

## **Works councils and collective bargaining in the Netherlands<sup>1</sup>**

### **1. Introduction**

In the Netherlands a system of dual worker's representations exists; trade unions as well as (elected) works councils represent Dutch employees. Traditionally, their powers are strictly separated. Trade unions are responsible for negotiations on (primary) working conditions and works councils have information and consultation rights on important corporate decisions, like mergers, acquisitions and some (secondary) working conditions. One of the principles of the Works Council Act is that if something is governed by a collective labour agreement there's no competence of the works council (the predominant position of collective labour agreements). In practice, this formal separation of powers is more diffuse. Employers do negotiate with works councils on working conditions, in particular in businesses where unions are not present. And more and more collective agreements explicitly transfer the power to negotiate from industry level to plant level, by so called 'decentralisation provisions'. The expectation is justified that the role of works councils in the negotiation of working conditions will continue to gain in significance, also in view of the declining representativeness of trade unions. The law, however, is still based on the traditional division of powers. The central question of this paper is whether the powers of works councils in the field of determining working conditions should and could be extended. We describe the pros and cons of negotiating with works councils and discuss the legal hurdles of agreements on working conditions. Prior to this we give a short overview of the Dutch system of collective bargaining in the 'Poldermodel' and the role of trade unions and works councils within this system. We also pay attention to the international framework, in particular the conventions of the International Labour Organisations (ILO).

### **2. The Dutch 'Poldermodel' and the role of trade unions**

Freedom of association and collective bargaining are essential for the pursuit of social justice. They enable workers' associations to form rules in the field of working conditions, including wages, to reconcile their interest with a view to ensuring lasting economic and social development. In many opinions, strong and independent workers' associations are essential to compensate the legal and economic inferiority of workers. Associations of workers and employers are also important for labour market governance and to establish valuable industrial relations, which are meaningful for stability, progress and economic and social prosperity.<sup>2</sup> This idea also underlies the Dutch consultation model (known as: polder model). Characteristic of this model is that employers and workers' associations and the government jointly establish socio-economic policy and is for instance formalized in the Social Economic Council of the Netherlands and the Dutch Labour Foundation (Stichting van de Arbeid).

In the Dutch polder model however, the Dutch legislator plays a minor role in regulating working conditions. The Dutch labour law does not provide in much more than minimum standards in areas such as working hours, working conditions, holidays and wages. Working conditions are mostly drawn up in negotiations between employers and employees individually, but mainly collectively in collective labour agreements. Collective labour agreements apply to more than 80% of all employment contracts (6,1 million employees) which brings along that the

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<sup>1</sup> Working paper

<sup>2</sup> International Labour Conference, 101st Session, 2012, ILC.101/III/1B, Giving globalization a human face, p. 17-18.

range of collective labour agreements in the Netherlands is quite high.<sup>3</sup> Both at individual and collective level there is freedom of contract which brings along that employers and associations of employers and workers have the freedom to enter into a collective agreement when they want, with whom they want and about what they want. The Dutch collective labour agreement act of 1927 ensures that any association of employers and employees can validly conclude collective agreements. The Dutch law does not require any form of representation and associations of employers and workers have equal legal opportunities to consultate and reinforce its negotiations respectively to reject the requested consultations and the requirements. The Dutch law ensures the same judicial starting position for all trade unions. If trade unions indeed succeed in achieving their goals actually depends on other factors in the field of industrial relations.<sup>4</sup>

Collective labour agreements mainly regulate working conditions but they oftenly also arrange matters that are not real working conditions, such as educational funds. Because of the broad definition of collective labour agreement in the Dutch law, the Dutch Supreme Court has ruled that by collective labour agreements all subjects can be arranged that relate to working conditions.<sup>5</sup> It has been argued in the literature that any topic that relates to the interest of employers and workers' association can be part of a collective labour agreement.<sup>6</sup> Where an agreement between employers and workers' association qualifies as a collective labour agreement according to the Dutch law, not only the parties that entered into the agreement, but also the members of these parties are legally bound by those agreements, as far as they fall within the scope of those agreement. Employers and employees that are bound by a collective labour agreement, are not allowed to enter into clauses that conflict the collective labour agreement. Those clauses are null and void.

Non-union members or members of unions that don't take part into a collective labour agreement, are not legally bound by a collective agreement. Nonetheless, an employer bound by a collective labour agreement is obliged by law (against the trade union(s) with whom he entered into the agreement) to follow this agreement in employment contracts with workers who are not bound by the collective labour agreement. To meet this obligation Dutch employers make use of clauses pursuant to which the employer would respect the from time to time negotiated collective labour agreements (incorporation clauses). The scope of collective labour agreements can be broadened by a declaration of 'generally binding' by the Dutch Minister for Social Services and Employment when a collective labour agreement already applies to a significant majority of working people in a certain area. A declaration of generally binding has the effect that provisions of collective labour agreement apply to all persons in a certain sector, regardless of membership or the existence of above mentioned dynamic clauses.

While approximately 80% of the employment contracts is covered by a collective labour agreement, only 20% of the employees is organized in a trade union. The high coverage of collectieve labour agreements in the Netherlands is therefore caused by a high level of organization under employers in connexion with the obligation for them to apply collective labour agreements to non-organized (including organized in trade unions that are not take part in the collective labour agreement) workers.

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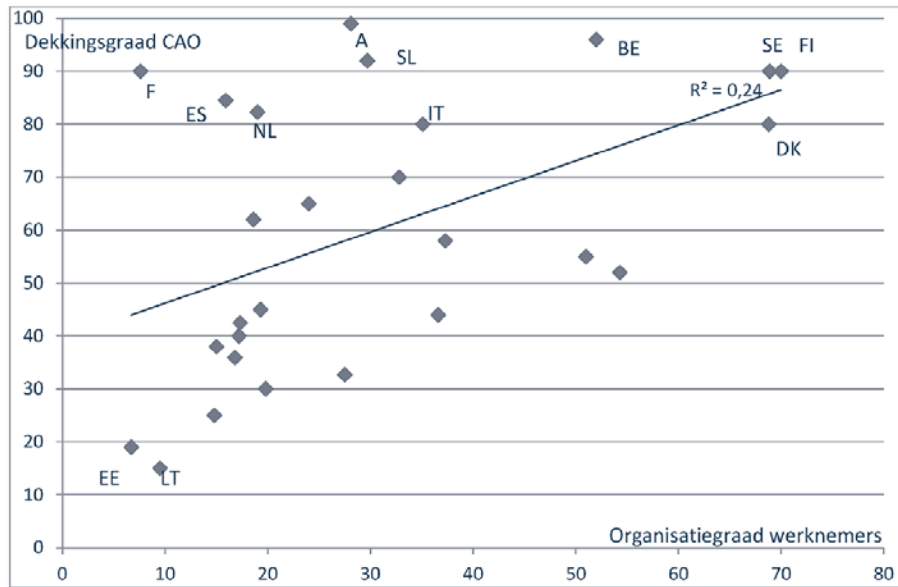
<sup>3</sup> Ministry of Social Affairs and Employment, 'Voorjaarsrapportage cao-afspraken juni 2011', p. 69 e.v.

<sup>4</sup> Advies inzake rechtsgevolgen van de representativiteit van organisaties van ondernemers en van werknemers (ten vervolge op het advies betreffende de representativiteit bij de samenstelling van publiekrechtelijke colleges (20 april 1979, 1979/06, SER 76/05), Den Haag: SER 1979, p. 12.

<sup>5</sup> Dutch Supreme Court 30 January 1987, ECLI:NL:HR:1987:AG5525.

<sup>6</sup> W.J.P.M. Fase & J. van Drongelen, *Cao-recht*, Deventer: Kluwer 2004, p. 48; G. Hekkelman, noot bij HR 19 maart 1976, AA 1978, p. 295-304; M.M. Olbers, 'Handhaving van de cao', *SMA* 1988, p. 207-208.

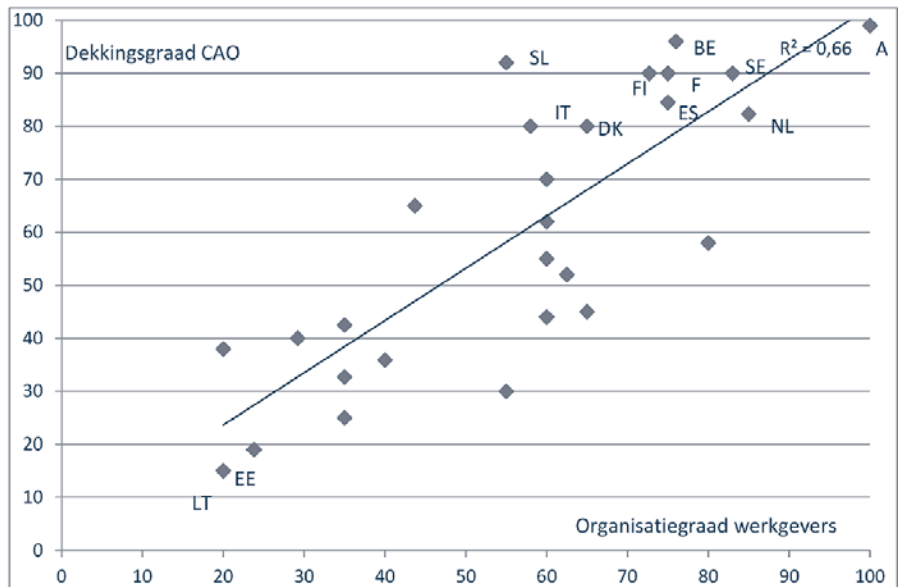
Table 1: unionization (employees) and coverage ratio of collective labour agreements EU27 2008-2010



Dekkingsgraad CAO = coverage ratio  
 Organisatiegraad werknemers = unionization employees

Source: secretary of the Social Economic Council, bases upon the ICTWSS database, version 3.0 (may 2011)

Table 2: unionization (employers) and coverage ratio of collective labour agreements EU27 2008-2010

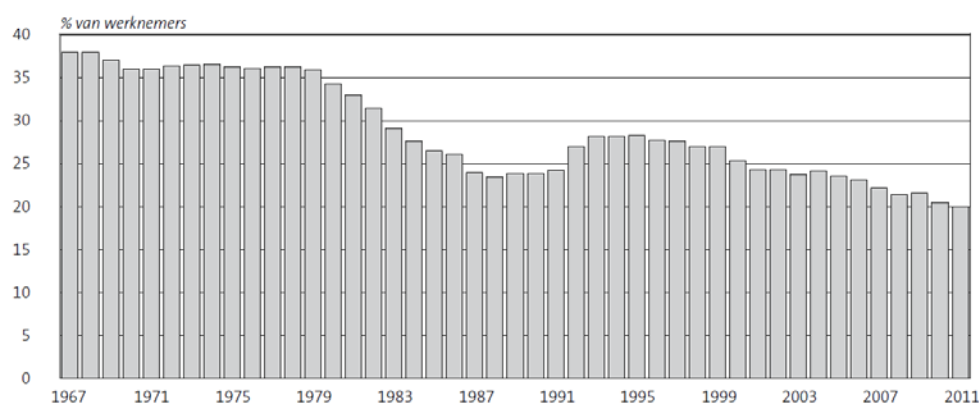


Dekkingsgraad CAO = coverage ratio  
 Organisatiegraad werkgevers = unionization employers

Source: secretary of the Social Economic Council, bases upon the ICTWSS database, version 3.0 (may 2011)

A decrease of unionization on behalf of employees as well as changes with regard to the labour market, such as globalization, the deeply financialized world economy with a growing weight of financial markets, a shift from a manufacturing economy to a service-economy, the emergence of share-economy related initiatives such as Uber and Airbnb and digitalization,<sup>7</sup> raise questions about the capability of trade unions to represent the interest of all workers that are being covered by a collective labour agreement.

Table 3: unionization



Source: CBS 2012

### 3. The role of works councils in the Dutch Polder Model

Every undertaking with at least 50 employees is obliged to set up a works council. The entire workforce elects the members of the works councils. Trade Unions play a role in the election procedure by compiling lists of candidates. Unlike Trade Unions, works councils not only represent the interests of the employees; representation also takes place in the interest of the enterprise in all its objections. Dutch works councils have extensive information and consultation rights on financial and economic decisions like mergers and acquisitions (article 25 of the Works Council Act).

According to article 27 WOR the works council has a co-decision right (right of approval) on social decisions, but primary employment conditions, like wages and working times, are explicitly excluded from this right, regardless whether they are governed by a collective agreement. The background of this exception – which was introduced in the seventies - is protection of the position of trade unions. At the time the Works Council Act was introduced, rivalry between trade unions and internal bodies existed. Unions were afraid of losing position. That's the reason the legislator opted for a strict demarcation of powers. So works councils only have approval rights on secondary terms of employment, including pension schemes. Article 27 paragraph 3 protects trade unions against infringement of existing collective labour agreement. This paragraph states that there's no right of approval if a matter has already exhaustively been settled in the collective agreement. This only concerns secondary employment conditions, because primary working conditions are excluded from article 27 WOR anyway. Article 27 paragraph 3 provides a priority rule between trade unions and works councils: the unions come

<sup>7</sup> M. Keune, 'Inleiding, De legitimiteit van het poldermodel in de eenentwintigste eeuw', in: M. Keune (red.), *Nog steeds een mirakel? De legitimiteit van het poldermodel in de eenentwintigste eeuw*, p. 10.

first and only if a matter is not governed by the collective agreement, there's a role for the works council. So the Dutch trade Unions are double protected against undesirable intervention of works councils in the field of collective bargaining.

In view of the decrease of unionisation, there is a growing body of opinion that the works council should take part at collective bargaining more often, or at least play a bigger role in the determination of employment conditions, especially in branches lacking union representatives.<sup>8</sup> Some authors also discuss the double protection of trade unions in the works council act. In their view it's not necessary to exclude primary working conditions in general, the collective agreement exclusion of paragraph 3 provides enough protection in their view.<sup>9</sup>

In the following paragraphs we discuss the legal possibilities and hurdles for works councils to take part in the determination of employment conditions, on the basis of four cases. Before that we discuss the advantages and disadvantages of negotiating with works councils and give a short overview of the international framework, in particular ILO-conventions 135 and 154.

#### **4. Advantages and disadvantages of negotiating with works councils**

The main advantage of works councils over trade unions is their justification. Works councils are democratic justified. The entire workforce had a voting right and is represented by the works councils. So the above-described problems of decreasing membership do not occur by negotiation with works councils. Moreover, the democratic legitimacy is sometimes in practice a fiction, because the turnout figure on elections is very low. And the composition of the works councils is often rather unilaterally. Flexible workers are in general not represented in works councils.

Another advantage of negotiating with works councils is their good view on the specific wishes of the company, so there is more room for customization than in case of negotiation with trade unions that are more focussing on the interest of the sector as a whole. Works councils are also not solely focused on the interest of employees, but have a broader view. In general they are more inclined to take into account the interests of the company, for example if it's in adverse economic conditions. On the other hand, this can be a weak point; there is a risk that the works council too easily succumbs for economic arguments of the employer. This is related to another disadvantage: works councils have less negotiation expertise and experience than unions. Works councils are composed of employees and not independent from the employer. Powerful weapons, like the right to strike, are also missing. In conclusion, their bargaining position is weaker. The lack of bargaining power may be partly compensated by education and hiring experts.

A more juridical/formal advantage of negotiation with trade unions is the legal effect of collective labour agreements. Collective agreements are binding for individual employers and employees, by virtue of article 12 of the Collective Agreement Act. Agreements between employer and works council doesn't have a binding effect (we explain that further in paragraph 3). It's also not possible to deviate from legal provisions, which allow deviation by collective labour agreements.

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<sup>8</sup> I. Zaal, 'De rol van de OR bij collectieve arbeidsvoorwaardenvorming', *ArbeidsRecht* 2014/4; M.A. de Blécourt e.a., 'Maatwerk bij het bepalen van de ontslagvolgorde: nu en na de Wet Werk en Zekerheid', in: L.C.J. Sprengers & G.W. van der Voet, *Arbeidsrechtelijke reflecties 2014*, Kluwer: Deventer 2014, p. 209.

<sup>9</sup> I. Zaal, 'De rol van de OR bij collectieve arbeidsvoorwaardenvorming', *ArbeidsRecht* 2014/4

## 5. The international framework: ILO-conventions 135 en 154

Before we go to the four cases it's necessary to take a look at international law. Does international law permit employers to negotiate with elected worker representatives like works councils? ILO-conventions 135 and 154 define the boundaries between the competences of the elected worker representatives and the trade union representatives. They protect the bargaining autonomy of the trade unions. These conventions prescribe that the national legislator shall take appropriateness measures, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the workers' organization concerned. The function of elected worker representatives does not include activities, which are recognized as the exclusive prerogative of the trade union in the country concerned (article 3b of convention 135). There's some debate on the scope of these conventions. Some authors believe that the ILO-conventions prohibit a role for elected representatives on determination of working conditions.<sup>10</sup> Other authors -including us - support a more limited explanation of the ILO-conventions. In their view, the conventions do not exclude that workers councils negotiate working conditions.<sup>11</sup> It only states that Member States should take necessary measures to prevent that works councils undermine the position of trade unions. An important limitation of article 5 is that it is only related to the situation that trade union representatives and works councils exist in the same undertaking.<sup>12</sup>

## 6. First situation: in the absence of trade unions and a collective labour agreement

As mentioned before, article 5 of ILO-convention 135 is only related to the situation that both trade union representatives and works council members exist in the same undertaking. So the first situation is not covered by the ILO-convention. After all, trade unions are not present in this case. Also Dutch law does not prohibit an agreement with the works council in this situation. Although there's no right of approval regarding primary working conditions, Dutch law approves arrangements above the statutory minimum will be agreed. The legal basis of these arrangements is article 32 of the Works Council Act. This article regulates agreements between works councils and the undertaking (hereafter, works agreements). Works agreements may regulate several issues, including (primary) working conditions. This is confirmed by case law.<sup>13</sup> In the Grabowsky-case the unions appealed to ILO-conventions. The president of the court of The Hague held that the power to negotiate primary working conditions was usually not awarded to works councils, but that the Works Council Act did not prohibit this. He further held that the provisions contained in international treaties do not change this.

The power to regulate working conditions in works agreements is not unlimited. There are no powers of the works council insofar as the substance has already been regulated for the enterprise in a collective labour agreement. If the works agreement contains working

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<sup>10</sup> K. Boonstra, *The ILO and the Netherlands*, Diss. 1996, p. 269.

<sup>11</sup> : J.J.M. De Laat, J.M. Van Slooten, 'ILO Conventions 135 en 154 and Works Councils' Powers in Making an Agreement on Labour Conditions with the Company', in: F. J.L. Pennings, *Social Responsibility in Labour Relations. European and Comparative Perspectives*, The Netherlands: Kluwer Law International;

<sup>12</sup> See also: E. Koot-van der Putte, *Collectieve arbeidsvoorwaardenvorming en individuele contractsvrijheid*, Diss. 2007 p. 219-220; I. Zaal, 'De rol van de OR bij collectieve arbeidsvoorwaardenvorming', *ArbeidsRecht* 2014/4. Zie anders: M.M. Olbers, *Vakbond of ondernemingsraad?*, in: C.J. Loonstra, H.W.M.A. Staal, W. Zeijlstra (red.), *Arbeidsrecht en mensbeeld 1946-1996*, Deventer: Kluwer 1996.

<sup>13</sup> President of the court of The Hague 19 May 1992, ROR 1992 no. 19 and court of appeal 's Hertogenbosch, 18 June 2012, JAR 2012, 226.

conditions, which is also governed by the collective agreement, that part of the works agreement is void and null. In this first situation no collective agreement exists, so paragraph 3 of article 32 will not apply. Employer and works council are free to negotiate and agree on working conditions, including primary conditions.

The works agreement is not a collective labour agreement, which falls within the scope of the Collective Labour Agreement Act (Wet cao). This act stipulates that a collective labour agreement is an agreement between one or more employers or one or more organisations of employers and one and more organisations of employees, which predominantly or exclusively contains stipulations on the labour conditions to be respected in individual labour contracts. A works council does not qualify as an organisation of employees because it has no full legal capacity.

Works agreements do not have direct and compulsory effect on the employment contract between employer and employee. It has no binding character or normative effect. This means that the employer, to implement the works agreement, in principle needs the consent of every individual employee. This negatively affects the effectiveness of collective bargaining with the works council. However, in practice there are some possibilities to simplify the implementation of works agreements in individual employment contracts. Hereafter we discuss the two most common clauses.

In the first place the employment contract may contain a so-called incorporation clause. This is a provision, which stipulates that the works agreement is applicable on the employment contract. These incorporation clauses – which are also used to incorporate collective agreements in the employment contracts of unbounded employees – create a normative effect. The works agreement is binding by contract. The formulation of the incorporation clause is very important. When the incorporation clause refers to a certain works agreement – for example works agreement 2015-2016 – future modifications and new versions are not incorporated in the individual agreement. Employer and employee must provide a flexible formulation.

In the second place the employer may use a previously agreed (written) unilateral amendment clause in the employment contract. According to article 7:613 of the Dutch Civil Code parties can include a unilateral amendment clause in the employment contract. An amendment clause provides the employer the ability to change the employment contract unilaterally. When the employment contract consist a unilateral employment clause, then the employer can amend the employment contract, but only when the wish to amend the contract is based on a 'substantial interest' – such as economic business interests - that outweighs the interest of the employees. Based on case law, the 'substantial interests' are present in case the works council approved the change of working conditions. So the fact that the proposed amendment was based on the works agreement, is – in general sufficient – to assume that substantial interests are present.

Thus, there is a indirect binding effect of works agreements, through clauses in the individual employment contracts. When the employment agreement does not contain an amendment- or incorporation clause, binding of the employee is only possible with his consent.

The works agreement schemes dates back to 1998. Since then there have been major changes occurred in the polder. Works agreement, which contain (primary) working conditions become more and more common in practice. It's time for the legislator to reconsider the binding effect of works agreements. During the parliamentary debate in 1998, the minister stated that the provision on works agreements takes a small step towards the German Model (in Germany works agreements – Betriebsvereinbarungen – are legally binding). We think it's time to take

the next step. With some safeguards – such as training and expert support – a works council can make binding agreements for the employees he represents.

### **7. Second situation: an agreement between employer and his works council contradicts a collective labour agreement**

The Dutch law not only stipulates that works council have no authority to bargain about working conditions where they have been covered exhaustively by a collective labour agreement but also provides for the legal consequences if an agreement entered into by a works council contradicts a collective agreement. Article 12 of the Dutch collective labour agreement act provides that any clause in an employment contract, which contradicts a collective labour agreement, is null and void. The term 'clause' is interpreted broadly and includes a clause agreed upon by the works council.

Recently the district court of Rotterdam had to judge on the validity of provisions of a collective agreement entered into by APM Terminals and his works council while this agreement were contrary to a collective labour agreement applicable to APM Terminals and entered into by FNV Havens. The announcement of more computerized container services in the harbor of Rotterdam unleashed a lot of commotion among employees. FNV Havens tried to come to an arrangement with all the companies in the harbor to secure future employment in the harbor of Rotterdam. Because of the willingness of FNV Havens to come to a agreement on sector level, FNV Havens didn't want to adapt the existing collective labour agreement with APM separately. APM Terminals therefore decided to make additional agreements with the works council, which, moreover, substantially corresponded to the wishes of FNV Havens. 80% of the employees of APM Terminals agreed upon those additional agreements. FNV Havens claimed the invalidity of these agreements under article 12 of the Dutch collective labour agreement act. The district court ruled that the appeal on article 12 was not justified in this case. The court considered that, because of their contractual relationship, FNV Havens could not simply ignore the invitation of APM Terminals to adapt the existing collective labour agreement to overcome the commotion among the employees of APM Terminals. Furthermore the court considered that FNV Havens unfairly favours general interests to the detriment of the interests of the employees of APM Terminals to ignore the invitation of APM Terminals, while more than 80% of the employees of APM Terminals agreed upon the additional agreements entered into by the works council.<sup>14</sup>

The judgment of the court infringes on the notion that the primacy of collective bargaining about working conditions lies with the labour union, but is in this case in our opinion justifiable. The idea that labour unions should bargain about working conditions is based on the underlying notion that labour unions are more suitable to stand up for the interests of employees than works councils. However, if this notion can be questioned, there is a reason to nuance the principle that trade unions should bargain about working conditions instead of a works council. Basically it's about the way representation of interest can take place in the best possible manner. So if the labour unions act unreasonable –for example by refusing to renegotiate in cases of a pressing social and economic need – there is some room for agreements with the works council, even if there is a collective labour agreement. Obviously, this is a exceptional situation.

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<sup>14</sup> District Court of Rotterdam 16 April 2016, *JAR* 2016/123



## **8. Third situation: a collective labour agreement provides for the possibility to negotiate with a works council about certain working condition**

For a long time trade unions had never supported works councils involvement in collective bargaining. Nowadays a slow but persistent development can be detected whereby involvement of works councils is gaining ground, within collective agreements. More and more collective agreements leave some subjects open for negotiations at a decentralised level (between works council and employer). In that case the collective agreement delegates the power to negotiate working conditions to the works council. Decentralisation clauses respond to the wish for more customization on enterprise level. Several forms of decentralisation clauses exist in collective agreements. Some clauses only foresee a choice for employer and works council between two or more systems of working conditions (a selection clause). Other collective agreements leave employer and works council entirely free to determining some working conditions. In some cases the approval of the parties of the collective agreement is needed.

When the power to determine (primary) working conditions by agreement between works council and employer is given by collective agreement, the question arises if these arrangements are directly binding for members of the parties to the agreement. As mentioned before 'works council agreements' are in principle not binding for individual employer and employees. In other words the agreement does not extends tot the employment contract. On the other hand the collective agreement – which is the basis of the decentralisation clause – is binding for the members of he parties to the agreement. Which regime is applicable on decentralized agreements? Is it a normal works agreement, which has no normative effect? Or does the decentralisation of the power to negotiate also imply the transformation of the binding effect?

The court of appeal of Amsterdam held that a works agreement, which is based on a collective agreement, has a binding effect based on the collective agreement. The court of appeal held that the freedom of contract implies that parties enjoy broad powers to determine the right and duties that will mutually will apply. <sup>15</sup> In that case the collective agreement explicitly indicated that working conditions agreed with the works council have binding effect for individual employers and employees. In our view this binding effect only appears in this specific situation. If the collective agreement does not contain a provision on the normative effect of decentralised arrangements, there is no binding effect in the individual employment contract. This effect can only appear if the parties to the agreement explicitly delegate the binding effect. Another point of view would be too intrusive on the principles of collective bargaining law.

## **9. Fourth Second situation: An employer bargains with his works council about working conditions, while there is no collective labour agreement but there is a trade union which isn't invited to bargain**

As been said before, the Dutch collective labour agreement act ensures that any association of employers and employees can validly conclude collective agreements. The Dutch law does not require any form of representation and associations of employers and workers have equal legal opportunities to consultate and reinforce its negotiations respectively to reject the requested consultations and the requirements. The Dutch law ensures the same judicial starting position

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<sup>15</sup> Court of appeal of the Hague 4 March 2014, JAR 2014/119.

for all trade unions. If trade unions indeed succeed in achieving their goals actually depends on other factors in the field of industrial relations.<sup>16</sup> Collective bargaining in the Netherlands is based on the law of contract. One of the main principles is freedom of contract. Employers have the freedom as to whether they want to negotiate and with whom.

If a trade union isn't invited to bargain about working conditions, it can either leave it that way or can take action against it. In het Dutch law the right to collective action is recognized through article 6 paragraph 4 ESH<sup>17</sup> and allows unions the opportunity through collective action collective to be admitted to collective bargaining.<sup>18</sup> Or a trade union will take a collective action depends on the degree to which members are willing to do so. Their willingness will be bigger if they think that their interests are insufficiently represented in the discussions in the absence of their union. Besides that the possibility to take strike also depends on sufficient funds.<sup>19</sup> The second way by which a union may seek to enforce consultation is by a judicial decision.<sup>20</sup> Since the eighties different Dutch courts ruled that it could be unjustifiable when a trade union isn't consulted. Generally speaking it can be said that Dutch courts give trade unions a right to be consulted if the trade union concerned, organizes a large number of employees in the sector or company regarded.<sup>21</sup> More specific, Dutch courts take into account to what extent a trade union is more representative than other trade unions concerned.<sup>22</sup> It is relevant to mention that a forced consultation doesn't have to lead to a collective labour agreement.

If an employer starts to negotiate with a works council instead of a trade union, above mentioned jurisprudence isn't very useful. A works council is elected and therefore a works council will represent all workers in the company regarded while a trade union will never reach to a 100% degree of organization. It's therefore important to look at other elements to conclude if a trade union has in this case a right to be consulted. Most obvious we can take into account that the primacy of collective bargaining about working conditions lies with trade unions. According to ILO-convention 135 and 154 appropriateness measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the workers' organization concerned. In view of this and generally spoken, it is reasonable that a trade union should be consulted if a works council is, otherwise the position of the workers' organization is undermined. Such an obligation may only arise when the trade union represents a certain part of the companies employees. Otherwise the principle of freedom of contract is too much violated.

## 10. Conclusion

In this paper we discussed the division between trade unions and works council under international and Dutch law. Dutch law is entirely in line with de Conventions 135 en 154. The notion that the trade union would be the bargaining agent of the employer has been the basis of all Dutch legislation. But the law does not award to the unions a monopoly. There's certainly room for the works council in the field of collective bargaining. It's thereby important to make a distinction between the situation in which no union is active in the undertaking and the

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<sup>16</sup> Advies inzake rechtsgevolgen van de representativiteit van organisaties van ondernemers en van werknemers (ten gevolge op het advies betreffende de representativiteit bij de samenstelling van publiekrechtelijke colleges (20 april 1979, 1979/06, SER 76/05), Den Haag: SER 1979, p. 12.

<sup>17</sup> Dutch Supreme Court 30 May 1986, ECLI:NL:HR:1986:AC9402.

<sup>18</sup> District Court of Utrecht 11 April 2011, *JAR* 2003/102.

<sup>19</sup> E. Verhulp annotate on Dutch Supreme Court 8 June 2007, *NJ* 2007/464.

<sup>20</sup> Dutch Supreme Court 8 June 2007, *NJ* 2007/464.

<sup>21</sup> Zie: A.T.J.M. Jacobs, *Collectief arbeidsrecht*, Kluwer: Deventer – 2005, p. 174-175 and W.J.P.M. Fase & J. van Drongelen, *Cao-recht*, Deventer: Kluwer 2004, p. 13-132.

<sup>22</sup> M. Brink, 'Een "recht" op collectief onderhandelen?', *SMA* 1988, p. 185.

situation that there is an active union. If there's no active union employers and works councils are free to negotiate and agree working conditions. The alternative – no representation at all – is not in the interest of employees.

In the second situation there is less room for the works council in the field of determining working conditions. There's only room in the following situations: (i) the trade unions explicitly delegate their power to the works council, (ii) a subject is not covered by the collective agreement and (iii) the unions behave unreasonable (the Rotterdamse havens case).

In our view it's desirable to reconsider the non-binding effect of works councils. If the legislator would extend the possibilities of negotiating with works councils, there's no direct risk for violation of the ILO-conventions. As long as the predominant position of collective agreements exists, Dutch law is in accordance with the international treaties.