

## **Collective agreements**

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### **1. Definitions**

#### **1.1 What is the definition of the collective agreement in your country?**

An agreement between one or more employers or organisations of employers and one or more organisations of workers, which mainly or exclusively regulates working conditions to be observed in employment contracts (Article 1 of the Act on Collective Agreements).

#### **1.2 Is there a distinction between different types of collective agreements according to their source, content or scope (occupational or territorial)?**

A distinction is made between branch agreements, concluded by an employers' organisation (or several employers' organisations) and enterprise agreements concluded by a single employer. Branch agreements usually cover all enterprises in a certain branch of industry without territorial limitations.

In some branches of industry a mixture of branch and enterprise agreements is found: the branch agreement regulates only the main topics of the working conditions and leaves room for further bargaining about detailed matters at sectoral and enterprise level. The printing industry is an outstanding example in this respect.

### **2. Please summarize the history of collective agreements in your country.**

The first collective agreements in the Netherlands were concluded in the period around 1900.

The 1907 Act on the employment contract (incorporated in the Civil Code) contained a provision which recognised the significance of collective agreements for employment contracts. Trade unions became more accepted as bargaining partners and collective bargaining gradually became widespread in the first half of the twentieth century. In 1927 the Act on collective agreements was adopted, and in 1937 the Act on the extension of collective agreements. Both Acts are still in force.

During the years 1945-1970 the development of wages was officially controlled by the Government. Collective agreements were subject to authorisation by a public agency. The government controlled wage policy gave rise to much unrest and was little successful in the long run. During the seventies the Dutch Government interfered

several times in the process of wage determination by means of incidental legislation (inter alia with reference to the oil crises) which eventually even led to reproaches from the ILO. Over the past twenty years free collective bargaining has remained predominant. Although unionisation has dropped to around 25%, the collective bargaining structure stands almost unaffected and approximately 75% of employment relations are covered by a collective agreement.

Recently a new form of “yellow union” has come up. Temporary agencies hiring “cheap” labour from other EU Member States (namely from Poland) conclude cheap collective agreements with unions of which the independent status is subject to doubt. This phenomenon led to discussions about new requirements for the representativity and independence of trade unions as bargaining partners.

### 3. Collective agreement as a source of law

#### 3.1 What are the constitutional and/or legal grounds of collective agreements?

The freedom of association, including the right to form trade unions, is recognised in Article 8 of the Dutch Constitution. The right to free collective bargaining is recognised in case law, mainly based on the European Social Charter (Council of Europe) and on ILO Conventions 87 and 98).

The 1937 Act on Collective Agreements gives a definition of a collective agreement and regulates its legal effects. So far it can be said that collective agreements have a legal ground in statutory law.

#### 3.2 Does a collective agreement have a contractual or statutory status (or both)?

Collective agreements are treated as contracts under civil law. However, the normative function of the agreement (Articles 12 and 13 of the Act on Collective Agreements) makes the collective agreement directly binding on the members of the contracting organisations, which lends it, metaphorically speaking, a “legislative” character.

Provisions of collective agreements can be declared generally binding by decree of the Minister of Social Affairs (*erga omnes* effect). The thus “extended” provisions have the same effect as secondary legislation and therefore may be said to have statutory status.

#### 3.3 The relationship between collective agreements and other sources of law

##### 3.3.1 How do collective agreements receive legal status from the Constitution and the constitutional principles in force in your country?

See above, under 3.1.

##### 3.3.2 Relationships between collective agreements and general principles

###### A) Hierarchy of standards

###### 1) Principle of hierarchy

###### a) Are collective agreements and covenants subject to superior standards?

Collective agreements rank below mandatory statutes.

However, some labour statutes are only half-mandatory and allow explicitly for deviation by collective agreements (for example, notification periods).

b) Does a hierarchy of levels exist between collective agreements?

A simple and yet not incorrect answer to this question would be: no, there is no such hierarchy between real collective agreements. However, to explain the Dutch system in this respect a little more needs to be said.

The central organisations of employers and of workers negotiate every year about the topics and outlines of the next rounds of collective bargaining which are to be held in the different branches of industry and are conducted by the branch-organisations of employers and the trade unions. Those central negotiations do not lead to binding collective agreements in the legal sense but may be considered as agreements or covenants concluded at the top level. The practical effect of these central covenants depend on the authority of the central organisations over their members (the branch-organisations).

Furthermore, a regular collective agreement, concluded at industry level, can leave a certain margin to be filled in by collective bargaining at sectoral or at enterprise level. This can result in a hierarchical structure of collective agreements at various levels.

2) Derogations

a) Are collective agreements subject to the “principle of favour” (exemption “in melius” from the laws or higher-ranked agreements)?

Yes, unless the statutes or “higher ranked agreements” explicitly prohibit such deviation in melius.

b) Can they be less favourable than the latter or is it acceptable that lesser ranked agreements contradict unfavourably (“in pejus”) to higher ranked agreements?

Only if the higher ranked laws or agreements explicitly allow this.

B) Principle of equality: non-discrimination and “equal pay for equal work”

1) May collective agreements set conditions of unequal treatment and are these upheld as legal?

Many forms of unequal treatment are forbidden by law. The effect of those statutes is usually that the discriminatory provisions of collective agreements must be considered null and void.

2) Are collective agreements subject to the principle of equality?

Yes, in so far as equality is statutorily protected (including EC legislation).

C) Law and order

1) Is there a definition of “social” law and order (which is different from “economic” or “management” law and order)?

The concept of “openbare orde” (public interest; public policy; ordre public) is used in Dutch legal theory and practice to indicate a protected sphere of general interests (public safety, public health) which may set aside legal rules and sometimes even statutes. It would be possible to distinguish a “social” sphere of public interest (compare the ECJ in the Albany case) but this is uncommon in Dutch legal theory (but we do distinguish social fundamental rights such as the right to bargain collectively).

2) Is there a distinction between absolute and relative law and order?

This distinction is unknown in Dutch law.

D) Is there a duty of good faith in collective bargaining?

Yes, this falls within the scope of the civil law of contracts.

### 3.3.3 Collective agreements and other sources of law

A) Collective agreements and law

1) Are collective agreements allowed to abridge rights that employees have been given by law?

Only in so far as the statute explicitly allows this.

2) May the law itself annex a collective agreement?

3) May a law delegate some of its powers to a collective agreement?

Yes, this is not uncommon, for example in working-time legislation.

B) Collective agreements and regulations

1) Should collective agreements be extended by a regulation to govern the whole profession, even businesses that are not members of the signatory unions?

The 1937 Act on the Extension of Collective Agreements provides for the possibility of extension (*erga omnes* effect) of provisions of collective agreements through a Ministerial Decree.

2) Are some collective agreements subject to approval by ministerial order?

No.

C) Collective agreements and customs

1) Does a collective agreement challenge custom when its object is the same?

Yes, within the scope of the collective agreement.

2) Does the voluntary enforcement by the employer of a collective agreement that normally does not apply to him/her constitute a custom?

This may be the case, particularly if it has been practised for a long stretch of time.

3) Have you something else to say about this point?

D) Collective agreements and the labour contract

1) Is the contract of employment allowed to contain clauses less favourable to the employee than the relevant collective agreement?

Only if the collective agreement expressly allows this.

2) Is the collective agreement incorporated into the contract of employment or does it remain independent from it?

The terms and conditions of employment contained in a collective agreement by which both the employer and the employee are bound are automatically incorporated into the employment contract.

The terms and conditions of employment contained in a collective agreement by which only the employer is bound are not incorporated into the employment contract, but there is an obligation of the employer (towards the contracting organisations) to apply the collective agreement as well with regard to unorganised employees.

The terms and conditions of employment contained in extended provisions of a collective agreement are automatically incorporated into all employment contracts to which they apply, regardless of whether the employers and employees are organised or not.

3) May a new collective agreement modify the contract of employment?

Yes, if both parties to the employment contract are bound by the collective agreement, or if the collective agreement is extended.

#### **4. Elaboration of collective agreements**

##### 4.1. Collective bargaining

See the answers above, under 3.3.2.A. “Hierarchy”

4.1.1 How many levels of bargaining exist in your country?

4.1.2 How are they related?

4.1.3 Is collective bargaining freely decided or mandatory?

There is no general obligation to bargain collectively.

However, if an employer decides to bargain with a certain union, he may be obliged to admit other representative unions to the negotiating table as well.

4.1.4 What subjects may collective bargaining include?

All matters of common interest to employers and workers.

##### 4.2. Conclusion of collective agreements

###### 4.2.1. Signatories

a) Who can be parties to the collective agreement?

(1) Only unions (or their representatives)?

Only unions which according to their own regulations (“constitution”) are competent to conclude collective agreements.

(2) Also the employees, or work-council, or workforce delegates?

A works council may negotiate and even conclude an agreement about working conditions, but such an agreement is not considered to be a collective agreement in the legal sense and therefore lacks normative effect.

(3) Other responses?

b) Must the parties meet a condition of representativity?

There is no statutory requirement in this respect. It is for the negotiating parties to decide with whom they want to negotiate. However, if an employer(s’ organisation) has started negotiations with one or more unions and excludes other representative unions, this may constitute a tort, according to case law.

c) May the agreement be signed by only one union, though in the minority, or is it necessary that a majority of unions do not oppose the text of the agreement?

No requirements, but see also the answer under b).

d) Does a right of opposition exist?

No.

#### 4.2.2. Formal requirements

a) Must collective agreements be made in writing? Yes.

b) Must a notice be given?

c) Must collective agreements be registered? Yes.

### 5. The enforcement of collective agreements

#### 5.1. Scope of collective agreements

##### 5.1.1. Geographic area

a) National, regional, local?

Branch-agreements are nearly always national.

b) International?

In so far as Dutch labour law is applicable to employment relationships of workers in other countries (for example in the case of posting of workers by a Dutch company), the provisions of Dutch collective agreements may apply as well.

##### 5.1.2. Professional sphere

What jobs, professions or branches are concerned?

In principle there are no limitations in this respect.

#### 5.2 Determining which collective agreement is enforceable

##### 5.2.1. Is the main activity of the business a criterion?

Yes.

##### 5.2.2. What about the mandatory application of “extended” collective agreements?

Extended collective agreements have mandatory effect for the whole branch of industry concerned.

##### 5.2.3. Is it possible for an employer to voluntarily apply a collective agreement that does not apply to his/her business? Then, how to prove this voluntary enforcement?

It is not unusual to incorporate such a collective agreement by means of an incorporation clause in the individual employment contract. Even employers who are bound to a collective agreement use incorporation clauses, to create “normative effect” for the unorganised workers.

##### 5.2.4 Which collective agreement is to be enforced in case of coincidence of several agreements? According to what criteria?

If the collective agreements have no special clauses for this situation, the principle of “lex posterior derogat legi anteriori” may be applied.

If the worker is not bound by the second agreement (because he is not a member of one of the unions concluding that agreement), he retains his rights from his “own” collective agreement. The parties to the second agreement may demand that the employer apply the more favourable conditions of the second agreement.

### 5.3 Binding force of collective agreements

#### 5.3.1 Are collective agreements enforceable upon signing?

Yes, but usually the bargaining results will have to be approved by the competent organs of the organisations according to their constitution.

#### 5.3.2 Do collective agreements apply automatically?

Yes.

#### 5.3.3 Are collective agreements binding (imperative)?

Yes.

## 6. Content of collective agreements

### 6.1 Is the content mandatory, or can the parties choose it freely (or both)?

There is no mandatory content, but in order to be a collective agreement in the legal sense, there must be some provisions concerning the terms and conditions of employment.

### 6.2 Different subjects dealt with

#### 6.2.1 Freedom of collective industrial organization?

This is not dealt with in collective agreements.

#### 6.2.2 Form and content of the contract of employment?

- Requirements concerning the use of fixed-term contracts?

Yes.

- Form of the contract: in writing?

Yes.

- Compulsory mentions?

No. Yes.....??

- Various clauses

- Covenant not to compete?

Must always be in writing in the individual contract.

- Compensation (financial) for covenant not to compete?

May be laid down in a collective agreement.

- Probationary period?

Yes.

#### 6.2.3 Minimum wages?

Yes.

6.2.4 Classification and career of staff members?

Possibly.

6.2.5 Hours of work

Yes, all the topics mentioned below.

- On-call time and hours of “equivalence”?
- Vacation?
- Overtime and fixed wages?
- Compensatory rest?
- Part-time work?
- Minimum rest time and maximum work time?

6.2.6 Rights of an employee who is on sick leave? Yes.

- Suspension of performance of the contract of employment?
- Guaranteed resources?
- Job security? Yes

6.2.7 Discipline?

Yes.

6.2.8 Vocational training?

Yes.

6.2.9 Follow-up of the agreement?

Yes.

**7. Interpretation of and litigations relating to collective agreements**

7.1. Which bodies are responsible for interpreting the collective agreements?

7.1.1 Joint boards?

Yes, often in the form of arbitration boards with the competence to give binding decisions.

7.1.2. Other bodies or organizations?

7.1.3. What is the scope of their interpretation?

a) Is it binding for the judge?

The collective agreement determines whether there is an arbitration board and if so, whether it can give binding decisions.

Arbitration decisions are binding for the judge except for violations of fundamental principles of procedural law or public order.

b) Can it be retroactive?

Yes.

7.1.4. Is the judge entitled to interpret collective agreements him/herself?

Yes. According to the case law of the Hoge Raad (Supreme Court) the collective agreement must be interpreted according to the same principles as are applied in the interpretation of statutes. The “intention of the contracting parties” may be invoked only in so far as this intention is made clear in the text or the annexes to the collective agreement. The Hoge Raad has chosen this position because of the consequences of the collective agreement for the rights and duties of individual workers who cannot participate in the negotiations.

7.2 Remedies against breach of collective agreements

7.2.1 Are penalties provided?

Penalty clauses are uncommon in collective agreements. If a party to a collective agreement violates its contractual obligations, this party can be sued for breach of contract, which may result in damages to be paid.

7.2.2 Which body or authority ascertains violations?

- The trade unions and employers organisations which are parties to the collective agreement;
- Works councils (within the limits of their competence to “promote” the correct application of rules about working conditions within the enterprise);
- The Minister of Social Affairs can call for an investigation by the Labour Inspectorate concerning the correct application of extended collective agreements.

7.2.3 What are the civil remedies?

a) Individual claims?

Yes.

b) Collective lawsuits?

Yes, initiated by the parties to the agreement.

7.3 Proceedings related to collective agreements

7.3.1 Is there a distinction made between individual and collective litigations in this matter?

The parties differ but the same procedural rules are applied, by the same courts.

7.3.2 Which court(s) or body(ies) have jurisdiction over legal matters relating to collective agreements?

All legal disputes concerning collective agreements fall within the jurisdiction of the Kantonrechter, an unus chamber of the ordinary Court (Rechtbank). The Kantonrechter is competent in all cases concerning employment contracts, small claims and a number of other fields.

In several branches of industry the organisations have established joint bodies for arbitration of conflicts concerning collective agreements.

7.3.3 How is the judge informed of the existence and content of a collective agreement? What is the role of the judge and the parties in litigation relating to collective agreements?

In most cases the collective agreement is extended by Ministerial Decree and published in the official state journal (Staatscourant). Otherwise, the parties will have to inform the judge.

## **8. Altering and challenging of collective agreements**

### 8.1 Cases and procedures

#### 8.1.1 Do procedures exist for the review and termination of collective agreements?

According to the Act on Collective Agreements the maximum duration is five years. One or two years is usual. If no written mention of the termination is given in due time (usually one or two months before expiration), then the duration of the agreement is automatically extended for a new period.

#### 8.1.2 What happens to collective agreements in the case of a transfer of undertaking or change of employer?

The transferee must apply the conditions of the collective agreement by which the transferor was bound.

#### 8.1.3 What happens before and during the time of expiration of the agreement?

After the expiration, the same conditions remain incorporated in the employment contracts of the workers who were bound by the collective agreement. However, the employer is now free to negotiate individually with his workers about other conditions.

#### 8.1.4 What is the procedure for substituting a collective agreement with another one?

The same parties usually negotiate about a new collective agreement.

### 8.2 Can employees retain vested or established rights (“droits acquis”) in case of termination of collective agreements?

Yes, if they were bound by the collective agreement, so that the conditions of the collective agreement are (and remain) incorporated in the individual employment contracts.

## **9. Conclusions**

### 9.1 Is there a policy promoting collective bargaining and contractual collective law?

Collective bargaining is usually looked upon by the government in a positive manner, and the government participates in annual consultation rounds with the central organisations of employers and workers about wage policies and related matters. The practice of extension of collective agreements by Ministerial Decree is also intended to promote collective bargaining.

### 9.2 Are there problems concerning the relationship between the contract of employment and collective agreements?

Problems may arise in periods between the expiration of an extended agreement and the declaration of extension of the new agreement. According to the case law of the Hoge Raad, unorganised workers do not retain the conditions of the extended agreement after its expiration; for those workers the incorporation into their employment contracts lasts only as long as the extension holds. The reason is that those workers have not authorised the unions to interfere in their individual employment contracts, therefore the individually agreed terms and conditions are supposed to “revive” when the extension of the collective agreement expires.

- 9.3 Does the connection between law and collective agreements operate in favour of employees (principle of favour, ratchet effect), or does it allow less favourable conditions?

Collective agreements may deviate in melius from statutory law unless the statutory law determines otherwise (which was predominantly the case during the years of government controlled wages policy, 1945-1970).

Deviation in peius by collective agreement is sometimes allowed in statutory law (for example regarding notification periods).

- 9.4 Are there any additional conclusions or problems you want to mention?