

# COMPARATIVE LABOUR CASE LAW - 2

## THE FANTASTIC EXISTENCE OF THE PRINCIPLE OF FAVOR. OFTEN EVOKED, HARDLY IMPLEMENTED

### EDITO

What remains of the principle of favor? This principle, which could be described by the doctrine as « the soul of labor law »<sup>1</sup> or « the centerpiece of the combination of norms in labor law »,<sup>2</sup> has never been formally enshrined in general terms. It is found occasionally in certain legal texts when the legislator has had to solve the hypothesis of a conflict of norms.<sup>3</sup> This in no way precluded the Conseil d'État<sup>4</sup> from recognizing it as a « general principle of law », nor the Constitutional Council<sup>5</sup> or the Cour de cassation<sup>6</sup> to call it a « fundamental principle in labor law ».

Adorned with these titles, it seems unassailable. The analysis of the case law shows a reality quite different from this glorious appearance. If the doctrine has praised it, it seems that jurisprudence has not always had a unique and precise vision of this principle, the hour of glory of which seems to be a memory. From the Auroux ordinance of 16 January 1982 on hours of work and paid holidays, the French legislature authorized the social partners to derogate from the legal provisions even in a way that was unfavorable to employees. This trend continued.

Is the jurisprudence accompanying this development or showing resistance in order to maintain this principle? In order to answer this question several judicial examples are proposed to the reader. First, Ms Allison Fiorentino proposes an analysis of the jurisprudential origin of the principle of favor in French law (I). As a multifaceted principle in Uruguayan law, it irrigates the branch of labor law without having received any formal consecration, as underlined in the article of Professor Hugo Barretto Ghione (II). This principle, also recognized in Portuguese law, obtained only a timid legal validation, as evidenced by the article of Professor António Monteiro Fernandes (III). This tendency is further accentuated in Hungarian law. The article of Professor Tamás Gyulavári states that, far from favoring a principle of favor established by the case-law, the legislator has favored contractual freedom (IV). Even more extreme is the example of the Czech Republic. The work of Professor Martin Štefko proves in this respect that Czech collective agreement law dismantled during the communist period has never been reborn from its ashes and that the principle of favor is only embryonic (V).

<sup>1</sup> Y. Chalaron « L'application de la disposition la plus favorable » in *Etudes offertes à Gérard Lyon-Caen*, Dalloz, 1989, p. 243.

<sup>2</sup> A. Chevillard, « La notion de disposition plus favorable », *Dr. soc.* 1993, p. 363.

<sup>3</sup> In the event of a conflict between the contract of employment and the collective agreement (Article L. 2254-1 C. Trav.), a conflict between a collective agreement and legal provisions (Article L. 2251-1 C. Trav.). Before the reform of the law of 4 May 2004, Article L. 2252-1 provided for an identical solution in the event of a conflict between regional and national collective agreement.

<sup>4</sup> CE. 22 mars 1973, avis n° 310.108, *Dr. soc.* 1973, p. 514 ; *Dr. ouvr.* 1973, p. 190.

<sup>5</sup> Décision n° 89-257 DC du 25 juillet 1989.

<sup>6</sup> Cass. Soc., 17 juillet 1996, n° 94-45281, 95-41313, *Dr. soc.* 1996, p. 1049.