If the balance of power in the employment relationship is singularly delicate, then the role of unions adds an extra layer of complexity to the equation. Collective action is an effective countervailing tool to safeguard the rights of the workforce, but maintaining equilibrium between the diverse interests at play can be a challenge, as recent developments in Europe bear out.

The International Labour Organisation (ILO) recently urged the Polish government to remedy deficiencies in domestic employment law that curtail the freedom of association, in response to a complaint submitted by the Solidarity labour movement. Solidarity — a national institution that was instrumental in toppling Poland’s Communist regime and that today remains a staunch advocate of workers’ rights — claimed that the existing wording of the Labour Code is unduly restrictive and does not adequately safeguard against anti-union discrimination. ILO Convention 87 on the freedom of association states that “workers and employees, without any distinction, shall have the right to establish … and to join organisations of their own choosing.” However, the Polish law refers only to “employees” — a narrow term that excludes numerous categories of worker, including the self-employed and those engaged under civil law contracts. Under this wording, the lack of a conventional employment relationship effectively precludes such individuals from establishing or joining a union, in contravention of the ILO convention. The ILO has thus recommended that the Labour Code be revised to ensure that all workers can enjoy these rights. Its intervention should intensify public pressure for legislative reform; but thus far, the government has given no indication of its intended response. (Ref 25392)

Reform has reached a rather more advanced stage in Hungary, where a revamped Labour Code took effect this summer. Among other things, the code introduces new provisions on collective activity. Under the new code, protected status now extends not only to the chief officer of the works council, but also to other appointed officials who work at the employer’s place of business. The exact number of individuals who can avail of such status is determined in proportion to headcount: Where the workforce is over 4,000 strong, up to five officers at the company may be protected under statute. (Ref 2602)

For those union officials who enjoy protected status, the precise extent of this shield is sometimes difficult to measure. In Switzerland, a recent Supreme Court decision provides some clarification on the issue. The claimant, a journalist for a leading media corporation in Zurich and chairman of the works council, lost his job in May 2009 alongside 56 colleagues. He sued for unfair dismissal, alleging that he had been sacked due to his position on the works council — specifically, in retaliation for his role in negotiating a social plan with the employer as part of the redundancy process some months previously. However, the suit was rejected at both first and second instance. The Supreme Court confirmed that the Swiss Code of Obligations does not afford union leaders blanket protection against termination, but requires only that any dismissal be objectively justified. In this case, the employer had legitimate economic grounds to let the journalist go, so the termination stood as fair. The existing Swiss regime again falls short of the protection required under the relevant ILO agreements. Proposed revisions have thus been tabled to align domestic law with international labour standards. (Ref 25203)
Elsewhere in Europe, the spotlight has fallen on the transport industry — traditionally, a heavily unionised sector, and one in which collective action can have far-reaching consequences. In Finland, the Finnish Seamen’s Union (FSU) has waged an audacious and aggressive campaign for many years against foreign-flagged vessels that call at Finnish ports. If the collective bargaining agreement in operation on a foreign vessel does not meet with its approval, the FSU will unilaterally assert its right, under the European Convention on Human Rights and the Finnish Constitution, to negotiate a new one. Its tactics of intimidation include orchestrating boycotts with related unions and stevedores to prevent the loading or unloading of the vessel; if the crew offload the cargo themselves, the FSU will simply target another vital spot in the logistics chain to prevent its distribution.

While the courts initially regarded these boycotts to be legitimate, in recent years, the tide has turned against the FSU, and the courts will now issue interim injunctions in such cases to protect the rights of ship owners and their crews (who seldom appreciate this unwarranted interference in their working practices). However, service of injunctions is often frustrated by the disappearance of FSU officials at crucial moments, and hefty securities are required in order to obtain them — even though the unions have admitted that they suffer no monetary damages as a result. Importantly, this was recently confirmed by the Helsinki Court of Appeal, meaning that security may no longer be required to obtain interim injunctions in such cases. Hopefully, the decision should mark another watershed in this protracted stand-off and protect foreign ship owners from being strong-armed into unnecessary labour negotiations by the FSU. (Ref 25892)

Of course, the collateral damage from industrial action in the transport sector can extend far beyond the intended targets. In recognition of this, the French government enacted new legislation earlier this year to mitigate the impact on air passengers when airline crew or
ground staff decide to strike. Under the law, companies operating in the industry have the opportunity to conclude master agreements to promote dialogue and prevent conflicts from escalating. Among other things, such agreements should outline the circumstances under which unions can notify the employer of their intention to strike and the framework within which negotiations should take place before this right can be exercised. Salaried employees whose absence would adversely affect passengers must give advance warning at least 48 hours before striking, while operators must inform passengers of any disruption at least 48 hours beforehand. The law is modelled on similar legislation that has applied to the carriage of passengers by land since 2007; but the sheer number of operators in the air travel sector whose employees could potentially cause disruption makes it impossible to predict how it will be interpreted and implemented. The new Socialist administration may also have the legislation in its sights — so for now, its potential impact remains very much an unknown quantity. (Ref 25255) EB

A full discussion of any of these topics can be accessed at the International Law Office website by inputting the five-digit reference number at www.internationallawoffice.com/newsletters.