

**COLLECTIVE AGREEMENTS AND INDIVIDUAL CONTRACTS OF
EMPLOYMENT IN LABOUR LAW : THE NETHERLANDS***

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1 Collective labour relations: the institutional context

Collective labour relations are shaped by the interaction between the unions, employers' associations and the government. In the Netherlands most unions are organized in one of the two federations: the christian CNV and the neutral FNV (the latter being the product of a merger between the catholic and socialist federations in 1976¹). There is however a separate federation for unions representing the higher-level personnel groups. The federations are the contactpersons for both the central employers' organizations and the national government on general socio-economic issues. They are not involved in direct negotiations on collective agreements, a task which lies with the unions. The federations can issue recommendations to the unions, but the latter are not legally or hierarchially bound by such advice. Besides their national coordinating role, the federations play a role in representing the employees at the national and international levels, e.g. in the European Trade Union Confederation and the International Confederation of Independent Unions. Membership of the federations is only open to unions.

The unions are predominantly organized along the lines of economic activity. After the Second World War and again in the 1990s, the unions demonstrated a tendency to merge into ever larger organisations.² In 1997 the unions for the arts, information technology and the media all merged. Another recent merger occurred in 1998 when several FNV unions representing particular branches formed one union with over 500.000 members.³ Time and again, however, members of a particular profession would not feel sufficiently represented by these unions and would create (or maintain) separate professional unions.⁴ In the late 1980s, for

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1. The federation was established in 1976, the official merger took place in 1981: W. Albeda, W.J. Dercksen, F.H. Tros, *Arbeidsverhoudingen in Nederland*, Alphen a/d Rijn: Samsom, 6th revised edition 1998, p. 54.
2. J.P. Windmuller, C. de Galan, A.F. van Zweden, *Arbeidsverhoudingen in Nederland*, Utrecht: Het Spectrum, 6th edition 1987, p. 268 and 280; W.J.P.M. Fase 1980 p. 12, A.A.H. van Hoek, *Internationale mobiliteit van werknemers*, Den Haag: SDU 2000, p. 33; W. Albeda, W.J. Dercksen, F.H. Tros, *Arbeidsverhoudingen in Nederland*, Alphen a/d Rijn: Samsom, 6th revised edition 1998, p. 52.
3. The merger involved the union for services, the union for transport, the union for the foodstuffs and nutrition sector and the union for industry. <http://www.bondgenoten.fnv.nl/start/fbg/frames/index.htm>; W. Albeda, W.J. Dercksen, F.H. Tros, *Arbeidsverhoudingen in Nederland*, Alphen a/d Rijn: Samsom, 6th revised edition 1998, p. 52; H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer, 16th edition 2000, p. 177.
4. Examples of unions representing specific professions are the union for nurses and assistant-nurses, the union for the national railways' train drivers and train conductors, the union for pilots in civil aviation and the union for medical doctors employed under a labour contract. Some of these

example, a separate union for nurses and paramedics came into existence. The 1970s saw the appearance and rise of unions for higher-paid employees.⁵ The formation of these unions would often be a reaction to specific incidents or specific union politics.⁶ The predominant union politics in the 1970s was aimed at a levelling of the differential between the higher and lower wage groups ('nivellering'). For that purpose the scope of application of collective agreements was extended to include the higher wage groups. The employees concerned objected to this. Until then, they had not been covered by collective agreements and did not feel that they were adequately represented by the traditional unions.⁷ As a result, the unions representing higher-level personnel flourished and a separate federation organizing these unions was created in 1974. Since then there have been three federations represented at the central level, the CNV, the FNV and the Unie MHP. Other professional unions are either independent or are members of the existing federations, the CNV or FNV.

Just as the unions have reshaped their structure in recent times, so have the employers. Since the mid-1990s, the employers are no longer organised along political and/or religious lines, but mainly follow economic structures.⁸ The VNO-NCW federation⁹ is the major representative of the Dutch private sector, representing the larger enterprises in both social and economic issues. It is associated with the General Dutch Employers' Organisation (AWVN), which concentrates on the interests of undertakings in their function as employers. The VNO-NCW federation is a member of the European confederation of employers, the 'UNICE'.¹⁰ Small and medium-sized enterprises are organised in MKB-Nederland¹¹, enterprises active in agriculture in LTO-Nederland¹². The three federations cooperate within the RCO: the council of central organisations of enterprises.¹³ Membership of the federations is open to federations, branchorgani-

professional unions are completely independent and not affiliated with any of the three federations (FNV, CNV, higher personnel).

5. Strictly speaking, separate unions for higher-level employees already had a long tradition. Political events provided these unions with a strong growth incentive. H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer, 16th edition (2000, p. 181) mention in this respect the mergers between the main unions as well as their wage policies.
6. A.A.H. van Hoek, *Internationale mobiliteit van werknemers*, Den Haag: SDU 2000, 33-34.
7. And of course they did not appreciate the unions' politics which resulted in a (relative) reduction of their income.
8. H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer, 16th edition p. 182, W. Albeda, W.J. Dercksen, F.H. Tros, *Arbeidsverhoudingen in Nederland*, Alphen a/d Rijn: Samsom, 6th revised edition 1998, p. 39 ff.
9. They merged in 1997.
10. The VNO-NCW also forms part of the Dutch delegation to the ILO: <http://www.ilo.org/public/english/dialogue/actemp/links/1998/europe.htm>.
11. Since 1995.
12. Since 1995.
13. Alongside these three federations of enterprises in the market economy, several organisations promote the interest of employers in health care and education and other governmental and semi-governmental institutions. These organisations do not participate in the social dialogue in the

sations, local organisations and single undertakings. Their function is mainly political.¹⁴ They partake in the social dialogue which takes place in the Joint Labour Council (Stichting van de Arbeid) and the Social and Economic Council (see below) but neither the VNO-NCW nor the MKB are themselves parties to collective agreements. They do coordinate the negotiations, however.¹⁵ Collective agreements are closed by branchorganisations and/or (groups of) enterprises.¹⁶ There are quite a few branchorganisations, sometimes more than one within the same branch of industry.¹⁷ The largest and most influential is the FME-CWM, which since a merger in 1995 is the main representative of the employers in the steel industry, in synthetic fibres, electronics and the electrotechnical industry. The membership of the FME-CWM includes multinational corporations like Philips, Stork and Corus.

Employers' organisations and the unions work together at different levels, in different institutions. Until recently they were fully responsible for running the labour exchange.¹⁸ They implemented both the general, statute-based social security and the additional social security at branch level. They (still) operate social funds and arbitration bodies. However, the Dutch system of labour relations does not include participation in or influence on the judiciary. Labour conflicts are dealt with through the ordinary (civil) courts. The highest-level organisations of employers and employees participate in two permanent institutions, the Stichting van de Arbeid (Joint Labour Council) and the Sociaal Economische Raad (Social and Economic Council). The SER is the central institution within a system of sector organisations under public law. It consists of 33 members, 11 of which are appointed by the central employees' organisations (FNV 8, CNV 2, MHP 1), 11 represent the employers (VNO 7, MKB 3, LTO 1) and 11 members are independent and are appointed by the 'Crown'. The sector organisations, of which the SER is the supervisory body, have (limited) legislative powers, e.g. in the areas of registration, professional standard setting and labour conditions. The latter competence, which stands in direct competition with negotiated collective agreements, is rarely used.¹⁹ The SER is one of the main advisory bodies of the government and in that capacity it deals with a wide range of social and economic issues. The Joint Labour Council or STAR is composed of representatives of the social partners only. It advises the

STAR and the SER. H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, Schets van het Nederlands Arbeidsrecht, Deventer: Kluwer, 16th edition 2000, 182.

14. H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, Schets van het Nederlands Arbeidsrecht, Deventer: Kluwer, 16th edition 2000, p. 183. In addition, they offer advice to their members.
15. H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, Schets van het Nederlands Arbeidsrecht, Deventer: Kluwer, 16th edition 2000, p. 183.
16. LTO is a party to collective agreements.
17. The construction sector has seven different organisations within the one federation, in the road-haulage sector there are two organisations of employers, each negotiating their own collective agreement.
18. As of 1 January 2002, the laborexchanges have changed into 'centers for employment and income' which perform functions with regards to unemployment benefit and social aid as well. The social partners do not participate in the management of these centers.
19. H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, Schets van het Nederlands Arbeidsrecht, Deventer: Kluwer, 16th edition 2000, p. 294.

government on social issues and is, inter alia, consulted during the process of declaring collective agreements to be generally applicable. Since both the SER and the STAR advise the government on social issues, the tasks of these institutions overlap to a certain extent. If both are consulted on the same issue or a similar issue, they try to avoid reaching contradictory conclusions by informal cooperation.

Twice a year, in the autumn and in the spring, the highest-level institutions of employers and employees hold a 'conference' with government officials in which they discuss the economic developments and prognoses. At this conference they try to reach an agreement on the desired developments in the field of wages and other labour conditions. This agreement functions as a recommendation to the unions and employers' organisations for the next round of negotiations.

2 Collective labour relations: the legal context

2.1 General

In the Netherlands, the legal position of the unions and the system of industrial relations is - on the whole - based on general rules on the one hand, and international agreements on the other. Although collective agreements and their general applicability are covered by special statutes, the negotiating process leading up to their conclusion has received little or no attention from the legislature. The Constitution does not contain any articles which specifically pertain to industrial relations. The freedom to establish trade unions, to operate as such and be members thereof are all covered by the right of association guaranteed in Article 8 of the Constitution.²⁰ The unions as institutions are governed by the rules on associations laid down in Articles 26 ff. of the Civil Code.²¹ The right to strike has not been the subject of any codification whatsoever and is based on case law. This lack of constitutional protection has not hampered the development of unions and industrial relations in the Netherlands. This in part the result of the Dutch system of judicial control, which diminishes the legal effect of the Constitution considerably and favours international conventions instead. The legislature being corrected by the courts cannot be based on a violation of the Constitution: Article 120 of the Constitution specifically states that the courts will not judge the constitutionality of statutes and international conventions. The courts can set aside statutory provisions, however, if these provisions violate treaty provisions having direct effect within the Dutch legal system.²² Such generally binding treaty provisions can be found in the

20. Jacobs, *Het recht op collectief onderhandelen in rechtsvergelijkend en Europees perspectief*, Alphen aan den Rijn/Brussel: Samsom/H.D. Tjeenk Willink 1986, p. 95.

21. H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer, 16th edition p. 184-186.

22. Art. 94 of the Constitution stipulates that statutes will not receive application if this application violates a generally binding provision of either a treaty or a decision of an international organisation. Whether a treaty provisions is considered to be general binding or not, depends primarily on the wording of the provision: can it impose obligations without further implementation? HR 30 May 1986, NJ 1986, 688 § 3.2; E. Verhulp, *Vrijheid van meningsuiting van werknemers en ambtenaren*, Den Haag: SDU 1996, p. 35.

European Social Charter (Article 6 section 4 on the right to strike is recognized as having direct effect²³), the European Convention on Human Rights and the International Convention on Social and Economic Rights.

ILO conventions will not – as a rule – have direct effect. Yet the norms contained therein have influenced Dutch labour law. For several decades after the Second World War, labour conditions were part of the general economic policy and as such a primary concern for the central government. The government had several legal instruments to control wages and other primary labour conditions, both in the profit and the non-profit sectors of the economy. These instruments did not sit well with the international obligations taken on by the Netherlands²⁴ and were gradually abandoned. One of the last vestiges of this interventionist policy was the Pay Adjustment (semi-public sector) Act²⁵, which was repealed in 1995.²⁶ This Act governed the wage levels of employees in organisations funded by the government. As it severely limited the right of negotiation for employers and unions, it was deemed to be incompatible with international law. To date, all that remains of the powers of government to intervene in the setting of wages is the Wage Formation Act²⁷. Article 10 of this Act contains the possibility for the government to freeze wages in an economic emergency. Article 5 ff. contain a procedure under which the Minister of Social Affairs may create regulations similar in content and effect to collective agreements (see below). Both powers are rarely used.

2.2 *Freedom and duty to negotiate*²⁸

Collective agreements in Dutch law are based on the law of contract. In line with the law on contracts in general, parties to the collective agreement, i.e. employers and the unions, have freedom as to whether they want to negotiate and with whom. This means that Dutch law does not contain a general obligation to negotiate, enter into agreements and/or regularly amend them as some other countries do (e.g. France). As collective negotiations are widely accepted in industry, most employers will be willing to negotiate. If not, pressure can be applied by way of industrial action, but no employer can be forced by law to enter into negotiations. Once negotiations are commenced, however, the freedom to choose with whom to negotiate is limited by law, albeit only marginally. Dutch law contains hardly any specific conditions which parties to a collective agreement have to fulfil. Any union may enter into

23. HR 30 May 1986, NJ 1986, 688; Jacobs 1986, p. 154; H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer, 16th edition 2000, p. 233.

24. K. Boonstra, *The ILO and the Netherlands*, Leiden: Stichting NJCM-Boekerij 1996.

25. *Wet arbeidsvoorwaarden gesubsidieerde en gepremieerde sector*.

26. Kamerstuk 22830 nr. 1, Stb. 1993, 557 and 1994, 985, Note to HR 11 December 1992, NJ 1996, 229.

27. *Wet op de loonvorming*.

28. L.M. van der Sluis, *Toelating tot CAO-onderhandelingen*, *Arbeidsrecht* 1995/3, p. 33; J. van der Hel, *Recht op CAO-overleg*, *Arbeidsrecht* 1999/10, p. 19-22; C.E.M. Schutte, *Overzicht van het CAO-recht*, 2th edition 1998, § 2.1.2; H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer, 16th edition, 203-204.

negotiations and become a party to collective agreements, the only prerequisite being that the union is an association with full legal capacity which has been given the authority to negotiate collective agreements in its constitution.²⁹ A union does not have to be elected by the personnel it claims to represent, nor does it have to meet any test as to its representativeness. This might lead to tension, especially when employers choose to negotiate with minor (or even yellow³⁰) unions and thereby exclude the big national unions associated with either the FNV or the CNV. Or conversely, to negotiate with a FNV- or CNV-union having little support in the company involved to the detriment of a more specialist and more representative union. This tactic of picking and choosing one's contractual partner is particularly rewarding in the Dutch system, since collective agreements affect all employees of the employers who are bound by the agreement and not only those employees who are members of a union which is a party to the agreement.³¹ Such an agreement can even eventually bind the whole industry, by the process of declaring it to be generally binding (see below). A striking example of this effect occurred in January 2002, when the employers in child care entered into a collective agreement with one union against the objections of two other unions participating in the negotiations. The union which closed the agreement had 85 (!) members under the 35 000 employees in the sector; the two opposing unions 11 500 members. Still, the unions thought the Minister of Social Affairs might declare the collective agreement to be binding on the sector as a whole. To counter this effect, both legal scholars and policy makers have at times suggested to introduce a test of representativeness into the Dutch system. So far, this has been rejected. However, since the early 1980s courts have in some instances obliged employers to accept 'representative' organisations as parties to ongoing negotiations. This obligation is based on good faith and the duties of a good employer and seems to be restricted to cases where the freedom of negotiations is being abused. The duty of the employers is limited to negotiating in good faith; the employers cannot be obliged to enter into an agreement.

2.3 *Statutory regulation of collective agreements and similar instruments*

Dutch law does not contain a special labour code. Labour law topics are dealt with in a myriad of legal rules. The regulation of individual labour contracts, for example, forms part of the Civil Code, whereas safety at work and working time are dealt with in special statutes. Even the statutory regulation of collective agreements is to be found in several laws. The collective agreement itself is regulated in the Collective Labour Agreements Act of 1927 (Wet CAO). This law contains the necessary requirements as to the parties to and the contents of collective agreements, the legal effects thereof and the legal remedies in case of breach. Entry into force of collective agreements is regulated in Article 4 of the Wage Formation Act (Wet op de loonvorming) which contains a duty to inform the Minister of Social Affairs of any

29. Wet CAO Art. 1 section 1 and Art. 2.

30. Yellow unions are unions established at the behest of or by the employer and, as such, doubts may be raised as to their independence.

31. Trouw (a national newspaper), Friday 11 January 2002, p. 5.

collective agreements entered into. No collective agreement can enter into force without such notification. Since the law makes entry into force dependent upon the Minister sending a receipt of notification to the parties, Dutch law is most probably in violation of international law on this point. Another law which is relevant to the system of collective negotiations is the Collective Labour Agreements (Declaration of Generally Binding and Non-binding Status) Act of 1936 (Wet AVV). This law contains the procedure to make collective agreements generally binding and regulates the legal consequences thereof.

If it is impossible to reach an agreement between the social partners on labour conditions in a specific sector of the economy, the Minister of Social Affairs may, upon the request of the social partners, determine the relevant standards. These regulations have a content and binding force which is similar to collective agreements or generally binding collective agreements, depending on the procedure followed.³² In practice, this power is rarely used by the Minister. Most sectors of the economy have a working system of collective negotiations. Even if it occasionally proves difficult to reach an agreement, the government will not intervene. But if for some reason a sensible system of negotiations cannot take place, then the special procedure of the Wage Formation Act can be used. The most recent example thereof consists of regulations pertaining to the labour conditions of seafarers (regeling arbeidsvoorwaarden zeevaart).³³

4 The concept of the collective agreement in the Collective Labour Agreements Act 1927

In Dutch law, one has to distinguish between a formal and a material concept of 'collective agreement'. The material concept of 'collective agreement' is very wide. The Collective Labour Agreements Act stipulates that a collective agreement is an agreement between one or more employers or one or more organisations of employers³⁴ and one or more organisations of employees, which contains predominantly or exclusively stipulations on the labour conditions to be respected in individual labour contracts.³⁵ This description of the collective agreement, stemming from the time when the Act on collective agreements was enacted in 1927, has proved over the years not to pose a real limitation on the powers of the social partners. The concept of 'collective agreement' covers both sector agreements and agreements between the unions and a single employer. It applies to collective agreements containing provisions on a myriad of subjects as well as to specific agreements on a single subject only. Basically, all the elements of labour law that

32. Wet op de loonvorming Artt. 5 and 6 respectively.

33. Regeling bijdrage Stichting Zeemanswelzijn Nederland 1998/1999, Al nr. 8989, Bijv.Stcrt. 16-04-1998, nr. 72.

34. Associations having full legal capacity (verenigingen met volledige rechtsbevoegdheid).

35. Collective Labour Agreements Act 1927 (Wet CAO) Art. 1: 'Onder collectieve arbeidsovereenkomst wordt verstaan de overeenkomst, aangegaan door een of meer werkgevers of een of meer verenigingen met volledige rechtsbevoegdheid van werkgevers en een of meer verenigingen met volledige rechtsbevoegdheid van werknemers, waarbij voornamelijk of uitsluitend worden geregeld arbeidsvoorwaarden, bij arbeidsovereenkomsten in acht te nemen.'

lend themselves to negotiation between the unions and employers, can be the subject of a collective agreement in the sense of the Act.³⁶

However, to qualify as a collective agreement, the contract has to fulfil certain formal requirements as well. The parties to the contract must be organizations with full legal capacity and the agreement has to be notified to the Ministry of Social Affairs.³⁷ If the agreement lacks in these elements, it can still be legally binding, but it will not create the special effects given to collective agreements by the 1927 Act. If the parties did not intend to create a legally binding instrument at all, their agreement can at most be a 'gentlemen's agreement'. Disputes as to the characterization of agreements between the unions and employers have arisen mainly in the field of the restructuring of companies. Agreements containing so-called 'social plans' relating to collective dismissals or restructuring agreements are not always considered to be collective agreements in the sense of the 1927 Act.³⁸

5 The scope of application of collective agreements

The two types of collective agreements which are prevalent in the Netherlands are the company-agreements and the agreements covering economic sectors. The two differ in both the parties on the side of the employer and the dominant factor determining their application. Company-agreements are concluded by companies or related groups of companies. The major Dutch companies, both national and multinational (Unilever, Philips, KLM, Ahold, KBB etc.) tend to negotiate special agreements for their Dutch enterprises and/or subsidiaries. The scope of application of these agreements is determined to a large extent by the parties on the employer-side (a personal criterion). The companies may have separate agreements for higher and managing personnel and sometimes apply a separate set of labour conditions to international personnel.

Sector agreements will contain the employment conditions for a sector of economic activity. They are typically concluded by organisations of employers rather than by individual employers. Sector agreements will in general apply throughout the Netherlands, local agreements are extremely rare.¹ The delineation of

36. However, collective agreements pertaining to pension plans are covered by separate Acts, the Pensioen- en spaarfondsenwet, 15 May 1962 Stb. 1962, 275 with subsequent changes and the Wet betreffende verplichte deelneming in een bedrijfspensioenfonds, 17 March 1949 with subsequent changes.

37. Collective agreements cannot as such become effective until notification has taken place: Wage Formation Act (Wet op de loonvorming) Art. 4.

38. J. van der Hulst, *Het sociaal plan*, Deventer: Kluwer 1999 with extensive literature. The Supreme Court has mentioned on several occasions that social plans can amount to collective agreements. They can be based on collective agreements, be part of collective agreements or be collective agreements in themselves. See e.g. HR 20 March 1998, JAR 1998/127, NJ 1998/815. In HR 26 mei 2000 JAR 2000/151, the Supreme Court decided that the rules of interpretation provided by the Court for collective agreements are also valid for 'social plans'. This means that provisions in social plans, as well as those in collective agreements, must be interpreted on the basis of their objective meaning and not according to the meaning the parties could reasonably have contributed to them (the latter being the rule as regards contracts in general).

the sector is based on agreement between the parties to the collective agreement. A sector might be defined widely to encompass a variety of economic activities or rather be construed narrowly. Factors that influence the division into sectors of economy are many. The organisational setup of the unions and employers is one. This in turn tends to follow (to a certain extent) divisions between sectors of the economy used in public law and social security law. The system as a whole is not static. Changes in the economic environment may cause collective agreements of related sectors to be merged, decentralization tendencies might cause large collective agreements to desintegrate. For further information, see below (trends). Inbetween sectors, unions may actually compete amongst themselves over the representation of a specific group of employees.¹ These so-called ‘border-disputes’ on the exact delineation of neighbouring collective agreements will be solved either by bipartite borderline commissions or by the negotiating parties. The Minister will not intervene in such disputes.¹

There are close to 200 sector agreements⁴² covering 4.4 million employees, or even 5 million if counting the effect of general applicability.⁴³ Close to 800 company agreements cover approx. 0.8 million employees.⁴⁴ On a total of approx. 7 million employed, this means that most employees are covered by some sort of collective agreement.

6 The binding character of collective agreements and their effect on the individual employment contract

In Dutch jurisprudence it is common to distinguish between the different types of provisions which can form a collective agreement.⁴⁵ On the one hand, a collective agreement may contain obligatory clauses which only bind the parties to the

39. The only relevant example being the local agreements for employment in the ports of Amsterdam and Rotterdam respectively.

40. One such dispute concerned the sector for mobile cranes: did the workers employed in this sector fall under the agreement for the construction industry or rather the agreement for transport workers?: see the decree on general applicability DCA nr. 7732, *Bijv.Stcr.* 9 March 1993, no. 47, p. 7. Others concern(ed) the position of drivers of security vans being used to transport money (transport or security?) and workers in the IT-sector (specific agreement, office equipment/utilities, assembly/metal industry?; see A. Van Liempt & A. van Uffelen, *Arbeidsverhoudingen in ontwikkeling, het ambivalente karakter van arbeidsvoorwaarden-regelingen in de ICT-sector*, SMA 2000, p. 244-252).

41. Such disputes do however affect the possibility that the Minister of Social Affairs will declare the agreement to be generally binding: *Beleidsregels AVV*, *Stcr.* 1998, nr. 240, p. 14, § 6.2.1.

42. Counting only the general agreements which contain all basic labourconditions and excluding special agreements on early retirement, training etc.

43. *Arbeidsinspectie, voorjaarsrapportage CAO-afspraken 2000*, bijlage 4.

44. *Idem.*

45. H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer, 16th edition 2000, p. 199; P.W. Kamphuisen, *De collectieve en de individuele arbeidsovereenkomst*, Leiden 1956, p. 17; F. Koning, *De obligatoire, diagonale en normatieve bepalingen van de cao*, SMA 1988, p. 175.

collective agreement. On the other hand, collective agreements are characterized by the fact that they contain so-called normative clauses: clauses which regulate the relationship between the individual employee and the individual employer. Other provisions might place obligations on - usually - the individual employer viz-à-viz the parties to the collective agreement or third parties (social funds, other employers within the same organisation or branch). Finally, the parties to the collective agreement can use the collective agreement to create bipartite institutions and funds for issues like vocational training and early retirement schemes. The Act contains provisions on the obligations of the parties to the collective agreement as well as on the position of the parties to the individual agreements covered by the collective agreement. The position of third parties is based on case law, in particular a number of decisions by the Dutch Supreme Court.⁴⁶

In general, a collective agreement is binding upon the parties to the agreement and any member thereof. This means that the individual employer and employee are bound by an operational agreement when they are (become or were at the time of conclusion) members of the organisations which are party to the agreement.⁴⁷ Any stipulations in the individual agreement which violate the collective agreement are void and are automatically replaced by the relevant stipulations in the collective agreement.⁴⁸ Any lacunae are automatically filled with the collective stipulations. In this fashion, the individual agreement is modelled on the collective agreement. The individual employee can (and in most cases must) rely on this remodelled individual agreement if he wants to claim performance by the individual employer. If this incorporation theory does not suffice in order to guarantee enforcement, the employee can sometimes rely directly on the collective agreement itself. A good example of this latter mechanism is to be found in a case which came before the Supreme Court and which dealt with the probation period. According to the relevant collective agreement any probation period had to be agreed upon in writing, adding a formal requirement to the legal requirements in the Civil Code. According to the Supreme Court the requirement in the collective agreement rendered an orally agreed probation period void. Since a provision of this kind cannot be deemed to be incorporated in the individual agreement, the individual employee had to base the avoidance of the probation period on the collective agreement itself. So, in principle all normative provisions in collective agreements are deemed to become part of the individual labour contract. It is in line with this incorporation theory that 'horizontal' stipulations in collective agreements are deemed to have an 'after-effect': they continue to shape the individual contract even after the expiry of the collective agreement. The after-effect lasts until the horizontal provisions are replaced or annulled by a subsequent agreement at the individual or collective level.

Collective agreements do not bind employees who are not members of a union, which is a party to the collective agreement: so-called non-organized or otherwise-organized workers. However, according to Art. 14 of the Collective Labour

46. HR 19 March 1976, NJ 1976, 407; HR 10 June 1983, NJ 1984, 147; HR 20 January 1987, NJ 1987, 936. On the absolute nullity of individual stipulations which violate the collective agreements and the position of third parties: HR 27 March 1998, JAR 1998, 99.

47. Wet CAO Art. 9.

48. Wet CAO Art. 12.

Agreements Act, an employer who is bound by a collective agreement is obliged to apply the agreement to his non- or otherwise-organized employees.⁴⁹ Most employers fulfil this duty by agreeing with each of their employees that the current sector agreement will apply to their contract. In this way up to 85 % of workers are covered by collective agreements even though only approx. 26 % are members of a union.⁵⁰ The influence of the Dutch unions far exceeds their representativeness based on membership only. The Collective Labour Agreements (Declaration of General Binding and Non-binding Status) Act only enhances this effect.

Through the decree on general applicability a sector agreement, or rather certain provisions thereof become binding on anyone falling within its scope of application. The most important effect in practice is that the collective agreement from then on also applies to the employees of non-organized employers. But, strictly speaking, the decree also changes the position of the other 'players' in the field. Those already bound by the collective agreement itself are now bound by the decree as well. The 'Article 14' employees are legally bound whereas previously they were not.⁵¹ And finally, the decree limits the freedom of the parties to the original collective agreement.

Both the effect of generally binding provisions on the individual contract and the remedies for the breach thereof are very similar to those concerning collective agreements in general. However, such generally binding provisions do not 'remodel' the individual labour contract as the collective agreement itself does. They are looked upon as quasi-statutory provisions. This means, *inter alia*, that the decree on general applicability does not have any after-effect.⁵² After expiry of the decree, the pre-existing individual contract is revived. This causes problems of continuity, which are to some extent countered by the judiciary using concepts from the law of contract. In 1993 the Supreme Court dealt with supplementary wages for working overtime granted in a collective agreement. Did the employee have a right to be supplemented even when the collective agreement was no longer applicable and the individual agreement was silent on this point? The Supreme Court decided that the answer depended on the reasonable expectations of the parties.⁵³ In 1994 the question arose whether an employee could still claim supplementary sickness benefit

49. The provision does allow the parties to the collective agreement to agree otherwise, but this rarely occurs. Collective agreements sometimes contain special benefits for organized employees, in which case the unions will derogate from Art. 14. Such stipulations are not welcome though, mainly for political reasons.

50. Representativiteit van de sociale partners in Nederland (in internationaal perspectief), Reaction of the Minister of Social Affairs to a parliamentary question by Wilders M.P., 8 February 2001, AV/A&M/2001/1324, p. 3.

51. An individual agreement between an employer who is bound by a collective agreement and an employee who is not, is valid even if it contains provisions which violate the collective agreement. However, the employer acts in breach of the collective agreement when entering into such an individual agreement.

52. HR 18 January 1980, NJ 1980, 348; A.A.H. van Hoek, *Internationale mobiliteit van werknemers*, Den Haag: SDU 2000, p. 47, C.E.M. Schutte, *Overzicht van het CAO-recht*, Nijmegen: Ars Aequi Libri, 2nd edition 1998, § 5.3.5.

53. HR 2 April 1993, NJ 1994, 612.

from his employer after the relevant provision in the collective agreement had ceased to apply to his individual contract. In this case the Supreme Court used the doctrine of acquired rights: the worker had acquired this specific right by becoming ill during the decree's period of application. According to the Supreme Court he retained that right even after the expiry of the decree.⁵⁴ Though these judgements come close to granting after-effect to generally binding provisions, the Supreme Court has not yet reversed its official opinion.

Collective agreements can be declared generally binding only when the agreement itself already covers a significant majority of the employers and employees in the sector.⁵⁵ Interestingly enough, in calculating the range of the original agreement, the Minister will take non-organized employees into account. Although strictly speaking not bound by the collective agreement, they are deemed to be covered by it. Since sector agreements are almost automatically declared to be generally binding, most employees will be bound by a collective agreement in one way or another. It is therefore of crucial importance to study in more detail the limits posed by the law on the contents of the collective agreement as well as its relationship to the individual contract.

7 The contents of collective agreements, legal constraints

7.1 General

In 1998 the Supreme Court dealt with the validity and effect of a clause in a 'social plan' (a reorganisation plan, dealing with collective dismissal), prescribing the use of an alternative dispute resolution method prior to addressing a court in case of disagreements concerning the termination of the labour contract.⁵⁶ When the employer approached the Subdistrict Court⁵⁷ with a request to dissolve a specific labour contract under Article 7: 685 of the Civil Code (BW)⁵⁸, the employee in question objected since there had been no prior mediation round and asked the court to dismiss the action. The court rejected this request based on the nullity of the provision. The Supreme Court concurred. Article 7: 685 BW specifically grants access to the court *at any time* ('te allen tijde') if one of the parties has compelling reasons for wanting the labour contract to be dissolved. Any stipulation to the contrary is void. This is true of stipulations in individual labour contracts and no less true for provisions in collective agreements, according to the Supreme Court. The Court justifies this decision with three arguments. The first relies on the fact that a dispute resolution clause in a collective agreement will be incorporated into the individual agreement under art. 9 section 1, 12 and 13 of the Collective Labour Agreements Act. There is therefore, according to the Supreme Court, no compelling reason to treat restrictions on the right of access to a court any differently according to the individual or collective 'source'. Another argument is based on the text of art.

54. HR 28 January 1994, NJ 1994, 420.

55. Wet AVV Art. 2.

56. HR 25 February 1994, NJ 1994, 377.

57. Kantonrechter: the court of first instance in labour cases.

58. Former Article 1639 BW.

7: 685 BW which renders ‘any provision’ void and does not restrict itself to provisions in individual contracts. A third and last argument is based on legislative principles. It relies on the fact that the law would contain a specific provision if derogation were possible by collective agreement but not by individual agreement – proclaiming the provision to constitute so-called ‘driekwart dwingend recht’ (law which is “three-quarters mandatory”).⁵⁹

So, mandatory provisions tend to have mandatory effect as regards individual and collective contracting parties alike. An exception in favour of collective agreements is formed by the concept of the three-quarters mandatory law: legal provisions which can be derogated from by collective agreement but not by individual agreement. The concept of three-quarters mandatory law creates the possibility to adapt employment conditions to the needs of a specific industry while safeguarding the protection of individual employees (supposing that the unions do effectively protect the employees). Whether a provision is three-quarters mandatory is evident from the wording of the provision itself.

If a provision is not mandatory, does this necessarily imply that it can be derogated from by collective agreement? Are there no provisions in labour law which should be immune from collective regulation? Especially problematic in this respect are some provisions which place an extra obligation on the employee and/or restricts their fundamental rights.⁶⁰ Again, arbitration clauses are a prime example: the right of access to a court⁶¹ can be waived,⁶² but can it be waived collectively? Similar problems arise as to closed shop provisions, which limit the freedom of (non-)association on the part of individual employees⁶³ and non-competition clauses, which restrict the fundamental freedom to choose one’s occupation.⁶⁴

7.2 Arbitration clauses

The right of access to the courts is guaranteed by both the Dutch Constitution and international conventions which bind the Netherlands. This right can be waived, however, for example by voluntarily submitting to arbitration. Dutch law, which looks upon on the proces of arbitration quite favorably, does not pose any specific

59. These kind of provisions are referred to in Germany as ‘*Tarifdispositives Recht*’ since they are not mandatory (dispositive) viz-à-viz collective agreements (Tarifverträge) only.

60. The probation period and a specific provision for temp-workers (uitzendbeding) are often mentioned in this context as well: F.B.J. Grapperhaus & M. Jansen, *De uitzendovereenkomst*, Deventer: Kluwer 1999, p. 45-47. These provisions, which do not have a human rights aspect, will not be discussed here.

61. European Convention of Human Rights Art. 6, Dutch Constitution Art. 17.

62. ECHR 27 February 1980, A-35, NJ 1980, 561 (Deweere v. Belgium); R.A. Lawson, *Arbitrage en artikel 6 EVRM: vrijheid in gebondenheid*, TvA 1996/4, p.157-166.

63. E.g. Dutch Constitution Art. 8, European Social Charter Art. 5.

64. E.g. Dutch Constitution Art. 19 section 3, European convention of human rights Art. 4, International convention on civil and political rights Art. 8, European Social Charter Art. 1, International convention on economic, social and cultural rights Art. 6, ILO conventions no. 29, 105, 117, 122; *Notitie Grondrecht van vrijheid van arbeidskeuze*, K II 1985-1986, 19376, nrs. 1-2.

requirements as to the form in which the right of access must be waived.⁶⁵ Arbitration clauses in general sales conditions are deemed to be binding, as are arbitration clauses in an organisation's articles of association. The same favouritism towards arbitration is valid in labour disputes as well. In general, Dutch law allows parties to a labour contract to submit their disputes to alternative dispute resolutions methods, including arbitration.⁶⁶ This is true even in cases based on Article 7: 685 BW. Parties have a right to request the dissolution of the labour agreement at any time. This invalidates any provision that prevents or delays such action but not those that simply change the venue for such action. Arbitration⁶⁷ can be agreed upon in a collective agreement and thus become binding on the members of the parties thereto.⁶⁸ In practice, collective agreements do contain such clauses.⁶⁹ However, arbitration clauses in collective agreements cannot be declared to be generally binding, as this would violate the requirement of voluntary submission.⁷⁰

7.3 *Closed shop*

Both national⁷¹ and international provisions⁷² protect the freedom of association. In its positive sense, this freedom entails the right to form trade unions and to be a member thereof. But the freedom is progressively thought to also protect the right *not* to be organised.⁷³ This freedom is put at risk by closed-shop provisions: provisions in collective agreements which - in one way or another - make union membership compulsory for the employees of employers bound by the agreement. Therefore, the contents of such provisions are strictly monitored by both national and international law. Yet, not all closed-shop arrangements contravene Dutch law.⁷⁴

65. HR 27 October 1967, NJ 1968, 3; HR 27 March 1992, NJ 1993, 97.

66. HR 14 December 1975, NJ 1974, 92; HR 22 November 1985, NJ 1986, 275.

67. Or the 'civil law' variety called binding advice ('bindend advies').

68. Until recently, a most elaborate one could be found in the Collective agreement for the publishing and printing sector, where the bipartite tribunal could even provide the employer with the administrative permission to dismiss normally granted by the regional labour office.

69. CAO voor het grafisch bedrijf (publishing and printing), CAO publiekstijdschrijffjournalisten (journalists), CAO Ziekenhuizen (hospitals).

70. Wet AVV Art. 2 section 5 sub a; Overzicht van een aantal niet algemeen verbindend verklaarde cao-bepalingen p. 8-9, bijlage bij brief aan de Sociaal Economische Raad van het Ministerie van Sociale zaken en werkgelegenheid, dienst collectieve arbeidsvoorwaarden, d.d. 19 maart 1991, kenmerk DCA/910825.

71. Constitution Art. 8: freedom of association.

72. E.g. ECHR Art. 11 and European Social Charter Art. 5: freedom of association; ILO convention nos. 87 and 98 on freedom of association and the right to organize respectively.

73. See ECHR 13 August 1981 Series A no. 44, *Young, James and Webster v. the UK* and notably ECHR 24 June 1993 Series A no. 264, *Sigurdur A Sigurjónsson v. Iceland* para. 35, with reference to Art. 11 para. 2 of the European Community Charter of the Fundamental Social Rights of Workers and a Recommendation of the Parliamentary Assembly of the Council of Europe of 24 September 1991, containing a proposal to amend Art. 5 of the European Social Charter.

74. H.L. Bakels, I.P. Ascher-Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer, 16th edition 2000, p. 187; C.E.M. Schutte, *Overzicht van het CAO-recht*,

Collective agreements may contain the duty to employ only workers who are members of *a* union. It is however against the law to discriminate between unions by making membership of a *specific* union compulsory.⁷⁵ The Collective Labour Agreements (Declaration of Generally Binding and Non-binding Status) Act excludes closed-shop provisions from the decree of general applicability.⁷⁶ So the closed-shop provision cannot bind the employer who is neither a contracting party nor a member thereof. Even in this attenuated form, closed-shop provisions are rare in Dutch practice. Until recently the collective agreement for publishing and printing ('grafische sector') did contain such a provision; at the moment, however, there are no such examples in existing collective agreements.

7.4 *Non-competition clauses*

The prevailing stance on the non-competition clause has changed quite recently. Before 1997, a non-competition clause had to be agreed upon in writing. This written agreement could not only be embodied in a written agreement between the employer and employee but also in a document containing the internal works-rules ('reglement'). This latter arrangement made it possible for the employee to be bound by a non-competition clause which he did not personally agree to. The employee was supposed to be protected against odious non-competition clauses by the procedural rules on the establishment of worksrules. It was consistent with this line of reasoning to assume that non-competition clauses could be agreed on by way of collective agreement as well: the provision was not considered to be strictly personal in nature, but only meriting extra procedural guarantees. This changed when the law on labour contracts was incorporated in the New Civil Code by law of 6 June 1996.⁷⁷ On this occasion, the legal provision on non-competition clauses was redrafted, eliminating the possibility to address the issue of non-competition in the internal works-rules. According to the explanatory report to the 1996 law, this change is meant to ensure that the employee personally agrees on any limitations as to his future employment.⁷⁸ Since then, it has been assumed that non-competition clauses cannot be included in collective agreements either.⁷⁹

Nijmegen: Ars Aequi Libri, 2th edition 1998, § 2.2.2.

75. Wet CAO Art. 1, section 3.

76. Wet AVV Art. 2, section 5 sub b.

77. Stb. 1996, 406, with a separate implementation act (invoeringswet) Stb. 1996, 562, in force since April 1997.

78. Kamerstuk II 1993-1994, 23 428 nr. 3 p. 35 (explanatory report).

79. K II 1993/1994, no. 23 438, nr. 3, p. 35; C.J. Loonstra, *Het concurrentiebeding in de arbeidsovereenkomst*, Den Haag: Elsevier bedrijfsinformatie, 3th revised edition 1999, p. 51-57; F.B.J. Grapperhaus, *Concurrentiebeding en Art. 7.10 BW: het schriftelijkheidsvereiste*, *Arbeidsrecht* 1997/5 p. 29-32, 29-30; idem, *Werknemersconcurrentie*, Deventer: Kluwer 1995, p. 212; G.J.J. Heerma van Voss, *De invoering van de titel over de arbeidsovereenkomst in het Nieuw BW*, *Sociaal Recht* 1997/3, p. 68-73, 72; R.Delgado & W.A. Zondag, *Het concurrentiebeding in de CAO*, *Sociaal Recht* 2001, nr.5, p. 134-139, 136; W.C.L. van der Grinten, *Arbeidsovereenkomstenrecht*, Deventer: Kluwer 1999, p. 139.

8 Conflicts between collective agreements and individual agreements: the absence of a more favourable right-provision in Dutch law

In The Netherlands, collective agreements are a means of organizing labour as much as a means of protecting employees against the unequal bargaining powers of the employers. Especially in the post-war period the government kept wagelevels under strict control. Every collective agreement was normative in the sense that both more favourable and less favourable provisions were *contra vires*. This has changed considerably: these days, collective agreements are mostly minimum arrangements.⁸⁰ Yet, this is based on practice, not law. If the parties to the collective agreement do not want employers to pay higher salaries or bonuses than the ones provided for in the collective agreement, they can simply make the collective agreement binding in an absolute sense. It was not unusual for Dutch collective agreements to contain provisions like “derogations from this agreement are not allowed unless specifically provided for by the relevant provision”⁸¹ or even “derogations from this agreement are not allowed, not even if they are more favorable to the employee”.⁸² Nowadays collective agreements often contain provisions which simply allow more favourable provisions,⁸³ both in general and in individual cases. But this still implies that the parties could also have stipulated otherwise.⁸⁴ Case-law on this issue is rare and inconclusive.⁸⁵

9 Conflicts between collective agreements⁸⁶

Rendering a sector agreement binding on all employers in the sector is (still) the predominant way of regulating labour conditions in the Netherlands. The binding agreements cover all those that fall within the scope of application of the decree on

80. Compare Nota Algemeen verbindend verklaren van cao-bepalingen (government memorandum on the general applicability of collective agreements) K II 1993-1994, 23532, nr. 2, p. 9 and 33.

81. Banking agreement 1998 Art. 1 § 3, AI nr. 9020, Bijv.Stcrt. 15-06-1998, nr. 109; Betonproduktenindustrie 1998/2000 Art. 3 section 2, AI nr. 9083, Bijv.Stcrt. 13-10-1998 nr. 195; CAO Handelsvaart tot 9000 GT 1998/1999 Art. 4 section 1 and Art. 5, AI nr. 9011, Bijv.Stcrt. 20-05-1998, nr. 94.

82. Homecare agreement (CAO Thuiszorg) 2000/2001 Art. 3, AI nr. 9310, Bijv.Stcrt. 20-01-2000, nr. 14.

83. E.g. CAO Tentoonstellingsbedrijven 2000/2001 Art. 3 section 6, AI nr. 9570, Bijv.Stcrt. 07-06-2000, nr. 107; CAO Dagbladjournalisten 2001 Art. 6 section 3, AI nr. 9556, Bijv. Stcrt. 08-05-2001, nr. 88; CAO Schoenherstellersbedrijf 2001 Art. 16, AI nr. 9563, Bijv.Stcrt. 31-05-2001, nr. 103; CAO voor de Nederlandse Video Detaillistenbranche 2001/2003 Art. 6 section 1, AI nr. 9568, Bijv.Stcrt. 06-06-2001 nr. 106; CAO Horecabedrijf 2001/2002 Art. 2 section 7, AI nr. 9565, Bijv.Stcrt. 01-06-2001, nr. 104.

84. Article 1:3 section 2 of the collective agreement for health-care workers working with the disabled stipulates that derogations are allowed if foreseen or condoned by the provision that is being derogated from (AI nr. 9569, Bijv.Stcrt. 06-06-2001, nr. 106).

85. HR 14 januari 2000, NJ 2000, 273; Pres.Rb. Utrecht 15 september 1994, JAR 1994, 198.

86. A.A.H. van Hoek, *Internationale mobiliteit van werknemers*, Den Haag: SDU 2000, p. 48-56.

general applicability, which mostly follows that of the underlying agreement.⁸⁷ This means, firstly, that the decree on general applicability is binding on all employers within the relevant field, including those already bound by the agreement itself. The statutory obligation does not replace the one adopted voluntarily, but is added to it.⁸⁸ Secondly, there is no automatic, *de jure*, exception for employers who are already bound by another collective agreement. Problems arising from overlapping collective agreements are dealt with through government practice, rather than legal provisions. So there is no general rule leading to the application of the most favourable agreement, nor one permitting application of the more specific agreement, and also not one honouring obligations adopted voluntarily over and above those based on legal compulsion.

Any conflicts between sector agreements and company agreements are solved through the system of exemptions. If a company, having its own company agreement, is also a member of an organisation of employers involved in negotiating collective agreements, this company will make sure he is excluded from the scope of application of any sector agreement by the parties to that agreement themselves. In that case the company is outside the scope of application of the sector agreement and hence cannot be covered by any decree on general applicability either. Furthermore, any employer bound by a company agreement can request to be exempted from the decree on general applicability during the procedure of making the decree. If they do, the guidelines on general applicability promulgated by the Minister of social affairs guarantee them that this exemption will be granted.⁸⁹ The Minister will not test for equivalence between the company agreement and the sector agreement. Neither is it a prerequisite any more that the company agreement was closed by the same union or unions as the sector agreement, the only condition being that the company agreement is valid and binding. If the company agreement covers far less issues than the sector agreement, it will still be a collective agreement meriting an exemption. The same would be true if the level of protection of the company agreement is lower than that of the sector agreement. Unions are supposed to take these consideration into account when closing a company agreement.

So, the Dutch system does not adhere to a more favorable right notion to solve any conflicts between collective agreements of different levels. Rather, through the system of exemptions voluntary submission to a more specific agreement is favoured over a sector agreement which is generally binding, regardless of the contents of the agreements. However, this system depends on action being taken by the company bound by a specific agreement. If that company fails to ask for an exemption, it will be bound by the sector agreement after the decree on general applicability enters into force.⁹⁰

87. The decree can narrow down the scope of application of the collective agreement, but it may not widen it: Wet AVV Art. 2.

88. On the complications arising from this 'double binding', see J. van de Hel, *De spanning tussen algemeen verbindend verklaard CAO-bepalingen en de CAO*, *ArbeidsRecht* 2001/4, p. 16-19.

89. *Toetsingskader algemeen verbindend verklaring cao-bepalingen (AVV)*, *Staatscourant* 1998, nr. 240, p. 14.

90. Compare *Rechtbank Utrecht (District Court of Utrecht, sitting on appeal)* 6 March 1996, JAR

The situation is slightly different as far as conflicts between agreements of the same type and level are concerned. If the scope of application of two sector agreements overlap, the Minister will not declare them generally applicable until the parties to the agreements have sorted out this problem. But sometimes overlap is not caused by the respective scopes of application of the agreements but by the mixed character of a specific company. In that case that company may have to apply different collective agreements to its employees depending on their function or the department in which they work. Finally, simultaneous application of several sector agreements can also come about when parties to an individual labour contract agree to apply one collective agreement when they are already legally bound by another. This last situation is not very different from the one in which the parties to the individual agreement deviate from the provisions of the collective agreement by contract stipulation. This means that the parties are bound by the collective agreement which applies *de jure*, but courts might condone application of the chosen collective agreement if this is more favorable to the employee.⁹¹

10 Future problems and trends: the changing position of the unions

The extent to which workers organize themselves in unions is highly divergent between the different sectors of the economy as well as between types of employers.⁹² Traditionally, high percentages of union membership are to be found in government and education, transport, heavy industry and construction, whereas most service sectors show low percentages. Workers with regular jobs organise themselves more readily than parttime, on-call or temp-workers. Blue-collar workers and administrative personnel more so than so-called 'knowledge-workers', the latter often being sought after, well-paid and relatively independent. As in other European countries, the membership rates in the Netherlands are low and declining. At the moment 26 % of the general workforce are members of a union, ranging from 56 % in transport by air and water to 11 % in ICT.⁹³ In sharp contrast to this low number of affiliates is the fact that 85 % of employees are covered by the collective agreements concluded by these unions. Recently, the liberal party drew attention to this phenomenon, once again raising the issues of representativeness of the unions and the almost automatic extension of collective agreements.⁹⁴ In his answer, the

1996, 72.

91. Based on the assumption that a more favourable provision will not violate the terms of the collective agreement which applies *de jure*.

92. Representativiteit van de sociale partners in Nederland (in international perspectief), Reaction of the Minister of social affair to parliamentary question by Wilders M.P., 8 February 2001, AV/A&M/2001/1324, Bijlage I.

93. Representativiteit van de sociale partners in Nederland (in international perspectief), Reaction of the Minister of Social Affairs to a parliamentary question by Wilders M.P., 8 February 2001, AV/A&M/2001/1324, p. 5.

94. Comp. G. Zalm, Opleggen van c.a.o.'s soms strijdig met regeringsbeleid – betekenis en toekomst van de algemeen verbindend verklaring, *Stcrt* 1991, nr. 248, p. 4 en 9; idem Mythen, paradoxen en taboes in de economische politiek, inaugural lecture VU 1990; K.Schilstra & E Smit,

Minister of Social Affairs stressed the fact that despite the low affiliation rate, Dutch unions enjoy wide support within the population. Even non-members by an overwhelming majority support the notion that unions perform a function which is in the interest of society in general.⁹⁵ This perception of unions as the co-guardians of the general interest was very much inherent in the post-war system of industrial relations and is still a part of the Dutch 'poldermodel',⁹⁶ though by now it might be for the want of a better alternative.⁹⁷ In the meantime the high percentage of 'freeriders' leaves the unions with few members and sparse funding. In reaction to this, a trend is discernable to enhance the service-providing element of union membership.⁹⁸ Unions offer legal advice, insurance etc. in an attempt to lure more employees into membership.⁹⁹ It is still unusual, however, to claim special benefits for union members in the collective agreements.

11 Future problems and trends: the changing position of collective arrangements¹⁰⁰

One of the buzz-words of modern labour relationships is flexibilization. This term is used to describe different phenomena,¹⁰¹ each aiming to counteract the collective character of traditional labour relationships. In the past, workers would be employed by the undertaking in which they performed their duties. Their labour contracts would be covered by standard arrangements valid in the whole sector. Individual variation was rare and not encouraged by the collective arrangements. This work pattern has changed considerably, leaving a more fragmented picture. In the

Drie scenario's voor de belangenbehartiging van werknemers, SMA 1996, p. 117-118.

95. Up to 80 %!: Representativiteit van de sociale partners in Nederland (in international perspectief), Reaction of the Minister of social affair to parliamentary question by Wilders M.P., 8 February 2001, AV/A&M/2001/1324, p. 3; Comp. A.G. Nagelkerke & T.C.J.M. Wilthagen, Op weg naar een institutioneel mozaïek: de Nederlandse arbeidsverhoudingen aan het begin van de 21^e eeuw, SMA 2000, p. 162.
96. As the Dutch model of consultation and industrial relations is called.
97. K.Schilstra & E Smit, Drie scenario's voor de belangenbehartiging van werknemers, SMA 1996, p. 117; A.G. Nagelkerke & T.C.J.M. Wilthagen, Op weg naar een institutioneel mozaïek: de Nederlandse arbeidsverhoudingen aan het begin van de 21^e eeuw, SMA 2000, p. 156, 162 and 164.
98. A.G. Nagelkerke & T.C.J.M. Wilthagen, Op weg naar een institutioneel mozaïek: de Nederlandse arbeidsverhoudingen aan het begin van de 21^e eeuw, SMA 2000, p. 163.
99. K. Schilstra & E. Smit, Drie scenario's voor de belangenbehartiging van werknemers, SMA 1996, p. 125.
100. A.G. Nagelkerke & T.C.J.M. Wilthagen, Op weg naar een institutioneel mozaïek: de Nederlandse arbeidsverhoudingen aan het begin van de 21^e eeuw, SMA 2000, p. 156-165; P. Leisink & H. Leisink, Modernisering van de grafimedia-CAO in de jaren negentig, SMA 2000, p. 197-207; M.J.S.M. van der Meer, De modernisering van de arbeidsverhoudingen in de bouwnijverheid, SMA 2001, p. 164-173; A. van Liempt & A. van Uffelen, arbeidsverhoudingen in ontwikkeling: het ambivalente karakter van arbeidsvoorwaarden-regelingen in de ICT-sector, SMA 2000, p. 244-252.
101. Comp. L. Delsen & J. Visser, Flexibilisering van de arbeid via de CAO's, SMA 1999, p. 296-305.

remainder of this report, some elements of this change will be briefly discussed.

11.1 Tendering out, temp-workers and self-employment

Undertakings tend to employ only those workers which are required for their core-activities. Ancillary functions, like cleaning and catering, might be tendered out to specialized undertakings. Even in the core activity, not all the manpower is employed by the undertaking itself. Firstly, the Netherlands has a high percentage of people working through temp-agencies. Secondly, professionals and skilled labourers progressively want to retain or regain their independence. They work as self-employed persons without personnel (*zelfstandigen zonder personeel*). These phenomena have an effect on the structure of collective negotiations. Catering and cleaning have become separate branches covered by special collective agreements. The same is true for temp-workers, especially since the Act on Flexibility and Certainty came into force on 1 January 1999. Temp-workers are deemed to be employed by their temp-agency. After working for the same agency for some time, they progressively become entitled to protection with regards to dismissal, training, pensionprovisions etc. The new system, introduced by the Act on Flexibility and Certainty provides a strong incentive for the collective agreement for temp-workers. To complicate matters, in some cases and to some issues the collective agreement of the company to which they are posted may also apply. The whole system does not seem to have settled yet.¹⁰²

So, tendering out and temp-work might change the structure of collective negotiations, but they have not reduced the reach of collective arrangements as such. This is different for the third trend mentioned above: the increase in self-employed persons. All kinds of specialized personnel, from nurses, in-company trainers and textwriters to stone masons and truck drivers offer their services to more than one customer, thus acquiring the status of self-employed. The position of this group, especially as regards tax and social security is far from clear, their protection against abuse sometimes weak. Recently, the FVN has created a special union for the self-employed. This 'union' aims to represent and protect the interests of those involved.¹⁰³ Although the Collective Labour Agreements Act does not exclude the possibility to close collective agreements on the labour conditions of self-employed,¹⁰⁴ the constitution of the association does not provide for such a power.¹⁰⁵ However, the union itself can be seen as a clear attempt to 're-organize' this part of the labour market.

102. F.B.J. Grapperhaus & M. Jansen, *De uitzendovereenkomst*, Deventer: Kluwer 1999, p. 125-162; C.J. Loonstra, *Uitzend- of inleen-CAO. De loonverhoudingsnorm van art. 8 WAADI, Ondernemingsrecht 1999*, p. 69-73.

103. Self-employed in the construction sector are allowed to join the FNV-union for the construction sector (but not the CNV-union): M.J.S.M. van der Meer, *De modernisering van de arbeidsverhoudingen in de bouw, SMA 2001*, p. 168.

104. Wet CAO Art. 1, section 2: 'Zij kan ook betreffen aannemingen van werk en overeenkomsten tot het verrichten van enkele diensten': A collective agreement may also concern contracting and/or the provision of services.

105. Deeds of incorporation, 26 June 1999.

11.2 Levels of negotiation: from sector to undertaking and back

Flexibilization seems to call for arrangements at the lowest level: the reduction or abolishment of nationwide wage prescriptions, agreements at company level rather than sector agreements, agreements for narrowly defined sectors to be favoured over those encompassing entire branches. And, in a sense, this is what has happened in practice.¹⁰⁶ However, not necessarily through the abolition of collective negotiations at the levels of sectors and branches. A direct return to the company level has taken place in the banking sector where the sector agreement was abolished altogether, leaving the negotiations to the separate banks. But in two other cases the scale of negotiations has even moved upwards. One of these cases concerns an old stronghold of union activity: publishing, printing and the media. This branch was covered by a set of sector agreements, one for small offset, one for post-production, etc. Several economic and technological factors forced both the employers and the unions to change their strategy in the field of labour conditions and collective negotiations.¹⁰⁷ This, surprisingly enough, resulted in a merger of both the relevant unions and the employers' organisations. The institutional merger was mirrored in the collective negotiations: the six pre-existing collective agreements were succeeded by a single one for the graphic media as a whole. Another example of a revival of sector negotiations is found in information and communication technology (ICT). This new sector of the economy has one of the lowest affiliation rates and for a long time showed hardly any organisation tendencies on the side of employees. At first, even the rules on workplace democracy were largely ignored. However, in the early 1990s, the - by then properly established - works councils asked the unions to take over negotiations concerning labour conditions.¹⁰⁸ At this moment approx. 23 % of employees in the sector are covered by collective agreements. One of these is sectoral in character, covering mainly sales and supplies (leaving out software development and services).¹⁰⁹ Both in the graphic media and ICT, the conclusion of the sector agreement would have failed if the unions had insisted on a highly standardized set of labour conditions. Both sector agreements are framework agreements and leave plenty of room for differentiation at company and/or personal level.

11.3 Framework agreements and labour conditions 'à la carte'

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106. For the decentralization of the negotiations as to the labour conditions of civil servants, see C. Vrins, *Decentralisatie van het arbeidsvoorwaardenoverleg*, Openbaar Bestuur 1993/5, p. 16-18. For the abolishment of national guidelines, see e.g. K. Schilstra & E. Smit, *Drie scenario's voor de belangenbehartiging van werknemers*, SMA 1996, p. 116.
107. P. Leisink & H. Leisink, *Modernisering van de grafimedia-CAO in de jaren negentig*, SMA 2000, p. 197-207.
108. A. van Liempt & A. van Uffelen, *arbeidsverhoudingen in ontwikkeling: het ambivalente karakter van arbeidsvoorwaarden-regelingen in de ICT-sector*, SMA 2000, p. 249; K. Schilstra & E. Smit, *Drie scenario's voor de belangenbehartiging van werknemers*, SMA 1996, p. 119-120.
109. A. van Liempt & A. van Uffelen, *arbeidsverhoudingen in ontwikkeling: het ambivalente karakter van arbeidsvoorwaarden-regelingen in de ICT-sector*, SMA 2000, p. 250.

As mentioned above, in the postwar period all collective agreements were standard arrangements allowing no derogations at all. These days, the individual employer and employee are usually free to agree on conditions which are more favourable to the employee.¹¹⁰ This already leads to a degree of flexibility at the personal level. But modern collective agreements go further than that. Labour conditions 'à la carte' refers to a system in which the employee may choose between different sets of labour conditions. Paid leave may be exchanged for travel expenses, reduced weekly working time for sabbaticals or child care etc. This system can become rather complex and does obfuscate the issue of 'more favourable provisions'. While the Supreme Court decided only quite recently that the question of whether a individual agreement was more favorable than the collective agreement had to be decided on a rule by rule basis,¹¹¹ à la carte agreements can only be judged in their entirety.

A la carte agreements provide flexibility at the level of the individual employee. Framework agreements allow specific agreements to be made at the company level.¹¹² The company agreement might be concluded by the local union, but also by the works council. In the latter case it will not have the same force as a collective agreement unless it is (deemed to be) incorporated into the collective agreement.¹¹³ In this process of decentralization, the relationship between the unions and the works councils has changed considerably. Primary labour conditions are still considered to be the prerogative of the unions, but the works councils are seen as strategic partners rather than competitors. It is not unusual for collective agreements to refer to the works councils for the implementation of specific arrangements at company level.¹¹⁴

12 Conclusions

Though the legal framework has remained almost intact, the practice of labour relations has changed considerably in the last decades. One of these changes concerns a move away from standard setting towards the protection of employees. The powers of the social partners in the field of personal (human) rights has been limited, leaving it to the individual employee to waive his or her rights to e.g. access to the courts. Collective agreements, which for years had a standard character, now mostly contain minimum standards, allowing derogations in favour of the individual employee. In general, a 'reprivatization' of labour relations has taken place, stressing

110. K. Schilstra & E. Smit, Drie scenario's voor de belangenbehartiging van werknemers, SMA 1996, p. 121.

111. HR 14 January 2000, NJ 2000, 273.

112. Framework agreements will contain the limits to this agreement. In a so-called layered agreement, some issues are dealt with in their entirety in the sector agreement, while others are left to be decided at the company level: K. Schilstra & E. Smit, Drie scenario's voor de belangenbehartiging van werknemers, SMA 1996, p. 121.

113. B. Van Bon, De lading kan omgevlagd, het incorporeren van ondernemingsovereenkomsten in CAO's, Sociaal Recht 1999, p. 244-250; A. Stege, De ondernemingsovereenkomst, de CAO en de individuele arbeidsovereenkomst, Sociaal Recht 1999, p. 250-256.

114. K. Schilstra & E. Smit, Drie scenario's voor de belangenbehartiging van werknemers, SMA 1996, p. 122-123.

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the contractual character of the relationship. Flexibilization of this relationship is attained by the 'à la carte' system of collective agreements, in which the individual employer is offered a choice between sets of (secondary) labour conditions.

These developments, however, have not diminished the role of collective agreements. These have even increased in coverage and number. What has changed, though, is the character of the collective agreements. Not only do they allow more freedom to the individual, they also more often than not have to be complemented by agreements at the company level. The negotiations at company level are often left to the works councils, which are progressively seen as the strategic partners of the unions in the protection of employees. The overall effect of these changes is a movement towards differentiation and fragmentation of labour conditions within a certain margin. The level of negotiations which has lost most of its impact, is coordination at the national level.