

Collective agreements

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1. Definitions

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

Spanish doctrine has defined the collective agreement as a written agreement through collective bargaining between an employer and the employees' representation, or between employers' associations and trade unions, which fixes wages, work and employment conditions, and regulates the collective relationships in different levels (shop floor, company, occupation, brand of industry, general or interprofessional).

Also, Art. 82.1 of Workers' Statute (Estatuto de los Trabajadores, ET) (Consolidating Text approved by Royal Legislative Decree 1/1995 of 24 March), provides a legal definition of collective agreement, when states that "Collective agreements, as the result of the bargaining developed by employee's and employers' representatives, constitute the expression of the agreement freely adopted by them by virtue of their collective autonomy".

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

Depending on their content, there are: 1) Inter-professional agreements, signed in the territorial scope of the Nation or an Autonomous Community by the most representative unions and employers associations, with the aim to regulate the structure of collective bargaining, the concurrence between collective agreements, different bargaining units' complementarity and the matters which can be dealt with by lower ranked collective agreements (Art. 83.2 ET); 2) Agreements on certain matters, e.g. on collective labour disputes resolution (Art. 83.3 ET); 3) Ordinary collective agreements, which regulate the employment conditions and the relations between employers' and employees representatives; and 4) Workforce agreements.

From the point of view of their nature and efficacy, collective agreements can be “estatutarios”, those which fulfil the requirements relating to the parties, majorities, registration, publication, content, etc. set by the Workers’ Statute, which have normative or statutory status, or “extraestatutarios” (in the event of non-compliance with those requirements) with mere contractual efficacy.

Regarding their territorial scope, collective agreements may be agreed at company or group level, or at a higher level: local, province, several provinces, Autonomous Community, or national.

As to their occupational scope, they may apply to all the employees of an company or of a branch of industry, or affect a certain profession or job (aviation pilots, train drivers...).

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

In the beginning of XXth century some Acts envisaged the development of their provisions by means of collective agreements. The Labour Code of 23rd August 1926 as well as the Employment Contract Act of 21st November 1931 (during the II Republic) expressly recognised the collective agreements. In spite of that, the public nature of both the bargaining system and the joint bodies in charge of the bargaining, let little room to the agreements between the concerned employers and employees.

During the first period of Franco’s Dictatorship (1939-1958) collective bargaining was forbidden. The Collective Agreements Act (Ley de Convenios Colectivos Sindicales) of 24 April 1958, expressly recognised the right to Unions to reach agreements. However, those collective agreements were peculiar or “sui generis”, given that freedom of association did not exist in Spain; at that time there were only one Union (Organización Sindical Española) and it had a mix nature for it embodied both employers and employees. Under the Act 38/1973 of 19 December, of Union Collective Agreements, the bargaining parties obtained slightly more autonomy in respect of public Authority, but the situation remained the same.

As a result, only after the recognition of freedom of association, firstly by the ambiguous Royal Decree-Act 17/1977, of 4 March, on Employment Relations (Real Decreto-Ley de Relaciones de Trabajo), and finally by the explicit Art. 28.1 of Spanish Constitution (Constitución Española, CE) (27th December 1978), there were appropriate conditions for free collective bargaining in Spain. Hence, Art. 37.1 CE expressly recognises the right to collective bargaining and its binding efficacy.

3. Collective agreement as a source of law

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

Art. 37.1 CE states that “The Act will guarantee the right to labour collective bargaining among the workers and employers’ representatives, as well as the binding efficacy of collective agreements.”

The mentioned Act is the Workers’ Statute (Estatuto de los Trabajadores, ET) (Consolidating Text approved by Royal Legislative Decree 1/1995 of 24 March), the III Title (Arts. 82 to 92) of which regulates the collective bargaining and the agreements resulting of it.

In addition, the Freedom of Association Organic Act (Ley Orgánica de Libertad Sindical, LOLS) (of 2nd August 1985), envisages and regulates the unions’ right to collective bargaining, as an essential part of their freedom of association.

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

The so-called “estatutarios” collective agreements have statutory status and are generally applicable (*erga omnes*). The other collective bargaining (“extraestatutarios”) have only contractual force: they apply only to members of the contracting organizations.

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 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 are source of law, under Spanish Constitution, statute law and statutory instruments, therefore they are subject to compulsory rules and minimum rights set by the referred sources.

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

The higher or lower territorial scope of application does not necessarily involves a higher or lower rank of the collective agreement for the general criterion which determines the agreement to be enforced is a temporal one: the collective agreement that came in force earlier prevails on the latter. However, it might be said that Inter-professional agreements, signed in the territorial scope of the Nation or an Autonomous Community by the most representative unions and employers associations, have a higher rank than the rest, given that they may regulate the structure of collective bargaining, the concurrence between collective agreements, different bargaining units’ complementarity and the matters which can be dealt with by lower ranked collective agreements (Art. 83.2 ET).

2) Derogations

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

In general, collective agreements cannot establish to the detriment of the employees any terms or conditions which are less favourable than or infringe those provided as mandatory by statute law.

- 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?

There is a flexible distribution of matters between higher and lesser-ranked agreements. Otherwise, it is not very frequent that colliding or conflicting regulations of two or more collective agreements apply at the same time to the same employment relationships. In case of conflicting regulations the rule is the application of the more favourable regulation, “globally” considered.

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?

See below B)2).

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

Given that Collective agreements are subject to standards set by Spanish Constitution and statute law, they must respect the principle of equality enshrined by both Spanish Constitution (CE) and the Workers Statute (ET).

In fact, Art. 14 CE establishes that the Spanish are equal before the law, without any discrimination which prevails by reason of birth, race, sex, religion, opinion or any other personal or social condition or circumstance. In addition, Art. 35.1 reminds the right to work, to free election of profession and job, to promotion through work and to a sufficient remuneration in order to satisfy their own and their family’s needs, without any discrimination by reason of sex.

As to the Workers’ Statute, its Art. 4.2.c) sets that in the employment relationship, workers shall not be discriminated against in access to jobs, or once employed, by reasons of sex, civil status, by age within the bounds framed by this Act, race, social origin, political or religious ideas, in joining or not a trade union, as by reason of language within the Spanish State. Nor they shall be discriminated against by reason of their physical, mental, or sensory disabilities, provided that they are suitable to perform the work or job in question.

Accordingly, Art. 17.1 ET establishes that it shall be deemed null and void any clauses of collective agreements which contain unfavourable discrimination by reason of age or contain favourable or adverse discriminations in employment, as in matter of remuneration, working time and the rest of work conditions for circumstances of sex, origin, civil state, race, social origin, religious or political ideas, joining or not to trade unions and their agreements, relationship to other employees of the enterprise and language within the Spanish State.

C) Law and order

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

There is no statutory definition of “economic” or “social” public order (“derecho necesario”: art. 3.3 and 3.5. Workers’ Statute Act). It is up to the courts to determine what legal work and employment conditions are “derecho necesario”.

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

It is usual to distinguish between:

- Absolute law, i.e. mandatory or prohibitive rules that cannot be modified even if it is to improve employees’ employment conditions.
- Relative law, containing minimum rights or maximum limits, which can be modified to benefit employees.

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

On the word of Art. 89.1 ET, the parties shall bargain under the duty of good faith (Art. 89.1 ET).

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?

Collective agreements cannot abridge employment terms or conditions established by law as mandatory or minimum rights, but only those set as discretionary provisions.

- 2) May the law itself annex a collective agreement?

It is feasible from a legal point of view, but in fact it is not made.

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

Excepting matters of public order, such as international law, procedural law, criminal law and penalties, etc., statute law may delegate the regulation of employment terms and conditions to collective agreements.

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?

Workers’ Statute (Art. 92.2 ET) envisages the extension (by the Ministry of Employment and Social Affairs or the Autonomous Community relevant body) of collective agreements to companies or branches of industry by reason of damage caused by the impossibility to achieve in their scope a collective agreement as a consequence of the absence of parties with the required representativity to bargain.

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

Agreements concerning civil servants are subject to approval by statute law, given that their economic conditions (e.g. wages) are subjected to budgetary limits. As a result, the increase of civil servants' wages agreed between unions and the Public Authority for which those civil servants work, have to be envisaged by its General Budget, which in turn needs the relevant Parliament's approval.

C) Collective agreements and customs

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

Under Spanish Labour Law custom is a subsidiary source of law. Thus, custom can only be invoked when the rest of sources of law (statute law, statutory instruments, collective and individual agreements) do not regulate some aspect or matter (Art. 3.4 ET). Consequently, as a general rule, collective agreement shall prevail over custom, when its object is the same.

Nevertheless, statute law may refer expressly to custom the regulation of a certain matter, in which case custom and shall prevail over what collective agreement might provide on the same matter.

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

Its unclear that the mentioned application constitutes a custom. Perhaps, it might generate an employees' acquired right as long as it fulfils some conditions: continuity of the collective agreement application, unequivocal intention to apply the agreement and to be bound to it.

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

According to art. 37.1 CE and art. 82.3 ET collective agreements are binding to individual contracts of employment in its scope of application. In the light of the quoted article of Spanish Constitution, the Constitutional Court (in its Decisions 105/1992 of 1 July, and 225/2001 of 26 November) reminds that collective autonomy prevails upon individual autonomy, constituting a limit for it and granting the binding efficacy of collective agreements enshrined by Art. 37.1 CE.

With the exception of those cases in which the collective agreement so allows, employers and employees cannot agree clauses containing less favourable terms or conditions than those set by the relevant collective agreement. In this sense, Art. 3.1.c) ET provides that “the duties and obligations concerning the employment relation are regulated: [...] c) By the parties ... in the contract of employment [...], but in no case they are allowed to establish to the detriment of the employee any terms or conditions which are less favourable than or infringe those provided by the above-mentioned statute law and collective agreements”.

Neither can contracts of employment and individual agreements avoid the application of the relevant collective agreement. Those clauses precluding its application are invalid and ineffective (Arts. 3.3 y 3.5 ET).

However, since 1994, modification of certain employment terms (among others timetable, shift work, system of remuneration, working system and productivity) established by collective agreements is possible inasmuch as Art. 41.2 ET allows such a modification by means of a workforce agreement between the employer and the workers’ representatives. Conversely, the employment contract is not allowed to change any terms provided by collective agreement.

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

The collective agreements’ clauses are not incorporated into the contract of employment; they are, as legal rules, “external” regulations for the contract. Therefore, there is no need for collective agreements to be expressly included or quoted in individual contracts to be binding.

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

A new collective agreement cannot modify employment conditions individually agreed by the parties, but only those incorporated into the contract by the prior collective agreement to which the new one substitutes.

4. Elaboration of collective agreements

4.1. Collective bargaining

- 4.1.1 How many levels of bargaining exist in your country?

See above question 1.2

- 4.1.2 How are they related?

See below question 5.2.4

- 4.1.3 Is collective bargaining freely decided or mandatory?

As any contract, collective agreements have to be freely decided. The freedom to bargaining is a requirement implicit in collective autonomy.

4.1.4 What subjects may collective bargaining include?

See below, question 6

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 can be parties (on behalf of employees) to the collective agreements signed at national, regional or local level (the scope of which is higher than a company) (Art. 87.2 ET).

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

With respect to collective bargaining at company level the parties to the collective agreement can be not only unions but also the workers' representatives (Art. 87.1 ET), i.e. the work-council (compulsory in establishments with 50 workers or more) or the workforce delegates (compulsory in staffs with 11 to 49 workers; optional from 6 to 10) (Arts. 62 and 66 ET).

(3) Other responses?

b) Must the parties meet a condition of representativity?

Unions will be able to bargain statutory collective agreements when they are deemed as:

- “Most representative unions at national level”: those which at least have the 10 % of all employees representatives elected in Spanish undertakings, or
- “Most representative unions in a certain Autonomous Community” those which at least have 15 % of all employees representatives elected in an Autonomous Community's undertakings and at least 1.500 of them, or
- “Representative unions within the territorial and functional scope of the collective agreement”: those which accrue at least 10% of workers representatives elected in the undertakings in the concerned scope.

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?

The agreement may be signed by only one union provided that it has the absolute majority (more than 50 %) of employees' representatives elected in the undertakings in the territorial and functional scope of the collective agreement, required by Arts. 88.1 and 89.3 ET. However, that union cannot impede other unions to take part in the bargaining as long as they meet the condition of representativity and are willing to negotiate (Art. 87.5 ET).

- d) Does a right of opposition exist?

Under Spanish Labour Law does not exist a right of opposition as such, but the right of representative unions to take part or not and to vote affirmatively or not to the agreement.

4.2.2 Formal requirements

- a) Must collective agreements be made in writing?

Collective agreements must be made in writing. Otherwise they will be null and void (Art. 90.1 ET).

- b) Must a notice be given?

The party willing to initiate the bargaining must give notice of that intention to the other party as well as to the relevant public authority. The notice, in writing, shall refer to the parties' representativity, the scope of the collective agreement and the matters to bargain (Art. 89.1 ET).

- c) Must collective agreements be registered?

They must be registered and made public through the relevant Official Journal, like statute law and statutory instruments. Art. 90.3 ET provides that "in a ten-day period from the registration of the collective agreement, the legal authority shall dispose its mandatory and free publication in the <<Official Journal>> of the State or, depending on the territorial scope of the agreement, either in the <<Official Journal of the Autonomous Community>> or in the <<Official Journal>> of the relevant province".

5. The enforcement of collective agreements

5.1. Scope of collective agreements

5.1.1. Geographic area

- a) National, regional, local?

The territorial scope of collective agreements may be national, regional ("autonómico", for an Autonomous Community), provincial (for a Province), interprovincial (several Provinces) or local. There are also collective agreements of undertakings and of groups of undertakings.

- b) International?

Case Law has limited the scope of collective bargaining to workers contracted in Spanish territory.

5.1.2 Professional sphere

What jobs, professions or branches are concerned?

As a general rule, collective agreements are intended to regulate employment relations of all the employees (regardless of the job or profession they carry out) who work in the undertakings included in their scope.

However, Constitutional Court admits the validity of the exclusion of some categories of employees, e.g. company's top executives. On the other hand, the so-called collective agreements of branch ("de franja") are those which regulate the employment relations in certain profession (aviation pilots, train drivers...).

5.2 Determining which collective agreement is enforceable

5.2.1 Is the main activity of the business a criterion?

Yes it is.

5.2.2 What about the mandatory application of "extended" collective agreements?

As to the application of extended collective agreements, Art. 86.1 ET distinguishes between normative clauses (those regarding employment terms: wages, working time, etc.) and contractual clauses (those imposing duties to the signatories; e.g. the duty of peace). The mandatory application of extended collective agreements which takes place from their date of expiry to the date in which the new agreement comes into force, only refers to the normative clauses (Art. 86.3 ET).

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 possible; proven by general means.

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

As a general rule, the collective agreement which came into force in advance is to be enforced (Art. 84 ET). However there are exceptions to the temporal criterion:

- a) An "interprofesional" agreement, signed at national level or for an Autonomous Community by the most representative unions and employers associations, might regulate the structure of collective bargaining and the concurrence between collective agreements, establishing another criteria, e.g. the priority of the latter agreement, or the different bargaining units' complementarity pointing out the matters which can be dealt with by different ranked collective agreements (Art. 83.2 ET); or the application of the most favourable clause.
- b) The latter collective agreement is to be applied when its scope is smaller (except for collective agreements for undertakings, which cannot regulate certain matters when there is a collective agreement already in force at a higher level.

5.3 Binding force of collective agreements

5.3.1 Are collective agreement enforceable upon signing?

Collective agreements are deemed to be real employment legislation and, like this, their entry into force is conditioned to their publication in the Official Journal or bulletin of the territory (State, Autonomous Community, Province) covered by the agreement (Art. 90.3 ET). The

publication enables those who are not members of the unions and employers' associations who negotiated the collective agreement, but are going to be affected directly or indirectly by it, to know about its existence and contents.

However, under Spanish labour law, the parties are free to choose the date of entry into effect of the collective agreement (Arts. 86.1 and 90.4 ET): they can postpone it in the future, after the publication, but also situate the entry into force back in time, before the date of official publication of the collective agreement, in which case the collective agreement would be applied retroactively, for instance, applying a salary increase backdated to January or to the deadline for the previous collective agreement, with the aim to keep the purchasing power of the employees.

5.3.2 Do collective agreements apply automatically?

Spanish collective agreements have automatic efficacy in individual employment relations, thus there is no need to include any "bridge clause" in employment contracts, in order to incorporate their terms and conditions into the individual employment relation.

5.3.3 Are collective agreements binding (imperative)?

As said before, Art. 37.1 CE establishes "the binding efficacy of collective agreements." On the one hand, as a contract, collective agreement is binding to the signatories. In addition, when it complies with requirements set by the Workers' Statute, collective agreement has a normative status and, as a result, is generally binding and enforceable. Hence, it has erga omnes efficacy, which means that it applies to all employees and employers included in its functional and territorial scope, regardless of whether they are or not associated to the unions and employers' associations who signed the agreement (Art. 82.3 ET).

6. Content of collective agreements

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

Under Spanish Labour Law there are only few clauses which are mandatory. Thus, collective agreements have to enclose the following content (art. 85.3 ET):

- a) Identification of the signatory parties.
- b) Determination of their personal, temporal, geographic and functional scope.
- c) Waiver clause from economic conditions provided by the collective agreement, in case of crisis.
- d) Notice of termination, formal requirements, etc.
- e) Designation of a Joint Committee as the signatories' representative.

In addition to the above-mentioned mandatory content, collective agreements usually regulate the terms of individual contracts of employment, the relationship between workers representatives and employers or their associations, some aspects of social benefits, etc. The parties are free to negotiate on the quoted matters, within the framework of the law (Art. 85.1)

6.2 Different subjects dealt with

6.2.1 Freedom of collective industrial organization?

Regarding collective labour relations and freedom of association, collective agreements can regulate various aspects, such as “no-strike” agreements, deduction of union subscriptions (the “check-off”); the right to time off for union or representative purposes; the number of employees’ representatives (as long as it is more favourable than the provided by the LOLS); the use of facilities and a room on company premises, proceedings to be followed for the resolution of disputes, etc.

6.2.2 Form and content of the contract of employment

- Requirements concerning the use of fixed-term contracts?

Art. 15 ET, which regulates fixed term contracts, establishes the aspects (duration, number of contracts per establishment, wages...) that collective agreements are allowed to deal with.

- Form of the contract: in writing; compulsory mentions?

The form of the contract is regulated by statute law (Art. 8 ET) and the relevant statutory instruments.

- Various clauses

- Covenant not to compete?

Art. 21 ET refers to the terms agreed on this matter. Collective agreements rarely regulate this covenant; it is usually dealt with by the employment contract or other individual agreements.

- Compensation (financial) for covenant not to compete?

Idem.

- Probationary period?

Art. 14 ET refers the regulation of the probationary period to the collective agreement, but establishes a subsidiary maximum limit.

6.2.3 Minimum wages?

Collective agreements fix wages to be paid to employees depending of their category or functions. The said wages constitute a minimum right which can be enhanced by the employment contract.

6.2.4 Classification and career of staff members?

Art. 24 refers this subject to collective agreements or, in their absence, to workforce agreements.

6.2.5 Hours of work:

Working time is a classic content of collective agreements. The Workers’ Statute establishes a maximum working time as well as minimum rest periods, which collective agreements can modify in mellius, to establish fewer hours of work or longer periods of rest. In addition, some questions are expressly referred to collective bargaining.

- On-call time and hours of “equivalence”? This question is not dealt with by Workers’ Statute but by collective agreement
- Vacation? Art. 38 ET Duration. Time. Annual staff schedule.
- Overtime and fixed wages? (Art. 35 ET). Remuneration. Option between remuneration or compensatory rest.
- Compensatory rest? Art. 35: overtime.
- Part-time work?
- Minimum rest time and maximum work time? Workers’ Statute refers to collective agreement the establishment of weekly and daily working time duration and allows it to provide its irregular distribution (Art. 34).

6.2.6 Rights of an employee who is on sick leave?

- Suspension of performance of the contract of employment?
Art. 45.1 ET guarantees the suspension of the contract of employment on grounds of sickness or accident. The duration is predetermined by Social Security Law.
- Guaranteed resources? Social Security Law grants a sick pay during the suspension of the contract of employment. Sick pay is lower than normal wages. Nevertheless, some collective agreements provide a complementary earning met by the employer.
- Job security? Collective agreements are not very prolix on this matter

6.2.7 Discipline

Collective agreements usually content a classification of employees’ conducts which amount to an infringement of their duties along with the sanction to be imposed (warning, suspension of the employment contract, dismissal, etc.) (Art. 58.1).

In addition, collective agreements may establish further formal requirements in relation to disciplinary proceedings (Art. 55.1 ET).

6.2.8 Vocational training?

Art. 23 refers to collective agreements the regulation of employees’ rights to adapt their working time to attend to vocational training courses or to obtain the pertinent time off to this end.

6.2.9 Follow-up of the agreement?

The signatories have to designate a joint board responsible for interpreting the collective agreement (Art. 85.3.e) and 92 ET). The collective agreement will establish its composition and functions as regards the follow-up of the agreement and dispute resolution proceedings (Art. 85.3.e).

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?

The signatories have to designate a joint board responsible for interpreting the collective agreement (Art. 85.3.e) and 92 ET).

7.1.2 Other bodies or organizations?

There are other extrajudicial bodies or organizations (joint tribunals, arbitrators, mediators) set by Inter-professional agreements at national (Acuerdo sobre Solución Extrajudicial de Conflictos Laborales 2005) or Autonomous Community level, which eventually will intervene in the resolution of labour disputes related with collective agreements included in their scope of application.

7.1.3 What is the scope of their interpretation?

a) Is it binding for the judge?

The interpretation given by Joint boards is not binding for the judge.

b) Can it be retroactive?

Yes.

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

When he/she is called to do so, as a result of a claim lodged by the concerned employee or employer, or their representatives in the scope of the collective agreement

7.2 Remedies against breach of collective agreements

7.2.1 Are penalties provided?

Art. 40 of Labour Infringements and Sanctions Act (RDLeg. 5/2000, of 4 August) provide penalties in case of breach of collective agreements, the amount of which depends on the matter of the contravened clause.

7.2.2 Which body or authority ascertains violations?

Employment Inspectors are statutorily empowered to issue a document (“acta”) stating the collective agreement infringement and proposing the pertinent penalty. The relevant Employment Authority will confirm and impose the penalty.

7.2.3 What are the civil remedies?

If an employer fails to fulfil any duty set by collective agreement, a complaint may be presented to a Social Judge or Employment Tribunal.

a) Individual claims?

When the dispute takes place between the employer and one or more employees on grounds of wages, dismissal, holidays, etc., set by collective agreement, the affected employee/s will seek its enforcement by means of an individual claim.

b) Collective lawsuits?

If the failure relates to trade unions or employee representatives in the undertaking, they can bring a claim before labour judges or tribunal to enforce the relevant collective agreement clause.

7.3 Proceedings related to collective agreements

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

Yes. Individual litigations are those which involve the employer and one or more employees on grounds of employment conditions set by collective agreement, the interpretation, application or enforcement of which is sought in the claim.

As to collective litigations, they involve an employer or employers' association or the bargaining committee, and employee representatives in the undertaking or trade unions, and are aimed to enforce or interpret a collective agreement, or to challenge a collective agreement clause because of being unlawful or detrimental of a third party interests or rights.

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

Social Judges and employment Tribunals (the High Court/Social Chamber of each Autonomous Community or the Supreme Court/Social Chamber) depending on the territorial scope of the dispute.

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?

The concerned parties shall quote the relevant collective agreement in their claim. If the agreement is "estatutario", it has normative nature, has been published in the relevant Official Journal and therefore the principle "iura novit curia" applies. Consequently, there is no need to prove the content of the collective agreement clause the application of which the party pretends.

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?

Once the date of expiry of the collective agreement has arrived, the interested party will give notice to the other of its intention to initiate the review of the collective agreement, or to terminate its application. Unless the collective agreement establishes that it is not necessary, notice in advance must be given to conclude its application, otherwise Art. 86.2 provides its extension year by year.

After that notice, the procedure to negotiate the review is the one regulated by arts. 88 and ss. ET.

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

Art. 44.4 ET (introduced by Act 12/2001)) provides that “except where objection is made by a workforce agreement, concluded by the transferee and the employee representatives after the completion of the transfer, the employment relationships of the transferred employees shall continue being determined by reference to the collective agreement in force in the undertaking, business, workplace or part of an undertaking or business transferred at the time of the transfer.

This application shall continue until the date of expiry of such collective agreement or the entry into force of another new collective agreement which is applicable to the transferred economic unit”.

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

In accordance with Art. 86.3 ET “once notice of termination of a collective agreement is effective, and until such time as an express agreement is achieved, the obligations on the signatories contained in the former shall be no longer in force.

The extension of the employment terms contained in the collective agreement, once concluded its agreed duration, shall take place in accordance with what the collective agreement itself had established. In the absence of an agreement in this regard, the employment terms of the collective agreement shall remain in effect”.

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

See question 8.1.1

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

In accordance with Art. 86.3 ET “the extension of the employment terms contained in the collective agreement, once concluded its agreed duration, shall take place in accordance with what the collective agreement itself had established. In the absence of an agreement in this regard, the employment terms of the collective agreement shall remain in effect”. Consequently, one could say that it is not a matter of vested rights, since the new collective agreement may modify the rights provided by the former (Arts. 82.4 and 86.4 ET), but a solution to avoid a law gap until the new collective agreement is achieved.

9. Conclusions

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

In the last years, it is to observe a trend to promotion of the collective agreement role as instrument to regulate the employment relations and conditions. Among the factors which have contributed to develop the collective bargaining it is possible to point out the intense deregulation carried out by the legal amendment of 1994 (Act 11/1994, of 19 May). The quoted deregulation entailed the removal of some minimum employment rights, granted beforehand by the Workers’ Statute, allowing wider room to collective bargaining.

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

During decades Spanish courts and judges have faced the continuous struggle in determining employment terms between collective and individual autonomy. Nevertheless, it is worth noting that this conflict is taking on special significance at present inasmuch as employers' efforts tend to the individualisation of labour relations by avoiding the application of current collective agreements and precluding the participation of unions in the collective regulation of employment terms and conditions.

The Constitutional Court's position on this issue is summarised by the Decision of 26 November 2001, num. 225/2001, with regard to the ingenious practice consisting of the offer of new employment terms, made to every member of a group included in the scope of a collective agreement in force, which results in the mass signing of individual agreements establishing employment terms other than those fixed by such collective agreement.

The Constitutional Court concludes that the mentioned employer's act infringes the freedom of association of unions who signed the relevant collective agreement, being irrelevant that the employer had obtained the employees' consent to introduce the challenged changes, whether or not the employer had followed the procedure provided by Art. 41 ET, as well as his/her lack of purpose to violate unions' freedom of association.

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?

As a general rule, the relationship between law and collective agreements operates in favour of employees. However, in the last decades legislation (statute law/statutory instruments) has undergone a backward step in relation to collective agreement, not only because of the above-mentioned deregulation but also because former statutory provisions (absolute law) have now turned into optional ones respecting some employment terms, allowing a different regulation (not necessarily more favourable conditions) by collective agreements.

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