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COLLECTIVE LABOUR AGREEMENTS AND INDIVIDUAL CONTRACTS OF EMPLOYMENT IN JAPANESE LABOUR LAW

I. COLLECTIVE LABOUR AGREEMENTS AS ONE OF THE PILLARS OF CONTEMPORARY LABOUR RELATIONS

1. The Legal System of Collective Bargaining

In Japan, Article 28 of the Constitution states, 'The right of workers to organize, and to bargain and to act collectively is guaranteed'. These rights included in Article 28 of the Constitution have the effect of establishing the principle according to which organization, collective bargaining and collective action should be free from state oppression in the form of legislation and administrative action. On the other hand, these rights are qualified as a fundamental social right, and as such state intervention is required to make effective the rights declared in the Article. In fact, the Trade Union Law of 1945, which was amended in 1949, and the Labour Relations Adjustment Law of 1946 were enacted in order to achieve this political obligation.

The Trade Union Law governs the formation and activities of trade unions. The main aim of the Law, as stated in Article 1, is 'to elevate the status of workers by promoting their being on equal standing with their employer in their bargaining with the employer'. To attain this goal, the Law also seeks: (1) 'to protect the exercise by workers of autonomous self-organization and association in trade unions so that they may carry out collective action, including the designation of representatives of their own choosing in order to negotiate working conditions;' and (2) 'to encourage the practice and procedure of collective bargaining ... for the purpose of concluding collective labour agreements governing relations between employers and workers.'

Furthermore, Article 7, No. 2 provides that the employer's refusal to bargain with the representative of the workers without proper reasons is 'unfair labour practice'. This means that a collective-bargaining obligation is imposed on the employer. Such an obligation on the employer consists not only of the prohibition of a refusal to bargain, but also of the duty to bargain in good faith with the trade union. The employer's acts that violate the duty to bargain in good faith are affirmed in the following cases for example: (1) where the employer declares, even if impliedly, that it has no intention of reaching an agreement; (2) where negotiations are conducted by persons having no negotiating authority; and (3) where the employer's negotiators

persist in putting forward counter-proposals of doubtful reasonableness. When an employer refuses to bargain without proper reasons, or does not bargain in good faith, the trade union or the union members can file an unfair labour practice complaint with the Labour Relations Commission under Article 27 of the Trade Union Law.¹

In addition, if a trade union suffered damage caused by the refusal of an employer to bargain without proper reasons, it can submit a damages claim to the court. Moreover, according to case law, when a trade union's competency and its legal right to demand collective bargaining is denied by an employer, the trade union concerned can sue to confirm the legal position vis-à-vis that employer.

2. Japanese Enterprise Unionism

In Japan, the predominant type of union is an enterprise union, which organizes workers in specific enterprises or establishments without regard to occupation. As a result, the form of collective bargaining is normally an enterprise-based one.

Enterprise unions have their strength in tending to form solidarity not only among the union members who belong to the same enterprise, but also between union members and managers. On the latter type of solidarity, cooperativeness is the main characteristic of Japanese industrial relations. In Japan, enterprise unions ordinarily play two roles: first, to obtain favourable terms and conditions of employment for union members through the adversarial process of collective bargaining; secondly to cooperate with employers by participating in the management of the enterprise to secure its prosperity and the workers' welfare.² In fact, in Japanese companies a joint Labour-Management consultation procedure³ that is separate from collective bargaining has been developed.⁴ It is said that in Japan labour-management consultation systems are a vehicle for sharing information and promoting mutual understanding between labour and management.⁵

¹ In order to be qualified to avail themselves of the procedures for relief against unfair labour practice provided by the Trade Union Law, it is necessary that unions prove before the Labour Relations Commission, which is an independent administrative committee comprised of an equal number of commissioners representing the public interest, employers and workers, that they conform to the definition of a union in the sense of Article 2 of the Law and that their articles of association contain the necessary statements indicated by Article 5, Paragraph 2 of the Law.

² See K. Sugeno, *Japanese Employment And Labor Law* (Carolina Academic Press and University of Tokyo Press, 2002), p. 499.

³ According to the Survey on Collective Bargaining and Labour Disputes, conducted by the Ministry of Labour (now Ministry of Health, Labour and Welfare) in 1997, 78.1% of the unions surveyed had a labour-management consultation organization, and 100% of the unions with 5,000 union members had one.

⁴ Labour-management consultation procedures are not a positively recognized legal institution. The statutory protections are given only to 'collective bargaining' procedure. Therefore labour-management consultation procedures can receive legal protection, only if they fall under the notion of 'collective bargaining' as provided by the Trade Union Law.

⁵ See Sugeno, *Japanese Employment And Labor Law*, *supra* n. 2, pp. 499.

II. LEGAL MECHANISMS OF SHAPING THE CONTENT OF THE CONTRACT OF EMPLOYMENT THROUGH COLLECTIVE LABOUR AGREEMENTS

1. Peculiarity of the Japanese Legal System on the Formation or Modification of Working Conditions

In Japan, as explained earlier, the majority of unions are enterprise unions, which organize only the employees of single enterprises. That is why the predominant form of collective labour agreement is an enterprise-based one. These enterprise-based collective labour agreements tend to establish the actual terms and conditions of employment in the enterprise or its divisions, in contrast to industry-based collective labour agreements, predominant in European countries, which tend to establish only the minimum terms and conditions of employment applicable in common to the industry concerned. Therefore, in the European system the collective labour agreement by the union at the industry level and the work rules or works agreements (e.g. *Betriebsvereinbarung* in Germany) by workers' representatives at the plant level can be clearly distinguished not only from the viewpoint of function, but also in bargaining matters. In the Japanese system, however, a collective labour agreement and work rules have concurrently similar functions. Article 92, Paragraph 1 of the Labour Standards Law provides that the work rules may not infringe upon any collective labour agreement applicable to the workplace concerned and in this sense they are subordinated to a collective labour agreement. This means that as far as a legal hierarchy is concerned, a collective labour agreement takes precedence over work rules. But in practice work rules are accomplishing a relevant function. Because a collective labour agreement is applied only to union members, except for the cases in which it is given general binding effect according to Article 17 of the Trade Union Law,⁶ in reality non-union members' working conditions cannot be determined otherwise than by a contractual measure. But it is unrealistic for an employer to have to negotiate with each non-unionized employee with a view to individually determining the terms and conditions of employment. Therefore, in practice the employer prefers using work rules which can be established only on the employer's initiative and provide collective and uniform working conditions for its employees; of course, as mentioned below, the binding effect of such work rules is controversial.

In addition, in Japanese labour law there is no concept of majority rule based on

⁶ The law admits two types of general binding effects; those of the workplace level and those of the local level. The requirements between the two types are different. The general binding effects in a workplace unit come into force automatically, if three-quarters or more of the workers of the same kind regularly employed in a particular factory or other workplace come under the auspices of a particular collective agreement. On the other hand, the general binding effects in a locality become operative, not only if a majority of the workers of the same kind in a particular locality come under the auspices of a particular collective agreement, but also if the Health, Labour and Welfare Minister or the prefectural governor, at the request of either or both of the parties to the said collective agreement and pursuant to a resolution of the Labour Relations Commission, decides that the said collective agreement should apply to the remaining workers of the same kind employed in the same locality and to their employers.

an exclusive bargaining system as invented by US law, so that two or more unions can request bargaining at the same establishment or enterprise. Under such a pluralism of unions, the employer tends to extend the terms and conditions of employment established by the collective labour agreement concluded with the majority union to the members of the other union(s) through the unilateral establishment or revision of work rules. Consequently, in Japan, even if a collective labour agreement is concluded, work rules play an important role in the establishment of the terms and conditions of employment unified at the enterprise level.

Before entering into a detailed explanation of work rules, it is appropriate to introduce the legal form and effect of collective labour agreements in Japan.

2. *Legal Form and Effect of Collective Labour Agreements*

It goes without saying that from a legal viewpoint, a collective labour agreement and work rules are clearly distinguished. The collective labour agreement is regulated by the Trade Union Law. Article 14 of the Law states that a collective labour agreement between a trade union and an employer or an employers' organization concerning working conditions and other matters has an effect if it is put in writing and at the same time is signed or sealed by both of the parties concerned. The Law attributes to a collective labour agreement two types of effect: normative effect and general binding effect, as mentioned above. Normative effect is laid down in Article 16 of the Trade Union Law, according to which any portion of an individual contract of employment contravening the 'standards concerning conditions of work and other matters relating to the treatment of workers' is void, and the invalidated portion of the individual contract of employment is governed by those standards.⁷ Thus, 'standards concerning conditions of work and other matters relating to the treatment of workers' that are included in a collective labour agreement have an imperative effect on individual contracts of employment. In other words, a collective labour agreement has the effect of compulsorily invalidating any inconsistent part of an individual contract of employment, and of directly amending that part. Accordingly, even if an individual union member consents to provisions less favourable than those of a collective labour agreement concluded by the union to which they belong, that consent is void.

A controversial question regarding such normative and mandatory effect of a collective labour agreement is whether or not the terms and conditions of employment established by such an agreement are merely minimum standards. If they are, a contract of employment that determines more advantageous working conditions is effective. In Germany, this is called the problem of *Günstigkeitsprinzip*. German law on collective labour agreements, *Tarifvertragsgesetz*, explicitly provides that the terms and conditions of employment established by collective labour agreements can

⁷ The same rule applies to matters as to which the individual contract of employment contains no provisions.

be derogated by other agreements in favour of employees (Article 4, Paragraph 3). But because the Japanese Trade Union Law does not contain such a provision, even though the part concerning collective labour agreements was modelled mainly on German law, this problem has generated a good deal of controversy.

Case law and a majority of academic opinion argue that in Japan the terms and conditions established by the 'enterprise-based' collective labour agreement are the applicable ones, so that any derogation from the collective labour agreement is not permissible, even if it is more advantageous to union members. In other words, even if an individual union member consents to provisions more favourable than those of the collective labour agreement concluded by the union to which they belong, that consent is void.

The issue which has been discussed more is the limit of the regulatory power of the trade union in determining the terms and conditions of employment through collective labour agreements. In the 1970s some judicial decisions stated that the disadvantageous modification of working conditions through the revision of the collective labour agreement was not binding unless the individual union members agreed to it. Since then, however, case law has frequently come to decide that even disadvantageous modification through the revision of the collective labour agreement is binding if it is not irrational. Furthermore, the courts are reluctant to scrutinize the irrationality of the content modified by the collective labour agreement, because they tend to respect collective autonomy (*Tarifautonomie*), trusting the role of the protection of the interest of workers to the decision of the trade union which organizes them.

3. Legal Form and Effect of Work Rules

The employer who continuously employs ten or more workers is required to draw up work rules and to submit them to the administrative office, by Article 89 of the Labour Standards Law. The Law sets forth the matters that should be dealt with in work rules. In drawing up and changing the work rules, the employer is required, by Article 90 of the Law, to ask the opinion of a trade union organized by a majority of the workers at the workplace concerned, or a person representing the majority of the workers where no such trade union exists. The work rules drawn up through such a process are given special effect; Article 93 of the Labour Standards Law provides that working conditions under individual contracts of employment that are inferior to standards established by work rules shall be superseded by those standards.

Thus, in a conflict between the work rules and the individual contract, the work rules prevail if the individual contract is unfavourable to the employee. However, as far as the conflict between the precedent work rules and the actual work rules is concerned, the law does not give us any clear guidance. That is why the difficult question arises regarding the binding effect of modified work rules, particularly when introducing working conditions inferior to existing ones. On this question the Supreme Court's Grand Bench ruled that because work rules deal collectively with

working conditions and because management needs to unify and consolidate working conditions by means of work rules, those unilaterally revised by an employer are applicable as far as they are reasonable.⁸

III. FACTORS DETERMINING THE REGULATORY POWER OF COLLECTIVE LABOUR AGREEMENTS TOWARDS THE CONTRACT OF EMPLOYMENT

1. Collective Labour Agreements and Deregulation

The laws in the field of labour law, which are basically made to protect the interest of the workers, have the function of establishing the minimum standards of terms and conditions of employment. Thus, the derogation from the legal provisions of collective labour agreements, work rules and individual contracts in favour of employees is permissible. Article 13 of the Labour Standards Law states: 'a contract of employment which provides for working conditions which do not meet the standards of this Law shall be invalid with respect to such portions. In such a case the portions which have become invalid shall be governed by the standards set forth in this Law'. This provision recognizes the effectiveness of those portions of the contract of employment which provide for working conditions superior to the standards of the Law.

On the other hand, the derogation from legal provisions in favour of employers through collective labour agreements, work rules and individual contracts is not in principle permissible. Recently, however, with a view to softening the rigidity of the regulation by labour protection laws, some academic opinion has argued that a contracting-out by an individual agreement should be valid, but only if the employee concerned gives informed and serious consent to it.

The law admits an exception for the imperative effect of the provisions of the labour protection laws. For example, in Japan the daily or weekly maximum working hours are established by Article 32 of the Labour Standards Law: 8 hours and 40 hours respectively; but Article 36 of the Law permits overtime work, which means work in excess of the daily or weekly maximum hours, if the employer concludes a labour-management agreement with a majority union, or a person representing a majority of the workers at the workplace where no such trade union exists. Strictly speaking, this labour-management agreement is not a collective labour agreement, because a labour-management agreement can also be concluded between the employer and a non-union member representing all the employees at the workplace. But a collective labour agreement between an employer and a majority union can also function as a labour-management agreement.

⁸ The *Shuhoku Bus* case, Supreme Court, 25 December 1968, *Minshu* vol. 22, no. 13, p. 3459.

2. Statutory Limits of the Scope of Collective Labour Agreements

In Japan, statutory limitation of the scope of collective labour agreements does not exist. As far as the employer's duty of collective bargaining is concerned, it is permitted to refuse to bargain with the trade union on some matters concerning management, but 'management matters' are not a clearly defined notion, so that the limits of the scope of the subject of mandatory bargaining are controversial. As a general rule, as far as management or production decisions (such as the introduction of new machines or new methods of production, the transfer of undertakings, the changes of labour organization and so on) are concerned, a mandatory bargaining duty arises only with regard to the aspects of those decisions that can affect working conditions.

Except for the public sector that is subject to the rules of public law,⁹ all private employees can be covered by collective labour agreements. Trade unions organizing public employees can make a request to the competent public administration for collective bargaining, but are not entitled to stipulate a collective labour agreement.

3. Exclusion of Some Employees' Groups from the Collective Labour Agreement Concluded by its Parties

In Japan, many enterprise unions limit their membership to regular employees, that is, employees whose contract of employment is indefinite and full time. Lifetime employment practice, which has been a pillar of Japanese employment systems, covers only regular employees. As a result, the terms and conditions of employment of a large section of non-regular employees, such as part-time workers and temporary workers (who are often called 'atypical workers' in some foreign countries), are not determined by a collective labour agreement, but by work rules. Recently, however, as the lifetime employment practice has been gradually undermined due to the drastic change in economic and social circumstances surrounding Japanese enterprises, the number of non-regular employees is notably increasing. Accordingly, Japanese trade unions tend to extend their membership to non-regular employees in order to maintain and strengthen their power.

4. Extension of a Collective Labour Agreement by a Public Authority

In Japan, there is a system of extension of a collective labour agreement. The Trade Union Law recognizes extensive application of collective labour agreements not only at workplace level, but also at local level. The former type of extension is recognized automatically if certain requirements are fulfilled, while the local extension of a

⁹ The Japanese government is attempting to reform the public servant system, but for the moment this reform will not involve the complete privatization of the employment relationship of public servants.

collective labour agreement is recognized only on the decision of the Health, Labour and Welfare Minister or the prefectural governor.¹⁰

5. Limits imposed on a Lower-level Collective Labour Agreement by a Higher-level Collective Labour Agreement

Under the Japanese collective bargaining system, conflict among various levels of collective labour agreements is rare. The majority of collective labour agreements are concluded at the single enterprise level.

IV. COLLECTIVE LABOUR AGREEMENT REGULATION AND FREEDOM OF PARTIES TO ENTER INTO CONTRACTS OF EMPLOYMENT

The relationship between collective labour agreement regulation and freedom of parties to enter into contracts of employment concerns the above-mentioned legal problem on the limits of the normative effects of a collective labour agreement. According to Article 16 of the Trade Union Law, the parties of individual contracts of employment have no freedom to put into the contract provisions *less* favourable to an employee than those of a collective labour agreement; nor, according to the majority of academic opinion, do the parties have any freedom to put into the contract provisions *more* favourable to an employee than those of a collective labour agreement.

V. PROSPECTS FOR COLLECTIVE LABOUR AGREEMENTS AS A MEANS OF REGULATION OF AN EMPLOYMENT CONTRACT

1. Collective Labour Agreements and the Evolution of Trade Unions and Employers' Organizations

Japanese enterprise unions are not distributed evenly among all enterprises. Indeed, in the small- and medium-scale enterprise, very few trade unions are established. In addition, the majority of non-regular employees is not covered by collective labour agreements. Collective bargaining, which covers particularly non-regular employees and those categories of workers excluded from the ordinary collective labour agreements, so far remains a limited phenomenon in Japan. In order to compensate for the lack of protection of some categories of workers, some labour law scholars are of the opinion that legal intervention is necessary to require the institution of a works council elected by all the workers at the workplace.

¹⁰ On the detail, see *supra* n. 6.

2. Collective Labour Agreements and other Collective Accords

As explained earlier, in Japan not only collective labour agreements but also work rules play an important role in determining terms and conditions of employment.

3. Evolution of the Economy and its Impact on the Application of Collective Labour Agreements

In the Japanese situation, nowadays the most important problem concerning the content or application of collective labour agreements is the trade union's capability to effectively represent employees. Japanese enterprises are now confronted with pressure to reduce costs. This situation has given considerable impulse to an intensive restructuring of personnel management. As a means of doing so, Japanese enterprises have been resorting to employment adjustment and numerous disadvantageous changes of working conditions. The main target of such restructuring measures is often middle-aged and elderly employees. Under the lifetime employment practice and the seniority-based wage system, which are both characteristics of the Japanese employment system, their salaries have reached a high level disproportionate to the profitability of their performance, and thus a situation has arisen where their working conditions have to be rearranged to restrain labour costs. Recently the number of cases where the employer intends to change the seniority-based wage system into the result-oriented wage system has been increasing. Such a change is usually thought to be a disadvantageous modification for middle-aged or elderly employees who have an expectation that their wage will rise automatically according to the increase in their years of service. When such a change is attained through a stipulation of collective labour agreements, conflict occurs between the younger and the middle-aged or elderly union members. The younger employees are more likely to accept the introduction of the result-oriented wage system, which may improve the performance of the enterprise and consequently increase their salary.

This is one example of the difficult tasks to be tackled by Japanese trade unions. The Japanese enterprise unions will more often than not be compelled to accept disadvantageous change in the terms and conditions of employment in order to secure employment. In such a case, it is now up to the trade unions to endeavour to persuade their members to accept the deterioration of working conditions, especially when that deterioration is not distributed uniformly among union members, and at the same time to try to acquire compensation from the employer with a view to reducing the loss suffered by the employees as much as possible.

Recent judicial decisions have tended to rule that collective labour agreements, which may bring about disadvantageous working conditions to only a certain group of union members (e.g. elderly members), are not binding if the union has previously failed to perform due procedure such as a hearing from such a disadvantaged group.

CONCLUSION

In Japan, an enterprise-based collective labour agreement determines the terms and conditions of employees in collaboration with work rules. I think that from a comparative viewpoint the most peculiar and interesting point of Japanese labour law is the case law concerning the unilateral modification of work rules, according to which work rules unilaterally revised by the employer are binding insofar as they are rational. This legal doctrine affords to the employer a convenient measure to adapt working conditions flexibly to change in the economic or financial situation of the enterprise, and at the same time trusts to the judge the role of protecting the interest of employees by the rationality test. It is fair to say that in Japan, due to such a work rules doctrine, there is little room for the role carried out by trade unions. But now, at a time of economic downturn, Japanese trade unions will be expected to play a more active role in finding the balance between the protection of the interest of employees and the efficiency and productivity of the enterprise, sometimes exercising their constitutional rights.