

Twenty Years On

2006 marks the twentieth anniversary of the inaugural meeting, in Paris, of the Euro-American Lawyers Group. Chairman David Walton, whose firm was one of those instrumental in setting up the Group sketches a brief history of the Group's success.

The initial inspiration came from a group of lawyers based in England, France and Norway who already enjoyed informal professional links. When past Chairman John Elliott's firm took over the London firm of Blackett, Gill & Swain in 1985, he saw the possibility of broadening these links into a more structured international group and suggested that a meeting was the only practical way forward.

Hosted by Eric-Jean Thomas, representatives from six firms met in Paris and agreed a basic constitution and a strategy for the new group. Tore Engelschen was elected first chairman and the Group expanded rapidly. Inviting American members to join gave clients of member firms direct access to a network of lawyers in the major commercial centres in Europe and America.

We have been well served by our officers over the years, as succeeding chairmen John Elliott, Eric-Jean Thomas and David Ross each also played their part in developing Group activities. Hans Christian Steenstrup (Oslo, Norway) has been the long-serving treasurer.

Currently chaired by David Walton (Manchester, England) with Andrew Danas (Washington DC, USA) as secretary, and members Jan Hermes (Tilberg, Holland) and Xavier San Roig (Barcelona, Spain) and Wolfgang Schroeder (Hamburg, Germany) comprising the Management Committee, the Group represents a wide range of experience and commitment.

One of our strengths has been in the personal contact between members. Meetings of the full membership are held twice a year with opportunities for sharing knowledge of legal practice in the various jurisdictions. We believe we can serve our clients' requirements better because of our close working relationships.



The Group has expanded into Eastern Europe, welcoming members in Poland and Estonia, and increasing our member representation to twenty countries. Further expansion is planned, and at the 20th Annual Meeting - when we return to Paris - we shall be undertaking a strategic review to move it on to the next stage of our development.

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legalinterview

The Newsletter of the Euro-American Lawyers Group

Issue 14

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ProfileOn:

Thomas, Herbecq & Associés
(Established 1990)



Our offices in Paris, close to the Trocadero

The firm has strong historical ties with the Scandinavian countries, especially Norway, and we are highly regarded for our practical mastery of Scandinavian commercial and legal language and terminology. Our knowledge of, and familiarity with, the legal and economic environment of the Nordic countries make us a clear choice for French clients doing business in Scandinavia, and Scandinavian clients wishing to do business in France.

In 1996 we opened offices in Hong Kong to better serve clients' needs in the People's Republic of China, Hong Kong itself and the Pacific-Asia region. We can be contacted there under our local firm name of Thomas, Mayer & Associates (TMA, www.tmahk.com).

French and other European and foreign companies wishing to establish themselves in Hong Kong, China or South East Asia, generally do so either by incorporating a new company or through merger or acquisition. However, in this region, and more particularly in China, joint ventures can be a legal requirement if not an economic necessity. Thanks to our network of local and international contacts throughout the whole of the region, and our experience of relevant local and international laws, we can advise clients on all legal and financial strategy issues.

In recognition of the firm's leading role in assisting and counselling clients in international transactions and investment negotiations, in 2006 we were appointed Legal Counsel to the French General Consulate in Hong Kong and Macao.

Our client base also extends into the Hispanic and Caucasian countries in Europe and America.

Membership of the Euro-American Lawyers Group (EALG) adds to the levels of expertise we can offer clients. Through this international association they have access to immediate counsel and local representation from experienced business lawyers in most commercial centres in Europe and America.

The firm can be contacted by e-mail on thass@thomas-herbecq.com
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Thomas, Herbecq & Associés, (www.thomas-herbecq.com) is a medium-sized Paris based international law firm, and the sole French member of the Euro-American Lawyers Group (EALG).

We are recognised as leaders in our specialist fields of international commercial law and investment. Our wide experience and expertise across the whole spectrum of international commerce and investment sets us apart from other similarly sized firms.

The firm combines busy general advisory and chamber work with an extensive litigation and international arbitration practice, which means that we are able to provide an integrated and comprehensive legal service for clients. We work closely alongside clients to provide practical and customised solutions tailored to provide best value to their businesses and other requirements.

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- ◆ Draw up a union labour management agreement in USA

The EALG provides instant access to specialist legal advice in all the major commercial centres in Europe and America

For further information please contact your EALG office – details are on the back page of this issue of INTERVIEW



Labour Laws or Employment Liberalisation



Luxembourg

Labour laws have been very much in the public eye in recent months. Most marked was the retreat by the French government and abandonment of their controversial youth law reforms. Germany has been accused in the media of sidestepping its labour laws, and high unemployment rates in Italy and uncertainty in other European economies has brought added attention to labour relations.

Globalisation and trade liberalisation have, over the years, reflected most countries' concerns with social progress, and their individual cultural approach and domestic policy. While there has been a global sharing of cultures, increased technology, especially in globally operating companies, has reduced the use and dependence on labour as technology asserts increasing dominance on the workplace.

However, there will always be a need for 'foot soldiers' to undertake the many operational functions that technology cannot fulfil, and consequently a need for evolving labour laws to regulate these arrangements.

Luxembourg, with a workforce of less than 450,000, of which 66% are 'frontier' workers or foreign residents, has a well-established tradition of social peace. It is one of the few countries that still maintain automatic, full linking of salaries to price increases.

In principle, contracts of employment are open-ended. Fixed-term contracts are the exception and may only be used when all conditions required by law are met. Written contracts are required regardless of whether the employment is for a fixed term or open-ended. In any event the term of the contract cannot exceed 24 months, and a probationary period may be provided for.

Either party may terminate the contract by giving written, statutory notice of termination. The period of notice varies between two months for less than five years' service, and six months for ten, or more, years. In the case of dismissal by the employer there must be reasonable or substantial grounds relating to the employee's conduct or competence, or to the operational needs of the business.

Either party may terminate the contract without notice on the grounds of grave cause deriving from an act or misconduct by the other party, with damages payable by the party whose act or misconduct has occasioned the summary termination. Where termination is by mutual agreement, the only requirement is confirmation of the agreement in writing.

Employment relationships in the UK are principally regulated by legislation, the majority of which is based on EU Directives.

Of most significance when purchasing businesses in the UK are the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") which apply when one undertaking is transferred to another or there are 'service provision changes' e.g. outsourcing. However, TUPE does not apply to the purchase of shares.

The regulations provide that:-

- Employee representatives must be informed and consulted in advance about the transfer;
- Employees' contracts of employment transfer automatically to the transferee on the same terms and conditions;
- Any dismissal for a reason connected with the transfer is automatically unfair unless there is an economic, technical or organisational reason ("ETO") entailing changes to the number or functions of employees;
- Any changes to terms and conditions of employment are void, unless there is an ETO reason. This applies even where employees agree to the variations;
- The transferor must provide certain "employee liability information" to the transferee;
- TUPE protection is relaxed to a limited extent where the transferor is subject to insolvency proceedings.

The ETO defence includes situations where redundancies require to be made. However, vendors and purchasers must ensure that all "affected employees" are informed and consulted in advance of the redundancies. Where 20 or more redundancies are proposed, there are specific collective redundancy obligations. Employees are also entitled to statutory redundancy pay (i.e. compensation) based on age and length of service.

Irrespective of whether TUPE applies, if an employer unilaterally varies material terms of a contract of employment, this may permit an employee to resign and claim constructive dismissal. However, changes to material terms can be achieved through agreement with employees, and changes to other terms and company policies can easily be made provided there is no substantial detriment to the employees.

The position in Switzerland, which is not an EU signatory, contrasts with the UK's reliance on EU Directives in the framing of its labour law. Swiss law favours employers more than most other European countries, and under Swiss law (articles 319 to 362 of the Swiss Code of Obligations), employees' protection from dismissal is fairly limited.

Employers may freely terminate employment agreements, without specific justification or compensation, provided they give the applicable written period of notice. One month's notice of termination is required during the first year of employment; two months up to completion of eight years and three months thereafter. During any probationary period, which may last for up to three months, employment may be terminated upon seven days advance notice to do so.

Employers may also validly terminate a contract of employment with immediate effect, and without giving due notice, in circumstances which render the continuation of the work relationship so intolerable that bona fide rules cannot impose the continuation of the relationship, even for the notice period.

Swiss labour law provides protection only against abusive dismissal and unwarranted dismissal. Dismissal is deemed to be abusive when it is motivated by personal animosity or when an employee has exercised his/her constitutional rights. In such cases the employer can be ordered to pay compensation of up to 6 months salary.

Unwarranted or improper dismissal, such as during pregnancy, or when through no fault of the employee such as illness or accident he/she is prevented from working, is deemed to be null and void.

Employers wishing to relocate employees, can make a so-called "termination-modification contract" ("Aenderungskündigung"). The existing employment contract terminates at the end of the statutory notice period and the termination is linked to a proposed new contract with modified conditions. The modification becomes valid only at the end of the period of notice.

These modified contracts may be considered abusive if the terms offered worsen employees' working conditions. Consequently, it is advisable not to link the termination with a proposed modified employment agreement. The employer should first terminate the existing employment contract (giving due notice of termination) and once the period of notice is complete, introduce an entirely new contract.



Switzerland



UK

Poland, as one of the recent signatories to the EU, draws attention to some of the main issues relating to the relocation of staff to that country.

As a rule, foreigners need a work permit, issued usually for one year, in order to work in Poland. Before issuing such permits (a process which takes about three months) the Voivode (local authority) must take into account the needs of the local labour market at the time; employers must prove they cannot find Polish workers to fill vacancies.

However, the 'local needs' test is dropped in cases of relocation of key staff such as directors and specialists from EU/EEA countries. It is also dropped in the case of citizens of Denmark, Netherlands, Norway and Italy. Company directors from outside the EU/EEA, who hold standard valid visas, and stay in Poland no longer than thirty days within a calendar year, do not need a work permit.

Following Poland's accession to the EU Treaty, freedom of movement of labour is permitted from all new member states (2004 EU entry), and also from the United Kingdom, Finland, Greece, Ireland, Iceland, Portugal, Spain and Sweden.

Contracts of employment must be in writing and most commonly are for an indefinite term. Three months notice of termination shall be given where employment has been for 3 years or more; otherwise the period of notice shall be shorter. The notice must set out the reasoning for termination and trade union consultation is required in certain cases.

Contracts for a definite term cannot be terminated unless this is specifically provided for, and the term of employment exceeds six months. A third consecutive fixed term contract offered to the same employee automatically changes into a contract for indefinite term.

Where collective redundancies occur due to the economic or operational needs of the business and affect more than 10% of the staff within a 30 days period, the dismissed employees are entitled to redundancy pay of one to three months salary, determined by length of employment.

Employers with more than 100 employees must establish Works Councils in line with EU Directive 2002/14/EC. From 2008 this threshold number will decrease to 50.

The Norwegian position tends to favour employers and is regulated by that country's Act of 2005. Generally, there is a freedom of contract between employer and employee except where this is restrained by collective agreements between trade unions and employers and employers' federations.

By law, employees must receive a written contract of employment which shall regulate at least the following – the identity of the parties and the workplace; job description, commencement date and, in the case of temporary employment, the anticipated duration of the contract; any probationary period; holidays and holiday pay; the period of notice; salary and fringe benefits and payment procedure; working hours and rest breaks; and information about any collective agreements between employer and employee.

The Act of 2005 generally states that employees may not be dismissed without good reason unless dismissal can be objectively justified on the basis of actions or facts related to the business, the employer or the employee.

Traditionally, Norwegian courts have approved the actions of the board of directors/management provided they can show that they acted reasonably and applied objective business principles.

Flexibility in re-location of employees is mainly regulated by individual employment contracts, but also relies on the general principle that employers must be allowed to lead, direct and control the working environment and procedures within the framework of the employment agreement.

Minimum periods of notice required by law vary between one and six months, depending upon the length of employment and the age of the employee. "Golden parachute" agreements are quite common, but probably not as generous as in many other countries.

In acquiring or starting a business in the United States, U.S. employment law provides a great deal more latitude than is available in many European countries.

In the absence of a union labour management agreement (unlikely in most instances) or a written employment contract, all employees are "employees-at-will". Either side can terminate the employment relationship with no liability except for accrued entitlements for salary, unpaid vacation pay and providing the former employee with access, at the employee's expense, to the employer's

medical insurance coverage on the same terms that the employee enjoyed during his employment.

Even if there is a written agreement, covering such matters as job duties and compensation, and post-employment obligations with respect to, say, confidentiality and covenants not to compete, it will still be employment-at-will if the contract does not provide for a fixed term.

A caveat to the foregoing is that no employee can be terminated if any part of the reason for termination relates to the employee being a member of a "protected class". Employer discrimination against the individual, in whole or in part, based upon such characteristics as ethnicity, religion, age or gender is unlawful. The anti-discrimination laws in this country are found at federal, state and sometimes municipal levels. Applicability of these statutes varies as a function of the number of employees – a minimum of 15 employees for federal law to apply, fewer for state and municipal law protection.

In order to attract a particular employee, term agreements may be required. When reverting to written agreements (whether term or at-will), great care must be taken in drafting. To avoid litigation the parties must define their respective rights with precision. For example, in defining what constitutes appropriate grounds for termination, the employer will want to have latitude relating to poor performance, whereas the employee will want objective criteria setting out precise grounds for termination.

What most employers from abroad will find most appealing is the absence of statutes guaranteeing post-termination compensation; "at-will" means just that. No notice is required in most circumstances and there are no indemnity or lump sum payments.

This very brief overview can only draw attention to the main issues relating to such a wide-ranging subject. However, it can be seen that the further west one travels the more generously the law favours employers.

Clients of member firms of the Euro-American Lawyers Group have the reassurance that their professional advisers are members of an international association with access to trusted professional support, and colleagues able to provide a rapid response to requests for professional assistance.



Poland



Norway



USA