Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment

Preface

The first instrument specifically dealing with termination of employment was adopted by the International Labour Conference in the form of a Recommendation in 1963 (No. 119). Subsequently, the Termination of Employment Convention (No. 158) was adopted in 1982, entering into force on 24 November 1985. In adopting Convention No. 158, the Conference adopted the Termination of Employment Recommendation, 1982 (No. 166), replacing its predecessor, Recommendation No. 119, as a supplement to the Convention. As at 9 September 2008, the Convention received 34 ratifications, [1] and has been denounced by one country. [2]

Shortly after their adoption, Convention No. 158 and Recommendation No. 166 were brought to the attention of the Working Party on International Labour Standards (1987) [the "Ventejol Group"] which recommended that the instruments were to be promoted on a priority basis. These instruments were subsequently considered by the Working Party on Policy regarding the Revision of Standards (1997–2002) [the "Cartier Group"]. However, no conclusions were reached by the Cartier Group on either of these instruments.

At its 300th Session, in November 2007, the Governing Body agreed to resume the discussion on Convention No. 158 and the Recommendation No. 166. [3] The present note seeks to provide an overview of the Convention, and was originally prepared to facilitate the consultations on these two instruments held in November 2008. This note has since been updated to reflect the outcome of the 79th Session of the Committee of Experts on the Application of Conventions and Recommendations (November–December 2008).

The present note is divided into four parts:

- Part I provides an overview of the content and operation of key provisions of Convention No. 158 and Recommendation No.166;
- Part II presents the findings of a review undertaken on the termination of employment provisions in the national legislation of 55 countries, with a view to highlighting trends;
- Part III illustrates the influence the Convention has had on case law of national courts related to termination of employment; while
- Part IV provides an economic perspective of Convention No. 158, including discussion on the flexibility which the Convention provides.

The note was prepared by the International Labour Standards Department (Sector I), the Employment Analysis and Research Unit (Sector II) and the Social Dialogue, Labour

[1] See table of ratifications contained in Appendix I to the present note. The Convention was open for denunciation between 23 November 2006 and 23 November 2007. No denunciations were registered during this period.

[2] The Convention was denounced by Brazil in 1996. In February 2008, President Lula da Silva submitted Convention No. 158 to the National Congress for ratification. In July 2008, the Foreign Affairs Committee of the National Congress voted against ratification. The issue was forwarded for examination by the Labour Committee of the National Congress.

[3] See para. 95 of document GB.300/13 (November 2007).

Law and Labour Administration Branch (Sector IV), with the collaboration of specialists from the ILO Training Centre in Turin.

Contents

Part I. Content of Convention No. 158 and Recommendation No. 166

A. Definitions and concepts

Termination

The Termination of Employment Convention, 1982 (No. 158) (hereinafter referred to as "the Convention") regulates termination of employment at the initiative of the employer. This means that the termination of an employment relationship by an employee does not fall to be considered within the scope of the Convention, neither would termination which arises out of a freely negotiated agreement reached by both parties. Similarly, the Convention would not apply to cases where an employee willingly resigns or takes voluntary retirement.

The Committee of Experts on the Application of Conventions and Recommendations ("the Committee of Experts") has also noted that this definition under the Convention does not require countries to alter the terminology they use, so long as the substantive provisions in national law are applied to the persons covered by the Convention. [4] The Committee of Experts has, however, stressed that the manner in which termination of employment is defined is of particular importance, as it should not enable the employer to circumvent the obligations with regard to the protection prescribed in the event of dismissal. [5]

Valid reason

Article 4 of the Convention articulates this requirement as follows: "[t]he employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service". The Committee of Experts has frequently recalled in its comments that the need to base termination of employment on a valid reason is the cornerstone of the Convention's provisions. [6]

The Committee of Experts has stated that the adoption of this principle, as outlined in Article 4, "removes the possibility for the employer to unilaterally end an employment relationship of indeterminate duration by means of a period of notice or compensation in lieu thereof". [7] Article 4 of the Convention "does not merely require the employer to provide justification for the dismissal of a worker, but requires, above all, that, in accordance with the 'fundamental principle of justification', the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking". [8]

[4] Committee of Experts on the Application of Conventions and Recommendations, *General Survey – Protection against unjustified dismissal (1995),* hereinafter "GS 1995", at para. 21.

[5] GS 1995 at para. 22.

[6] See for example, CEACR observation – *France* (2007).

[7] GS 1995 at para. 76.

[8] CEACR direct request – *Luxembourg* (2007). See report of the ILC at its 67th Session in which it was stated "Thus, today the justification principle has become the centrepiece of the law governing

It is noteworthy that Article 4 requires that the reason given be connected with one of the following grounds: (i) the capacity of the worker; (ii) the conduct of the worker; or (iii) the operational requirements of the undertaking, establishment or service.

(i) Reasons connected with the capacity of the worker

A lack of capacity, or aptitude, on the part of the worker can take two forms, (a) it can result from a lack of the skills or qualities necessary to perform certain tasks, leading to unsatisfactory performance; and (b) poor work performance not caused by intentional misconduct, as well as various degrees of incapacity to perform work as a result of illness or injury.

(ii) Reasons connected with the conduct of the worker

An act of "misconduct" may belong to one of two categories: (a) one involving inadequate performance of duties the worker was contracted to carry out, e.g. neglect of duty, violation of work rules, disobedience of legitimate orders, etc.; or (b) one which encompasses various types of improper behaviour, e.g. disorderly conduct, violence, assault, using insulting language, disrupting the peace and order of the workplace etc. [9]

(iii) Reasons connected with the operational requirements of the undertaking, establishment or service

While the concept of "operational requirements" of the undertaking is not specifically defined in the Convention or the Recommendation, the definition offered by the Office to the first discussion at the Conference stated that these reasons "generally include reasons of an economic, technological, structural or similar nature. Dismissals resulting from these reasons may be individual or collective and may involve reduction of the workforce or closure of the undertaking". [10] The Committee of Experts has also stated that "reasons related to the operational requirements of the undertaking, establishment or service could also be defined in negative terms as those necessitated by economic, technological, structural or similar requirements which are not connected with the capacity or conduct of the worker". [11]

Period of notice

Article 11 of the Convention provides that, unless an employee is guilty of serious misconduct, a worker whose employment is terminated shall be entitled to a reasonable period of notice, or compensation in lieu thereof. The purpose of this obligation is to

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termination of employment by the employer…", ILC, 67th Session, 1981, Report VIII(1), p. 7. Further, it is noted in this regard that the UN Committee on Economic, Social and Cultural Rights noted, in its General Comment No. 18 on the Right to Work, that the violations of the right to work can occur through acts of omission, for example when States parties do not regulate the activities of individuals or groups to prevent them from impeding the right of others to work. Thus the Committee on Economic, Social and Cultural Rights considered that "violations of the obligations to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdictions from infringements of the right to work by third parties. They include omissions such as … the failure to protect workers against unlawful dismissal". *General Comment No. 18 on the Right to Work, UN Committee on Economic, Social and Cultural Rights (E/C.12/GC/18), adopted on 24 November 2005, at paragraph 35.* See also paragraph 11 of the general comment in which reference is made to Article 4 of Convention No. 158.

[9] GS 1995 at para. 90.

[10] ILC, 67th Session, 1981, Report VIII(1), p. 23.

[11] GS 1995 at para. 98.

prevent a worker from being taken by surprise by immediate termination of employment and to mitigate its detrimental consequences. Such notice is intended to enable the worker to prepare himself to adapt to the situation and look for a new job. [12] Recommendation No. 166 thus provides that, during the period of notice, the worker should be entitled to a reasonable amount of time off without loss of pay at times that are convenient to both parties, so that s/he might look for other employment.

The Convention requires that such a period of notice be of a "reasonable" duration. The specific length of this notice period is left to be determined by legislation, and may be augmented by collective agreements, the contract itself or by custom. Article 11 also envisages that the requirement to give a period of notice may be extinguished if compensation is provided in lieu. The Committee of Experts has considered that such compensation should correspond to the remuneration the worker would have received during the period of notice if it had been observed. [13]

It is also noted, in this connection, that the Committee of Experts has stressed that the only exception to the obligation to give notice (or compensation in lieu thereof) is in respect of an employee's serious misconduct. [14]

B. Flexibility

Means of application

The Convention allows a degree of flexibility to the ratifying States as to the manner in which the obligations are implemented at the national level. To this end, Article 1 of the Convention provides that "the provisions of th[e] Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws".

The Committee of Experts has also recognized that the methods referred to in Article 1 of the Convention "are not equally suitable for giving effect to the Convention in all fields and for all persons concerned". [15] Accordingly, "the Convention leaves to the ratifying State the choice between the different methods of implementation in accordance with national practice, taking account of national differences in the regulation of relations between employers and workers, thus affording considerable flexibility in applying the instrument". [16]

Recommendation No. 166 supplements Article 1 of the Convention by providing that the provisions of the Recommendation may be applied by "national laws or regulations, collective agreements, work rules, arbitration awards or court decisions, or in such other manner consistent with national practice as may be appropriate under national conditions".

The Committee has recognized that many of the provisions of the Convention relate not only to labour law, but also to such other areas as human rights, appeals procedures

[12] GS 1995 at para. 239.

[13] GS 1995 at para. 247.

[14] CEACR direct request – *Serbia* (2006).

[15] GS 1995 at para. 25.

[16] GS 1995 at para. 24.

before judicial bodies, social security and employment. [17] Accordingly, ratifying States may give effect to this Convention through numerous sources of law. Conversely, some ratifying States have directly transposed the Convention into their national legislation (see, for example, Australia).

In recognition of the plurality of sources of law which may serve to implement the Convention, the Committee of Experts has attached considerable importance to case law deriving from impartial bodies tasked with examining national law related to the termination of employment. Part III of the present note provides information on the use of Convention No. 158 by national courts.

Other provisions containing flexibility devices

The Convention contains provisions which allow ratifying States a degree of flexibility as to the manner of implementation. This flexibility thus enables States to pursue various methods to promote employment, while ensuring basic rules of fairness regarding security of employment to workers. The Committee of Experts has emphasized that the Convention clearly demonstrates awareness of the need to balance worker protection from unjustified dismissal against the need to ensure labour market flexibility. [18]

While the Convention, in its general application, applies to all branches of economic activity and to all employed persons, irrespective of their nationality, Article 2 of the Convention allows a great deal of flexibility in that it offers ratifying States the option of excluding certain types or categories of workers on the basis of the nature of the contract of employment or the category of workers concerned. Appendix II to this note provides an overview of the use of these exclusions by governments, as extrapolated from their reports on the application of the Convention, as provided pursuant to article 22 of the ILO Constitution.

(i) Exclusions based on the nature of the contract of employment

Article 2, paragraph 2, sets out those exclusions which may be made in light of the nature of the contract of employment. It provides that a "Member may exclude the following categories of employed persons from all or some of the provisions of this Convention: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period.

Adequate safeguards

Article 2, paragraph 3, of the Convention seeks to preserve the proper application of the Convention, by requiring that "adequate safeguards … be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention". To this end, the Committee of Experts has closely followed the national practice on the use of contracts for a specified period of time, as reported by governments and social partners, so as to ensure that recourse to fixed-term

[17] GS 1995 at para. 26.

[18] CEACR, general observation concerning Convention No. 158 (2001).

contracts were not made with the aim of avoiding the protection resulting from the Convention. [19]

In this connection, the Committee has referred to the role to be played by tripartite dialogue to ensure such adequate safeguards are in place. In its 1995 observation addressed to Spain, the Committee expressed its hope that the Government would "continue to develop a tripartite dialogue and encourage the participation by the social partners in the follow-up of employment contracting with a view to provide and implement adequate safeguards against recourse to temporary contracts of employment, the aim of which is to avoid the protection resulting from the Convention". [20]

(ii) Exclusions based on the category of workers concerned

Article 2, paragraphs 4 and 5, provide for exclusions based on the category of workers concerned. In this regard, Article 2, paragraph 4, provides that measures may be taken, after consultation with the organizations of employers and workers concerned, to exclude categories of employed persons from the application of, part or all, of the Convention, where their terms of employments are governed by special arrangements which, as a whole, provide protection that is at least equivalent to the protection afforded under the Convention.

Two matters are worthy of note: firstly, the exclusions envisaged under Article 2, paragraph 4, of the Convention may only be resorted to after consultations with the organizations of employers and workers concerned. In this regard, the Committee has stated that "consultation must be able to have some influence on the decision". [21] Secondly, the provision requires that such excluded categories of workers be subject to special arrangements which are as a whole at least equivalent to that afforded under the Convention. The Committee has stated that "it is for governments, in the first instance, to determine in good faith whether a particular category of employed person enjoy different protection which as a whole is at least equivalent to that afforded under the Convention, subject to the evaluation by supervisory bodies of the ILO". [22]

Article 2, paragraph 5, envisages the possibility of also excluding other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of workers concerned or the size or nature of the undertaking that employs them. The Committee has recalled that this provision was drafted in light of the consideration "that a certain amount of flexibility was required, in particular to allow member States to exclude certain categories of workers to whom it was particularly difficult to extend certain aspects of the protection afforded by the Convention". The Committee has, however, provided that in order to use this Article, the exclusion "must meet the conditions laid down in [Article 2, paragraphs 5 and 6] thus, as in the case of the exclusions referred to in paragraph 4, the organizations of employers and workers concerned must be consulted before any measures of exclusion are adopted". [23]

[19] CEACR observation – *Finland* (2007).

[20] CEACR direct request – *Spain* (1995).

[21] ILC, 79th Session, 1992, Report III (Part 4B), para. 191.

[22] GS 1995 at para. 62.

[23] GS 1995 at para. 67.

Article 2, paragraph 6, of the Convention requires ratifying States to list in their first report on the application of the Convention, submitted under article 22 of the Constitution of the ILO, any categories which may have been excluded in pursuance of Article 2, paragraphs 4 and 5 giving reasons for such exclusions, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

It 2007, the Committee observed that, where the Australian Government had indicated that an exclusion of employers with 100 employees or less would be consistent with Article 2, paragraph 5 of the Convention, such an exclusion "only applies if the Government lists the exclusion in the Government's first report". Accordingly, as the Government did not list this particular exclusion in its first report the Government was requested to amend the legislative Act in question to bring it in compliance with the Convention. [24] Similarly in 2007, the Committee of Experts considered Government of Turkey's report on the application of the Convention in which the Government indicated that establishments with fewer than 30 workers were excluded from the application of the Convention by virtue of Article 2, paragraph 5, in light of comments provided by workers' organizations thereon. In noting that the Government of Turkey had not listed such enterprises for exclusion under this provision in its first report, the Committee "request[ed] the Government to indicate how workers employed in establishments with fewer than 30 workers are covered by the protection afforded by Article 4 of the Convention". [25]

A review of the information provided by governments in its reports under article 22 of the ILO Constitution, as contained in Appendix II to the present note, indicates that many ratifying States have availed themselves of the flexibility under Article 2 of the Convention. Of the 34 countries which ratified the Convention, it was found that 23 countries used some or all of the exclusions provided under Article 2, paragraph 2, of the Convention, while 16 countries, comprising nearly half of the ratifying States, registered exclusions under Article 2, paragraph 4 or 5 of the Convention in their first report. [26]

Case study: Article 24 representation alleging non-observance by France of Convention No. 158
(Governing Body document GB.300/20/6)

A Tripartite Committee was established to consider a representation brought under article 24 of the Constitution of the ILO by the Confederation Générale du Travail – Force Ouvrière, alleging non-observance by France of, inter alia, Convention No. 158. In respect of Convention No. 158, the Tripartite Committee considered whether Ordinance No. 2005-893 was in accordance with the provisions of Convention No. 158 which was ratified by France. The aforementioned ordinance established a contract of employment of indeterminate duration for any new employment in enterprises with not more than 20 employees ("CNE"), and served to exclude the application of certain protections under the Labour Code relating to individual or collective terminations of employment, for the first two years following conclusion of a CNE.

The Tripartite Committee thus addressed two issues relevant to Convention No. 158: (i) whether workers recruited under the CNE can validly be excluded from the protection of the Convention on the basis of Article 2, paragraph 2(b); and (ii) whether, and to what extent, the application of the Ordinance deprived workers of the protection under Article 4 of the Convention.

[24] CEACR observation – *Australia* (2007).

[25] CEACR observation – *Turkey* (2007).

[26] Please note that full information was not available for nine ratifying States.

Exclusions under Article 2, paragraph 2(b)

The Tripartite Committee considered whether workers under the CNE might be excluded from the scope of the Convention by virtue of Article 2, paragraph 2 of the Convention. In this regard, while the Committee noted that that an exclusion may be made under Article 2, paragraph 2, without any particular procedure, the Committee expressed its doubts "as to whether Article 2, paragraph 2, of the Convention offers an appropriate basis for justifying any exclusions from protections that might be considered necessary to achieve those objectives". The Committee considered that the policy considerations underlying the establishment of the CNE, including in particular the promotion of full and productive employment, were of the kind that might have justified measures under paragraph 4 or 5 of Article 2. The Committee felt that those considerations had little relevance to the situations covered by Article 2, paragraph 2, and that the purpose of characterizing the period of employment consolidation as a qualifying period of employment was essentially to enable employees under the CNE to be excluded from certain provisions of the Convention.

Furthermore, the Committee considered whether the "period of employment consolidation" was of a reasonable duration, in the context of Article 2, paragraph 2(b) of the Convention. In this regard, the Committee noted that "the main concern should be to ensure that the duration of the period of exclusion from the benefits of the Convention is limited to what can reasonably be considered as necessary in the light of the purposes for which this qualifying period was established, namely in particular, (to enable) employers to measure the economic viability and development prospects of their enterprise and to enable the workers concerned to acquire skills or experience". The Committee thus found itself unable to conclude from the considerations which were apparently taken into account by the Government in determining the duration, that a period as long as two years was reasonable.

The Committee thus concluded that there was insufficient basis for considering the period of employment consolidation as a qualifying period of employment of reasonable duration, within the meaning of Article 2, paragraph 2(b), justifying the exclusion of the workers concerned from the benefits of the Convention during that period.

Protections under Article 4 of the Convention

The Tripartite Committee also considered whether workers under the CNE benefited from the protections under Article 4 of the Convention. The Committee noted from the Government's communications, that in the case of termination under the CNE (a) workers whose employment is terminated for reasons of performance or conduct (except for cases of a disciplinary nature) need not be provided an opportunity, prior to or at the time of termination, to defend themselves against the allegations made; (b) the requirement under Article 4, read with Article 7, of the Convention that the employee must be given a valid reason, prior to or at the time of termination, at least in cases relating to conduct or performance, need only be complied with where the termination is of a disciplinary nature; (c) employees could be obliged to take court proceedings simply to obtain information as to why their employment had been terminated; and (d) while a valid reason for termination must exist in the sense that the termination must not be an abuse of rights or for reasons connected with the employees health condition, their political or religious opinions or their customs in circumstances showing harassment or any of the discriminatory reasons referred to in the Labour Code, it was not clear that the Ordinance allowed action to be effectively taken against terminations for other invalid reasons.

The Tripartite Committee thus concluded that the Ordinance No. 2005-893 significantly departed from the requirements of Article 4 of Convention No. 158.

In this regard, the Tripartite Committee invited the Government, in consultation with the social partners, (i) to take such measures as may be necessary to ensure that the exclusions from the protection provided by the laws and regulations implementing Convention No. 158, are in full conformity with its provisions; and (ii) to give effect to Article 4 of Convention No. 158 by ensuring that the CNE can in no case be terminated in the absence of a valid reason.

In its 2008 report, submitted under article 22 of the Constitution, the Government reported that, taking into account the recommendations of the Tripartite Committee, it passed Act No. 2008-596 of 25 June 2008, implementing a national tripartite agreement, which repeats the provisions relating to the CNE. The CNEs in force at the time of publication of the Act were reclassified as contracts of unlimited duration. Furthermore, the social chamber of the French Cour de Cassation, in its judgement of 1 July 2008 (No. 1210), held that, under the terms of Article 2, paragraph 2(b) of the Convention, the CNE is not one of the categories of contracts that can be excluded from the protection of the Convention. The court also held that the CNE did not comply with the requirements of the Convention.

In its 2008 observation, the Committee of Experts noted with satisfaction the information provided by the Government which indicated that the Convention was applied at the national level.

C. Prohibitions

Article 5 provides a non-exhaustive list of reasons which would not constitute a valid reason for termination. The invalid reasons for termination stipulated in Article 5 of the Convention serve to reflect the protections put in place by a number of other ILO Conventions. The following grounds cannot constitute a valid reason for termination: (i) union membership or participation in union activities outside of working hours or, with the consent of the employer, within working hours; (ii) seeking office as, or acting or having acted in the capacity of, a workers' representative; (iii) the filing of a complaint or the participation in the proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (iv) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and (v) absence from work during maternity leave. Recommendation No. 166 supplements this list by adding: (a) age, subject to national law and practice regarding retirement; and (b) absence from work due to compulsory military service or other civil obligations, in accordance with national law and practice.

Article 6 of the Convention further states that "temporary absence from work because of illness or injury shall not constitute a valid reason for termination". The Convention, however, leaves it to national methods of implementation to determine "the definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations ". The Committee noted, however, that "[a]lthough the Convention leaves the definition of temporary absence to national provisions, the Committee considers that where the absences is defined in terms of its duration, it should be compatible with the aim of the Article, which is to protect a worker's employment at a time when, for reasons of force majeure, [s]he is unable to carry out his obligations". [27]

D. Procedure relating to termination: Appeal, severance allowance, and income protection

The Convention serves to lay out standards of procedural fairness in cases of termination of employment and thus includes, amongst its terms, provisions relating to the procedure to be applied prior to or at the time of termination, the procedure of appeal against termination, and a worker's entitlements upon termination.

(i) Procedure to be applied prior to or at the time of termination

Article 7 of the Convention provides that "the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity".

The Committee of Experts has considered that "over and above the terms of Article 7 and its meaning, which is to allow workers to be heard by the employer, the purpose of this Article is to ensure that any decision to terminate employment is preceded by dialogue and reflection between the parties". [28]

[27] GS 1995 at para. 137.

[28] GS 1995 at para. 148.

The Convention does not explicitly state what form this defence should take, nor the form in which the allegations should be presented. Accordingly, the Convention also offers some flexibility as to the manner of implementation on this matter.

It is necessary in this respect that the right to be heard is provided prior to the termination of employment, irrespective of whether the worker is entitled to procedures after the termination of employment, and even if the termination is not considered as final until the appeals procedures are exhausted.

Recommendation No. 166 further supplements Article 7 by identifying additional procedures that may be followed prior to, or at the time of, termination. The Recommendation provides, inter alia, that the employer should notify a worker in writing of a decision to terminate his employment, [29] and that the worker should be entitled to receive a written statement from his employer of the reason or reasons for termination on request. [30] Furthermore, the Recommendation envisages the possibility of employers consulting workers' representatives before a final decision is taken on individual cases of termination of employment, [31] and makes provision for the worker to be assisted by another person when defending himself, in accordance with Article 7, against allegations regarding his conduct or performance liable to result in the termination of employment. [32]

The Recommendation also envisages the provision of a warning prior to termination. In respect of termination of employment on grounds of misconduct, the Recommendation provides that the employment of a worker should not be terminated for misconduct which is of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning. [33] The Recommendation also provides that "the employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct". [34] In respect of termination on grounds of unsatisfactory performance, the Recommendation provides that "the employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed". [35]

(ii) Procedure of appeal against termination

Articles 8 and 9 of the Convention deal with the right of appeal, which is considered to be an essential element of a worker's protection against unjustified dismissal. Article 8, paragraph 1, of the Convention provides that "a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator". Article 8, paragraph 2, provides for a certain degree of flexibility, in that where termination

[29] Termination of Employment Recommendation, 1982 (No. 166) (hereinafter "R166") at para. 12.

[30] R166 at para. 13.

[31] R166 at para. 11.

[32] R166 at para. 9.

[33] R166 at para. 7.

[34] R166 at para. 10.

[35] R166 at para. 8.

has been authorized by a competent authority, the requirement, as set forth in Article 8, paragraph 1, of the Convention might be varied according to national law and practice. Additionally, Article 8, paragraph 3, indicates that each country has the latitude to choose whether or not to impose a time-limit after which a worker may be deemed to have waived his/her right to appeal against his termination.

Recommendation No. 166 supplements Article 8 in that it stipulates that provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment. The Committee of Experts has stated that "conciliation gives each party an opportunity to review, in the presence of a third party, the question of justification of the termination of employment, in the light of applicable legal standards, and to assess the likelihood of winning or losing the case before the competent court and the possibility of reaching an agreed solution … [enabling] the number of cases to be heard by the competent bodies … to be reduced". [36]

Article 9 of the Convention provides further guidance on the procedures to be applied where a worker seeks to exercise his or her right of appeal. In this connection, Article 9, paragraph 1, provides that the impartial bodies "shall be empowered to examine the reasons given for termination and the other circumstances relating to the case and to render a decision on whether the termination was justified".

Article 9, paragraph 2, provides that the burden of proving the existence of a valid reason for the termination should not be borne solely by the worker.

In this connection, the Committee of Experts has observed that "in cases of termination of employment, the application of the general rule applicable in contract law, whereby the burden of proof rests on the complainant, could make it practically impossible for the worker to show that the termination was unjustified, particularly since proof of the real reasons is generally in the possession of the employer" [37] and accordingly the Convention proposes several methods of ensuring that the worker does not bear alone the burden of proof.

(iii) Workers' entitlements upon termination

Article 12 of the Convention provides for a worker whose employment has been terminated to be entitled to (a) a severance allowance or other separation benefits; (b) benefits from unemployment insurance or assistance or other forms of social security; or (c) a combination of such allowance and benefits. Under Article 12, paragraph 2, a worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any severance allowance or other separation benefits envisaged under Article 12, paragraph 1(a), solely because s/he is not receiving an unemployment benefit under Article 12, paragraph 1(b). Article 12, paragraph 3, of the Convention also leaves scope for national methods of implementation to limit the aforementioned entitlements for workers terminated for serious misconduct.

The Committee of Experts has stressed the flexibility of this provision of the Convention, as it is intended to take into account the different programmes or schemes intended to afford some income protection for workers whose employment is terminated. The Committee of Experts has noted that it can be applied "in the many countries (in particular developing countries) with general legislation providing for a severance allowance, but without social security schemes which provide unemployment or other

[36] GS 1995 at para. 190.

[37] GS 1995 at para. 199.

benefits; in a number of industrialized countries with social security schemes of general scope, but which leave matters of severance allowance to collective bargaining; as well as in countries which have established both social security schemes and a severance allowance of general scope". [38] Accordingly, "the flexibility contained in Article 12 allows countries to develop protection systems adapted to the specific conditions of their situation". [39]

It is to be noted that the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy states that "Governments, in cooperation with multinational as well as national enterprises, should provide some form of income protection for workers whose employment has been terminated". [40]

E. Collective dismissals

Articles 13 and 14 of the Convention establish supplementary provisions to be applied in respect of termination of employment for economic, technological, structural or similar reasons. The Committee of Experts has noted that "compliance with the principles set forth in the Convention may facilitate the development of socially responsible economic activity when taking decisions relating to collective dismissals" and accordingly "terminations of employment for economic, technological, structural or similar reasons must be consistent with the provisions of Article 13 and 14 of the Convention, particularly in respect of the consultation of worker's representatives and notification to the competent authority". [41]

Articles 13 and 14 are considered as supplementary to the preceding provisions in the Convention, and thus should be read in conjunction with Parts I and II of the Convention. The Committee of Experts has noted in this regard that "termination of employment, whether for economic, technological or other reasons, must therefore be justified and accompanied by procedures of appeal in accordance with the provisions of Article 4 relating to justification for termination". [42]

It is noted that the Convention does not provide guidance over any specific quantitative criterion or threshold for the number of terminations of employment beyond which the procedures provided for in these supplementary provisions are applicable. Articles 13, paragraph 2, and 14, paragraph 2, thus enable certain flexibility to ratifying States in that it envisages that national measures of implementation may specify the quantitative threshold limiting the application of these supplementary provisions.

The Tripartite Declaration of Principles concerning Multinational Enterprises also states that "in considering changes in operations (including those resulting from mergers, takeovers or transfers of production) which would have major employment effects, multinational enterprises should provide reasonable notice of such changes to the appropriate government authorities and representatives of the workers in their employment and their organizations so that the implications may be examined jointly in order to mitigate adverse effects to the greatest possible extent. This is particularly important in the

[38] GS 1995 at para. 266.

[39] GS 1995 at para. 268.

[40] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006), at para. 28.

[41] CEACR observation – *Cameroon* (2007).

[42] GS 1995 at para. 276.

case of an entity involving collective lay-offs or dismissals". [43] The Tripartite Declaration also provides that "arbitrary dismissal procedures should be avoided" in this regard. [44]

Information and consultation of workers' representatives

Article 13 of the Convention requires that an employer contemplating terminations for reasons of an economic, technological, structural or similar nature, provide the workers' representatives concerned in good time with relevant information, including reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

Article 13 also makes provision for consultations to be held with the workers' representatives concerned, as early as possible, on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

In August 2005, the International Finance Corporation's Good Practice Note on Managing Retrenchment stressed the importance of consultations to both the development and the implementation of a retrenchment plan. The Good Practice Note states that "without consultation, companies run the risk of not only getting key decisions wrong, but also of breaching legal rules and collective agreements and alienating workers and the community. Workers can often provide important insights and propose alternative ways for carrying out the process to minimize impact on the workforce and the broader community". [45]

Recommendation No. 166 provides guidance as to the kind of measures which could be adopted to avert or minimize the terminations of employment. In this regard Recommendation No.166 provides that such measures might include, amongst other things, "restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work". [46] The Recommendation also provides that, "where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimize terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice". [47] It is noteworthy that the Recommendation contemplates that consultations be held before the stage at which the terminations become inevitable.

The Committee of Experts has noted the value of holding such consultations, as "consultation provides an opportunity for an exchange of views and the establishment of a

[43] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006), at para. 26.

[44] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006), at para. 27.

[45] International Finance Corporation of the World Bank Group, "Good Practice Note – Managing Retrenchment", August 2005 (No. 4), www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_ Retrenchment/ $FILE/Retrenchment.pdf.

[46] R166 at para. 21.

[47] R166 at para. 22.

dialogue which can only be beneficial for both the workers and employer, by protecting employment as far as possible and hence ensuring harmonious labour relations and a social climate which is propitious to the continuation of the employer's activities". [48]

Notification to the competent authority

Article 14, paragraph 1, of the Convention requires an employer, which contemplates terminations for reasons of an economic, technological, structural or similar nature, to notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

The Convention does not specify the time when the notification should be made and, in particular, whether this should be done during or after the consultations. Article 14, paragraph 3, of the Convention thus merely stipulates that the minimum period of time in which the employer shall notify the competent authority before carrying out the terminations should be specified by national laws and regulations.

The Committee of Experts has also emphasized the flexibility inherent in the Convention as to the role to be played by the competent authority, noting that "Article 14 of the Convention does not refer to the role which might be played by the competent authority to which notification is made. It therefore allows each country to determine the purpose of notification". [49]

Recommendation No. 166 details the role that might be played by the competent authority in order to mitigate the effects of termination of employment for reasons of an economic, technological, structural or similar nature. In particular, Recommendation No.166 refers to the promotion of the placement of workers affected in suitable alternative employment as soon as possible, with training and retraining where appropriate, through measures taken by the competent authority, with the collaboration of the employer and worker's representatives concerned where possible. The Recommendations also provides that such measures should be suitable to national circumstances. [50]

In this regard, the Recommendation provides that consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence, with a view to mitigating the adverse effects of termination of employment for reasons of economic, technological, structural or similar nature. The Recommendation thus provides that the competent authority should consider providing financial resources to support these measures. [51]

F. Concluding remarks

It is noted that the provisions of the Convention envisage a degree of flexibility as to the manner of implementation, and the scope of its application. It is noted that the majority

[48] GS 1995 at para. 283.

[49] GS 1995 at para. 290.

[50] R166 at para. 25(1).

[51] R166 at para. 26.

of the ratifying States have availed themselves of the exclusions provided under Article 2, paragraphs 2, 4, and 5 of the Convention. In particular, of the 34 ratifying States: [52]

- 23 have sought to exclude persons who are employed under contracts for a specified period of time or a specified task (Article 2, paragraph 2(a) of the Convention);
- 22 have sought to exclude workers serving a period of probation or qualifying period of employment (Article 2, paragraph 2(b) of the Convention);
- 17 have sought to exclude casual workers from the scope of the Convention (Article 2, paragraph 2(c) of the Convention.

It is further noted that 16 ratifying States have excluded certain categories of workers from the scope of the Convention, as envisaged under Article 2, paragraphs 4 and 5 of the Convention. In some reports, no distinction has been made as to whether their exclusion is premised on Article 2, paragraph 4, or Article 2, paragraph 5, of the Convention.

While the Convention leaves the precise modalities of implementation to ratifying States, it establishes certain core requirements which must apply to all instances of termination of employment. Examples of such core requirements include the requirement of a valid reason for termination; the provision of a period of notice; and the right of appeal against termination. The Convention does, however, offer a degree of flexibility as to how these core requirements are to be implemented.

In its general observation on the Convention adopted in 2008, the Committee of Experts noted that "many more countries than those that have ratified the Convention give effect to its basic principles, such as notice, a pre-termination opportunity to respond, a valid reason and an appeal to an independent body. Most countries, be they ratifying countries or otherwise, have provisions in force at the national level that are consistent with some or all of the basic principles of the Convention". [53]

Part II. Convention No. 158 and labour legislation reform in the field of termination of employment [54]

To complement the information provided above on the provisions of the Convention, an examination was undertaken of the legislation relating to termination of employment in 55 countries. In selecting the sample of countries for examination, particular regard was given to ensure the representativeness of this sample, both in terms of legal systems and regional balance. This selection was also undertaken to ensure that there was a balance in reviewing legislation of countries that have ratified the Convention and those that have not. This leads to a high number of European legislation being reviewed.

[52] Information was not available for nine ratifying States, as the reports submitted by the governments under article 22 of the Constitution were under examination by the Committee of Experts.

[53] General observations on the Termination of Employment Convention, CEACR 2008 (full text set out in Appendix V).

[54] This section was prepared on the basis of a selective review of national laws and regulations on termination of employment that are compiled by the Office on an ongoing basis. This information is currently compiled and organized according to national profiles which are accessible on the ILO web site (www.ilo.org/public/english/dialogue/ifdial/info/termination/) and, as of January 2009, will be made available through an online database on national legislation on termination of employment.

Out of the 34 countries that have ratified Convention No. 158, the legislation of nine countries were not reviewed, mainly because the reports submitted by governments under article 22 of the Constitution were under examination by the Committee of Experts.

The review of the legislation of these 55 countries was purposefully very selective, as shown in the comparative table set out in Appendix III to the present note, in order to focus on the core requirements of Convention No. 158, namely: Article 2 (exclusion of certain categories of workers or enterprises); Article 4 (valid reason for dismissal); Article 5 (invalid reasons for dismissal); Article 11 (period of notice); Article 13 (collective dismissal – consultations of workers' representatives); Article 14 (collective dismissals – notification to the competent authority); Article 12 (compensation for dismissal). Appendix III presents the content of those 55 legislations in the form of a table that summarizes the key information in a user friendly format.

Over the past five years, 36 of the 55 countries reviewed have undertaken a partial or complete reform to their labour legislation. Revision of provisions dealing with termination of employment is often at the heart of these reforms and the ILO is often called upon to provide technical advisory services. The Office responded to seventeen requests for technical comments on labour legislation emanating from these countries and one of these (China) has also requested the assistance of the Office for an activity to examine the ratification prospects of Convention No. 158. Furthermore, it has been noted that certain regional initiatives, such as CARICOM, have used the Convention as the basis for model legislation relating to the termination of employment.

ILO activities relating to national legislation on termination of employment

The ILO Subregional Office in Port-of-Spain has undertaken a number of activities aimed at assisting countries in the Caribbean to give effect to Convention No. 158. In particular, the Subregional Office assisted with the development of the CARICOM Model Law on Termination of Employment, which was adopted in 1995 and provides that its objective is, inter alia, to give effect to the provisions of Convention No. 158.

More recently, in the context of the Project on Harmonization of Labour Legislation in the English- and Dutch-speaking Caribbean funded by the Government of Canada, the Subregional Office has undertaken an assessment of the national legislation of 13 member States, using as a benchmark the four CARICOM Model Laws (including that on termination of Employment), as well as relevant ILO Conventions. As a result of this project, the ILO published a Caribbean Digest of Labour Legislation on Termination of Employment in 2008. This is expected to be published online in the near future.

The purpose of this analysis is to provide a short review of how national legislations are currently regulating key aspects of the termination of employment with a view to highlighting trends. This review does not, however, purport to offer a detailed comparative analysis.

Table 1. Sample of countries for which labour legislation was examined under the present exercise [55]

Region	Countries
Africa (12)	*Cameroon, Democratic Republic of the Congo,* Egypt, *Ethiopia, Gabon,* Ghana, *Lesotho, Malawi, Morocco, Niger,* Senegal, South Africa
Americas (11)	Argentina, Bolivia, Brazil, Chile, Colombia, Dominican Republic, Mexico, Panama, Peru, United States, *Bolivarian Republic of Venezuela*
Arab States (1)	Saudi Arabia
Asia (7)	*Australia,* Bangladesh, Cambodia, China, India, Japan, Republic of Korea
Europe (24)	Armenia, Austria, Azerbaijan, Belarus, *Bosnia and Herzegovina, Cyprus, Finland, France,* Georgia,

[55] Countries that have ratified the Convention are indicated in italics.

A. Exclusion of certain categories of workers or enterprises (Article 2)

The information available indicates that only a handful of countries are excluding certain types of enterprises from the scope of application of legislation relating to termination of employment. Out of the seven countries that are excluding certain types of enterprises, only *Australia* [56] and India are excluding enterprises with less than 100 workers. Austria, Bangladesh, Germany, and the Republic of Korea do exclude enterprises with less than five workers, while *Turkey* [57] excludes enterprises with less than 30 workers. The threshold of the number of workers employed tends to vary over time in countries, like in *Australia* and Germany, where it has been regularly adjusted to best match labour market evolution.

Conversely, almost all countries, except *Bosnia and Herzegovina* and the Dominican Republic, excluded one or more categories of workers from the scope of application of their labour legislation. Typical exclusions include civil servants, police, army, domestic workers, seafarers, family members. Some of these categories of workers are, however, the subject of specific regulations determining their terms and conditions of employment and one cannot rule out that their exclusion from the scope of application of labour legislation may result de facto in an absence of protection against unjustified dismissal. Vulnerable categories of workers are potentially more at risk of being excluded than others. Quite frequently, provisions regulating termination of employment are not applicable to temporary workers or to workers under a fixed-term contract or under probation.

B. Justification and invalid reason for dismissal (Articles 4 and 5)

The review clearly indicates that the legislation of the vast majority of countries require that termination of employment be based on a valid reason. The five countries that do not require a valid reason are Austria (with the exception of summary dismissal), Georgia, Japan, United States and *Zambia*. However all these countries, with no exception, provide safeguards against wrongful and unfair dismissals. Nearly half of the countries reviewed are incorporating all the invalid grounds for termination as set out under article 5 of the Convention in national legislation. In the others, provisions forbidding discrimination in employment are used to protect workers against wrongful or unfair dismissals.

C. Notice (Article 11)

The right to due notice is clearly enshrined in a significant number of legislation. Georgia, Mexico, Panama, Peru and United States are the only countries reviewed that do not require that due notice be given to workers whose contracts of employment are terminated.

It is noted, however, that what is considered a “reasonable period of notice” varies from country to country, and within countries, according to the seniority of the employee and type of contracts.

[56] See CEACR 2007 observation in that respect.

[57] See CEACR 2007 observation in that respect.

D. Collective dismissals – Consultation of workers' representatives (Article 13)

The legislation of three-quarters of the countries reviewed requires that workers' representatives be consulted when collective dismissals are being contemplated.

One can observe that seven out of the fourteen countries where such requirement does not exist are located in the Americas (Bolivia, Brazil, Chile, Colombia, Dominican Republic, Panama and United States), four in Europe (Azerbaijan, Georgia, *Turkey* and *Ukraine*), one in the Arab States (Saudi Arabia), one in Africa *(Malawi)* and one in Asia (Bangladesh).

E. Collective dismissals – Notification to the competent authority (Article 14)

In 44 (out of 55) countries, administrative authorities should be notified of a collective dismissal. Legislation not requiring such notification is found in Azerbaijan, Bolivia, China, Ethiopia, Georgia, Kazakhstan, *Lesotho, Malawi,* Russian Federation, Saudi Arabia and *Turkey*.

F. Compensation for dismissal (Article 12)

Legislation of 48 (out of 55) countries provide that compensation for dismissal be paid to the workers by the employers. In Ghana, Kazakhstan, *Serbia* and *Slovenia*, compensation is provided only for redundancy while in Japan and the United States no compensation for termination of employment is required. In the *Democratic Republic of the Congo* no compensation is foreseen except for employees in the commercial sector.

G. Concluding remarks

Of the legislation reviewed in the present exercise, it can be observed that most countries, be they ratifying States or otherwise, have provisions in force at the national level which are consistent with some, or all, of the core requirements of the Convention. For example, all countries reviewed provided safeguards against wrongful and unfair dismissals, while a significant majority required that termination be based on a valid reason. Furthermore, a majority of countries reviewed required that notice be given prior to termination, however the duration of the notice period varied from country to country.

It has also been noted that almost all countries have excluded one or more categories of workers from the scope of application of provisions related to termination of employment under their domestic legislation, while a limited number of States have sought to exclude certain types of enterprises.

Part III. Use of Convention No. 158 by national courts

As previously indicated (page 9), the Convention makes provision for various methods of implementation. Article 1 of the Convention provides that, in addition to legislation, the ratifying State may give effect to the Convention by means of collective agreements, arbitration awards, court decisions, or in such other manner as may be consistent with national practice. Case-law thus plays a fundamental role in giving effect to the provisions of the Convention. The Committee of Experts has indicated that "particularly where texts are of a more general nature or scope as regards termination of

employment … [i]n the absence of explicit provisions, judicial decisions may also establish certain general principles of law on particular questions in many countries". [58]

To this end, the Committee of Experts has regularly recalled the importance of providing excerpts of relevant court decisions relating to termination of employment, as well as statistics on the number of complaints against dismissal, the results thereof, the nature of the redress granted and the average time needed for a ruling to be handed down, [59] as requested in the report form for Convention No. 158, [60] and has noted such information with interest. [61] In its 2008 general observation on the Convention, the Committee of Experts noted that "the principles of the Convention are an important source of law for labour courts and tribunals in countries that have or have not ratified the Convention". [62]

A review of relevant case law compiled by the ILO International Training Centre [63] provide evidence that national courts have directly invoked or referred to the Convention in delivering their judgements related to termination of employment. This practice has been observed in countries that have ratified the Convention, and those that have not. It appears that the Convention has been invoked by national courts for a multitude of reasons, including (i) as a norm of direct application in the legal systems; (ii) as an aid to interpretation of national legislation, where such national legislation is ambiguous or incomplete; (iii) as an instrument to strengthen the application of national law, in which it highlights the fundamental feature of the law or principle in question; and (iv) as a source of equity.

A. Use by national courts in countries that have ratified the Convention

National courts in countries that have ratified the Convention have sought recourse to the provisions of the Convention as a source of guidance on the interpretation and application of national law related to the termination of employment. In a recent judgement of the Federal Court of Australia, [64] the court had regard to the provisions of the Convention in order to elucidate the definition of "competent administrative authorities" under its national law. The court observed that the object of the particular legislative provision was to give effect to article 5, paragraph 1(c) of the Termination of Employment Convention, and thus the meaning of the expression "competent administrative authorities" under national law has always borne the same meaning as in the Convention. Accordingly, the court had regard to the *travaux preparatoires* of the Convention, and the General Survey of the Committee of Experts, in order to assist with interpretation of this provision of its national legislation.

[58] GS 1995, at para. 32.

[59] See for example, CEACR Comments – *Democratic Republic of the Congo* (2007); *Finland* (2007); *Gabon* (2007); *Luxembourg* (2007).

[60] See Parts IV and V of the report form for Convention No. 158.

[61] See for example, CEACR comments – *Latvia* (2007); *Spain* (2006).

[62] See Appendix V.

[63] See also ILO–ITC "Use of International Law by Domestic Courts – Compendium of Court Decisions" (July 2006).

[64] *CSR Viridian Limited (formerly Pilkington Australia Limited)* v. *Claveria* [2008] FCAFC 177, setting aside *Claveria* v. *Pilkington Australia Ltd*, 8 November 2007, (2007) FCA 1692.

In France, the Cour de Cassation stated, in 2006, that Convention No. 158 was directly applicable. [65] Therefore, when a national regulation was adopted in contradiction with the terms of the Convention, the Cour de Cassation emphasized the need to ensure that full effect was given to the Convention. [66]

B. Use by national courts in countries that have not ratified the Convention

It is noteworthy that the practice of having regard to the Convention has not been merely confined to the judiciary of those countries that have ratified the Convention, but has also been observed in judgements delivered by the judiciary and industrial courts of member States that have not ratified the Convention. In such countries, the courts have sought to refer to the Convention in its legal reasoning, on grounds that it expresses or codifies basic principles of equity and law; it enshrines principles of good industrial relations practice; and/or that the instrument is an important point of reference.

It has also been observed that, where countries have brought their national legislation in line with the provisions of the Convention, or have used the Convention as a model upon which to develop their national legislation, the Courts have been inclined to refer to the provisions of the Convention in applying their national laws.

Source of rules of equity

The Botswana Industrial Court, for example, made recourse to the Convention where its national law was silent on the relevant procedure to be followed in cases of termination of employment. The Industrial Court found that while the Employment Act of Botswana did not prescribe any procedure for an employer to follow before dismissing an employee for misconduct, the rules of natural justice would dictate that there must be a valid reason for such dismissal. The Industrial Court thus considered that "these rules of natural justice, or rules of equity as they are sometimes called, are derived from conventions and recommendations of the [ILO]". Thus, despite Botswana not having ratified Convention No. 158, the Court applied Article 4 of the Convention to the facts at hand, in considering that Article 4 was the "origin of the equitable requirement that an employee can only be dismissed if the employer had a valid reason for doing so". [67]

Source of principles of good industrial relations practice

Similarly, in Trinidad and Tobago, the Industrial Court sought recourse to the Convention as it considered that it enshrined principles of good industrial relations practice. The Industrial Court considered that "Convention No. 158 has put in written form long standing principles of good industrial relations practice and it is of no consequence that the Convention has not been ratified by Trinidad and Tobago". The Industrial Court continued that the Convention "is not applicable as part of the domestic law of Trinidad

[65] Cour de cassation – Soc, 29 Mar. 2006 *Sté Euromédia télévision c/ M. Christophe X.*

[66] Arrêt n° 1210 du 1er juillet 2008, Cour de cassation – Chambre sociale, France. See also Case Study on page 8 of the present note.

[67] Botswana Industrial Court, *Sebako and Another* v. *Shona Gas* (IC 665/04) [2005] BWIC 2 (1 Sep. 2005) at para. 14.

and Tobago but as evidence of principles of good industrial relations practice which have been accepted at an international level". [68]

Aid to interpretation and application of national laws

Furthermore, some Courts have had regard to the Convention as an aid to interpretation of provisions of its national law, despite not being bound by the international obligations set forth in the Convention. The Labour Court of South Africa considered that although South Africa had not ratified Convention No. 158 and was therefore not obliged to implement its terms in domestic legislation "the Convention [was] an important and influential point of reference in the interpretation and application of the Labour Relations Act". In so doing the Court also considered that "the observations and survey by the ILO's Committee of Experts on Convention 158 are equally important as a point of reference in the interpretation of … the Labour Relations Act and the Labour Code since they give content to the standards that the Convention establishes". [69]

Convention No. 158 as a legislative model

In South Africa, for example, the Labour Court considered that the Convention and the observations and surveys of the ILO's Committee of Experts were important points of reference, in particular because the relevant provisions of the Labour Relations Act and the Labour Code drew heavily on the wording of Convention No. 158. [70] Similarly, in February 2008, in invoking Article 8 of the Convention in order to establish that workers have a right to appeal, the Labour Court of Zimbabwe stated that "ILO conventions have been followed in our jurisdiction, regionally and internationally", [71] notwithstanding that Zimbabwe had not ratified Convention No. 158.

C. Concluding remarks

While reference is only made to the case law from a handful of countries in which Convention No. 158 is invoked, the aforementioned cases are indicative of the influence the Convention has well beyond ratifying States. It has been noted that the Convention has been invoked by national courts, often in light of the manner by which the Convention, or the principles contained therein, have been incorporated within the national legal system. In this regard, the Convention have served as an aid to the court in arriving at its judgements, in that it represents (i) norms of direct application in the legal systems; (ii) an aid to interpretation of national legislation; (iii) an instrument to strengthen the application of national law; and/or (iv)as a source of equity.

[68] Industrial Court of Trinidad and Tobago, *Bank and General Workers' Union* v. *Public Service Association of Trinidad and Tobago*, 27 April 2001, Trade dispute No. 15 of 2000.

[69] Labour Court of South Africa, *Avril Elizabeth Home for the Mentally Handicapped* v. *Commission for Conciliation Mediation and Arbitration and Others* (JR 782/05) ZALC [2006] ZALC 122.

[70] ibid.

[71] Labour Court of Zimbabwe, *Ignatius Ncube and 12 Others* v. *Solus University* (LC/MT/45/08) (14 February 2008).

Part IV. Termination of employment: An economic perspective [72]

The issue of the flexibility which the Convention provides has previously been discussed in the context of increasing competitive pressures and the resulting need for firms to adjust their operations and labour force frequently and rapidly to meet fluctuations in demand and to achieve progress in productivity. This need for more flexible labour markets has led to a general agenda of deregulation which has almost exclusively focused on the costs of employment protection legislation (hereinafter "EPL"). [73] The argument made, in this regard, is that direct costs, such as severance payments, or other procedural requirements in favour of redundant workers, such as assistance in re-employment and funding of labour market training, may have detrimental effects on labour costs, employment and productivity.

After decades of both theoretical and empirical research, however, the debate on the effects of hiring and firing rules remains inconclusive and academics have failed to reach consensus. This section of the note seeks to (i) provide an overview of the main theoretical and empirical findings on the impact of EPL on economic and employment outcomes; and (ii) highlight the importance of a comprehensive approach based on the interactions between the different institutional schemes that influence the labour market, and the need for a cost-benefit approach is also discussed. In this regard, the concept of flexicurity is introduced as an alternative to the "either/or" rigidity/flexibility debate. Finally, the role of Convention No. 158 is examined in light of the flexibility–security–stability nexus.

A. Economic theory and the impact of employment protection legislation

In order to evaluate if labour market institutions maximize social welfare, it is important to first recall the linkages between public policy, institutions and labour market performances. Restrictions on dismissal, such as the requirement of a period of notice or the provision of severance payment, are direct costs on employers and might be seen as impairing the competitiveness of firms. It has been argued, however, that this approach does not take account of three factors: (i) a time-is-cost approach is not able to catch the benefits of social welfare that might be given in cases of termination; (ii) these limitations may have some positive spill-over effects on firms' performance; and (iii) flexibility should not be solely defined as a mere lack of regulation.

Economic models suggest that termination costs decrease discharges in economic downturns but also deter employers from hiring in upturns, as they anticipate that it will be difficult to fire new workers. [74] Furthermore, it has been considered that if labour markets are competitive, higher firing costs might translate into lower wages to offset the effects of stricter EPL on employment. However, if labour markets are not competitive, the resulting effects on employment may be more complex and depend on the quality of the collective

[72] See Appendix IV for full list of references.

[73] Employment protection legislation refers to regulatory provisions that relate to hiring and firing practices, particularly those governing unfair dismissals, termination of employment for economic reasons, severance payments, minimum notice periods, administrative authorization for dismissals, and prior consultations with trade union and/or labour administration representatives.

[74] See, Bertola, G., "Microeconomic perspectives on aggregate labour markets" in Ashenfelter and Card (eds), "Handbook of Labour Economics", Vol. 3, North-Holland; Boeri T., 1998. "Enforcement of employment security regulations, on-the-job search and unemployment duration", in European Economic Review (Amsterdam), Vol. 43, No. 1, pp. 65–89, 1998.

bargaining system and on the degree of employers' and workers' market power (as determinants of wage flexibility). In general, theoretical models clearly indicate that employment should be more stable and individual employment relationships more durable when EPL is stricter, given a constant cyclical wage pattern. [75] This means that the effects on stocks, such as employment or unemployment levels, are a priori ambiguous, while it is more likely that EPL reduces flows between unemployment and employment. [76] In addition, it is important to recall that the legislation governing hiring and firing rules may affect the decisions of employers and employees and, as such, may generate a number of effects on labour costs, employment and productivity.

The primary task of EPL is in fact to promote better conditions of employment and income security for workers, both in their current jobs and in the case of redundancy. It is accepted, for example, that advance notice of termination gives the workers the time to search for new jobs, while severance pay moderates their income loss. As a consequence of a more secure employment relationship, workers are encouraged to invest in training and to accept new technologies and working practices. On the other hand, firms are encouraged to look for internal reserves, to invest in human resources and to constantly improve technologically and organizationally. [77] Finally, employment protection helps to mitigate discrimination against vulnerable categories of workers (such as older workers, women, youth, persons with disabilities and other groups) and helps save social welfare funds, otherwise necessary to support the income of these disadvantaged groups. In this way, higher EPL ensuring job stability should enhance aggregate productivity through better enterprise adaptation, technological progress and continuous training of workers, while also ensuring better income equality and prevention of discrimination. It has thus been argued that the overall expected effect is improved economic performance and raised standards of living. [78]

It has been argued, however, that EPL may also bring some potential increased costs. Firstly, it widens the distance between insiders and outsiders in the labour market, in particular by stimulating an increase of atypical forms of employment and potential substitution to regular jobs. Secondly, in some cases, firms are unable to afford to pay high firing costs. Thirdly, for society as a whole, the costs of stricter EPL may be twofold: (a) the labour market segmentation could increase inequality; and (b) the enforcement of legislation could prevent an efficient matching between labour supply and labour demand. The net impact of all these effects is likely to vary according to the size of the enterprise, the type of activity, and the economic conditions. But an overview of theoretical models suggests that employment will be more stable and individual employment relationship more durable when EPL is higher.

[75] See, "Employment protection and labour market adjustment in OECD countries: Evolving institutions and variable enforcement", Bertola, Boeri and Cazes; Employment and Training Paper 48, 1999.

[76] See, "Employment protection in industrialized countries: The case for new indicators", Bertola, Boeri and Cazes, ILR, Vol. 139, 2000.

[77] See, Akerlof, G. An Economic Theorist's Book of Tales. New York: Cambridge University Press, 1984.

[78] See, C. Ichinwski, K. Shaw and G. Prennushi. 1997. "The effects of human resource management practices on productivity: A study of steel finishing lines", The American Economic Review, 87: 291–313. Nickell, S. and Layard, R. (1999) "Labor Market Institutions and Economic Performance", in O. Ashenfelter and D. Card (eds), Handbook of Labor Economics, Vol. 3, Amsterdam, Netherlands , pp. 3029–3084.

A further element for consideration relates to the manner in which legislation is actually enforced and, in particular, the role of the judiciary in this respect. Some researchers argue that employment protection should not be put in place through layoff taxes or judicial intervention, as they consider that that firms know their adjustment needs better than courts. [79] However, the main hindrance identified by such researchers is not the role of the judiciary per se but the discretionary power of the courts, and the uncertainty over the decisions they will reach, i.e. if legal provisions are well defined, benefits of enforcement procedures can overcome their drawbacks.

B. Empirical evidence

Empirical research has previously explored implications using econometric analysis and has provided mixed results as to the influence of EPL on labour market performance. One critical problem relates to the measurement of labour legislation. Accordingly, caution should be exercised in generalizing certain results, since they could depend on the methodology used to construct EPL indicators, as well as the assumptions underlying the model.

Based on the OECD's overview of the empirical evidence, [80] some general conclusions might be drawn: (i) EPL has generally been found to have little or no effect on overall unemployment, although it may affect the duration of unemployment and its demographic composition; (ii) higher EPL tends to reduce turnover in the labour force and to increase the proportion of long-tenure jobs, while the effect on temporary employment and part time is rather ambiguous; and (iii) strong EPL may favour higher unemployment among women, less skilled workers and young people. Moreover, multivariate analysis gives an insight of the linkages between EPL and other labour market institutions: collective bargaining at the central level has been found to mitigate the negative effect of stricter EPL. The OECD's overview also finds a significant negative impact of the replacement levels of unemployment benefits on unemployment and employment, even if it is dispersed when generous benefits is combined with effective active labour market policies. Finally, the analysis confirms that the impact of EPL seems to be greater on the dynamics and the composition of employment, than on the level of employment.

Recent empirical evidence, however, suggests that a general agreement is far from reach. For instance, some authors find that job security legislation in India has a negative effect on job opportunities and reduces workers' welfare; [81] while in another paper, the effects of notice period and indemnities for dismissal in Latin America are not found to have any significant effect on unemployment and employment, while payroll taxation seems to reduce employment and increase unemployment. [82] Other researchers have found evidence that EPL has had a positive effect on employment performances [83] or on job

[79] See, Blanchard, O., 2005 "Designing labour market institutions" in: J. Restrepo and A. Tokman, (eds): "Labour Markets and Institutions", Central Bank of Chile, Santiago; Blanchard, O.; Tirole, J., 2004. "The optimal design of labor market institutions", MIT, mimeo.

[80] See, Organisation for Economic Co-operation and Development , 2006, "Employment Outlook", Paris.

[81] See, Ashan, A.; Pagès, C., 2007. "Are all labor regulation equal? Assessing the effects of job security, labor dispute and contract labor in India", World Bank.

[82] See, Heckman, J.; Pagès, C., 2000. "The cost of job security regulation: evidence from Latin America countries", NBER Working paper 7773, NBER, Cambridge, MA.

[83] See, Amable, B., Demmou, L. and Gatti, D., "Employment performance and institutions: new answers to an old question", Institute of the Study of Labour (IZA) Bonn, March 2007.

tenure and productivity [84] suggesting that EPL provisions can have positive effects by increasing investments in human resources. To sum up, policy recommendations on the effect of EPL on economic and labour market outcomes should be formulated with great caution, in the light of ambiguous empirical results and measurement issues.

C. The need for a balanced and comprehensive approach

A balanced and comprehensive approach is needed to address labour market flexibility. One researcher points out that formalization involves a trade-off between ex-ante and ex-post costs and, consequently, can lead to great benefits through the reduction of information asymmetries and business uncertainty. [85] It has also been argued that flexibility does not merely entail numerical external flexibility but also includes the possibility to redeploy employees and to adapt firms to new challenges (functional flexibility).

Furthermore, current debate has focused on the possible nexus between security and flexibility. In spite of intensive discussions, there is no well established and common definition of flexicurity. [86] It has been suggested that the meaning of flexicurity relates both to a conceptual framework and to a policy strategy. It has thus been argued that competition in a globalized world needs adaptability rather than pure flexibility, i.e. when labour market institutions have to be reformed, a new type of security should be introduced which takes into account the complementarities between different labour market institutions. [87]

In a recent research paper, it was highlighted that, when job insecurity is high, it is more difficult to reconcile work and private life; the incentive to invest in human capital decreases; and, in the extreme case, a widespread disaffection could undermine the willingness of people to accept any kind of reform measures. [88] Research conducted in Central and Eastern Europe has also shown that significant labour market deregulation, in particular, the dismantling of legal protections for workers facing termination of their employment, has proved inefficient in terms of employment recovery, even leading, in some cases, to adverse effects on labour reallocation and productivity. In this regard, it was found that many workers were, for example, hesitant to quit their jobs voluntarily, even in

[84] See, Auer, P.; Berg, J.; Coulibaly, I.; 2005. "Is it a stable workforce good for the economy? Insights I the tenure–productivity–employment relationship" in International Labour Review, Vol. 144, No. 3.

[85] See, Arrunada, B.; 2007. "Pitfalls to avoid when measuring institutions: Is *Doing Business* damaging business?" in Journal of Comparative Economics, Vol. 35, pp. 729–747.

[86] The first definition introduced by Wilthagen (2004) provides a fair framework by defining flexicurity as "a policy strategy that attempts, synchronically and in a deliberate way to enhance the flexibility of labour markets, the work organization and labour relation on the one hand, and to enhance security – employment security and social security – notably for weak groups in and outside the labour market on the other hand". See Wilthagen, T., and Tros, F. (2004) The concept of 'flexicurity': a new approach to regulating employment and labour markets, Transfer, 10 (2), 166–186.

[87] See, Cazes, S. 2008: " Flexicurity in Europe, a short note on moving forward", document prepared for the High-level Tripartite Dialogue on the European Social Model in the context of globalization, Turin, 1–3 July 2008.

[88] See, European Foundation for the Improvement of Living and Working Conditions, 2008. "Employment security and employability: a contribution to the flexicurity debate", paper published within the framework of EWCS, Dublin.

period of economic upswing, due to the general weak labour market institutional setting, and the resulting feeling of insecurity. [89] In that context, the concept of flexicurity proved to be an extremely relevant approach, offering an alternative to the pure flexibility policy prescription promoted in the region, and offered a means to promote synergies between social and economic goals.

D. Concluding remarks

In assessing the flexibility of the Convention, a number of factors are worthy of note. Firstly, it has been recalled that economic research on the effect of labour legislation, and in particular those related to the termination of employment, does not lead to clear-cut outcomes: theory argues that EPL should be associated with more stable employment, but evidence does not provide clear-cut results in support thereof. Secondly, it can be argued that flexibility and security are not necessarily two mismatched concepts but complementary ones, based on an adequate level of protection to maintain social welfare and to enhance the efficiency of firms. From this perspective, provisions contained in the Convention are not constraining as they set a common baseline for employment protection legislation but do not establish a quantitative threshold.

Moreover, many alternatives are provided for those protections for which there is no common agreement (for instance, the role of courts, or remedies for unjustified dismissal). As pointed out by the European Commission, "there will be no one-size-fits-all institutional system, nor is there a long-term institutional model that is superior to all others". [90] Consistent with this approach, and in the light of the contrasting results of empirical evidence, the Convention allows each member State to determine the specific requirements necessary to apply its provisions, so as to respect the features of different national labour markets. It is noted, in this regard, that six of the countries that have ratified the Convention, appeared amongst the top 35 countries ranked for ease of doing business, in the 2008 World Bank Group's *Doing Business Economy Rankings*. [91] Thus the Convention does not seem to put constraints on doing business; it could even represent a key element of an integrated approach to enhancing both flexibility and security in the labour market, when incorporated in a balanced programme of reforms designed and implemented with the participation of the social partners.

[89] See, Cazes, S.; Nesporova A.; 2007. "Flexicurity, a relevant approach in Central and Eastern Europe", International Labour Office, Geneva.

[90] COM(2007)359 final, Commission communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards common principles of flexicurity: more and better jobs through flexibility and security, Brussels, 27 June 2007.

[91] World Bank Group, *Doing Business Economy Rankings:* www.doingbusiness.org/economyrankings/

Appendix I

Status of ratifications of Convention No. 158
(as at 20 January 2009)

Country	Ratification date
Antigua and Barbuda	16.09.2002
Australia	26.02.1993
Bosnia and Herzegovina	02.06.1993
Cameroon	13.05.1988
Central African Republic	05.06.2006
Democratic Republic of the Congo	03.04.1987
Cyprus	05.07.1985
Ethiopia	28.01.1991
Finland	30.06.1992
France	16.03.1989
Gabon	06.12.1988
Latvia	25.08.1994
Lesotho	14.06.2001
Luxembourg	21.03.2001
The former Yugoslav Republic of Macedonia	17.11.1991
Malawi	01.10.1986
Republic of Moldova	14.02.1997
Montenegro	03.06.2006
Morocco	07.10.1993
Namibia	28.06.1996
Niger	05.06.1985
Papua New Guinea	02.06.2000
Portugal	27.11.1995
Saint Lucia	06.12.2000
Serbia	24.11.2000
Slovenia	29.05.1992
Spain	26.04.1985
Sweden	20.06.1983
Turkey	04.01.1995
Uganda	18.07.1990
Ukraine	16.05.1994
Bolivarian Republic of Venezuela	06.05.1985
Yemen	13.03.1989
Zambia	09.02.1990

Appendix II

Information extracted from governments' reports indicating the use of exclusions in relation to:
(i) the nature of the contract of employment (Article 2(2)); and
(ii) the category of workers concerned (Article 2(4) and (5))

Ratifying State	Article 2(2)*			Article 2(4)**	Article 2(5)**
	Contracts for a specified period of time or a specified task	Workers serving a period of probation or a qualifying period of employment	Casual basis for a short period		
Antigua and Barbuda	Used	Used	Apparently used	Established employees of the Government; persons in the naval, military or air force of the Government; the police force; persons holding the status of diplomatic agents; and persons employed by the United Nations or its specialized agencies.	Not used
Australia	Used	Used	Used	Australian Federal Police, employees covered by the Maritime Industry Seagoing Award 1983, non-award high income earners. *(CEACR sought clarification in its 2007 observation concerning legislation referred to in the Government's 2006 report, by which employers employing less than 100 employees are exempt from provisions on unfair dismissal. Government's report is due in 2009)*	Not used
Bosnia and Herzegovina	Not used	Not used	Not used	Not used	Not used
Cameroon	Not used	Not used	Not used	Not used	Not used
Central African Republic	Used	Used	Not used	Under examination (see CEACR 2008 direct request)	

Ratifying State	Article 2(2)*			Article 2(4)**	Article 2(5)**
	Contracts for a specified period of time or a specified task	Workers serving a period of probation or a qualifying period of employment	Casual basis for a short period		
Cyprus	Used	Used	Not used	Employees of the UK Government or the navy, army and air force institutes are excluded, provided their conditions of service as to redundancy benefits are no less beneficial.	Not used
Democratic Republic of the Congo	Used	Used	Not used	Magistrates and judiciary, civil servant covered by a particular statute, gendarmerie and army regulated by particular texts.	Not used
Ethiopia	Used	Used	Used	Persons holding managerial posts who are directly engaged in major managerial functions; workers employed under contracts of personal service for non-profit making purposes; members of the armed forces, members of the policy force, employees of state administration, judges of courts of law, prosecutors and others whose employment relationship is governed by special law.	Not used
Finland	Used	Used	Not used	Not used	Not used
France	Used	Used	Not used	Public sector employees who do not fall within the Labour Code, but are accorded a specific status by regulations or legislation.	Not used
Gabon	Used	Used	Not used	Labour Code does not apply to a person in a permanent employment relationship in the context of public administration. Government furnished conditions of termination for such workers – which indicate that they benefit from a protection at least equivalent to that offered under the Convention.	Not used

Ratifying State	Article 2(2)*			Article 2(4)**	Article 2(5)**
	Contracts for a specified period of time or a specified task	Workers serving a period of probation or a qualifying period of employment	Casual basis for a short period		
Latvia	Used	Used	Used	Certain categories of managerial staff in the public sector are covered by a special status, and several provisions of the Convention did not apply to them.	Not used
Lesotho	Used	Used	Used	Members of the army and defence force are excluded. Public Servants are also exempt by Labour Court (Exemption) Order. Trainees or Apprentices subject to Technical Vocational Training Act, 1984 are excluded from the application of the provisions of the code on contracts of employment, termination, dismissal and severance pay. "Any group of employees" can be exempt from the provisions relating to unfair dismissal if "Minister is satisfied, following consultations with representative workers' and employers' organizations, that there is available to such group, whether under statute or not, a remedy for dismissal analogous to a claim for unfair dismissal".	Not used
Luxembourg	Used	Used	Used	Not used	Not used
Malawi	Used	Used	Apparently used	Armed forces, the prison service or the police except those employed in civilian capacity	Not used
Republic of Moldova	Used	Used	Used	Not used	Not used
Montenegro	*No information at present. Government's first report has yet to be received.*				
Morocco	Used	Used	Used	Used *(Under examination. See also CEACR comments 2006 on additional exclusions referred to in Government's report. Government was requested to respond in 2008)*	Not used

Ratifying State	Article 2(2)*			Article 2(4)**	Article 2(5)**
	Contracts for a specified period of time or a specified task	Workers serving a period of probation or a qualifying period of employment	Casual basis for a short period		
Namibia	*Under examination.*			Namibian defence force and Namibian police force.	Not used
Niger	Used	Used	Used	Judiciary, military, teaching staff of the universities, staff of public institutions of commercial character and territorial communities staff.	Not used
Papua New Guinea	*Under examination. No relevant legislation has been promulgated.*				
Portugal	Used	Used	Used	Civil service	Not used
Saint Lucia	Used	Used	Not used	Public servants	Not used
Serbia	Used	Used	Used	Not used	Not used
Slovenia	Used	Used	Not used	Not used	Not used
Spain	Used	Used	Used	High managerial posts and family undertakings	Not used (*See CEACR comment 2006 in which Government seeks to exclude employment relationships of prisoners, despite not having included this in its first report)*
Sweden	Used	Used	Used	Those holding managerial positions, those engaged in work in the employer's household, and those employed on relief work or "sheltered employment". Those holding "state-graded positions" are also not covered by some provisions relating to summary dismissal.	Not used
The former Yugoslav Republic of Macedonia	*Government's first report has yet to be received.*				

Ratifying State	Article 2(2)*			Article 2(4)**	Article 2(5)**
	Contracts for a specified period of time or a specified task	Workers serving a period of probation or a qualifying period of employment	Casual basis for a short period		
Turkey	Used	Used	Used	Not used	Not used (*See CEACR comment 2007 which addresses Government's indication that establishments with fewer than 30 workers are excluded from the application of the Convention, despite not having indicated this in its first report. Government was requested to report thereon in 2009)*
Uganda	*Insufficient information provided in Government's reports.*				
Ukraine	Used	Used	Used	Not used	Not used
Bolivarian Republic of Venezuela	Used	Used	Used	Under examination (see CEACR 2008 observation)	
Yemen	*Under examination. A draft amendment to the Labour Code is presently under consideration by the Government.*				
Zambia	Used	Not used	Used	Used – public service employees, employees of small scale enterprises with less than 5 workers, employees of an employer who is adjudged or declared bankrupt and employees of a company being wound up.	Not used
Total number of countries making recourse to exclusions	26	26	18	18	nil

* The term "used" in respect of exclusions envisaged under Article 2(2) of the Convention, denotes that the Government has indicated in its article 22 reports that it has availed itself of these exclusions, and that workers under these contracts of employment are excluded from either some or all of the provisions of the Convention.

** The term "used" in respect of exclusions envisaged under Article 2(4)–(5) of the Convention, denotes that the Government has indicated in its first article 22 report on the application of the Convention that certain categories of workers are excluded from either some or all of the provisions of the Convention, in accordance with Articles 2(4) and/or 2(5) of the Convention.

Appendix III

Comparative table of the national legislation governing termination of employment in 55 countries

Country	Recourse to flexibility clauses		Reasons for termination		Notice	Specific procedures for collective dismissals		Severance allowance
The countries that have ratified the Convention are shaded in grey in the table	**Excluded enterprises, based on the number of workers (Art. 2)**	**Excluded categories of workers (Art. 2)**	**Valid reason for termination (Art. 4)**	**Invalid reasons for termination (Art. 5)**	**Reasonable period of notice (Art. 11)**	**Consultation of workers' representatives (Art. 13)**	**Notification to the competent authority (Art. 14)**	**Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)**
Argentina	No	Civil servants, particular categories (agricultural workers, domestic workers)	Yes	General principle of non-discrimination	Yes	Yes	Yes	Yes
Armenia	No	Fixed-term contract, casual or season workers, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Australia	100 [1]	Fixed-term contract, casual or season workers, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Austria	5	Particular categories (agricultural workers, domestic workers, journalists, actors)	No, except for dismissal without notice for serious misconduct	All the reasons set out under C158, except the filing of a complaint	Yes	Yes	Yes	Yes
Azerbaijan	No	Army, judiciary, fixed-term contracts, casual and seasonal workers, workers on probationary period	Yes	General principle of non-discrimination	Yes	No	No	Yes
Bangladesh	5	Civil servants, managers, fixed-term contracts, casual and seasonal workers, workers on a probationary period	Yes	General principle of non-discrimination	Yes	No	Yes	Yes

Country	Recourse to flexibility clauses		Reasons for termination		Notice	Specific procedures for collective dismissals		Severance allowance
The countries that have ratified the Convention are shaded in grey in the table	**Excluded enterprises, based on the number of workers (Art. 2)**	**Excluded categories of workers (Art. 2)**	**Valid reason for termination (Art. 4)**	**Invalid reasons for termination (Art. 5)**	**Reasonable period of notice (Art. 11)**	**Consultation of workers' representatives (Art. 13)**	**Notification to the competent authority (Art. 14)**	**Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)**
Belarus	No	Fixed-term contracts, casual and seasonal workers, workers on a probationary period	Yes	General principle of non-discrimination	Yes	Yes	Yes	**Yes**
Bolivia	No	Civil servants, agricultural workers	Yes	General principle of non-discrimination	Yes	No	No	**Yes**
Bosnia and Herzegovina	No	No	Yes	All the reasons set out under C158, except the filing of a complaint	Yes	Yes	Yes	**Yes**
Brazil	No	Civil servants	Yes	General principle of non-discrimination [2]	Yes	No	Yes	**Yes**
Cambodia	No	Civil servants, judiciary, police, army, military police, personnel of aerial and maritime transportation, domestic workers	Yes	All the reasons set out under C158, except the filing of a complaint against the employer, marital status, family responsibilities, pregnancy, absence from work during maternity leave	Yes	Yes	Yes	**Yes**
Cameroon	No	Civil servants, judiciary, army, police, fixed-term contracts, casual or season workers, workers on probationary period	Yes	General principle of non-discrimination	Yes	Yes	Yes	Yes

Country	Recourse to flexibility clauses		Reasons for termination		Notice	Specific procedures for collective dismissals		Severance allowance
The countries that have ratified the Convention are shaded in grey in the table	**Excluded enterprises, based on the number of workers (Art. 2)**	**Excluded categories of workers (Art. 2)**	**Valid reason for termination (Art. 4)**	**Invalid reasons for termination (Art. 5)**	**Reasonable period of notice (Art. 11)**	**Consultation of workers' representatives (Art. 13)**	**Notification to the competent authority (Art. 14)**	**Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)**
Chile	No	Civil servants	Yes	General principle of non-discrimination	Yes	No	Yes	Yes
China	No	Civil servants	Yes	All the reasons set out under C158	Yes	Yes	No	Yes
Colombia	No	Civil servants	Yes	General principle of non-discrimination	Yes	No	Yes	Yes
Cyprus	No	Civil servants, army, fixed-term contracts, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Democratic Republic of the Congo	No	Civil servants, army, gendarmerie, fixed-term contract, workers on probationary period	Yes	All the reasons set out under C158, except the filing of a complaint	Yes	Yes	Yes	No, except commercial workers
Dominican Republic	No	No [3]	Yes [4]	General principle of non-discrimination	Yes	No	Yes	Yes
Egypt	No	Civil servants, domestic workers, fixed-term contracts, casual and seasonal workers, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Ethiopia	No	Senior management, fixed-term contracts, casual and seasonal workers, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	No	Yes
Finland	No	Fixed-term contract, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes

Country	Recourse to flexibility clauses		Reasons for termination		Notice	Specific procedures for collective dismissals		Severance allowance
The countries that have ratified the Convention are shaded in grey in the table	Excluded enterprises, based on the number of workers (Art. 2)	Excluded categories of workers (Art. 2)	Valid reason for termination (Art. 4)	Invalid reasons for termination (Art. 5)	Reasonable period of notice (Art. 11)	Consultation of workers' representatives (Art. 13)	Notification to the competent authority (Art. 14)	Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)
France	No	Civil servants	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Gabon	No	Civil servants, fixed-term contract, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Georgia	No	Fixed-term contract, casual and seasonal workers, workers on probationary period	Non	General principle of non-discrimination	No	No	No	Yes
Germany	5	Civil servants	Yes	General principle of non-discrimination	Yes	Yes	Yes	Yes
Ghana	No	Army, police, fixed-term contracts, casual and seasonal workers, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	Yes	No, except for termination for economic reasons
India	100	Civil servants, senior management, army, airforce, police	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Japan	No	Civil servants, seafarers	Yes	All the reasons set out under C158	Yes	Yes	Yes	No[5]
Republic of Korea	5	Family member, particular categories (domestic workers)	Yes	General principle of non-discrimination	Yes	Yes	Yes	Yes
Kazakhstan	No	Fixed-term contract, casual and seasonal workers, workers on probationary period	Yes	General principle of non-discrimination	Yes	Yes	No	No, except for termination for economic reasons

Country	Recourse to flexibility clauses		Reasons for termination		Notice	Specific procedures for collective dismissals		Severance allowance
The countries that have ratified the Convention are shaded in grey in the table	**Excluded enterprises, based on the number of workers (Art. 2)**	**Excluded categories of workers (Art. 2)**	**Valid reason for termination (Art. 4)**	**Invalid reasons for termination (Art. 5)**	**Reasonable period of notice (Art. 11)**	**Consultation of workers' representatives (Art. 13)**	**Notification to the competent authority (Art. 14)**	**Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)**
Kyrgyzstan	No	Army, fixed-term contract, casual and seasonal workers, workers on probationary period	Yes	General principle of non-discrimination	Yes	Yes	Yes	Yes
Latvia	No	Fixed-term contract, casual and seasonal workers, casual and seasonal workers, workers on probationary period, certain categories of civil servants	Yes	All the reasons set out under C158	Yes	Yes	Yes	No
Lesotho	No	Civil servants, army, fixed-term contracts, casual and seasonal workers, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	No	Yes
Luxembourg	No	Fixed-term contract, casual and seasonal workers, workers on probationary period	Yes	All the reasons set out under C158, except the filing of a complaint	Yes	Yes	Yes	Yes
Malawi	No	Army, police, fixed-term contract, casual and seasonal workers, workers on probationary period	Yes	All the reasons set out under C158	Yes	No	No	Yes
Mexico	No	Civil servants	Yes	General principle of non-discrimination	No	Yes	Yes	Yes
Republic of Moldova	No	Fixed-term contract, casual and seasonal workers, workers on probationary period	Yes	General principle of non-discrimination	Yes	Yes	Yes	Yes

Country	Recourse to flexibility clauses		Reasons for termination		Notice	Specific procedures for collective dismissals		Severance allowance
The countries that have ratified the Convention are shaded in grey in the table	Excluded enterprises, based on the number of workers (Art. 2)	Excluded categories of workers (Art. 2)	Valid reason for termination (Art. 4)	Invalid reasons for termination (Art. 5)	Reasonable period of notice (Art. 11)	Consultation of workers' representatives (Art. 13)	Notification to the competent authority (Art. 14)	Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)
Morocco	No	Fixed-term contract, casual and seasonal workers, workers on probationary period *	Yes	Yes	Yes	Yes	Yes	Yes
Niger	No	Fixed-term contract, casual and seasonal workers, workers on probationary period, particular categories of workers (army, civil servants)	Yes	Yes	Yes	Yes	Yes	Yes
Panama	No	Civil servants	Yes	General principle of non-discrimination	No	No	Yes	Yes
Peru	No	Civil servants	Yes	All the reasons set out under C158	No	Yes	Yes	Yes
Portugal	No	Civil servants	Yes	All the reasons set out under C158, except marital status and social origin	Yes	Yes	Yes	Yes
Russian Federation	No	Fixed-term contract, casual and seasonal workers, workers on probationary period, particular categories of workers (army)	Yes	General principle of non-discrimination	Yes	Yes	No	Yes

Country	Recourse to flexibility clauses		Reasons for termination		Notice	Specific procedures for collective dismissals		Severance allowance
The countries that have ratified the Convention are shaded in grey in the table	**Excluded enterprises, based on the number of workers (Art. 2)**	**Excluded categories of workers (Art. 2)**	**Valid reason for termination (Art. 4)**	**Invalid reasons for termination (Art. 5)**	**Reasonable period of notice (Art. 11)**	**Consultation of workers' representatives (Art. 13)**	**Notification to the competent authority (Art. 14)**	**Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)**
Saudi Arabia	No	Fixed-term contract, casual and seasonal workers, workers on probationary period, particular categories of workers (domestic workers, seafarers, sportspersons)	Yes		Yes	No	No	Yes
Senegal	No	Civil servants	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Serbia	No	Fixed-term contract, casual and seasonal workers, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	Yes	No, except for termination for economic reasons [6]
Slovenia	No	Fixed-term contract, workers on probationary period	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes for termination for economic reasons [7]
South Africa	No	Particular categories (army, persons who work less than 24 hours a month)	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Spain	No	Civil servants, executives, family enterprises	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes

Country	Recourse to flexibility clauses		Reasons for termination		Notice	Specific procedures for collective dismissals		Severance allowance
The countries that have ratified the Convention are shaded in grey in the table	Excluded enterprises, based on the number of workers (Art. 2)	Excluded categories of workers (Art. 2)	Valid reason for termination (Art. 4)	Invalid reasons for termination (Art. 5)	Reasonable period of notice (Art. 11)	Consultation of workers' representatives (Art. 13)	Notification to the competent authority (Art. 14)	Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)
Sweden	No	Fixed-term contract, casual and seasonal workers, workers on probationary period, particular categories of workers (managers, employees in sheltered workshops, domestic workers)	Yes	All the reasons set out under C158	Yes	Yes	Yes	Yes
Turkey	30 [8]	Fixed-term contract, casual and seasonal workers, workers on probationary period	Yes (except, seafarers)	Yes	Yes	No	No	Yes
Ukraine	No	Fixed-term contract, casual and seasonal workers, workers on probationary period	Yes	Yes	Yes (partially)	No	Yes	Yes
United Kingdom	No	Police, army, seafarers	Yes	All the reasons set out under C158, except social origin and marital status	Yes	Yes	Yes	Yes
United States	No	Civil servants, particular categories of workers (agricultural workers, domestic workers, family enterprises, workers covered by the Railway Labour Act)	No	General principle of non-discrimination	No	No	Yes	No

Country	Recourse to flexibility clauses		Reasons for termination		Notice	Specific procedures for collective dismissals		Severance allowance
The countries that have ratified the Convention are shaded in grey in the table	**Excluded enterprises, based on the number of workers (Art. 2)**	**Excluded categories of workers (Art. 2)**	**Valid reason for termination (Art. 4)**	**Invalid reasons for termination (Art. 5)**	**Reasonable period of notice (Art. 11)**	**Consultation of workers' representatives (Art. 13)**	**Notification to the competent authority (Art. 14)**	**Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)**
Bolivarian Republic of Venezuela	No	Fixed term contract, casual and seasonal workers, workers on probationary period[9]	Yes	General principle of non-discrimination	Yes	Yes	Yes	Yes
Zambia	No	Fixed-term contract, casual and seasonal workers	No	Yes	Yes	Yes	Yes	No

[1] See CEACR observation 2007 – this exclusion was not listed in the first report on the application of the Convention, submitted under article 22 of the Constitution, and is not in conformity with C158.

[2] (Desahucio) the parties can terminate the employment relationship without justification, while respecting the period of notice.

[3] See art. 5 of the Labour Code of the Dominican Republic 1999.

[4] See art 75 of the Labour Code – (Desahucio) the parties can terminate the employment relationship without justification, while respecting the period of notice.

[5] Provision for severance allowance may be provided under collective agreements.

[6] See CEACR observation which requested that legislation be brought into conformity with Article 12(1).

[7] In all other cases of termination, the unemployed person seeking employment will be provided with an unemployment allowance.

[8] See CEACR observation 2007 – this exclusion was not listed in the first report on the application of the Convention, submitted under article 22 of the Constitution, and is not in conformity with C158.

[9] See CEACR comments 2008 relating to managers.

*See CEACR comments 2008 relating to domestic workers and workers in the traditional sector.

Appendix IV

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Appendix V

General observation on the Termination of Employment Convention, adopted by the Committee of Experts at its 79th Session, 2008

General observation

The Committee was informed of the consultation held on the status of the Termination of Employment Convention, 1982 (No. 158) in the framework of the Committee on Legal Issues and International Labour Standards at the 303rd Session of the Governing Body, in November 2008. The Committee is aware that some concerns were reiterated on the record of the ratification of the Convention, in the use of the exclusions provided for in *Article 2*, and the flexibility as to the manner of implementation.

The Committee wishes to note that many more countries than those that have ratified the Convention give effect to its basic principles, such as notice, a pre-termination opportunity to respond, a valid reason and an appeal to an independent body. Most countries, be they ratifying countries or otherwise, have provisions in force at the national level that are consistent with some or all of the basic principles of the Convention. The Committee notes that the principles of the Convention are an important source of law for labour courts and tribunals in countries that have or have not ratified the Convention. At its present session, the Committee noted with satisfaction the rulings handed down in March 2006 and July 2008 by the Court of Cassation in France directly applying the Convention. As an example of a non-ratifying country, the Committee notes from information supplied to it that the courts in South Africa have used the Convention in developing its jurisprudence.

The Committee considers that the principles underlying the Convention constitute a carefully constructed balance between the interests of the employer and the interests of the worker as evidenced by its provisions relating to termination on grounds of operational requirements of the enterprise. This is of particular relevance given the current financial crisis. Because the Convention supports productive and sustainable enterprises, it recognizes that economic downturns can constitute a valid reason for termination of employment. The Committee stresses that social dialogue is the core procedural response to collective dismissals – consultations with workers or their representatives to search for means to avoid or minimize the social and economic impact of terminations of employment for workers.

The Committee is convinced that a better dissemination of the information available on the Convention and the recognition by the stakeholders of the core requirements of the Convention might provide a basis for achieving tripartite consensus in any further consultations.