ICLG

The International Comparative Legal Guide to:

Employment & Labour Law 2012

A practical cross-border insight into employment and labour law

French employment chapter, contributed by Dechert Paris LLP

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main sources that govern the employment relationship, in order of importance, are: EC law; the French Constitution; the French Labour Code; case law; collective bargaining agreements; company collective agreements; internal rules and regulations; and company practices.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

There are two main types of workers under French employment law: employees; and the self-employed. Employees have greater protection as they benefit from the provisions regarding termination as detailed in section 6 and could be entitled to benefit from unemployment allowances if they are dismissed. Individuals are employees if they perform duties for a company under a subordinating link and receive remuneration in return for their work.

The self-employed are less protected by French law. An individual is self-employed if he chooses to work for himself without being answerable to an employer.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

While it is generally advised to have all contracts in writing, it is not a legal requirement to have written employment contracts, except when an applicable collective bargaining agreement requires it or when the contract is for a fixed-term, part-time, or an apprenticeship.

It should be noted that oral fixed-term contracts are categorically deemed to be indefinite-term contracts and oral part-time contracts are considered to be full-time contracts.

Moreover, in the absence of a written contract, in accordance with EU law, an employer should provide every employee with a written statement of the main terms which determine the employment relationship. The main terms are: name of the parties; place of work; position; starting date; length of paid holidays; name of applicable collective bargaining agreement; salary; and working time.

1.4 Are any terms implied into contracts of employment?

Employers and employees are expected to behave in a correct manner towards one another and mutual trust should be maintained and respected.

Employees should respect their duties of loyalty, should not disclose confidential information to people outside of the workplace and are expected to carry out reasonable tasks when asked to do so; while employers engage to pay wages and to provide a safe working environment.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Minimum wage

All employees who are employed under an employment contract, either indefinite or fixed term, are entitled to receive a minimum gross monthly wage (in 2012: €1,398.37 gross for a 35-hour work week). Depending on the job category, collective bargaining agreements also frequently determine the minimum monthly wage.

35-hour work week

The normal working time is 35 hours a week. It should be noted that employees must not work more than:

- an average of 44 hours a week during 12 consecutive weeks;
- 48 hours during any given week;
- 10 hours a day; and/or
- 220 hours of overtime a year (subject to applicable collective bargaining agreements).

However, the 35-hour work week can be adapted if employers successfully enter into an agreement with the trade unions present in the company or if the industry-wide collective bargaining agreement provides specific arrangements. This provides for a longer working week or allows employees to work their hours more flexibly, including agreeing day packages with autonomous executives under which their working time is organised over a certain number of days instead of a fixed number of hours and daily hours are not recorded by the employer. In general, all employees, executives included, must be granted (i) a daily rest period of 11 consecutive hours, and (ii) a weekly rest period of 35 consecutive hours, including Sunday.

Regarding day packages, it should be noted that the French Supreme Court has recently decided (on 29 June 2011) to make the validity of the day packages conditional on due compliance with particular requirements relating to the protection of health and safety, and maximum weekly working time, as well as daily and weekly rests. Such requirements should be included in the collective agreement

establishing the possibility of using day packages. Additionally, the employer must establish a document that follows the days worked, ensure regular monitoring of the organisation of the employee's work and hold an annual meeting to discuss the organisation and the workload.

Paid holidays

Employees are entitled to a minimum of five weeks' paid holiday a year. In France, there are also approximately 10 public holidays every year.

Additional paid leave

The law and collective bargaining agreements provide for additional paid leave. This can be granted (i) to employees who have reached a specific length of service, and (ii) for family-related events.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

In French employment law, a collective bargaining agreement is an essential element of an employment relationship between the employer and employee. Most companies are governed by a bargaining agreement at industry level. Bargaining agreements at company level will come on top and will be negotiated only in companies of a certain size.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The law published on 20th August 2008 dramatically changed the conditions applicable to determining trade union representation and trade unions' rights.

The unions who are already present in companies will continue to be considered as representative until 2013.

Otherwise trade unions are considered as representative only when they have existed for more than two years and gained at least 10% of the votes at the latest works council election.

2.2 What rights do trade unions have?

The extent of the trade unions' rights depends on whether they are representative or not.

A union section (*section syndicale*) may be created by (i) representative trade unions, (ii) trade unions affiliated to one of the five trade union confederations, and (iii) trade unions who meet several criteria, i.e. respect of republican values, independence, minimum two years of existence, having a geographical and professional scope which includes that of the company, or if they have at least two members in the company or establishment.

The role of the union section is to represent the social and economic interests of its members before the employer. In order to carry out this role, the union section may collect dues, post notices and hold meetings. Furthermore, unions may distribute hand-outs within the enterprise. The union sections may have union meetings once a month on the company's premises.

Non-representative unions may appoint a union section's representative. In addition, all unions which are representative and have established union sections in a company employing 50 employees or more, have the right to appoint one or more union delegates (*délégués syndicaux*) in order to represent the union section in discussions with the employer. Trade union delegates are, in principle, the only representatives with whom the employer may negotiate and enter into collective bargaining agreements.

2.3 Are there any rules governing a trade union's right to take industrial action?

An industrial action may originate from trade unions or the employees themselves. Case law interprets industrial action as *a collective and concerted work stoppage aiming to support professional demands*. While trade unions may be bound by certain agreements providing notice or prior steps before calling for industrial actions, these restrictions are not binding on the employees themselves.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

In companies with at least 50 employees, a works council must be established. The works council is in charge of expressing the opinions of the employees and to that effect plays an important role in the economic and financial evolution of the company as well as the work conditions and the training.

The works council must be informed and consulted on almost all major company decisions, including:

- Matters relating to the employer's organisation, management, and general running of the business.
- Decisions that are likely to affect the company, e.g. the volume or structure of the workforce, working hours and conditions, and training.
- Restructuring operations and collective redundancies.
- A change in the company's economic or legal structure, especially in the case of mergers, transfers or undertakings, or major changes in the production structure of the company, as well as of the takeover or sale of subsidiaries.

The information and consultation of the works council must have occurred before taking the decision on any project.

It also manages the social and cultural activities for employees, which the employer pays for. Works council members are elected for four years and may be re-elected by employees. The number of members elected to the works council depends on the company's headcount.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

The works council's consent, favourable opinion, or absence of opposition is only required in a very limited number of cases:

- Introduction of exception to collective working hours.
- Replacement of overtime pay by additional rest.
- Health and safety elections.
- Refusals of certain employee absences.

2.6 How do the rights of trade unions and works councils interact?

The works council expresses the employees' opinion on economic matters, whereas trade unions aim to satisfy varied professional

claims. Works councils are consulted prior to the execution of companywide collective bargaining agreements by the unions.

2.7 Are employees entitled to representation at board level?

Two works council representatives (or four in large companies), appointed by the works council, may attend board meetings. These members must be invited to every board meeting in the same way as the directors and, prior to these meetings, they must receive the same information. The works council representatives cannot vote on the suggested resolutions, but they have the right to express their opinion on them.

Two works council representatives, appointed by the works council, can also attend shareholders' meetings. They have the same rights as for the board meetings.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are protected against discrimination, according to the French Labour Code (section L. 1132-1).

3.2 What types of discrimination are unlawful and in what circumstances?

Discrimination strictly prohibits sanctions of existing employees, as well as exclusion of applicants from the recruitment process, on the basis of their origin, name, habits, political opinions, trade union activities, ethnic group, race, religion, health, sex or family situation.

Discrimination is subject to criminal sanctions.

3.3 Are there any defences to a discrimination claim?

The main defence is evidence of objective reasons for the difference of treatment.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees can bring discrimination claims before the Employment Tribunal. Employees have to present the Tribunal with evidence illustrating examples of discrimination. In turn, the employer has to prove that his/her decision was based on elements unrelated to discrimination.

Claims can be settled before or after lawsuits are initiated.

However the public prosecutor is always able to pursue the claims before a criminal court despite the existence of a settlement between the parties.

3.5 What remedies are available to employees in successful discrimination claims?

Discrimination is a criminal offence punishable by:

- a maximum of three years' imprisonment and a fine of €45,000 (Article 225-2, Criminal Code) for the author of the offence and employer's legal representative (namely the chief executive officer); or
- a fine of up to €225,000 (Article 225-4, Criminal Code) for the employing legal entity.

Any decision resulting from discrimination is void. As a consequence in case of dismissal, for instance, the employee must be reinstated or receive compensatory damages.

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Atypical workers benefit from additional protection with respect to discrimination. They should not suffer discrimination linked to the kind of contract they have.

For example, workers under a fixed-term employment contract or under a temporary agency contract are entitled to the remuneration that a worker under an indefinite term contract benefits from (for similar qualification, with the exception of a possible impact on the length of service).

In addition, the "atypical" workers will benefit from the same protection as other workers (see question 3.2) in specific situations (i.e. prohibition of the discrimination when his fixed-term contract is renewed, prohibition of discrimination with respect to access to bonuses, etc.).

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Employees are entitled to maternity leave, which varies in duration:

- 16 weeks for a single birth bringing the number of children to one or two (6 weeks before childbirth and 10 weeks after childbirth).
- 26 weeks for a single birth bringing the number of children to three or more (8 weeks before childbirth and 18 weeks after childbirth).
- 34 weeks for a multiple birth of twins (12 weeks before childbirth and 22 weeks after childbirth).
- 46 weeks for a multiple birth of triplets or more (24 weeks before childbirth and 22 weeks after childbirth).

The applicable collective bargaining agreement can provide for a longer leave.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Employees on maternity leave are given an allowance by the French Social Security. The employer is not required by law to pay their salary during this time. However, collective bargaining agreements often state that the employee must receive her usual salary if the employee has a certain length of service.

4.3 What rights does a woman have upon her return to work from maternity leave?

Following maternity leave, employees have the right to return to their original position (or a similar position with the same remuneration).

Employees with at least one year's service on the date of the birth or adoption can, until the child reaches the age of three, either:

- work part-time; or
- take unpaid parental leave.

4.4 Do fathers have the right to take paternity leave?

Fathers may take three days' leave on the birth of a child as well as 11 consecutive days' paternity leave (18 days if there are multiple births), which must be taken within four months following the birth. Special durations apply in case of adoption.

During the leave, the employment contract is suspended and the French Social Security pays a specific allowance. However, the employer does not have to maintain the male employee's remuneration during the leave unless provided otherwise by the collective bargaining agreement.

4.5 Are there any other parental leave rights that employers have to observe?

All employees authorised to adopt by social services have the following rights to leave:

- For adoption of a single child:
  - ten weeks for the first two children adopted separately; and
  - 18 weeks when the adoption brings the number of children at home to three or more.
- 22 weeks for multiple adoptions at one time.

It is possible to split the leave between the two parents in which case the duration of the leave is slightly increased. Finally, before adoption, employees can claim unpaid leave of up to six weeks if they need to travel abroad to adopt a child.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

Employees who are carers for dependents and have at least two years' length of service may ask for an unpaid leave of three months, which may be up to a year.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

In case of a share sale, the employees' contract is not directly impacted. They remain employees of the transferred entity. In case of an asset transfer, if there has been a transfer of an autonomous economic entity, employees are automatically transferred by application of Article L.1224-1 of the French Labour Code. An autonomous economic entity is an organised group of persons, with its own assets, clients and line of business.

Recent case law has now made it easier to transfer employees in case of a transfer of part of the business when employees shared their time between two or more of his employer's businesses.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

The terms of each individual contract will transfer without any change. However, on the collective employment front, the transfer is for a limited period of time (maximum 15 months). During that period, the transferred employees continue to benefit from rights that were in force with their previous employer immediately before the transfer and also start to enjoy rules applicable to their new employer.

During the 15-month period, the new employer must negotiate a new collective agreement to adapt the rules previously applicable to the transferred employees. If an agreement cannot be established, the previous collective rights will cease to apply but the transferred employees will benefit from their individual acquired rights.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

The works council must be informed and consulted on any proposed change to the economic or the juridical organisation of the employer, including modifications resulting from a merger, sale of assets, or a merger or acquisition of a subsidiary, if such modifications would affect employees.

There are also specific consultation requirements in case of a public open bid.

The information-consultation has to fulfil certain conditions:

- it must occur before the implementation of a project; and
- in order to allow the works council to express a reasoned opinion, the employer has to provide it with precise and written information, a reasonable time to consider all elements, and to give a reasoned answer to its observations.

The duration of the process depends on the complexity of the project and its impact on the work force. 3 weeks to 4 months is a representative range of the time it may take.

Any employer, who does not consult the works council or consults it irregularly, is subject to sanctions consisting of a fine of €3,750 for the employer's legal representative (€18,750 for the employing legal entity) and/or 12 months' imprisonment.

5.4 Can employees be dismissed in connection with a business sale?

Dismissals implemented by the transferor before the transfer are forbidden and are considered as void if they are to prevent the employee transfer rules from applying. The sanction for the employer is to reinstate the concerned employees or to pay them compensation.

Dismissals after the transfer are possible but cannot be justified by the transfer.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

The employers cannot change the terms and conditions of employment because of a business sale. They have to comply with the normal process for changing terms. However, the fact that new collective rules apply to the buyer can impact individual employees.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The employer must serve notice in which he will lay out the grounds for dismissal, either personal or economic.

The dismissal letter must be sent by registered mail no earlier than 2 days after a preliminary meeting at which the employee and the employer will discuss the contemplated termination. In case of

termination for economic reasons, this delay will be 7 days, increased to 15 days in case of termination of an executive.

The notice period is usually of 1 to 3 months' duration but the employee's age and the length of service can increase the length of the notice period.

When the parties enter into an amicable termination agreement, they have to comply with a specific process but there will be no notice period. The specific process takes approximately 6 weeks and requires the involvement of the labour administration.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

There is no concept of garden leave. The employer can release the employee from working his notice period but in this case the employee is free to join another employer, even if he continues to be paid his notice by his previous employer.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

A specific process must be respected by employers before implementing a termination. The preliminary meeting referred to in question 6.1 is part of that protection.

Labour Inspector authorisation is required in the case of dismissing an employee representative or an employee benefiting from the same protection (Employment Tribunal judges). All other cases do not require third party consent.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

The following employees benefit from a special protection against dismissal:

- pregnant women;
- employees on sick leave resulting from a work-related accident or illness;
- employee representatives; and
- Employment Tribunal judges, and social security tribunal judges.

Labour Inspector authorisation is essential for the dismissal of an employee representative.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

An employer is entitled to dismiss for reasons related to the individual employee for disciplinary or non-disciplinary grounds:

- A disciplinary termination could be contemplated if an employee has committed a fault or violated one of the disciplinary rules established by the employer; noting that the termination cannot be implemented more than two months after the employer's acknowledgment of the misconduct.
- A non-disciplinary termination could be contemplated if the employee fails to adequately perform the job assigned to him. The employer will have to show that the employee lacks the necessary skills to adequately perform his/her job.

An employer is entitled to dismiss for reasons related to the business when three cumulative conditions are fulfilled:

- the termination is unrelated to the specific employee's abilities and performance;
- the termination results from the elimination or transformation of the position, or from a modification of an essential element of the employment contract; and
- the termination results from economic difficulties, technical changes or a reorganisation necessary to safeguard the group's competitiveness.

Employees are entitled to benefit from a severance indemnity which is determined by the applicable collective bargaining agreement or by the Labour Code (whatever is more favourable to the employee) which amounts to at least 1/5 of the monthly salary per year of service.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

It is rather simple to terminate an employee for personal grounds as long as there is a valid ground for dismissal. The following steps need to be followed:

- invite the employee to a preliminary meeting by registered post or letter remitted by hand, received five working days' prior to such meeting. This letter must state the time and place of the meeting as well as the employee's right to be accompanied by a colleague (or an outside party subject to certain conditions);
- hold the meeting with the employee; and
- send the dismissal letter by registered post after a certain delay following the meeting, which length varies in accordance with the type of termination; the presentation of the letter to the employee's home will be the starting point of the notice period (generally between 1 to 3 months).

For dismissals based on economic grounds, the employer will have to:

- apply selection criteria to all the employees belonging to the professional category within which the employer wishes to suppress the position. The criteria for selecting the terminated employee are determined by law: family situation (single parents for example); length of service; difficulties finding a new job (age or disability); and professional skills;
- search for all available positions within the company and within the whole group, even abroad to redeploy the employee prior to any redundancy; and
- order the customary redeployment scheme documentation; in groups with less than 1,000 employees in Europe, the employer has a statutory obligation to inform the employee about his entitlement to benefit from the CSP scheme: specific State retraining programmes allowing employees to follow training sessions to find new employment while receiving higher unemployment allowances. If the employer belongs to a group of more than 1,000 employees, in the redundancy letter he must offer the employee redeployment leave. The employee has 8 days to either accept or refuse such measure. In case of acceptance, the employee will benefit from a specific training for 4 to 9 months while being compensated by his employer.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee can challenge the grounds for his termination before the Employment Tribunal and request the payment of additional

indemnities. Employees with more than 2 years' length of service in companies with at least 11 employees are entitled to a minimum of 6 months' salary. There is no maximum compensation that can be ordered by the Tribunal.

In addition, if the court decides in favour of the employee, it will order the employer to reimburse all or part of the unemployment compensation received by the employee, if any, to the unemployment agency (*Pole Emploi*). The amount of such reimbursement may not exceed 6 months of unemployment compensation (roughly equivalent to 3 months' salary).

In order to counteract an employee's claim, the employer must prove that the grounds for termination were real and serious and for dismissals based on economic grounds, the employer must prove that the redundancy plan was justified and fulfils all necessary criteria.

It should be noted that such proofs should result from written documentation and that affidavits are the usual way to collect witness statements.

6.8 Can employers settle claims before or after they are initiated?

Employers can settle claims before and after they are initiated:

- Before: so as to prevent the terminated employee from suing the company to obtain compensation for unfair termination, in exchange for the payment of a specific financial compensation. The risks and the costs of litigation will thus be avoided.
- After: so as to request the terminated employee to waive his claim in exchange for specific financial compensation.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

An employer has additional obligations if it is dismissing various employees at the same time.

In case of 2 redundancies or more over 30 days (but less than 10): the information-consultation of the employees' representatives is mandatory as well as the information of the labour administration within 8 days of the sending of the redundancy letter.

In case of more than 9 redundancies within a 30-day period in companies having more than 50 employees, the company will have to apply the following procedure (in addition to the steps described in question 6.6):

- the employer must prepare a job protection plan which contains concrete and precise measures that the employer proposes to implement in order to accompany terminations but more specifically to avoid or reduce the number of redundancies and facilitate the obtaining of new employment positions within and/or outside the group;
- the employees' representatives must be informed and consulted on the economic grounds and on the job protection plan; and
- in addition to reviewing the job protection plan, the Labour Inspector checks the adequacy of the consultation procedure, and notifies the employer of any relating remarks.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees, through the intermediary of the employees' representatives, can negotiate a higher severance indemnity and/or better measures of outplacement or trainings in the job protection plan.

If an employer fails to comply with its obligations, i.e. if the Employment Tribunal considers that the employer did not comply with the redeployment obligation or when the redundancy is not based on real and serious economic grounds, damages for unfair termination will be awarded to the terminated employee.

If the job protection plan is considered as being insufficient by the Employment Tribunal, the redundancy proceedings will be considered as null and void. The employees made redundant could then ask for their reinstatement or for damages.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Various types of restrictive covenants are recognised:

- non-compete;
- non-solicitation of employees; and
- confidentiality.

7.2 When are restrictive covenants enforceable and for what period?

A non-compete clause is valid only if it is necessary to protect the company's legitimate interests, taking into consideration the specificities of the job position of the employee concerned and is limited geographically and in time.

The non-compete clause must also ensure financial compensation to the employee.

The period is generally defined by the collective bargaining agreement. When there is no provision in the collective bargaining agreement in this regard, case law considers that two years is the limit.

The non-solicitation of employees and the confidentiality clauses are enforceable without any specific conditions.

7.3 Do employees have to be provided with financial compensation in return for covenants?

Employees have to be provided with financial compensation in return for non-compete covenants.

The compensation is generally provided in the collective bargaining agreement. However, an employment contract can provide the employee with a more favourable compensation.

The compensation generally represents at least 30% of the employee's former salary for the period for which the clause is applicable. Payment of the compensation during the course of the contract is not valid.

7.4 How are restrictive covenants enforced?

A breach in the non-compete or confidentiality covenants can be enforced by the former employer before the tribunals which could:

- decide that the breach must immediately end; and/or
- decide to award damages to the employer (which for the non-compete clause could represent the reimbursement of the

financial compensation plus additional compensation based on the prejudice suffered).

8 Court Practice and Procedure

8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The Employment Tribunal (*Conseil de Prud'hommes*) has jurisdiction to hear employment-related complaints at first instance level. It is composed by non-professional judges elected by the employees and the employers.

Claims for specific cases can also be brought before administrative courts and tribunals for social affairs.

8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The employment-related complaints are examined by the Employment Tribunal in two procedural steps:

- the conciliation hearing: judges intend to conciliate the parties; and
- the trial hearing: if the parties have not been able to conciliate, at the trial hearing where the parties plead their case.

The conciliation is therefore mandatory once the claim has been filed except for claims with their aim regarding a disqualification of a fixed-term contract to an indefinite-term contract as, in that case, the parties will be convened directly to the trial hearing.

8.3 How long do employment-related complaints typically take to be decided?

There is no minimum or maximum time for the proceedings to be dealt with. It depends on the jurisdictions.

On average, it takes one year for an employment-related complaint to be judged at first instance level.

8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

A decision rendered by an Employment Tribunal may be appealed against before a Court of Appeal within two months after the decision has been rendered.

The procedure takes approximately another year before the Court of Appeal renders its decision.

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- Public Procurement
- Real Estate
- Securitisation
- Telecommunication Laws and Regulations
- Trade Marks

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