Conclusion

There are significant differences between US and French law with respect to the reasons and process for lawfully terminating employees. While there are less restrictions on US employers when it comes to a termination decision, employers must contend with the constant specter of employment discrimination lawsuits, which can be extremely costly and disruptive. French employers must be circumspect in their termination decisions as failure to follow the proper procedures and demonstrate real and serious cause can be quite expensive. Under both legal regimes, the best approach for employers is to document employee performance issues and make objective employment decisions that are defensible in court. One of the best ways to avoid termination-related issues is to pay close attention to hiring decisions and communicate with employees about performance problems before they escalate.

Caroline André-Hesse
Altana, Paris
candrehesse@altanalaw.com

The national collective agreement signed on 11 January 2013: a genuine revolution or much ado about nothing?

During the last Annual Conference, I desperately tried to convince the other members of my panel that France can be flexible or may at least be on the verge of becoming so. Of course everybody laughed and it became a joke for the rest of the session. A recent development has however occurred in French law: a national collective agreement has been signed on 11 January 2013 between national employers' and employees' representatives. The agreement aims at strengthening employees' rights while enabling companies to benefit from an increasing flexibility to face the economic crisis and related difficulties. The main part of this agreement will now be transposed into French law and a bill is scheduled to be introduced in this respect by the end of March 2013.

The government that firmly encouraged the signing of the agreement considers it as a genuine revolution that will drastically change French employment law. Is it a purely optimistic view or is France indeed becoming flexible?

The main rules provided for by this agreement are the following:

Main measures aimed at strengthening employees' rights

- *Penalty on fixed term contracts*: The employers' contribution to the unemployment organisation currently amounts to four per cent of the gross remuneration paid whatever the nature of the contract may be. It will be increased to seven per cent for fixed term contracts with a duration of less than one month and up to 5.5 per cent for those with a duration of between one and three months.
- *Part-time work*: As of 31 December 2013, all part-time contracts shall provide for at least 24 hours of work per week. Reduced working hours may only apply under some restricted exceptions or if such reduced working hours are requested by the employee through a written and documented document.
- *Secured voluntary mobility*: In companies employing more than 300 persons, employees having more than two years of service will have the opportunity to leave the company for a two year period to '*discover* new employment in another company'. At the end of this period, the

employee will have the option of going back to their initial employer and being employed in a similar position to the one they previously held. Such mobility is subject to the employer's prior approval and the employer may not refuse more than twice.
- *Appointment of employees to management boards*: Companies employing more than 10,000 persons globally or more than 5,000 in France will have to appoint employees' representatives to the board of directors (one if less than 12 directors and two if there are 12 or more directors) with voting rights.

Measures deemed to increase the companies' flexibility

- *Collective agreement aimed at keeping people at work*: In case of serious current economic difficulties, a company may conclude an agreement with its trade union representatives to reduce remuneration and/or increase working hours for a maximum duration of two years in consideration of a commitment to maintain full employment for the duration of the agreement. Employees concerned shall individually agree on the application of the agreement to their individual situation. An employee who refuses may be made redundant, and the redundancy will be deemed justified on the ground of the agreement concluded.
- *Internal mobility*: Companies contemplating a reorganisation that may involve movement of employees but no reduction in headcount will have the option, subject to a collective agreement with trade union representatives, to unilaterally impose internal transfers as long as it does not change the level of remuneration or the employee's grade or level within the hierarchy of the company. If an employee refuses, he or she may have their employment terminated for misconduct.
- *Modification of principles applicable to collective redundancy processes (companies having at least 50 employees)*: In order to secure and ease the process leading to a collective redundancy process, the process and the content of the job preservation plan will be determined by a collective agreement concluded with trade union representatives and, if such agreement is not possible, by an administrative homologation, within 21 days of a document drafted by the employer and submitted for the opinion of the works council.
- *Litigation in the employment court*: A scale of damages that can be granted to the employee in case of litigation in the employment court is defined and shall apply at the conciliation level, if both parties agree to a conciliation. However, if parties choose not to submit to conciliation and proceed to trial, the scale of damages will not be adhered to by the court.

A glass can always be regarded as either half full or half empty; in the case at hand, it must be noted that the signing of an agreement with such a wide scope on subjects that are both challenging and controversial is an undoubted success of the social dialogue in a time where the crisis is more conducive to the exacerbation of political and social tensions than to concessions.

The agreement concluded on 11 January 2013 serves to prove, in particular to foreign investors who are more and more reluctant to come to France, that employers and trade unions may find a way to reach an agreement, at least when dictated by necessity.

It is also the confirmation of the flexicurity which eventually looks to corporations and businessmen as partners and not as enemies of the government, the trade unions and, more generally, the employees. Even if the agreement does not expressly refer to it, it is clear that it is through flexicurity that the French people's jobs will be protected and that ideological opposition between trade unions and employers necessarily leads to job reduction. Our German neighbours understood this a long time ago and one must be happy that French social partners have eventually realised it.

Here is the glass half full view and one could make do with it. It would unfortunately be a pure illusion and some of the steps forward announced by those who signed the agreement should not be over-emphasised.

Some measures are clearly of significant importance and should therefore be welcome. This is the case, for instance, of new principles applicable to internal mobility for economic grounds, the development of health insurance or the creation of rechargeable rights to unemployment allowance.

Some other measures are, however, less impressive.

Company collective agreements aimed at keeping people at work are not created by the agreement but already exist. Launched by the former French President they were at that time deeply criticised by those who welcome them today. In fact, the car manufacturer Renault started negotiations a few months ago with its trade union representatives to implement such an agreement.

Further, what about the 'new' process applicable to the redundancy of ten or more persons in a company employing at least 50 persons? From a practical point of view, nothing has changed drastically. The company still has to negotiate with the trade unions or obtain the opinion of the works council and to submit the draft job preservation plan to the labour administration which validates it. Furthermore, the agreement does not make mention of the health and safety council at all which currently must be consulted. Neither are there steps laid down for consultation with the works council. It is likely that rules currently applicable will in practice remain applicable.

As regards the legal exposure, one should welcome the social partners' will to reduce it by preventing employees from challenging the economic justification on an individual basis once a company collective agreement has been signed or the job preservation plan has been validated by the labour administration. In practice however, some legal exposure remains. Indeed most litigation arising from a redundancy does not deal with the economic justification but with respect to the employer's obligation to search for alternative positions prior to the redundancy. According to French law, as soon as the labour court considers that such an obligation has not been fulfilled, the dismissal is deemed to be wrongful. The legal exposure remains thus exactly the same on this point.

For all those reasons among others, it is doubtful that the agreement concluded on 11 January 2013 will truly change the story for employers and reduce the uncertainty related to the collective negotiation and social dialogue within companies.

However, even if it does not achieve the results touted, one should stay optimistic and consider it as a positive first step that is welcome.

Se Ry Lee
Kim&Chang, Seoul
sery422@gmail.com

Executive compensation in the financial industry in South Korea

A financial company's executive compensation comprises of base salary and various allowances, but is largely dependent on a performance-based bonus (Incentive). Recently, due to the high turnover of executives in the financial services industry, financial crisis and deteriorating economy, financial industry regulators and the press have questioned whether Incentive levels are fair and appropriate, as well as whether executive compensation provides proper incentives. Accordingly, there is an attempt to regulate the granting of such high Incentives based on short term results, as such short term results may expose the shareholders and a company to excessive long term risks. However, the reasonableness and effectiveness of these new regulations are debatable.

The legal status of 'executives'

Labour Standards Act (LSA) is the basic law that governs individual employment matters including wages in Korea and sets out the minimum employment standards. Under the LSA, 'employee' means a person, regardless of their type of occupation, who offers work to a business or workplace for the purpose of earning wages. Under the Korean Commercial Code, a director or statutory auditor of a company (who is appointed at a general meeting of shareholders) is considered to be under the 'mandate' relationship with the company and thus is not considered an employee.

However, according to court precedents, to the extent that the director or the statutory auditor performs executive, managerial or other corporate functions under the supervision of the representative director of