸⁴¹ In Vietnam the demand can only be in writing.⁸⁴²

The right of one party to call for negotiations is matched by a respective obligation on the other party. The duty to negotiate comes into play when a party presents a proposal for a bargaining or negotiation. The party that has a duty to negotiate must appear at any meeting, and present its standpoint and its reasons for any suggested solution of the matter to which the negotiations relate.⁸⁴³ As for Vietnam, this is implicitly understood between the parties and has been discussed in legal literature as some punitive sanctions for failure are provided in a Government legal document.⁸⁴⁴ A party that fails to fulfill the duty to negotiate will be liable to damages (Sweden) or could face a punitive sanction (Vietnam).⁸⁴⁵

For both systems, in order to avoid unfair delay by either party, a deadline for any preparation is given and negotiations shall be held within a stipulated period. As for Sweden, this period is two weeks after receipt by the other party of a demand for negotiations, where the other party is an individual employer or a local employees' organization, and within three weeks of receipt of if such demand given by the other party, unless a period has already been otherwise agreed by the parties.⁸⁴⁶ In Vietnam the given period is twenty days.⁸⁴⁷ The parties may also agree to a time and place for the negotiations. The number of representatives of each party in negotiation shall also

⁸⁴¹ See Section 16 of Co-Determination Act.

⁸⁴² Article 46 Vietnamese Labour Code 2002.

⁸⁴³ Section 15, Co-Determination Act

⁸⁴⁴ Decree of Government No 47/2010/ND-CP dated May 6, 2010 On penalties for administrative violations in the field of labour legislation (see item a, para 2, Article 9).

⁸⁴⁵ See also: section 4.7. Violations relating to collective agreements.

⁸⁴⁶ Section 16, Co-Determination Act (1976).

⁸⁴⁷ See para. 1 Article 46, Vietnamese Labour Code 2002.

be agreed by both parties.⁸⁴⁸ In Sweden, however, there are no rules on the number of parties' representatives. This means, it is up to the parties to decide. If there is no agreement, each party shall decide on the representation itself.

Some evident differences between the two systems can be observed. Besides the fact that collective bargaining in Sweden can take place at different levels (including industrial and central level) while in Vietnam this still remains a distant prospect, there is also another distinction: in Sweden, negotiation can take place between an actor at grassroots unit and an actor at central level.⁸⁴⁹ This kind of negotiation evidently allows for more ways to handle problems of labour relations collectively. This also means there is always a possibility for employees to be represented even in the absence of a local trade union. Further, it is also possible for the labour market parties to overcome deadlock and continue negotiation even if the employer fails to reach an agreement with local employees' representative body. This can hardly occur in Vietnam.

In the absence of local trade unions in many enterprises, while the duties of the local trade union can not be transferred to higher level organizations, bargaining activity is limited. Thus, in a large part of the labour market, where there is no representative organization for employees to rely on and where collective agreements have not been concluded, employees are largely left to deal with employer individually.

4.1.3. Negotiation

At meetings, each party presents its demand and viewpoints, exchanges information on the common concerns and considers the other's demand and opinions.

The negotiations should be conducted in a speedy manner (Sweden). In order to confirm any bargaining achievements, minutes should be kept throughout. In Vietnam, this has been regarded as a good practice and has mentioned in the legal literature, but it is not covered in the Labour Code. As for Sweden, the parties are not

⁸⁴⁸ Article 46 Vietnamese Labour Code 2002.

⁸⁴⁹ See Section 10 and Section 14 Co-Determination Act (1976).

The first negotiation shall be conducted by the local trade union. If agreement is not reached, negotiations are subsequently pursued at central level, or perhaps between the relevant employee organization at the central level and the company concerned. See: Lars Gellner, Lars Sydolf (2008), *Swedish labour law*, Norstedts Juridik AB, p.18).

forced to do so, but it can become a formal demand if a party so requests.⁸⁵⁰ In practice minutes are kept for most negotiations. The parties may agree as to who is to keep the minutes - normally the employer side keeps the minutes, which are subsequently checked by the employee side.⁸⁵¹ The minutes are to be approved by both parties when the negotiation finishes.

When discussing collective bargaining, it may be asked whether the parties to collective bargaining, particularly the party receiving the demand for such negotiations, has the duty to bargain in good faith, and further, how industrial action should be used to support collective bargaining. These issues are important and should not be underestimated; however, they are not the main concern of this research. So, only certain key points are taken into account here.

Bargaining in good faith

In many systems, such as the United States, Japan, Canada, Korea, and the Philippines the employer receiving a request to negotiate has a statutory obligation to bargain in good faith.⁸⁵² This has been mentioned in a number of documents in the labour relations field. As far as my understanding, "Bargaining in good faith" as a general term requires the parties to collective bargaining to be active and constructive in establishing and maintaining productive relationships. It further determines how the parties treat one another during the bargaining. Generally, each party should use its best efforts to achieve satisfactory results from the bargaining, but should do so in a sincere manner (so they should not, directly or indirectly, act in a manner that misleads or deceives the other), while acting with goodwill (being responsive and communicate in meaningful ways etc.), flexibility and, where necessary, accepting reasonable concessions, in order to reach a collective agreement.

The duty to bargain in good faith is often prescribed at the first instance to employers. This is based on the assumption that collective bargaining is likely to

⁸⁵⁰ See Article 16 Co-Determination Act .

⁸⁵¹ Lars Gellner, Lars Sydolf (2008), *Swedish labour law*, Norstedts Juridik AB, p.33

⁸⁵² - Regarding the United States, see National Labour Relations Act (29 USC ss. 151-159), Section 158(a)(5). See Section 158(d) for the definition of "Obligation to Bargain Collectively"; For Japan, see the Trade Union Law Art. 7. See also the labour court case - the example presented below; For Canada: see Labour Code (S.C. 1985, c. L-2) Section 55; For Korea, see Trade Union and Labour Relations Adjustment Act (Law No. 5310, 1997), Article 30; For Philippines, see the Labour Code 1974, Article 252.

bring better terms and working conditions for employee side. In many legal systems, the collective agreement has been regarded as a key means for the maintenance of decent employment conditions and opposition to arbitrary rules and harassment at work. This means collective agreements are definitely good for employees; accordingly, they tend to raise labour costs and are less beneficial to the immediate interests (at least) of the employer.

The performance of the duty to "bargain in good faith" is demonstrated by the employer's engaging in the proper behaviour such as meeting and conferring with the union's representatives face to face,⁸⁵³ not only listening to the union's demands and contentions but also responding to them in concrete terms and then following up with its own answers and contentions which should be responsive to those of the union. Where necessary, it should indicate the basis of its arguments and present the necessary supporting data.

There is no regulation on the employer's obligation to bargain in good faith in Sweden, though traditionally the parties concerned tend to work well together. In order to support the bargaining process, trade unions have a special "weapon" - industrial action - which can be exerted when necessary to solve a bargaining deadlock. The Swedish notion is that, strength at the bargaining table does not stem from legal requirements on behavior but on the willingness and ability of the union concerned to resort to industrial action.⁸⁵⁴ The Vietnamese Labour Code mentions the duty to bargain in good faith, but indirectly (Article 9 of the Labour Code 2002) and, notably, there is no sanction applied in case the parties fail to observe this duty. So, "good faith" in the course of bargaining turns out to be little more than a suggestion to Vietnamese parties.

- Industrial actions - supportive means for negotiation

In Section 41 of the Co-determination Act different kinds of industrial action are listed including work stoppage (strike and lockout),⁸⁵⁵ blockade,⁸⁵⁶ boycott⁸⁵⁷ or other

⁸⁵³ In some systems, this is one of the primary demands. For implementation of this in Japan, see Tokyo Dist. Ct. Apr.11.1990 1352 Judgment - Except where it is based on the consent of the parties, discussion in the form of phone calls will not constitute performance of the duty to bargain in good faith).

⁸⁵⁴ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-56

⁸⁵⁵ *Work stoppage*, i.e. a lockout or a strike, means that work is temporarily suspended, not to be performed and that the employer has no duty to pay wages. (Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, para. 581).

comparable hostile measure. In the Swedish labour market, mass dismissals, bans on overtime working, going slow, or working to rule can also be used as industrial actions.⁸⁵⁸

Generally speaking, the labour market parties can resort to any form of industrial action as a weapon of defense when necessary, provided that the usage of such means is not in contravention of the law or their contractual obligations. So, the only question is determining what constitutes a lawful industrial action. According to the Swedish Constitution, the labour market organizations are entitled "*to take strike or lock-out action or any similar measure unless otherwise provided by law or arising out of an agreement*".⁸⁵⁹ Thus, trade unions will not be liable for having delayed the employer's fulfillment of contracts or, indeed, for ruining the employer by calling a strike in support of the demand for a collective agreement.⁸⁶⁰ In particular, during intervals when no collective agreement is in force (in the sense that an ordinary agreement on pay and other employment conditions has expired), the legal assumption is that in principle the parties have the right to take industrial action against each other as a means of applying pressure in a dispute over the conclusion of a new agreement.⁸⁶¹ However, something should be noted:

First, in this situation the parties may still be bound by a basic agreement or some other more permanent co-operation agreement. In so far as any such agreement contains rules on industrial action, those rules must continue to be observed.⁸⁶²

⁸⁵⁶ A *blockade* is usually combined with a work stoppage. This means the prohibition on other workers taking on work in the blacked work place and on employers employing workers on strike or locked out. A blockade may also constitute an independent action, particularly the *new employment blockade*, intended to prevent the employer from recruiting personnel in general or to a specific position. (Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL,para. 582).

⁸⁵⁷ *Boycott* is the term for a form of blacking intended to induce the public not to purchase the employer's products or utilise its services. (Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL,para. 582).

⁸⁵⁸ Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL,para.580

⁸⁵⁹ See Article 17 Chapter 2 of Instrument of Government.

⁸⁶⁰ Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL,para. 587

⁸⁶¹ Source: *Industrial action*, Sweden, Eurofound, August 2009. Available at: www.eurofound.europa.eu/.../SWEDEN/ANCHOR-FACKLIGASTRIDS-Acirc

⁸⁶² For example, a rule laid down in Chapter III of the Saltsjöbaden Agreement concluded between SAF and LO, inter alia, restrict the right to take action against a neutral third party as long as they do not make anything that affects the conflict. Source: *Industrial action*, Sweden, Eurofound, August 2009. Available at: www.eurofound.europa.eu/.../SWEDEN/ANCHOR-FACKLIGASTRIDS-Acirc.

Second, industrial action can in principle only be resorted to during the course of concluding a new agreement. As soon as this agreement has been concluded, the right of the parties and their members to take industrial action ceases.⁸⁶³ This relates to the so-called "peace obligation". Like other obligations under collective agreements, the peace obligation is binding on the parties to a particular agreement and their members, but in a certain sense it is also binding on a wider circle of persons. Where employees covered by a collective agreement engage in an unlawful strike it is not lawful for those of their colleagues who are either not union members or belong to a different union to join in that strike action.⁸⁶⁴ Also, the peace obligation as defined by the Co-Determination Act (1976) is that action may not be used with a view to achieving any change to the agreement.⁸⁶⁵ This prohibition protects not only what is expressly regulated in the agreement but also its implied supplementary rules.⁸⁶⁶ However, secondary (or sympathy) action⁸⁶⁷ is an independent matter. The fact of being itself bound by a collective agreement does not prevent a party from being entitled to take such secondary action, provided the action taken in the primary dispute is lawful.⁸⁶⁸ The right to take secondary action is indeed very broad and extensive in Swedish law. However, in the public sector the right to take secondary action is subject to some minor restrictions.⁸⁶⁹

⁸⁶³ This is only in principle. Actually this right does not cease absolutely. See below

⁸⁶⁴ See: *Peace Obligation*, Sweden, Eurofound August 2009. Available at: www.eurofound.europa.eu/.../SWEDEN/ANCHOR-FREDSPLIKT-SE.htm; See also: Section 42 Co-Determination Act (1976).

⁸⁶⁵ See Section 41 Co-Determination Act (1976).

⁸⁶⁶ Ronnie Eklund, Tore Sigeman and Laura Carlson (2008), *Swedish labour and employment law: cases and materials*, Iustus (2008), p.31.

⁸⁶⁷ This is an industrial action taken by a party in the labour market to support or express sympathy with someone who is involved in an industrial dispute. In a typical case, the course of events is that in a primary dispute strike action by a union is unsuccessful in inducing an employer to enter into a collective agreement and another union then takes secondary action in the form of a refusal to handle deliveries to and from that employer in order to help pressure the latter into giving way. (Source: *Secondary/sympathy action*, Sweden, Eurofound August 2009. Available at: www.eurofound.europa.eu/.../SWEDEN/ANCHOR-SYMPATI-Acirc-TG-Auml).

⁸⁶⁸ See: *Secondary/sympathy action*, Sweden, Eurofound August 2009. Available at: www.eurofound.europa.eu/.../SWEDEN/ANCHOR-SYMPATI-Acirc-TG-Auml; See also: Ronnie Eklund, Tore Sigeman and Laura Carlson (2008), *Swedish labour and employment law: cases and materials*, Iustus (2008), p. 32

⁸⁶⁹ In the public sector the right to take secondary action is restricted in the case of work which consists in the exercise of public authority. Under the 1994 Public Employment Act, in such work it is not permitted to take industrial action in support of those not covered by the Act, *i.e.* in support of employees or employers in the private sector. Source: *Secondary/sympathy action*, Sweden, Eurofound August 2009.

Certain rules of conduct must be followed even though the industrial action itself will remain lawful. The party initiating the industrial action must, for example, give the opposite party and the Mediation Office advance notice of an action at least seven working days before the date on which it is to start or be extended.⁸⁷⁰ Failing to observe this duty leads to the risk of being fined.⁸⁷¹

Recently lockouts and large-scale strike actions have been rare.⁸⁷² Since the 1990s, lockouts have in principle not been used.⁸⁷³ On the employee side the use of restrictive actions dominates. Only a few key persons go out in strike with a view to causing the employer as much trouble as possible without great cost to the trade union. Or several types of more limited actions are used together, for example a ban on overtime work in combination with a few persons striking.⁸⁷⁴ Very few unlawful strikes in Sweden have been recorded; since 2000 there have only been 18, involving less than 2,000 workers.⁸⁷⁵

In contrast to the case in Sweden, where industrial action is extensively used, in Vietnam, no measures equivalent to strikes, such as lockouts are recognized by law. There has hardly been any explanation of this in the literature on labour law. A presumption is that the state wishes to keep the labour market as stable as possible in order to maintain the continuation of work and employment. As the labour collective is regarded as a powerless party, the strike - the only major form of industrial action that the labour collective can resort to when necessary - has been recognized. But in

⁸⁷⁰ See Section 45 Co-Determination Act (1976).

⁸⁷¹ In case AD 1982 No. 157 a trade union was held liable to pay about 1.000 Euros as general damages to the employer for neglect in this respect. Failure to notify the National Mediation Office entails a penalty of at least 30.000 SEK and at most 100.000 SEK (about 3.000-10.000 Euros). See: Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, para. 588.

⁸⁷² One explanation is that the labour market has grown more vulnerable due to e.g. changes in organization, production, transports etc. (See Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, para. 582a).

⁸⁷³ This happens due to economic reasons i.e. because the employer will lose too much in production. (See Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, para. 582a).

⁸⁷⁴ *Ibid*, para. 582a

⁸⁷⁵ Philip Simon (2007), *Sweden - Freedom of Association and Labour Law*, Available at: www.legislationline.org/.../17,

practice, it is not easy to make a strike be legal. According to law, a legal strike must satisfy all the following conditions:⁸⁷⁶

- Arise from a collective labour dispute, falling within the scope of labour relations;

- Be conducted by employees within an enterprise;

- Be organized after resorting to mediation conducted by the company labour conciliatory council and the provincial labour arbitration council in which no desirable results have been achieved (in case of disputes over rights, be organized after resort to mediation conducted by the company labour conciliatory council and the Chairman of District People's Committee but, again, no desirable results are achieved and the employees' side does not opt for litigation at court⁸⁷⁷);

- Be conducted after obtaining the approval of the labour collective (according to Article 174b the rate of approval must be more than 50% of the labour collective for enterprises which have less than 300 employees, and more than 75% of employees' representatives⁸⁷⁸ for enterprises which have 300 employees or more);

- Give prior notice of the strike to the employer and to the relevant bodies in charge of the state administration of labour and industrial relations⁸⁷⁹ in due time and manner⁸⁸⁰. The notice must contain all necessary issues provided for in the law⁸⁸¹;

⁸⁷⁶ See Articles 172a, 173, 174a, 174b, Vietnamese Labour Code. It is worth mentioning that Article 173 only lists the elements that make a strike become illegal. What is mentioned here are ideas derived from the regulation.

⁸⁷⁷ According to the Labour Code, the employee side has two options after any compulsory mediation steps have failed to reach a satisfying result: bringing the case before the court or otherwise going on strike.

Generally solving dispute at the labour courts is supposed to be a more amicable option, but the proceedings may be time-consuming. So, the labour collective seems to prefer a more immediate solution: going on strike.

⁸⁷⁸ These representatives may consist of: members of local trade union committee, union representatives in sub-units, chiefs (or vice chiefs) of production sub-units at workplace.

⁸⁷⁹ The notice will be given to the employer and the provincial Department of Labour - War Invalid and Social Affairs, and provincial Federation of Trade Union (item 4, Article 174b, the Labour Code updated 2007).

⁸⁸⁰ The notice must be given at least 5 days prior to the start of the strike. The notice is given directly by a nominated group of employees which consists of at most 3 persons (item 4, Article 174b, the Labour Code updated 2007).

⁸⁸¹ The issues included in the strike notice are listed in item 3, Article 174b, the Labour Code updated 2007.

- Be organized and led by the local trade union execution committee (or the provisional trade union execution committee) or other employees' representatives as stipulated by law;⁸⁸²

- Not be in enterprises belonging to areas of service where strikes are not allowed;⁸⁸³

- Not violate the decision of a competent authority to suspend or end the strike.

Although strikes are aimed at supporting the resolution of collective dispute situations, they can hardly be exerted immediately and easily. The main problem is obviously the complicated procedures and mandatory requirements that a strike is subject to.⁸⁸⁴ But these are not the only issues. Another factor is that awareness of the relationship between industrial actions and collective bargaining is still poor; bargaining activity remains weak and has not made much of an impression on employees. As employees are not used to using strikes in an effective way, few strikes have been used to compel the conclusion of a collective agreement either. Observing the huge number of strikes which have occurred since the market economy was launched (1986), I have not yet seen any whose purpose was to support the conclusion of a collective agreement.⁸⁸⁵

Concluding negotiation

Unless otherwise agreed to by the parties, negotiations shall be deemed to be concluded when a party who has fulfilled his duty to negotiate has given the other

⁸⁸² In enterprises which have not had a trade union, strikes can be led by representatives selected by labour collective and this selection has been reported properly to the district trade union organization. (Article 172a of the Labour Code).

⁸⁸³ Strikes are prohibited at enterprises which serve the public, and enterprises which are essential to the national economy or national security and defense as provided for in the list issued by the Government. (See the Government Decree No 122/2007/ND-CP dated July 27, 2007 on providing the list of disallowed -strike enterprises and the solutions to workers' collective demands).

⁸⁸⁴ Since the market economy was launched in 1986, there have not been any legal strikes so far - 100% strikes are illegal. The main reason is the complexity of the legal procedures which need to be fulfilled before taking collective action. (See Do Ngan Binh (2006), *Law on strikes and handling strikes in Vietnam*, PhD. thesis, p.143)

⁸⁸⁵ There is a fact that no trade unions involved in strikes and no strikes relate to the conclusion of collective agreements. It is rather strange that there has been no published document discussing this rather odd phenomenon. I suppose that the role of collective action from collective bargaining perspective has not made an impression on our colleagues.

party notice in writing that he is withdrawing from the negotiations (Sweden).⁸⁸⁶ There is no regulation of this issue in Vietnam. But normally negotiations will be deemed completed when the two parties have agreed to the key contents of a collective agreement.

In practice, due performance of the law relating to collective agreement negotiation in Vietnam does not always happen. In many cases negotiations are conducted in a defective manner. For example, real negotiation, face-to-face meetings or immediate contact during negotiation are all rare.⁸⁸⁷ Normally, the party taking the initiative in collective bargaining sends its counterpart a written demand stating all issues that need to be negotiated and proposes suggested solutions. The recipient considers the demand and sends back its replies in writing, which may include: (i) its own demands/requirements in response to those called for by the first party. (ii) statements about the extent to which it can accept an offer/make a concession. After several such document exchanges, if the demands are met, the two sides will sit together and discuss the conclusion of the collective agreement more concretely.⁸⁸⁸ Generally speaking, such a process of negotiation consumes both time and energy and meets many obstacles because indirect nature of the communication and insufficient information exchange are likely to create problems and misunderstandings. Since there is no statutory deadline for negotiations, in many instances it is prolonged for years and no meaningful results are ever reached.⁸⁸⁹

Since industrial action is not often used to solve a bargaining deadlock, if such a deadlock occurs and it is felt that there is little likelihood of reaching agreement and if it seems pointless to pursue the project of establishing a collective agreement, the

⁸⁸⁶ See Section 16 Co-Determination Act.

⁸⁸⁷ This is one such provided for in Resolution No 01/ NQ-DCT dated June, 18, 2009 by Central Committee of VGCL on "innovating, improving the quality of negotiation, conclusion and implementation of collective agreements".

⁸⁸⁸ Nguyen Nang Khanh (2009), *"Collective agreements in Vietnamese labour law"* PhD. thesis, Institute of State and Law (2009), see: Section 2.1.3. *Procedure of negotiating and concluding collective agreements*.

⁸⁸⁹ Nguyen Nang Khanh mentioned an example: Sunway Hatay Joint Venture Company is a supplier of Ready Mixed Concrete and Quarry Products, established in Vietnam in 1995. The old collective agreement of the company expired late 2004. The company trade union put forward new demands and proposals to the head of the company in April 2005. The two parties exchanged documents many times but had not reached a collective agreement by 2008. (See Nguyen Nang Khanh (2009), *"Collective agreements in Vietnamese labour law"* PhD. thesis, Institute of State and Law (2009), Section 2.1.3. *Procedure of negotiating and concluding collective agreements*).

exhausted party may "voluntarily" withdraw from negotiations. If this is the case, employment relations in the enterprise are to be settled pursuant to state laws. This means, in practice, that the employees' working conditions cannot be expected to be anything better than the national minimum standards.

Some practical issues should also be noted. The parties are advised to keep minutes during the negotiations and to record all terms that they have agreed. In recent years, it has been noted that, although many issues agreed by the two parties, only some are presented in collective agreements. Many others are not included, especially agreements on fringe benefits or additional payments. In many instances, enterprises sign collective agreements with very poor contents, though in practice they may offer some increased payments to employees. There are two major reasons for this: *first*, the enterprises plan to escape from some financial duty such as making contributions to the employees' social security fund or covering the trade union's contribution; *second*, any employees' benefits that are not explicitly provided for in collective agreements can be cut down or abolished at the enterprise's will without this being regarded as non-fulfillment. These practices are unfortunately common in the private sector, and have even spread to the FDI sector.⁸⁹⁰

The knowledge and experience of the persons who take charge of negotiations are important factors in determining the quality of any collective agreement that is eventually concluded. Although some collective agreements do have a wide range of useful and practical provisions, there remain a vast number of collective agreements with poor, or even unlawful contents. These stem from a lack of labour law knowledge, that is an inadequate grasp or an incorrect understanding of the law or from the powerlessness, the ignorance or the lack of interest of the trade union. Sometimes violations of labour law by enterprises are obvious. For example, Article 5 of the collective agreement of the Vietnam One-member Machinery and Coal Limited Company, signed on 18 February 2006, provided that employees can be assigned to another job that is not their specialty for a period not exceeding *12 months in one year*

⁸⁹⁰ According to Dr Duong Van Sao - The Head of Institute of Workers and Trade Union - in practice some items of payments such as expense for meals, travel and housing are provided. but no enterprises cover those payments in the collective agreements. This gives the initiative to management, making the payments appear as a kind of favour, which can be used as a tool for labour management, when necessary they can be cut down or abolished without being considered as an infringement of the agreement; See: Hue Chi (2007), *Wages in FDI sector - not as good as expected*, The *An ninh Thu do*, issued August 18, 2007.

(!)⁸⁹¹ while according to law, this duration can not be longer than *sixty (60) days* and only in cases where an enterprise faces unexpected difficulties due to business production demand (see para. 1, Article 34, the Labour Code 2002). This also reflects the weakness of labour law enforcement and the consequent negative impact on collective agreement system.

4.1.4. Consultation

When a draft collective agreement has been produced, each side needs to undergo a consultation procedure in which it will consider whether to approve the terms. This procedure is of great importance as it will make sure that the new collective agreement meets each party's wishes and is also workable. In the event that the draft is not approved, representatives of the parties, taking into consideration the remarks and proposals made during the consultation, will introduce amendments and additions to the draft and submit it to the other side for further discussions.

In Sweden, though the law does not mention it, when new collective agreements are negotiated many trade unions have consultative procedures for obtaining their members' views on what needs to be improved, changed or supplemented.⁸⁹² In Vietnam, such a consultative procedure is a statutory requirement.⁸⁹³ The Executive Committee of the trade union (or provisional trade union) is responsible for gathering the employees' opinions and approval, whether by voting or by written approvals. Generally all employees at the units whose working conditions will be affected by the collective bargaining are to be consulted when the draft agreement with all the principal provisions has been produced. The results of the employee consultation must be recorded in the minutes stating the number of employees consulted and the number giving their approval or objecting to the draft. The minutes are confirmed by the signature of a leading representative of the trade union executive committee.⁸⁹⁴

⁸⁹¹ See the Conclusion of MOLISA's Inspection dated August 1, 2006 on law observation in Vietnam One-member Machinery and Coal Limited Company.

⁸⁹² Source: *The function of the collective agreements*, LO document, August 2009; <http://www.lo.se/home/lo/home.nsf/unidView/F53218717022F344C1256E4C004F02EF>

⁸⁹³ See: Article 45, Vietnamese Labour Code and Article 3, 4 of the Government Decree No 196 dated December 31, 1994.

⁸⁹⁴ See Article 4 of the Government Decree No 196 dated December 31, 1994.

In Sweden no statutory rules exist on the balloting of members or any other form of membership approval before an agreement can enter into force. It is entirely for the trade union to decide on the matter. The result of any consultation is not binding on the union either⁸⁹⁵, though the union is presumably unlikely to entirely disregard a strong majority view. In Vietnam, the Labour Code stipulates that a collective agreement shall only be signed when it has been approved by more than 50% of employees who will be bound by the collective agreement.⁸⁹⁶ This seems a reasonable requirement since the Vietnamese market economy is still young and trade unions have not had much experience of this kind of activity. Many enterprises have never entered into any collective agreements since their establishment. So, a period in which the parties can accumulate experiences is significant. In practice, it is a pity that the consultation procedure has not been properly followed.⁸⁹⁷ In the non-state sector, the local trade union often assigns its sub-units to carry out the consultation and gather in the opinions. It is not uncommon for the opinion of employees in the sub-units to be affected by the opinions of the head of the sub-unit union; this problem is especially likely to arise where employees do not know much about collective agreements. Thus, in many instances, consultation with employees is only a pro-forma matter.⁸⁹⁸

If a serious approach to negotiation and consultation is not taken, the results achieved are likely to be poor. For example, in the FDI sector, an area which is expected to offer better remuneration to their hard-working employees, what has been done in fact is not at all good as might be expected. New collective agreements are regularly signed, but the differences between them are very small. An article on the "*An ninh Thu do*" says that, for a period 3 years (2004-2007), only 70% of employees were entitled to upward wage adjustments. *A strange phenomenon but not uncommon in practice* and one which has been noticeable for a long time is that wage increase

⁸⁹⁵ See: Reinhold Fahlbeck, Tore Sigeman (2001), *European employment and industrial relations glossary: Sweden*, Publisher: Office for Official Publications of the European Communities, para. 314, p.194).

⁸⁹⁶ See the Section 45 of The Labour Code 2002.

⁸⁹⁷ This is a comment in a recent article: "Many enterprises have no collective agreements or otherwise, they have collective agreements, but only for form's sake, in order to present them to the task force when necessary (...). When concluding collective agreements, consultation with employees is just pro forma (...) 7.9% workers do not know whether their own enterprises have collective agreements. See: Le Thanh Ha (2008), *Some current shortcomings concerning to implement of employment and remuneration for workers and employees in our country*, The "Communist" No. 5 (149), 2008.

⁸⁹⁸ Nguyen Nang Khanh (2009), "*Collective agreements in Vietnamese labour law*" PhD. thesis, Institute of State and Law (2009), see Section 2.1.3. *Procedure of negotiating and concluding collective agreements*.

rates in this sector are extremely low. In some instances the wage table consist of 37-40 different levels, but the gap between them is only 10,000 VND (equivalent to 0.6 USD)!!!⁸⁹⁹

Strengthening trade unions and overhauling the manner in which they work is indispensable if this kind of problem is to be overcome (see Chapter 5).

4.1.5. Signing a collective agreement

Having obtained approval of the collective agreement draft, representatives of the parties will sign the agreement. Since the head of each party (the chairperson of the executive committee of the local trade union and the director of the enterprise) are the persons ultimate responsible for all activities of their side, they are also the ones who take charge of signing the final document. In case such competent persons are absent from the bargaining process, whether by being away due to business or illness, other persons may be authorized by them (in writing) and they can also sign it.⁹⁰⁰ But, in any event the heads of each side are responsible for the legitimacy and the enforcement of the signed collective agreement.

The two parties are not forced to sign the collective agreement, even when they have agreed all substantive matters. There is no obligation to sign a collective agreement under either Swedish or Vietnamese law. In Sweden, the parties even have no obligation to show any willingness to compromise or to reach common ground.⁹⁰¹

However, when all the key issues of a collective agreement have been agreed to, the parties have no reason for not signing it. And in Sweden, there is no reason why the parties should have any reluctance about signing. Collective agreements are traditionally entered into freely and they have been very frequently used in the Swedish labour market. Even though the Swedish employer may have a co-operative and understanding attitude towards unions, collective bargaining is still resorted to as it tends to produce a settlement short of industrial strife⁹⁰², and keep the peace in

⁸⁹⁹ See: MOLISA (2007), Thematic reports on wage - income and construction labour relations in enterprises in 2007; see also: Hue Chi (2007), *Wages in FDI sector - not as good as expected*, The An ninh Thu do, August 18, 2007.

⁹⁰⁰ See para 2 Article 45 Vietnamese Labour Code 2002.

⁹⁰¹ Reinhold Fahlbeck, Bernard Johann Mulder (2008), Sweden, *Int'l Labour & Emp. Laws Vol. IIA*, p.19-56.

⁹⁰² Ibid, p.19-56.

labour-management relationship. There is indeed no need to appeal to the employers with regard to concluding collective agreements. They sign them voluntarily because they need them. In Vietnam, collective agreement have been reached in certain parts of labour market, but the employer side has not shown so much interest in collective agreements in many cases.

4.2. Registering collective agreements

4.2.1. Purpose

A registration procedure is normally set out on the one hand to allow the government to manage the labour market and grasp the current situation with respect to employment and labour utilization and, on the other hand to confirm the validity of a collective agreement before its application. Where a collective agreement is shown to be concluded improperly, where the contents of the agreement are not in conformity with the law or where the negotiating procedure has not been strictly observed, the administrative authority can ask the parties to revise the collective agreements (and give them some guidance where necessary).

A procedure for registering collective agreements often appears in a legal system where the state has sought to gain control over the labour market. The procedure of registration may apply to all types of collective agreements.⁹⁰³ But in countries where large-scale collective agreements are common, this obligation is often limited to national and sectoral agreements; there is no registration of company agreements.⁹⁰⁴ A number of countries have even no legal obligation to register collective agreements at

⁹⁰³ Such a procedure exists in Thailand, Singapore, Japan, Vietnam and Indonesia etc.

⁹⁰⁴ Some of them, such as Belgium (see: Youcef Ghellab, Daniel Vaughan-Whitehead (2004), *Sectoral social dialogue in future EU member states: the Weakest link*, published by ILO, European Commission 2004, p.59) Czech Republic, Lithuania, Slovakia and Slovenia. (See: Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound. Available at: www.eurofound.europa.eu/.../2005/.../tn0503102s.htm).

all,⁹⁰⁵ Sweden being among them.⁹⁰⁶ In Vietnam, however, registration is a legal requirement.⁹⁰⁷

The existence of a registration procedure for newly-concluded agreements links to the actual conditions and characteristics of the labour market and the attitude of the state. For example, in a legal system which already has an efficient supervisory mechanism, there is no great need for establishing such a registration procedure. By contrast, where a bargaining system suffers from certain shortcomings and fails to secure a balance of power between the parties, leaving labour relations in an unsound state, there is definitely a need for supervisory mechanisms, including registration, to correct/compensate for its shortcomings and weaknesses.

It is difficult to judge whether a registration system derives from the objective needs of the market or from the subjective demands of the state. The evaluation of the actual conditions on which registration is based is difficult because it reflects subjective aspects of the nation. Involved may be the state's desire to check whether labour regulations are being adhered to in agreements, to have a system providing information and advice, to assist with regional structural policies and the need to recognizing the parties' compromise and make it binding.⁹⁰⁸ At the moment, a mass of countries, including those in Europe, have adopted registration.⁹⁰⁹

In the current Vietnamese situation, the registration procedure is very important. First, trade unions are relatively powerless and hold a less advantageous position at the bargaining table; second, industrial action is of limited use in the negotiation process; third, statutory enforcement is weak and labour standards are poorly observed. All of these are reasons for adopting some kind of supervisory mechanisms of which registration is a good example. The registration procedure enables the state

⁹⁰⁵ These countries are mainly in Northern and Western Europe and include Denmark, Greece, Ireland, Italy, Latvia, Norway and the UK.. See: Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

⁹⁰⁶ See: Carina Gunnarsson and Inga Åkerlund (2002), *The Role of Collective Bargaining*, Questionnaire for the Tenth Meeting of European Labour Court Judges Stockholm, September 2, 2002 - the case of Sweden, p.3.

⁹⁰⁷ See Article 47 para 1 (d). Vietnamese Labour Code 2002.

⁹⁰⁸ In some countries in order to make a collective agreement mandatory and binding on the signatory parties, it must be registered (see Section 2.8. *Legal Effect of Collective agreements*).

⁹⁰⁹ A study on collective bargaining shows that most EU countries (18/26 countries involved in the study) make it an obligation to register collective agreements (See: Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005).

to monitor the collective agreement system and provide assistance in order to help the parties concerned implement their agreements.⁹¹⁰ This may restrain labour law violations (which are common in the Vietnamese labour market) to a certain extent and provide employees with some protection.

Before the amendment of the Labour Code in 2002, the registration of collective agreements was considered as a precondition to recognizing the legitimacy of a newly-concluded collective agreement.⁹¹¹ After the amendment of the Labour Code, it is no longer seen as such a precondition to the legality of collective agreements, but it remains a mandatory procedure, though the purpose is for labour administration only.

The amendment of the Labour Code aims at granting more power and discretion to the parties. It is an indispensable step in developing a full market economy in which the creative roles of the social partners will be increasingly promoted. But there should still be some guarantee of the legitimacy and quality of collective agreements, or other problems will appear. As an example: if an agreement is not subject to registration, illegal content may be discovered too late - after implementation when its terms will have been integrated into individual employment contracts. Correction of labour law violations in such a case may be more complicated and time-consuming than would be the case prior to the implementation of the agreement.

4.2.2. Authorities responsible for collective agreement registration

The authorities responsible for this activity are often the Ministry of Labour such as in Finland,⁹¹², Germany,⁹¹³ and Hungary⁹¹⁴ or the labour court, as in Singapore⁹¹⁵

⁹¹⁰ Diep Thanh Nguyen (2005), *Basic knowledge on labour law*, student book - Can Tho University, p.54.

⁹¹¹ See: para 2 Article 47 of Labour Code 1994.

⁹¹² See: Thorsten Schulten (2005), *Changes in national collective bargaining systems since 1990*, Eurofound 2005.

⁹¹³ See: Annelie Marquardt Richter in am Bundesarbeitsgericht Bundesarbeitsgericht, Erfur (2006), *Collective agreements*, Germany, Document for XIVth Meeting of European Labour Court Judges 4 September 2006 (Collective agreements are registered by Federal Ministry of Labour).

⁹¹⁴ Since 1997 collective agreements are registered by the Ministry of Employment and Labour. See: Laszlo Neumann, *Questionnaire for EIRO comparative study on changes in the national collective bargaining systems since 1990*, case of Hungary.

⁹¹⁵ See Article 25 Labour Relations Act 1960 of Singapore.

and Malaysia⁹¹⁶. In some special cases, several bodies take charge of collective agreement registration, like in Poland⁹¹⁷, or else a high-ranking official is involved, as with the Director-General (or a person authorised by him) in Thailand⁹¹⁸.

As there is no registration procedure in Sweden, there are no organizations responsible for registration either. However, collective agreements are on demand sent to the National Mediation Office for the purposes of collecting statistics and enabling research.⁹¹⁹

In Vietnam, the two bodies responsible for registration are:

- The Provincial Authority of Labour, War Invalids and Social Affairs (where the enterprises or organizations are headquartered).
- The Industrial Park Management Board (in case enterprises are in export-processing zones, industrial or high-tech parks).⁹²⁰

Registration has demonstrated the importance of its role in the administration of labour in Vietnam. It does help prevent and restrain labour law violations. However, this activity does meet some unnecessary difficulty. Some recent inspectors' reports mention that certain collective agreements which have been registered by the authorities still contain illegal elements. The collective agreement of the Thong Nhat Joint-stock Motor Company which is located in Thua Thien Hue, is an example. At the time the inspection was conducted, the agreement had already been registered at the provincial authority. According to the inspection report on this agreement, some provisions regulating employment conditions in the agreement were merely regulations imposing punishment on employees (in cases where employees did not

⁹¹⁶ See Article 16 Industrial Relations Act 1967 of Malaysia.

⁹¹⁷ In Poland, Supra-company collective agreements are registered by the Minister with responsibility for labour, whereas company collective agreements are registered by the district labour inspectors. See: The national report of Poland on Implementation of the international covenant on economic, social and cultural rights, UN Committee on Economic, Social and Cultural Rights, August 2008, p.54, para. 234.

⁹¹⁸ See Article 5 (on terminology) and Article 18 (on employer's obligation of collective agreement registration) of the Thai Labour Relations Act 1975.

⁹¹⁹ Instruction for the National Mediation Office (2007:912)

⁹²⁰ See Article 5 of the Government's Decree No 196/CP of December 31, 1994 detailing and guiding the implementation of a number of Articles of the Labour Code regarding collective agreements and Para 3, Article 1, Decree No 93/2002/ND-CP dated November 11, 2002 amending and supplementing a number of Articles of the Government's Decree No 196/CP.

fulfill their production quotas, or where they did not act on their manager's orders). Some other provisions were not in compliance with labour law either such as forcing the employee to pay any medical expenses incurred in work-related accidents where such accidents were the employee's fault.⁹²¹

This was partly due to the negligence of the authority in charge of registration, but also because labour regulation in certain cases is still too complicated or unclear for both the parties to the agreements and to the authorities themselves. Thus, besides improving law, interpreting the law is equally important to collective bargaining and to the administration of labour.

4.2.3. Procedure of registration

Within 10 days of the date on which a new collective agreement has been entered into, the employer must send it to the responsible authority for registration. The authority considers the newly-signed collective agreement and makes the decision to register. The authorities also have the right to declare a collective agreement partially or wholly void.⁹²²

Where the signatory parties did not follow the statutory procedure or where a person who signed the agreement did not have power to do so, if the terms of the agreement seem beneficial to employees, the body in charge of the administration of labour will instruct the parties to try again in conformity with legal requirements within 10 days of the date of being so instructed.⁹²³ If the parties fail to follow this instruction, the agreement will be annulled by the authority. The rights, obligations and benefits of the parties recorded in any agreement which is declared invalid are governed by the related law.⁹²⁴

⁹²¹ See the conclusion of MOLISA's labour inspection dated May 13, 2008.

According to Article 107 of the Labour Code 2002, The employer must bear all medical expenses incurred from the time of the first aid or emergency treatment to the completion of medical treatment in respect of an employee who was injured in a work-related accident or contracted an occupational disease (para 2). In serious cases of work-related accident, even when the employee is at fault, he is also entitled to some compensation (which shall be at least equal to twelve (12) months' wages and wage allowance (if any)) (para 3).

⁹²² See: Article 47, 48, Labour Code 2002.

⁹²³ See: Article 48, Labour Code 2002.

⁹²⁴ See: Article 48, Labour Code 2002.

By and large the registration procedure is not too complicated. But a problem is that many collective agreements have been signed, but not all of them have been registered. In late 2006 an inspection campaign on "*labour law observation*" at 24 enterprises was conducted by an interdisciplinary inspection force from Hanoi. The result was that 7 out of 12 enterprises did not have their existing collective agreements registered. Among them many violations were found: half had no wage tables. One enterprise - Socson Farm - was still applying the monthly outdated minimum wage of 180.000 VND (in late 2000).⁹²⁵ Many enterprises were applying the monthly minimum wage of 290.000 VND (out of date since September 2005).⁹²⁶ 1 in 4 enterprises was behind in its social security contribution by up to 6 to 18 months. Many violations relating to employment contracts were also found.⁹²⁷ A similar situation could be observed in other provinces outside Hanoi.⁹²⁸

As collective agreements are voluntary-based internal regulations, it is for the parties to decide whether there should be a collective agreement in their enterprise at all. But this "laziness" in submitting collective agreement for registration suggests there may be problems in the collective agreements themselves such as the stipulation of poor working conditions or other matters contrary to labour law. Putting aside the problem of content, an employer who does not register a signed collective agreement with the competent authority will be fined.⁹²⁹

4.3. Implementation of collective agreements

When a collective agreement is to come into force is left to the parties to decide. A collective agreement shall become effective on the date agreed by both parties and

⁹²⁵ On December 15, 2000 the Government issued Decree No 77/2000/ND-CP to adjust the minimum wage level from 180.000 VND to 210.000 VND.

⁹²⁶ On September 15, 2005 the Government issued Decree No 118/2005/ND-CP to adjust the minimum wage level from 290.000 VND to 350.000 VND.

⁹²⁷ Thao Lan, August (2007), *Some difficulties and grievances of workers in the capital area*, MOLISA. Available at: www.molisa.gov.vn/...kho...xuc...lao.../language/.../Default.aspx

⁹²⁸ See the report of MOLISA's inspection dated July 31, 2008 on implementation of the labour law in Thanh Hoa province and the report of MOLISA's inspection on implement of the labour law in Hue city dated May 13, 2008 etc.

⁹²⁹ The punitive sanction is provided for in para. 1 Article 9 of Government's Decree No 47/2010/ND-CP dated May 6, 2010 On Penalization for Administrative Violations in the field of labour legislation. (See also: Section 4.7. *Violations relating to collective agreements*).

recorded in the agreement; in the absence of such regulation, the collective agreement shall be deemed to be effective from the day it is signed by the parties.⁹³⁰

To implement a collective agreement, the persons affected by it must be defined. The parties can agree, *at a concrete level*, the persons who will be bound by or excluded from coverage. For example, in the agreement on general conditions of employment signed between Teknikarbetsgivarna and Sif, Sveriges Ingenjörer and Ledarna (April 2007), the whole of Section 1 including 8 subsections is intended for this purpose. Subsection 4 states that "*This agreement applies immediately to salaried employees who are employed on probation (...)*" while subsection 5 provides as follow: "*This agreement does not apply to salaried employees whose employment is a secondary employment (...)*" etc. In Vietnam, since trade unions represent both trade union members and employees in general, a collective agreement will normally apply to the entire related workforce. In collective agreements, this issue is normally covered very clearly. For example, in Article 1 of Saokim Pharmaceutical Limited Company's collective agreement, which was signed on May 2006, the scope of its application is prescribed as follow: "*All employees of company, including employees who are not union members and who are recruited after the signatory day of this agreement, shall have the obligation of fully and correctly implementing this agreement (...).*"

Prior to applying the collective agreement, the employer has the duty to notify all employees and other relevant persons in his enterprise about it. All employees, including new employees who are employed after the signing of the agreement, will be responsible for compliance with its terms.⁹³¹

A collective agreement has the overriding legal value in the workplace. In cases where the rights stipulated in the signed labour contract of an employee are poorer than those provided for in the collective agreement, the respective terms of the latter must be complied with.⁹³² The parties will adjust the related employment contracts pursuant to the new regulation in the collective agreements upon its coming into

⁹³⁰ As for Vietnam, see Article 47 Labour Code 2002.

In Sweden, there is no statutory regulation on this matter. But the commencement date of an agreement application is defined the same way in practice.

⁹³¹ Para. 1- Article 49, Labour Code 2002.

⁹³² Para. 2- Article 49, Labour Code 2002 (Vietnam) and Section 27, Co-Determination Act (Sweden).

force. Similarly, all labour regulations within the enterprise such as work rules must be amended so that they are consistent with the new provisions.

Co-operation between the parties is of great significance if the collective agreement is to be implemented smoothly and effectively. It is possible that certain unexpected events may occur in the course of its application resulting in disadvantages for a party fulfilling its obligations according to the agreement. In such a case, the parties should use best efforts to surmount the problem. Each party will support its counterpart in dealing with its rights and obligations.

In Vietnam, in cases where certain provisions of collective agreements have become outdated, each party has the right to put forward a request for an amendment of or an addition to the existing collective agreement. For example, when the national payment rate is adjusted, the respective provisions of collective agreements may need to be adjusted pursuant to the new statutory regulation. In the course of running the business, where the need for an amendment appears and it is unreasonable to wait until the expiry date of the collective agreement, the parties can also resort to an amendment.

There is, however, a limitation imposed by the Labour Code: an amendment can only be made after at least three months after the effective date of a collective agreement with duration of less than one year, and after at least six months in respect of an agreement with duration of one to three years. There has been some criticism of this regulation. It is argued that the parties to a collective agreement should not be given the chance to change the contents of a signed agreement. This is to maintain industrial peace⁹³³ and, on the other hand, to stop the production of collective agreements with sketchy and poorly thought out provisions which, in turn, result in disadvantages for the employee side.⁹³⁴ This argument shows certain reasonable elements. However, the issue has still not been settled thoroughly. Another aspect of the problem is that labour market parties need to adapt themselves to changes in the business environment which are not under their control. So the question is only how

⁹³³ See *"Improving and implementing law on collective agreements"*, Cong Minh Law firm's webpage-Dated May 4, 2008

⁹³⁴ The presumption is that this helps to limit incautiousness of the parties in concluding collective agreements. A sketchy collective agreement can guarantee only a few employees' benefits.

to maintain industrial peace, but not stop the labour market parties from adjusting their agreements.

As for Sweden, there are no provisions on the amendment of collective agreements and the parties can always negotiate and sign some complement or supplement to the agreement which has been signed. During such a secondary negotiation process, strikes will not be permitted as the ordinary collective agreement is still in force (and the peace obligation continuously maintained). This arrangement is both practical and beneficial as it guarantees two desirable goals: on the one hand there are opportunities for the parties to promptly handle problems occurring during the life time of the signed collective agreement; on the other hand, any instability in labour relations is avoided.

Application of collective agreements in the event of transfer or reorganization of an undertaking.

In a market economy, it is not uncommon for an enterprise to change its structure and managerial mechanisms to adapt itself to changes in the business environment or to run the business more effectively. There are also many other situations which will lead to substantial changes such as transfer of ownership (or business) whether in whole or in part, which may take place under a variety of forms including merger, division, separation.

It is worth noting that there is not much to do if such a change is only a technical way of boosting the business. For example, a merger of enterprises may merely aim to conduct business more conveniently via consolidation of the enterprises being merged. But, a transfer of ownership is a special event, because it leads to a change in labour-management relationship. The employment relationship between the employees and the former employer will be terminated and a new employment relationship between the employees and the new employer will be established. Because the new employers have the right to decide labour relation policies (provided that they do not contravene the laws), employment conditions could be changed. So, once such a substantial change appears, the rights and obligations of relevant parties must be redefined. In this event, the question is whether the collective agreement continues to apply to the employees affected by the change.

In Sweden when an undertaking, a business or a part of a business is transferred from an employer who is bound by a collective agreement to a new employer, the collective agreement continues to be valid and binding on the new employer, unless he is bound by another agreement applicable to the enterprise.⁹³⁵

There are also some ways to cancel the old agreement. Both the old employer and the employees may be able to cancel it.

If the employee side gives notice of termination of the agreement within thirty days of receiving notice of the transfer, the agreement shall cease to apply upon transfer. Where the employees' notice to terminate collective agreement is given after the transfer, the agreement shall be canceled immediately upon the giving of such notice.⁹³⁶

The old employer is also entitled to terminate the agreement. If prior to the transfer he gives notice to terminate the agreement, the collective agreement shall not apply to the new employer. However, if such notice is given less than sixty days before the transfer, the agreement shall apply to the new employer for sixty days after notice to terminate was given.⁹³⁷

In case where no termination notice is given, the employment conditions for the employees subject to the transfer will be protected for 1 year. In case the agreement at the company being sold has ceased to apply by virtue, say, of expiry, or a new collective agreement applicable to the employees has entered into force, a shorter period is applicable.⁹³⁸

Regulation of the Co-Determination Act (1976) on enterprise transfer is now to be seen in the light of the Council Directive 2001/23/EC of 12 March 2001. Both the Directive and the Swedish legislation aim to protect the employees' acquired rights in the case of a transfer of a business or undertaking from one employer to another, so

⁹³⁵ See para 1, Section 28, Co-Determination Act (1976)

⁹³⁶ Ibid, para 2, Section 28

⁹³⁷ Ibid

⁹³⁸ Ibid

that the conditions the employees enjoyed under their former employer, the transferor, continue to apply after the transfer.⁹³⁹

The merger of enterprises is another matter. According to the Co-Determination Act (1976), where two or more employers' or employees' organizations are merged, the collective agreements of the merged organizations will not be canceled as a result. They remain in force and apply to the new merged organization. They continue to be binding on the employees who were bound by it in the former organization.⁹⁴⁰ Thus, the new organization could be bound by several collective agreements.

In Vietnam, this issue is dealt with by Article 52 of the Labour Code. It states that in cases where an enterprise merges, consolidates, divides, separates, or transfers ownership of, the right to manage, or the right to use the assets of the enterprise, the employer and the executive committee of the trade union of the enterprise shall, based on the labour usage plan, consider the continuance of, amendment of, or addition to the existing collective agreement, or the entering into of a new one.

This regulation has been explained by Government Decree 93/2002/ND-CP. According to this document, what happens to a collective agreement is determined differently in two separate cases: first, if the number of employees of the merged enterprise who were bound by the old collective agreement is more than 50% of the total number of employees in the new enterprise, it will continue to be valid; second, if the number of such employees is 50% of the total or less, the two parties have to negotiate and sign a new collective agreement within six months.⁹⁴¹

Not all mergers, divisions or separations lead to a change in ownership/employer, for example, the merger of a number of enterprises belonging to the same owner, or the division of an enterprise into different businesses (and new enterprises) but the employer still takes control over all the new enterprises. In such a case, there is no change in the labour relationship, and there is not much to discuss. The question whether the collective agreement should continue to apply only occurs where an enterprise is sold (enterprise transfer). The Co-Determination Act (1976) is

⁹³⁹ See Article 28 Co-Determination Act (1976) and Article 3,4,5,6 of the Directive.

⁹⁴⁰ See the last paragraph of Section 28 Co-Determination Act.

⁹⁴¹ See: para 5 - Article 1, Decree No 93/2002/ND-CP dated November 11, 2002 amending and supplementing a number of Articles of the Government's Decree No 196/CP of December 31, 1994 which guides the implementation of a number of Articles of the Labour Code regarding collective agreements.

fairly clear cut on this⁹⁴² though the stipulation in Government Decree 93/2002/ND-CP unfortunately remains rather ambiguous. The Decree has not distinguished between two separate cases (*undertaking transfer* and *business reorganization*) which are totally different in nature and then resolves the issue of application on this unsound basis. This issue should be further considered to see whether the regulation should be improved. (See further discussion in the chapter 5).

4.4. Termination of collective agreements

Collective agreements may be terminated for one of these reasons:

- Expiration of term of agreements
- Cancellation by parties' consent
- Dissolution of undertaking
- Agreement is declared entirely void.
- Termination at one party's request (where the other side is in serious breach of agreements).

A collective agreement normally remains in force for the duration agreed by the parties. Upon its expiry date, theoretically, the collective agreement is automatically terminated; there is no need for the parties to give notice to terminate it though in some legal systems giving notice for collective agreement termination is regarded as mandatory.⁹⁴³

In both Sweden and Vietnam, the termination procedure is generally decided by the parties themselves. However, in order to terminate a fixed term collective agreement in Sweden giving notice is a requirement and without it the collective agreement will automatically remain in force.⁹⁴⁴ In Vietnam there is no need to give such prior notice

⁹⁴² In Swedish law (Section 28), the key concern is on transfers of undertaking, an event that does give rise to problems that need to be solved. Reorganization of undertakings is also mentioned, but this is rather marginal (see the last paragraph of Section 28).

⁹⁴³ See also Section 2.8 Legal effect of collective agreements.

⁹⁴⁴ See: *Termination of collective agreements*, Sweden, Eurofound August 2008 available at: www.eurofound.europa.eu/.../SWEDEN/ANCHOR-UPPS-Auml-GNINGAVKO.

The Co-Determination Act (1976) provides that a notice of termination shall be made in writing.⁹⁴⁵ Notice of termination shall be deemed to be valid when it has been sent to the other party's last known address in sufficient time for it to have reached that party before the latest time at which the notice should have been given, regardless of whether such notice was received, or received in due time (Section 30). A three-month period of notice may be reasonable for a local agreement.⁹⁴⁶

Where a collective bargaining agreement has been entered into by several parties on one of the sides, each party can terminate such agreement in relation to one or more parties on the other side. If the date when such termination is to be effective is fixed, another party may terminate the agreement effective at the same time. The latter notice of termination has to be given within three weeks of the time at which notice of termination would otherwise have been given, or, if the agreed period of notice is less than six weeks, within one half of the agreed period of notice (Section 29).

A collective agreement of indefinite duration will evidently not terminate automatically. Giving notice of termination is necessary. National law may leave the right to decide the termination procedure to the parties but it can also prescribe the procedure. This aims to indicate to the parties how to deal with the matter where they have not taken any express view on it.

In Vietnam, as indefinite-term collective agreements are not referred to in the law, there is no regulation on their notice either. This appears strange, but, as far as I understand it, there are at least two reasons for it:

- First, the regulation departs from the fact that in Vietnam collective agreements take place at grassroots level, and mainly deal with actual working conditions. The Labour Code as amended in 2002 and its successors try to elaborate national labour standards and requirements. Almost all long-term labour issues are covered by these legal documents. So, there is not much for the labour market parties to negotiate about; an indefinite collective agreement does not seem to be the kind of thing that needs to be set up.

⁹⁴⁵ See Section 30 Co-Determination Act (1976).

⁹⁴⁶ See the labour court case AD 1978 No 8.

- Second, it has been assumed that employment conditions should be renegotiated regularly to improve employees' working conditions⁹⁴⁷ and prevent employer from engaging in "laziness" when taking care of the workers' lives by not enhancing their working environment, the pay scheme or other fringe benefits for employees. Since the trade union's role remains blurry, the regulation shows a certain support for the union and a boost for collective agreements.

Collective agreements can also be terminated by the parties' consent. As collective agreements are voluntarily entered-into documents, statutory regulation may equally authorize the parties to terminate a signed collective agreement as they will.⁹⁴⁸ In many instances, though, this right is not mentioned in the law but the parties to collective agreements are not prevented from terminating an existing agreement or replacing it by a new one. In both Sweden and Vietnam, a collective agreement may always be terminated by the mutual consent of the parties, even though labour law does not expressly mention this.

Dissolution of an undertaking is also a situation that terminates a collective agreement. Normally, it remains in force if the undertaking remains operative. However, the dissolution of an enterprise may take place for various reasons such as voluntary liquidation (voluntary withdrawal from trade activities), dissolution by a competent authority (the court, the state administrative authority or equivalent bodies) or insolvency (bankruptcy). Where an enterprise ends its existence due to financial problems, the undertakings often has difficulty in paying its creditors, including the employees. Since a collective agreement is always linked to an obligation to pay, two practical questions arise: one, on which date does an existing collective agreement cease to be binding on the parties?⁹⁴⁹ And two, to what extent can the employers'

⁹⁴⁷ It is supposed that when a new collective agreement is reached, employment conditions are more or less improved as the parties would find it difficult to agree to poorer working conditions than before.

⁹⁴⁸ For example, in Rumania and Poland national law states that collective agreements can be ended by the parties' consent see para c, Article 33, the Law No. 130/1996 republished - Rumanian Law on collective agreements and see Section 241-7, Act to amend the Labour Code and other Acts in respect of collective bargaining 1994, respectively. In Mexico, the Federal Labour Law also gives parties to an agreement this right (see: Philip M. Berkowitz, Thomas Müller-Bonanni, Anders Etgen Reitz (2008), *International Labour and Employment law*, American Bar Association (2008), p 134, etc.

⁹⁴⁹ Actually if the collective agreement ceases to be binding on the parties while the employees still work, then the payment and other benefits. can still be implemented pursuant to minimum standards provided by the State.

payment obligation be fulfilled in case where the remaining funds of the bankrupt enterprise fails to cover the whole debt?

In Sweden, the Labour Court has held that, if the employer goes bankrupt, the collective agreement is still binding so long as production or any employment relationship governed by the collective agreement continues.⁹⁵⁰ In Vietnam, there is no regulation stating the date on which a collective agreement will cease to have effect where an enterprise becomes bankrupt. But some documents relating to payment and benefits for employees in bankrupt enterprises suggest that the collective agreement shall be valid as long as the employment continues.⁹⁵¹ In case the assets of a bankrupt enterprise will not cover the whole amount of the wages owing, the employees will share the loss *pro rata*.

Another situation leading to termination of collective agreement is when an agreement is declared null and void. A collective agreement may be annulled in cases where the statutory requirements were not observed by the parties when concluding it (This will be dealt with later in Section 4.5. *Invalid collective agreements*).

A collective agreement may be ended by one party's serious breach, but may still not be terminated unilaterally at the other parties' will. In both Sweden and Vietnam, where one party considers that the other party has failed to fully perform or breached the provisions of the collective agreement, a dispute settlement procedure may be resorted to. But the parties do not have the right to denounce the collective agreement unilaterally. It is for the Court to declare whether the collective agreement is still applicable or not.⁹⁵²

4.5. Invalid collective agreements

4.5.1. Legal grounds for invalidating collective agreements

If the labour market parties are fully aware of their rights, obligation and responsibilities under the law and observe them strictly throughout the negotiation of a collective agreement, then the newly-signed agreement will be legitimate and

⁹⁵⁰ The case AD 1978 No. 95 (see Adlercreutz, A./Nyström, B. (2009), *Sweden*, ELL, para. 538).

⁹⁵¹ Article 2, Decree No. 94/2005/ND-CP of July 15, 2005 *on settlement of benefits of labourers in bankrupt enterprises and cooperatives* provides that wages, social insurance and other benefits of employees shall be calculated as long as the employees work.

⁹⁵² For Sweden, see Article 31, Co-Determination Act. For Vietnam, see the the Article 166, Labour Code 2002;

enforceable. But in reality, not all mandatory requirements are fully respected or strictly observed by the parties. An infringement may be made intentionally or unintentionally. The nature of a violation is also diverse.⁹⁵³ But once such violations occur, their immediate consequence is that the signed collective agreement becomes, partly or wholly, invalid and inapplicable. Generally a collective agreement will be deemed to be invalid when it has one or more provisions incompatible with statutory rules or it has not been entered into according to the due procedure.

Normally if the parties agree to certain issues contrary to mandatory regulation such as excessive working hours, low wages and the like, only the regulation of such issues is invalid without prejudice to the validity of the remaining part of the collective agreement. But in some cases, illegal content is sufficient to invalidate the whole collective agreement. Illegal provisions relating to types of jobs/work have this effect.⁹⁵⁴

In Sweden, the issue of the validity of a collective agreement is mentioned in various provisions of the Co-Determination Act (1976). In term of content, first of all, an agreement shall not be valid as a collective agreement, if the content falls outside the scope of labour relations that is, conditions of employment and the relationship between employers and employees generally.⁹⁵⁵ Further, an agreement is also invalid if it results in the removal or limitation of rights or obligations under the Co-Determination Act (1976), or results in the application of provisions that are less favourable to employees than the provisions contained in the applicable EC Council Directives.⁹⁵⁶ In general, the content of a collective agreement must not be

⁹⁵³ There may be a case where substantive regulations of labour standards are not observed, or procedural regulations for collective agreement conclusion are not followed. This also means a violation may be substantive or procedural. A substantive violation may occur without association with a procedural breach at all, or vice versa.

⁹⁵⁴ Some kinds of employment/work are prohibited by national law, for example, employment relating to prohibited production (drugs, falsely-labeled goods), or prohibited services (prostitution). Because the issue of employment is of central importance in a contractual relationship - and the nature of the employment holds the key position in an agreement, if this clause is unlawful, the remaining contents of the agreement will become unworkable. This case may not only involve a breach of labour law, but also of criminal law or state administrative law. So, the legal consequence is not only that the collective agreement is invalidated, but that the relevant parties are at risk of being sanctioned for the criminal law violation or a state administrative law breach, as the case may be.

⁹⁵⁵ See Section 25 of Co-Determination Act (1976).

⁹⁵⁶ See Section 4 Co-Determination Act (1976).

incompatible with statutory regulation. In some exceptional cases, if a stipulation is deemed to be unreasonable, it may also be annulled by the Labour Court.⁹⁵⁷ In term of the procedure for their formation, a collective agreement has to be entered into between an employer or an employer's organization and an employees' organization;⁹⁵⁸ and a collective agreement must be in writing if it is to be formally recognized as such.⁹⁵⁹

By and large, the stipulations of the Co-Determination Act (1976) on the validity of collective agreements basically emphasize the substantial side of the collective agreements. There are less express requirements relating to the procedural aspect. On this point, its Vietnamese counterpart more or less differs.

Vietnamese labour law also links the validity of collective agreements with conditions on both their contents and the procedure that has to be met. According to Article 48, of the Labour Code 2002, a collective agreement shall be deemed partially invalid if one or a number of provisions in the agreement are contrary to provisions of the law.⁹⁶⁰ A collective agreement may also be deemed wholly invalid in certain circumstances. There are three such circumstances: 1) The entire contents of the agreement are contrary to the law; 2) The person signing the agreement was not authorized; 3) The signing procedure was not strictly followed.

First, the entire contents of an agreement are contrary to the law

It is rare for all the provisions of a collective agreement to be unlawful. But there is a greater possibility of one or more of its principal provisions being unlawful and invalidating the agreement entirety. The ground for this is that some matters constitute the basis of the contractual relationship between the parties. Such clauses hold a key position in the collective agreement, and once their validity is disputed, all the remaining stipulations of the collective agreement become meaningless or unworkable.

⁹⁵⁷ Carina Gunnarsson and Inga Åkerlund (2002), *The Role of Collective Bargaining*, Sweden, Questionnaire for the Tenth Meeting of European Labour Court Judges Stockholm, September 2, 2002 - the case of Sweden, p.11.

⁹⁵⁸ See Section 23 Co-Determination Act (1976).

⁹⁵⁹ Lars Gellner, Lars Sydolf (2008), *Swedish labour law*, Norstedts Juridik AB, p. 19; See also: Section 23, Co-Determination Act (1976).

⁹⁶⁰ Item 1, Article 48, Labour Code 2002.

Second, the person signing the agreement was not authorized

The persons signing a collective agreement must be the heads of the respective sides or persons who have been expressly authorized in writing by such persons. The authorized person may only act within the scope of his authorized activities and may only deal with the issues authorized. Where these requirements are not met, the signed collective agreement may not be valid.

Third, the signing procedure was not strictly followed

In Vietnam, the establishing of a collective agreement is subject to various steps and each step is subject to different requirements. But some of the steps or requirements are more important than others. For example, the parties must not skip negotiations, fail to observe the principles of negotiation (such as being sincere and not deceptive), or fail to consult the employees. If these procedures are not followed, the collective agreement signed will have no legal value.

4.5.2. Authorities who can declare a collective agreement to be invalid

In Sweden, the competent authority for invalidating collective agreements is the national Labour Court. The national Labour Court is allowed to restrict a rule or term of a collective agreement or declare it invalid in cases there are any provisions which are incompatible with mandatory legislation or deemed to be unreasonable (see above - 4.4. *Termination of collective agreements*).

In Vietnam, declaring a collective agreement to be invalid falls into the competence of the two following authorities:

- The authority in charge of collective agreement registration⁹⁶¹

When considering newly-signed collective agreements before granting a registration, the authority may recognize that certain of the contents contradict the law or that there has been an ignorance of legal procedure. If the parties' wrongdoing can be corrected⁹⁶² the authority shall first ask the related parties to repair the defect (for

⁹⁶¹ See above: Section 4.2.2. *Authorities responsible for collective agreement registration*.

⁹⁶² In cases where the steps or requirements established by the legal procedure have not been strictly observed but the employment conditions set up in the signed collective agreements seem beneficial to employees. (See above, section 4.2.3. *Procedure of registration*).

example, if the parties have not consulted the employees, they must do it now). If the parties fail to correct the collective agreement pursuant to the competent authority's request within the stipulated period (10 days), the authority is then entitled to declare the collective agreement void.⁹⁶³

- People's court

The People's court is one of the bodies in charge of the settlement of collective labour disputes.⁹⁶⁴ While hearing a labour dispute, should the court finds that certain contents of the collective agreement are incompatible with statutory rules, the court has the power to declare the collective agreement to be partially or wholly invalid.⁹⁶⁵

In reality another authority will often deal with invalid collective agreements: labour inspectors. When accessing enterprises and conducting inspections, the task force⁹⁶⁶ may find unlawful clauses in collective agreements. Labour inspectors do not have the power to invalidate collective agreements (or certain clauses in them), but they can force the relevant enterprises to correct any errors. Once certain provisions of a collective agreement are found to be illegal, labour inspectors often recommend revising them. A period (normally 60 days)⁹⁶⁷ is given for the enterprise to correct the defective contents. Should the enterprise fail to do so within the given period, or if the enterprise has not corrected the agreement in the way suggested by the task force, then it is at risk of being fined. Though labour inspectors are theoretically not empowered to annul collective agreements, their role in this area is still relatively active.

4.5.3. Legal consequences of invalid collective agreements

For Sweden, an invalid collective agreement can be partly revised at Labour Court demand or completely annulled by Court order in the light of generally prevailing principles of equity in contractual relationship as set out in Section 36 of

⁹⁶³ Article 48 Labour Code.

⁹⁶⁴ See Article 168 Labour Code; See also: Section 4.6.2. *Dispute settlement bodies*.

⁹⁶⁵ The item 4 Article 166, Labour Code.

⁹⁶⁶ The task force normally consists of some labour inspectors and representatives of relevant bodies taking charge of labour relations such as upper trade union etc. (if any).

⁹⁶⁷ This is my observation drawn from a number of MOLISA's inspection conclusions from 2006 till 2009.

the Contract Act.⁹⁶⁸ The Labour Court may void the unlawful contents or unfair provisions and let the rest of the agreement stand. There has been very little discussion on this topic. It should be noted that unlawful collective agreements are not common in the Swedish labour market. Experienced trade unions and a long tradition involving a systematically-developed collective agreement system have themselves produced decent working conditions at the workplace and there is little chance of poor and illegal clauses finding their way into collective agreements. In practice, the annulment of invalid collective agreements is very rare. The last time that a collective agreement was annulled by court order was in 1935.⁹⁶⁹

In Vietnam, in general, if certain clauses of a collective agreement are contrary to mandatory provisions, such clauses are null and void. The rights, obligations and interests of the involved parties are to be determined pursuant to the corresponding provisions of the applicable legislation and the lawful terms in the individual contracts (if any).⁹⁷⁰ Once stipulations in the collective agreement have been voided, employment contracts will not be shaped by such stipulations, but by the relevant statutory provisions instead. Where a collective agreement is declared completely null, the parties must not apply the collective agreement. They may negotiate a new agreement if they so wish. The rights and obligations of the parties will be settled as above mentioned.

There has been some discussion regarding unlawful clauses in a collective agreement and the appropriate remedy. In reality, not every unlawful clause in a collective agreement has a strongly negative implication. In practice, the statutory regulation may be too restrictive for the specific circumstances or both parties may feel more satisfied with arrangements other than those provided for in the state law (though the aim of the law is theoretically to guarantee a minimum benefit to the weaker party or provide the right balance in labour relations). For example, in some

⁹⁶⁸ See: Reinhold Fahlbeck, Bernard Johann Mulder (2009), *Labour and Employment Law in Sweden*, Lund : Juristförl., 2009 p.36; See: Michael H. Whincup (2006), *Contract law and practice: the English system with Scottish, commonwealth and continental comparisons*, 5th edition, Kluwer (2006), p.245.

⁹⁶⁹ Source: *Annulment of a collective agreement, Sweden*, Eurofound 2009. Available at: www.eurofound.europa.eu/.../SWEDEN/ANCHOR-H-Auml-VNINGAVKO

⁹⁷⁰ See Para 4 - Article 1, Decree No 93/2002/ND-CP dated November 11, 2002 amending and supplementing a number of Articles of the Government's Decree No 196/CP of December 31, 1994 which guide the implementation of a number of Articles of the Labour Code regarding collective agreements.

enterprises, the employer and the trade union provided in their collective agreements for certain extra forms of punitive disciplinary sanctions that had not previously been seen in labour law such as extension of the period for upgrading salary of the employee in question. This, though illegal, was a good way of dealing with breaches of work rules which could not be resolved properly by any of the allowed means.⁹⁷¹

In some legal systems, in order to give labour market parties more rooms to handle their relationship themselves, invalid collective agreements may be dealt with in more flexible ways. For example, in France, if a collective agreement is unlawful, the court may void it as a collective agreement but hold it valid as a simple contract under civil law and subject it to the provisions of the law of contracts.⁹⁷² Belgium is another country where the validity of a collective agreement may not be challenged, the parties themselves regard it as invalid, and the court agrees.⁹⁷³

Returning to the situation in Vietnam, there could well be a more flexible approach to illegal provisions in newly-created collective agreements. If the competent authorities see them as reasonable, there should be no need to annul such clauses (this issue will be discussed in Chapter 5).

4.6. Disputes concerning collective agreements

In general, a labour dispute is any dispute which affects the relationship between employers and employees.⁹⁷⁴ Labour disputes in a broad sense consist not only of

⁹⁷¹ The former regulation (Article 84 of the former Labour Code (1994)) was very limited: for example, "*transferring the employee to another position with a lower salary*" is one of three given punitive sanctions. But this solution was not workable in many cases, e.g. (1) where the employee holds an irreplaceable position in the enterprise; (2) where the employee holds a position with the lowest salary in the company, in which case, there is no other lower-paid positions in the enterprise for him to move to. Further, transferring employee to another position requires other rearrangement: vocational retraining, redistributing jobs and the like. This obviously created a number of obstacles to observing the statutory regulation.

⁹⁷² See Jacques Rojot (2004), "*Collective agreements in France*", in "*Collective Bargaining in Europe*", Ministerio de Trabajo y Asuntos Sociales-Spain (2004), p.131.

⁹⁷³ In Belgium, when an action is brought before the court, the parties can point out that the provision of the collective agreement that they do not want to see applied, is in conflict with a provision which is higher in the hierarchy of sources. If the judge agrees, the judge can consider the provision of the collective agreement to be null and void. (see *Chris Engels and Lisa Salas (2004), "Collective Bargaining in Belgium" in "Collective Bargaining in Europe"* - published by Ministerio de Trabajo y Asuntos Sociales, Spain in 2004, p.73).

⁹⁷⁴ This is a common perception of labour disputes in both Sweden and Vietnam. Regarding Sweden: see Arbetsdomstolens - *Presentation of the Swedish Labour Court*. Available at: [www.arbetsdomstolen.se/.../page.asp?](http://www.arbetsdomstolen.se/.../page.asp?;); Regarding Vietnam, the same notion of labour dispute was provided in the former labour law documents such as Ordinance No 29/SL dated March 12, 1947, Ordinance No 95/SL dated August 13, 1949 and Circular No 02-TT/LN dated October 02, 1985. The Labour Code (and its

disputes relating to collective agreements, but also to those relating to employment contracts as such or other issues involving the relationship between employer and employees. The statutory regulations of both Sweden and Vietnam define the concept of labour disputes in this broad way.⁹⁷⁵ As the concern of this research is collective agreements, labour disputes are here limited to those linked to collective agreements.

4.6.1. Types of disputes

Generally, labour disputes relating to collective agreements are disputes which arise during the conclusion, implementation or termination of collective agreements.

A dispute arising upon the conclusion of a collective agreement *involves conflicting interests (dispute over interests)*. This is the typical collective labour dispute.⁹⁷⁶

A dispute relating to the implementation of a collective agreement normally results from its non-performance or inappropriate performance, or disputes relating to interpretation, *involves conflicting rights (dispute over rights)*.⁹⁷⁷ This kind of dispute may be both individual and collective. For example, a complaint may be made either by an individual worker who is not receiving a wage level provided for by the collective agreement (individual labour dispute), or by a trade union which does not feel satisfied with the way a collective agreement is being interpreted and applied to its members; or it feels that it has not been provided with office space in an establishment (collective labour dispute).

A dispute relating to the termination of a collective agreement may also stem from a violation or a misinterpretation of statutory labour standards or the terms of the collective agreement itself, for example, disputes occur because of the unilateral termination of a collective agreement by a party without a ruling from the authorities,

amendments) put forward some more details but it tends more to explain the concept of labour dispute than to make any real changes to it.

⁹⁷⁵ Regarding Sweden, the wording of the Labour Disputes (Judicial Procedure) Act (1974:371) implies that labour disputes are *disputes concerning collective agreements and other disputes relating to the relationship between employers and employees* (Section 1); Regarding Vietnam, disputes relate to collective agreements are only a small fraction of labour dispute in general (See Article 157 Vietnamese Labour Code (updated 2007 with new amendments)).

⁹⁷⁶ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, National report, project for the study on *Conciliation, Mediation and Arbitration*, p.6

⁹⁷⁷ *Collective agreements* - Sweden, published by Eurofound., last updated August 14, 2009. Webpage: <http://www.eurofound.europa.eu/emire/SWEDEN/ANCHOR-KOLLEKTIVAVTAL-SE.htm>

or in the case of an enterprise transfer where the new employer neither recognizes nor performs the agreement signed by the former employer. These are *labour disputes over rights*. They can only be collective in nature because the termination of a collective agreement will always involve the rights of a labour collective.

It may be said that Swedish legislation does not distinguish between collective and individual legal disputes. Both of these kinds of disputes are resolved in the same way.⁹⁷⁸ Labour disputes are, however, regularly divided into disputes over rights (which concern the application or interpretation of collective agreements or statutory rules, and are often classed as *legal disputes*⁹⁷⁹) and disputes over interests (which relate to the conclusion of new collective agreements).

Vietnamese law divides labour disputes into individual and collective labour disputes. An individual labour dispute concerns the rights of individual employees while a collective labour dispute concern the labour collective and may be a dispute of rights or one of interests. Each kind has a different settlement procedure.

4.6.2. Dispute settlement bodies

In both Sweden and Vietnam, the bodies taking charge of settling labour dispute consist of the disputing parties, mediation institutions and the courts. Nevertheless, the roles and particular activities of such bodies within the two systems are neither the same nor even fully compatible. There are dissimilarities in the organizational structure, neutrality, actual capacity for dispute settlement and legal competence and in the procedures that must be followed. These factors affect the outcome of any dispute settlement.

4.6.2.1. Dispute settlement bodies in Sweden

** Disputing parties*

The disputing parties play a key role in resolving any dispute because the conflict concerns their problems and they should always have the right to decide how they are settled. In Sweden, trade unions officially represent their members in dispute

⁹⁷⁸ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, National report, p.6

⁹⁷⁹ This term has been used in many legal documents and in the legal literature, e.g. See section 35, Co-Determination Act (1976); See also: Lars Gellner, Lars Sydolf (2008), *Swedish labour law*, Norstedts Juridik AB, p.24; Orjan Edstrom (2003), *The actors of Collective Bargaining*, Swedish report to 17th World Congress of Labour Law and Social Security, Montevideo, September 2003., pp. 3, 5, 6, 7, 8, 13, 21.

settlements. Once a dispute has arisen, regardless of whether it involves the labour collective or a single employee, the representative of employees' side is usually a trade union.⁹⁸⁰ So, at plant level, the disputing parties include the local trade union and the employer. The national organizations of both sides will also get involved in a labour dispute, where the parties at plant level have failed to reach a decision.

** Conciliation/Mediation bodies*

The central authority responsible for state mediation activities in relation to labour disputes is the National Mediation Office.⁹⁸¹ This was founded in 2000 and replaced the old state mediation system which had been around for a very long time.⁹⁸² Under the Co-Determination Act (1976), the National Mediation Office has two tasks: to mediate in labour disputes and to promote an efficient wage formation process.⁹⁸³ The Office is also required to provide guidance and information to the social partners involved in the negotiation of collective agreements.⁹⁸⁴

The Swedish mediation service at the national level has traditionally relied on external mediators appointed on an ad-hoc basis. This allows the parties to the dispute a greater influence on the choice of mediator than in other countries.⁹⁸⁵ Mediation services are financed by the state, and free of charge for the parties to the dispute.⁹⁸⁶ Mediators can be appointed with the consent of the parties or, in certain cases, by the National Mediation Office without consent (which has only occurred three times

⁹⁸⁰ This thesis does not consider labour disputes which merely relate to rights and interest of non-unionized employees. A dispute which relates to a collective agreement naturally pertains to workplaces having trade unions and directly or indirectly involves rights or interests of trade unions or their members.

⁹⁸¹ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.7

⁹⁸² For further detailed information, see: Torgeir Aarvaag Stokke (2002), *Mediation in Collective Interest Disputes*, Scandinavian Studies in Law, vol. 43, pp.137, 143, 144).

⁹⁸³ See Section 46, Co-Determination Act (1976).

⁹⁸⁴ Ibid, Section 47.

⁹⁸⁵ Torgeir Aarvaag Stokke (2002), *Mediation in Collective Interest Disputes*, Scandinavian Studies in Law, vol. 43, p.142

⁹⁸⁶ Ibid, p.136

during the period 2000-2004).⁹⁸⁷ The Office is located in the capital, but it has local offices where the parties can meet.⁹⁸⁸

Tasks of mediators appointed by the National Mediation Office

The task of a mediator is to seek agreement between the parties. In order to achieve this goal, the mediator is required to summon the parties to the negotiating table or to take other appropriate actions (such as asking the National Mediation Office to require the disputing parties to fulfill their obligations on penalty of a fine). Mediators must also seek to persuade the labour party concerned to postpone or cancel any planned industrial action with the support of the National Mediation Office.⁹⁸⁹ A mediator also has the task of promoting an efficient wage formation.

Private mediation system

Beside the Swedish Mediation Office, there are also private mediation systems established by a collaboration agreement between the parties, to which the labour market parties can turn if they prefer to solve their conflicts through such a mediation system. Collaboration agreements must be registered at the National Mediation Office

** The Labour Court*

The Labour Court was founded in 1928. It serves as the final – and in most cases only – forum for settling legal disputes on labour issues.⁹⁹⁰ There are no regional or sector tribunals.⁹⁹¹ The Swedish Labour Court has been described as the partners' court (or tripartite labour court), as its members include representatives from government, employers and unions. These representatives of the social partners constitute the majority of the court.

⁹⁸⁷ Philip Simon (2007), *Sweden - Freedom of Association and Labour Law*, Available at: www.legislationline.org/.../17.

⁹⁸⁸ Regional mediators deal with local labour disputes, primarily those concerning disputes where a trade union demands the introduction of a collective agreement at a workplace and the employer is opposed to such a course. (See: Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, National report, p.9).

⁹⁸⁹ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.9.

⁹⁹⁰ Mia Ronnmar (2004), *The Personal Scope of Labour Law and the Notion of Employee in Sweden*, p.3. the article available at: www.jil.go.jp/english/events_and.../cills04_ronnmar2.pdf,

⁹⁹¹ Source: *Labour Relations In Sweden*, published by Swedish Institute February 2005, p.3

According to the Labour Disputes Act, The Labour Court shall, as a court of first and also last instance, deal with disputes where the action is brought by an employers' or employees' organization, or by an employer who is a party to a collective agreement but only in the two following cases:

(1) disputes concerning a collective agreement or other disputes under the Co-determination Act;

(2) other labour disputes provided that the parties are bound by the same collective agreement or that the individual employee concerned is engaged in work within the scope of the collective agreement by which the employer is bound.⁹⁹²

When hearing a case the labour court generally consists of seven members. In more straightforward cases, however, the court may consist of only three members.⁹⁹³

In the usual seven-member court, four of the seven members are appointed by the Government on the recommendation of the social partners. Two of the members represent the employers and two the unions. The other three members are appointed from parties free of any interest in the matter. These three members, often known as "official" members, are individuals with long experience in the judiciary.⁹⁹⁴ The chair and deputy chair will both be experienced judges. The third impartial member will be an expert specializing in labour market relations.⁹⁹⁵ This person often holds a prominent position in a government department or the like.⁹⁹⁶

The three-member court consists of a chairman plus one representative each for the employer and employee interests.⁹⁹⁷

Of the members only the chairman is engaged full time in and therefore employed by the court. Other members serve the court on an occasional basis alongside their usual employment.⁹⁹⁸

⁹⁹² See also: Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, Wolters Kluwer, para. 403; See also Section 1, Chapter II, Labour dispute Act.

⁹⁹³ See: Arbetsdomstolens - *Presentation of the Swedish Labour Court*. Available at: www.arbetsdomstolen.se/.../page.asp?

⁹⁹⁴ Ibid.

⁹⁹⁵ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.6.

⁹⁹⁶ See: Arbetsdomstolens - *Presentation of the Swedish Labour Court*. Available at: www.arbetsdomstolen.se/.../page.asp?

⁹⁹⁷ Ibid.

The Labour Court acts independently. It is financed from public funds. The individual parties in a dispute have no influence whatsoever over the composition of the court. The court largely follows the same judicial procedure as the general courts.⁹⁹⁹

4.6.2.2. Dispute settlement bodies in Vietnam

** Disputing parties*

In Vietnam the disputing parties are also the ones responsible for dispute settlement, they must take part and put their best efforts into trying to reach agreements on the disputed issues. However, the notion of “disputing parties” in Vietnam is a legal term that appears narrower than does the expression in Sweden: it does not involve the national organizations of the two sides. In Vietnam, upper trade union may be involved in settling labour disputes, but as a neutral party, and a similar thing never happens on the employer side.

** Mediation bodies*

- Company labour conciliation councils

A company labour conciliatory council is a body which is established in enterprises having a trade union or a provisional executive committee of a trade union.¹⁰⁰⁰ It consists of an equal number of representatives of the employees and the employer. The two sides may together select other members to join the council.¹⁰⁰¹ The term of office of the labour conciliatory council of an enterprise is two years.¹⁰⁰² Every year, the representatives of the two parties take the positions of chairman and secretary of the council in rotation.¹⁰⁰³ The labour conciliatory council performs its

⁹⁹⁸ See also Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, Wolters Kluwer, para. 400. see also: Arbetsdomstolens - *Presentation of the Swedish Labour Court*. Available at: www.arbetsdomstolen.se/.../page.asp?

⁹⁹⁹ Ibid.

¹⁰⁰⁰ Article 162, the Vietnamese Labour Code 2002 and amendments.

¹⁰⁰¹ Ibid, Item 1, Article 163.

¹⁰⁰² Ibid, Item 2, Article 163.

¹⁰⁰³ Ibid, Item 2, Article 163 and the regulation of the Government Decree 133/2007/ND-CP dated August 8, 2007 guiding the implementation of a number of Articles of the Labour Code on the settlement of labour disputes.

duties on the basis of the principles of agreement and unanimous approval.¹⁰⁰⁴ The employer has to ensure the necessary conditions for the labour conciliatory council to carry out its activities.¹⁰⁰⁵ An enterprise-level conciliation council conciliates both individual and collective labour disputes arising in an enterprise.¹⁰⁰⁶

- Labour conciliators

A Labour conciliator is appointed by the State labour administration authority at district level and is to resolve labour disputes in enterprises where enterprise labour conciliatory councils have not been established, labour disputes relating to the performance of an apprenticeship contract or training fees, labour disputes that are not subject to a mandatory conciliation and collective labour disputes where there is a enterprise-level conciliation council but the disputing parties prefer that conciliation be effected by such a labour conciliator.¹⁰⁰⁷

Normally, a labour conciliator is an officer who works at the District Department of Labour - War Invalid and Social Affairs. But this is not a mandatory requirement for any of the cases. A labour conciliator may be any individual, provided that he or she satisfies the required conditions and has been registered and recognized according to law.¹⁰⁰⁸

- Labour arbitration council:

A labour arbitration council is a body established by the Provincial People Committee, which consists of both full time and part time members who will be representatives of the State labour administration authority of the province (or city under central authority), the trade union, the employer, together with respected lawyers and local persons experienced in the field of labour relations.¹⁰⁰⁹ The number

¹⁰⁰⁴ Item 2, Article 163, the Vietnamese Labour Code 2002 and amendments.

¹⁰⁰⁵ Ibid, Item 3, Article 163.

¹⁰⁰⁶ Ibid, Item 4, Article 163.

¹⁰⁰⁷ See Article 162 of the Labour Code (amended in 2006), item 1, Article 7 of the Government Decree 133/2007/ND-CP dated August 8, 2007 guiding the implementation of a number of Articles of the Labour Code on the settlement of labour disputes.

¹⁰⁰⁸ See Article 163 Labour Code (amended 2006), item 1, Article 6 of the Government Decree 133/2007/ND-CP dated August 8, 2007 guiding the implementation of a number of Articles of the Labour Code on the settlement of labour disputes.

¹⁰⁰⁹ See Article 164,1 of the Labour Code (amended in 2006).

of persons on a provincial labour arbitration council has to be an odd number, but may not exceed seven.¹⁰¹⁰ The term of office of the labour arbitration council is three years.¹⁰¹¹ It decides on a conciliation plan by a majority and by sealed votes.¹⁰¹² The State labour administration authority of the province (or city under central authority) provides conditions for the labour arbitration council to carry out its activities.¹⁰¹³

Labour arbitration councils conciliate collective labour disputes over interests and disputes in those enterprises where strikes are forbidden.¹⁰¹⁴

** Chairman of District People's Committee*

The Chairman of a District People's Committee has the authority to resolve *collective labour dispute over rights*¹⁰¹⁵ which have failed to be resolved by the company labour conciliatory council or a labour conciliator, or which were not dealt with by such bodies within the stipulated period.¹⁰¹⁶

** People's court*

People's courts can resolve labour dispute as the final step in the dispute settlement procedure. The District people's court shall hear an individual labour dispute which has not been resolved by the company labour conciliation council or a labour conciliator, or which was not dealt with by such bodies within the stipulated period. District people's courts can also deal directly with those labour disputes that are not subject to a mandatory conciliation.¹⁰¹⁷ Provincial courts have the authority to resolve collective labour disputes over rights.¹⁰¹⁸ They also have the authority to determine the legitimacy of strikes occurring within their locality.¹⁰¹⁹ Any subsequent

¹⁰¹⁰ Ibid, Article 164,2.

¹⁰¹¹ Ibid, Article 164,3.

¹⁰¹² Ibid, Article 164,5.

¹⁰¹³ Ibid, Article 164,6.

¹⁰¹⁴ Ibid, Article 164, 4, Article 157, Article 175, Article 157.

¹⁰¹⁵ Ibid, Article 168.

¹⁰¹⁶ Ibid, Article 170.

¹⁰¹⁷ Such cases are listed in Item 1, 2 Article 166, Labour Code (amended in 2006).

¹⁰¹⁸ Ibid, Article 170b.

¹⁰¹⁹ Ibid, Article 177, item 1

appeal against a decision of the provincial courts will be heard before the Court of Appeal of the Supreme People's Court.¹⁰²⁰

4.6.3. Dispute settlement procedure

In both Sweden and Vietnam, labour disputes are in principle settled by way of negotiations between the disputing parties and through mediation. In case such a resolution cannot be achieved, the court is used as the last resort.

4.6.3.1. Dispute settlement procedure in Sweden

** Disputes of rights*

Disputes of rights, in cases involving parties that are bound by collective agreements, are dealt with in the first instance by way of negotiation on grievances.¹⁰²¹ Negotiations must proceed in two stages: initially at the local workplace between the local union and employer and subsequently at central level between the national organizations on each side.¹⁰²² In cases where negotiations are unsuccessful, the case may be brought before the Labour Court. A party to a collective agreement may not take industrial action to force its own position through in such a legal dispute.¹⁰²³

Both the unions and union members have a right to take individual or collective disputes to court. Trade unions may represent their members in Labour Court (even without their authorization) if there is a collective agreement in place for the member.¹⁰²⁴ Part of the Court's task is to try to persuade the partners to settle their differences amicably, and it has often been successful in this.¹⁰²⁵

¹⁰²⁰ Ibid, Article 177, item 1

¹⁰²¹ See: Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, pp. 5, 6

See also: Nystrom (2004), *The evolving structure of collective bargaining in Europe 1990-2004* p.12

¹⁰²² Notably, legal disputes at workplaces without collective agreements or affecting non-organised wage earners are settled by the district court in the area where the dispute occurred. No prior negotiations are required for cases brought before a district court. The court's ruling may be appealed to the Labour Court as the final instance. (See: Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.6).

¹⁰²³ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.5

¹⁰²⁴ Philip Simon (2007), *Sweden - Freedom of Association and Labour Law*. Available at: www.legislationline.org/topics/country/1/topic/1/subtopic/17.

¹⁰²⁵ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.6

When a case is filed, the trial starts with a preparatory phase. There is always a formal preparatory meeting where the case is summarised and the parties are requested to clarify their views on the issues and on what evidence will be given. At this meeting, the court is normally very active. This mediation is not compulsory, but is in fact initiated by court in almost all cases.¹⁰²⁶ The preparatory meeting is mostly chaired by professional judge who will also be one of the trial judges. This mediation is confidential and is not open to the public. Mediation chaired by the Court is often successful. Should no settlement be agreed upon, the case is decided by the court.¹⁰²⁷

A number of labour cases involve interpretation of clauses of collective agreements. This is the concern of the Labour Court. Disputes regarding interpretation are often caused by the fact that the provisions of collective agreements are understood in different ways. Compromises are made due to weak bargaining power, and the wording of the individual provisions used to record these are imprecise.

The time it takes to resolve a dispute in the labour court depends on the nature of the case. Normally it takes around six months from the time that an application is received until a judgment is passed. In urgent circumstances, cases can be resolved in a considerably shorter time.¹⁰²⁸ Each party to a case receives a copy of the court's judgment. Court proceedings are public and it is possible for anyone to go in and listen to the proceedings.¹⁰²⁹

An arbitration procedure can also be resorted to resolve disputes over rights, though this is relatively unusual in the Swedish labour market.¹⁰³⁰ The parties can always agree to resolve disputes by through arbitration and collective agreements often contain provisions whereby certain kinds of disputes are to be settled that way. This is common practice in the case of disputes over the interpretation of pension and

¹⁰²⁶ Source: Michael Koch (2003), *New initiatives to make Labour Court hearings more efficient: use of alternative disputes methods, collective (class) action*, National Report of Sweden, document for XIth Meeting of European Labour Court Judges-Florence, 24 October 2003.

¹⁰²⁷ Ibid.

¹⁰²⁸ see Arbetsdomstolens - *Presentation of the Swedish Labour Court*. Available at: www.arbetsdomstolen.se/.../page.asp?

¹⁰²⁹ Ibid.

¹⁰³⁰ Carina Gunnarsson and Inga Åkerlund (2002), *The Role of Collective Bargaining*, Sweden, Questionnaire for the Tenth Meeting of European Labour Court Judges Stockholm, September 2 (2002), p.9.

insurance terms which the parties have agreed to in collective bargaining.¹⁰³¹ Arbitration is confidential. The secrecy is probably the most important reason why arbitration is chosen in some cases.¹⁰³² The rulings of arbitrators are not subject to appeal.¹⁰³³

** Disputes of interest*

Disputes of interest, which may arise during the course of negotiating (to conclude, amend or complement) collective agreements, typically relate to pay and other employment conditions. They could also be resolved by negotiations. Unlike to cases of disputes over rights, it is not possible to bring a dispute over interests before a court.¹⁰³⁴ Disputes of interest are left to the free decision of the parties and the disputing parties will normally take industrial action to force through a settlement.¹⁰³⁵ Industrial action is permitted if parties fail to agree, but a mediation process is usually initiated before such industrial action is taken.

Generally negotiations on pay and general employment conditions are a preliminary to national collective agreements for whole sectors. Where the parties fail to agree at the national level, industrial action is usually permitted. Bargaining at the workplace between an individual employer and the union organization often concerns matters that the parties in the national agreement have delegated to local parties for resolution. At this lower level, both sides are required to maintain industrial peace during these negotiations. No industrial action is allowed.¹⁰³⁶

A labour dispute over interests may also be dealt with at a very early stage by mediation since mediators of the National Mediation Office can take part in the process of collective agreement negotiation if the concerned parties accept such a

¹⁰³¹ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.7

¹⁰³² Source: Michael Koch (2003), *New initiatives to make Labour Court hearings more efficient: use of alternative disputes methods, collective (class) action*, National Report of Sweden, document for XIth Meeting of European Labour Court Judges-Florence, 24 October 2003, p.3.

¹⁰³³ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.11

¹⁰³⁴ Nystrom (2004), *The evolving structure of collective bargaining in Europe 1990-2004* p.6

¹⁰³⁵ Ibid, p.6

¹⁰³⁶ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, pp. 5, 6

Since negotiations at plant level are conducted within the period of effectiveness of the relevant national collective agreement, the negotiating parties are subject to the peace obligation resulting from such national agreements. (see above: Section 4.1.3. *Negotiation*).

course (this is known as *Voluntary mediation*).¹⁰³⁷ Mediators can be appointed with the consent of the parties when there is no threat of industrial action.¹⁰³⁸ In this case, if any differences between the two parties arise, the mediator is available to help the parties surmount their differences and reach an agreement. The costs of negotiation managers and mediators are defrayed by the state.¹⁰³⁹

If the National Mediation Office foresees that a risk of industrial action exists, or if such action has already been initiated, the Mediation Office may appoint one or several mediators to the case without the agreement of the parties concerned. This is called compulsory mediation.¹⁰⁴⁰ However, if the parties have signed a collective agreement on bargaining procedures and registered their agreement with the Mediation Office, they can use their own mediation procedure and the Office cannot appoint mediators in this way even though there is notice of industrial action.¹⁰⁴¹

Mediators must seek to persuade the party concerned to postpone or cancel a planned industrial action. If the party refuses to comply with the mediator's request to postpone an action for which notice has been given, the mediator may ask the National Mediation Office to order the party concerned to postpone it.¹⁰⁴² An action may only be postponed for 14 days at the most, and such a course may only be taken once per term of mediation.¹⁰⁴³ The parties can be fined if they fail to give proper notice of industrial action (SEK equivalent of 3,301 to 10,831 Euros) or if they violate a postponement order (SEK equivalent of 33,008 to 108,310 euros).¹⁰⁴⁴

¹⁰³⁷ Upon the request of the parties negotiating collective agreements, the National Mediation Office may appoint negotiation managers or mediators to take part in the bargaining process. However, if one of the parties oppose such a course, the National Mediation Office is prevented from making such an appointment. Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.9; See also: Nystrom (2004), *The evolving structure of collective bargaining in Europe 1990-2004*, Sweden, National report, p.8 ; And see: Section 47a Co-Determination Act (1976).

¹⁰³⁸ Nystrom (2004), *The evolving structure of collective bargaining in Europe 1990-2004* p.8

¹⁰³⁹ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, pp. 6, 7

¹⁰⁴⁰ Ibid, p.9; See also: Section 47b, Co-Determination Act (1976).

¹⁰⁴¹ Nystrom (2004), *The evolving structure of collective bargaining in Europe 1990-2004* p.8

¹⁰⁴² See: Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p. 10

¹⁰⁴³ Ibid, p. 10

¹⁰⁴⁴ Philip Simon (2007), *Sweden- Freedom of Association and Labour Law*, Available at: www.legislationline.org/.../17,

Swedish legislation is silent on the issue of how the parties are to come to a decision on any mediation proposals, whether by ballot or other means.¹⁰⁴⁵ The mediator and disputing parties will also decide this upon a successful meeting.

Arbitration can also be used in the case of a labour dispute over interests. According to the Co-Determination Act, a mediator appointed by the National Mediation Office may propose that the partners allow a dispute to be settled by arbitration.¹⁰⁴⁶ The partners are, however, required to accept such a proposal.¹⁰⁴⁷ The National Mediation Office may participate in the appointment of arbitrators. If an industrial action has been initiated, the National Mediation Office may urge the partners to settle their differences through arbitration.¹⁰⁴⁸ In case the disputing parties have earlier signed a collaboration agreement, the procedure will be different. According to the collaboration collective agreement on bargaining procedure, an independent chairperson¹⁰⁴⁹ may – with the partners' consent – prescribe that certain kinds of disputes be settled by arbitration. The procedure is thus based on voluntary participation. And if the partners say no, the independent chairperson has no powers to force through such a settlement by arbitration.¹⁰⁵⁰

Generally speaking, negotiation seems to be quite effective in resolving labour disputes in Sweden. Regarding labour disputes over rights, the practice of multi-tier negotiations resolves a huge number of disputes. Only a tiny number of all the legal disputes that occur are ultimately resolved by a court of law or through arbitration.¹⁰⁵¹ Every year, about 300 to 400 cases are filed at the Labour Court and the Court only

¹⁰⁴⁵ Other Nordic countries, for example, Norway have some rules regulating how a ballot shall be conducted, but whether or not to conduct the ballot is left to the unions to decide. In Denmark the mediator is given both the right to demand a union ballot and the right to treat several proposals for a new collective agreement (See: Torgeir Aarvaag Stokke (2002), *Mediation in Collective Interest Disputes*, Scandinavian Studies in Law, vol. 43, p. 147).

¹⁰⁴⁶ See Section 51, Co-Determination Act (1976).

¹⁰⁴⁷ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.11

¹⁰⁴⁸ See Section 51, Co-Determination Act (1976).

¹⁰⁴⁹ One of the issues specified by the collaboration agreement is that the negotiations are to be led by an impartial chair. The task of the chair is to assist the parties in the negotiations should they themselves fail to reach an agreement (Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.8). In 2008 there were eight Impartial Chairs appointed (Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, Wolters Kluwer, para. 617b).

¹⁰⁵⁰ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.11

¹⁰⁵¹ Ibid, p.11

hears some 150 cases a year.¹⁰⁵² A relatively high number of cases are withdrawn in the early stages as the parties reach an amicable settlement.¹⁰⁵³ Regarding labour disputes over interest, mediation is also of great significance. The Swedish labour market is extensively covered by collective agreements where the partners themselves have decided the forms to be followed in bargaining and the rules concerning both the appointment of impartial chairs and their powers. The role of the impartial chairs is, in many respects, the same as that of a mediator appointed by the National Mediation Office.¹⁰⁵⁴

4.6.3.2. Dispute settlement procedure in Vietnam

According to the Labour Code, where a party considers that the other party has failed fully to perform the provisions of the collective agreement or breaches its provisions, the first party has the right to request full compliance with the agreement. Both parties must consider and resolve this, failing which, each party shall have the right to request resolution in accordance with the procedure stipulated by law.¹⁰⁵⁵

** Procedure for settlement of individual labour disputes*

Individual labour dispute relating to a collective agreement only composes a tiny fraction of the individual labour disputes in the labour market as a whole.¹⁰⁵⁶ As with other cases involving an individual labour dispute, the procedure comprises two steps: conciliation and court ruling.¹⁰⁵⁷ Normally, at an early stage, a conciliation meeting is conducted with the assistance of the enterprise-level conciliation council (or by a conciliator assigned by the district labour administrative authority - in cases where there is no such council or where the disputing parties prefer a conciliator's assistance).

¹⁰⁵² Ibid, p.6; See also: Philip Simon (2007), *Sweden - Freedom of Association and Labour Law*, Available at: www.legislationline.org/.../17;; See also: *Labour Relations in Sweden*, published by Swedish Institute February 2005, p.3

¹⁰⁵³ see Arbetsdomstolens - *Presentation of the Swedish Labour Court*. Available at: www.arbetsdomstolen.se/.../page.asp?.

¹⁰⁵⁴ Kurt Eriksson (2002), *Conciliation, Mediation and Arbitration*, Sweden, national report, p.11

¹⁰⁵⁵ Para 3 - Article 49 Labour Code 2002

¹⁰⁵⁶ The main reason is that collective agreements have not been used much on the labour market.

¹⁰⁵⁷ See Article 162, Labour Code (amended 2006).

Unlike the case in Sweden, where individual employees are normally represented by the local trade union, in Vietnam, the employees normally deal with the employer themselves. The trade union position is limited though it may give some helpful ideas to the parties. The role of negotiation at the conciliation meeting is thus relatively feeble. Usually the conciliation body puts forward a proposed resolution. The two parties consider and decide whether to accept it.¹⁰⁵⁸ In case they are not satisfied with the suggestion, the conciliation meeting is regarded as unsuccessful. Either of the disputing parties can then bring the case before the district court. The stipulated time for organizing a conciliation meeting is 3 working days from the date of receiving the request from either (or both) of the disputing parties. Should the conciliation body fails to organize the meeting within such period, the disputing parties can have immediate recourse to the district court.¹⁰⁵⁹

In some special cases where conciliation does not appear to be essential, a dispute can be filed directly with the court.¹⁰⁶⁰ Also, where a labour case involves complicated elements, such as one of the disputing parties being foreign, the case may also be referred to the provincial court.¹⁰⁶¹

** Procedure for settlement of collective labour disputes*

- Collective labour dispute over rights

The formal settings for resolving collective labour disputes over rights are conciliation proceedings, judgments of the Chairman of District People's Committee and people's court hearings. The labour collective can engage in strike action once the possibilities of conciliation and judgment by the Chairman of the District People's Committee have been exhausted.

¹⁰⁵⁸ Ibid, Article 165a.

¹⁰⁵⁹ Ibid, Article 165a, Article 166; 3.

¹⁰⁶⁰ The cases are mentioned in Article 166, Labour Code (amended 2006).

It is supposed that one of the purposes of conciliation is to achieve harmonious relationships between the employer and employees involved. But in cases of, say, termination of an employment contract, where the two parties have no wish to co-operate further, and the remaining problem between them may be determining the payment obligation before the employee leaves for other workplace, conciliation does not seem particularly significant.

¹⁰⁶¹ See Article 34, Article 33: 3 of Civil Procedure Code 2005.

For a collective labour dispute over rights, the settlement procedure is again conciliation in a manner similar to that for an individual labour dispute (see above). In case of failure, the dispute will be referred to the Chairman of the District People's Committee to resolve.¹⁰⁶² If the Chairman does not provide a satisfying judgment or fails to resolve the dispute within the stipulated period of 5 working days,¹⁰⁶³ the parties have a right to bring the case before the relevant provincial people's court¹⁰⁶⁴; The labour collective may also strike.¹⁰⁶⁵ The judgment of the court is not final and it can be appealed.

- Collective labour dispute over interests

A collective labour dispute over interests can be settled through conciliation, arbitration and industrial action.

Similar to other labour dispute cases, conciliation is called for at the early stage of a dispute over interests.¹⁰⁶⁶ In case of failure, the dispute may be referred to a labour arbitration council for a second round of mediation.¹⁰⁶⁷ The arbitration council must organize a mediation meeting within a period of 7 working days. If no result is achieved, the employees' side can start preparation for a strike.¹⁰⁶⁸

Some differences between the procedure for resolving a dispute over rights and for resolving a dispute over interests should be observed. In a dispute of rights, after conciliation has failed, dispute settlement bodies can give judgment (the Chairman of the District People's Committee and the people's court both have power to decide the dispute). But in a dispute of interests, no neutral body has the authority so to decide. Instead, the labour collective has the right to take industrial action as the last resort. The explanation is that in a dispute over interest it is the two disputing parties who

¹⁰⁶² See Article 170a, Article 171 of the Labour Code (amended 2006).

¹⁰⁶³ See Article 170a, Labour Code (amended 2006).

¹⁰⁶⁴ The court which has authority to resolve the collective labour dispute case could be the provincial court of the locality where of either plaintiff or defendant resides, or the court of the plaintiff's choice. (See Article 35: 1 of Civil Procedure Code 2005).

¹⁰⁶⁵ See Article 170a: 2 of the Labour Code (amended 2006).

¹⁰⁶⁶ The body responsible for conciliation is identical to that mentioned above in cases of individual labour disputes and disputes over rights.

¹⁰⁶⁷ See Article 171 of the Labour Code (amended 2006).

¹⁰⁶⁸ Ibid, Article 171.

must decide. Neutral bodies have no ground (such as mandatory standards) which could support a concrete judgment.¹⁰⁶⁹

Some remarks

In few legal systems is industrial action recognized as a means to resolve dispute over rights. But this is the practice in Vietnam. The reason is that the development of the Vietnamese market economy is only at its start; employees are not yet fully acquainted with collective agreements. Some 90% of the strikes in recent years relate to employees' rights (those rights which are prescribed by law, not by collective agreements). It is not uncommon for strikes to stem from disputes relating to both rights and interests. Since employers do not strictly observe national standards, and employees feel that they have been treated poorly; or the employer has committed acts causing the employees extreme distress, while the latter have never heard of the so-called "peace obligation" and have not received any help from trade union or other authorities either, they tend to go on strike spontaneously, regardless of whether their demands involve rights or interests.¹⁰⁷⁰ Also, it is felt that the employees, who mostly come from rural areas (former farmers), with limited social knowledge, should not have to assess their demands and decide whether they concern rights or interests before taking industrial action.¹⁰⁷¹ In the context of the poor enforcement of labour standards, such an approach gives the employees more chance of protecting their rights.

The activities of the enterprise-level conciliation councils have not proved very effective. The council members who represent employees are all employed by the employer, so they do not have enough scope for acting independently at conciliation meetings.

In recent years, arbitration councils have had little room to provide assistance as collective labour disputes were rarely referred to arbitration.¹⁰⁷² A similar situation is the case at the people's courts. According to the Labour Court of the Supreme People's

¹⁰⁶⁹ In case of a dispute over rights, dispute settlement bodies can look at relevant legal documents to determine the standards which need to be observed. This is the ground for granting a decision.

¹⁰⁷⁰ See report No 2131/BC/UBXH of the Committee on Social Affair on reconsidering the project of amending and complementing a number of Articles of the Labour Code, May 19, 2006.

¹⁰⁷¹ Ibid.

¹⁰⁷² Ibid.

Court, the number of labour disputes has tended to increase in recent years. In 2003, the number of disputes filed at the court was 652, in 2006: 820, in 2007: 1022, in 2008 the number increased to 1709.¹⁰⁷³ But almost all of these are individual disputes. The number of collective labour disputes filed at the labour court was very small. Among the thousands of labour dispute cases heard during the past 13 years (up to 2008), only 2 cases of collective labour disputes and 4 cases involving a strike were filed and heard before the people's courts.¹⁰⁷⁴ One of the reasons for this is the existence of some defects in the labour market itself. Due to a lack of knowledge of labour law, employees often take industrial action at a very early stage regardless of whether the dispute has been dealt with through conciliation, arbitration or the labour court. In such a case no collective dispute was even launched before a strike occurred. In addition to this, in many instances, the people's court could not take jurisdiction of the case. Since trade unions have not been established in many enterprises, when a strike occurred, employers could not define a counterpart on the employee side to sue for damages. There was a case (in Bac Ninh province) reported in 2008 where an employer brought the case of an illegal strike to court. But the employer could not list the names of all the workers involved, but could only state that about one hundred and fifty workers had joined the strike! Naturally the court did not file the case and the employer had to accept the problems caused by the event.¹⁰⁷⁵ (The issue of developing trade union activity will be further discussed in Chapter 5).

4.7. Violations relating to collective agreements

4.7.1. Concept of violations relating to collective agreements

A violation will exist where a labour party fails to perform its duty under a collective agreement or the law relating to collective agreements. Within the scope of this research, the concern is restricted to those violations which occur during the course of the conclusion or the implementation of collective agreements.

4.7.2. Forms of violations and treatment

¹⁰⁷³ Annual report of Supreme People's Court in relevant years: 2003, 2006, 2007, 2008.

¹⁰⁷⁴ See Thao Lan, 30 March 2009, *The status of disposition of labour dispute at the court*, MOLISA's webpage: <http://www.molisa.gov.vn/news/detail/tabid/75/newsid/41013/se0/Thuc-trang-giai-quyet-tranh-chap-lao-dong-tai-Toa-an>.

¹⁰⁷⁵ See: Luu Thu (2008), *Solving Labour disputes - Great difficulty, even when complying with law*, The An ninh Thu do, December 21, 2008.

4.7.2.1. Violations relating to concluding collective agreements

** Failing to perform duty of negotiation*

In both Sweden and Vietnam, the breach of the duty to bargain is sanctioned by damages (compensatory, if any, and punitive). But, because the obligation to bargain in Sweden is rather limited, damages are confined to situations where the employer has refused to appear at the bargaining table at all.¹⁰⁷⁶ Similarly, in Vietnam, if a party refuses to bargain, it will be at risk of being liable for both damages and a fine. According to Government Decree 47/2010, a fine from VND 2,000,000 to VND 5,000,000 (equivalent to 700 to 1,700 Swedish Krona) may be imposed on an employer who refuses to conduct negotiations on entering into, amending or supplementing a collective labour agreement upon a request from the other party as stipulated in the Labour Code.¹⁰⁷⁷

** Failing to observe statutory requirement and procedures on concluding collective agreements*

Generally, upon concluding a collective agreement, the parties must observe all the relevant statutory requirements. Should the parties fail to do so, the end result – the collective agreement – could fail to be recognized and could even be partly or wholly annulled by the Labour Court or equivalent authorities.¹⁰⁷⁸ In Sweden violations of this kind are very rare.¹⁰⁷⁹ In Vietnam, it is uncommon for a collective agreement to be wholly invalidated, but the fact that certain parts of a collective agreement are contrary to law is rather common. In neither Sweden and Vietnam does the law provide any punitive sanction applicable to the parties involved.

Failure to register a newly-signed collective agreement is another matter that is rather common in Vietnam.¹⁰⁸⁰ In such a case, a fine from VND 500,000 to VND

¹⁰⁷⁶ Reinhold Fahlbeck (2001), *International Labour and Employment Law- Volume II*, American Bar Association (2001), p.10-48; Reinhold Fahlbeck, Bernard Johann Mulder (2008), *Sweden, Int'l Labour & Emp. Laws Vol. IIA*, p.19-56.

¹⁰⁷⁷ See the item 2, Article 9, Decree 47/2010/ND-CP.

¹⁰⁷⁸ See above, Section 4.5. *Invalid collective agreements*.

¹⁰⁷⁹ The last time that a collective agreement was annulled by court order was in 1935. See above, Section 4.5. *Invalid collective agreements*.

¹⁰⁸⁰ Also see above, the Section 4.5. *Invalid collective agreements*.

5,000,000 (an equivalent of 170 to 1,700 Swedish Krona) can be imposed on the relevant employer.¹⁰⁸¹

4.7.2.2. Violation relating to implementing collective agreements (breach of the terms of a collective agreement)

In both Sweden and Vietnam, the body which has the power to ascertain whether there has been a violation is the court. In Sweden, it is the national Labour Court, but in some cases such as those where individual employees file suit, a district court will be the court of first instance.¹⁰⁸² For Vietnam, the matter will go to a provincial court (if the case involves a collective labour dispute or in certain special cases of individual labour disputes) or the district court (if the case involves an individual labour dispute).

In Sweden the main remedy for breaches of collective agreements is punitive damages. Punitive damages have been described as a hybrid between damages and a penal sanction.¹⁰⁸³ The courts, in assessing the quantum of damages, shall pay attention to any non-financial loss, such as the parties' interest that the provisions of the agreement be applied.¹⁰⁸⁴ Further, not only are the injured individuals themselves entitled to damages, but their representative organization also enjoys this right. On the employee side, both the aggrieved employee and the trade union are entitled to damage. Likewise, on the employer side, both the employer and the employer federation are entitled to damages, where applicable.¹⁰⁸⁵ The law does not specify any upper limit to such exemplary damages, but normally awards are moderate.¹⁰⁸⁶ Where several persons are responsible for losses, liability for damages will be divided between them depending on their contributions.¹⁰⁸⁷ A serious breach of collective

¹⁰⁸¹ See the item 1, Article 9, Decree 47/2010/ND-CP.

¹⁰⁸² Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.

¹⁰⁸³ Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p.201

¹⁰⁸⁴ Ibid.

See also: Section 55, Co-Determination Act (1976).

¹⁰⁸⁵ Reinhold Fahlbeck, Bernard Johann Mulder (2008), *Sweden, Int'l Labour & Emp. Laws Vol. IIA*, p.19-60.

¹⁰⁸⁶ Ronnie Eklund, Tore Sigeman and Laura Carlson (2008), *Swedish labour and employment law: cases and materials*, Iustus (2008), p. 28

¹⁰⁸⁷ See Section 61, Co-Determination Act (1976).

agreement may entitle the aggrieved party to have the labour court annul the agreement.¹⁰⁸⁸

An individual can choose to initiate matters and conduct proceedings before a district court (with the Labour Court as the court of appeal) for a breach of a collective agreement, if his or her organization does not bring his or her case to the Labour Court.¹⁰⁸⁹

A non-union employee and an employer bound by a collective agreement are generally free to conclude individual contracts. However, if the employer fails to meet the conditions stated in the collective agreement, he is in breach of the collective agreement and may thus have to pay damages to the contracting trade union. The trade union may bring an action for damages in the Labour Court for breach of the collective agreement in this case. A non-union member has no rights under the collective agreement, so he is not entitled to damages in the event of a breach of the collective agreement. But the trade union is still entitled to damages, as usual.¹⁰⁹⁰

In Vietnam, liability for a breach of a collective agreement is not directly mentioned in the law. But as a rule, such a breach is also remedied by damages. Since disputes concerning damages for breach of a collective agreement are handled by the people's courts, the court will consider both pecuniary and non-pecuniary loss and decide how much the employer must pay to the injured employee. But there is no obligation for an employer to compensate the relevant trade union as is the case in Sweden.

Regarding the right to sue for an employer's infringement of a collective agreement, the trade union has, according to the Trade Union Law 1990, responsibility for protecting the rights and interests of its members and employees in

¹⁰⁸⁸ See above, Section 4.5. *Invalid collective agreements*.

¹⁰⁸⁹ Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006), *Collective agreements*, Sweden, national report, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.

See also: Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, Volume 43, p. 201

¹⁰⁹⁰ The employer has a contractual obligation towards the trade union to apply the terms of the collective agreement also to non-union members, unless the collective agreement has explicit provisions to the contrary. (see: *Per Norberg and Ann Numhauser-Henning (2004), "Collective agreements in Sweden" in "Collective Bargaining in Europe" - published by Ministerio de Trabajo y Asuntos Sociales, Spain in 2004, pp. 247*). See also Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, Wolters Kluwer, para.565.

general. It is also empowered to supervise the observance of labour law by the employer and other relevant bodies.¹⁰⁹¹ So, it is primarily the trade unions which make claims for damages for breaches of collective agreements. However, should the trade union fail to do so, individual employees themselves can bring a case against the wrongful performance of the employer.

Another situation may in practice occur: a non-unionized employee receives poorer conditions than those provided for in a collective agreement. In principle such a non-unionized employee can also request the trade union's help in presenting and protecting his legitimate rights before the court just like a unionized employee.¹⁰⁹²

Failing to observe industrial peace obligation

This obligation is, in Sweden, of paramount importance. The peace obligation is binding not only on the organizations concluding collective agreements but also their members.¹⁰⁹³ An employee must not go on strike or takes other forms of industrial action without the consent of his trade union. In the event of a breach of the obligation to maintain industrial peace, damages may be imposed on individual employees. Normally a fine applied to employees will not involve high amounts, though the Labour Court is free to assess damages as it sees fit.¹⁰⁹⁴ Currently it will not be more than approximately 200 Euros.¹⁰⁹⁵ The relevant trade union is also liable for the damages. The parties are mutually responsible for their members' breach of their duties according to the collective agreement. Besides, parties may also be responsible for not having made efforts to make members comply with the collective agreement.¹⁰⁹⁶ Notably, where an organization has organized an unlawful industrial

¹⁰⁹¹ See Article 6:3, Article 9:1, Article 11:1 of the Trade Union Law.

¹⁰⁹² See Article 11:4 of the Trade Union Law.

¹⁰⁹³ See: Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, Wolters Kluwer, para.607.

¹⁰⁹⁴ Ibid, para.572.

¹⁰⁹⁵ According to the Collective Agreements Act of 1928 damages could not be imposed on individual employees in an amount exceeding 200 SEK (about 20 Euros); at the time the Act was passed this was a rather high maximum corresponding to a worker's monthly earnings. The amount was never changed despite inflation. This limitation, of symbolic value to the Labour movement, was not definitely abolished until 1992. (see Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, Wolters Kluwer, para.572.); see also: Ronnie Eklund, Tore Sigeman and Laura Carlson (2008), *Swedish labour and employment law: cases and materials*, Iustus (2008), p.32; And see: Lars Gellner, Lars Sydolf (2008), *Swedish labour law*, Norstedts Juridik AB, p.23.

¹⁰⁹⁶ See: Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, Wolters Kluwer, para. 572, 574, 607; See also: Section 42, Co-Determination Act (1976).

action, the individual employees cannot be sanctioned with damages for participation in the action.¹⁰⁹⁷

It is worth mentioning that according to Swedish law, not only are the parties bound by the collective agreement prevented from engaging in unlawful strikes but so are the unorganized employees. There is thus a general prohibition against any participation in unlawful industrial action.¹⁰⁹⁸ If unorganized employees take part in such an illegal strike, no distinction is made and they are at risk of being subject to damages to the same extent as applies to union members.¹⁰⁹⁹ But an employee's participation when an "established" trade union has called a strike will not entail liability even if it is considered unlawful.¹¹⁰⁰

In Vietnam the notion of the "industrial peace obligation" remains a novelty and has not been mentioned in any legal documents in the labour relations area. Nevertheless, liability for damages caused during the process of conducting a strike has been provided for in the law.¹¹⁰¹ A punitive fine and compensation for damages will be imposed on employees who have intentionally committed acts causing loss to the employer. In serious cases, such aggressive actions may be regarded as crimes. If that is the case, the employees concerned may be subject to the regulations of the Vietnamese Penal Code.¹¹⁰² In 2008 a new Governmental Decree was enacted. It prescribed trade unions's liability for damages in case a *trade union organizes an illegal strike*.¹¹⁰³

It is worth noting that in Vietnam liability for damages caused by a wildcat strike is only applied to the individual employees who have caused the employer loss. Liability will not be imposed on a trade union for not preventing such an unlawful

¹⁰⁹⁷ See Section 59 of the Co-Determination Act (1976). For further details, see: Ronnie Eklund, Tore Sigeman and Laura Carlson (2008), *Swedish labour and employment law: cases and materials*, Iustus (2008), p.32; See also: Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, Wolters Kluwer, para.157; Lars Gellner, Lars Sydolf (2008), *Swedish labour law*, Norstedts Juridik AB, p.23

¹⁰⁹⁸ According to para 2, Section 42, Co-Determination Act (1976).

¹⁰⁹⁹ Adlercreutz, A./Nyström, B. (2009), Sweden, ELL, Wolters Kluwer, para. 609

¹¹⁰⁰ Ibid, para. 609

¹¹⁰¹ See Article 179, Labour Code (amended 2006).

¹¹⁰² Ibid, Article 179: 2.

¹¹⁰³ See Decree N0 11/2008/ND-CP dated January 30, 2008 on liability for damages caused by an illegal strike.

strike. In fact, hundred of strikes take place every year and trade unions are virtually always acting as an “outsider” in their regard.¹¹⁰⁴

Concluding remarks

Sweden and Vietnam are two countries with different histories and policies regarding collective agreement development. While Sweden opts for a multi-union regime, Vietnam opts for a single union. The labour market in Sweden operated for decades under the principle of self-regulation, with little state intervention while in Vietnam labour legislation has been the leading way of regulating labour relations since the early days of the market economy. That is why collective agreements in Vietnam have less opportunity of showing their importance as a way of balancing the interests of all the parties concerned with labour relations.

As for Sweden, powerful and independent trade unions together with reasonable regulation on the use of supportive measures in bargaining such as the industrial actions, all creating the possibility of negotiations between actors at different levels are some of the factors that help promote meaningful collective agreements. In addition to this, a long tradition of concluding collective agreements gives the bargaining actors valuable experience to rely on. This is the reason why though the legal requirements and the procedure for concluding collective agreements are simple, collective agreements of high quality are still entered into.

Regarding the implementation of collective agreements, the active role of trade unions in protecting members' rights (which involves their role in the supervision of collective agreements), has long been appreciated. A high degree of integration of wills and actions, rights, interests and responsibility within the Swedish trade unions allows there to be strong cooperation between them and their members. The responsibilities of the trade unions for guaranteeing their members' benefits are to be highlighted. A reasonable mechanism of conflict settlement is also an important factor in promoting the role of collective agreements in harmonizing the industrial relations system. All of these factors are valuable considerations for a young market economy like Vietnam to study and apply.

¹¹⁰⁴ Also, see above: Section 4.1. *Conclusion of collective agreements*, subsection 4.1.3. *Negotiation*.

As for Vietnam, transforming itself away from a centrally planned economy, the recognition and regulation of the law on various aspects of a market economy such as collective agreements, strikes and labour disputes could be seen as a revolution in innovating the legislative system. There have been some important achievements such as concrete stipulations on the principles of collective bargaining, their content, the procedure for their conclusion and their legitimacy, which give very useful guidance and have achieved some results in balancing the interests of management and workers.

After that, the conclusion and implementation of collective agreements in Vietnam is still subject to some limitations. The structural integration (and also integration of interests) between trade unions, state authorities and management, together with the fact that no competition exists between trade unions coupled with unclear regulation on the rights and responsibility of the trade union in protecting workers all lead to insufficient bargaining power on the employees' side. Imperfect laws and weak law enforcement also foster this. All of these shortcomings obstruct the development of the collective agreement system and need to be quickly and radically improved.

Chapter 5. Promoting collective agreement development in Vietnam

As has been seen in previous Chapters, some shortcomings and limitations are still to be found in the current Vietnamese collective agreement system. These include the lack of essential conditions allowing trade unions to develop and act independently, a powerless trade union system, defective labour law, lack of capacity for labour law enforcement, lack of awareness of the role and importance of trade unions and collective agreements. Based on this understanding and on my personal knowledge, I would like to make the following recommendations which may serve to promote collective bargaining and collective agreements in Vietnam:¹¹⁰⁵

¹¹⁰⁵ The suggested measures are listed in an order based on degree of importance to the development of collective agreements.

First, creating more space and the fundamental conditions for development of independent and autonomous trade unions.

Second, strengthening the capacity of the existing trade union system, with the focus on primary level ones.

Third, improving the current labour legislation to make it more systematic and effective, providing the appropriate legal basis for the conclusion and implementation of collective agreements.

Fourth, strengthening the role of the state administration and the law enforcement regarding collective agreements and labour law.

Fifth, removing some other obstacles in the path of collective agreements.

The working out of these measures demands the appropriate conditions, time, methods and specific resources. Some of them are more long term than the others but they are all complex and interconnected. Innovating the whole system will thus be a heavy task. Given the fact that there exist various difficulties challenging the innovation process, any adjustment should be conducted in an orderly, consistent and thorough way so as to develop a sound labour market and a flexible, dynamic and competitive economy. This would also be a positive response to the new context of international economic integration and globalization, preventing the Vietnamese economy from lagging behind in such a way that society and the economy would fail to benefit from the advantages and opportunities of such integration.

This chapter will focus on five such measures in separate subsections, with specific recommendations/proposals on how to resolve the problems they pose.

5.1. Creating fundamental conditions for trade union development

As my research has shown, the existence of a sound trade union system is essential for meaningful collective bargaining and for the protection of employees'. So, securing conditions which will allow trade unions to develop and act freely is of central importance for a fair and dynamic labour market and a healthy economy. Nowadays it is more broadly known that mere economic success is not the only target of national development and can not even be obtained in isolation while social aspects

such as equality, fairness and a decent working life are ignored. This means that sustainable economic development is closely connected with social progress. In the context of globalization, ensuring the fundamental rights of workers and decent working conditions now becomes a competitive value, impacting on commercial activities between countries. Thus, the protection of the rights and working conditions of workers has two implications for a developing country, bringing practical benefits to the country in two ways: *promoting production capacity* (by harmonizing labour relations and establishing a healthy labour market) and *promoting trade*. This is clearly the case of Vietnam.

Since 1986 Vietnam entered the reform process and made increased efforts to convert/shift the planned economy to a market one. With policies favouring reform and openness, Vietnam has become more and more active and positive towards integrating into the global economy. Along with its earlier membership of the UN and ILO¹¹⁰⁶, since 1995 Vietnam became a full member of the Association of Southeast Asian Nations (ASEAN). Then, in 1998 it joined the Asian Pacific Economic Cooperation (APEC) and in 2007 Vietnam became a full member of the World Trade Organization (WTO). Integration is increasingly affecting economic life. Up to December 2009, Vietnam has also set up bilateral ties with more than 170 countries in the world and exports goods to more than 230 countries and territories. It has signed more than 90 bilateral trade agreements, almost 60 agreements on trade promotion and encouragement, 54 agreements on the avoidance of double taxation and a number of bilateral cultural cooperation agreements with countries and international organizations.¹¹⁰⁷

Generally speaking, globalization offers various advantages for economic development such as the spread of capital, techniques and knowledge, adequate allocation of resources, the expansion of trading activities, improving economic effectiveness and intensifying economic and technical linkages between the nations and regions.¹¹⁰⁸ For Vietnam, globalization creates a great opportunity to absorb direct

¹¹⁰⁶ Vietnam joined and has been a member of the UN since 1977 and was in ILO during the period 1950-1976, and 1980-1985. Nearly ten years after withdrawing from ILO, Vietnam rejoined in 1992.

¹¹⁰⁷ Source: *Vietnam is recognized as a full market economy*, Communist party of Vietnam online newspaper, Dec. 2009. Available at: www.cpv.org.vn/.../News_Detail_E.aspx?

¹¹⁰⁸ See: Dao Quang Vinh (2006), *Labour market and Employment conditions in Vietnam*, MOLISA, Institute of Labour Science and Social Affairs, p.2

foreign investment and receive new technology to promote economic development. But integration also provides Vietnam with great challenges. For example, the legislation for the operation of the labour market has not yet been fine tuned and this causes higher labour costs and higher transaction costs.¹¹⁰⁹ Further, opportunity only has a potential; opportunities themselves do not have any specific value; opportunities can only be turned into reality when there are enough conditions to allow them to be taken up.¹¹¹⁰

Involvement in the globalization process means that Vietnam has to comply with a series of requirements which are all needed for integration. Meanwhile, there are many international standards and regulations which have been formulated in a context where developed countries provide the driving force.¹¹¹¹ Some researches indicate that Vietnam can only benefit from WTO accession and deeper integration into the global economy and better access to the world market when it engages in active integration tasks.¹¹¹²

So, to meet the demands of the new context, it will be necessary to change the legal system and management mechanisms with the aim of swiftly and consistently forming the elements of a market economy, providing the basis in which market economy principles can function, eliminating all discrimination, creating an equal playing field and building a healthy competitive environment.¹¹¹³ With regard to labour and employment, it is necessary to accelerate the changes in labour policies, strengthen labour market regulations and improve employment conditions. The recognition and guarantee of the conditions for the labour market parties' organizations to be established and to act freely are one of the fundamental parts of the integration strategy. In this regard, the legislative improvement is of great

¹¹⁰⁹ Ibid, p.1

¹¹¹⁰ Ibid,p.1

¹¹¹¹ Ibid, p.4

¹¹¹² According to the "Seminar Proceedings" of the seminar "Impacts on Economy, Employment and Poverty Reduction 2 years after Vietnam's WTO accession" co-organized by the Center for Development and Integration and Vietnam Asian Pacific Economic Center under the project Trade, Development and Poverty Reduction donated by CUTS CITEE (from India) on November 11, 2008.

¹¹¹³ Dao Quang Vinh (2006), *Labour market and Employment conditions in Vietnam*, MOLISA, Institute of Labour Science and Social Affairs, p.2

significance in *removing obstacles/barriers to and broadening the way for trade between Vietnam and other countries.*

What must be done by the government in response to the new context of integration and globalization departs from the needs of the market itself. Because an important role of the Government is regulating the economy, it should take into account the actual conditions of the economy and try to issue appropriate policies which will support socio-economic development. In the field of labour relations, the government must focus attention on the needs for innovation in the employment relationship.

As regard employer's need, Vietnamese enterprises are today placed in a context of a larger market. This brings them more business opportunities, but also put them in intense competition. With the expansion of trade links with foreign partners, businesses are under pressure to adhere to international labour standards, code of conducts, regulation on moral practices, standards of corporate responsibility and other environment related qualities and standards.¹¹¹⁴ This means, enterprises have to compete not only over product quality and price but also with respect to commitments to take care of the life and working conditions of their workers. Many managers of enterprises, especially in export manufacturing and processing industries have been aware of that their foreign partners will not accept their products if enterprises violate labour standards by using child labour, fail to guarantee the working conditions and safety of their workers or perform any act which lacks respect for workers.

But the problem is that labour law violations are widespread as the forces of the state relating to labour are not strong enough to guarantee enforcement (a fact that will be discussed below - Section 5.5 Reinforcing labour law enforcement). In the meantime, the trade union system is not capable of protecting workers either. The lack of labour administration capacity also means it is uncertain whether there even is a fair and equal labour market. This also implies that a business will face significant risks if their investment plans include providing workers with better working conditions. Enterprises can quickly become losers in the face of severe competition and may be forced out of the game (due to high labour costs) before they could harvest any benefits from such long-term labour-friendly policy. Thus, the

¹¹¹⁴ Ibid, p.1

competitiveness of Vietnamese enterprises becomes weaker as compared with many foreign partners, in part because the labour market is defective.

With regard to labour's concern, in a dynamic economy, import - export activities become more active; foreign investment increases and new private enterprises come into existence and with all this, Vietnamese workers have more opportunities to find work at home as well as in other countries. But it is clear that competition in employment and labour costs will become more severe in a more open and broader labour market, especially for low-skilled labour. The newly-created employment is also uncertain since FDI enterprises may move to other countries with more favourable business conditions. Further, in the harsh competition, some small businesses may be forced out of the market.¹¹¹⁵ Having become more fully integrated into the global market economy, in fact Vietnam has begun to be affected more deeply by the global economic downturn. For example, in the period from December 2008 to the first quarter of 2009, at least 171,000 people lost their jobs or were underemployed. For Vietnamese workers working overseas (about 467,000), over 7,000 people returned home early because of lay-offs or underemployment.¹¹¹⁶

Obviously within a broader business environment, the labour market needs to be better organized, on the one hand to equip workers with essential skills and knowledge, on the other hand to provide them with better organizational protection. In the coming years the number of salaried workers will continue to increase and the market will become more diverse. Therefore, it is essential to have specific regulations guiding and managing the operation of the labour market to protect the interests and determine the responsibility of the partners involved in the labour market. Since Vietnamese enterprises will do business with foreign partners who may enjoy an adequate legal regime complying with international labour standards in which the basic rights of workers are recognised, their employees should also soon be granted more autonomy and the freedom of organization so they have the same legal status as do their partners and conditions in which they can protect their rights and interests and operate labour relations effectively.

¹¹¹⁵ *Vietnam is recognized as a full market economy*, Communist party of Vietnam online newspaper, Dec. 2009. Available at: www.cpv.org.vn/.../News_Detail_E.aspx?

¹¹¹⁶ Angie Ngoc Tran (2009), *Vietnamese labour management relations*, Stanford Program on International and Cross-cultural Education (SPICE), Stanford University

It is worth noting that beside *broadening the way for trade activities* and *creating a sound and transparent environment* for developing business, accelerating positive change in labour market regulation is of principal importance in *harmonizing labour-management relationships and enhancing productivity*. Strengthening harmonious labour-management cooperation in the workplace has today become a matter of concern. It has been appreciated that labour relations can contribute to and promote workplace cooperation, flexibility, productivity and competitiveness.

As shown above, labour relations in the Vietnamese labour market have not been harmonious. The number of strikes and labour disputes arising in the past years is high. It has been observed that the weakness of the system does not merely lie in the inadequacy of dispute resolution procedures, but in the absence of an institutional framework that can reduce the likelihood of such breakdowns arising in the first place.¹¹¹⁷ This systemic weakness pertains to the weakness of trade unions and their failure to articulate the aspirations of members and this will not be resolved without freedom of association and collective bargaining.¹¹¹⁸

So, there is a need to promote production capacity by resolving the problem of unbalanced labour relations. The key issue is giving employees adequate rights and a voice in labour relations. Promoting the capacity of market self-regulation by opening the door to the development of independent representative organizations will inspire the existing trade unions, reinforce the implementation of labour law, create a sound environment for business competition and improve working life. In the process of refining all relevant legislation, the state can also accelerate the process of ratifying the related ILO conventions (Conventions No 87 and 98).

In the current context of Vietnam where the capacity of the state administration regarding labour is not strong and there is a lack of financial resources, manpower and experience¹¹¹⁹, a more open and flexible approach in regulating labour relations could be suitable. This allows it to make use of the potential advantages of the labour market itself. Experience has been drawn from several neighbouring countries,

¹¹¹⁷ Clarke, S., Lee, C.H. and Do, QC (2007), *'From Rights to Interests: The Challenge of Industrial Relations in Vietnam'*, Journal of Industrial Relations, 49:4, p. 565.

¹¹¹⁸ Ibid, p.565

¹¹¹⁹ See below, Section 5.5. *Reinforcing labour law enforcement*.

regarding the factors hindering collective agreements which should be avoided. For example, the politicization of trade unions in China and their lack of independence makes their activities become formalistic; similarly the repression of trade union activity in South Korea and the lack of clear rules and provisions protecting trade unions in Thailand, Hong Kong, and Taiwan have caused difficulties for trade union development and collective bargaining there. All these restrictions lead to misery for employees.

It is recognized that freedom of association is an essential condition without which interest groups in a society would be unable to function effectively.¹¹²⁰ By doing the research, I also found that there is probably no better resolution for a market economy to develop healthily, except ensuring freedom of association in the field of labour, offering more autonomy for trade unions. Experiences regarding this have been convincingly demonstrated in many advanced economies, including Sweden. For Vietnam, this is of the necessary action, a positive response to integration. When the potential for self-regulation in the labour market has been activated, the workload for the state with regard to labour law enforcement and administration will be considerably reduced. If that is done, even if the state does not invest much effort and resources in the management of labour at the workplace, the labour market can still operate soundly.

5.2. Strengthening Vietnamese trade union system

The prior section addresses the broad, substantial and long-term measures needed to resolve the problematic situation of collective bargaining and collective agreements in Vietnam. This section is intended to address more immediate measures: strengthening the existing trade union system.¹¹²¹

5.2.1. The necessity of trade union innovation

The Vietnam General Confederation of Labour (VGCL) is now the only representative body which has legal status and the competence to speak on behalf of

¹¹²⁰ De Silva, S.R. (1998), *“Elements of a Sound Industrial Relations System”* International Labour Organisation ACT/EMP Publications, p.18.

¹¹²¹ Even if other independent trade unions were recognized, trade union belonging to VGCL would still be an important actor on the labour market. The rise of other unions (if any) would make the competitive climate among the employees' representatives systems more intense. In such a situation, the improvement of VGCL would be even more significant.

workers and labourers in Vietnam. The VGCL has a long history of acting as a broad socio-political organization of the Vietnamese working class under the leadership of the Communist Party of Vietnam. In the past, the VGCL played an important role in the political system and made a great contribution to Vietnamese national liberation as it mobilized and gathered up the strength of the working class for the Vietnamese revolutionary movement.

When the war ended, the trade union's tasks were adjusted from time to time to meet the requirement of the new situation. The trade union's legal status and tasks are enshrined in Article 10 of the Constitutions of 1959, 1980 and 1992. Generally, caring for and protecting the interests of workers has been regarded as the trade union political task. These trade union activities are also integrated into the tasks of the party-state.¹¹²²

In the planned economy¹¹²³, only state-owned production units existed. Neither managers nor labour participated in the determining terms and conditions of employment, but were rather engaged in applying decisions which were made outside the enterprise (by the state). The interests of the two sides were balanced from outside. In such a situation, the trade union assisted in welfare matters and sometimes played a supervisory role, but never a negotiating one.

Since the innovation program was launched (1986), a comprehensive transformation of the economy has taken place. Vietnam has step by step integrated itself into the global economy by way of reforming administrative procedures, creating favourable conditions for attracting foreign direct investment, advanced technologies and management skills and promoting commercial activities in order to help develop the country. The domination of state ownership has gradually been replaced by a multi-ownership system in all sectors of the economy. Along with the renovation process, the strict state regulation over the economy has been relaxed, the

¹¹²² The Party and State regard caring for rights and interests of working class as one of their tasks. This spirit has been stated in many documents of both State and Party, including Constitutions.

¹¹²³ The economy within the period 1954-1975 in the socialist North, and 1975-1986 in the reunified Socialist Republic of Vietnam.

dual price system¹¹²⁴ has been removed, state control over foreign trade was also phased out.¹¹²⁵

While many new regulations were enacted to regulate the new economy, the trade union has not been separated from the state. The trade union continues to assume heavy political tasks which are opposed to the standard conception of a trade union. It actively cares for community interests but its role in protecting workers' rights remains passive and weak.¹¹²⁶ In solving labour disputes, the participation of the trade union aims more at securing goals relating to social order and the attraction of investment environment¹¹²⁷ than to workers' rights. Due to all this, the trade union is not seen as a representative body of the employees.¹¹²⁸

In the new circumstances of a market economy which allows the development of enterprises with all forms of ownership, the relationship between labour and management contains various elements in opposition to one another and the way the trade union acts can not be constrained in the way it was in the planned economy. Innovation has brought new tasks for representative body Vietnamese trade union: it is no longer an "administrative agency" but must play the role of a genuinely economic organization.

¹¹²⁴ On this two-price system, one was applied to state employees and civil servants (the state paid them a low symbolic wage but provided them with low price goods - to operate this, a ration ticket system was also set up) and another was applied in the free markets.

¹¹²⁵ H. Mahadevan (2009), review of discussion papers presented at WFTU's Seminar: *Rights at work and social protect in Asia-Pacific Region and evaluate of sicial dialogue in these countries*, held in Dhaka, Bangladesh, December 22-23, 2009.

¹¹²⁶ For example, the Trade Union of Vietnam is a member of the Vietnam National Committee for the prevention of HIV/AIDS, drug addiction and prostitution. Tasks undertaken by the trade unions include promulgating regulations against drugs and prostitution by delivering leaflets which provide specific prevention measures and encouraging people to develop drug-free and prostitution-free residential quarters for workers. Trade unions are responsible for providing adequate information and guidance to their members in the fight against HIV/AIDS.

See: Han Mai Huong (2005), *Country report*, ITCILO/ACTRAV training course entitled "Trade Union Training on Financial and Economic Analyses of Enterprises for Collective Bargaining" (by International Training Center and Bureau for Workers' Activities - ILO), p.6

¹¹²⁷ This means that dispute must be solved smoothly so as to avoid causing foreign-owned enterprises too much trouble because this may negatively affect the attraction of the investment environment. But in fact this causes disadvantages to the labour collective, and further, is contrary to the trade union's task of protecting employees' rights.

¹¹²⁸ Currently the international trade union community has not recognized the trade unions of Vietnam as genuine trade unions. See: Simon Clarke (2007), *Trade Unions in Russia, China and Vietnam*, Historical Materialism Conference, London, 9 November 2007, p.5

Since the fundamental objective of the trade union movement is to ensure the economic well-being of all workers, proper conditions allowing it to effectively protect employees' rights and benefits must be set up. Some ILO experts studying the Vietnamese labour market consider that the priority for the development of a stable industrial relations system in Vietnam is "the strengthening of the substantive foundations of the system by strengthening the mechanisms that ensure the accountability of the trade union organization to its members and by providing workplace trade union officials with the skills and resources required to bargain effectively on behalf of their members".¹¹²⁹

A promising sign is that the VGCL seems to be becoming more open-minded. The Resolution of the Tenth Congress of the VGCL in November 2008 demonstrates a changing attitude within the party state and the unions in favour of the protection of workers through labour union representation at the grassroots level – away from the conventional political role of the labour unions in socialist countries – and of a concerted effort to strengthen workers so they can hold on to their power and economic position.¹¹³⁰

5.2.2. Specific actions needed to enhance the trade union's role

5.2.2.1. Strengthening the primary organization

Renewal will not take place equally in all parts of the union apparatus. The main concern should focus on organizations at plant level as their activities will directly impact working life. The grassroots trade unions are today facing many difficulties and obstacles that make it difficult for them to fulfill their tasks.

In the least few years, the VGCL has been successful in lobbying for labour rights.¹¹³¹ Labour law has recognised relatively progressive labour rights which are in favour of employees. Regulation provides for voluntary, fair and equal collective bargaining. But all such efforts will not mean much if it is not strictly observed in the workplace. Nowadays violations of labour law occur in nearly every area of the labour relations. Because of this, employees' rights regarding employment security,

¹¹²⁹ See: Clarke, S., Lee, C.H. and Do, QC (2007), 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam', *Journal of Industrial Relations*, 49:4, p. 566.

¹¹³⁰ Source: The Resolution of the Tenth Congress of the VGCL, November 2008.

¹¹³¹ See also: Section 4.1.1.1.2. *Trade union in Vietnam*

wages, occupational health and safety and social insurance have become uncertain. Notably, such violations occur even in enterprises which already have a union organization. Collective agreements contained poor contents. In certain cases they even involved clauses that fall outside the scope of labour relations.¹¹³² This status has endured for a long time and has led to doubt about the trade union's credibility.

The ineffective operation of the primary organizations is the consequence of various shortcomings in the system such as problematic working relationships between trade union and management and between trade unions at different levels, lack of motivation and financial difficulties. All of these problems must be solved simultaneously. But some of them have more impact than others and should be focused on. These include personnel, finance, and the linkage between different levels of the trade union.

5.2.2.1.1. Improving the personnel of the plant-level trade unions

In enterprises where a local union exists, it tends to depend on management, if it is not, integrated into management structures. This organizational limitation has prevented it from exercising the essential functions required of a trade union.¹¹³³ So, I agree with the opinions of some ILO experts on Industrial Relations in Vietnam that the mechanism of establishing trade unions at plant-level should be reformed to give employees more choice and avoid the integration of trade unions into management which maintains their dependent position. Union leaders should not be appointed by enterprise management; a union leader should in no case concurrently hold a managerial position. Employers must not influence the selection of enterprise union representatives in any way.¹¹³⁴ To solve this problem, a possible solution is *to encourage the development of full-time trade union officials*.

Speaking on the issue of union personnel, Mr. Mai Duc Chinh, Vice Chairman of VGCL said that, at present (October 2009), more than 95% of trade union officials

¹¹³² Some collective agreements include, for example, matters relating to birth-control .

¹¹³³ The organizational limitation is that normally trade union officials are also members of the management board, so their interests tend to merge into those of the management.

¹¹³⁴ Jan Sunoo - Chief Technical Advisor, Project Director - *ILO/Vietnam Industrial Relations Project*. "Some Suggestions for Improving Effectiveness of the Union at the Enterprise Level", See the step 4 of "Four steps to strengthen enterprise unions and reduce wildcat strikes".

are part-time.¹¹³⁵ Up to Dec. 2009, there are only 8,416 full time trade union officials¹¹³⁶, compared with approximately 99,577 trade union units and 6,619,069 members.¹¹³⁷ This means that every 785 trade union members and every 12 plant trade union units will share 1 full-time trade union officials member. Further, enterprises which have a local trade union only represent a small part of the labour market while the full-time union officials also work for other levels of the trade union apparatus. Thus, the above data may even underestimate the overall ratio of employees in the entire workforce to full-time union officials working at the grassroots level. Some projects for allocating full-time trade union officials have recently been developed. However, they were only experimental with limited application due to financial limitations.¹¹³⁸ A lesson learnt from such projects is that full-time trade union officials worked quite effectively. They maintained regular contact with upper-level trade union levels and had a positive sense of responsibility.¹¹³⁹

VGCL currently plans to establish full-time trade union officials in all enterprises employing 500 workers or more.¹¹⁴⁰ Since most of Vietnamese enterprises are small or medium-sized, this may not be enough to improve significantly trade unions. Because a major difficulty for the trade union is lack of finance, the overall aim must not be reducing the number of full-time trade union officials, but strengthening the economic conditions of the trade union so that it can pay for staff. As roughly estimated, full-time trade union officials could be found for all enterprises

¹¹³⁵ Mr. Mai Duc Chinh, Vice chairman of VGCL provided this figure in a direct talk between high-rank officers of VGCL, MOLISA and representatives of 335,000 employees in the province on October 18, 2009; Source: *There will be full time trade union officials at the workplace*, the Tien Phong, October 19, 2009.

¹¹³⁶ Source: VGCL's *Resolution No. 04a/NQ-TLD on continuing to promote and improve the quality of training, fostering union period 2010-2020*, dated 4 March 2010.

¹¹³⁷ Source: *Report- review and assesment of 19-year implementation of the Trade union Law*, VGCL's report No 17/BC-TLD dated 09 March 2010.

¹¹³⁸ The projects were intended to apply only in IDI and private enterprises which employ a large number of workers.

¹¹³⁹ For further details, see: Mai Huong, *Allocating full-time trade union officialss to enterprises - improving the quality to win "trade name"* - The Sai Gon Giai phong online, 09/05/2009.

¹¹⁴⁰ See: The Forth Bill of the Trade union Law, Article 18:4.

employing 300 workers or more and the campaign to this effect should be implemented uniformly throughout the country.¹¹⁴¹

At the workplace a full-time trade union staff member should be appointed to the chair position. Such persons will play a key role in the grassroots trade union organization and would help coordinate activities among members of the union executive. They could also be the persons responsible for initiating collective agreements and other trade unions activities.

Together with staffing local trade unions with full-time chairpersons, it is also necessary to prescribe more precisely and clearly the rights, tasks, responsibility and activities of a local trade union; failure to do this remains a weakness of the current system. If such issues are not clearly defined, union operation will largely depend on the individual capacity, intention, activeness and devotion of trade union officials.

As the core member of the trade union, full-time officials must be qualified for the job. For this, basic conditions for their recruitment should be set out. The candidates must meet certain requirements, both in terms of knowledge and personality. For example, they should be sufficiently trained and experienced and have other qualities and conditions necessary for the job such as high motivation and devotion to the cause.

Regarding salaries of full-time union officials: the payment should in the long run be made by the local union fund and be based on the actual income of the local union. They should be defined at a reasonable level, taking into account the financial capacity of local unions and tasks assumed by the trade union officials (see below, Section 5.2.2.4.3. *The issue of payment for staff of primary unions*).

Full-time trade union officials should ideally be persons who are recruited or elected by workers and recognized by upper-level trade unions. They could simultaneously be employees in the enterprise. They must receive the necessary training and other support which will allow them to fulfill their responsibilities as union officials in a professional manner.

When working on this project, the union officials will face various difficulties and obstacles. At this will be the first stage in establishing credibility and reputation,

¹¹⁴¹ See also: 5.2.2.4. Strengthening trade union economic condition.

they cannot immediately expect much increase in membership, so finance will still be a problem. Moreover, there is a possibility some employers may react negatively and refuse to cooperate. They may even challenge the trade unions. However, if the project is applied uniformly and consistently, with the support of the media and legal measures, new habits could be created in the labour market.¹¹⁴²

In fact this campaign is not expected to prove as difficult as was the case for European trade unions at the early stages of unionism which took place about one hundred years ago. This is because nowadays labour unions are basically accepted around the world and many employers do not fight this. Many employers also understand the significance of a good relationship between management and labour for business development and are thus willing to cooperate.

5.2.2.1.2 Activating and tightening the links between trade unions at different levels

One of the reasons why the role of primary organizations is blurry is that they are largely left to their own devices and receive very little training relating to performing trade union work so their bargaining skills are poor. Those who are trained in bargaining are mostly key staff of upper-level trade unions or provincial federations. This may be based on the fact that their tenure is more stable than is that of local and enterprise union leaders who are re-elected every two years.¹¹⁴³ But this is still a problem because these staff are not involved in collective bargaining and they do not train the staff of their subordinate bodies. Upper-level trade unions do sometimes support these functions, but this support is very limited and may be restricted to handling disputes where strikes have occurred. Recently the VGCL appears more interested in tightening the relationship between different trade union levels and boosting the activity of local trade unions. But VGCL is also very cautious in its action and what has been undertaken remains rather limited.¹¹⁴⁴ To enhance the

¹¹⁴² Vietnam has some experience of this. The strategy of abolishing firecrackers (since 1994), and of demanding helmet use (since 2008), were strongly rejected at first, but have become acceptable later on.

¹¹⁴³ See: Clarke, S., Lee, C.H. and Do, Q.C. (2007), 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam', *Journal of Industrial Relations*, 49:4, p.552.

¹¹⁴⁴ VGCL recognized that the weakness of their primary organizations is a major barrier to their playing an effective role in moderating industrial conflict. However, higher trade union bodies have a very limited capacity and limited staff resources to reform primary organizations from outside. Moreover, they are very reluctant to initiate changes due to the fear of provoking conflict between management and the workplace trade union –

local trade union function, the linkage between the primary and upper organization should be strengthened. The responsibility of upper-level trade unions for giving support to subordinate units should be expanded and clearly stipulated in trade union law and in trade union constitutions as well.¹¹⁴⁵ In my opinion, higher-ranked (provincial and district) union bodies should undertake the following key tasks:

First, speaking on behalf of members at any workplace within the constituency upon their request. This includes making demands that collective agreements be entered into and then negotiating and signing collective agreement if the workers so wish.¹¹⁴⁶ To perform this task, upper unions must be aware of the operations of the local unions within their constituency and help supervise collective agreement making in such units, sending in staff to assist in the bargaining at weak moments if necessary though always subject to the consent of the executive committee of the local union.

Some ILO experts also suggest that upper union representatives should work directly with grassroots trade unions in enterprises, helping them organize workers and negotiate collective agreements. This is a detailed instruction:

Upper union officials must be invited into negotiations by the enterprise union executive board in writing. All the workers should be notified that this is happening and approve of this action. Upper union officials participate at the pleasure of the enterprise union, and must respect their decisions. The upper union officials' participation may be terminated at any time by the enterprise union executive board, if the board perceives that the advisors are not being effective, or are not representing the views of the enterprise union executive board and the workers to their satisfaction. The upper union officials may order a new enterprise union election, if it is clear that the majority of workers desire different leadership. The finished collective agreement

which might happen if the trade union genuinely represented the interests and aspirations of its members. See: Simon Clarke (2007), *Trade Unions in Russia, China and Vietnam*, Historical Materialism Conference, London, 9 November 2007, p.8; See also: Tim Pringle (2008), *Trade Union Renewal in China and Vietnam?*, paper prepared for 26th International Labour Process Conference, 18th-20th March 2008, University College, Dublin, p.15.

¹¹⁴⁵ Regarding reasoning on this intervention of upper trade union, see subsection 5.4.1 *Expanding bargaining actors on the employee side*.

¹¹⁴⁶ See also: Section 5.4. *Improving law relating to collective agreements*.

must be ratified by the workers before it is signed by the enterprise union executive board.¹¹⁴⁷

Upper unions should also help supervise the implementation of collective agreements signed by them. This support of the upper union should be aimed in the first place at units where there are no full-time trade union officials.

Second, providing local unions with necessary training, especially where new trade union officials are concerned. Training may regular or irregular. Regular training may be organized twice every five years (for new staffs elected to the executive board of local trade unions, this training would run parallel with their term). The content of regular training should focus on the key issues of labour relations such as the technique, skills and basic requirements for collective bargaining and the main tasks of the trade union. Irregular training can be held when training needs appear. It can be used as a forum for information exchange between grassroots trade unions or between lower and upper levels and can be combined with special programs of the central organization involving, for example, the participation of experts from the ILO.

To provide adequate training of both kinds, there must be a regular and active channel of communication between different levels of the trade unions. Also, the central union should also actively establish and maintain close contacts with ILO regional offices, ITUC and other related organizations and take advantage of effective support from international organizations to improve the quality of the labour unions in VGCL system.¹¹⁴⁸

In fact, the VGCL already has a special institution responsible for training trade union officials of all grades. The Vietnam Trade Union University was established in 1946, as an agency under the VGCL and it acts as a training centre for union staff. It has the functions of training trade union officials and developing research on working class and trade union activities. But to date, this facility has not been efficiently exploited for the purposes of strengthening trade unions. The training remains at the

¹¹⁴⁷ See: Jan Sunoo - Chief Technical Advisor, Project Director - *ILO/Vietnam Industrial Relations Project "Some Suggestions for Improving Effectiveness of the Union at the Enterprise Level"* , See the step 3 of "Four steps to strengthen enterprise unions and reduce wildcat strikes".

¹¹⁴⁸ The relationship between VGCL and ITUC should be improved. Currently the international trade union community has not recognized the trade unions of Vietnam as a genuine trade union. For its part, the VGCL has never expressed any long term wish to affiliate to the ICFTU (now ITUC) See: Simon Clarke (2007), *Trade Unions in Russia, China and Vietnam*, Historical Materialism Conference, London, 9 November 2007, p.5

general level (such as training in Law, Accounting, Finance and Banking). There is little training content related to the direct operations of the unions.¹¹⁴⁹

5.2.2.2. Clearly stating trade union rights and responsibilities in law and adding new ones

Efforts to reform trade union personnel and organization should go along with renewal of the content of their work. Generally both the rights and the obligations of trade unions should be further detailed and clearly stated in the law. The Labour Code, the Trade Union Law and other relevant documents cover the rights and responsibilities of trade unions, but the regulation remains general, unclear and overlapping. Further, the law overemphasizes the aspect of welfare for workers. This leads to the result that the activities of the trade union tend towards culture and entertainment rather than fighting to protect workers' rights. Some basic activities of a true trade union have never even been mentioned in the law.

Thus, there is a need for the adjustment of current regulations so as to make them concentrate on the economic functions of trade unions. At the least, these rights and obligation should be added and set out in detail. These would include:¹¹⁵⁰

- Initiating collective bargaining to set terms and employment conditions. The trade union should be the party which raises the demand for negotiation. Upper-level trade unions could also make such a demand in case it seems necessary or there is a request from employees at enterprise level. While engaged in this task, the upper-level union could also boost unionism in the undertakings where it works.

At present the right to initiate bargaining is held by both sides. Partly because this legal right remains too general, trade unions are passive and hesitant to use it, and the employers take advantage of the weakness of labour to provide low pay and poor working conditions. The right should be emphasized so that initiating bargaining becomes one of the key rights/tasks of the trade union.

- Taking part actively in resolving labour disputes and seeking compensation when the employer violates the rights of union members.

¹¹⁴⁹ See the webpage of the University: <http://dhcd.edu.vn/Giớithiệu/tabid/58/Default.aspx>

¹¹⁵⁰ Since some rights and obligations unite, I do not divide them into different groups. Some of these rights and responsibilities are also mentioned in some other places in this chapter, so they are only presented briefly here.

The trade union should be obliged to represent not only the labour collective and but also individual members. This should be an official task of the union as this has major practical value in giving individual employees the opportunity to be better protected. In such cases, both the trade union and the aggrieved employees should be entitled to compensation once it is determined the employer had violated the rights of workers. The level of compensation should be determined by taking into account the need to prevent repetitions in the future.

- Being liable for illegal strike by members

At present labour law has not yet provided for such liability on the part of trade unions (see also: 5.4.11. Industrial peace obligation and liability for the illegal strikes). But this regulation would be of great significance since it recognizes the key role of the collective agreement as a peace document and encourages parties to establish collective agreements for this purpose too. In addition, such a liability would put pressure on the trade union and force it to better supervise the members, making them more active in protecting their members' rights, so as to avoid illegal strikes.

- Balancing economic needs and deciding the level of membership fees.

The membership fee is a stable source of trade union revenue. To give the union more autonomy in their business, the union should be enabled to manage its economic needs and decide a specific rate of membership fee which will ensure adequate finance. Some people think that an increase in membership fees would lead to a decrease in members. I am personally not too pessimistic about this because the willingness to join the trade union depends on many factors, including the quality of the unions' activities. The level of membership fees can also be adjusted flexibly and is governed by the law of value. The union itself can also adjust their activities to provide an adequately good service. Currently employers' contribution is still an important revenue in the union's income structure. But in involved long term, membership fees should be considered as a key economic source and must be able to sustain the basic activities of the union even if the employers' contribution is cut down.¹¹⁵¹ Since this is an internal problem for the trade union and its members, it is

¹¹⁵¹ Currently employers' contribution still constitutes an important part of union income. But in the process of building the new trade union law, some people have suggested eliminating the provisions on employers' contributions, which have been seen as burden on enterprises. Cutting down employers' contribution should thus be considered as a possibility in the long run.

quite a flexible matter and there is no need to fix a rate by law. If necessary, the state may give limits within which the trade union could decide on a reasonable rate.¹¹⁵²

5.2.2.3. Protecting trade union officials from anti-union treatment

The activity of the primary-level trade unions has met various obstacles, including the fact that trade union officials have been at risk of unfair treatment. The mechanism ensuring trade union officials can work independently is weak. The rights of trade union officials, especially part-time union officials, have not been secured. This impacts psychologically on them and makes it difficult for them to devote themselves to trade union jobs. The quality of trade union representation in the workplace is thus limited.

The Labour Code provides some measures to protect trade union officials from unfair treatment. Article 155 provides that when an employer decides to retrench or to terminate unilaterally the employment contract of an employee who is a staff member of the enterprise trade union, the approval of the executive committee of such enterprise trade union must be obtained. Where the employee is the head of the enterprise trade union, the approval of the immediately superior trade union organization must be obtained.

Such a regulation is not sufficient to protect trade union officials and its enforcement is in practice also limited. In the labour market, unfair treatment of trade union officials who actively protect employees' rights is common. Normally employers seek "just causes" to terminate the employment contract of trade union officials. Or employers may refuse to rehire them once their employment contract expires even though they are fully qualified for the job. Even if they do not fire the leaders, employers may also cause difficulties for them which erode their enthusiasm for trade union work.

In such a situation, to create additional security for the unions, especially for part-time union officials whose income basically depends on their employment, the following actions should be taken:

¹¹⁵² For example, to prevent abuse of this right, state law can state the highest rate that trade union can decide to collect from its members.

First, adding more protective measures in trade union law, labour law and other relevant documents. The protective measures should consist of allowing trade union officials' to have priority in maintaining employment, or being moved to other suitable work in case of redundancy or undertaking reorganization and priority in being re-employed. There should be a mechanism to protect trade union officials from unfair transfers or degrading work conditions. Further, both incumbent and former trade union officials must be entitled to these priorities.

Second, adding proper resolutions to deal with cases where the above measures cannot apply. For example, the law should prescribe in detail the different levels of compensation and allowance paid to trade union officials where it has been determined that reinstatement of leaders who have been dismissed, transferred or downgraded is not possible. This gives employers the possibility of resolving genuine problems relating to trade union officials' employment, but it also prevents acts of abuse. To do this, the compensation should be adequate, taking into account both the damage incurred and the need to prevent the repetition of such situations in the future. The enforcement measures related to the regulation should be drawn up so as to ensure that the related trade union officials are fully compensated.

Third, applying strict punitive sanctions to employers who engage in unfair treatment. Also, the remedial sanction imposed for other newly added types of unfair treatment (such as unfair transfers or degradation and failure to compensate as mentioned above) should also be specified.

The draft Trade Union Law provides some additional measures to protect union officials' employment (see the fourth Bill, Article 26). This regulation is basically reasonable. However, the content should be reviewed. For example, item 1 stipulates: "Where an employment contract or work contract expires during the office term of an employee who is a member of the executive board of the local union, such employee shall be automatically enabled to continue performance of the contract to the end of the term." Normally when a labour contract expires, the work still continues. But there are also cases where a labour contract expires, and the work also finishes. If this is the case, the employee can not just "sit around" until his union term expires. An appropriate solution could be that the employers should, with the consent of the employee, find the employee another job with equivalent salary and working

conditions which will last until the end of his or her term on the trade union execution board.

Parallel with protecting trade union officials, any anti-union acts aimed at employees must be punished. Employers who commit obstruct or challenge unionism or attack the trade union movement by applying discriminatory measures in labour recruitment, dismissals or during employment by way of transfers, downgrading and other acts that are prejudicial to workers must also be severely fined.

5.2.2.4. Strengthening trade union's economic conditions

At present, financial support from the state is still important and covers the needs of the administrative apparatus of the union. But in the long run, the union needs to function as an economic organization and be financially independent. Of the union financial issues, those of grassroots unions should be particularly subject to scrutiny, because the activity of the local trade union directly affects the actual lives of the workers. Moreover, solving the financial problems at the grassroots level is essential to building up the funds of the entire trade union apparatus.

This section will discuss two issues: rebalancing the structure of union expenses at grassroots units and improving trade union funds as a whole.

5.2.2.4.1. Rebalancing the trade union cost structure

Revising the cost structure to make it more viable is one way of sustaining trade union economic capacity. The current spending of grassroots trade unions is not done in the most reasonable way. For example, there is a tendency to provide minor, unimportant and miscellaneous welfare for workers, like wedding gifts, birthday gifts, sports, shows, sightseeing and the like, but these are not the true basic expenses of a genuine trade union which relate more to paying its staff and organizing strikes.

The above is the unavoidable consequence of a system where trade unions were not set up to resolve conflicts of interests between the labour parties. In the centrally-planned economy, the Vietnamese trade union did not engage in collective bargaining, organizing strikes or resolving disputes. There was nothing to discuss or define regarding wages or working conditions as the state fixed everything. So what the union could do was limited to taking care of some fringe benefits for its members and this is now embedded in the way trade unions work.

This has become outdated and unsuitable in the new context of a market economy where a trade union must play an economic role, must concern itself with facing the employer and actively striving for the rights and interests of its members. Nowadays the trade union fund must be used in a more pragmatic way. It is the fact that where employees' rights have not been secured and long working hours, low wages and poor working conditions exist, entertainment activities organized by trade union are of much less importance to workers.

The following table shows the existing cost structure of the trade union in the workplace, which should, in my opinion, be adjusted.

Structure of the expenses of the primary organization¹¹⁵³

Contents	Level
Wages, allowance, extra expenses pertaining to wages of full-time trade union officials Allowance of part-time trade union officials	30%
Administrative expense ¹¹⁵⁴	10%
Trade union movements ¹¹⁵⁵ and other expense ¹¹⁵⁶	40%
Caring for employees and members ¹¹⁵⁷	20%

¹¹⁵³ See: - Decision No 1375/QD-TLD of VGCL dated October 16, 2007 regarding the Regulation on the contents and levels of the collection and spending of primary organization fund.

- Decision No 212/QD-TLD of VGCL dated February 16, 2009 regarding the Regulation on the contents and levels of the collection and spending of primary organization fund in FDI enterprises.

¹¹⁵⁴ This basically consists of: Paying for meetings, organizing congresses of the union, sub-unions, office stationery, facilities for trade union office, minor repairs in trade union office, postal expenses, water, entertaining.

¹¹⁵⁵ This basically consists of: Paying for trade union to take part in collective bargaining and conclusion of collective agreements, settlement of labour disputes; Paying for consultative services, lawyers, meetings to collect member opinions; Paying for activities regarding education, training and propagation; Paying for organizing entertainment activities: sport, shows, emulation movements; Awards for active members.

¹¹⁵⁶ Paying for trade union social activities and donation, supporting members' expenses for sightseeing, tours organized by the trade union.

¹¹⁵⁷ Paying for presents (weddings, birthdays, illness, relative funerals .)

The two last items are occasional but account for 60% while the first one (pay for both full-time and part-time trade union officials) is regular (and important) but accounts for only 30%. This apportionment is not reasonable and should be adjusted. As I have mentioned above, almost all trade union officials (95%) do trade union work on a part-time basis. They do not have the financial strength would allow them to work independently as trade union officials so this structure does not reflect the actual economic needs of the trade union. Trade union officials' wages should have priority.

While cutting down the last two expense items, programs for strengthening overall financial power should be developed simultaneously. Also, some kinds of expense are quite important and should be secured, such as pay for consultants and hiring lawyers. Regarding spending on negotiating collective agreements, it is not a big problem. According to the Labour Code, employers are the persons who are responsible for all expenses relating to the conclusion, signing, registration and amendment of collective agreements (see para. 1, Article 53 of the Labour Code). When new trade union activities are added or stressed (such as an official handling individual employees' dispute settlement), the structure needs to be adjusted accordingly.

5.2.2.4.2. Enriching trade union funds

Due to financial shortages, the VGCL could not sustain some projects, such as the establishment of full-time trade union officials at plant level unions as mentioned in Section 4.1.1. *Parties to collective agreements*. Further, the actual economic needs of the Vietnamese trade union is even greater than has been estimated would be needed if it wishes to assume the role of a genuine trade union.

The trade union law 1990 (Article 16) prescribes the sources of trade union funds. These sources are provided for in detail as follows:

- Contributions received from employers. According to current regulations, the employer's contribution is 2% of the payroll if the enterprises belong to non-state sector.¹¹⁵⁸ Of this, the local union is entitled to 50% (equivalent to 1% of the

¹¹⁵⁸ See item b, part II, Circular letter No 119/2004/TTLT/BTC-LDLĐVN dated December 8, 2004 issued by the Ministry of Finance and VGCL guiding implementation of the payroll deduction for trade union.

payroll),¹¹⁵⁹ the remainder will be transferred to upper-level unions. As for FDI enterprises, their contribution is only 1%¹¹⁶⁰ and the local organization is entitled to all of it.¹¹⁶¹

- Membership fees, which are collected from union members by means of a monthly deduction from their wages. The current rate is 1%.¹¹⁶² Of this, the local organization is entitled to 70%, the remaining 30% will be transferred to the upper-level union.¹¹⁶³

- Other sources: payment by the enterprise to facilitate trade unions, extra payments by employer for union business and other financial support from organizations and individuals inside or outside the country. The local trade union is entitled to the whole of such amounts.¹¹⁶⁴

Briefly, local unions' income consists of: employer's contribution: 1% of payroll, 70% of total membership fees in the enterprise, and other extra financial sources. Roughly speaking, if an enterprise employs 300 workers or more, the related primary trade union will have enough stable income to be able to pay for members of the executive board, including one full-time official, two part-time officials and some other basic trade union activities.¹¹⁶⁵

¹¹⁵⁹ See Regulation No 1582/QD-TLD dated November 9, 2000 of the VGCL on the contents and level of collecting and spending the primary organization fund.

¹¹⁶⁰ Article 1 Decision No 133/2008/QD-TTG dated October 1, 2008 of Prime Minister on Deduction of employer's contribution for trade union fund in FDI enterprises and Foreign Executive Office in regard with Business Cooperative Contract.

¹¹⁶¹ See part B, II, Resolution No 212/QD-TLD of VGCL dated February 16, 2009 regarding the Regulation on the contents and levels of the collection and spending of primary organization fund in FDI enterprises.

¹¹⁶² See part II, Announcement No 58/TTR-TLD dated May 10, 2004 of the VGCL guiding delivery and collection trade union membership fee, Article 39 of VGCL Constitution.

¹¹⁶³ See: - Regulation No 1582/QD-TLD dated November 9, 2000 of the VGCL on the contents and level of collecting and spending primary organization fund. (part II, item 2).

- Resolution No 212/QD-TLD of VGCL dated February 16, 2009 regarding the Regulation on the contents and levels of the collection and spending of primary organization fund in FDI enterprises (part II, item B).

¹¹⁶⁴ See Regulation No 1582/QD-TLD dated November 9, 2000 of the VGCL on the contents and level of collecting and spending primary organization fund. (part II, item 3); Resolution No 212/QD-TLD of VGCL dated February 16, 2009 regarding the Regulation on the contents and levels of the collection and spending of primary organization fund in FDI enterprises (part II, item B).

¹¹⁶⁵ See the payment plan suggested in section 5.2.2.4.3. *The issue of payment for trade union officials*

This is, however, trade union revenue in theory, computed pursuant to existing regulations. In reality trade union earnings from these sources are limited. There are at least the two following difficulties which face the trade union when collecting contributions:

First, the revenue from the membership fees is small due to difficulty in the development of membership.

The level of unionism within the enterprises is low. This is partly because employees do not wish to join the union and partly because enterprises do not support unionism. In the private sector and especially in the foreign investment sector, employers sometimes openly oppose trade unionism. For example, in many industrial parks and processing zones in Binh Duong, Dong Nai, Ho Chi Minh city workers have often been required to make a written commitment not to join a trade union or to sign a collective commitment to work without a trade union organization.¹¹⁶⁶ Regretfully, employees easily accept this unfair demand from the enterprises as they do not see much practical benefit in joining a trade union anyway. Even where there is no intervention from enterprises, many employees do not wish to join a union either since they have no faith in the quality of union activities.¹¹⁶⁷

On a broader scale, promoting the development of unionism also faces many difficulties. In the labour market, enterprises which have established company trade unions only comprise a small proportion. Small-sized enterprises in the private sector rarely form trade unions. Even enterprises with a large number of workers also seek to avoid or constrain unionism. The law provides that, no later than six months from the date of commencement of operation of a newly-established enterprise, a trade union body should be established.¹¹⁶⁸ However there are cases where enterprises have operated for a rather long time and had recruited hundreds of workers but when upper union representatives came and expressed their intention of establishing a company union, the enterprise manager alleged that the company was still in the period of

¹¹⁶⁶ See: Hoang Ha (2010), *The necessity of concretizing rights of upper trade union*, The Labour, 21 March 2010.

¹¹⁶⁷ See: Pham Tat Thang, *Promoting political awareness of Vietnamese working class in the context of international economic integration*, The Communist review No 3 (147) 2008.

¹¹⁶⁸ Article 153 of the Labour Code.

experimental operation and had not really started operations!¹¹⁶⁹ Many enterprises explained they were too busy for the establishment of trade union. Certain managers even bluntly stated that their company only recruited workers for their business, but not for trade union purposes.¹¹⁷⁰ As the rate of unionism remains small, membership fees do not yet make an important contribution to trade union revenue.¹¹⁷¹

Second, it is extremely difficult to collect the employer's contribution for trade union fund. It is not uncommon that enterprises, even enterprises which used to be state-owned ones (privatised enterprises), fail to pay their trade union contribution. A shortcoming of the legal system is that a punitive sanction for this kind of violations has not been provided for. Thus, there is no ground for fining such enterprises and, as a consequence, enterprises largely ignore the obligation. Trade unions often try to persuade enterprises to pay contribution, but if the enterprises ignore this, they have to accept it!¹¹⁷² In addition to this, as the regulation on this obligation of employers' contribution is unclear, it is not understood and implemented uniformly in practice. For example, the contribution may only be based on the basic wages or on the wages of trade union members in the enterprises which both lead to losses to trade union revenue.¹¹⁷³

So, the fact that the trade union fund is limited may not be because of the low level of the employer's contribution or the membership fees but rather because the regulation has not been complied with whether because of the lack of enforcement measures or because the regulation is unclear and difficult to understand and implement effectively.

In sum, in order to solve the problem of trade union funds, three actions should be simultaneously taken: *first*, adjusting the structure of trade union expenses so as to

¹¹⁶⁹ Le Nguyen, *Amending the Labour Code and Trade union Law: There should be detailed regulation on punishment*, The Magazine on Potential and Opportunity for Investment and Development, Dong Nai provincial Committee, 21/12/2009.

¹¹⁷⁰ Le Nguyen, *Establishment trade union in FDI enterprises: extreme difficulties*, The Magazine on Potential and Opportunity for Investment and Development, Dong Nai provincial Committee 28/8/2009.

¹¹⁷¹ According to VGCL, currently (2009), the revenue from membership fee accounts only for about 23% of the trade union fund.

¹¹⁷² Chau Long, *Necessity for detailed regulation of the obligation of deducting contributions for trade union fund*, source: The Labourers No 216, 25 Sep.2009.

¹¹⁷³ See: VGCL, January 2010, *Report of assessment of socio-economic impacts - Trade union Law*, p. 16

guarantee pay for trade union officials and other conditions allowing the trade union to work independently; *second*, guaranteeing that the regulation of trade union funding is correctly understood and strictly observed in practice; and *third*, reconsidering the trade union's economic needs and finding way to increase trade union funding if necessary.

Promoting unionism is an indispensable condition for improving trade union income. In recent years, VGCL has made great efforts to boost membership. But the membership loss every year remains large, equivalent to more than half of the newly-joined members. For example, in 2008 VGCL added 662,879 new members, but the membership loss during the year was 388,396 (equivalent to 58.6%), in 2009, new members amounted to 598,727 while the membership loss was 318,763 (equivalent to 53.25%). There are no clear reasons why this situation arises.¹¹⁷⁴

This "gain-and-loss" membership development is not really sustainable: the management of existing members should be improved. Questions arise regarding measures to preserve union membership: an example is how to maintain membership where a member moves to another enterprise where there is no union organization? Should upper-level unions directly manage the membership in this case? But how then to protect his rights in the new workplace? Also, the development of union membership should also pay more attention to the quality of union work. This means, that trade unions should attract workers by their useful activities: merely campaigning for members while ignoring whether the workers have a real interest in joining will never succeed. Currently the draft Trade Union Law has mentioned the issue of membership development (Article 18, fourth draft of Trade Union Law). However, the content of this regulation is not entirely reasonable. For example, under paragraph 2, the establishment of a grassroots trade union and the appointment of the local trade union executive committee will be *decided by the upper-level trade union*. This is not correct. Deciding whether a union should be formed in an enterprise must be the right and business of the workers in such units themselves. The upper union can only provide them with the facilities they need to establish their grassroots trade union in accordance with proper procedures. In general, ensuring employees act in a voluntary manner is also a factor ensuring the quality of new membership.

¹¹⁷⁴ See: The report No 4, January 7, 2010 of VGCL on the Results achieved in the Program of developing membership in 2009.

5.2.2.4.3. The issue of payment for staff of primary unions

Solving the problem of payment for union officials is of great importance to guarantee essential conditions for the union officials work effectively. As indicated above the immediate concern must be primary unions as activities of these bodies directly affected workers' lives.¹¹⁷⁵

Regarding the salary of full-time union officials, as the current union income consists of the employer's contribution (1% of the total payroll of the enterprise), 70% of the total union membership fees and other sources as mentioned above, a payment plan could be as follows: The salary should consist of two parts: basic salary and additional salary. The basic salary is based on the revenue from the employer's contribution and is calculated by a fixed rate multiplied by the average income of the employees at the place where the union official works. The additional salary/allowance based on the revenue from the membership fees and is calculated as a certain percentage (%) of the total amount collected from the membership fees. Both the rate of basic salary and the additional income percentage could be fixed at a reasonable level (by law or by the union's constitution), attaching to the size of the enterprises where the full-time officials work. For example, if full-time officials are in enterprises employing 300 workers to 399, the rate could be 1.5;¹¹⁷⁶ if enterprises employ 400 workers to 499 the rate could be 2.0; for enterprises with 500 workers to 699 the rate could be 2.5; if enterprises employ 700 workers to 999 the rate could be 3.0 and so on. With large-sized enterprises which employ thousands of employees, which have various branches, where necessary, full-time trade union officials could be established in sub-units of the union, and the salary could be calculated on a similar basis to that mentioned above. The additional salary could be fixed at the rate of 15% or 20% of the total amount collected from membership fees). This level of salary is not so high, but it is secure and flexible, based on labour principles, suits the financial capacity of the local union and is also linked to the income of the enterprise. The more incomes the enterprise gets and the more members the union has, heavier duties will be called for but the union official will have a higher income.

¹¹⁷⁵ See also Section 5.2.2.1.1. *Improving the personnel of the plant-level trade union*

¹¹⁷⁶ Employer' contribution (1% payroll) in an enterprise employing 300 workers will be equivalent to 3 times of average income of the employees in the enterprise. The wage rate of 1.5 will give union officials a basic salary equivalent to 1.5 the average salary, equivalent to 50% of the total employer's contribution.

Besides the payment set out for full-time union officials, an additional salary/allowance for another two part-time union officials members, those on the executive board of the trade union needs to be considered too. This additional salary/allowance could be calculated on a similar basis to that of the full-time officials (15% or 20% of the total amount collected from the membership fees).

5.3. Organizing both sides for collective bargaining

In order to improve collective bargaining, fully fledged representatives on both sides are indispensable. One of the reasons why there was so much debate and it took so long to sign the industrial experimental collective agreements is that the partner on the employer side (The Vietnam Textile and Garment Association) was not a fully representative body. To be capable of collective bargaining, the labour market parties need conditions in which they can become self-reliant, autonomous and independent, not subject to the domination of the other side or the government, and sufficiently authorized. But of the two sides, a strong union is more necessary to ensure that there is equality of bargaining positions between the parties and to ensure the strict observance of agreements.¹¹⁷⁷

In the current Vietnamese context, improving the trade unions should be considered as the key factor in reforming the organizations of both sides. Developing the employer organization is not the most important concern. The experience of Sweden and of many other advanced market economies is that the employer's representative system will automatically develop in response to the development of employees' organizations. The need is to make the latter stronger and more viable with access to sources of advice, the ability to influence public opinion, take charge of collective bargaining and dispute settlements.

5.4. Improving the law relating to collective agreements

Labour law is the instrument with the aid of which one can establish a better environment for collective bargaining. It is also the essential tool for social protection where collective bargaining is not well developed. As all parts of the law are interconnected, improving labour law as a whole should be undertaken with reform of the law on collective agreements.

¹¹⁷⁷ De Silva, S.R. (1998), *“Elements of a Sound Industrial Relations System”* International Labour Organisation ACT/EMP Publications, p.18.

Bearing in mind the scope of this research, only the most important aspects of the law relating to collective agreements will be considered.

5.4.1. Expanding bargaining actors on the employee side

According to current Vietnamese labour law, trade unions - or a provisional trade union body - belonging to VGCL are the only employees' representative body which have the right to conclude collective agreements. But trade unions belonging VGCL have not been functioning efficiently for the reasons indicated above. This leads to the fact that low quality collective agreements have been signed and employee confidence in trade unions, collective bargaining and collective agreements has been eroded. To combat this and also support unionism in many enterprises, the following possibilities could be seen as solutions to some problems, which might assist collective bargaining at company level:

- First, empowering upper-level trade unions to participate in collective bargaining at enterprises once the labour collective in enterprise has requested it.¹¹⁷⁸ An upper-level trade union has advantages, such as an independent legal and economic status and being better trained in labour relations and collective bargaining. Giving assistance to member unions is also a part of upper union responsibility, so this participation is not contrary to trade union tasks and functions. In Sweden, though plant-level trade unions are strong, the intervention of higher level trade unions to conclude collective agreements is still allowed; negotiation between an actor at the grassroots unit and an actor at central level can take place.¹¹⁷⁹ In Vietnam this is probably applicable.

A progressive aspect of the Fourth draft of the Trade union Law is to foresee the rights of upper-level trade unions to carry out trade union business in undertakings *where a primary trade union body has not been established*. In particular, upper-level trade unions will represent and protect the rights and benefits of the workers in such undertakings.¹¹⁸⁰ But, materializing this provision will not be easy because if there were neither a grassroots organizations nor trade union members, it would be difficult

¹¹⁷⁸ See also: Section 5.2.2.1.2 Activating and tightening the links between trade unions at different levels.

¹¹⁷⁹ See Section 10 and Section 14 Co-Determination Act (1976); See also: Lars Gellner, Lars Sydolf (2008), *Swedish labour law*, Norstedts Juridik AB, p.18).

¹¹⁸⁰ See Article 19 of the draft.

for the upper unions to grasp the situations of the enterprises or the workers' needs in order to represent them in a efficient and timely manner. Further, the regulation will be unpractical where the employees in such enterprises have no intention of joining the trade union at all. Without the employees' support, the upper-level trade union will not manage to carry out these tasks over the long run. So, all of these provisions should pertain to union membership. Upper-level trade unions should only provide their services to their members in enterprises.

- Secondly, enabling labour representatives to be involved in collective bargaining.

At present, labour representatives have been recognized in organizing and leading industrial actions. Because these are linked to the right to establish and implement collective agreements, representatives should also be recognized as actors in collective bargaining.¹¹⁸¹ Labour representatives often receive strong support from workers as they understand workers, are "workers' heroes" who have won the trust and confidence of workers. So the collective bargaining conducted by labour representatives could be successful. In order to provide good conditions for them to work in, they should be empowered to agree with the labour collective on any of their related concerns including financial issues and other costs incurred in the process of concluding collective agreements as well as conducting other related activities such as strikes. Labour representatives should also be empowered to supervise the implementation of the signed collective agreements, represent the workers to claim compensation when the employers breach the commitments.

- Thirdly, enabling the whole labour collective to be involved in collective bargaining.

Sometimes the entire labour collective may bargain with the employer with the assistance of an authority in charge of labour administration. In practice, when solving strikes in grassroots units, the authority/task force can bring the parties together and encourage collective bargaining between them. Negotiation of this kind is often limited in its content, but it should still be encouraged, as it does provide an immediate resolution to conflicts between workers and employer. The task force can also take this opportunity of educating workers, propagating knowledge of labour law

¹¹⁸¹ See also: Section 5.4.2. *Using strikes in supporting collective agreement conclusion.*

and collective agreements, giving workers guidance on collective bargaining and campaigning for unionism.

Also, there are cases where bargaining is conducted completely independently by a group of employees without trade union or any support from outside. In this case, the legal requirement concerning subject conducting the bargaining do not match. But in the current context where trade unions are weak and there is no other way for employees to protect themselves, this form of bargaining should also be recognized. What follows is a case reported in a processing zone in Ho Chi Minh city in October 2007:

"I heard that leaflets were passed around one day before, calling for strikes. The next day, at exactly 7.30 a.m. all the workers gathered in front of the company's gate. They queued up in several orderly lines. No violence, no yelling. They all looked cheerful. A piece of paper containing the workers' demands was given to the guard who passed it to the director. Security guards stood around the strikers but there was no tension. They even chatted and laughed loudly. One hour later, the director came out to talk to the strikers. He is Korean and can not speak Vietnamese; neither can workers speak Korean or English. Workers demanded an increase of 300 thousand dong by raising three fingers. The director shook his head and showed one finger. The silent bargaining continued until the director raised two fingers (VND 200,000) and workers applauded. They dispersed peacefully and returned to work the next day".¹¹⁸²

In short, broadening the number of bargaining actors, including the recognition of upper-level trade unions, labour representatives and even the labour collective will help in the development of collective agreements.

5.4.2. Using strikes in supporting collective agreement conclusion

To date industrial actions (strike) have not been much used in support of collective agreements in Vietnam. As far as I understand things, there are at least two reasons for this: *First*, labour laws do not prescribe, and collective agreements do not often specify any obligation on the trade union to keep the labour peace. *Second*, even when collective agreements are in force, employees still have the right to claim for

¹¹⁸² Do Quynh Chi (2007), *Independent workers activism in Vietnam and its influence on the strategy of the government and traditional union-* Analytical report, Nov. 2007.

better benefits than those provided in collective agreements. Strikes can be used as a way not only to resolve disputes over interests, but also to resolve labour disputes over rights.¹¹⁸³ In practice, the number of collective labour disputes referred to the competent bodies has been very small (only 2 cases were filed and heard before the courts in the 13 years up to 2008), but the strikes taken place in those years have numbered in the thousands.¹¹⁸⁴ The strikes happened spontaneously and were the direct reactions of employees, but they reflected workers' discontent and the real state of conflictual labour relations. The fact that collective labour disputes have not been recorded in such large numbers does not mean labour relations in Vietnam have been sound and harmonious, but because the workers lacked leaders who could organize them so as to confront employer collectively. The above mentioned strikes were all illegal, but in most cases their existence was not unreasonable.

The situation is worrying. For a healthy labour market, industrial actions should be used in a reasonable way. Thus, the following actions should be undertaken:

First, strikes should be regarded as a means of support for bargaining

Chapter 5 of the Labour Code is preserved for collective agreements. After various amendments, the provisions on the legal procedure for concluding a collective agreement have been improved. The problem is that while concrete steps for concluding collective agreements are stipulated, the right to use strikes as part of the bargaining process has never been mentioned. The absence of this regulation leads to the incorrect misconception that making a collective agreement and industrial action have no direct connection. This is one reason why workers are not aware of this role of the strike and why strikes are not used in negotiations. So, clearly providing for the right to strike in support of bargaining in Chapter 5 would be very meaningful and would help guide workers' actions. If strikes were used in this manner, collective bargaining will become more intensively used and the quality of collective agreements might well be improved.

¹¹⁸³ See Article 170a, Labour Code.

¹¹⁸⁴ See: Thao Lan, March 30 (2009), *The status of disposition of labour dispute at the court*, MOLISA's webpage: <http://www.molisa.gov.vn/news/detail/tabid/75/newsid/41013/se0/Thuc-trang-giai-quyet-tranh-chap-lao-dong-tai-Toa-an>

Further, at present collective bargaining has been conducted at industry level, but strikes could not be conducted/organized beyond single enterprises. This is an inconsistent regulation of labour law which should be reviewed and amended so as to ensure that strikes can be used as a means of supporting collective bargaining at industry level, when necessary.

Going along with the inclusion of the right to strike in the process of negotiating collective agreements, another regulation must also be added: the obligation to refrain from going on strike when a collective agreement is in force. Generally, employees need to be educated so they can use strikes correctly.

Second, creating a legal basis for employees' representatives to act

At present the Labour Code allows employees' representatives (who are not trade union officials) to lead workers when they go on strike, but they are not yet recognized as representatives in bargaining. It is a fact that *if this matter of representation is not solved thoroughly from the beginning, the strike remains illegal.*

According to current regulations, in order to make a strike valid, the mandatory steps in dispute settlement must have already been fulfilled. If the employees' representatives are not empowered to represent employees, launch a conflict and act on the employees' behalf when confronting the employer and following up on the process, then the necessary steps of collective dispute settlement can never be fulfilled. In the absence of such a leadership, how can the labour collective itself make progress in a collective labour dispute? And how can they secure the conditions for the strike to happen legally?

To fill this gap in the legislation regulation, employees' representatives should be enabled to act adequately. In particular, they should be recognized as persons who acts on the workers' behalf to make demands in negotiation, submit any dispute to a conciliation body and organizes the labour collective to follow the process in an orderly way. If such efforts have not resolved the dispute, then the employees' representatives should be able to resort to the right to organize a strike. The representatives are also the persons who sign any agreement reached between the two parties.

5.4.3. Collective agreement registration, a mandatory procedure affirming the legitimacy of the agreement before application

As mentioned in Section 4.2. *Registering Collective agreements*, since the amendment of the Labour Code in 2002, registration is no longer regarded as a condition for recognizing the validity of a new collective agreement. This amendment aims to provide the parties with more power and discretion and can be seen as an essential step in developing a market economy in which the creative roles of the social partners will be increasingly promoted. But it can be considered that it is too early for this move to develop its practical value. In the labour market, as the trade unions are relatively powerless and inexperienced, they have not been as strong as the employer at the bargaining table. The result is that the employer is dictating the content of collective agreements, which results not only in poor working conditions, but also gives rise to unrelated issues or even illegal contents also appearing, burdening workers with unfair duties. Thus, the control of the validity of a newly-signed collective agreement is still significant. Enabling collective agreements to apply some days earlier according the new regulation will not make much sense and is not really necessary, especially if the issue of expired collective agreements is solved (see Section 5.4.8. below). This means that a collective agreement should perhaps not take effect before a registration body has confirmed its legitimacy. Further, an enterprise that fails to submit a collective agreement for registration should also be fined properly.¹¹⁸⁵

5.4.4. Dealing with clauses which are incompatible with labour law provisions but appear well suited to the specific situations of the enterprises¹¹⁸⁶

Statutory provisions do not always foresee all circumstances that may arise in the labour market and may need to be regulated. In order to run the labour market smoothly, the competent authorities - normally the bodies responsible for registration - should be empowered to recognize unlawful collective agreement contents in some special cases. A rigid attitude and a onto-literal interpretation of the wording of statutory provisions are sometimes unnecessary, especially when statutory provisions have become outdated or too limited.

¹¹⁸⁵ Regarding the sanction, see Article 9: 1, Decree 47/2010/ND-CP dated May 06, 2010.

¹¹⁸⁶ See also: Section 4.5.3. *Legal consequences of invalid collective agreements*.

It is worth noting that recognition of these clauses may be at risk of violating the principle of guaranteeing strict compliance with the law.¹¹⁸⁷ So, this should all be very carefully considered. If the authorities see that certain clauses in a collective agreement are adequately clear, are not likely to harm the rights and interests of employees and are useful for the enterprise as it runs its business, they should be able to recognize such clauses. If this is the case, the wishes of the parties and the opinion of the authority should be affirmed. The authorities should also then be liable for errors which lead to unnecessary enforcement of genuinely illegitimate clauses, obviously violating the rights of employees.

When dealing with this matter some countries such as France, Japan and Belgium adopt quite flexible approaches.¹¹⁸⁸ In Vietnam, because of the diversification of the labour market, a similarly flexible viewpoint may also be necessary on some occasions.

5.4.5. Duration of collective agreements

The current version of the Labour Code provides that the term of a collective agreement must be definite and not exceed 3 years. Generally, in the Vietnamese situation where collective agreements are concluded at plant level, the parties use collective agreements to resolve problems occurring during the course of labour utilization at the workplace. They normally deal with the actual current conditions of the labour market so this provision makes sense and prevents enterprise "laziness" in renewing collective agreements.

However, a problem is that the scope of labour relations issue is broad and they vary in terms of their nature. Further, the idea of concluding industry collective agreements that could serve as a stable framework has appeared. So, to provide greater flexibility for collective agreements, the state might better provide that the parties can conclude collective agreements with different form of duration (both a definite and an indefinite term). The State may limit the issues which be covered by an agreement of indefinite duration. For example, with general and stable issues such as the basic principles of conduct, rights and obligations of the two parties,

¹¹⁸⁷ This is one of the overall principles ruling the Vietnamese legislation system.

¹¹⁸⁸ As for France and Belgium, see: Section 4.5.3. *Legal consequences of invalid collective agreements*.

For Japan, see: Section 2.8. *Legal effect of collective agreements*.

mechanism for negotiating or amending an existing collective agreement and resolving disputes, the parties should be able to use an indefinite agreement. Along with this, the parties may also decide to conclude several collective agreements of different durations which still apply concurrently.

5.4.6. Applying collective agreements in the event of the reorganization of an undertaking

At present, the solution for collective agreement effect in case of reorganizing enterprises has not been decided on a basis whether the ownership is transferred.¹¹⁸⁹ Such a provision is not reasonable and should be amended. If there is no change in employer, there is absolutely no need to replace the existing signed collective agreement. It can continue to apply until it is terminated by the normal procedure – by the mutual consent of the parties or the expiration of its term.

In cases of transfer of an enterprise, with change in employer, it is more of an issue whether the collective agreement of the former enterprise should continue to apply. In my opinion, the agreement should stay in force with respect to the transferred employees until its expiry. The new employer should be obliged to continue to apply the agreement. In case the new employer also has an applicable collective agreement, the transferred employees should be given power to decide whether the former agreement should be replaced or not.

5.4.7. Amendment of collective agreements

In a dynamic and also unstable labour market, the need to change a signed collective agreement may appear unexpectedly. The labour market parties thus need a flexible legal framework in order to be able to adjust their agreement in response to the changes of the market. So it is undesirable to prevent the parties from amending, adjusting or adding new clauses to an existing collective agreement by forcing them to comply with a stipulated period of agreement implementation as provided for in Article 50 of the Labour Code.¹¹⁹⁰

¹¹⁸⁹ See also: Chapter 4, Section 4.3. *Implementation of collective agreements (Application of collective agreements in the event of transfer or reorganization of undertaking).*

¹¹⁹⁰ See above, Section 4.3. *Implementation of collective agreements.*

The regulation may aim at maintaining stable labour relations as is argued by some researchers.¹¹⁹¹ But this goal can still be achieved in the absence of such a requirement. As one of the key role of collective agreements is keeping industrial peace, they should indeed be seen as peace documents and this should be clearly expressed in the law. The law may state that once a collective agreement is in force, regardless of any revision, the labour collective has an obligation to stabilize labour relations by not going on strike. With such a regulation in place, the parties could amend the collective agreement whenever they see it as necessary while industrial peace will still be being maintained.

5.4.8. Expiry of collective agreements

According to Article 51 of the Labour Code, before a collective agreement expires, the parties can negotiate to extend its term or sign a new one. After three months from the date of expiration of the collective agreement, if the negotiation fails to reach a conclusion, the agreement will automatically ceases to have effect. A similar provision is set out in the Bill of the Labour Code with a few changes, but the prolongation period is only 30 days (see Article 86, second Bill). In practice, this overrun of collective agreements often happens and employers are often not eager to sign new ones either. If the agreement ceases to have any effect as provided for by the law, only the employees suffer loss, but the employer does not and thus he will not need to hurry to enter a new collective agreement in place either. In my opinion, where a collective agreement expires, the working conditions set up by the agreement should be maintained until a new collective agreement comes into force. However, the obligation on the trade union to maintain "industrial peace" should be deemed to have expired. This means strike then could be used to resolve bargaining deadlocks when the parties negotiate a new collective agreement.

5.4.9. Sector-level collective agreements, a new development

It is presently felt that concluding sector-level collective agreements in Vietnam has not been an easy matter to organise. *First*, trade unions at plant level do not yet exist in most enterprises. Collective bargaining at this level remains small in scale and

¹¹⁹¹ See Nang Khanh (2009), *Collective agreements in Vietnamese labour law*", Doctoral thesis (see Section 1.2.3. *Statutory regulation on legal effect of collective agreements*); See also: Phan Nghiem (2008), *Completing and implementing law on collective agreements*, The Nghien cuu Lap phap No 113 Feb.2008.

low in quality. So, establishing trade unions and improving the quality of collective agreements in the workplace must be the immediate concern. *Secondly*, the sector-level organizations on both sides are not prepared for this task. They need authorization with regard to collective bargaining from their members but the members themselves are, in many cases, not yet ready for collective agreement negotiations. For example, in the textile and garment industry, many employers allege that they are controlled by upper-level contractors and have not been able to decide labour prices independently. So, to develop collective agreements at sector-level, the first requirement is to remove obstacles at plant level, giving the business owners no reasons for avoiding this task. A multi-employer bargaining mechanism at plant level¹¹⁹² should be established as this would be a precondition for later sector-level agreements.

In the future, collective agreements at sector level will develop. the legal basis for this type of collective agreement has been specified in the Bill of the Labour Code (Section IV, chapter V), which includes regulation of the parties to collective agreements, content, applicable units, registration, implementation, duration and relationship to sector and plant level collective agreements. However, in order to work this through, many other related issues should be simultaneously regulated such as strikes conducted at the sector level, supervising the implementation of sector collective agreements, the procedure for settling disputes and corrective measures for violations of sector collective agreements etc.

5.4.10. The trade union's representative role in setting labour disputes

Due to unclear regulation, the trade union of an enterprise normally represents only the labour collective, but not individual employees, in solving labour disputes. This means a union plays its role as one party to a labour dispute only in cases where the dispute is a collective one. The law on this point should be changed so that a local trade union also takes charge of representing individual employees (who are trade union members) before dispute settlement bodies without needing the authorization of such employees. Notably, *upper-level trade union* should also be allowed to undertake this task where necessary in cases where the upper union has entered a

¹¹⁹² See: 5.5. Lack of resources and competence.

collective agreement at grassroots level and the dispute is supposedly related to a breach of such an agreement. In sum, trade unions, including both primary trade unions and upper-level bodies, should be able to represent employees in any labour dispute occurring within their constituency.¹¹⁹³

5.4.11. Industrial peace obligation and liability for the illegal strikes

In Vietnam the concept of the "industrial peace obligation" remains new. It has not been mentioned in any legal documents in the labour field.¹¹⁹⁴ In order to build sound relations between employees and employer, the obligation of industrial peace, including the liability of the trade union for illegal strikes by its members, should be strongly supported by the law.¹¹⁹⁵ The employees' right to strike should be mentioned in chapter V of the Labour Code (on collective bargaining agreements) so that the Vietnamese employees understand the role of strike and use them in correct situations. Where a collective agreement has been signed and has entered into force, the trade union is responsible for industrial peace in the workplace. Once an illegal strike occurs, the employer will have the right to sue the trade union for damages. The damages should be determined by properly taking into account all relevant factors and the specific situation:

First, where an illegal strike is organized and guided by the trade union, such trade union is clearly liable for damages.¹¹⁹⁶ The employees involved are free from such liability.

Second, if an illegal strike is not organized or guided by the trade union, the trade union together with the employees should compensate the employer for any loss.

Notably, if illegal strikes occur in enterprises with no unions, compensation should come from involved individual employees, as the current law provides (see

¹¹⁹³ See also: 5.2.2.2. Clearly stating and adding trade union rights and also responsibilities in law.

5.4.1. Expanding bargaining actors on the employee side.

¹¹⁹⁴ See: Chapter 4, Section 4.7.2.2. *Violations relating to implementing collective agreements.*

¹¹⁹⁵ See also: Section 5.2.2.2. *Clearly stating trade union rights and responsibilities in law and adding new ones.*

¹¹⁹⁶ The Governmental Decree NO 11/2008/ND-CP dated January 30, 2008 could be looked at in this case.

Article 179 of the Labour Code amended 2006 and Article 259 of the second Bill of the Labour Code).

This stipulation will remind the social partners to agree on the point and record it in their collective agreements. Further, regulation of the liability of the trade union for illegal strikes will highlight its role: trade unions must keep close contact with their members, actively present their desires and aspiration and supervise, control, and prevent their members from engaging in illegal strikes.

In cases where several collective agreements apply in the workplace, the parties may attach the industrial peace obligation to a particular agreement, but it may be more reasonable if this obligation is linked to agreements on wages and working conditions.

5.4.12. Completing the mechanism relating to the settlement of labour dispute

While the settlement of labour disputes is directly related to collective agreements in Sweden, this connection is not so clear in Vietnam since collective agreements are not so well developed. But, a collective agreement system cannot function effectively without a good enforcement mechanism. I will only briefly discuss this and only the major questions affecting the quality of dispute settlement will be reviewed.

Bodies dealing with labour disputes are an important element in the mechanism of dispute settlement. To perform their task, these bodies should maintain a neutral position. In Vietnam, the relevant bodies consist of labour conciliatory councils, labour conciliators, provincial labour arbitration councils, Chairmen of District People's Committee and the labour courts.¹¹⁹⁷ Most of them do hold a neutral position, except for the labour conciliatory council.

It should be noted that conciliation is one of the key devices of dispute settlement. In Sweden, conciliation appears effective and a majority of labour disputes have been settled amicably through conciliation. In Vietnam, if conciliation activities were held properly, labour dispute might well be settled more quickly. Currently, the labour conciliatory council chairs a primary conciliation meeting where a labour

¹¹⁹⁷ See also: Section 4.6.2.2. *Dispute settlement bodies in Vietnam*.

dispute has arisen. But this council suffers from some organizational limitations and this makes it difficult for it to stay neutral.

According to law, a labour conciliatory council is set up in enterprises. Because members of the council consist of representatives of the two disputing parties¹¹⁹⁸, it can hardly have a neutral voice or make much progress in resolving a dispute or providing new ideas to break the deadlock.

To make things worse, as representatives on the employee side are members of the trade union execution committee, and such persons often also hold a position on the management board, especially in Human Resource Management¹¹⁹⁹, the labour conciliatory council in many cases turns out a body favouring employer interests. Some surveys have observed that workers have no confidence in the neutrality of the conciliation council – employee representatives who are managers are unlikely to rule against the employers – so very few cases are referred to enterprise conciliation councils and many enterprises have not even bothered to set them up.¹²⁰⁰

The amendment of the Labour Code in 2006 gives the disputing parties another choice: the dispute can be first referred to a conciliator belonging to the district labour administration authority. This represents progress in the dispute settlement mechanism. Such a conciliator is neutral and can help in resolving a dispute. This means that, while recognizing the authority of any conciliator to mediate any dispute when being required, use of the labour conciliatory council can be regarded as a free choice. This suggest that the formation of such a labour conciliatory council in an enterprise should not be mandatory as in many cases the parties will not wish to resolve conflicts through its efforts. But, according to the Labour Code, establishing a labour conciliatory council is still a mandatory requirement.¹²⁰¹ The regulation should be amended so that the parties may establish such a council only if they so choose.

The role of the Chairman of the District People's Committee in solving labour disputes over rights is also problematic. This is a body responsible for many tasks

¹¹⁹⁸ See also: Section 4.6.2.2. *Dispute settlement bodies in Vietnam*.

¹¹⁹⁹ See above: Section 4.1.1.1.2. *Trade unions in Vietnam*.

¹²⁰⁰ Clarke, S., Lee, C.H. and Do, QC (2007), 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam', *Journal of Industrial Relations*, 49:4, p.559.

¹²⁰¹ Article 162 of the Labour Code amended 2006 provides that "The Labour conciliation council must be formed in enterprises where there is a trade union organization or provisional trade union committee" (item 1).

relating to state administration, of which labour administration only constitutes a minor part. The Chairman of the District People's Committee can take part in a labour dispute settlement, but his role is limited. It can not deal with labour disputes in the absence of professional help from outside. This regulation burdens the Chairman with an impractical task and this should be revised.

Regarding the Labour Arbitration Council, the new amendment of the Labour Code makes its role become unclear. Formerly, the Labour Arbitration Council had the power to decide on the resolution of a dispute after conciliation had been conducted without success. But under an amendment of the Labour Code in 2006, this power was removed. This means that the Labour Arbitration Council is now merely a conciliatory body, similarly to the labour conciliation council. A dispute over interests is thus subject to two rounds of conciliation: at the labour conciliatory council/conciliator and at the arbitration council. It is felt that this repeated conciliation makes the process of settling the dispute last too long. If conciliation is conducted effectively from the first step, there is no need to repeat the conciliation again. Thus, improving the quality of the initial conciliation would be more significant, and the conciliation role of the Labour Arbitration Council could be cut.

There is also another possibility for arbitration: it could still be maintained as a step in the dispute settlement as currently provided by law. But this body should also be empowered to make decisions if so requested by the disputing parties. Decision making is the ultimate right of the parties, but if they find it too difficult, they would get such help within the framework of arbitration.

5.5. Reinforcing labour law implementation

If state law is not implemented properly, any efforts to improve it become meaningless. In the recent years because of the weakness of law enforcement, the establishment of grassroots trade unions in enterprises has not been carried out correctly; issues related to the revenues of the trade union has been handled with great difficulty; many collective agreements with illegal content have been signed and the correction of labour law violations has become pro forma, causing loss to employees. So, an important part of any action plan to improve trade unions and collective bargaining must be the reinforcement of the implementation of labour law.

At present the enforcement of labour law in Vietnam is confronted by many obstacles. One of the first is the flaws in and instability of the legislation which makes things difficult even for people working in the labour courts.¹²⁰² Another obstacle is the shortage of funds for enforcement and the lack of proper training. Also, labour law enforcement is conveniently set aside in favour of attracting investment which is seen as the key engine of economic growth and industrialization.¹²⁰³ In addition to this, rapid economic expansion and corruption have also helped make it difficult to enforce labour laws.¹²⁰⁴

A direct concern is to promote the capacity of the bodies in charge of monitoring, supervising and correcting violations of regulations in the labour field: labour inspection. The relevant body is now facing many difficulties. For one thing, there remains a serious shortage of staff. At present, the MOLISA has only 471 inspectors in total. During the past five years (2005-2009), labour inspection has only been conducted at about 8.000 enterprises, compared with 350.000 enterprises across the country.¹²⁰⁵ This means, on average, an enterprise will only be inspected once every 219 years! In a crowded industrial centre like Ho Chi Minh City, there are only 33 inspectors and Hanoi, ranked second, with 10 inspectors. Many provinces only have 2 inspectors.¹²⁰⁶ Compared to the ILO benchmarks based on the level of economic development, which in less developed countries is at least one inspector per 40,000 employees,¹²⁰⁷ the ratio in Vietnam is much too low. The Vietnamese labour force nowadays is more than 50,000,000 labourers so the number of inspectors should be at least 1,200.

¹²⁰² See: Luu Thu (2008), *Solving Labour disputes - Great difficulty, even when complying with law*, The An ninh Thu do, December 21, 2008.

¹²⁰³ Youngmo Yoon (2009), *A comparative study on industrial relations and collective bargaining in East Asian countries*, Industrial and Employment Relations Department ILO - Geneva November 2009.

¹²⁰⁴ Mark Manyin, Thomas Lum, Lois McHugh, Phuong-Khanh Nguyen, Wendy Zeldin (2002), *Vietnam's Labour Rights Regime: An Assessment*, CRS report for Congress, p.3

¹²⁰⁵ *From the shortage of inspection personnel to the ignorance in punitive sanction*, VOVNEWS (Radio the voice of Vietnam), March 8, 2010.

¹²⁰⁶ Do Minh, *Hopelessly waiting for "Sir" labour inspectors*, The Information 24/7 issued March 22, 2008.

¹²⁰⁷ Source: *ILO calls for strengthening labour inspection worldwide*. Available at: http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_077633/index.htm

Regarding the reason for this personnel shortage which had lasted for years, Mr. Nguyen Van Tien, the Vice Director of MOLISA' Labour Inspection said that the salary has not appeared attractive enough to candidates who are capable of better-paid technical jobs.¹²⁰⁸

Besides this personnel shortage, labour inspection is also faced with shortages of fund and training so labour law monitoring and enforcement can not be performed as expected. Violations discovered in inspections comprise only a tiny part of the real number of labour law infringements. And as the inspection force is unable to supervise all enterprises in the labour market, an unavoidable consequence is that labour law violations are spreading and indeed becoming normal. When violations are discovered, employers are often not punished sufficiently strictly. This is evidently worse in the FDI sector. For example, in the past years, about 90% of reported strikes related to labour law violation¹²⁰⁹. When resolving such strikes, many violations are exposed but the related employers have rarely been fined. Or if fined, the sanction was far too lenient.¹²¹⁰ In practice, the aim of the task force was merely to dispose of conflicts in an amicable way.¹²¹¹

This situation needs to be changed but this is going to be very difficult. The goals may not be achieved if enhancing the labour inspection does not go together with improving laws and activating or improving the operation of many relevant bodies such as the Courts and the labour administration Authorities. These bodies are also facing difficulties of staff shortages and limited experience, training and finance. A practical and effective resolution of the problem would lie in the promotion of the trade union role in monitoring and supervising labour law implementation at the workplace. If this were done, a huge burden on the state would be released.

5.6. Overcoming some other difficulties confronting collective agreement development

¹²⁰⁸ Hong Khanh, *Labour Inspection, a serious understaffed problems*, Vnexpress, issued January 16, 2008.

¹²⁰⁹ Do Ngan Binh (2006), *Law on strikes and handling strikes in Vietnam*, PhD. thesis, p.94.

¹²¹⁰ For employer violation which led to strikes, the task force only handled cases where the acts appeared to be serious crimes such as abuse and humiliation of employees or assault. Normally for these acts the wrongdoers only have to apologise, or are fined a small symbolic amount of money (there was a case where the compensation was only 1 USD for an act of hurting an employees' dignity!!!) Yen Trinh, *Solving strikes - just a hush up of a matter*, The Vietbao, January 30, 2007.

¹²¹¹ Yen Trinh, *Solving strikes - just a hush up of a matter*, The Vietbao, January 30, 2007.

To improve the collective bargaining system, it is necessary to consider both the situation as a whole and the related problems which need to be treated. Ignoring any of the factors obstructing the process of innovation may result in paying a higher cost for success. While engaged in my research, I found that the following obstacles should be removed:

5.6.1. Lack of awareness of collective agreements and trade unions

While in Sweden and in many developed economies the role of collective agreements and trade unions has long been appreciated by the working class, in Vietnam, the role of trade unions and the importance of collective agreements are still seriously underestimated. The major cause of this is that the trade union and the collective agreements neither have ever had the chance to show their importance. Before launching the *Innovation*, the economy belonged to the state, and the state belonged to the "working class". Under such a regime, workers were seen as the "masters" of the factories or establishments where they worked; the management board of such establishments was regarded as representative of all the workers under their control. The conflicts occurring, if any, were naturally seen as conflicts within the working class itself, thus, there was *no need for bargaining, mediation or labour court*. Poor working conditions and low pay were seen as problems due to poorly-organized and ineffective production. Further, this status was the case in all production units. As a result, no difference of working conditions existed for workers to use as comparisons. With subsidies coming from the state, all labourers had jobs. Many new production units were established with the aim of recruiting the entire labour force. Workers never have to worry about losing jobs, even when they worked poorly. *Trade union was not involved with collective bargaining*. As a whole, the trade union role in the bargaining sector was opaque and did not make any impression on workers.

Since the open economy was launched, while many new laws were enacted, the regulation of trade unions, which should have been improved as a healthy response to the new economy, lagged. Organizational limitations have weakened core trade union functions. Being powerless and being used to surviving in an environment where competition did not exist, the trade unions became passive and there has been not much change in the way it acts in recent years. Since the Vietnamese working class has no experience of genuine collective bargaining by trade unions and has not been

effectively protected by collective agreements either, the unavoidable consequence is that they tend to overlook the role of trade unions and ignore collective agreements.

This lack of awareness will be a problem for all efforts to develop trade unions and collective agreements in Vietnam. The development of collective agreements will be poorly supported in the beginning and may make slow progress. Changes in the role of the trade union will be seen as one of the key elements in changing workers' minds. But, to boost the process, educational programs on labour relations and the role of collective agreements should be arranged.

5.6.2. Lack of knowledge of labour law

Lack of knowledge of labour law is another obstacle to improving the quality of collective agreements. Lacking knowledge of labour law, employees can neither participate actively in negotiating collective agreements nor effectively protect themselves against violations of their rights. It is the lack of professional competence in and the low awareness of trade unions which has led to weak collective bargaining in Vietnam.¹²¹²

Low motivation may be seen as the key factor leading to a lack of knowledge of labour law. The Vietnamese Labour Code does provide some relatively precise and progressive clauses which are close to international standards. But most workers have not concerned themselves with it. In some recent discussions, this problem has been blamed on workers' lack of education as most of them come from rural areas.¹²¹³ But deficiencies in execution and the general poor observation of labour law have led to their being less confidence in the power of the law as a whole which reduces motivation for studying the Labour Code. Labourers are not interested in studying the Code since it is assumed that it is not in fact observed in the labour market.

The unfortunate instability and complication of the relevant legislation is a factor leading to lack of knowledge of collective agreements in Vietnam. Since case law has not been recognized, the labour court's right to interpret the law is limited and the legal

¹²¹² Han Mai Huong (2005), *Country report*, ITCILO/ACTRAV training course entitled "Trade Union Training on Financial and Economic Analyses of Enterprises for Collective Bargaining" (by International Training Center and Bureau for Workers' Activities - ILO), p.3

¹²¹³ Some legal documents also mention this, for example, the Directive No 22/CT/TW dated June 5, 2008 of the Central Secretarial Committee of Vietnamese Communist Party on building harmonious, stable and progressive labour relations in enterprises.

stipulations becomes the only basis the authorities can refer to. To meet the demands of the court, the law must consist of detailed provisions. Thus, following the Labour Code, many other types of documents such as decrees, circulation letters, resolutions, instructions and decisions should be enacted to give full details and assist implementation.¹²¹⁴ Many provisions or details in the Labour Code are repetitive and overlapping. This makes the legislation too complicated, confusing and heavy. In addition to this, the documents are revised too often. It is hard for people to keep up with all the changes and this is the case for the labour market parties too. In some cases, illegal clauses in collective agreements exist because the parties were not aware of new amendments of the labour law.

So, another strategy might need to be launched: innovating legislation giving rise to a simple, clear and stable legislation system but this will be a long-term project. To deal with the current situation, the main contents of the Labour Code and the newly-amended regulations need to be propagated both through the media and directly at grassroots units, especially in enterprises employing large number of workers.

5.6.3. Lack of experiences and skills needed for collective bargaining

The lack of knowledge, experience and bargaining skills constrains the active participation of the trade union officials. Some enterprises have established trade unions, but the trade unions have never initiated any demand for collective agreements.

However, bargaining skills and experience will be improved if practical activities are engaged in. One solution might be that labour issues should be negotiated separately (and recorded in separate collective agreements). Collective bargaining with less content would be easier to organize and this would give the parties more time and conditions to study bargaining matters and extract the necessary lessons after each negotiation. This might help to handle problems of the labour relations effectively in the primary stages of developing collective agreements.

¹²¹⁴ Hundreds of such legal documents have been issued to detail and guide the implementation of the Labour Code.

As local trade unions play the core role in developing sound labour relations at the workplace, they should have priority in receiving training in bargaining skills. Further, trade union officials should be encouraged and motivated to engage in self-study.

5.6.4. Lack of resources and competence

Lack of resources and other practical conditions for collective bargaining on both sides is another issue. In the low-paid sectors, the lack of time, motive and bargaining power when bargaining for improved wages and conditions at the enterprises become a very serious problem. Trade union representatives in these sectors share in these economic difficulties and have little time, energy or motivation to bargain. Also, the fund securing trade union activities is very limited. On the employer side, many employers are generally unable to go above the minimum wage rates and conditions because the conditions are effectively set by third-parties (such as head-contractors).

This is the case in the textile and apparel industry and it is reason why efforts have been made to set up a sector-level collective agreement in this sector. To provide employees and employers with better prospects for bargaining in these circumstances, a multi-employer bargaining system should be set up. Association and concertation among the trade unions in the industry would also be important. Normally, employees in low-paid sector find it hard to gain better conditions as they face severe competition from other cheap labour in the region, that to be found e.g. in China. But there is also room for sharp practice at the local level. With a multi-employer bargaining system, employees would be able to negotiate both with their direct employer and with other employers in the chain/net of contractors.

If this were the case, it is necessary to have a body responsible for coordinating the parties and facilitating the negotiation. This body should have the power to bring the parties to negotiation meetings. It could require third parties (contractors who stand behind the direct employer) to attend, if this is necessary to advance the negotiations. The process might include the head contractor who determines the terms and conditions that apply to employees. Such a co-ordination body would also assist the parties in case of conflict, it could mediate and make recommendations. The assistance of such a body at the first negotiation could be very important.

But, in order to materialize this, the trade union or bargaining representatives must be able to apply to the co-ordination body so that it can start this special bargaining procedure with a specified list of employers. The body must consider a range of factors, including whether the proposal is reasonable and the extent to which the applicant is prepared to respond to the needs of individual employers. It will then be able to assist the parties by conducting such compulsory conferences and mediation activities.

Final remarks

Improving the law on labour and trade union is an indispensable task because the existing regulation in this field contains many defects seriously obstructing the development of the collective bargaining system.

In the current context, balancing the interests of the parties and to better protect workers' interests has become a pressing need because the competitiveness of the economy is at a higher level. If industrial relations is not well regulated, there will be a lot of risks to the parties, especially to the labour. Such inharmonious labour relations can not be an element for economic development.

As Vietnam integrates into the world economy, ensuring decent employment and working conditions becomes more meaningful, not only in stabilizing labour relations, enhancing the domestic production capacity but also in promoting trade activities between Vietnam and other countries. That is also an objective reason for improving the conditions for development collective agreement in Vietnam.

Improving the laws involves various processes and activities. First of all it is necessary to overcome the defective mechanisms that hinder the parties' role of representation and negotiation. The most decisive factor is to make the trade union to be sufficiently capable. Thus, it is the need to create a favorable legal environment for the development of independent trade unions by the key tools of freedom of association. At the same time it is necessary to strengthen the existing trade union system by way of making it focus on economic functions, giving it more power and responsibility, strengthening union personnel and finance conditions, activating and insolidating work relationships between different levels of unions, protecting trade union officials etc.

A favourable legal regime for collective bargaining and collective agreements must simultaneously be established. This process includes the recognition of new negotiating actors, encouraging different forms of negotiation, guarantees the effective use of bargaining supportive means, properly handling problems arising during the lifetime of a collective agreement etc. Further, one should note that efforts to develop the collective agreement system can not succeed if other parts of the labour law and related mechanisms are not revised properly.

Conclusion

Collective agreements are a typical product of a market economy, a basic form of co-operation between the social partners, addressing (and solving) their problems and conflicts. Collective agreements can help overcome the adverse effects of a market economy - which are exploitation and unfairness - as they provide an opportunity to obtain better working conditions for employees than those prescribed by law.

A collective agreement may refer to any matter within the scope of labour relations. The first collective agreements were signed simply, but collective agreement content is increasingly expanded. Collective agreements may be signed for different duration, basically depending on stability of the problem treated by the agreements.

Collective agreements can be various. Within a nation, collective agreements may be entered at the local, sector and central level. In most countries, collective agreements are binding and have mandatory effect to the lower agreements, labour contracts and other documents entered in a workplace. Nowadays collective bargaining has developed and are entered at regional and global level. Despite their controversial nature, position and legal effects, they have proved an active role in regulating labour relations and accelerating social progress.

The role of the collective agreement has been demonstrated vividly in many developed market economies, including Sweden. Collective agreements help coordinate the parties' activities, balance their interests, and resolve conflicts effectively. In addition to this, by uniformly applying working conditions to employees within an enterprise or an industry, collective agreements are well suited to the new pattern of modern industrial production which is normally conducted on a

large scale. Collective agreements are also economically effective as they mobilize the power of the labour market to offset management dominance. Collective agreements are thus widely used in many industrialized countries and serves as an instrument of peace, contributing greatly to stabilizing labour relations and economic development.

Collective agreements are so important, but in our country they have never been adequately used or enforced effectively. The current law on collective agreements in Vietnam contains many shortcomings. For one thing, the regulations remain over-general, are ignored, are not realistic or not sufficiently well explained. This causes difficulties for the labour parties in applying the law on bargaining and collective agreements, making the collective agreement of limited used in the market, the quality of collective agreements being low. What is obvious in our country is the lack of effective dialogue between the labour parties, the interests of workers are not resolved satisfactorily and the labour relationship gives rise to many conflicts. In the context of weak law enforcement, enterprises must compete in an environment rife with violations. To survive, they are forced to violate laws too - perhaps more than do their competitors - and the end result is the always at the workers' expense.

Therefore, a crucial task is to reform and complete the legislation on collective agreements and collective bargaining. We first need to create more opportunities for bargaining and improving bargaining procedures will help this. Collective agreements should be entered into at plant level as this is negotiation on a small scale and easy to organized. But the next step should be facilitating the conditions for the development of collective agreements at higher levels. In the context of the incomplete market economy in Vietnam, the more collective bargaining develops, the more the conflicts of the parties will be satisfactorily resolved. A growth of the collective agreement system also offers the possibility of building a stable legal system.

One of the key conditions for the collective agreement development is the capacity of trade unions. Without strong and active unions, there can be no healthy collective bargaining and no stable labour relations. So, an immediate task to be undertaken is the boosting of unionism and the improvement of the capacity of trade union officials at grassroots units. Besides strengthening personnel, expanding the autonomy, rights and responsibilities of trade unions, providing more protection for

trade union officials and increasing revenues are also vital matters for the unions. These are also essential conditions if workers are to be better protected.

As this study focused on collective agreements, some related issues were looked at rather generally. To serve the renovation of the legislation on collective agreements and provide more healthy labour relations, they also need to be further studied. Such issues include: the organizational structure of trade unions, their personnels and finance, salaries of union officials, industry-wide collective agreements, collective agreements in the public self-accounting sector (e.g. education, training and academic centers) the dispute settlement mechanism, the operational efficiency of the labour administrative authorities and the labour courts etc. In the future, labour relations may become more diverse. Regulating and handling problems arising on the labour market may become more and more complex. So, suitable training is needed if good staff is to be available. Union officials, the personnel of the dispute settlement bodies, officials of the State administrative authority on labour and judges must all have adequate knowledge of collective agreements and labour relations and have sufficient capacity to undertake their tasks.

In sum, the completion and implementation of the law on collective agreements should be effected in such a way as to overcome the limitations of existing law to ensure uniform, consistent, specific and feasible regulations and ensure good implementation in practice. Only in suitable conditions will the law on collective labour agreements prove its practical value, contributing to stability and the development of labour relations, the forming of a healthy labour market and the creation of a favourable environment for economic development and social stability.

Related publications

1. Hoang Thi Minh (2009), *Thoả ước lao động tập thể và pháp luật lao động quốc gia - nhìn từ góc độ so sánh (Collective agreements and National Labour laws-From a Comparative Perspective)*, Jurisprudential Review N^o 10, 2009.
2. Hoang Thi Minh (2010), *On the Interrelationship between Collective agreements and Employment contracts*, State and Law Review N^o2 (2010).
3. Hoang Thi Minh (2010), *Content of Collective Agreements from an International Comparative Perspective*, State and Law Review N^o2 (2010).
4. Hoang Thi Minh (2011), *Về thời hạn của thoả ước lao động tập thể (On Duration of Collective Agreements)*, Legislative Studies Journal N^o 5/190, 2011
5. Hoang Thi Minh (2011), *Điều kiện để phát triển thương lượng tập thể (Conditions for Collective Bargaining)*, Legislative Studies Journal N^o 8/193, 2011
6. Hoang Thi Minh (2011), *Sử dụng hành động công nghiệp trong thương lượng tập thể ở Thụy Điển và sử dụng đình công ở Việt Nam (Using Industrial Actions in the Collective Bargaining In Sweden and Using Strikes in Vietnam)*, Judiciary Review N^o 9/2011
7. Hoang Thi Minh (2011), *Công đoàn Thụy Điển: đối tác thương lượng tập thể hiệu quả (Swedish Trade Union: A Powerful Bargaining Actor)*, Democracy and Law Review N^o 5/2011.

References and appendix

Official documents

International law

United Nations Universal Declaration of Human Rights, 1948 (UN)

International Covenant on Economic, Social and Cultural Rights (1966) (UN)

International Covenant on Civil and Political Rights (1966) (UN)

ILO Constitution 1919 (ILO)

Declaration of Philadelphia 1944 (ILO)

Declaration on Fundamental Principles and Rights at Work, 1998 (ILO)

Convention No 87 on Freedom of Association and Protection of the Right to Organize, 1948 (ILO)

Convention No 98 on the Right to Organize and Collective bargaining, 1949 (ILO)

Convention No 154 on collective bargaining, 1981 (ILO)

Recommendation No 91 on collective agreements, 1951 (ILO)

Recommendation No 163 on collective bargaining, 1981 (ILO)

European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe)

European Social Charter (Council of Europe)

Revised European Social Charter. (Council of Europe)

Charter of Fundamental Rights of the European Union - version 2000, 2007 (EU)

Guidelines for Multi-national enterprises (OECD)

Sweden

Board Representation (Private sector employees) Act (SFS 1987:1245)

Co-Determination Act 1976 (SFS 1976:580)

Labour Dispute (Judicial Procedure) Act (SFS 1974:371)

Representatives (Status at the Workplace) Act (SFS 1974:358)

Vietnam

Constitution in 1946, 1959, 1980, 1992

Decree No. 47/2010/ND-CP dated 06 May 2010

Draft of the Trade Union Law (4th)

Draft of the Labour Code (2nd)

Labour Code in 1994, the amendment up to 2007

Ordinance No. 29

Other countries

Employment Relations Act 1999 (Britain).

Industrial Relations Act 1967 (Malaysia)

Labour Code 1974 (Philippine).

Labour Relations Act 1960 (Singapore)

Labour Relations Act 1975 (Thailand)

Trade union Law (Japan)

Trade Union and Labour Relations Adjustment Act 1997 (Korea)

United States Code (US) 2006

Other documents

Adlercreutz, Axel/Nyström, Birgitta (2009) *Sweden*, International Encyclopedia of Law (ELL), Wolters Kluwer 2009.

Alvin L. Goldman, (1996), *United States of America*, ELL, Kluwer Law International.

Andre Sobczak (2007) "*Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility*" *Relations industrielles / Industrial Relations*, Vol. 62, No. 3, 2007.

- Angie Ngoc Tran (2009) *Vietnamese labour management relations*, Stanford Programme on International and Cross-cultural Education (SPICE), Stanford University
- Annika Berg, Arbetslivsinstitutet (1999) *Are trade union activities expensive for employers?*, published by Eurofound, available at: www.eurofound.europa.eu/.../1999/.../se9905161f.htm.
- Annika Berg (2005) *10 years of EU labour law examined from a Nordic perspective*, published by Eurofound April 2005, available at: www.eurofound.europa.eu/eiro/2005/02/feature/se0502103f.htm.
- Anita Chan and Irene Norlund (1998) *Vietnamese and Chinese Labour Regimes: On The Road to Divergence*, The China Journal, No. 40 (July), pp. 173-197.
- Anne Lally (2005) *Freedom of association and the right to collective bargaining* - Clean Clothes Campaign, September 2005, Available at: www.cleanclothes.org/codes/docs/CCC_FoA_Primer.pdf
- Anthony Ferner, Richard Hyman (1998) *Changing industrial relation in Europe*, Blackwell publishing.
- Arbetsdomstolens - *Presentation of the Swedish Labour Court*. Available at: www.arbetsdomstolen.se/.../page.asp?.
- A. T. J. M. Jacobs (2004) *Labour law in the Netherlands*, Kluwer Law International 2004.
- A. W. R. Carrothers (1970) *The Legal Status of Collective Agreements in England, the United States and in Canada*, Queen's Industrial Relations Centre, 1970.
- Bob Hepple QC, Sandra Fredman and Glynis Truter (2002) *Great Britain*, ELL, Kluwer Law International.
- Birgitta Nystrom (2005), *The evolving structure of collective bargaining in Europe 1990-2004*, National report, Sweden.
- Bruno Caruso – Loredana Zappalà (2005) *The evolving structure of Collective Bargaining in Europe 1990-2004*, National Report, Italy.
- Cao Ba Khoat (2004) *Uncle Ho's lesson: treatment to entrepreneurs*, Research Center for Entrepreneurship Development.

- Carina Gunnarsson, Cathrine Lilja Hansson and Inga Åkerlund (2006) *Collective agreements*, National report, Sweden, documents of XIVth Meeting of European Labour Court Judges 4 September 2006.
- Caroline Heuer (2005) *China's Labour Law: An Effective Instrument of Workers' Representation?* A study within the project "Chances and Limits for Shop-floor Representation in the PR China" Commissioned by International Metalworkers' Federation, IG Metal (German Metal Workers Union), North-South-Network of DGB Bildungswerk.
- Charles Barrow (2002) *Industrial relations law*, 2nd edition, Cavendish Publishing Limited.
- Chau Long (2009) *Necessity to detailed regulate the obligation of deducting contribution for trade union fund*, source: The Labourers No. 216, 25 Sep. 2009.
- Chris Engels (2004) *The evolution of labour law in Belgium 1992-2002*, Final report 2003-06-04, Country studies assigned by the European Commission, Director General for Employment and Social Affairs to the national experts.
- Chris Engels and Lisa Salas (2004) "*Collective Bargaining in Belgium*" in "*Collective Bargaining in Europe*" - published by Ministerio de Trabajo y Asuntos Sociales - Spain, 2004.
- Chris Hayes (2007) *Public Employee Collective Bargaining: Bad Policy for North Carolina*, Civitas institute's publication.
- Clarke, S., Lee, C.H. and Do, QC (2007). '*From Rights to Interests: The Challenge of Industrial Relations in Vietnam*', Journal of Industrial Relations, 49:4
- Dao Quang Vinh (2006) *Labour market and Employment conditions in Vietnam*, MOLISA, Institute of Labour Science and Social Affairs.
- Dave Spooner (2003) *International Framework Agreements: Implementing Workers' Rights in Global Corporations*, Global Labour Institute.
- De Silva, S.R. (1998), "*Elements of a Sound Industrial Relations System*" International Labour Organisation ACT/EMP Publications.
- Diep Thanh Nguyen (2005) *Basic knowledge on labour law*, student book - Can Tho University.

- Do Minh (2008) *Hopelessly waiting for "Sir" labour inspectors*, The Information 24/7, 22 March 2008
- Do Ngan Binh (2005), *Law on strikes and handling strikes in Vietnam*, Doctoral thesis, Hanoi Law University.
- Do Quynh Chi (2007) *Independent workers activism in Vietnam and its influence on the strategy of the government and traditional union-* Analytical report, Nov. 2007.
- Duong Minh Duc, (2007), *The whole political system jump on the bandwagon* - The Labour No. 188 dated August 15, 2007.
- Duong Minh Duc (2009) *Challenges to the trade union*, The Labour No. 208, 16 Sep. 2009. (Dương Minh Đức, Những thách thức đối với công đoàn, theo Báo Lao Động số 208, Ngày 16/09/2009).
- Dung Hieu (2007) *Grievances of labourer in FDI enterprises*, VNEconomy, Sep. 2007 (Dũng Hiếu, 2007, *Bức xúc của lao động trong doanh nghiệp FDI* (Nguồn: VNEconomy tháng 9/2007).
- Dimitris Stevis, Terry Boswell (2007) *Globalization and labour, Democratizing global governance*, Rowman & Littlefield Publishing 2007.
- Earl V Brown Jr, (2008) *Thailand: Labour and the Law*, Asia Monitor Resource Center (AMRC).
- Euan Gibb (2005) *IFAs: Increasing the Effectiveness of Core Labour Standards*, The Global Labour Institute.
- European Commission (2008) *Employee representatives in an enlarge Europe*, Vol. 1.
- European Commission (2003) *Employment in Europe 2003-Recent Trends and Prospects*, Luxembourg: Office for Official Publications of the European Communities, Sep. 2003.
- European Commission (2003) *Quality industrial relations: Some facts and reflections about the costs and benefits of having or not having social dialogue*, Reflection paper on the 'Costs of not having social policy', Background note for the conference on the mid-term review of the Social Policy Agenda: Achievements and perspectives, 19-20 March 2003, Brussels.

Federation of European Employers - *Labour Courts and Court Systems*. Available at: <http://www.fedee.com/labcourts.html>

International Labour Organization (1996) *Digest of Decision*

International Organization of Employers (2007) *International Framework Agreements-an employers' guide*. Available at: www.ioe-emp.org/.../guides/.../guide_2007august_ifasrevi.pdf

Jacques Freyssinet and Hartmut Seifert and the research group (2001) "*Negotiating collective agreements on employment and competitiveness*". Published by Eurofound, Available at: www.eurofound.europa.eu/pubdocs/2001/24/en/1/ef0124en.pdf

Jacques Rojot, (2004), "*Collective agreements in France*" in "*Collective Bargaining in Europe*", Ministerio de Trabajo y Asuntos Sociales-Spain, 2004.

Jean-Marie Standaert (2005) *Collective Bargaining by Employers' Organizations* - ILO's publication 2005.

Jane Pillinger (2006) "*Challenging times - Innovative ways of organizing working time: the role of trade unions*", The Report of ETUC Conference '*Challenging Times: Innovative Ways of Organizing Working Time*', held in London, 17-18 November 2005 (rewritten and edited by Dr Jane Pillinger).

Jenny Holdcroft (2006), *International Framework Agreements: A Progress Report* (an IMF special report 2006, This Special Report is a summary of a background paper prepared for the IFA World Conference, in Frankfurt, Germany, September 26 – 27, 2006).

Jeroen M. J. Chorus, P. H. M. Gerver, E. H. Hondius, Nederlandse Vereniging voor Rechtsvergelijking, (2006) *Introduction to Dutch law*, Kluwer Law International 2006.

John E. Kelly (2002) *Industrial relations: Critical perspectives on Business and Management*, Routledge publishing house, London.

John H. Pencavel (1996) *The legal framework for collective bargaining in developing economies*, Stanford Institute for Economic Policy Research (SIEPR).

John W. Budd (2006) *Employment with a Human Face: Balancing Efficiency, Equity, and voice*, Publisher: ILR Press.

- Jonas Malmberg (2002), *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Stability and Change in Nordic Labour Law, Scandinavian Studies in Law, Vol. 43, Stockholm 2002.
- Juan García Blasco and Ángel Luis de Val Tena, Zaragoza, (2004) "Collective bargaining in Spain" in "Collective Bargaining in Europe, Ministerio de Trabajo y Asuntos Sociales-Spain, 2004.
- Jus labouris (2005) *Collective Bargaining Agreement*. Available at: www.eapm.org/index.php/en/.../6c-CollectiveBargaining.pdf
- Karen Brouwer, Gerry Paster (2008) *"An Introduction to International Framework Agreements"*. Available at: http://www.fnv.nl/binary/International%20Framework%20Agreements_tcm7-18663.pdf.
- Kazuo Sugeno (2002) *Japanese employment and labour law*, Carolina Academic Press.
- Konstantinos Papadakis, Giuseppe Casale and Katerina Tsotroudi (2008) *"International Framework Agreements as elements of a cross-border industrial relations framework"*, in *Cross-border social dialog and agreements: An emerging global industrial relations framework?* ILO, International Institute for Labour Studies.
- Kristine Nergaard (2003) *Thematic feature - redundancies and redundancy costs*, published by Eurofound, Available at: <http://www.eurofound.europa.eu/eiro/2003/11/tfeature/no0311103t.htm>
- Kurt Eriksson (2002) *Conciliation, Mediation and Arbitration*, National report: Sweden, project for the study on *Conciliation, Mediation and Arbitration*.
- George R. Gray, Donald W. Myers, and Phyllis S. Myers (1998) *Collective bargaining agreements: safety and health provisions* - Monthly labour review, USA, published in May 1998, Vol.121. No. 5
- Göran Brulin (1995) *Sweden: Joint Council under strong unionism*, pages 189-216, in: Joel Rogers and Wolfgang Streeck *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations*, University of Chicago Press, 1995.

- Greg Bamber, Russell D. Lansbury, Nick Wailes (2004) *International and Comparative Employment Relations: Globalization and the developed market economies*, 4th edition, London: Sage, 2004.
- Hakan Goransson (1990)- *Hidden clause in collective agreements, the case law of Swedish Labour Court*, Scandinavian Studies in Law, Vol. 34, p.93-113 Stockholm 1990.
- HaNoi law University - *Vietnamese Labour law* - student book, version 2004, 2009
- Han Mai Huong (2005) *Country report*, ITCILO/ACTRAV training course entitled "Trade Union Training on Financial and Economic Analyses of Enterprises for Collective Bargaining" (by International Training Center and Bureau for Workers' Activities - ILO).
- Haug, Ralph (2004) *History of Industrial Democracy in Sweden: Industrial Revolution to 1980*, International Journal of Management, Vol. 21, March 2004.
- Heiner Dribbusch (2009) *Germany: wage formation*, published by Eurofound, Available at: <http://www.eurofound.europa.eu/eiro/studies/tn0808019s/de0808019>
- Hideyuki Morito (2006) *Decentralizing Decentralized Industrial Relations? the Role of Labour Unions and Employee Representatives in Japan*, JILPT (the Japan Institute for Labour Policy and Training) Report, No. 3, 2006, pp.1-12.
- Helmers Reinhard (2000) "Swedish labour law and the European Union", Contemporary Review Vol.276, May 2000.
- Ho Keun Song, (2002) *Labour unions in the Republic of Korea: Challenge and choice*, in A.V. Jose (ed.) *Organised Labour in the 21st Century*, International Institute for Labour Studies, Geneva, pp.199-231.
- Hoang Ha (2010) *The necessity of concretizing rights of upper trade union*, The Labour, 21 March 2010 (*Cụ thể hoá quyền của công đoàn cấp trên*).
- Hue Chi, (2007) *Wages in FDI sector - not as good as expected*, The An ninh Thu do 18 August 2007 (Huệ Chi, (2007) *Lương công nhân FDI - không cao như mong đợi*, Nguồn: Báo An ninh Thủ đô, ngày 18/8/2007).
- ILO (1994) *Political transformation, structural adjustment and industrial relations in Africa: English -Speaking Countries*, Volume 78.

- International Organization of Employer (2006) *Trends in collective bargaining*, survey conducted November 2006.
- ITUC (2009) *Annual survey of violations of trade union rights*. Available at: survey09.ituc-csi.org/
- Kristine Nergaard (2008) *Controversy over law on extension of collective agreements*, published by Eurofound, the article is available at: www.eurofound.europa.eu/.../2008/.../no0808019i.htm
- Lars Gellner, Lars Sydolf (2008) *Swedish labour law*, Norstedts Juridik AB.
- Le Mau Han, Trinh Muu, Mach Quang Thang (2007) *"History of Vietnamese Communist Party"* student book - publication of Ministry of Education and Training.
- Le Nguyen (2009) *Amending the Labour Code and Trade union Law: There should be detailed regulation on punishment*, According to the Magazine on Potential and Opportunity for Investment and Development, Dong Nai provincial Committee, 21 December, 2009.
- Le Nguyen (2009) *Establishment trade union in FDI enterprises: extreme difficulties*, The Magazine on Potential and Opportunity for Investment and Development, Dong Nai provincial Committee 28 August, 2009.
- Le Thanh Ha (2008), *Some current shortcomings concerning to implement of employment and remuneration for workers and employees in our country*, The "Communist" No. 5 (149).
- Liou, Chih-Poung (2006) *The Roles of Labour Unions and Employee Representatives in Taiwan*, JILPT (the Japan Institute for Labour Policy and Training) Report, No. 3, 2006, pp.113-132.
- LO (2007), *The Swedish Trade union Confederation*, www.lo.se
- Maarten Keune (2005) *"The Coordination of Collective Bargaining in Europe"* - Annual Report, ETUC 2005.
- Mai Huong (2009) *Allocating full-time trade union staffs to enterprises - improving the quality to win "trade name"*, The Sai Gon Giai phong, 09 May 2009. (Mai Huong, *Đưa cán bộ công đoàn chuyên trách về doanh nghiệp - Nâng chất để tạo "thương hiệu"* - tr. thông tin điện tử Báo Sài Gòn Giải phóng, 09/05/2009).

- Mark Carley (2001) *Industrial relations in the EU, Japan and USA, 2000*, published by Eurofound, Available at: www.eurofound.europa.eu/.../2001/.../tn0111148f.htm
- Mark Carley (2005) *Industrial relations in the EU, Japan and USA, 2003-2004*, published by Eurofound, Available at: <http://www.eurofound.europa.eu/publications/htmlfiles/ef0573.htm>
- Mark Manyin, Thomas Lum, Lois McHugh, Phuong-Khanh Nguyen, Wendy Zeldin (2002) *Vietnam's Labour Rights Regime: An Assessment*, CRS report for Congress.
- Manfred Weiss and Dr. Marlene Schmidt (2000) *Federal Republic of Germany*, Kluwer Law International.
- María Caprile (2000) "Employment gains importance in company-level bargaining", Eurofound May 2000. Available at: <http://www.eurofound.europa.eu/eiro/2000/05/feature/es0005189f.htm>
- Marinette Mormont (2005) *Questionnaire for EIRO comparative study on changes in the national collective bargaining systems since 1990 –case of Belgium*. Available at: www.eurofound.europa.eu/eiro/2005/03/word/be0412303s.doc
- Marita Körner (2005) - *German Labour Law in Transition* - German Law Journal No. 4.
- Michael Koch (2003) *New initiatives to make Labour Court hearings more efficient: use of alternative disputes methods, collective (class) action*, National Report of Sweden, document for XIth Meeting of European Labour Court Judges-Florence, 24 October 2003.
- Michał Seweryński (2003) *Collective agreements and individual contracts of employment*, Kluwer Law International, 2003.
- Michael H. Whincup (2006) *Contract law and practice: the English system with Scottish, commonwealth and continental comparisons*, 5th edition, Kluwer Law International, 2006.
- Ministerio de Trabajo y Asuntos Sociales-Spain (2004) *Collective Bargaining in Europe* - English edition of the book «La Negociación Colectiva en Europa», published by Ministerio de Trabajo y Asuntos Sociales, Spain in 2004.
- MOLISA (2007), Thematic reports on wage - income and construction labour relations in enterprises in 2007

- MOLISA (2008), Report of annual conference on the plan of implementation of labour, Invalids and Social Affairs in 2009
- Nguyen Nang Khanh (2008), "*Collective agreements in Vietnamese labour law*" Doctoral thesis, Institute of State and Law, 2008.
- Mia Ronnmar (2004) *The Personal Scope of Labour Law and the Notion of Employee in Sweden*, the article available at: www.jil.go.jp/english/events_and.../cills04_ronnmar2.pdf
- Niklas Bruun (2004) *Collective agreements in Finland* - in "*Collective Bargaining in Europe*", Ministerio de Trabajo y Asuntos Sociales, Spain, 2004.
- Niklas Bruun (2002), *The autonomy of collective agreement*, General report presented to the VIIth European Regional Congress of the International Society for Labour Law and Social Security (Stockholm September 2002)
- Organization for Economic Co-operation and Development, *Employment Outlook 2004* , OECD Publishing, 2004.
- Ole Hasselbalch, Monica Smith, Sylvia van Oosten-Rosman (2005) *Labour Law In Denmark*, Kluwer Law International, 2005.
- Ole Hasselbalch (2002) *The Roots: The History of Nordic Labour Law*, Scandinavian Studies in Law, Vol. 43, Stockholm 2002, pp.11-35
- Orjan Edstrom, 2003, *The actors of Collective Bargaining*, Swedish report to 17th World Congress of Labour Law and Social Security, Montevideo, September 2003.
- Paul Davies and Mark Freeland (2005), *The evolving structure of Collective Bargaining in Europe 1990-2004*, national report of United Kingdom
- Per Norberg and Ann Numhauser-Henning (2004), "*Collective Bargaining in Sweden*" in "*Collective Bargaining in Europe*", Ministerio de Trabajo y Asuntos Sociales-Spain, 2004.
- Peter Auer (2001) *Labour market policy for socially responsible workforce adjustment*, Employment Sector of ILO. Available at: www.ilo.org/.../index.htm
- Pham Tat Thang, *Promoting political awareness of Vietnamese working class in the context of international economic integration* - The Communist Review - No. 3 (147).

- Philip M. Berkowitz, Thomas Müller-Bonanni, Anders Etgen Reitz (2008) *International labour and employment law*, American Bar Association, 2008
- Philip Morgan, Nigel Allington (2003), *Private Sector 'Good', Public Sector 'Bad'? Transformation or Transition in the UK Public Sector?* Scientific Journal of Administrative Development Vol.1 No.1 I.A.D. 2003.
- Philip Simon (2007) *Freedom of Association and Labour Law*. Available at: www.legislationline.org/.../17
- Quit, Ires (1999) *Industrial relations in SMEs*, published by Eurofound, Available at: www.eurofound.europa.eu/.../1999/.../tn9905201s.htm
- Quoc Anh (2009) *Labour relations in textile and garment enterprises- many shortcomings*", The Forum for Enterprises 26 June 2009.
- Rainsberger, Paul K. (2008) *"Historical Models of Collective Bargaining in the U.S." In "Collective Bargaining."* University of Missouri (USA) Labour Education Program.
- Reinhold Fahlbeck (1996) *Guest Editorial Reflection on Industrial Relations*, The International Journal of Comparative Labour Law and Industrial Relations, Kluwer, Vol.12, issue 4, 1996
- Reinhold Fahlbeck -*The American way of life*, Some points of departure for a lecture on the American labour law and industrial relations vista.
- Reinhold Fahlbeck, *The Japanese miracle*, Some points of departure for a lecture on the Japanese labour law and industrial relations vista.
- Reinhold Fahlbeck (1999), *Trade Unionism in Sweden*, Discussion paper, International Institute for Labour Studies, No. 109/1999.
- Reinhold Fahlbeck (2008) *Employee participation in Sweden: union paradise and employer hell or...?*, Lund: Jurisforlaget 2008.
- Reinhold Fahlbeck (2001) *International Labour and Employment Law- Volume II*, American Bar Association, 2001.
- Reinhold Fahlbeck, (2002) *Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features*, Scandinavian Studies in Law, Vol.43, pp.87-133

- Reinhold Fahlbeck, Bernard Johann Mulder (2009), *Labour and Employment Law in Sweden*, Lund : Juristförl., 2009.
- Reinhold Fahlbeck, Bernard Johann Mulder (2008), *Sweden, Int'l Labour & Emp. Laws Vol. IIA*.
- Reinhold Fahlbeck, Tore Sigeman (2001), *European employment and industrial relations glossary: Sweden*, Publisher: Office for Official Publications of the European Communities.
- Reynald Bourque (2008) *International Framework Agreements and the future of collective bargaining in Multinaional Companies* - Just Labour (a Canadian Journal of Work and Society), Vol. 12, 2008.
- Roberto Pedersini (2007) *Industrial relations in the EU, Japan, US and other global economies, 2005–2006*, published by Eurofound, Available at: www.eurofound.europa.eu/.../tn0706028s_1.htm
- Roger Blanpain, (2001) *Labour Law, Human Rights and Social Justice*, Kluwer Law International 2001.
- Roger Blanpain (2007) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* - Wolters Kluwer.
- Roger Blanpain (2008) *European labour law*, Kluwer Law International, 2008.
- Roger Blanpain, Thomas Blanke (2005) *Collective bargaining and wages in comparative perspective - Germany, France, The Netherlands, Sweden and the United Kingdom*, Kluwer Law International, 2005.
- Ronnie Eklund, Tore Sigeman and Laura Carlson (2008) *Swedish labour and employment law: cases and materials*, Iustus, 2008.
- Ruth Nielsen (2002) *Europeanization of Nordic Labour Law*, Scandinavian Studies in Law Vol. 43, Stockholm 2002 p 37-75.
- Ruth Nielsen, (2004). *The evolving structure of Collective Bargaining in Europe 1990-2004*, : National Report, Denmark, Research Project Co-financed by the European Commission and the University of Florence.
- Sangheon Lee, Co-author ILO Global Wage Report 2008/9, "*What's ahead for wages in Asia Pacific?*", publication of ILO Regional Office for Asia and the Pacific.

- Sean Cooney, Richard Mitchell, Zhu Ying, (2002) *Law and labour market regulation in East Asia*, Published by Routledge, 2002.
- Simon Clarke (2007), *Trade Unions in Russia, China and Vietnam*, Historical Materialism Conference, London, 9 November 2007
- Sinha (2006), *Industrial Relations, Trade union and Labour Legislation*, Dorling Kindersley Pvt. Ltd 2006.
- Sriyan de Silva (1996) *Collective Bargaining Negotiation*- Publication of the Bureau for Employers' Activities (ILO).
- Susanne Kopsen (2008) *Overpowering demands of learning-Learning in local trade unions at the workplace level*, European Research Network in Vocational Education and Training.
- Stephen Deery, Richard Mitchell (1999) *Employment relations*, The Federation Press.
- Stefan Linggemann, Robert von Steinau-Steinruck, Anja Mengel (2008)- *Employment and Labour law in Germany*, Verlag C.H.Beck, Ant. N. Sakkoulas, Athens, 2008.
- Stefan Zagelmeyer (2000) *Innovative Agreements on Employment and Competitiveness in the European Union and Norway*, Official Publications of the European Union, Luxembourg.
- Swedish Institute (2005) *Labour relations in Sweden*.
- Swedish National Mediation Office Annual report 2003, 2004, 2005, 2006, 2007, 2008 Summary.
- S. Cooney, J. Murray and R. Mitchell S. Cooney, J. Murray and R. Mitchell (2008) *Labour Regulation in East Asia: China*, Center for Employment and Labour Relation Law, Melbourne University.
- Tadashi Hanami (2005) *Nothing fails like failure - trade unionism in Japan*. in B. Nystrom, A. Westregard, H. Vogel, *LiberAmicorum Reinhold Fahlbeck*, Juristförlaget i Lund, pp. 285-295
- Takashi Araki (2007) *A comparative analysis of security, flexibility, and decentralized industrial relations in Japan*, Comparative Labour Law & Policy Journal, Vol. 28, No. 3, pp. 443-454, 2007.

- Tim Pringle (2008) *Trade Union Renewal in China and Vietnam?*, paper prepared for 26th International Labour Process Conference, 18th-20th March 2008, University College, Dublin
- Thao Lan, August (2007), *Some difficulties and grievances of workers in the capital area*, MOLISA. Available at: www.molisa.gov.vn/...kho...xuc...lao.../language/.../Default.aspx (Thảo Lan, (2007) *Một số khó khăn, bức xúc của công nhân lao động thủ đô*)
- Thao Lan, (2009) *The status of disposition of labour dispute at the court (Thực trạng giải quyết tranh chấp lao động tại tòa án*, MOLISA's webpage: www.molisa.gov.vn/...tranh-chap-lao.../Default.aspx
- Thomas, Mark (2008) *Collective Bargaining on Working Time: Recent European Experiences*, Relations industrielles / Industrial Relations, Vol. 63, n° 1, 2008, pp. 176-178.
- Thorsten Schulten, (2005) *Changes in national collective bargaining systems since 1990*, published by Eurofound 2005, Available at: www.eurofound.europa.eu/.../2005/.../tn0503102s.htm.
- Tim De Meyer (1998) *The Ratification of International Labour Conventions in the Asian - Pacific Region: Up To The Standard?* The article is available at: <https://qir.kyushu-u.ac.jp/.../KJ00000724154-00001.pdf>.
- Tore Sigeman (1999) *Insiders and Outsiders in the Labour Market - Experiences of a Nordic Welfare State in Labour Law Perspective* - Scandinavian Studies in Law, Vol. 38, pp. 265-278
- Torgeir Aarvaag Stokke (2002) *Mediation in Collective Interest Disputes*, Scandinavian Studies in Law, vol. 43, pp. 135-158
- Torsten Müller, Hans-Wolfgang Platzer, Stefan Rüb (2008), *International Framework Agreements – Opportunities and Limitations of a New Tool of Global Trade Union Policy*, ITUC, Briefing Paper N° 8, 2008
- Udo Rehfeldt and Isabel da Costa (2008) *Transnational Collective Bargaining at Company Level: Historical Developments in the Automobile industry*, in *Cross-border social dialog and agreements: An emerging global industrial relations framework?* ILO, International Institute for Labour Studies, pp. 43-64.

- V. Largo (2002) *Vietnam, current issues and historical background*, Nova Biomedical, July 2002.
- Vera Glassner and Bela Galgoczi (2008) *Presentation at the Seminar "How to improve collective bargaining in Europe"* Research Department, ETUI, Budapest 17-19 October 2008.
- VGCL (2009), Resolution No. 01/NQ-DCT on “*Reforming, improving quality of negotiation, conclusion and implementation of collective labour agreements*”, dated 18 June 2009.
- VGCL (2010), *Resolution No. 04a/NQ-TLD on continuing to promote and improve the quality of training, fostering union period 2010-2020*, dated 4 March 2010.
- VGCL (2010) Report No. 17/BC-TLD assessment of 19 years of implementation of the Trade Union Law, dated 09 March, 2010.
- Vietnamese Supreme People's Court, annual report 2003, 2006, 2007, 2008.
- Voss, Eckhard; Wilke, Peter; Sobczak, André; Schömann, Isabelle (2008) “*Codes of conduct and International Framework Agreements: New forms of governance at company level*” report, Eurofound, March 2008.
- Wang, Hong-Zen (2005) ‘*Asian Transnational Corporations and Labour Rights: Vietnamese Trade Unions in Taiwan-invested Companies*’, *Journal of Business Ethics* 56, pp. 43-53.
- Weiler, Anni; Newell, Helen; Carley, Mark (2007) *Industrial Relations Developments in Europe 2006*, published by Eurofound, the report is available at: www.eurofound.europa.eu/.../ef0734.htm
- Yasuo Suwa (1993) *Relation of Collective Agreement to Rules of Employment*, Japan Labour Bulletin, Vol. 32 No. 3 p.5.
- Yen Trinh (2007) *Solving strikes - Just a hush up of a matter*, The Vietbao, 30 January 2007 (Yến Trinh, Giải quyết đình công - cốt cho êm, Theo Việt báo, 30/1/2007).
- Ying Zhu and Fahey (2000) *The Challenges and Opportunities for the Trade Union Movement in the Transition Era: Two Socialist Market Economies China and Vietnam*, Asia Pacific Business Review, Vol. 6, No. 3 and 4, pp.282-299, Routledge, part of the Taylor & Francis Group.

Youngmo Yoon (2009) *A comparative study on industrial relations and collective bargaining in East Asian countries*, Industrial and Employment Relations Department - ILO, Geneva November 2009.

Appendix 1: 17 ILO conventions ratified by Vietnam

(Source: ILOLEX - 30. 12. 2010)

Convention	Ratification date	Status
<u>C5 Minimum Age (Industry) Convention, 1919</u>	03:10:1994	denounced on 24:06:2003
<u>C6 Night Work of Young Persons (Industry) Convention, 1919</u>	03:10:1994	ratified
<u>C14 Weekly Rest (Industry) Convention, 1921</u>	03:10:1994	ratified
<u>C27 Marking of Weight (Packages Transported by Vessels) Convention, 1929</u>	03:10:1994	ratified
<u>C29 Forced Labour Convention, 1930</u>	05:03:2007	ratified
<u>C45 Underground Work (Women) Convention, 1935</u>	03:10:1994	ratified
<u>C80 Final Articles Revision Convention, 1946</u>	03:10:1994	ratified
<u>C81 Labour Inspection Convention, 1947</u>	03:10:1994	ratified
<u>C100 Equal Remuneration Convention, 1951</u>	07:10:1997	ratified
<u>C111 Discrimination (Employment and Occupation) Convention, 1958</u>	07:10:1997	ratified
<u>C116 Final Articles Revision Convention, 1961</u>	03:10:1994	ratified
<u>C120 Hygiene (Commerce and Offices) Convention, 1964</u>	03:10:1994	ratified
<u>C123 Minimum Age (Underground Work) Convention, 1965</u>	20:02:1995	ratified

<u>C124 Medical Examination of Young Persons (Underground Work) Convention, 1965</u>	03:10:1994	ratified
<u>C138 Minimum Age Convention, 1973</u>	24:06:2003	ratified
<u>C144 Tripartite Consultation (International Labour Standards) Convention, 1976</u>	09:06:2008	ratified
<u>C155 Occupational Safety and Health Convention, 1981</u>	03:10:1994	ratified
<u>C182 Worst Forms of Child Labour Convention, 1999</u>	19:12:2000	ratified