Relationship between the Civil Law and the Labor Standards Act regarding Termination of Employment

I. Introduction

The Civil Law and the Labor Standards Act are often regarded as equivalent to each other when it comes to employment. However, strictly speaking, there are many areas where the Labor Standards Act does not apply and/or has limited application. The Labor Standards Act applies to a limited number of legal provisions for a workplace with less than five persons, but does not apply to workplaces with only relatives and housekeepers living together. Issues that are not stipulated in the Labor Standards Act are subject to the principle of good faith and prohibition of abuse of rights in Article 2 of the Civil Law, as well as some other provisions of the Civil Law. The employment section of the Civil Law has only 9 provisions in total, but is considered the general law in labor law. As there are some differences in the details and application when it comes to termination of employment, it is necessary to distinguish between the Civil Law and the Labor Standards Act. Five of the nine provisions of the Civil Law on employment are related to the termination of employment contracts.[1]

In our capitalist economic system, as the Civil Law is based on the principle of freedom of contract, one party of the contract can freely terminate the contract on the premise of certain requirements or damages. However, if employment contracts allow employers, who are in a socially and economically superior position to employees in the labor contract relationship, to unilaterally dismiss employees, those employees whose ability to maintain their livelihoods is based upon earnings from employment are threatened with unemployment at any time, which places them in an unequal and oppressive relationship[2] For this reason, the Labor Standards Act was enacted under the Constitution in order to improve such unequal relationships and to guarantee human dignity and the right to pursue happiness as a basic right of workers.[3]

II. The need to distinguish the different types of termination of employment

1. Divisions in the Laws

There are three types of termination of employment under the Civil Law. First, if employment is terminated when the contract period expires, it is recognized that renewal of the contract is

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[1] The five provisions of the Civil Law on the termination of employment contracts: ① Article 658 (Content of Service and Right of Rescission for Future); ② Article 659 (Lapse of Three Years or More and Right to Give Notice of Rescission of Contract for Future); ③ Article 660 (Notice of Rescission for Future of Contract of Employment in which No Period has been Fixed); ④ Article 661 (Unavoidable Cause and Right to Rescind Contract for Future); and ⑤ Article 663 (Employer's Bankruptcy and Notice of Rescission of Contract for Future).

[2] Lim, Jongyul, 「Labor Law 」, 14th edition, Parkyoungsa, 2016, page 528; Kim, Allim, 「The Labor Protection Law」, KNOU Press, 2013, page 213.

[3] Article 32 of the Constitution of Korea: (3) Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity.

granted under certain circumstances (Article 662 of the Civil Law). Second, if the contract term is for more than three years or there has been no contract for a period of time, the right of notice of termination shall be granted to each party, and at this time, termination will take effect after a specific period of time (Civil Law Articles 659 and 660). Third, there is recognition of the right of termination under certain circumstances (Articles 657, 658, 661, and 663). A contract under the Civil Law is a contract between the parties, so it is presumed that it can be cancelled if necessary.

However, in the Labor Standards Act, unilateral termination of a labor contract by an employer becomes an unfair dismissal and becomes subject to remedy application for unfair dismissal. Provided, however, that this shall not be the case if the contract period is fixed, the period required for the completion of the work is specified and attained, or if the employee reaches retirement age. In the case of an employment contract with a definite period of time, if the contract is longer than two years, the contract type is changed to a non-fixed contract (Article 4 of the Fixed-term Employment Act).

2. Just cause for termination

The Civil Law allows either party to freely and unilaterally terminate the employment contract as the contract is freely concluded between the parties in accordance with the principle of freedom of contract.

However, the Labor Standards Act stipulates that employers cannot dismiss, suspend, or discipline a worker without justifiable reason (Article 23 of the LSA). According to the Labor Standards Act regarding employment contracts, it is impossible to notify termination of an employment contract unilaterally in a manner that would be acceptable under the Civil Law. This is because The LSA's aim is to protect employees. However, it is possible to terminate an employment contract for justifiable reason. Justifiable grounds are situations where an employee is liable to such an extent that the employment relationship cannot be continued under social norms, or there is inevitable management necessity.[4] Whether or not the employment relationship can in fact not be continued depends on various factors such as the purpose and nature of the business, the conditions of the workplace, the status of the worker, the motivation behind the employee's violations and/or actions affecting the company, and previous behavior. The situation must be reviewed and judged comprehensively based upon the above.[5]

III. Termination of an employment contract in the Civil Law

1. Expiration and exception of employment terms

If the parties set a term of employment, the employment shall terminate at the expiration of that period. However, it may be renewed by agreement of the parties before or after the expiration of the term of employment. If, however, after the expiration of the employment period, the employee continues to provide labor without an agreement of renewal and the

[4] Supreme Court ruling on July 8, 2003, 2001doo8018.

[5] Supreme Court ruling on May 28, 2009, 2007doo579.

employer does not take action within a reasonable period of time, the Civil Law interprets that the employee has been rehired under the same conditions (Article 662 of the Civil Law). However, termination of the contract may then be given at any time by the parties, and termination shall take effect one month from receipt of the notice (Articles 662 and 660 of the Civil Law). It is considered by the Civil Law that the shorter-term contract is a more favorable contract between the two parties in terms of the principle of freedom of contract.[6]

2. Notice of dismissal

(1) In cases of long-term employment

The period of employment can be determined by agreement between the parties, but when employment has continued for a very long period of time, there is a problem of restricting the freedom of the parties on the nature of the employment relationship. Therefore, the Civil Law stipulates that when a contract term of employment exceeds 3 years or until the end-of-life of one party or a third party of the parties, each party may give notice of termination at any time after three years (Article 659 of the Civil Law). In that case, termination will take effect three months from the date on which the other party receives notice of termination (Article 659 of the Civil Law). In the case of employment contracts, the maximum term of employment contracts with fixed term is limited to three years. This is to avoid disadvantage to the employee by lengthening the period of employment. In other words, it is a characteristic of the employment contract made between comparably equal parties in the Civil Law that the employment period must be short enough to protect employees.

(2) In cases where there is no agreement on the contract period

In the absence of an agreement on terms of employment, each party may at any time notify termination of the contract (Article 660 of the Civil Law). In this case, termination shall take effect one month from the date on which the other party receives notice of termination (Article 60 of the Civil Law). However, when remuneration is determined by a period of time, the termination will become effective upon the passing of the first period after the notice was received (Article 660 of the Civil Law).[7]

3. Termination of employment

Notice of termination of an employment contract can be made at any time in the following instances. From the time the notification reaches the other party, the termination becomes effective with no notice period: 1) When an employer assigns the employer's right to a third party without consent of the employee (Article 657 of the Civil Law: Exclusivity of Rights and Duties); 2) When the employer requests the provision of labor not agreed to in the employment contract (Article 658 of the Civil Law: Content of Service and Right of Rescission

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6 Yang, Jaehyun, "A Study on the Employment Contract in the Civil Law", Soongshil University's Doctor's thesis paper, 2010, page 66.

7 For example, if you give a notice of cancellation in April, your contract will be cancelled the first period after 1 June.

for Future); 3) In case of unavoidable circumstances, the parties may terminate the contract despite the employment period (Article 661 of the Civil Law: Unavoidable Cause and Right to Rescind Contract for Future); and 4) If the employer receives a bankruptcy determination; even when there is an agreement on the term of employment, the employee or bankruptcy trustee may terminate the contract (Article 663 of the Civil Law: Employer's Bankruptcy and Notice of Rescission of Contract for Future).

IV. Termination of employment contracts under the Labor Standards Act

Under the Labor Standards Act, the termination of an employer's unilateral labor relations is strictly restricted. It is not easy to break the employment relationship with employees unless there is a fixed term contract. There must be legitimate reasons, limited by the time of termination, and termination must be carried out adhering to strict dismissal procedures. Unilateral notice of termination of an employment contract by the employer becomes unfair dismissal and is subject to unfair dismissal relief application through the labor committee.

1. Expiration of and exceptions to employment terms

According to Article 4 of the Fixed-term Employment Act, "the employer may utilize the services of a fixed-term employee to the extent that employment does not exceed two years, or to the extent that repeated renewal of the fixed-term employment contract does not exceed two years. However, in exceptional cases, where the period required for the completion of the project is set, the age of the employee is 55 or more, the person is engaged in a professional position and has 25 national qualifications, if his/her earned income per year is higher than top 25%, even if it exceeds 2 years, the termination contract can be canceled by the expiration of the term with the fixed-term worker.

2. Limitations of termination for just cause

Article 23 of the Labor Standards Act stipulates that employers cannot dismiss employees without justifiable grounds. According to the Labor Standards Act, in employment contracts, it is impossible to provide a Civil Law-related unilateral notice of contract cancellation. This is because it (LSA) aims to protect workers. However, if there is justifiable cause, it is possible to terminate a labor contract. The Labor Standards Act provides justifiable grounds for dismissal as specified below. The following cases may constitute "the reasons prescribed in the Labor Ministry Ordinance (Article 14)":

① The employee took a bribe for allowing an inflow of flawed products from a supplier that has upset the production process of the company;
② The employee forced made another person to drive a business vehicle without authorization, which resulted in an accident;
③ The employee provided confidential information on the business to a competitor, which adversely affected the business;
④ The employee made up or disseminated ungrounded facts or masterminded unlawful

collective actions that caused a considerable disturbance to the business;

⑤ The employee took advantage of his/her job position or committed breach of trust to misappropriate, embezzle, or use company money for private purpose for a long time (e.g., embezzling the proceeds from operation of a company vehicle);

⑥ The employee stole or carried products or material out of the company without authorization;

⑦ The employee, being engaged in personnel management, treasury or accounting, manipulated the records or produced fraudulent statements that caused damage to the business;

⑧ The employee deliberately destroyed company equipment or property, causing considerable disturbance to the business; or

⑨ The employee deliberately committed acts which seriously disturbed the business or caused considerable financial damage to the company.

3. Restrictions on layoffs

According to Article 24 of the Labor Standards Act, if an employer dismisses an employee for managerial reasons, the employer must: ① have a need for urgent management changes; ② make efforts to avoid dismissal; ③ select employees to be dismissed by establishing rational and fair criteria for dismissal, and ④ notify the representative of the employees 50 days in advance to discuss these efforts to avoid dismissal and the selection of the dismissal target. If the above four criteria are met, it will be a legitimate dismissal under Article 23 of the Labor Standards Act. Therefore, there are strict restraints when trying to terminate an employment contract with an employee for reasons attributable to an employer without cause by the employee.

4. Restrictions on dismissal time

The employer shall not dismiss any employee during a period of temporary interruption of work for medical treatment of an occupational injury or disease or within 30 days thereafter, or any female employee during a period of temporary interruption of work before and after childbirth as provided herein or within 30 days thereafter (Article 23 of the LSA). This provision is designed to protect employees from the risk of unemployment during periods when employees lose their ability to work or when they cannot perform effective job searches.[8] If an employee is dismissed in violation of this, the penalty clause is applied and the action is invalidated by law. However, if the employer cannot continue the business or pays an adequate lump sum compensation for the injury or illness on the job, the period of dismissal is not exceptionally limited (Article 23 of the LSA).

[8] Lim, Jongyul, 「Labor Law 」, 14th edition, Parkyoungsa, 2016, page 543; Supreme Court ruling on August 27, 1991, 91nu3321.

5. Restrictions on dismissal procedures

(1) Notice of dismissal

According to Article 26 of the Labor Standards Act, the employer shall give notice at least 30 days before dismissing an employee. If the notice is not given 30 days before the dismissal, ordinary wages of more than thirty days shall be paid to the worker. This provision stipulates that employees should be given 30 days' advance notice even in cases where there is legitimate reason, and if there is no justifiable reason, the notice of the dismissal cannot be just cause for dismissal.

(2) Written notice of dismissal

Under Article 27 of the Labor Standards Act, if an employer intends to dismiss an employee, the employer shall notify the employee of the reasons for dismissal and the date of such dismissal, in writing. In the absence of this written notice, the dismissal shall have no effect. This regulation mandates that the employer be careful when dismissing employees. This notice is designed to clarify the reason for dismissal and date of dismissal so that any dispute surrounding the dismissal can be easily resolved and the employee can take appropriate action against the dismissal.[9]

V. Conclusion

There are few benefits to be gained by making comparisons between the Civil Law and the Labor Standards Act. The Civil Law establishes rights and obligations based on the contractual relationship between equal parties at the level of general law, while the Labor Standards Act stipulates enforcement regulations in a special law that the employer must comply with. Therefore, as the Civil Law is more comprehensive and there are limitations on the application of the Labor Standards Act, the Civil Law can be interpreted additionally or applied in a supplementary fashion for cases not covered under the Labor Standards Act.

[9] Supreme Court ruling on October 27, 2011, 2001da42324.

Restructuring Story

1. Introduction

As the economy becomes more difficult, companies try to survive by reducing costs, especially with labor being the item that costs a company the most. Low labor costs help to overcome difficult times, thereby increasing the likelihood of survival. Restructuring is utilized by companies as a short-term effort to reduce labor costs. This restructuring can include unpaid leave, voluntary resignations, layoffs, etc., with layoffs being used as a last resort whenever possible. Before the economic crisis in 1998, the concept of a lifelong workplace was established along with the rapid growth of companies, and most employees continued to work until retirement; the laws and the system were set accordingly. However, during the economic crisis, the managerial dismissal law and the dispatched workers law were introduced as conditions necessary for procuring an IMF loan. Most of the companies suffering from the economic crisis chose to dismiss a large number of workers by using the managerial dismissal law (among other various methods of restructuring), and then, as the economy recovered, began using fixed-term workers or dispatched workers with lower labor costs instead of full-time workers. This type of employment raised concerns that all workplaces would use irregular workers only, and in order to cope with this trend, in 2007 the Non-regular Worker Protection Act was enacted to restrict the use of non-regular workers.

This type of employment has led to the establishment of dual employment structures in Korea. Full-time employees in large corporations are groups that receive stable employment and high wages, while non-regular workers are groups that receive insecure employment and low wages. The restructuring of SsangYong Motor is a typical example of the adverse effects of this dual structure.[10] During and since restructuring in 2009, more than 30 workers have tragically committed suicide over nine years, as a large number of workers in the first group were dismissed for managerial reasons and demoted to the second group. I will attempt to determine the most suitable restructuring methods by analyzing the restructuring of SsangYong Motor and by comparing that case with another in a foreign country.

II. SsangYong Motor's restructuring: Layoffs[11]

SsangYong Motor has changed ownership (and names such as Shinjin Motors and Dongah Motors in the 1970s and 1980s), and eventually came to belong to the SsangYong Family Group in 1988. SsangYong Motor produced the Musso SUV in 1993 through technical cooperation with Mercedes Benz in Germany, and then produced the new Korando in 1996, making the

[10] Lee, Seungyun/Kim, Sungsup, "SsangYong Motor's layoff and sliding Korean society", Korean Social Policy, Volume 22, 2015, page 75.

[11] Wikipedia online encyclopedia, key words: SsangYong Motor's Incident", downloaded on Oct. 23, 2018; Kwak, Sangshin/Park, Myungjoon, "SsangYong Motor's incident: Review and Suggestion for better solutions", Labor Review, April 2013, Korean Labor Institute.

company a representative maker of 4WD automobiles.

However, since 1992, deficits had accumulated and the company was sold to Daewoo Motor in 1998. When Daewoo went bankrupt in 1999, SsangYong Motor was moved to court administration and then sold to Shanghai Motor Company in 2004, after its management status had improved thanks to the court administration. After this, Shanghai Motor did not invest in new car development for four years and was placed into administration in court in 2008. Shanghai Motor withdrew from the Korean market, taking with it only current SUV technology and key personnel.

In April 2009 SsangYong Motor announced that it would cut 2,646 people (out of 7,135) in order to normalize management. In May 2009, the union took over one of plants in the Pyeongtaek factory, went on strike and proceeded to occupy the plant for 76 days, until August. The strike was stopped after a police suppression operation and successful negotiations between the union and the company. As a result, out of the original 2,646 employees, 2019 voluntarily resigned, 459 were put on unpaid leave, 3 were switched to the sales team, and 165 (159 production and 6 management) employees were laid off.[12]

A total of 156 persons dismissed for managerial reasons filed suit against the company in November 2010 for invalid layoff.

On 1 August 2012, the court of First Trial said, "As a result of the financial crisis, there is no way to solve a liquidity shortage, and a company that is going through the regeneration process is forced to overcome the difficulties in management and lay off as part of restructuring to secure competitiveness through cost reduction. It is recognized that there is a necessity to carry out managerial dismissal."

On February 7, 2014, the Court of Second Trial (the High Court) said, "The 'Court of Appeal' has no problem in meeting the requirements related to the selection of the dismissal candidates and the consent of the collective agreement. However, it is not clear that the actual requirements of dismissal as an effort to avoid dismissal are not implemented, and so this managerial dismissal has not satisfied the validity requirements of managerial dismissal as provided in Article 24 of the Labor Standards Act."

On November 13, 2014, the Court of Third Trial (the Supreme Court) said that that the "urgent management necessity" among the requirements of managerial dismissal should respect the judgment of management unlike the ruling of the High Court. In the judgment of "urgent management necessity", it is a requirement for judging the legitimacy of managerial dismissal. The existing interpretation in the Supreme Court accepts that there is objective rationality in order to cope with a crisis that the company may have in the near future. And this concept is also reaffirmed in this Supreme Court ruling.[13]

[12] In June 2009, out of 2,646 employees, 1,666 left the company through voluntary retirement, and the remaining 980 employees (974 production and 6 management) were dismissed. Out of the 980 workers who were summarized through the labor-management agreement in August, 815 were unpaid leave (459), ERP resignation retirement (353), and the business was converted into employment, and finally 165 people were laid off.

[13] Lee Sung-gil, "SsangYong Motor, managerial dismissal was justifiable ", Labor Law, January 2015, Related Cases: Supreme Court Decision on Nov. 13, 2014 2014 Da 20875-20882 (for white color workers), 2012 Da 14517 (for blue color workers); Park Eunjung, "Urgent necessity for managerial dismissal," Labor Review, January 2015, Korea Labor Institute.

In November 2010, SsangYong Motor was sold to Mahindra in India. Since then, SsangYong Motor has gradually reinstated workers previously placed on unpaid leave and dismissed other workers, in line with the company's business status. Following the reinstatement of 454 of the unpaid leave personnel in March 2013, 40 people were reinstated in February 2016, 62 in April 2017, and 16 in 2018. In September 2018 the company also agreed to complete the reinstatement of the remaining 119 dismissed workers by the end of the following year. This reinstatement was possible through the improvement in the management status of the company. As company sales improved (a deficit of KRW 141.2 bn in 2011, a deficit of KRW 9.9 bn in 2012, a deficit of KRW 8.9 bn in 2013 and finally a surplus in 2016), it outperformed GM Korea and Renault Samsung Motors, achieving third place in the domestic market in September 2017. (1st place was Hyundai Motor Company, and 2nd place was KIA Motors).

III. Volkswagen restructuring: Job sharing[14]

Volkswagen was founded as a German state-owned enterprise in 1937 under Adolf Hitler's Nazi government. After privatizing its shares in 1960, it became the largest automaker in Europe following the acquisition of the Audi Group in 1969 and Skoda in 1990.

In 1993, Volkswagen reached a peak of 103,000 employees in Germany, but the factory made no profit at all. Wages of workers comprised 25% of sales (its ratio of wages vs. total sales was 20% higher than competitors such as Ford and Opel), and their productivity was the lowest in the industry. In 1992 Volkswagen's net profit was only 147 million marks, a drop of 87% from the previous year, and became a deficit of 1.94 billion marks in 1993. This was a result of the fact that Japanese car companies had entered the European market in full swing and the company could not handle the aftereffects of the collapse of the economic bubble which occurred after German unification. German media at the time pointed out that Volkswagen should take restructuring measures as soon as possible.

Volkswagen announced plans to cut 30% of its German workers (about 31,300) by 1995. The union, after consultation with the company, chose to shorten the working hours without wage maintenance, instead of dismissal. In November 1993, Volkswagen signed a labor-management agreement to strengthen job security and competitiveness after bargaining for four weeks with the union (which agreed to introduce job-sharing). This agreement was a dramatic resolution, created between a company that originally tried to dismiss 30,000 workers and a union that worked desperately against layoffs. The agreement included three points: ① The core of the job sharing initiated in 1994 was that the company guaranteed the employment of the workers, while the union agreed to shorten the working hours without wage preservation (from 36 hours to 28.8 hours per week, with the introduction of a 4-day week). This reduced labor time by 20% and labor income by up to 20%. However, due to employment security, the trust between the union and the company improved, and additional

[14] Kim Tae-jung, and others, "Cases and Implications of Labor-Management Relations in a Slowdown Economy," 「CEO Information」, Samsung Economic Research Institute, May 5, 2009; Lee Won-duk, 「News Insight」, National Future Research Institute, Aug. 8, 2016; Lee Dae-hee, "Volkswagen's job sharing for all tripartites", Pressian, June 17, 2009.

measures for labor flexibility were taken. ② In 1995, the Ministry of Labor introduced a "Work Time Account System"[15] that covered wages equivalent to the existing working hours when production was reduced; the deficient hours were settled during subsequent production. As a result, the company laid the basis for a flexible adjustment of production volume in response to fluctuations in demand, and the shift system also diversified into a one-shift system or a three-shift system, depending on the characteristics of each system. ③ Workers with reduced working hours received a block-time benefit from the government, guaranteeing paid vocational education for up to six months. As a result, workers were able to increase their work proficiency even during idle hours and the company was able to reduce labor costs.

In other words, the core content of the labor-management agreement was that first, instead of guaranteeing the employment of all workers, they shortened working hours and cut labor costs, both by 20%. The second was to introduce a working time account system to replace overtime with vacation instead of allowance, while, if the work time fell short of the contractual working hours, the company would demand that the worker concerned work overtime when required. Through this agreement, the union achieved job security and the company was able to preserve its highly-skilled workforce as it controlled labor costs. The effects were immediate. In the first year, the company reduced labor costs by 1.6 billion marks. In addition, the proportion of labor costs to sales, which was 25% in 1993, dropped to 16% after six years. As a result, the labor productivity of workers, guaranteed to secure employment stability, rose by 6 percentage points.

Volkswagen's success was due to job-sharing and structural improvement. In particular, the innovation of the production process, which had been suffering from high cost problems, and the development of new cars suited to the market, coupled with effective marketing, saved the company. Cost reduction efforts such as platform integration and modularization greatly improved the profit structure of the company. At the time of the crisis in 1993, a total of 16 platforms were sharply reduced, enabling the company to succeed in common use and to produce a variety of derivative models at low cost. In 2000, Volkswagen had 10.3 models per platform, surpassing Chrysler (1.8), Ford (2.8) and GM (3.5). Furthermore, R & D costs, which are expensive due to the adoption of the joint platform, have declined by 3 billion marks annually.

In return for the union’s cooperation, the company responded with a guarantee of employment for all workers. The company also promised to create jobs by investing in the Hannover and Wolfsburg factories in Germany, instead of overseas factories. Volkswagen saved more than 1 trillion won (about 1.6 billion marks) over the year without employment reduction. The operating margin also improved from minus 8.7% in 1993 to plus 1.7% in 1998. Volkswagen's global sales volume has risen from 5.1 million units in 2004 (fourth in the world) to 9.93 million units in 2005, becoming the world's second-largest automaker after Toyota.

[15] The Working Time Account System is a system in which German companies save overtime and use it as vacation time. The system is designed to be used as a means of reducing labor costs and securing workers' employment.

IV. Lessons and Challenges

A company is a creature that constantly changes or disappears, in a competitive market. In order for a company to survive in a 'survival of the fittest' environment, constant adaptive restructuring is necessary. However, it is wrong to think that restructuring always requires mass dismissal. Restructuring can encompass various methods such as cost reduction and productivity improvement, reduction of working hours and wage cuts, in addition to labor-management cooperation. If dismissal is inevitable as a last resort, the dismissed workers should participate in job training and be given an opportunity to rejuvenate their mental and physical condition so they can get a new job and will not stay unemployed for a long period of time.[16]

Volkswagen introduced a "work-sharing" system that increased productivity while preserving jobs, which was a shock to Korean industry, which focused only on the dismissal of workers when restructuring.[17] In 2009, SsangYong Motor could have overcome many difficulties with incentives such as job-sharing rather than restructuring with one-sided layoffs, if both labor and management had only recognized their situation more maturely.

The survival of a corporation makes possible the continuous employment of workers. Since the employment of workers cannot be guaranteed without the survival of the enterprise, labor and management should seek a desirable direction for the survival of the enterprise and for the guarantee of employment. Managerial dismissal hinders the development of a company due to the lack of potential human resources due to the withdrawal of competent personnel. Therefore it is necessary to recover and restore employment by dividing the jobs in the manner of Volkswagen. This is a restructuring method in which labor and management can gain mutual benefit by restructuring in a manner in which both the company and the workers share the pain and overcome the difficulties.

V. Conclusion

Dismissed workers from SsangYong Motor endured the hardships of living as well as mental suffering during a long unemployment period, resulting in the deaths of more than 30 dismissed workers, who committed suicide. This was caused by the shortage of safety nets in Korea's social security system and the dual employment structure. As a solution for this problem, companies should adopt a variety of restructuring methods to enhance their competitiveness, while individuals should have lifelong vocational abilities, rendering them capable of re-employment. In addition, the government should provide unemployment benefits for job security and vocational skills education for reemployment so that workers can recover from unemployment.

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[16] Lee Won-deok, "For restructuring, is mass unemployment inevitable?" National Future Research Institute, Posted on its website on Aug. 2, 2018.

[17] Lee, Jinchul reported in E-daily paper: "We need to make mutual concessions between labor and management", June 1, 2016.

Representative Directors of Foreign Company Subsidiaries

I. Introduction

In general, labor law does not apply to a representative director because he has a delegated contractual relationship with his employer. This means that he is not entitled to retirement benefits, compensation for industrial accidents, unemployment benefits, legal protection from unfair dismissal, or other things that ordinary employees enjoy. A representative director does not have employee status because he is an ultimate decision maker who represents the company externally and has the right to decide personnel, operations and funding. However, if a representative director is employed by an actual employer and registered on the corporate register, even if simply for the sake of formality, as a representative for external activities, and if his work is performed under considerable supervision from the employer, he is recognized as an employee under the Labor Standards Act.

When a multinational corporation establishes a company in Korea, a local person is commonly hired as the representative director for efficiency and effectiveness. In this case, regardless of his legal status as a registered director, the representative director or the head of the company in Korea often does not have the authority of an employer. In this regard, I would like to examine specifically the distinction between employee and employer, some characteristics of foreign company subsidiaries, and the criteria for determining whether a representative director is also an employee.

II. The Distinction between Employee and Employer

1. The concept of employer

The term “employer” means a business owner, or a person responsible for management of a business or a person who works on behalf of a business owner with respect to matters relating to employees (Article 2(1-2) of the Labor Standards Act, or LSA). Here, the term “employer” means a person who operates a business through employees (Article 2 of the Wage Claim Guarantee Act). The person responsible for management of a business means a person who is responsible for general business management and is entrusted with comprehensive delegation authority from the employer for management of all or part of the business and is able to represent or delegate the business externally. This includes representative directors, registered directors and others. Regardless of whether the position includes “representative” or “director” in the name, the person who actually exercises the management rights of the company is the manager. [18]

The representative director or director is a person with rights to represent the company, holds executive power according to the company's articles of incorporation, is entrusted with certain administrative powers by the company, and is not an employee under the Labor

[18] Supreme Court ruling on May 11, 2006, 2005do 8364; Jongryul Lim, 『Labor Law』, 14th edition, 2016, Parkyoungsa, p. 40.

Standards Act. However, if a representative director is employed by an actual employer and registered on the corporate register, even if simply for the sake of formality, as a representative for external activities, and if his work is performed under considerable supervision from the employer, he may be the employee stipulated by the Labor Standards Act. [19]

2. The concept of employee

The term “employee” means a person who offers work to a business or workplace to earn wages, regardless of the kind of job he/she is engaged in (Article 2 (1-1) of the LSA). Whether or not a person has employee status depends on whether or not that person has provided work to an employer, in a subordinate relationship, that is performed to earn a wage, regardless of the type of contract. [20] Because of his authority to represent the company externally and enforce the business of the company internally, a representative director has employer status. However, if the representative director position is only formal or nominal, if his management is considerably under the direction and supervision of the actual employer, and if he is paid wages in return for the work, the person in that representative director position is an employee according to the Labor Standards Act.[21]

III. Characteristics of a Representative Director of a Foreign Company Subsidiary

1. Representative directors of foreign company subsidiaries

If a domestic foreign office established by a multinational corporation manages its business independently with a certain authority and the representative director is delegated with the right to independently manage the local business within a certain scope, that representative director retains employer status.

In this regard, a judicial ruling states that, "Generally, multinational corporations are a group of several corporations of different nationalities, and legally separated. A multinational corporation as a business group is not comparable to a group of constituent companies but to a parent company which is the ruling supervisory head and is at the top of its subsidiaries, collectively deciding all matters concerning the multinational corporation. Subsidiaries are under the control of the parent company, and there is a controlling subsidiary relationship between the parent company and its subsidiaries. Accordingly, there is a certain supervisory relationship between the parent company’s executives and the subsidiary company’s executives due to the business connections between the parent and subsidiary. This is similar to the subordinate relationship between an employer and company employees, but differs in that it is a subordinate relationship that occurs only in the interindustry relationship between a parent and a subsidiary. As a result, as there is a certain directive and supervisory relationship between executives of a controlling parent company and executives of a subsidiary company, directors with executive powers in the subsidiary cannot be regarded as employees of the

[19] Supreme Court ruling on Sep. 26, 2003, 2002da64681.
[20] Supreme Court ruling on Sep. 26, 2013, 2012do6537.
[21] Supreme Court ruling May 29, 2014, 2012da98720.

subsidiary." [22] Nevertheless, if the representative director of a subsidiary of a foreign company receives directions and is supervised by the parent country during the carrying out of his duties, and is essentially an intermediate manager with almost no independence, he is not an employer but an employee.

2. Determining employee status of a representative director

Whether or not the person is an "employee under the Labor Standards Act" shall be determined by whether he has provided work to the employer in a business or workplace for the purpose of earning wage, [23] and not on whether the representative director is registered as such on the corporate register. [24] In actuality, a representative director is not an employee because he represents the company externally and has the authority to execute the affairs of the company internally. However, if he is registered as a representative director of the corporation, but does not have the right to execute the internal affairs of the company or handle its external affairs, his title is simply formal and nominal while there is another manager who actually makes the decisions, and if he is provided wages not for his performance in management or work, but according to the nature of the work itself, he is an employee in actuality. [25]

Therefore, the two most important factors affecting the determination of whether a representative director of a foreign company subsidiary is an employee or not are: (i) the existence of significant supervision over the representative director, and (ii) whether the person has been registered as the representative director on the corporate register.

(1) Existence of significant supervision over the representative director

"In the course of job performance, whether the employee has been supervised and controlled by the employer substantially and individually or not" was quoted in a lawsuit in 1996 regarding a part-time instructor's employee status at a private institute.[26] However, in a lawsuit in 2006 regarding the employee status of a full-time instructor[27], the above supervision was reduced to "considerably supervised and controlled by the employer". For a representative director, whether he is an employee or not depends on whether his work has been considerably supervised and controlled by the employer. This change is due to the diversification of occupations, from the simple structure of production and office employees to the complex service industry. [28]

(2) Whether the person has been registered as the representative director on the corporate register

An executive director's status as employee is often recognized by whether he was registered as a director on the corporate register. In general, registered directors are denied employee status, but this is not the case if his duties are performed under considerable supervision and

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[22] Seoul High Court ruling on Dec. 21, 2012, 2012na52795.
[23] Supreme Court ruling on Feb. 24, 1999, 98doo2201; Supreme Court ruling on Feb 9, 2001, 2000da57498.
[24] Supreme Court ruling on Sep. 4, 2002, 2002da4429.
[25] Supreme Court ruling on Aug. 20, 2009, 2009doo1440.
[26] Supreme Court ruling on Jul. 30, 1996, 96do732.
[27] Supreme Court ruling on Dec. 7, 2006, 2004da29736.
[28] Donghee Bae, "A Study on Employee Status Based on Review of Court Rulings", Korea University Ph.D thesis, 2016, p. 59; Bongsoo Jung, "A Study on the Employee Status of Native English Teachers", Korea University MA thesis, 2013, p. 32.

control. On the other hand, an unregistered director is recognized as an employee in principle, but denied employee status if his own decision-making authority or exclusive right to execute the work is clear.[29]

IV. Criteria for Judicial Ruling and Application

1. Criteria for determining employee status

The Supreme Court issued clear criteria for determining employee status in a lawsuit involving a full-time instructor at a private institute in 2006. These criteria can also be used to determine employee status for the representative director of a foreign company: first, employee status may exist regardless of the type of contract; second, the criteria for determination of a subordinate relationship are enumerated as the 9 items in the paragraph below; third, the existence of conditions suggested as signs of employee status shall be determined by considering whether the employer can unilaterally decide whether these conditions exist.

In this case, the Supreme Court[30] ruled, "Whether a person is considered an employee under the Labor Standards Act shall be determined by whether, in actual practice, that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages, regardless of the contract type, such as an employment contract or a service contract. Whether or not a subordinate relationship with the employer exists shall be determined by collectively considering: ① whether the rules of employment or other service regulations apply to a person; whether that person's duties are decided by the employer, and whether the person has been significantly supervised or directed during his/her work performance by the employer; ② whether his/her working hours and workplaces were designated and restricted by the employer; ③ who owns the equipment, raw materials or working tools; ④ whether the person can be substituted by a third party hired by the person; ⑤ whether the person's service is directly related to business profit or loss as is the case in one's own business; ⑥ whether payment is remuneration for work performed or ⑦ whether a basic or fixed wage is determined in advance; ⑧ whether income tax is deducted for withholding purposes; whether the person is registered as an employee by the Social Security Insurance Act or other laws; ⑨ whether work provision is continuous and exclusive to the employer; and the economic and social conditions of both sides. Provided, that as whether basic wage or fixed wage is determined, whether income tax is deducted for withholding, and whether the person is registered for social security insurances could be determined at the employer's discretion by taking advantage of his/her superior position, the characteristics of employee cannot be denied because of the absence of these mentioned items." [31]

"The above criteria are not applied formally or uniformly, but in the event facts equivalent to the above items exist, Employment status should be determined after reviewing whether these facts were decided by the employer's superior position or required naturally by such job characteristics."[32]

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[29] Taesik Ahn, "A Criteria for Determining Employee Status for Registered Directors", 「Law and Policy」, Vol. 22, Korea Policy Association, June 2014, p. 624.

[30] Supreme Court ruling 2004da29736, on Dec. 7, 2006: Full-time instructors' employee status.

[31] Supreme Court ruling on Dec. 7, 2006, 2004da29736.

[32] Supreme Court ruling on May 11, 2006, 2005da20910: Ready-mix truck driver case.

2. Determining Employee Status[33]

Supreme Court Ruling (9 items: details for judgment)		Factual Grounds for the Representative Director	Judgment	
			Employee	Employer
1) Employer's direction & supervision	① Application of Rules of Employment; type of contract	Whether the Rules of Employment were applied; type of contract (Employment contract or service contract)	X	●
	② Right to manage personnel	Rights to hire, dismiss, and discipline employees	●	X
	③ Arrival/departure from work, annual leave	No control over arrival/departure time, no annual leave granted		
	④ Exclusive right to execute work and financial authority	Exclusive work performance, considerable supervision during work performance; right to determine how corporate money is spent		
2) Working hours and work places	⑤ Working hours	Whether working hours are controlled		
	⑥ Work place	Whether the workplace is mandated		
3) Equipment, working tools, expenses	⑦ Ownership of equipment, working tools	Who owns equipment, tools, etc.; whether damage claims are possible or not		
	⑧ Expenses	Whether operating costs are subsidized, expenses reimbursed, corporate credit card, etc.		
4) Substitution	⑨ Substitution with a 3rd party	Whether work is exclusive or person can be substituted in the event of absence		
5) Earning	⑩ Pursuit of profit	Whether pursuit of profit through individual effort is possible		
	⑪ Independent business	Whether independent business is possible		
	⑫ Liabilities for damage	Whether the director is responsible for losses		
6) Characteristics of wage	⑬ Remuneration for labor	Whether wage is decided by evaluation of total sales, or paid at a fixed amount in return for work provided		
	⑭ Independent business	Whether the individual can create his own profit		
7) Basic pay	⑮ Whether basic pay is fixed	Majority of pay is based on basic wage or incentive pay		
8) Income tax, etc.	⑯ Income tax and social security insurances	Whether corporate tax or income tax is deducted whether premiums for social security insurances are deducted		
9) Continuous service, etc.	⑰ Continuous work	Work is continuous		
	⑱ Exclusive work	Whether the director can work for another company during employment		
Review/Evaluation		<Describe the above items, which are particularly strong>	total	total

* In the review, weighting is divided into two stages: employee status and employer status. The more checkup signs are calculated in the total sums, the stronger status is considered.

[33] Bongsoo Jung, "A Study on the Employee Status of Native English Teachers", p. 79: adjusted to evaluate a representative director's employee status.

V. Conclusion

In judging the employment status of a representative director of a foreign company subsidiary, there is a tendency to simply decide by considering whether he has been registered as a director, whether the executive has written a commission contract, and whether he has been given the title of “representative director”. It is common for multinational corporations to have a controlling and dominant relationship with their foreign subsidiaries, which means the directors of those subsidiaries in Korea must report business details to their parent companies and receive instructions in turn. It can be difficult to distinguish between normal corporate relations and whether a director is an employee or not.

The representative director of a foreign company subsidiary is generally comprehensively instructed and supervised by the head office of the multinational company on company operations and does not have the right to manage personnel, has limited executive authority and limited decision-making powers on the use of funds. Even department managers should report their business practices to the department directors at the parent company. In such cases, the representative director of a foreign company subsidiary may be judged to be an employee. Therefore, when judging the employment status of a representative director of a foreign company subsidiary, it is necessary to look comprehensively at the director’s exclusive rights to execute work, the right to manage personnel, and the right to spend company money at his own discretion, not by whether he has formally been registered as a representative director, his Korean title, or has signed a service contract.

Method for Establishing a Labor Union

1. Procedures for establishing a labor union

To establish a labor union, the employees shall complete an application form for labor union establishment and submit it, along with their Union's bylaws, to the related administrative office, and the administrative office shall issue a Certificate of Labor Union Establishment as long as there is no reason to reject it. Before this, the employees who want to establish a labor union shall hold a general meeting where they shall establish the union bylaws and elect union officials. The administrative office very often requests meeting minutes of the general meeting as verification that the bylaws were legitimately established and union officials properly elected. Therefore the meeting minutes are used to objectively verify that the labor union was established according to legally appropriate procedures.

2. Meeting minutes of a General Meeting for Labor Union Establishment (Sample)

- Date/time: _____
- Place: _____
- Attendants: _____

Order of Meeting
1. Opening Declaration
2. Progress Report
3. Election of Chairman
4. Matters to Determine
   1) Review of bylaws and determination; 2) Election of Union officials;
   3) Matters concerning operational plans and budgets
5. Closing of the meeting

-. Opening Declaration
Host: We would like to start the general meeting for the establishment of this Labor Union.
Labor ceremony (omitted)
-. Progress Report
-. Election of temporary Chairman
Host: We would like to designate the acting Chairman for the meeting. What would you think of appointing the Arrangement Committee Chairman as the acting Chairman?
All: Yes, we agree.
000, who was appointed as the acting Chairman, gives a greeting speech and starts the meeting.
Acting Chairman: I hereby declare that the general meeting for establishment of this Labor Union is being held with 00 in attendance.
-. Selection of Secretary
Acting Chairman: I would like to suggest 000 for our secretary. Do you agree?
All: Yes, we agree.
-. Matters to Determine
Agenda 1 – Review of bylaws and determination

Acting Chairman: 000 will introduce and explain the bylaws of the Labor Union.
(000 explains the bylaws.)
Acting Chairman: We will now discuss the suggested bylaws. Are there any concerns or questions?
000 suggests that the bylaws be determined by a vote.
All agree.
Acting Chairman: We will take a direct, secret vote concerning the bylaws according to the Labor Union Act. (Voting and counting process is taken.)
Acting Chairman: five people were in attendance, and in the voting, all five agreed on the bylaws. The bylaws are established by majority agreement. (Applause)

Agenda 2 – Election of labor union officials
Acting Chairman: Now we are going to hire union officials. Any suggestions as to the method of selection?
000: After we elect the Chairman of the Labor Union, let's choose other officials by recommendation. What do you think?
Acting Chairman: Do you agree with 000's suggestion?
All agree.
Acting Chairman: Now we will select our Chairman. Nominations?
000 would like to nominate 000.)
000: 000 would like to nominate 000.
Acting Chairman: In the voting, 000 got 3 votes and 000 got two. So, 000 has been elected Chairman by majority vote.
The Chairman greets the attendants.
Acting Chairman: We will now select other labor union officials. How shall we select them?
000: I would like to suggest that the Chairman nominate three other union officials.
Chairman: Do you agree?
All agree.
The Chairman suggests 000 for Vice-Chairman and receives consent.
Chairman: I would like to suggest 000 as Secretary.
All agree.
Chairman: I would like to suggest 000 as Auditor.
All agree. Applause.
Agenda 3 – Matters concerning operational plans and budgets
Chairman: As we are not ready for drafts of operational plans and budgets, I would like to suggest an additional temporary general meeting to discuss them.
All agree.
- Other topics
Chairman: do you have any other matters to discuss here?
No further matters brought up.

- Closing of the meeting
Chairman: Thank you for your time and effort. Now we will close this meeting for the establishment of the labor union. Thank you.

Date: _____
Chairman: 000 Secretary: 000

3. Documents Required to Establish a Labor Union

<table>
<tr><td colspan="5">Application for Labor Union Establishment</td><td>Disposal
3 days</td></tr>
<tr><td colspan="2">① Name of the union</td><td></td><td>② Type of union</td><td></td></tr>
<tr><td colspan="2">③ Address</td><td></td><td>④ Number of union</td><td></td></tr>
<tr><td rowspan="3">Chair
-man</td><td>⑤ Name</td><td></td><td>⑥ Registration No</td><td></td></tr>
<tr><td>⑦ Address</td><td></td><td>⑧ Telephone No</td><td></td></tr>
<tr><td>⑨ Department</td><td></td><td>⑩ Title</td><td></td></tr>
<tr><td colspan="2">⑪ Related union(s)</td><td colspan="3"></td></tr>
<tr><td colspan="6">The applicant has held a general meeting with _____ other employees designed to establish a labor union at _____ on _____ and hereby submits an application for labor union establishment.

Date: _____

Union Chairman (Signature)

To_____Administrative Office</td></tr>
<tr><td colspan="6">Attachments
1. Bylaws; 2. List of Union Officials</td></tr>
</table>

List of Labor Union Officials

Title	Name	Registration No.	Address
Chairman			
Vice-Chairman			
Secretary			
Auditor			

4. Establishing bylaws: Please see www.k-labor.com

Foreign Teachers' Labor Union

I. Introduction

More than 15,000 foreign English teachers are working in Korea with legitimate work visas (E-2) as of 2009, but they have not yet received sufficient legal protection under labor law. A labor union established by foreign English teachers has a lot of meaning, as it is the first legal entity for foreign English teachers, established under Korean labor law. The labor union is able to promote job security for them, and gives them the ability to collectively confront unlawful labor practices by some employers. Most foreign English teachers have been receiving fair treatment in accordance with their employment contract, but there are still more than a few who have suffered from their employers' unilateral changes of working conditions or non-fulfillment of legally-binding contracts. Frequently occurring examples include dismissing the foreign teacher in the eleventh month to avoid paying severance pay, delaying payment of the last month's wages and severance pay, dismissing English teachers without justifiable reason in the middle of the contract period because employers dislike them, and not paying overtime allowance for overtime work. I strongly believe that this establishment of a labor union for foreign teachers will contribute to the betterment of their working conditions and promote job security by legitimately confronting unlawful labor practices of some of their employers.

Here, I would like to explain the background reasons for this labor union, and I would also like to show how the labor union and its by-laws (self-regulating rules) can be established.

II. Background to the Establishment of the Labor Union

1. Disputes on working hours

In early September 2009, five foreign English teachers working at an institute in Inchon visited this labor law firm and we began establishing a case regarding their unpaid overtime allowance. The teachers were supposed to work 30 hours per week, 6 hours per day, to complete their contractual working hours according to their employment contract, but their employer had them working 40 hours a week by keeping them at work for 8 hours a day, which resulted in two hours of overtime every day. The employment contract stipulates, "The employee shall work 30 hours per week, or 120 hours per month. If the employee agrees to work overtime, the employer shall pay a 15,000 won overtime rate per hour." At a meeting between the employer and the teachers on September 1, one female foreign English teacher brought up the issue of working overtime without being paid for overtime, and the employer gave her verbal notice that her employment would be terminated in one month. Uncertain of their rights, the foreign English teachers brought their concerns to this labor law firm as a group, seeking remedy for their situation. Then the English teachers collectively refused to do any more

overtime that was not stipulated in the employment contract.

The labor inspector in charge of this petition case investigated both parties. The employer stated that the actual teaching hours were only 6 per day, but the remaining hours were preparation time required for teaching. However, the teachers claimed they had to come to the institute for preparation, and if they were late, they were penalized. Therefore, this mandatory preparation time should be regarded as working hours. In this dispute, the labor inspector confirmed that each day the teachers had to stay in the institute for two hours above the regulated 6 working hours, but that they had some time for dinner between their working hours. The labor inspector concluded that the employer be ordered to pay 50% of what the teachers claimed as unpaid overtime work.

2. Disadvantageous treatment and establishment of the labor union

The employer decided not to dismiss the female teacher who initially brought up the unpaid overtime as the labor attorney submitted the petition to the labor office. However, right after the petition was concluded, the employer called a disciplinary hearing for the teacher concerned and dismissed her immediately. The same teachers who filed the first petition were sure that the same thing would happen to them, so they visited this labor law firm again on November 12, 2009, and requested that a labor union be established.

To aid them, this labor attorney gave some lectures to the five foreign teachers on the benefits of establishing a labor union, how to establish and operate one, and then assisted them in their general meeting designed to establish the labor union, the bylaws and labor union registration. In particular, this labor attorney had to complete, in English as well as Korean, the documents required to register the labor union: application forms, bylaws, and meeting minutes for the general meeting. These bilingual documents were designed not only to help the foreign English teachers operate the labor union democratically and independently, but also to ensure they were able to provide qualified documents for the district (Gu) official in charge of union registration in Inchon. The district official concerned thoroughly reviewed the documents for registering the labor union, checked with the labor office in that area, and, finding nothing amiss, issued a Certificate of Labor Union Establishment on November 24, 2009.

III. Collective Bargaining

1. Summary

Five foreign teachers working at a language institute in Yeonsoo-Gu, Inchon, established a labor union on November 19, 2009, and started collective bargaining. The labor union suggested 21 items to the employer for collective bargaining on December 21, 2009, but the employer intentionally wasted time, rejecting collective bargaining, without answering the labor union's request. The employer's intention was to delay as long as possible, knowing that the union members' employment contracts would expire. However, due to repeated requests

by the labor union, the employer unwillingly began collective bargaining on April 13 to 14, 2010. The employer agreed to accept the contents equivalent to the conditions of the employment contract, but firmly rejected four items related to improvement of working conditions. Furthermore, the employer declared that he would not participate in any further collective bargaining and did not respond to further requests to engage in collective bargaining. The labor union decided to engage the employer by taking collective action, and applied to the Incheon Regional Labor Commission for an adjustment of labor disputes as a procedure to obtain the right to strike.

The Mediation Committee in the Labor Commission persuaded the labor union and management to talk, extending the mediation period due to a serious situation arising because of the disagreement between the union and the employer, and drew up an adjusted collective agreement that both parties could agree to. Even though the labor union did not have all its demands fulfilled, it was able to finalize a collective agreement by acquiring some concrete working conditions regarding disciplinary procedure, longer vacation, and recognition of the labor union entity. Here, I would like to explain the processes of detailed collective bargaining and how the collective agreement was drawn up by the Mediation Committee of the Labor Commission.

2. Concluding a Collective Agreement through Mediation

(1) Timeline to the conclusion of collective bargaining

- Nov 19, 2009: Labor union established
- Dec 21, 2009: Twenty one items for collective bargaining brought to the employer by the labor union
- Apr 13 ~ 14, 2010: Collective bargaining begun
  (17 items were agreed upon, 4 unresolved).
- Apr 20, 2010: The employer declared the end of collective bargaining and refused to engage in any more.

(2) Mediation by the Labor Commission, and the Resulting Collective Agreement

- Apr 28, 2010: The labor union applied to the Labor Commission for adjustment of labor disputes
- May 6, 2010. 10:00 ~ 12:00: The mediation hearing confirmed the existence of disputes.
  Mediation begun between the labor union and management.
- May 13, 2010. 10:00 ~ 16:00 Resolution of labor disputes and conclusion of a collective agreement

IV. Major Disputed Items

1. Introduction of disciplinary procedures

(1) Items Agreed Upon

Article 7 (Types of Disciplinary Action)
1.There are four types of disciplinary action:

written warning; salary reduction; suspension from work; and dismissal,

2. Details follow each article of the employment contract.

Article 8 (Disciplinary Hearings)

Union members must be informed of any disciplinary hearing in writing at least three working days in advance. These hearings will be conducted solely in English as far as possible.

Article 9 (Disciplinary Committee)

1. A Disciplinary Committee shall be composed of one chairman (the employer), two union members designated by the union chairman, and two persons designated by the employer.
2. A decision or vote will pass the Disciplinary Committee only if more than half of the Committee members attend the meeting and if at least half of the Committee members agree with the decision. However, if there is an equal vote on an issue, the chairman shall decide.
3. The chairman of the Disciplinary Committee will give Committee members at least 3-calendar days written notice in the event of a Disciplinary Hearing.

(2) Evaluation

Previous disciplinary actions were unfair because the employer had presided over disciplinary hearings in Korean for foreign teachers who did not understand Korean. However, this collective agreement 1) introduces disciplinary procedures, 2) provides the opportunity to submit testimony, and 3) composes the Disciplinary Action Committee of an equal number of members from the labor union and the employer, and 4) shall be held in the English language.

2. Use of annual leave

(1) Previous employment contract

"The employee is entitled to 10 days of paid leave for the entire year according to the rules and procedures of the company. Paid leave cannot be taken less than three months after the beginning of employment and no more than 5 days can be used at one time.

(2) Items agreed upon

1. Employees are allowed to take up to 6 consecutive days off as paid vacation (including off-days). In cases where an employee takes 7 to 9 days off as paid vacation (no more than 5 of these regular working days), the employee shall leave a 600,000 won deposit with the employer to ensure his/her return to work.
2. When an employee returns from vacation, the employer shall refund the deposit immediately. However, if the employee does not return to work by the designated returning day, the deposit will not be returned.

(3) Evaluation

The previous rules allowed employees to use up to 6 days including a weekend, but the revised rule was improved to allow up to 9 consecutive days. During mediation, the employer expressed his fear that employees would not return to work after visiting his/her home country if he/she took longer leave. The employer accepted the deposit method where the employee deposits a certain amount of money when taking more than 7 consecutive days off. Due to the distinct situation of foreign teachers, the union had to introduce this deposit system, but it was desired that this item be deleted in the next collective agreement once mutual trust has developed.

3. Provision of recess hours

(1) Request

Article 14 (Scheduling)

The Company shall not give teachers a schedule that requires them to work in a classroom with students for more than 170 consecutive minutes per day. If the Company wishes to give a teacher a schedule of more than 170 minutes of teaching, then the teacher must be given 30 minutes of office time after the initial 170 minutes.

(2) Reason for requesting recess hours and related collective bargaining

Foreign teachers were unable to have a dinner break one or two days a week when they had to teach 4 pm to 10 pm non-stop. The labor union requested recess to eat dinner. The employer was very strongly against providing recess, explaining that, if allowed, the employer would have to hire an additional foreign teacher and rearrange the schedules already announced. The association of regional institute owners also insisted that the employer never accept this demand.

(3) Evaluation

The labor union had to withdraw this demand in order to conclude the collective agreement. However, "an employer shall allow a recess period of 30 minutes for every 4 working hours during the working day" according to Article 54 of the Labor Standards Act, so this labor attorney, who supported the labor union, persuaded the labor union to withdraw this demand at this time, explaining that this dispute could be resolved separately through a claim to the Labor Office.

4. Request for an English translation of the Rules Of Employment

(1) Request

Article 18 (Translation of Documents)

In the event that Company documents, i.e. the Rules Of Employment, are not translated into a language that union members can understand, the Company will pay for a certified translation. If the Company requires the Union to pay for the translation, the Company will reimburse the Union for 100% of the costs within 14 calendar days upon presentation of a receipt.

(2) Reason for omission

The Labor Commission's mediation officials persuaded the labor union to withdraw this article, explaining that this is not directly related to working conditions and that the labor union can resolve this matter with union fees.

(3) Evaluation

It seemed a matter of course that a language institute where foreign teachers work should provide the Rules Of Employment in English as well as in Korean. However, as the employer would not accept this demand, the labor union decided to accept its omission in favor of concluding a collective agreement.

V. Outcome and Limit of Concluding the Collective Agreement

There are some important outcomes to the establishment of the first foreign teachers' labor union under Korean law, and their conclusion of a collective agreement on working conditions. The first is that the labor union was able to achieve better working conditions through the unity of the employees, things which could hardly be expected from individual effort alone. The second is that foreign teachers were able to exercise their employment rights guaranteed by the Labor Union Act. That is, through organization into a labor union, the foreign teachers were protected in the same way as Korean employees under the Labor Union Act. Thirdly, even though the concluded collective agreement was less than the union members wanted, they were relatively satisfied with the results, and their decision to establish a labor union was confirmed to be in their best interest.

Despite these positive outcomes, the labor union could not take full advantage of its collective power due to the fixed contracts of the teachers, and they had to be satisfied with a lesser achievement. First of all, as the foreign teachers involved all have one year contracts, they have to renew employment every year, or, if their contracts are not renewed, they have to leave the workplace. The employer greatly disliked the idea of a labor union, intentionally evaded its requests for collective bargaining, and attempted to simply wait until the end of their employment contracts rather than deal with the teachers as a union. Because of these situations, unique to foreign workers in Korea, the foreign teachers' union had to conclude a collective agreement with mediation by the Labor Commission.

Full-Time Union Officers and the Paid Time-off System

I. Overview

According to the Labor Union Act, when an employer subsidizes wages to full-time union officers engaged in duties only for the labor union, this is considered to be unfair labor practice by the employer, and the employer shall be subject to a punishment of up to two years in prison or a fine of 20 million won. Since the time this provision was added to the Labor Union Act in 1997, implementation has been delayed several times, but starting July 1, 2010, it will finally come into effect by a revision of the Labor Union Act on December 31, 2009. This revision, however, allows a minimal number of paid full-time union officers by introducing paid time-off for some union activities. The paid time-off can allow for full-time union officers within a maximum number of hours when the labor union and the employer agree on paid time-off. The employer shall not subsidize wages for full-time union officers in cases where there is no agreement between both parties. The Ministry of Labor announced in May 2010/June 2013, the maximum number of paid time-off hours as decided by the Union Activity Review Commission. The following explains the revision of the Act concerning the prohibition against payment of wages to full-time union officers, and application of the revision, based upon guidelines from the Ministry of Labor.

II. Prohibition Against Payment of Wages to Full-Time Union Officers

1. Current law

Labor Union Act, Article 24 (Full-Time Officer of a Labor Union)

(2) Those who are engaged in duties only for labor unions in accordance with paragraph (1) shall not be remunerated in any way by employers for the duration of their tenure.

Article 81 (Unfair Labor Practices)

4. Payment of wages for full-time officers of a labor union or financial support for the operation of a labor union.

Addenda, Article 6 (Exceptions to Full-Time Officers of a Labor Union)

(1) The provisions of Articles 24 (2) and Article 81 (4) (limited to the provisions concerning payment of wages for full-time officers of a labor union) shall not apply until December 31, 2009.

2. Implementation of the Act (Revised January 1, 2010)

The prohibition against payment of wages to full-time union officers is to be implemented on July 1, 2010. Exceptions will be made when a labor union has already stipulated a wage subsidy for its full-time union officers in the collective agreement before the Labor Union Act was revised. In such cases, the wage subsidy will be allowed for the effective period of the collective agreement, up to 2 years.

This newly revised Act introduced a ‘paid time-off system’ by tripartite agreement of union, management, and the government. This stipulates that the company can provide a minimal number of paid time-off hours for union activities, even though a wage subsidy for full-time union officers is prohibited. It is regarded as work-provision when labor union officers are engaged in collaborative activities with the company such as collective bargaining or consultation, grievance-handling, industrial safety issues, etc. and labor union

maintenance/management tasks designed to promote good relations between labor and management. To determine the maximum number of paid time-off hours and the items considered as paid time-off, a Union Activity Review Commission (UARC) was composed under jurisdiction of the Ministry of Labor. The UARC consisted of 15 representatives: 5 recommended by labor, 5 by management, and 5 public committee representatives recommended by the government.

III. Paid Time-Off System as an Exception to the Wage Subsidy Prohibition

The Union Activity Review Commission (UARC) determined the maximum number of paid time-off hours at a conference attended by labor, management and public committee representatives in June 2013, which was announced by the Ministry of Labor & Employment and is implemented from July 1, 2013. Wage subsidy for full-time union officers is prohibited, but if the collective agreement stipulates such subsidy, activities for which full-time union officers receive a subsidy from the employer are allowed within the maximum number of paid time-off hours regulated by the Ministry of Labor. If there is no such stipulation in the collective agreement, full-time union officers' activities shall not be subsidized financially in principle.

Number of Union Members	Maximum Paid Time-Off Hours (Full-Time Union Officers)	Maximum Number of Part-Time Union Officers
Fewer than 100	Up to 2,000 hours (1)	○ Companies with fewer than 300 union members: in cases where paid time-off is split between part-time officers, the number of part-time union officers shall not exceed three times the number in parentheses. ○ Companies with 300 union members or more: in cases where paid time-off is split between part-time officers, the number of part-time union officers shall not exceed two times the number in parentheses.
100 ~ 199	Up to 3,000 hours (1.5)	
200 ~ 299	Up to 4,000 hours (2)	
300 ~ 499	Up to 5,000 hours (2.5)	
500 ~ 999	Up to 6,000 hours (3)	
1,000 ~ 2,999	Up to 10,000 hours (5)	
3,000 ~ 4,999	Up to 14,000 hours (7)	
5,000 ~ 9,999	Up to 22,000 hours (11)	
10,000 ~ 14,999	Up to 28,000 hours (14)	
15,000 or more	Up to 36,000 hours (18)	

1) "Number of Union Members" refers to the total number of union members at an identical business or workplace.
2) 2,000 Time-Off Hours required to maintain one full-time union officer (considering ⓐ 2,088 hours = 40 hours per week x 52 weeks + 8 hours; ⓑ annual leave)
3) Implementation: The above shall enter into force as of July 1, 2013. In cases where the company has a collective agreement effective July 1, 2013, the above is applied from the day after the current collective agreement's effective period is expired.

IV. Application of Paid Time-Off

1. Question) Three full-time union officers are allowed for a workplace with 500 union members according to the maximum number of paid full-time union officers determined by the Union Activity Review Commission (UARC). Can a labor union that has two full-time union officers go on strike to demand one more full-time union officer?

Answer) If a labor union goes on strike to acquire more full-time union officers than the maximum allowed according to the paid time-off table, this is illegal. Industrial action is only permitted when demands are related to the improvement of working conditions like wages, working hours and allowances. That is, going on strike is only allowed for demands related to a dispute of interests (normative items). However, if the labor union goes on strike to demand things such as more full-time union officers, payment for union activities during working hours and other contractual issues (a rights dispute), such industrial action is illegal. It is illegal for a labor union to go on strike to demand paid union hours in addition to those stipulated by the paid time-off guidelines in the Labor Union Act.

2. Question) When an employer refuses demands from a labor union, does the labor union have to accept the refusal?

Answer) No, it doesn't. When the labor union goes on strike over a demand for a wage increase, demanding more paid time-off for full-time union officers as part of its industrial action may be justifiable.

3. Question) Paid time-off is only applicable to full-time union officers engaged in union activities. That is, union activities covered by this paid time-off are Labor Union Act-related collective bargaining, consultation, industrial safety issues, grievance-handling, and labor union maintenance/management tasks designed to promote good relations between labor and management. Considering this, will the following be regarded as paid hours: additional labor-management meetings regulated by the Industrial Safety and Health Act, the Act concerning the Promotion of Worker Participation and Cooperation (Labor-Management Council Act), and the Labor Standards Act, as well as the Labor Union Act?

Answer) Paid time-off is only applicable to full-time labor union officers engaged in union activities according to the Labor Union Act. However, activities in additional meetings regulated by the Industrial Safety and Health Act, the Labor Management Council Act and the Labor Standards Act can be regarded as paid hours.

4. Question) If the labor union and the company collaborate to increase the number of paid hours, is it possible to increase the number of paid full-time union officers limited by the maximum time-off?

Answer) Since full-time union officers, for which paid time-off of the Labor Union Act applies, are carrying out activities like industrial safety, collective bargaining, consultation, and grievance-handling, a limited number of additional employees would be necessary in order to participate in Labor-Management meetings. If the company considers all or part of the work done by employees in grievance-handling as time-off, thus exceeding the stipulated maximum time-off, this is unfair labor practice by the employer, and the employer would be punished for it. The Ministry of Labor plans to carefully inspect workplaces to prevent any unfair labor practices from now on, and will visit companies to see whether Workplace Improvement Committees, Industrial Safety and Health Committee, and Labor-Management Councils (required by the Labor-Management Council Act, the Labor Standards Act, and the Industrial Safety and Health Act) are being operated properly and in ways appropriate to their purposes.

5. Question) The maximum number of full-time union officers is 18 for Hyundai Motors Company (HMC), which has 45,000 employees. Can the number of full-time union officers be increased when Labor-Management meetings are constituted continuously according to the Industrial Safety and Health Act, the Labor-Management Council Act, and the Labor Standards Act?

Answer) From time to time, the number of part-time union officers can increase whenever necessary. However, such numbers will not be equal to the numbers common today. It is a fact that there are many full-time union officers without specified duties who participate in these Labor-Management meetings on a regular basis.

6. Question) Is participation by ordinary union members in a general meeting paid or unpaid when during working hours?

Answer) This is what the labor union and the company need to decide as a policy. It is not simple to determine all such meetings as unpaid. And on the other hand, even though a company allows all time spent in general meetings as paid time-off, it is not always fair to simply punish the employer.

7. Question) Is a wage subsidy ordinary wages or average wages for a full-time union officer?

Answer) This would be determined by agreement between labor and management at the workplace involved. Consideration of wage subsidies as average wages would apply for companies like HMC that have previously considered wage subsidies as average wages for their full-time union officers. If the full-time union officer receives an overtime allowance and holiday work allowance, those to whom the paid time-off system applied in the past, shall have it applied as before. If the Ministry of Labor interrupts the payment criteria of private companies, this would cause more disputes between labor unions and employers.

8. Question) Labor union chairmen have frequently been provided a car and driver. Under the current paid time-off system, is it acceptable for the company to provide such things?

Answer) According to the paid time-off system a company would be punished for unfair labor practice if it provides a car and driver to any of its full-time union officers.

9. Question) Is it acceptable for the labor union and the company to simply stipulate paid time-off hours in the collective agreement, without stipulating the number of full-time union officers?

Answer) According to the Labor Union Act, paid time-off hours and the union personnel who can use them can be stipulated in the collective agreement. If so, the labor union and the company together shall determine the maximum number of paid time-off hours and the union members who can use them. As an example, if labor and management in a workplace with 350 union members (with a maximum of 5,000 paid time-off hours) agree on 4,000 hours of paid time-off, ‘4,000 hours of paid time-off: two full-time union officers’ (or one full-time union officer and two part-time union officers) shall be stipulated in the collective agreement. For a concrete list of full or part-time union officers, the labor union shall also notify the company ahead of any union activities.

Plural Labor Unions[34]

I. Understanding of the Plural Union System

1. Concept

Starting July 1, 2011, employees are free to organize two or more labor unions in the unit of a business (or workplace) or to join such labor union(s), according to the revision of the Labor Union and Labor Relations Adjustment Act (hereinafter referred to as 'the Labor Union Act'). However, this revised law stipulates the application of one unified collective agreement in a business (or workplace) by introducing a single bargaining channel. This is designed to prevent disturbances from duplicated bargaining, different applications of working conditions, and serious disputes between unions.

2. Legal issues related to permission for plural labor unions

(1) Estimation of a business or workplace

The unit to be considered a single bargaining channel is a business or workplace. It is necessary to estimate whether the business is organically operated as a managing body itself, regardless of the workplace. The corporate entity as a business agent is a single unit, and so all workplaces or business departments in the entity's corporation are regarded as a single bargaining unit. However, despite being a single corporation, if each workplace or each business department has authority to determine its working conditions, and if its personnel, labor management, and accounting have been separately operated, exception shall be made, and such individual workplace or business department shall be regarded as an independent bargaining unit.

(2) Joining two labor unions (dual membership)

Joining two or more labor unions is an exercise of 'the employee's freedom to choose a labor union', since the employee is free to organize or join such union(s). In cases where an identified person has joined two or more labor unions, calculation of the number of members in each union shall be determined as those who pay union fees.

(3) Collective withdrawal from a labor union and division of its property

Should a single member or multiple members withdraw from a labor union, in principle, the labor union's basic property and debts, and the collective agreement are not transferred to the newly joined or organized labor union. Therefore, as a union member withdrawing from the

[34] This article is based upon the Guide of the Ministry of Labor, "Manual on plural labor unions in a business (workplace)" (December 2010)

labor union would lose any rights to the previous labor union's property, he/she cannot request any division of the property unless there exists a stipulated right to divide its property.

(4) Effect of the article, 'sole bargaining body'

The article, 'sole bargaining body' refers to the contents in the collective agreement: "The Company shall acknowledge no other labor organizations, except for a particular labor union, as the exclusive body with the right to bargain for the sake of its union members." This article is null and void as it violates Article 33 (1) of the Constitution and Article 5 of the Labor Union Act by depriving other labor unions the right to negotiate with the consent of two exclusive parties.

(5) Effect of agreement on 'union shop'

The union shop refers to the part of the collective agreement that stipulates that the employee is hired on condition that he/she becomes a member of the labor union, which is the most typical means to force union membership on employees. In this case, when a new employee refuses to join the labor union within a certain period of time or arbitrarily withdraws his/her membership, the labor union can request that the company dismiss that employee, and the company shall comply with the union's request. However, starting July 1, 2011, when permission for plural unions comes into effect, the company shall not put the employee in any disadvantageous position in terms of status, on the grounds that the employee has withdrawn from the labor union to organize a new one or join another existing union.

II. Determining the Representative Union Channel for Bargaining

1. Summary

In order to start bargaining procedures with the employer in a business or workplace, all labor unions shall participate in the procedures for determining the bargaining channel and determine the representative bargaining union. The regulation to establish a bargaining channel is mandatory for both the labor union and the company. Regardless of 'type of organization' and 'duplicate organizations,' all labor unions which employees of a business or workplace have joined or organized shall participate in the procedures to determine the representative union to be the bargaining channel. Determining the bargaining channel is 1) to confirm which labor unions are participating in the bargaining channel and, 2) to determine a single representative bargaining union.

2. Procedures confirming participating labor unions

(1) Demand for bargaining (by the labor union)

A labor union may begin to request bargaining with the employer three months before the expiration date of the collective agreement, and in this case, the request shall be made in writing, including the name of the labor union and the number of union members as of the date of the request for bargaining.

(2) Public notice of the labor union's request for bargaining (by the employer)

Upon receiving a request to bargain from a labor union, an employer shall put a notice on a bulletin board in the business or workplace concerned **for seven days** from the date of receiving said request. Even should there be only one labor union in that business or workplace, the employer shall post notice of the labor union's request for bargaining as there may be employees who have joined other industrial or local labor unions.

(3) Application by another labor union for bargaining (by the labor union)

If another labor union wants to participate in the collective bargaining, it shall request to do so **within the seven-day notice period**. Unions that fail to do this will be unable to participate in the procedures to determine a bargaining channel.

(4) Confirmation of labor union request for bargaining (by the employer)

The employer shall give public notice of the submitted request **for five days** beyond the seven-day notice period. Only labor unions that were confirmed as labor unions requesting bargaining can participate in the procedures to determine the representative bargaining union, and apply for redress of any violation of the right for fair representation.

3. Procedures for determining the representative bargaining union

(1) Summary: If there is only one labor union confirmed and determined as a labor union requesting bargaining, that labor union shall be the representative bargaining union. If two or more labor unions are confirmed and determined as labor unions requesting bargaining, the labor unions shall determine one representative bargaining union regardless of the type of organization or duplication in organizational coverage and negotiate with the employer. An exception is possible if separate bargaining with the other labor union(s) is accepted by the employer.

(2) Autonomous determination (by the labor union)

The labor unions, after confirmed or determined as labor unions requesting bargaining, can autonomously determine the representative bargaining union **within 14 days after such confirmation**. As there are no special procedures or limits on the method used to determine the representative union, the only requirement is that the labor unions collectively agree.

(3) Confirmation of a majority labor union (by the labor union)

A majority labor union is a labor union organized with a majority of the members of all labor unions participating in the procedures for determining the representative bargaining union. If there is no majority labor union, in cases where two or more labor unions share the majority of the members of all labor unions participating in the procedures to establish a single bargaining channel by delegating authority or being united, they will be regarded as the majority labor union. Once the representative bargaining union is determined, the employer shall be notified **within five days after the expiration of the period for autonomous determination**.

(4) Notification of information (by the employer)

Upon receiving notification that a labor union is the majority labor union, the employer shall give public notice of this **for five days** from the date of receiving that notification to ensure that other labor unions and employees see this.

(5) Joint bargaining representative team (by autonomous or Labor Commission decision)

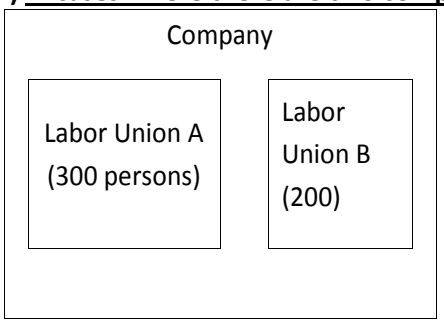
If there is no majority labor union, the labor unions eligible to jointly participate as the representative bargaining union shall organize a joint bargaining representative team and begin negotiations with the employer. **The joint bargaining representative team shall be organized autonomously by the labor unions, but if there is no agreement, it will be composed by the Labor Commission**. The labor union eligible to participate in the joint bargaining representative team shall be the one whose members make up not less than 10% of the members of all labor unions participating in the procedures to determine the representative bargaining union. The collective agreement that the joint bargaining representative team concludes with the employer shall still apply to members of labor unions who make up less than 10% of the membership of all unions at the business or workplace, and these members shall still be eligible to vote for or against collective action.

4. Determining the representative bargaining union and bargaining methods

(1) Principle: In cases where a company-level labor union was determined and confirmed as the representative bargaining union, through the procedures mentioned above, it can conclude a collective agreement by negotiating with the employer. A branch or unit of an umbrella labor union (such as an industrial union) at the business or workplace shall also participate in determining and confirming the representative bargaining union through the procedures mentioned above. Accordingly, if the branch or unit of the umbrella union or the company-level labor union did not participate in determining and confirming the representative bargaining union, it cannot negotiate with the employer. In such a case, if the employer rejects a request for negotiation with the umbrella union, it will not be considered unfair labor practice.

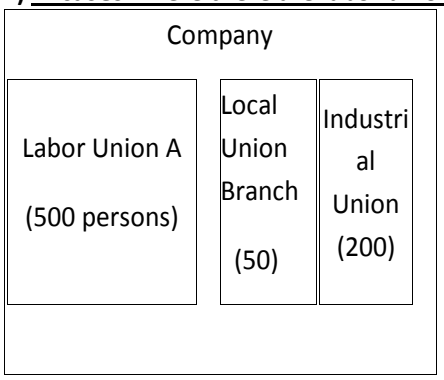
(2) Determining the representative bargaining union case-by-case

1) <u>In cases where there are two company-level labor unions</u>



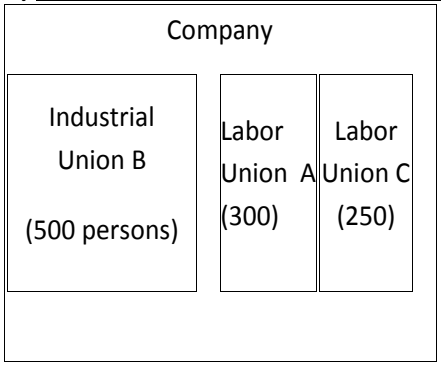
Above all, Labor Union A and Labor Union B autonomously shall determine the representative bargaining union. If they fail to do so, Labor Union A becomes the representative bargaining union as it has the majority of union members.

2) <u>In cases where there are labor unions at the company, local, and industry level</u>



Above all, company-level Labor Union A, local-level Labor Union B and Industrial Union C shall autonomously determine the representative bargaining union. If the labor unions fail to do so, Labor Union A becomes the representative bargaining union as it has the majority of the total 750 union members.

3) <u>In cases where there are two industrial unions and one company labor union</u>



Above all, the three labor unions shall autonomously determine the representative bargaining union. If they fail to do so, none of the labor unions represent a majority of the 1,050 members, but if a particular labor union comes to represent a majority of the members by coalition or commission, that joint union becomes the representative bargaining union as it will now represent a majority of the membership.

5. Application to companies with plural unions as of December 31, 2009

Employees in companies with plural labor unions as of December 31, 2009 are free to organize a new labor union from July 1, 2011, but as the regulations for representative bargaining unions becomes effective July 1, 2012, the employer shall negotiate with each individual labor union until June 30, 2012.

6. Exception for the representative bargaining union system: division of bargaining unit

The bargaining unit shall be a business or workplace, but if it is deemed necessary to divide the bargaining unit given the considerable disparity in working conditions,

employment status, bargaining practices, etc., in a business or workplace, the Labor Commission may decide to divide the bargaining unit at the request of either or both of the parties to the labor relationship. As the decision on bargaining unit by the Labor Union Act shall be determined exclusively by the Labor Commission, neither the employer or labor union(s) shall be allowed to divide the bargaining unit arbitrarily.

III. Status of the Representative Bargaining Union

1. Authority and obligations of the representative bargaining union

As collective bargaining and collective action shall be implemented by the representative bargaining union according to the single bargaining channel system, the representative bargaining union has authority as the labor union's party. Accordingly, the representative bargaining union has authority under and obligations of the Labor Union Act to independently conduct collective bargaining, conclude a collective agreement, and lead collective action, etc. The other labor unions cannot refuse the collective agreement concluded by the representative bargaining union, nor take steps that lead to independent collective action.

2. Duration of status of the representative bargaining union

(**1) General principle**: The representative bargaining union shall retain its status for two years regardless of the effective period of the collective agreement.

(2) In cases where a new representative bargaining union has been determined

Since the effective period of the previous representative bargaining union has expired, the same representative bargaining union shall retain its status until such time as a new representative bargaining union is determined to renew the expiring collective agreement.

(3) In cases where a new representative bargaining union has not been determined

If the status of a representative bargaining union has expired, and a new one yet to be determined, the existing representative bargaining union shall retain its status as representative bargaining union in relation to the implementation of the existing collective agreement until a new representative bargaining union is determined.

(4) In cases where collective bargaining is not concluded within one year

If a representative bargaining union has not concluded a collective agreement within one year since such determination was made, other labor unions may demand bargaining with the employer. Then, a procedure to determine the representative bargaining union agreement is initiated. The reason for this is because the representative bargaining union has not been able to conclude a collective agreement even though it has negotiated with the employer for one year. This seems to show that it has neglected to, or does not intend to properly exercise its bargaining representative authority, or has abused its authority.

The Bargaining Representative Union

I. Understanding the Multiple Union System

Generally in the Multiple Union System, only the largest labor union representing more than half of a company's union members will engage in collective bargaining and collective contracting as the bargaining representative union, and has the duty to represent the minority labor unions fairly. Since this Multiple Union System was implemented on July 1, 2011, many changes have occurred in labor relations between employers and the labor unions, both positive and negative. The positive changes include guaranteeing the right to multiple labor unions in one company where employees are free to join the one they like, and even establish their own. The negative changes include the weakening of industrial unions as they are now splintered and must choose a bargaining representative union to represent all of them in each workplace or business unit. Some companies have taken advantage of this change by subsidizing or otherwise supporting company-friendly labor unions to the point where they obtain the majority of union membership. In such situations, the existing combative and unfriendly labor unions find themselves generally powerless as they become minority labor unions that have lost their right to bargain and take action collectively.

This loss of union power has resulted in petitions being filed with the Constitutional Court, claiming employers have violated the bargaining representative system. However, the Constitutional Court ruled that the system of determining the bargaining representative union is constitutional and declared the following: "Article 29-2 of the Labor Union Act regulates that the system for determining the bargaining representative union was designed to solve potential issues in the following areas: In cases where there are two or more labor unions coexisting in a business or workplace, as these labor unions exercise their bargaining rights respectively, problems that realistically be anticipated include: hostility between those labor unions or disputes between the labor unions and the company; an increase in the costs associated with collective bargaining due to having to repeat negotiations in the same bargaining areas; management difficulties in preparing multiple collective agreements; and unreasonable differences arising out of the application of different working conditions for members of different unions who are all providing the same or similar work. The system of determining a bargaining representative union as mentioned above has resulted in restrictions of the collective bargaining rights of minority labor unions not selected as the representative union, requiring certain safeguards to minimize these restrictions. One of the safeguards introduced was the duty of fair representation stipulated in Article 29-4 of the Labor Union Act. This was designed to prevent discrimination against: a) minority labor unions not selected as the representative union (and who had participated in determining the bargaining representative unions) or b) their members by assigning the bargaining representative union and employer the duty of fair representation." (Constitutional Court decision on April 24, 2012, 2011hunma338)

II. Determining the Bargaining Representative Union

1. The right of collective bargaining

(1) Principle:

If there are two or more labor unions which are established or joined by workers in a business or workplace, regardless of the type of organization, the labor unions shall determine the bargaining representative union before beginning collective bargaining. The bargaining representative labor union shall have the authority to collectively bargain and conclude a collective agreement with the employer on behalf of all labor unions or union members that requested collective bargaining. A labor union, if there is a collective agreement in the business or workplace concerned, may begin requesting collective bargaining with the employer three months before the expiration date of the existing collective agreement. Provided that if there are two collective agreements or more, the labor union may begin to request bargaining with the employer three months before the expiration date of whichever collective agreement expires soonest.[35] In cases where there is only one labor union in the business or workplace, whether the employer shall take the procedure for determining bargaining representative union or not can be a controversial issue to consider. If there is evidently only one labor union existing in the business or workplace, the labor union does not have to go through the procedure. However, although the employer knows that there is only one labor union in the business or workplace concerned, as some employees may join industry-level or regional labor unions, the employer shall demand determination of the bargaining representative union through the procedure for determining the bargaining channel. This will avoid any problems if another labor union was established during the bargaining process or if the fact that another labor union was in existence during the bargaining period becomes confirmed later, perhaps after the employer has concluded a collective agreement with the current labor union.[36]

(2) Exceptions:

1) Separate bargaining: This shall not apply if the employer consents not to undergo the procedure for determining the bargaining channel within the period (14 days) during which the bargaining representative union can be determined autonomously (Article 29-2 of the Labor Union Act);

2) Decision on dividing bargaining unit: The unit for which the bargaining representative union shall be determined shall be a business or workplace. However, if it is deemed necessary to divide the bargaining unit given the considerable disparity in working conditions, employment status, bargaining practices, etc., in a business or workplace, the Labor Relations Commission may decide to divide the bargaining unit at the request of either or both of the parties to the labor relationship (Article 29-3 of the Act).

2. Procedure for Determining the Bargaining Representative Union

Determination of the bargaining representative union shall be a step-by-step process (Article 29-2 of the Act).

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[35] Labor Union Act: Article 29-2 (Procedure for Determining Bargaining Representative Union); Article 29 (Authority to Bargain & Make Agreements); and Enforcement Decree: Article 14-2 (Timing & Method for Demands to Bargain by Labor Unions)

[36] Guidelines from the Ministry of Employment & Labor: A Manual for Multiple Unions (Dec. 2010)

(1) All labor unions participating in the procedure for determining the bargaining representative union shall autonomously determine the bargaining representative union within 14 days.

(2) If the bargaining representative union is not determined within the 14-day period, the labor union composed of a majority of the members of all labor unions participating in the procedure for determining the bargaining representative union shall become the bargaining representative union.

(3) All labor unions participating in the procedure for determining the bargaining representative union, if failing to determine the bargaining representative union, shall jointly organize a bargaining representative team and then begin collective bargaining with the employer. In this case, labor unions eligible to participate in the joint bargaining representative team shall be those whose members make up not less than 10/100 of the members of all labor unions participating in the procedure for determining the bargaining representative union.

(4) If agreement fails to be reached on the organization of the joint bargaining representative team, the Labor Relations Commission may decide in consideration of the proportions of union members at the request of the labor union(s) concerned.

The following restrictions shall apply to labor unions not participating in the procedure for determining the bargaining representative union: they cannot request collective bargaining; they cannot apply to the Labor Relations Commission for mediation of labor disputes; industrial action undertaken by such unions cannot be justified as legitimate actions; they cannot seek remedy from the Labor Relations Commission for violation of the fair representation duty.

3. Duty of Fair Representation

The bargaining representative union and the employer shall have the duty of fair representation, which is to treat fairly and avoid discriminating against members of minority labor unions, participating in the procedure for determining the bargaining channel, or the labor unions themselves, without reasonable grounds. If the bargaining representative union and employer engage in discrimination, the affected labor union(s) may request the Labor Relations Commission to remedy such discrimination within three months from the date on which the act is committed. If the Labor Relations Commission recognizes that there has been discrimination without reasonable grounds, it shall issue an order to remedy such discrimination (Article 29-4 of the Act). One example of the failure to uphold the duty of fair representation is when a bargaining representative union paid union officers from a minor union a much lower rate for paid time-off hours than officers from their own union (Seoul Administrative Court ruling on April 25, 2013, 2012guhap35498).

III. Practical Application for Organizations with Multiple Unions

The following are important practical questions related to the bargaining channel system.

1. Question from the private sector

"My company has multiple unions: 60 employees belong to the company-based labor union while another 50 employees belong to the port industry labor union. Today, we received a request for collective bargaining for 2014 wages from the port industry labor union. My company has already concluded a collective bargaining agreement with the company-based labor union after going through the procedure to determine the bargaining representative union when there was a request for collective bargaining in May 2013. At that time, the port industry labor union did not participate in the procedure to determine the bargaining representative union. In this situation, does the company have to respond favorably to the port industry union's demand for collective bargaining?"

➔**Response:** The company-based labor union will continue to have authority as the bargaining representative union since your company determined the bargaining representative union after the procedure to decide the bargaining channel in May 2013. Accordingly, the port industry labor union cannot request collective bargaining during the effective period of the collective agreement that the bargaining representative union contracted with the company. They may participate only in the procedure to determine the next bargaining representative union beginning three months prior to expiry of the current collective agreement, which is in May 2015. The courts have also stipulated that any union not participating in the procedure to determine the bargaining representative union has no right to request collective bargaining. (Related reference: Article 29-2 of the Act, Gwangju Appellate Court ruling on August 16, 2011, 2010ra131).

2. Question from the public sector

"In the Seoul City government at present, the Public Service Workers' Union is composed of full-time employees who are not public servants. This public service workers' union has a membership of 300 regular full-time workers in 6 subordinate divisions under the City government. Recently, 28 short-term contract workers in the Park Administration Office of the city has established a branch union of the Public Irregular Workers' Labor Union and requested collective bargaining with the Park Office on April 10, 2014. Does the Park Office have to respond favorably to this request?

For reference, the City government received a demand for collective bargaining from the Public Service Workers' Union in 2014, and on March 6, 2014 posted on the bulletin boards of its 6 subordinate workplaces for 7 days that they had requested collective bargaining. No other labor union joined in the request during the posted period. The City government accepted the Public Service Workers' Union as the bargaining representative union and announced it to the 6 mentioned workplaces. Currently, the City government is engaged in collective bargaining with this Public Service Workers' Union."

➔ **Response:** The main issue in this question is whether the City government can be regarded as their employer, or whether the Park Office that hired those irregular workers is considered

their independent employer. The designated unit for selection of a bargaining channel shall be "a business or workplace". The business shall not solely be determined in terms of location, but whether that particular business is operated and managed as part of an organic structure, regardless of its location (Supreme Court ruling on February 9, 1993, 91da21381). "Business" means the company itself in operating management, while "workplace" refers to subordinate organizations in different locations. As one business entity belongs to one business, even though several workplaces and business organizations have been commissioned with partly independent management in personnel and labor management, they belong to a business entity as they are generally restricted by corporate directions and purposes. The business entity shall therefore be considered one bargaining unit representing all workplaces and business organizations. However, even though one particular workplace belongs to one business entity, if they are independently operated in personnel and labor management, accounting, and other business functions, that workplace or subordinate organization shall be regarded as one bargaining unit.

Since a bargaining representative union has been determined through the proper procedure according to Article 29-2 of the Labor Union Act, the City government can reject the request for collective bargaining from the 2nd labor union with justifiable grounds. In this case, the 2nd labor union can participate in the procedure for determining the bargaining representative union in two years.

IV. Conclusion

As multiple unions have been allowed at one workplace, the bargaining representative union system was introduced as a restriction against undue complications arising from multiple bargaining requests, different working conditions inside one company, intense struggles between labor unions, and inter-union splits. Some companies have been able to successfully defeat the hostile and combative nature of their majority labor unions through the exclusive bargaining representative union in this Multiple Union System, but in this author's opinion, these are exceptions that have developed in the course of adopting the Multiple Union System. If companies and unions clearly understand and respect the bargaining representative union's duty of fair representation to protect the rights of minor labor unions involved in bargaining representative union selection, all labor unions can be protected equally in accordance with the size of their membership. This would allow the Multiple Union System to be viewed as a way of helping the members of any union, and promote a more active involvement in varying labor unions representing their interests.

Preparation and Effect of Collective Agreement

1. Preparation of the Collective Agreement

A Collective Agreement that was not prepared by the method stipulated in Article 31 (1) of the Labor Union Act is null and void (May 29, 2001, Supreme Court 2001 da 15422, 15439)

Article 31 (1) of the Labor Union Act stipulates that a collective agreement shall be prepared in writing and both parties shall affix their signatures and seals thereto. The purpose of the procedure is to clarify the content of the collective agreement to prevent any possible future disputes surrounding its contents, and to confirm the final positions of both parties to ensure truthfulness in the collective bargaining process. Therefore, if a collective bargaining does not follow this procedure, it cannot remain effective.

II. Normative Effect of the Collective Agreement

Article 33 (Validity of Standards)

(1) Any part of the rules of employment or a labor contract that violate standards concerning working conditions and other matters concerning the treatment of workers as prescribed in the collective agreement shall be null and void.

Article 92 (Penal Provisions)

A person who falls under any of the following subparagraphs shall be punished by a fine not exceeding ten million won:

1. A person who violates the matters falling under any of the following items from among the contents of a collective agreement concluded pursuant to Article 31 (1):
   (a) Matters regarding wages, welfare costs and retirement allowances;
   (b) Matters regarding working and resting hours, holidays and vacations;
   (c) Matters regarding causes for disciplines and dismissals and important procedures;
   (d) Matters regarding safety, health and disaster relief;
   (e) Matters regarding provision of facilities and conveniences and participation in meetings during on-duty hours; and
   (f) Matters regarding industrial actions.

Effect after expiration of the collective agreement (Apr 14, 200, Nosa relations team-1049)

Although the effective period of the collective agreement expired or the collective agreement was invalid due to one party's notice on the cancellation of the agreement during the autonomous extension period, 'standards concerning working conditions and other matters concerning the treatment of employees' (namely, normative portion) as prescribed in the collective agreement would be transformed to working conditions of individual employees and remain effective in their labor contract. If the employer wants to revise normative portions, he shall conclude a new collective agreement in accordance with legitimate procedures, or revise the rules of employment and obtain the collective consent of the employees concerned. On the other hand, the term 'working conditions' means standards concerning the treatment of employees under the labor contract between the employer and the employee. Concrete contents refer to items stipulated in Article 96 of the LSA (the rules of employment) as well as

wages, working hours, welfare and dismissal procedures stipulated in the LSA. The regulation of the collective agreement concerning "disciplinary procedures such as the composition of disciplinary action committee" falls under "matters pertaining to award and punishment" pursuant to Article 96(10) of the LSA. So, this item shall be working conditions and be included under the normative portion. (Supreme court Feb 23, 1996, 94nu9177)

Although a newly concluded collective agreement was unfavorable compared to the old collective agreement, the new collective bargaining will apply. (May 30, 1995, Union 01254-623)

Concluding a collective agreement that is unfavorable to employees is still effective. (Sep 29, 2000, Supreme Court 99 da 67536)

According to the principle of freedom to contract, when the labor union concludes a collective agreement with a company, it can not only revise it for better working conditions, but also more unfavorable conditions. In cases where the collective agreement was revised with unfavorable working conditions, such agreement is not null and void, with the exception of a special situation where the revision was concluded so disadvantageously that it goes beyond the purpose of the labor union. The labor union does not have to get in advance individual agreement or authority from employees in relation to such agreement. Whether the collective agreement is short of such remarkable rationality or not shall be estimated by various situations, considering the contents of the collective agreement, its concluding procedures, employer's business conditions, etc.

III. Obligational Effect of the Collective Agreement

Normative and obligational portions (May 26, '93, Union 01254-605)

The 'normative portions' in the contents of the collective agreement mean the standards concerning working conditions and other matters concerning the treatment of employees, such as wages, wage payment, working hours, paid holiday, and severance pay, etc. The 'obligation portions' refer to the rules regulating rights and duties between the two parties in the collective agreement, such as articles of peace, solitary bargaining group, shop, strikes, etc.

In case the collective agreement becomes ineffective, standards concerning working conditions and other matters concerning the treatment of employees will be transformed to working conditions of individual employees and remain effective continuously, but the obligation portion, such as pay to a full-time union officer, will lose its effect. (Nov 16, 2000, Union 68107-1065)

Principally, the collective agreement loses its effect when its effective period expires. However, by Article 32 (3) of the Labor Union Act, even though both parties continue to attempt collective bargaining to make a new collective agreement before or after the expiration of the effective term of an existing agreement, the parties fail to make a new collective agreement, the existing collective agreement shall remain valid for three more months after its expiration. However, if the collective agreement contains a separate provision to the effect that when a new collective agreement is not made in spite of the expiration of the term of an existing collective agreement, the said existing collective agreement shall remain effective until a new collective agreement is made, such a separate provision shall be observed. Any party to the agreement may, however, terminate the existing collective agreement by notifying the other

party of such termination six months in advance of the date the party intends to terminate it. If the collective agreement becomes ineffective, standards concerning working conditions and other matters concerning the treatment of employees (namely, the normative portion) will be transformed to working conditions of individual employees and remain effective continuously, but the obligation portion, such as pay to a full-time union officer, will lose its effect.

Industrial action in violation of a duty of peace and its justification (National LRC Jan 16, '95, 95, 94 industrial disputes 99)

A duty of peace is the obligation that any one party shall not revise or abolish the agreed matters, nor request a new condition during the effective period of the collective agreement. Although there is no regulation stipulated in the collective agreement, the collective agreement contains the intrinsic obligation inherent in its function of maintaining peace. Since a duty of peace is very important to maintain peaceful labor relations and preserve order, the industrial action taken during the effective period of the collective agreement is not justifiable as a purpose of the labor union.

IV. General Binding Force of the Collective Agreement

By general binding force, the collective bargaining is applicable to all employees including non-union members. (Mar 22, 2006, Nosa relations team 776)

1. According to the principle of freedom to contract, when the labor union concludes the collective agreement with the company, it cannot only revise it to better working conditions, but also to more unfavorable conditions. In case the collective agreement was concluded with unfavorable working conditions, such agreement cannot be null and void, with the exception of special situations where the revision was made so disadvantageously as to go beyond the purpose of the labor union. (Nov 26, '02, Supreme Court 2001 da 36504)

In cases where the both parties concluded the collective agreement in which employees would reduce a certain amount of wages temporarily for six months starting June 1, 2006, according to the labor union's resolution in an extraordinary general assembly to save the nearly bankrupt company due to business deterioration, the collective agreement is effective unless there is special condition.

2. On the other hand, the collective bargaining concluded by mutual agreement between the company and the union is basically applicable to the two parties concerned: the employer and the labor union and its union members. However, in accordance with Article 35 of the Labor Union Act, when a collective agreement is made with a majority of employees with the same kind of job employed under ordinary circumstances in a business or workplace, normative portions concerning working conditions and other matters concerning the treatment of employees as prescribed in the collective agreement shall apply to the other employees with the same kind of job employed in the same business or workplace. Accordingly, if a majority of employees with the same kind of job fall under the general binding force of the collective agreement, non-labor union members in the same kind of job shall fall under the normative portions of the collective agreement, such as wages of the corresponding collective agreement, unless there is special condition.

In principle, the collective agreement concluded shall be definitely applicable to the parties concerned, the employer and the labor union's members, except in case of its application to general binding force. (Jan 11, '00, Union 01254-27

The representative of a labor union shall have the authority to bargain working conditions and other conditions with the employer for the labor union and its members. In principle, the collective agreement concluded shall be definitely applicable to the parties concerned, the employer and the labor union's members, except in case of its application to general binding force according to Article 35 of the Labor Union Act. Even though the company belongs to the application of general binding force by the Labor Union Act and so its working conditions become further applied to non-union members by its enlarged effect of the collective agreement, the employer and those who cannot join union membership by the Union Bylaws cannot be applicable to enlarged effect of the collective agreement.

In cases where the collective agreement of a company does not specify its membership scope and therefore applies to all kinds of jobs, all employees of the company are deemed as employees with the same kind of job without classifying jobs because of the enlarged effect of general binding force. (Dec 24, '98, Union 01254-869)

In principle, the effective scope of the collective agreement is defined to the two parties concerned: the employer and the labor union's members, but in accordance with Article 35 (General Binding Force) of the Labor Union Act, when a collective agreement is made with a majority of employees with the same kind of job employed under ordinary circumstances in a business or workplace, it shall apply to the other employees with the same kind of job employed in the same business or workplace. In this case, "employees with the same kind of job employed under ordinary circumstances" mean all employees with the same kind of job as a matter of fact in the company regardless of the employee position and type, fixed or unfixed employment period, or the name of the labor contract. In cases where the collective agreement does not specify its membership scope and so applies to all kinds of common occupations, all employees of the company are deemed as employees with the same kind of job without classifying jobs because of the enlarged effect of general binding force. However, in cases where the collective agreement specifies the membership scope for the type of job and excludes a certain group of employees in the application of the collective agreement, it is hard to regard them as in the same kind of job applicable to enlarged effect of the collective agreement as a concept of general binding force of the collective agreement.

The working conditions of the collective agreement for technical (blue-color) employees cannot be enlarged and applied to other white-color or managerial employees. (Mar 10, '92, Union 01254-218)

If the members of a labor union, the party of the collective bargaining, consist of only technical (blue-color) employees, and if working conditions are not the same between the technical employees (union members), and the white-color or managerial employees (non-union members), the collective agreement is not applicable to white-color or managerial employees, in terms of the purpose of Article 35 of the Labor Union Act concerning the enlarged application of the collective agreement.

System Preceding Adjustment (Cooling-off Period)

I. Related Articles

Labor Union and Labor Relations Adjustment Act (hereinafter referred to as the "Labor Union Act")

Article 45 (System Preceding Adjustment)

(2) Any industrial action shall not be conducted without completing adjustment procedures as referred to in Sections 2 through 4 of Chapter 5; Provided that this shall not apply in cases where adjustment procedures are not completed within the period as provided for in Article 54 or where an arbitration award is not made within the period as provided for in Article 63.

Article 54 (Period of Mediation)

(1) Mediation shall be completed within ten days for general businesses, or within fifteen days for public-service businesses, after a request for mediation as referred to in Article 53 is made.

Article 63 (Prohibition of Industrial Actions during a Period of Arbitration)

Industrial actions shall not be conducted for fifteen days from the date when an industrial dispute is referred to arbitration.

Article 91 (Penal Provisions)

A person whose actions fall under any of the following subparagraphs shall be punished by imprisonment for not more than one year or by a fine not exceeding ten million won:

1. A person who violates the main sentence of Article 45 (2);

II. Types of Mediation of the Labor Committee

<table>
<tr><td rowspan="2">Mediation proposal</td><td colspan="2">Accepted by both parties</td><td>Mediated agreement (Yes)</td><td>Mediation done</td></tr>
<tr><td colspan="2">Rejected by one party or both</td><td>Mediated agreement (No)</td><td>Industrial actions possible</td></tr>
<tr><td rowspan="6">No mediation proposal</td><td>Accepting guidance</td><td>Agreement by guidance and withdrawal</td><td>Collective Agreement (Yes)</td><td>No need for industrial action</td></tr>
<tr><td>Mediation stopped</td><td>Apparent disagreement</td><td>Collective Agreement (No)</td><td>Industrial action possible</td></tr>
<tr><td rowspan="4">Administrative guidance</td><td>No eligible party</td><td>Return</td><td>Industrial action impossible</td></tr>
<tr><td>No subject of industrial action</td><td>Return</td><td>Industrial action impossible</td></tr>
<tr><td rowspan="2">Lack of bargaining</td><td>Employer-side reason</td><td>Industrial action possible</td></tr>
<tr><td>Employee-side reason</td><td>Industrial action impossible</td></tr>
</table>

III. Mediation Process

In resuming collective bargaining after stopping the industrial action, are new adjustment procedures required or not? (May 19, 2001, Hyuprug 68107-238)

While the labor union was taking industrial action after completing legitimate procedures like adjustment procedures, it provisionally and only partially agreed on the contents of the collective agreement but its union members returned to work. At that time, when the labor union continued to negotiate the not-yet-agreed-upon parts of the collective agreement, if there was identity in the industrial disputes between the previous mediation time and the current mediation time of the industrial dispute, the labor union does not have to complete any additional mediation processes. However, if there are additional items added in the course of negotiation after the union returns to work, the labor union shall complete new adjustment procedures.

In cases where the labor union put forth a new demand and took industrial action, it had to complete adjustment procedures again in advance. (Sep 25, 1998, Hyuprug 68140-359)

When the labor union resumed the strike, collective bargaining for wages that the labor union proposed was not included in the first application of mediation for the industrial disputes in October 1997. Accordingly, as the two cases are hard to regard as identical in industrial disputes, the two parties shall negotiate new disputes sufficiently at first, and then, if there is no agreement, shall complete adjustment procedures for industrial disputes.

When the labor union requested adjustment procedures, proposed items were not acknowledged as objects of adjustment. In this case, the industrial action cannot be justifiable if it is conducted without completing adjustment procedures. (Mar 12, 1998, Hyuprug 68140-87)

The Labor Committee shall commence mediation without delay when any one of the parties concerned submits a request for adjustment of an industrial dispute. However, if the items submitted for adjustment were not acknowledged as objects of adjustment, the Labor Committee shall inform the concerned parties the reason for rejection and other problem-solving methods in accordance with Article 24 (2) of the Implementation Ordinances of the Act. If the Labor Committee reviews whether or not the case belongs to industrial disputes, finds the case cannot be an object for adjustment, and informs the parties of other problem-solving methods, such as independent bargaining procedures for both parties, the labor union shall be viewed as not having completed adjustment procedures, in accordance with Article 45 (2) of the Labor Union Act.

If a mediation proposal was suggested, but was not accepted by both parties, the labor union can start industrial action. In this case, it is regarded that the adjustment procedures have been completed. (Dec 5, 1998, Kugi 68140-458)

One party applied for adjustment concerning implementation of a monthly pay system and the Labor Committee suggested a mediation proposal. However, when both parties or either party could not reach agreement during its mediation period, this is regarded that the adjustment procedures have been completed.

In cases where a strike was stopped, but later resumed, shall the labor union complete adjustment procedures or not? (May 10, 2002, Hyuprug 68107-168)
The goal of an industrial action in the time of application for mediation was not yet achieved. If there is no objective reason to deny the identity of the industrial actions between the first strike and the later strike, the labor union does not have to complete adjustment procedures and take a pro-and-con vote of the union members again.

In cases where the labor union returned to work after a strike, and then resumed the strike without completing additional adjustment procedures, is this legally acceptable? (Aug 23, 2001, Hyuprug 68107-427)
The labor union went on strike from February 28 to June 1, 2001, then returned to work and continued collective bargaining. When the two sides could not reach agreement, the labor union resumed the strike on August 20, 2001, without completing additional adjustment procedures. Whether the union completed additional adjustment procedures or not shall be determined based upon recognition of identity for industrial actions between the time of its first application for mediation and the time of the resumed industrial action.

IV. Administrative Guidance

Objects subject to adjustment procedures for industrial disputes (Mar 8, 1999, Hyuprug 68140-85)
1. According to Article 2(5) of the Labor Union Act, "the term 'industrial disputes' means any controversy or difference arising from disagreements between a labor union and an employer or employers' association with respect to the determination of conditions of employment, such as wages, working hours, welfare, dismissal, and other issues. In this case, the disagreements refer to situations in which the parties to labor relations are no longer likely to reach an agreement by means of voluntary bargaining even if they continue to make such an attempt."
2. Whether an individual item is subject to adjustment procedures or not shall be determined in accordance with concrete actual practices such as practical bargaining situations. If one party has requested collective bargaining for wages, but there has been no single negotiation between the parties and no bargaining proposal has been suggested, this case cannot be seen as a disagreement (namely, an industrial dispute) between the labor union and the employer with respect to the determination of conditions of employment. It is therefore hard to consider this request as subject to adjustment procedures.

Since the application for mediation was submitted in situations where there had been no sufficient negotiation between the labor union and the employer, adjustment procedures could not be completed because there had been no identical industrial disputes arising from disagreements. In this case, the mediation procedures cannot satisfy justification. (Aug 6, 1997, Hyuprug 68140-314)
The 'disagreements' applicable to mediation for industrial actions under the Labor Union Act refer to "situations in which the parties to labor relations are no longer likely to reach an agreement by means of voluntary bargaining even if they continue to make such an attempt." This clear definition is designed to ensure sufficient bargaining before completing adjustment procedures. As the labor union requested adjustment for its proposal to collective bargaining,

without there having been mutual efforts to reach agreement, this situation cannot be regarded as an industrial dispute coming from disagreement. In this case, although the labor union has followed required procedures, such as a pro-and-con vote of its members, it cannot satisfy justifiable requirements for industrial disputes and industrial actions.

Procedural justification for an industrial action after administrative guidance from the Labor Committee (April 10, 2000, Hyuprug 68140-132)
If the Labor Committee acknowledged that bargaining items cannot be objects for mediation in the adjustment of industrial disputes, but the labor union began industrial action without additional adjustment procedures, this is a violation of Article 45 (2) of the Labor Union Act (system proceeding adjustment).

An industrial action is not illegal after the administrative guidance of the Labor Committee in relation to 'system proceeding adjustment. (Jun 26, 2001, Supreme Court 2000 Do 2877)
It is not illegal to begin a strike right after completion of a mediation period, when the labor union applied for adjustment for industrial disputes, but mediation was not accepted nor terminated.

How to handle the application for mediation when it was requested without sufficient bargaining between the parties (June 4, 1997, Hyuprug 68140-220)
Article 2 of the Labor Union Act regulates that the term 'industrial disputes' means situations in which the parties to labor relations are no longer likely to reach an agreement by means of voluntary bargaining even if they continue to make such attempts. Accordingly, if both parties to labor relations have not conducted sufficient negotiations, it is hard to regard the situation as an industrial dispute. In cases where there is application for mediation according to Article 53 of the Labor Union Act, the Labor Committee shall hear the opinions of the two parties. If the situation cannot be acknowledged as an industrial dispute, the Labor Committee shall suggest another problem-solving method, like a recommendation of independent negotiation in accordance with Article 24 (2) of the Implementation Ordinances of the Act.

After the Labor Committee determined a termination of adjustment due to the absence of the parties at a mediation meeting, an industrial action taken without completing additional adjustment procedures is an industrial action in violation of Article 45 (2) of the Labor Union Act. (Mar 25, 1998, Hyuprug 68140-97)
According to Article 45 (2) of the Labor Union Act, industrial action shall be taken only after completing adjustment procedures. Also, Article 53 and 58 of the Act regulate that the parties related shall participate in adjustment procedures in good faith, attend the mediation meeting, and confirm their opinions. In cases where the Labor Committee determined "a termination of mediation process" due to the absence of the parties at the mediation meeting, adjustment procedures were not completed. Accordingly, industrial action taken without completing adjustment procedures is an industrial action in violation of Article 45 (2) of the Labor Union Act.

System Preceding Adjustment (Cooling-off Period)