

**COLLECTIVE AGREEMENTS: A COMPARATIVE  
STUDY BETWEEN BELGIUM AND SOUTH AFRICA**

**By**

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*The thought  
must never be subject  
to a dogma,  
nor to a party,  
nor to a passion,  
nor to an interest,  
nor to a preconceived idea,  
nor to anything else,  
except to the facts themselves,  
because for it,  
to be subject  
would be to cease being.*

**Henri Poincaré**

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## **SUMMARY**

This dissertation analyses, in a comparative perspective collective agreements entered into in Belgium and in South Africa in the private sector. It is divided into three parts: Belgian law, South African law and a comparative perspective. Each part adopts the same format: it comprises a historical survey, a description of the parties to collective agreements, the forums in which collective bargaining takes place and an analysis of collective agreements, focusing on the nature of their binding force.

Because Belgian law prohibits agency shop and closed shop agreements, on the basis of the freedom of association, no reference has been made to these agreements, even though they are permitted in South Africa and are regarded as collective agreements.

This dissertation does not deal with collective agreements entered into to regulate terms and conditions of employment in the public sector as state employees in Belgium are excluded from the scope of labour law and have their employment relationship governed by administrative law.

**Key words:** collective agreements; collective bargaining; parties; non-parties; bargaining forum; binding force; extension; mandate of representatives; terms and conditions of employment; levels of collective bargaining

# **TABLE OF CONTENT**

<b>SUMMARY .....</b>	<b>3</b>
<b>INTRODUCTION .....</b>	<b>8</b>
<b>PART A            BELGIAN LAW.....</b>	<b>9</b>
<b>CHAPTER I        HISTORICAL BACKGROUND.....</b>	<b>11</b>
<b>CHAPTER II       PARTIES TO COLLECTIVE AGREEMENTS .....</b>	<b>19</b>
<b>I        Workers' organisations .....</b>	<b>20</b>
I.1      At the National Labour Council.....	20
I.2      At Joint Committee and at plant level.....	21
<b>II       Employers' representative organisations .....</b>	<b>22</b>
II.1     At the National Labour Council.....	22
II.2     At Joint Committee level .....	22
<b>CHAPTER III      FORUMS FOR COLLECTIVE BARGAINING .....</b>	<b>24</b>
<b>I        The National Labour Council .....</b>	<b>24</b>
I.1      Origin of the National Labour Council.....	24
I.2      Composition of the National Labour Council.....	24
I.3      Functions of the National Labour Council .....	25
<b>II       Joint committees.....</b>	<b>26</b>
II.1     Origin of joint committees.....	26
II.2     Establishment of joint committees.....	28
II.3     Composition of joint committees.....	29
II.4     Functions of joint committees.....	30
<b>III      The Union delegation .....</b>	<b>32</b>
III.1    Origin of union delegations.....	32
III.2    Establishment of the union delegation .....	33
III.3    Functions of the union delegation .....	34
<b>CHAPTER IV       COLLECTIVE AGREEMENTS.....</b>	<b>37</b>
<b>I        Scope of application of the 1968 Act.....</b>	<b>37</b>
I.1      Persons subject to the 1968 Act.....	37
I.2      Persons who are not subject to the 1968 Act.....	38
<b>II       Features of collective agreements .....</b>	<b>38</b>
II.1     A collective agreement is a contract.....	38
II.2     A collective agreement is a form of legislation .....	39
II.3     The hybrid character of collective agreements .....	40
<b>III      Content of collective agreements .....</b>	<b>40</b>
III.1    The normative provisions of collective agreements .....	41
III.2    The obligatory part of collective agreements .....	43
<b>IV      Conditions of validity of collective agreements .....</b>	<b>45</b>

IV.1	Substantial formalities .....	45
IV.2	Deposition of collective agreements .....	47
IV.3	Publication in the Moniteur Belge.....	49
IV.4	Endorsement by joint committees .....	49
<b>V</b>	<b>Nullity of the norms contrary to hierarchically superior norms.....</b>	<b>50</b>
V.1	Compliance with peremptory provisions superior to collective agreements .....	50
V.2	Compliance with superior conventional provisions.....	53
V.3	Nullity of provisions contained in an employment contract.....	55
<b>VI</b>	<b>Persons bound by collective agreements .....</b>	<b>55</b>
VI.1	Collective agreements concluded within a joint body.....	56
VI.2	Collective agreements concluded outside a joint body .....	58
<b>VII</b>	<b>Extension to non-parties .....</b>	<b>62</b>
VII.1	Binding force conferred by Royal Decree.....	62
VII.2	Collective agreements and clauses susceptible of extension.....	63
VII.3	Procedures .....	63
VII.4	Publication.....	64
VII.5	Termination of the general binding force.....	64
VII.6	Anticipated abrogation of the general binding force.....	65
<b>VIII</b>	<b>Binding force and mandate of the organisations' representatives.....</b>	<b>66</b>
VIII.1	Irrebuttable presumption of the mandate of the representatives.....	66
VIII.2	The mandate of the representatives .....	67
<b>IX</b>	<b>Coming into force of collective agreements .....</b>	<b>68</b>
IX.1	Collective agreements not extended to non-parties.....	68
IX.2	Collective agreements extended to non-parties.....	69
IX.3	Retrospectivity of collective agreements.....	69
<b>X</b>	<b>Particular situations.....</b>	<b>70</b>
X.1	Transfer of an undertaking .....	70
X.2	Disaffiliation of the employer.....	71
X.3	Modification of the scope of a joint committee .....	72
X.4	Dissolution of a representative organisation.....	72
<b>XI</b>	<b>Enforcement and sanctions .....</b>	<b>73</b>
XI.1	Enforcement .....	73
XI.2	Sanctions .....	73
<b>PART B</b>	<b>SOUTH AFRICAN LAW .....</b>	<b>72</b>
<b>CHAPTER I</b>	<b>HISTORICAL BACKGROUND .....</b>	<b>77</b>
<b>CHAPTER II</b>	<b>PARTIES TO COLLECTIVE AGREEMENTS .....</b>	<b>91</b>
<b>I</b>	<b>Registration of trade unions and employers' organisation.....</b>	<b>91</b>
<b>II</b>	<b>Representative organisation .....</b>	<b>93</b>
II.1	At sectoral level .....	93
II.2	At plant or enterprise level .....	95
<b>CHAPTER III</b>	<b>FORUMS FOR COLLECTIVE BARGAINING .....</b>	<b>98</b>
<b>I</b>	<b>Bargaining councils .....</b>	<b>98</b>

I.1	Origin of bargaining councils .....	98
I.2	Establishment of bargaining councils .....	99
<u>1.3</u>	Composition of bargaining councils .....	101
<u>1.4</u>	Competence of bargaining councils .....	101
<b>II</b>	<b>Statutory councils .....</b>	<b>102</b>
II.1	Origin of statutory councils .....	102
II.2	Establishment and composition of statutory councils .....	103
II.3	Competence of statutory councils .....	104
<b>CHAPTER IV</b>	<b>COLLECTIVE AGREEMENTS .....</b>	<b>106</b>
<b>I</b>	<b>Scope of application of the LRA 1995 .....</b>	<b>106</b>
<b>II</b>	<b>Features of collective agreements .....</b>	<b>107</b>
II.1	The notion of a collective agreement .....	107
II.2	Collective agreements and temporary employment services .....	108
II.3	Hybrid character of collective agreements .....	109
II.4	Interpretation of collective agreements .....	112
<b>III</b>	<b>Content of collective agreements .....</b>	<b>113</b>
III.1	Matters of mutual interest .....	113
III.2	Incorporation in the individual employment contract .....	114
<b>IV</b>	<b>Conditions of validity of collective agreements .....</b>	<b>115</b>
<b>V</b>	<b>Nullity of the norms contrary to hierarchically superior norms .....</b>	<b>116</b>
V.1	Compliance with statutory provisions superior to collective agreements .....	116
V.2	Compliance with superior conventional provisions .....	121
<u><b>VI</b></u>	<u><b>Persons bound by collective agreements .....</b></u>	<u><b>125</b></u>
<u>VI.1</u>	<u>Collective agreements concluded within a council .....</u>	<u>125</u>
<u>VI.2</u>	<u>Collective agreements concluded outside a council .....</u>	<u>127</u>
<u><b>VII</b></u>	<u><b>Extension to non-parties .....</b></u>	<u><b>130</b></u>
<u>VII.1</u>	<u>Majority representativity .....</u>	<u>131</u>
<u>VII.2</u>	<u>Sufficient representation .....</u>	<u>132</u>
<b>VIII</b>	<b>Binding force and mandate of the organisations' representatives .....</b>	<b>133</b>
<b>IX</b>	<b>Coming into force of collective agreements .....</b>	<b>136</b>
<b>X</b>	<b>Particular situations .....</b>	<b>137</b>
X.1	Transfer of undertaking .....	137
X.2	Disaffiliation .....	138
X.3	Modification of the scope of a council .....	139
X.4	Dissolution of a representative organisation .....	140
X.5	Amalgamation of bargaining councils .....	140
<b>XI</b>	<b>Enforcement and sanctions .....</b>	<b>140</b>
XI.1	Enforcement .....	140
<b>PART C</b>	<b>COMPARATIVE LAW .....</b>	<b>134</b>
<b>CHAPTER I</b>	<b>BACKGROUND TO THE REGULATION OF COLLECTIVE AGREEMENTS .....</b>	<b>144</b>

<b>CHAPTER II</b>	<b>PARTIES TO COLLECTIVE AGREEMENTS .....</b>	<b>147</b>
<b>CHAPTER III</b>	<b>FORUMS FOR COLLECTIVE BARGAINING .....</b>	<b>150</b>
<b>CHAPTER IV</b>	<b>COLLECTIVE AGREEMENTS.....</b>	<b>151</b>
<b>I</b>	<b>Scope of Application of the respective legislations .....</b>	<b>151</b>
<b>II</b>	<b>Features of collective agreements .....</b>	<b>151</b>
<b>III</b>	<b>Content of collective agreements .....</b>	<b>152</b>
<b>IV</b>	<b>Conditions of validity of collective agreements .....</b>	<b>154</b>
<b>V</b>	<b>Nullity of the norms contrary to hierarchically superior norms.....</b>	<b>156</b>
<b>VI</b>	<b>Persons bound by collective agreements .....</b>	<b>157</b>
<b>VII</b>	<b>Extension.....</b>	<b>161</b>
<b>VIII</b>	<b>Binding force and mandate of the organisations' representatives .....</b>	<b>161</b>
<b>IX</b>	<b>Coming into force of collective agreements .....</b>	<b>162</b>
<b>X</b>	<b>Particular situations.....</b>	<b>162</b>
<b>XI</b>	<b>Surveillance and sanctions/Enforcements .....</b>	<b>163</b>
<b>CONCLUSION.....</b>		<b>164</b>
<b>BIBLIOGRAPHY.....</b>		<b>166</b>

## INTRODUCTION

The subject of this dissertation was chosen shortly after the writer's arrival in South Africa, in early 1996. The reading of a decision of the Industrial Court on the protection of maternity happened to awake the writer's interest in making a comparative study of collective agreements entered into in Belgium and South Africa.

This decision, *Collins v Volkskas Bank*, (1994) ILJ 1398 (IC), made reference to the fact that conditions of employment negotiated through collective bargaining were binding and enforceable against individual employees through the common-law principles of agency or *stipulatio alteri*.

This decision, analysed in the light of the writer's Belgian law background which tends to acknowledge that labour law constitutes a branch of law independent from the traditional division between civil and public law, dictated the choice of collective agreements as the object of a comparative study.

As the binding force of collective agreements has been the topic of lengthy articles, books, and even theses in Belgium, at least until the enactment of the 1968 Act regulating collective agreements, it was assumed that this would be an "easy" topic. South Africa had probably been facing the same difficulties in enforcing collective agreements, and if reference was still being made to the law of agency and *stipulatio alteri*, a comparative study with the Belgian system could surely contribute to the development of South African law.

This dissertation has been divided into three parts: Belgian law, South African law and a comparative perspective. Each part adopts the same format: it comprises a historical survey, a description of the parties to collective agreements, the forums in which collective bargaining takes place and an analysis of collective agreements, focusing on the nature of their binding force.

Because Belgian law prohibits agency shop and closed shop agreements, on the basis of the freedom of association, no reference has been made to these agreements in this dissertation, even though they are permitted in South Africa and are regarded as collective agreements.



No reference will be made either to the situation applicable in the Public Service, since all employees of the Belgian State are excluded from the scope of labour law, and have their employment relationships governed by administrative law.

## **PART A**

### **BELGIAN LAW**

## CHAPTER I HISTORICAL BACKGROUND

The first known collective agreement regulating working conditions was negotiated in 1906 in order to end a lock-out which took place in the textile industry. After the conclusion of this agreement, the idea that employers' and workers' organisations could negotiate working conditions in lieu of individual workers and employers in a specific professional sector developed, and more and more collective agreements were concluded<sup>1</sup>.

From the outset these agreements were aimed at ensuring social peace in enterprises.

Although they were not legally enforceable, their success and expansion can be explained by the following: trade unions were enabled to negotiate working conditions collectively; employers were willing to institute a social climate favourable to production; and competition resulting from different wage levels between companies within the same industry was avoided. The first collective agreements therefore arose mainly at sectoral level, through committees established on an ad hoc basis and composed of representatives of employers' organisations and trade unions.

The main problem that these collective agreements faced was that they were not legally binding: their infringement could not lead to any legal action. Furthermore, they were concluded by organisations which lacked legal personality<sup>2</sup> (and still do today). Various theories were therefore utilised to confer validity on them, amongst which were theories of civil law relating to contracts, due to the contractual elements present in collective agreements.

None of these theories could, however, satisfactorily explain the binding force of

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<sup>1</sup> V. Vannes, "Le lock-out: conditions de légitimité", in *Cent ans de droit social*, Bruxelles, Bruylant 1986, 371; P. Van der Vorst, *Introduction au droit social*, PUB, Vol I, 7th ed., 1990, 90.

<sup>2</sup> Belgian trade unions have no legal status or corporate capacity, and there is no legislation regulating the administration or functioning of trade unions. This situation suits the unions as it means that they do not suffer any disadvantages attached to legal personality (such as being sued) and at the same time have been given limited legal personality to defend and represent their members' rights. See C.T. Bruxelles, 21 April 1988, *J.T.T.*, 1990, 117, where it was held that trade unions lack legal personality; therefore, they do not have capacity to sue and to be sued, except in the cases where the legislation expressly gives them limited legal personality.

these agreements on persons who did not negotiate them.

Three theories of civil law can be pointed out.

- Agency

The mandate, or agency, is an agreement in the terms of which one person, the principal, instructs another person, the representative, to act on his behalf<sup>3</sup>. This implies that all the rights acquired by the representative, when undertaking his mandate, and all the obligations that result therefrom, accrue to the principal.

The binding effect of collective agreements was therefore seen as the result of a mandate given by the union members to their union representatives to negotiate working conditions, in the capacity of an agent<sup>4</sup>.

This theory only partially explains the effects of a collective agreement. It provides a basis for arguing why a collective agreement is binding on union members, who are presumed to have authorised the union to act on their behalf. But it cannot explain the effect of a collective agreement on non-union members and employers who were not represented during collective negotiations<sup>5</sup>.

Moreover, this theory ignores the main feature of agency, which implies that the trade union can only act in the capacity of a representative. To represent means to act on behalf of a principal. With regard to the conclusion of a collective agreement, however, the trade union is also a principal party to the agreement; it intervenes both in its own right and in the capacity of a representative, although a contract of mandate excludes the instance of the representative being part of the rights and obligations thereof, especially where Belgian trade unions lack legal personality.

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<sup>3</sup> Article 1984 Civil Code; See also H. De Page, *Traité élémentaire de droit civil belge*, t. V, Bruxelles, Bruylant, 4<sup>th</sup> ed., 1975, n° 355 onwards.

<sup>4</sup> M. Magrez, *Droit collectif du travail*, P.U.B., 1986-87.

<sup>5</sup> M. Magrez, "Le statut des conventions collectives de travail", *J.T.*, 1969, 201; V. Vannes, *Droit paraétatique*, P.U.B., 1994, 13.

- The *negotiorum gestio*

The *negotiorum gestio* occurs in circumstances where a person voluntarily acts in the interests of somebody else, in their absence and in order to advance their interests. The basis of *negotiorum gestio* is altruism, and it is characterised by the initiative of the *gestor*, whose will is to intervene on behalf of a third party, with the intention of being reimbursed. The *negotiorum gestio* is excluded where the *gestor* acts in furtherance of his own interests, or where the *gestor* acts without the intention of being reimbursed<sup>6</sup>.

The *negotiorum gestio* reflects the fact that trade unions and employers' organisations look after workers' and employers' interests, as the *gestor*. However, this theory does not satisfactorily explain the binding effects of a collective agreement since a *gestor* is supposed to stop acting once the person whose interests are being managed requests this, and further because the *gestor*, is supposed to act on behalf of the third party and without furtherance of his own interests, which is clearly not the case when a trade union concludes a collective agreement. Furthermore, the same criticisms of the agency theory are applicable in this instance: since trade unions lack legal personality, they can hardly be the bearer of rights or obligations.

- The *stipulatio alteri*

The *stipulatio alteri* is a contract in terms of which one party, the *promittens*, agrees with another, the *stipulans*, to perform something for the benefit of a third person, the beneficiary. Although the *stipulans* acts for the benefit of the beneficiary, he acts in his own name and not in the name of the beneficiary<sup>7</sup>.

The right of the beneficiary does not vest immediately on conclusion of the contract in his favour, but vests only after he has accepted the benefits arising from the contract. Prior to his acceptance the *promittens* is regarded as contractually bound only to the *stipulans* in respect of the undertaking to

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<sup>6</sup> H. De Page, *Traité élémentaire de droit civil belge*, t. II, Bruxelles, Bruylant, 3<sup>th</sup> ed., 1964, n° 1068 onwards; V. Vannes, *Droit paraétatique*, P.U.B., 1994, 14.

<sup>7</sup> H. De Page, *ibidem*, n° 694 onwards; V. Vannes, *ibidem*, 15.

benefit the third party.

This theory explains that the trade union, acting as a *stipulans*, concludes an agreement for the benefit of union members. It does not explain the binding effects of the agreement on non-parties. Furthermore, the *stipulatio alteri* can only create rights, but no obligations, for the beneficiary. Moreover, the beneficiary is not obliged to accept the *stipulatio*. The theory also fails to explain how representative organisations, lacking legal personality, can be bound by the obligations contained in the agreement.

As a result of the increasing number of collective agreements, the legislator enacted a Decree in 1945 acknowledging joint committees and their right to negotiate collective agreements<sup>8</sup>. This decree constituted the very first legal basis for collective bargaining to take place at a sectoral level<sup>9</sup>.

According to Article 10 of this Decree, joint committees had jurisdiction to establish general levels of remuneration and to negotiate general working conditions<sup>10</sup>.

The agreements reached by these committees<sup>11</sup> could be declared generally binding at the request of the joint committee itself, or of at least one representative organisation which took part in the negotiations. The binding force was conferred by Royal Decree.

The Decree of 1945 did not regulate the legal status of agreements which had been negotiated in these committees, but which were not declared generally binding by Royal Decree. As a result, these agreements, as well as agreements concluded outside joint committees, had no legal effect. The *Cour de Cassation*<sup>12</sup> held that they

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<sup>8</sup> Arrêté - Loi 9 June 1945 "portant création des commissions paritaires", *M.B.* 15 June 1945; R. Blanpain and C. Engels in *International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer, 1990, "Belgium", 335 explain that "the joint committees were endowed with legal status with the decree of 9 June 1945. The decree was not intended to innovate, but only to confirm the *de facto* exercise of power and the authority of existing institutions, by conferring legal status upon them."; see also G. De Broeck, "De paritaire comités" in *Arbeidsrecht C.A.D.*, Bruges, La Charte, 1987, III-II-5.

<sup>9</sup> P. Van der Vorst, *Introduction au droit social*, Vol II, P.U.B., 5th ed., 1990-1991, 148.

<sup>10</sup> *Ibidem*, 170.

<sup>11</sup> These committees were composed of delegates of all the organisations representative of the sector for which they were competent - See L. François, *Théories des Relations Collectives du Travail en Droit Belge*, Brussels, Bruylant, 1980, 301.

<sup>12</sup> The *Cour de Cassation* or Supreme Court is the highest Belgian court. It is not competent to decide on the merits of the matter referred to it. Its jurisdiction is limited to matters which have been tried in

had the status of a gentlemen's agreement only<sup>13</sup>. In 1953, it held that they only generated a moral engagement for the signatory parties<sup>14</sup>.

In March 1954 two Acts of Parliament<sup>15</sup> were enacted. According to the 1954 Acts, agreements concluded in joint committees that were not declared generally binding by Royal Decree were said to compensate for the silence of parties. In other words, issues which had not been expressly regulated by the parties to a contract of employment were regulated by the collective agreement. Therefore, collective agreements not extended by Royal Decree had a supplementary character in the hierarchy of sources of obligations. They had the value of custom.

Because the civil theories referred to above could not adequately account for the effects of collective bargaining, certain authors then referred to public law concepts.

According to these authors, a collective agreement is not a contract but a statutory act because:

- collective agreements not only contain compulsory provisions, but are also concluded by representative organisations, and have a law-making function;
- it is not possible to depart from collective agreements which have been declared generally binding by Royal Decree.

The main objection to this theory is that it does not take into account that a collective agreement results from free and voluntary negotiation by groupings whose activities are primarily regulated by private law, and not public law.

As a result of these difficulties, the legislator on 5 December 1968 adopted "the Act regulating joint committees and collective agreements"<sup>16</sup> (the 1968 Act)<sup>17</sup>.

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last resort, i.e. after exhaustion of all other recourse. An appeal to the Cour de Cassation must be based either on the ground that the judge violated the law or did not comply with formalities prescribed on pain of absolute nullification.

<sup>13</sup> Cass. 20 December 1950, *Pas.*, 1951, I, 267.

<sup>14</sup> Cass. 22 January 1953, *Pas.*, 1953, I, 362.

<sup>15</sup> Acts of 4 and 11 March 1954 amending the Act regulating employment contract, *M.B.* 1954.

<sup>16</sup> *M.B.* 15 January 1969.

<sup>17</sup> See M. Magrez, quoted by V. Vannes in *Questions approfondies de droit collectif du travail*, Vol II, P.U.B., 2nd ed., 1994-1995, 437; and B. Haubert, "La nature des conventions collectives et des commissions paritaires", *J.T.T.*, 1992, 85; G. De Broeck, *op cit.*, III-II-17.

The 1968 Act confirmed the then existing practice by stating that a collective agreement is an agreement voluntarily concluded between parties that are exclusively<sup>18</sup>, on the one hand, the most representative workers' organisations, and on the other, the largest employers' organisations (or an individual employer in the case of collective agreement concluded at plant level)<sup>19</sup>.

By virtue of the 1968 Act, all employers who are members of an employers' organisation that has concluded a collective agreement at national or sectoral level<sup>20</sup>, or who have themselves concluded a collective agreement, are bound by such agreement. The essence of Belgian law on collective agreements is that as soon as an employer is bound by a collective agreement, the employer's entire workforce becomes bound<sup>21</sup>. In other words, a collective agreement binds the employees merely by virtue of the fact that they work for an employer who is bound by an agreement. Consequently, workers who do not belong to a signatory organisation (i.e. a trade union party to a collective agreement), but who are employed by an employer member of a signatory organisation, are bound by the agreement. This corresponds with the notion that a trade union negotiates on behalf of all the workers of a particular economic sector.

Furthermore, when these agreements are concluded at national or sectoral level,

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<sup>18</sup> *Ibidem*, 437: "Experience largely showed that only organisations that are well structured, enjoying a long tradition and benefiting from a broad membership are able to make sure that important agreements are complied with, therefore creating a real climate for social peace."

<sup>19</sup> On the concept of "representative" organisation, see Chapter II, *infra*.

<sup>20</sup> The distinction between national and sectoral level refers to whether a collective agreement has been concluded in the National Labour Council (N.L.C.) or in a joint committee. A collective agreement concluded in the N.L.C. is normally applicable throughout the entire country and covers all the sectors of activity. Such agreements regulate for example early retirement, guaranteed monthly income, outplacement etc. A collective agreement concluded in a joint committee will be applicable in the sector of activity for which a joint committee has been established. Examples of joint committees are the joint committee for the chemical industry, joint committee for the textile industry etc. Collective agreements negotiated in the N.L.C. and in joint (sub)committees are referred to as collective agreements concluded in "a joint body" insofar as they are bodies established by the State and operate outside a particular enterprise.

For further developments, see *infra*, Chapter IV, Section VI.

<sup>21</sup> W. Rauws, "Binding van de normatieve bepalingen" in *Actuele problemen van het Arbeidsrecht*, t. III, Antwerpen, Kluwer, 1990, 37 held that "De stelling dat de leden van een organisatie instemmen met de inhoud van een C.A.O. via het lidmaatschap, is eerder fictie. De grenzen van de civielrechtelijke uitwerking *inter partes* van een overeenkomst worden duidelijkst overschreden bij de binding van alle werknemers van een gebonden werkgever: deze regel is, blijkens de parlementaire voorbereiding, ingegeven door twee motieven. In eerste orde is er het gegeven dat de representatieve vakbonden traditioneel onderhandelen namens alle werknemers. Bovendien wenste de wetgever blijkbaar te voorkomen dat de werkgever zich aan de toepassing van een C.A.O. zou onttrekken door zoveel mogelijk ongeorganiseerde werknemers in dienst te nemen."



they can be declared binding *erga omnes* and acquire an “imperative” nature<sup>22</sup>. The *Cour de Cassation* held that they constitute an “Act” in the meaning of Article 608 of the Judicial Code<sup>23</sup>.

The 1968 Act also establishes a strict hierarchy of the sources of law governing the employment relationship, whether they are statutory or originate through an agreement.

Furthermore, the 1968 Act conferred “a restricted legal personality” on trade unions and employers’ organisations by allowing them to sue and to be sued on certain issues.

Finally, the State is given an essential mission in the context of collective bargaining: it is the “*guardian of the general interest*”<sup>24</sup>: it creates joint committees; it appoints their members; it makes sure that collective agreements comply with the legal requirements set up in the 1968 Act, and is responsible for the extension of collective agreements.

Flowing from the 1968 Act, different types of collective agreements can be distinguished, namely:

- Collective agreements concluded within the National Labour Council and joint committees – referred to as ‘joint bodies’<sup>25</sup> and declared generally binding by Royal Decrees. These collective agreements regulate, without the possibility of deviation, individual relations in all enterprises either throughout the entire

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<sup>22</sup> R. Blanpain and C. Engels, *op cit.* 23 define “imperative nature” as meaning that parties cannot deviate from the law either by individual or collective agreement, except when the law sets only minimum standards which can be improved upon. The imperative character of an act means that the non-compliance of the act is relatively null: in other words, the nullity can only be invoked by the party in whose favour this provision has been inserted, and only within a period of ten years.

<sup>23</sup> Cass. 14 April 1980 and conclusions Lenaerts, *J.T.T.*, 1980, 289. Article 608 of the Judicial Code provides that: “The *Cour de Cassation* is competent to hear matters in the last instance where the reason for appeal is the non-compliance with an act of legislature or the non-compliance with procedures for which compliance is deemed either substantial or “prescribed on pain of nullification”; and Cass. 5 November 1994, *J.T.T.*, 1995, 7 where the *Cour de Cassation* refused to hear the matter as the collective agreement which had been infringed, had not been extended; such a collective agreement does consequently not constitute an act of parliament within the meaning of Article 608 of the Judicial Code; Cass. 29 April 1996, *J.T.T.*, 1996, 367.

<sup>24</sup> M. Magrez, quoted by V. Vannes, *op cit.*, 438.

<sup>25</sup> “Joint body” (*organe paritaire* in French) is defined in Article 1 al. 3 as “the National Labour Council, joint committees and joint sub-committees”. See also footnote 20 *supra*.

country<sup>26</sup> or falling within the scope of the joint committee. The infringement of these collective agreements gives rise to penal sanctions;

- Collective agreements concluded within the National Labour Council or joint committees but not declared generally binding by Royal Decree. They bind employers who are members of a signatory organisation and therefore all their employees. Employers who are not members of an organisation which concluded the collective agreement, but who fall within the sector covered by the agreement, are bound in a "supplementary" way, i.e. the provisions regulating individual labour relations will be binding on an employer and the employees in his service, unless the parties agree in the contract of employment to deviate from the application of these provisions;
- Collective agreements concluded outside the National Labour Council and joint committees. These agreements are mainly concluded at plant or company level, and are binding on the employer who concluded them and all the employees in his service, provided that the agreement has been deposited<sup>27</sup> with the Ministry of Labour. A collective agreement which has not been deposited is only binding on the signatory parties, i.e. those who signed it <sup>28</sup>.
- Collective agreements concluded outside the scope of the 1968 Act. These agreements are not collective agreements within the meaning of the 1968 Act<sup>29</sup>, and are considered as gentlemen's agreements only.

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<sup>26</sup> Collective agreements concluded in the National Labour Council.

<sup>27</sup> To be deposited with the Ministry of Labour, the collective agreement must comply with certain requirements defined in Articles 16 of the 1968 Act. If those requirements are met, the deposition must be accepted. See also *infra*, Chapter IV, section IV.

<sup>28</sup> Cass. 30 May 1988, *J.T.T.*, 1988, 352 and note C. Wantiez; See also *infra* Section IV.

<sup>29</sup> Example of such collective agreements would be agreements concluded between organisations which are not representative within the meaning of the 1968 Act.

## CHAPTER II PARTIES TO COLLECTIVE AGREEMENTS

In terms of the 1968 Act, the right to bargain and to conclude collective agreements belongs exclusively to the most representative organisations<sup>30</sup>. The expression "organisation" is used as a generic term for federations of employers' organisations, individual employers' organisations, federations of trade unions and individual trade unions.

Generally speaking, an organisation means (i) a grouping of persons having common professional interests, (ii) set up in a permanent and structured way and (iii) having as their object the defence of common professional interests.

These three characteristics are, however, not sufficient to entitle an organisation to negotiate collective agreements within the meaning of the 1968 Act. This privilege is reserved for the most representative organisations. The *travaux préparatoires* of the 1968 Act state that on the workers' side, "*an organisation is recognised as representative if it proves that it is stable, has authority, and commands respect. If the organisation does not comply with these requirements, it cannot guarantee the compliance of the obligations it contracted in a collective agreement and it will not be able to assume its responsibilities.*"<sup>31</sup> In addition, the organisations must be recognised as representative by the Crown. The representivity requirements for the

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<sup>30</sup> The meaning of the term "representative organisation" varies according to the rights the organisation is seeking to exercise. For example, to be represented in works councils, the 1948 Act "to make provision for the organisation of the economic life of the country" provides that the following trade unions shall be deemed representative:

a) [an] inter-professional workers' organisation established at national level, represented at the Central Economic Council and the National Labour Council and having at least 50.000 members;  
[or]

b) a professional or inter-professional organisation that [is] affiliated to or a part of the inter-professional organisations referred to in a).

In 1986, the notion of representative workers' organisation was extended to enable the executive staff personnel (*cadres*) to participate in collective bargaining. Executive staff personnel are defined by the 1985 Social Recovery Act as employees who perform a higher function normally reserved for holders of a diploma of a level to be decided, or who have equivalent job experience.

Article 14.5 of the 1948 Act defines executive staff personnel organisations as *inter-professional staff organisations, established at national level, having at least ten thousand members. These shall be recognised by the Crown as representative organisations following the procedure and in the manner specified by the Crown. The advice of the National Labour Council shall be taken on the recognition procedure.*

Only one organisation complies with those conditions : La Confédération Nationale des Cadres (C.N.C.). This organisation has no right to conclude collective agreements as it is not represented at the National Labour Council.

<sup>31</sup> Doc. Parl., Sén., session 1967-1968, n° 78, 36.

purpose of concluding collective agreements are laid down in the 1968 Act and in the 1952 Act establishing the National Labour Council<sup>32</sup> and differ, depending on whether the organisation is an employers' organisation or a workers' organisation, as well as on the institution where the representative organisation wishes to sit.

## **I WORKERS' ORGANISATIONS**

### **I.1 At the National Labour Council**

In terms of Article 2 of the 1952 Act establishing the National Labour Council, a workers' organisation must be inter-professional<sup>33</sup> and established at national level to be represented at the National Labour Council.

In addition, to these two objective criteria (inter-professional and established at national level), the 1952 Act gives the Crown the task of selecting the organisations which will be represented at the National Labour Council.

Three representative workers' organisations are currently represented at the National Labour Council: the Fédération Générale du Travail de Belgique (F.G.T.B. - linked to the Socialist party), the Confédération des Syndicats Chrétiens (C.S.C. - linked to the Catholic party) and the Centrale Générale des Syndicats Libéraux de Belgique (C.G.S.L.B. - linked to the Liberal party)<sup>34</sup>. Analysing the issue of recognition at the National Labour Council, L. François stated that "*to be recognised*

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<sup>32</sup> See *infra* Chapter III, Section I.

<sup>33</sup> "interprofessionnelles" in French. This means that the scope of activity of the trade union extends to various sectors of activity. R. Blanpain and C. Engels, *op cit.*, 151 use the term "inter-industrywide".

<sup>34</sup> About 60% of Belgian workers are unionised. The C.S.C. has 1.5 million members, the F.G.T.B. has around 1 million members and the C.G.S.L.B. has 240 000 members. These federations are composed of trade and regional unions. Belgian trade unions are not organised on a craft or occupational basis, and industrial unions prevail. Both the socialist and the Christian unions have separate divisions for white-collar workers, regardless of the sector of industry to which they may belong. The F.G.T.B. is based on principles of democratic socialism corresponding with those of the Belgian Socialist party. Its declared goal is a system of social and economic democracy under which the means of production will be at the service of the whole community. Different national unions are affiliated to the F.G.T.B. Each union is an independent organisation with its own structure, governing body, and statutory rules. To become affiliated, the union must give an assurance that it will accept the basic principles of the F.G.T.B., and that it will carry out all the decisions made by the governing body of the F.G.T.B. The C.S.C. defends the interests of its members in accordance with Christian social doctrine and the principles of democracy. It has, in the main, the same structure as the F.G.T.B.: it is composed of 18 industry-based national unions, which are decentralised at regional and local level. The C.S.C. and the F.G.T.B. have essentially the same structure; both are federations of national trade unions organised – as a general rule – per sector of the industry. White-collar employees are important exceptions. The C.G.S.L.B. has a unified structure. See R. Blanpain and C. Engels in *International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer, 1990, "Belgium", 161-171.

as representative, trade unions must belong, through one of these large federations, to one of these political 'families' which hold power in Belgium."<sup>35</sup>

## 1.2 At Joint Committee and at plant level

At joint committee and plant level, the notion of a representative trade union is defined by Article 3 of the 1968 Act.

This Article provides that<sup>36</sup>:

*"For the purpose of the application of this Act, the following shall be deemed to be trade unions:*

- 1. inter-professional organisations<sup>37</sup> of workers [...] established at national level and represented on the Central Economic Council<sup>38</sup> and the National Labour Council; the worker's organisations shall furthermore have at least 50.000 members; [or]*
- 2. the professional organisations affiliated to, or forming part of, an inter-professional organisation referred to in paragraph 1; (...)"*

Furthermore, to be represented in a joint committee, the trade union must have been designated by the Minister<sup>39</sup>. This means that the fulfilment of the requirements prescribed in Article 3 above are not sufficient to entitle a trade union to be represented in a joint committee. The *travaux préparatoires* indicate that *"trade unions must also be representative of the sector to be entitled to representation in a joint committee"*<sup>40</sup>. It must be noted that often the Confédération Générale des Syndicats Libéraux de Belgique is not represented in joint committees<sup>41</sup>.

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<sup>35</sup> L. François, *op cit.*, 215.

<sup>36</sup> All the translation of the articles of the 1968 Act quoted in this dissertation are directly taken from *International Encyclopaedia for Labour Law and Industrial Relations*, "Legislation - Belgium", Kluwer, 1991, 119-142.

<sup>37</sup> Inter-professional organisations are in practice the three federations, F.G.T.B., C.S.C. and C.G.S.L.B. The professional organisations affiliated are the trade unions organised by industry.

<sup>38</sup> The Central Economic Council is composed of representative organisations in industry, agriculture, commerce and handicrafts and of workers, as well as a number of experts, with the duty of submitting opinions or proposals to Ministers or to the legislature with regard to problems relating to the national economy (either on its own initiative or at the request of the said authorities) in the form of reports setting out the various points of view expressed by its members. There are no specific legal requirements to be complied with, in order to be represented at this council.

<sup>39</sup> Article 42 of the 1968 Act. For further details on joint committees, see Section III.II.2 below.

<sup>40</sup> Doc. Parl., Sén., session 1967-1968, n° 176/2, 25.

<sup>41</sup> Whilst the C.S.C. and F.G.T.B. have a seat on each joint committee in Belgium.

At plant level, collective agreements are negotiated by the union delegation, which can be defined as the representation of the unionised employees in the enterprise. The collective agreement is concluded, however, by the trade union itself (see Section VIII *infra*). It must be noted that only the three federations of trade unions represented at the National Labour Council have the right to request the establishment of a union delegation.

## **II EMPLOYERS' REPRESENTATIVE ORGANISATIONS**

### **II.1 At the National Labour Council**

In terms of Article 2 of the 1952 Act, only the most representative employers' organisations of the industrial sector, agriculture, commerce and handicraft may be represented at the National Labour Council. Special provision must also be made for the representation of small and medium enterprises.

The 1952 Act gives the Crown the task of selecting the employers' organisations<sup>42</sup> which will be represented at the National Labour Council.

### **II.2 At Joint Committee level**

In contrast to trade unions, the law does not require an employers' organisation to have any minimum number of employers as members to be considered representative.

According to Article 3 of the 1968 Act:

*"For the purpose of the application of this Act, the following shall be deemed to be Employers' representative organisations:*

- 1. inter-professional organisations of employers established at national level and represented on the Central Economic Council and the National Labour Council; [or]*
- 2. the professional organisations affiliated to, or forming part of, an inter-professional organisation referred to in paragraph 1<sup>43</sup>; [or]*
- 3. the employers' professional organisations which, in any given branch of*

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<sup>42</sup> There are 3 organisations present at national level: the Fédération des Entreprises Belges (F.E.B), the Conseil Supérieur des Classes Moyennes and the Belgische Boerenbond.

<sup>43</sup> Those are professional organisations amongst which 85 % are affiliated to the F.E.B.

*activity, are declared representative by the Crown on the advice of the National Labour Council<sup>44</sup>; [or]*

- 4. The national inter-professional and professional organisations approved under the Act of March 6 1964, to provide for the institutional structure of the middle classes which are representative of heads of handicraft undertakings, small and medium trades and small-scale industry and self-employed persons carrying out a liberal profession or other professional type of work shall also be deemed to be representative employers' organisations<sup>45</sup>."*

When an employers' organisation is not inter-professional, established at national level and represented at the National Labour Council and at the Central Economic Council, the Ministry of Labour may determine whether an employers' organisation may be considered as representative of the professional interests of employers.

The Minister does not have discretionary power. He must inquire about the representivity and the power in numbers of the concerned organisation. Furthermore, its decision must take the advice of the National Labour Council into account.

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<sup>44</sup> There are more or less 60 organisations which are not affiliated to the F.E.B. and covered by this provision. For example, in the health care industry, the Union francophone des laboratoires dentaires de Belgique, the Union des industries de techniques dentaires; in the cinema industry, the Union des producteurs de films francophone, the Vlaamse filmproducentenbond, etc.

<sup>45</sup> Those are Union nationale chrétienne des classes moyennes, Union syndicale des classes moyennes du Boerenbond belge, Alliance agricole belge and the Fédération royale des notaires belges.

## CHAPTER III FORUMS FOR COLLECTIVE BARGAINING

Collective bargaining can take place at three levels: at national inter-industry-wide level, through the National Labour Council; at sectoral level through joint committees and joint subcommittees; and at plant level through the union delegation.

### I THE NATIONAL LABOUR COUNCIL

#### I.1 Origin of the National Labour Council

Although it has existed in its current form since the 1952 Act, the National Labour Council is the result of a long evolution which started in 1892 with the creation of the Supreme Council of Labour (Conseil Supérieur du Travail)<sup>46</sup>. This first tripartite body was constituted at national level and consisted of representatives of management and labour and specialists competent in industrial relations. It had to give its opinion about all matters which were submitted to it by the government. Taking into account the growing importance of the trade unions, the Council was replaced in 1935 by the Supreme Council of Labour and Social Prevention (Conseil Supérieur du Travail et de la Prévention Sociale), which was more involved in the formulation of social and economic policies. Negotiations about wages, annual vacations, working time, etc. also took place. In 1944<sup>47</sup>, trade unions and employers' organisations created the General Parity Council (Conseil Paritaire Général) which was a bilateral body consisting of representatives of management and labour, and competent to give opinions, make proposals and conciliate industrial disputes<sup>48</sup>. The public body which is now called the National Labour Council emerged from the General Parity Council in 1952.

#### I.2 Composition of the National Labour Council

The National Labour Council consists of 49 members:

- one chairperson, appointed by the Crown for a renewable period of 6 years,

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<sup>46</sup> For a more detailed historical background, see G. De Broeck, "De Nationale Arbeidsraad" in *Arbeidsrecht C.A.D.*, Bruges, La Charte, III-12-5 to III-12-10.

<sup>47</sup> It must be noted that from 1936 to 1939 and from 1944 to 1948, National Labour Conferences were also held. These conferences were set up by the government, and trade unions and employers' organisations were invited to make representations on important socio-economic matters. These conferences were usually called when major industrial actions were taking place in a sector of the economy. The last conference was held in 1948.

<sup>48</sup> The creation of this body was already mentioned in the Pact of Social Solidarity.



and nominated for his/her independence from both employers' and workers' organisations and his/her skills in social and economic matters;

- a maximum of 12 representatives and an equal number of substitutes, representing the most representative employers' organisations, appointed by the Crown for a renewable period of 4 years, from a list submitted by the representative organisations containing two candidates for each seat;
- a maximum of 12 representatives and an equal number of substitutes, representing the most representative workers' organisations, appointed by the Crown for a renewable period of 4 years, from a list submitted by the representative organisations containing two candidates for each seat.

### **1.3 Functions of the National Labour Council**

The functions of the National Labour Council are governed by the 1952 and other Acts.

It has two types of functions: to give advice and to conclude collective agreements.

#### **1.3.1 Advisory function**

The advisory function is divided into two categories: namely those that it may perform and those that it is obliged to perform.

- advisory functions that it may perform: the National Labour Council is competent to give advice or to make any proposals to the Executive or to the legislature, either on its own initiative or on request, about general social problems concerning employers and workers<sup>49</sup>. It can also give its advice about conflicts of jurisdiction that could arise between joint committees;
- advisory functions that it is obliged to perform: various Acts oblige the National Labour Council to advise the Ministry of Labour about such topics as Sunday rest, working hours, children and women's labour, public holidays, annual vacation etc. When an Act requires the Crown to consult the National Labour Council, the Council must communicate its advice within two months.

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<sup>49</sup> The National Labour Council has become so influential through this advisory function that P. Van der Vorst, *op cit.*, 163, holds that it is a "workshop of labour law", and that the National Labour

### **1.3.2 Conclusion of collective agreements**

The 1968 Act gives the National Labour Council the status of a joint body<sup>50</sup>. According to Article 7 of this Act:

*"The scope of an agreement concluded in the National Labour Council shall cover different branches of activity throughout the entire country.*

*Provided that an agreement may be concluded in the National Labour Council for a branch of activity which is not within the competence of an established joint committee or where an established joint committee does not function."*

If the National Labour Council wishes to conclude a valid collective agreement, at least half of the employers' representatives and half of the trade unions' representatives must be present at the meeting. All decisions must be taken by a unanimous vote of the present members.

## **II JOINT COMMITTEES**

### **II.1 Origin of joint committees**

The first joint committee, which was called the "Study Commission for the reduction of working time in the coal-mining industry" (Commission d'études pour la réduction du temps de travail dans les mines sidérurgiques) was established in Belgium in 1919 in order to resolve a dispute which arose in the industry<sup>51</sup>. It was formed by the then Prime Minister at national level, and was composed of trade unions and employers' organisations. Its mission was to conduct research regarding working hours. This was followed by the establishment of other similar committees.

Due to the success of these bodies<sup>52</sup> established at sectoral level and composed of labour and employers' representatives, their number and their competence<sup>53</sup> increased progressively and they were finally called "joint committees" (*Commission Paritaire*)<sup>54</sup>.

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Council is a "pre-legislator" of labour law.

<sup>50</sup> See footnote 20 *supra*.

<sup>51</sup> See G. De Broeck, *op cit.*, III-11-5.

<sup>52</sup> In 1919, there were 7 joint committees, 127 in 1936 and 172 in 1940; see V. Vannes, *Questions approfondies de droit collectif du travail*, Vol. I, PUB, 1994-1995, 66.

<sup>53</sup> Being originally study commissions, their competence extended thereafter to conciliation, arbitration and finally to negotiation and conclusion of collective agreements.

<sup>54</sup> See Chapter I - Historical Background, for more details.

The main problem with these bodies was that the agreements they concluded had no legal effect. Jurisprudence considered that these agreements only had the status of custom<sup>55</sup>.

During World War II, joint committees were banned by the occupying forces.

At the end of World War II, a Pact of Social Solidarity<sup>56</sup> was concluded between employers' and workers' organisations which aimed at restoring the institution and giving them legal recognition.

The Decree of 9 June 1945 confirmed the terms of the Pact of Social Solidarity and conferred legal status on joint committees. Moreover, it provided that agreements concluded by joint committees could be declared to be generally binding by Royal Decree. In each branch of industry, trade or agriculture, a national joint committee was created by Royal Decree. These committees were competent for a particular sector throughout the entire country.

This Royal Decree was repealed by the 1968 Act. However, the 1968 Act retained the same collective bargaining structures and only amended minor points.

Notwithstanding the fact that the notion of joint committees has received statutory recognition since 1945, it has never been defined by the legislator. In practice, a joint committee can be defined as an institution within a sector which bargains collective agreements at sectoral level, which prevents and conciliates disputes between employers and employees, and which gives advice to the government, to the Central Economic Council and to the National Labour Council.

The main purpose of a joint committee is, however, the negotiation of collective agreements: they are organs of "social dialogue". There are currently 97 joint committees in Belgium.

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<sup>55</sup> See Cass. 22 January 1953, *Pas.*, 1953, I, 362 and Chapter I - Historical Background.

<sup>56</sup> In this Pact, the representatives of the employers and the trade unions representatives expressed the intention to conduct their relations on a basis of mutual respect and reciprocal recognition of each other's rights and duties.

## II.2 Establishment of joint committees

Articles 35 and 36 of the 1968 Act regulate the establishment, competence and territorial scope of application of joint committees. These Articles provide that:

*"35. The Crown may, on its own initiative or on request of one or more organisations, establish joint committees of employers and workers. It shall specify the persons, the economic sector or the undertakings to which these committees shall apply and the territorial scope of each committee.*

*36. Whenever the Minister considers recommending to the Crown to establish a joint committee or to alter the scope of an existing committee, he shall inform the relevant organisations by notice published in the Moniteur Belge."*

In the circumstances where the Crown<sup>57</sup> is acting on its own initiative, consultation must take place with the representative organisations<sup>58</sup>.

Moreover, Article 37 provides that:

*"At the request of a joint committee, the Crown may establish one or more joint subcommittees. After consulting the affected joint committee, the Crown shall specify the persons and territory falling within the scope of the said subcommittees."*

The *travaux préparatoires* of the 1968 Act indicate that joint subcommittees may be established in respect of a specific region or a specific sub-sector of the economy<sup>59</sup>. This means that a joint subcommittee could be established for a particular area of the country<sup>60</sup> or for a particular activity within a specific sector<sup>61</sup>.

The Crown cannot take the initiative in the establishment of a joint subcommittee. The joint committee must request this from the Crown, which, after consulting the joint committee, shall specify the persons and territory falling within the scope of the

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<sup>57</sup> i.e. the King acting on the advice of his Ministers.

<sup>58</sup> C.E., 13 July 1953, *R.J.D.A.*, 1953, 290; C.E. 30 April 1996, *J.T.T.*, 1996, 370 and rapport B. Haubert.

<sup>59</sup> Doc. Parl., Sén., session 1966-1967, n° 148 (exposé des motifs), 47.

<sup>60</sup> For example, in the ceramic industry there is a joint subcommittee competent for the manufacturing of tiles in the region of Tournai.

<sup>61</sup> In the ceramic industry, for example there is a joint subcommittee for porcelain manufacturing.

said subcommittees.

### II.3 Composition of joint committees

The composition of joint committees and joint subcommittees is regulated by Articles 39 to 46 of the 1968 Act<sup>62</sup>. Their composition is as follows:

- one chairperson and one vice-chairperson; the chairperson is appointed by the Crown, for a renewable period of 4 years, from amongst persons competent in social affairs, but not involved in interests with which the joint committee or subcommittee may be concerned. In practice, the role of a chairperson is filled by a mediator from the Ministry of Employment and Labour;
- an equal number of representatives of employers' and workers' organisations, nominated by the Crown. The organisations concerned are requested, by notice published in the *Moniteur Belge*, to state whether they wish to be represented and, if so, to furnish evidence of their own representative nature<sup>63</sup>. The Minister must then designate the organisations which are to be represented and determine the number of seats to be granted to each of them. Seats are allocated by taking into account the support obtained by trade unions in works council elections and the elections of committees for safety, health and enhancement of the workplace<sup>64</sup>. The Minister's decision

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<sup>62</sup> See also J. Rombouts, "Prise de décision et décisions des commissions paritaires", *R. T.*, 1992, 5-27.

<sup>63</sup> To be authorised to be represented in a joint committee, a trade union or employers' organisation must (as noted above) first comply with the requirement of being a representative organisation within the meaning of Article 3 of the 1968 Act. Furthermore, it must be considered by the Crown as representative within the sector. If there is no representative organisation within a sector, a joint committee cannot be established and the National Labour Council would then perform the functions of the joint committee.

<sup>64</sup> See R. Blanpain and C. Engels, *op cit.*, 172.: "At the level of enterprise or establishment three different bodies may operate which represent respectively the employers and the employees or the trade unions: the union delegation, the works council, and the committee for safety, health and enhancement of the workplace. (...) This triad is the result of a post-war compromise towards the rivalling attitudes of the major unions. At that time the Christian unions favoured the idea of collaboration between workers and management through the works council, while the Socialist trade unions emphasised the strife between labour and capital through the union delegation. A typically Belgian solution to the problem was arrived at: not two but three organs were created, where many agreed that one could do the job. It follows that in practice there is a great deal of overlapping with regard to both the jurisdiction and composition of the different bodies."

A Works Council has to be established in every enterprise usually employing a minimum of 100 employees. It is composed, on the one hand, of the employer and one or more representatives and substitutes from the employers' organisations indicated by him; and on the other hand of a number of employees' representatives whose numbers may vary from two to twenty-five (depending on the size of the enterprise). The employees' representatives are elected by secret ballot every four years from

must be notified to all organisations which have asked to be represented. The designated organisations are required to submit within one month the names of two candidates for each seat allocated to them, and

- two or more secretaries, appointed by the Minister of Employment and Labour.

The members of a joint committee or a joint subcommittee may be assisted by technical advisors, the numbers of whom shall be determined by procedural rules agreed to by the parties. The Minister may also, on his own initiative, designate one or more civil servants as advisors.

## **II.4 Functions of joint committees**

According to Article 38 of the 1968 Act, joint committees and joint subcommittees are competent to:

- collaborate in the drafting of collective agreements;
- promote the conciliation of disputes between employers and workers;
- advise the government, the National Labour Council and the Central Economic Council on matters falling within their competence, at the latter's request or on their own initiative, and
- to carry out any other task imposed on them by law or by virtue of the law<sup>65</sup>.

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lists of candidates submitted by the most representative unions. All employees, except the managerial personnel, have the right to vote, whether or not they are members of a union. The purpose of the works council is to promote collaboration between employers and employees. Its competence is largely of an informative and advisory nature, while the employer retains the decision-making power. For further details, see R. Blanpain and C. Engels, *op cit.*, 182-211.

A Committee for safety, health and enhancement of the workplace has to be established in every enterprise usually employing on average 50 or more employees. The Committee is composed of an equal number of delegates and substitutes representing the employees and the employer. As with the works council, the representatives are elected by secret ballot from lists of candidates nominated by the most representative unions. The essential task of the committee is to promote safety, health and enhancement of the enterprise. For further details, *ibidem*, 212-217.

<sup>65</sup> For example, the Act of 19 March 1991 provides that when an employer wishes to dismiss for operational requirements an employee who is a member of the works council, the committee for security, health and enhancement of the workplace or union delegation, the joint committees must first accept the existence of an operational requirement.

Once a joint committee is established, its jurisdiction is limited by three factors: the sector of the economy in which it operates, the persons subject to its jurisdiction and the area in which it operates.

In respect of the persons active in the economic sector, the jurisdiction of a joint committee is determined by the main activity of the undertaking, and not by the profession of the workers, their work or the functions they exercise within the undertaking<sup>66</sup>. When the undertaking exercises one main activity and subsidiary activities, its competence will be determined by the main activity. This principle can however be subject to exceptions: it may happen that two joint committees are established for one sector, each joint committee then having jurisdiction for blue-collar employees and for white-collar employee respectively<sup>67</sup>. If an enterprise exercises various activities which are not linked in any way, it can also fall within the scope of two different joint committees<sup>68</sup>.

In respect of the area in which it operates, the jurisdiction of a joint committee is usually the entire country. It is also possible for the Crown to establish a joint committee only for a specified region of the country<sup>69</sup>.

The general functioning of each joint committee and subcommittee is regulated by Royal Decree. Furthermore, each committee draws up its own standing orders. In terms of the 1968 Act, collective agreements are validly concluded if at least half of the representatives or substitute members representing the employers and half of the representatives or substitute members representing the workers are present, and the decision is taken by a unanimous vote of the members present, unless there is specific provision to the contrary in the constitution<sup>70</sup>.

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<sup>66</sup> Exposé des Motifs, Doc. Parl., Sén., 1966-1967, n° 148, 45; B. Haubert, "Rapport Min. Publ." sous C.E. 30 April 1996, *J.T.T.*, 1996, 370; N. Lepoivre, "Du ressort des commissions paritaires", *C.D.S.*, 1989, 161-178; Cass. 24 December 1990, *C.D.S.*, 1991, 244; Cass. 9 September 1991, *J.T.T.*, 1992, 398; C.T. Liege 16 October 1981, *J.L.*, 1982, 161; See also Cass. 14 February 1983, *R.W.*, 1983-1984, 2104 which took into account the activity "usually" exercised; C.T. Gand, 8 November 1989, *J.T.T.*, 1990, 116; C.T. Liège, 1 March 1989, *J.T.T.*, 1990, 430; Cass. 17 June 1996, *J.T.T.*, 1996, 365; Cass. 28 June 1995, *J.T.T.*, 1995, 441.

<sup>67</sup> This is the case for example in the food manufacturing industry.

<sup>68</sup> This would be the case for example where the company manufactures a product and distributes it. See T.T. Bruxelles, 27 June 1972, *J.T.T.*, 1972, 278.

<sup>69</sup> C.E., 5 June 1959, n° 7122, *J.T.*, 1959, 52.

<sup>70</sup> Article 47 of the 1968 Act.

### III THE UNION DELEGATION

#### III.1 Origin of union delegations

The Pact of Social Solidarity negotiated towards the end of World War II between employers' representatives and trade unions was the first act of recognition by employers of union delegations within undertakings.

In 1947, a national inter-sectoral agreement was concluded between employers' organisations and trade unions, recognising the legal authority of the employer and the indisputable existence of trade unionism. This agreement also formulated principles concerning the establishment of union delegations. Each joint committee was asked to adapt these principles to the specific situation in their own sector.

This agreement had no legal standing as it was concluded between organisations that did not have legal status. Nevertheless, the agreement was very influential in that it formed the basis for employers to recognise union delegations within an enterprise; although it imposed no obligation, it was in practice widely applied<sup>71</sup>.

After the 1947 national agreement, many collective agreements regulating the status of union delegations in undertakings were concluded in joint committees and at plant level.

On 24 May 1971, the national agreement was replaced by the collective agreement N° 5 "regulating the status of union delegations representing employees in undertakings" (Collective Agreement N° 5), concluded within the National Labour Council<sup>72</sup>. Collective Agreement N° 5 lays down only the leading principles for the establishment of union delegations. This collective agreement has not been extended to non-parties by Royal Decree.

Article 1 of Collective Agreement N° 5 provides that:

*"The manner in which the principles laid down by this collective agreement will be applied shall be specified by collective agreements concluded in joint committees or joint subcommittees. In the absence of such collective agreements, it shall be*

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<sup>71</sup> O. Vanachter, "Syndicale afvaarding" in *Arbeidsrecht C.A.D.*, Bruges, La Charte, 1985, III-8-3.

<sup>72</sup> M.B., 1st July 1971.



*specified at plant level. The parties will therefore be able to take into account, situations specific to various sectors and enterprises as appropriately as possible."*

### **III.2 Establishment of the union delegation**

Article 7 of Collective Agreement N° 5 states:

*"A trade union delegation shall be set up in accordance with the rules set out below when one or more of the trade union signatory parties to this agreement request the head of the undertaking to do so.*

*In enterprises covered by a joint committee where these organisations are represented, these organisations have the right to present candidates for the designation or the election of the union delegation.*

*A trade union which is a signatory party to this agreement but which is not represented in a joint committee that has concluded a collective agreement on the status of the union delegation, has the right to participate in the appointment of the union delegation or in the designation of candidates to be elected, provided it can prove its representivity. Such proof is afforded where the said organisation has obtained at least one seat at the last elections for the establishment of the Committee for health, safety and enhancement of the workplace. In enterprises where no such election took place, the trade union must prove that its members account for at least 10 % of the unionised workers of the enterprise."*

Various comments must be made:

- Union delegations are therefore established at the request of trade unions and not on the initiative of an employer;
- The trade unions party to Collective Agreement N° 5 committed themselves to appointing a "joint" union delegation should there be more than one trade union requesting the establishment of a union delegation. In other words, trade unions must attempt to avoid the proliferation of union delegations within a single enterprise by reaching an agreement providing for a proportional representation of unionised workers<sup>73</sup>;

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<sup>73</sup> See Article 5 of Collective Agreement N° 5; if the trade unions fail to reach an agreement, they can apply for conciliation at the joint committee. If the parties fail to conciliate, the employer may have to

- In addition, the right to request the establishment of a union delegation accrues only to the trade unions represented in the National Labour Council (i.e. trade unions which signed the Collective Agreement N° 5). If a joint committee has concluded a collective agreement on the status of the union delegation, only trade unions represented on this joint committee will be entitled to request the establishment of a union delegation. If the union is not represented on the joint committee, then it will be required to prove its representivity, either through having obtained at least one seat at the last social elections, or by showing that it represents at least 10 % of the unionised workers;
- Because Collective Agreement N° 5 has not been extended to non-parties by Royal Decree, only employers who are affiliated to employers' organisations that were party to this collective agreement are expected to establish a union delegation.

Collective agreements concluded to implement Collective Agreement N° 5 must determine, *inter alia*, the size<sup>74</sup> of the enterprises where union delegations must be established and the number of union delegates<sup>75</sup>. With regard to the possibility offered to trade unions by Article 7 either to appoint employees as union delegates or to designate candidates amongst an employer's workforce to be elected, this decision is made at sectoral level<sup>76</sup>.

### **III.3 Functions of the union delegation**

A distinction must be made between the employees the union delegation represents and its competence to fulfil certain duties.

#### **III.3.1 Representation**

In principle, a union delegation only represents the unionised employees<sup>77</sup>, i.e. employees affiliated to one of the signatory organisations.

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face two or three union delegations.

<sup>74</sup> i.e. the number of employees employed in an enterprise. Most of the collective agreements provide that only companies employing at least 50 persons must establish a union delegation when requested.

<sup>75</sup> Article 8 of Collective Agreement N° 5.

<sup>76</sup> Often, collective agreements concluded at sectoral level opt for the appointment of union delegates, instead of designating candidates to be elected by the unionised employees. See J. Piron, "Le rôle de la délégation syndicale et ses contradictions", *J.T.T.*, 1982, 153.

<sup>77</sup> C.T. Mons, 15 January 1990, *J.T.T.*, 1990, 181; this is not the case for the works council and the committee for security, health and enhancement of the workplace, where the delegates represent the entire workforce.

A collective agreement concluded within a joint committee may extend the competence of the union delegation to all employees of the undertaking, including non-unionised employees<sup>78</sup>.

These principles are expressly stated in Article 6 of Collective Agreement N° 5:

*"Employers shall recognise that employees belonging to a trade union will be represented in their regard by a trade union delegation whose members shall be designated or elected from amongst the employees of the undertaking. It is meant by employees belonging to a trade union those affiliated to one of the signatory organisations. Under an agreement concluded by the joint committee, representation of employees by the trade union delegation may be extended to all employees in the categories covered by the agreement setting up the trade union delegation, on the conditions that are specific to the various sectors of activity and undertaking."*

It must be emphasised that the union delegation does not represent the trade union(s), but only unionised employees within the undertaking. Although union delegates derive their mandate from the trade union, since they have been designated or appointed by the trade union, they are not acting as representatives of the union but as representatives of unionised employees<sup>79</sup>.

This explains why, although union delegations are competent to negotiate collective agreements, they are not competent to conclude and to sign agreements on behalf of unions. This competence belongs to the unions' officials only<sup>80</sup>.

### **III.3.2 Duties**

The competence of the union delegation is laid down by Article 11 of Collective Agreement N° 5:

*"The responsibilities of the trade union delegation relate, amongst other things, to:*

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<sup>78</sup> For example, in the chemical industry, the collective agreement provides that the union delegation represents all the employees whose salaries are regulated by collective agreements.

<sup>79</sup> See J. Piron, "Le rôle de la délégation syndicale et ses contradictions", *J.T.T.*, 1982, 153; and C.T. Mons, 15 January 1990, *J.T.T.*, 1990, 181.

<sup>80</sup> This position has been confirmed by the National Labour Council in its *Avis n° 682*, of 27 February 1981. See also C.T. Bruxelles, 7 November 1986, *C.D.S.*, 1987, 224 where it was held that a collective agreement which has been concluded with the union delegation is not a collective agreement within the meaning of the 1968 Act.

1. *industrial relations;*
2. *negotiations with a view to concluding collective agreements within the undertaking, without affecting collective or other agreements concluded at other levels;*
3. *ensuring that social legislation, collective agreements, the work rules and individual employment contracts are complied with within the undertaking;*
4. *the observance of the general principles as set out in Articles 2 to 5<sup>81</sup> of this agreement”.*

In addition, there are numerous Acts that increase the competence of the union delegation<sup>82</sup>.

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<sup>81</sup> The general principles set out under Articles 2 to 5 concern the recognition of the legitimate authority of the employer, the conscientious compliance with the provisions of the contract and the respect in all circumstances of justice, equity, conciliation and freedom of association.

<sup>82</sup> Although those Acts are not to the issue of collective bargaining, one can refer to the Act of 8 April 1965 on work rules, the Act of 10 June 1952 concerning the social security of workers, the Act of 20 September 1967 relating to plant closing, etc.

## CHAPTER IV COLLECTIVE AGREEMENTS

### I SCOPE OF APPLICATION OF THE 1968 ACT

Chapter I of the 1968 Act defines essential terms used in the Act, its scope of application and the notion of representative organisations.

#### I.1 Persons subject to the 1968 Act

The 1968 Act applies to employees, employers<sup>83</sup> and their organisations.

According to the deeming provisions of Article 2 § 1, for the purpose of this Act:

- "1. an employee includes a person who, other than by virtue of a contract of employment, performs work under the authority of another person<sup>84</sup>;*
- 2. an employer includes a person who gives work to a person fulfilling clause (1);*
- 3. a contract of employment includes the employment relationship between persons deemed to be employees and employers;*
- 4. a branch of activity includes groups of persons assimilated to employers who, outside a defined sector of the economy, carry on identical or related activities;*
- 5. an undertaking includes the establishment belonging to a person considered as an employer."*

The question as to whether the 1968 Act applies to contracts of employment which have been declared null and void has been solved as follows by Article 2 § 2:

*"The nullity of a contract of employment shall not be considered ground for the non-application of this Act, where work is performed:*

- 1. under a contract of employment declared null and void on the grounds of violation of the legislation regulating the employment relationship.*
- 2. in gambling rooms."*

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<sup>83</sup> Defined in terms of ordinary legal principles.

<sup>84</sup> An apprentice is deemed to perform work under the authority of an employer. Therefore, a collective agreement concluded within a joint committee may determine the remuneration payable to an apprentice; see Cass. 16 November 1992, *C.D.S.*, 1993, 113 and note J. Jacquemain.

## **I.2 Persons who are not subject to the 1968 Act**

The 1968 Act mainly excludes persons employed by the State from its scope of application <sup>85</sup>.

According to Article 2 § 3, the 1968 Act does not apply to:

- "1. persons employed by the State, provinces, communes, public establishments owned or operated by the above and quasi-public or officially recognised bodies. Provided that the Crown may, by order, stating the grounds on which it is based, discussed and adopted by the Council of Ministers, extend in full or in part the application of this Act to the above-mentioned persons or certain categories thereof;*
- 2. persons employed in vocational training centres under the legislation with respect to the finding of jobs or vocational training for job seekers;*
- 3. members of staff subsidised by the central government in non-state subsidised educational establishments."*

## **II FEATURES OF COLLECTIVE AGREEMENTS**

A collective agreement is defined by Article 5 of the 1968 Act as:

*"an agreement concluded between one or more workers' organisations, one or more employers' organisations or one or more employers, regulating individual and collective relations between employers and employees<sup>86</sup> in undertakings or in a branch of activity, and regulating the rights and obligations of the contracting parties<sup>87</sup>."*

### **II.1 A collective agreement is a contract**

Article 5 of the 1968 Act evidences the dualistic character of a collective agreement: on the one hand, it is a contract, in that its formation depends upon the consent of signatory parties and its obligatory provisions generate rights and obligations for

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<sup>85</sup> The employment relationship of civil servants is regulated by administrative law. See A. Renard, "La non-application de la loi sur les conventions collectives de travail et les commissions paritaires au personnel engagé dans les services publics", *C.D.S.*, 1986, 2; C.T. Liège, 20 December 1989, *J.T.T.*, 1990, 360.

<sup>86</sup> Provisions regulating the individual and collective relations shall be referred to a "normative provisions".

<sup>87</sup> Provisions regulating the rights and obligations of the contracting parties shall be referred to as

signatory parties<sup>88</sup>.

This feature was expressed by G. Magrez-Song as follows: "*Collective labour law is thus a law by consent, undertaken by representative organisations, in respect of which a high degree of autonomy is enjoyed*"<sup>89</sup>.

On the other hand, it is a contract of a particular nature in that neither Article 1134 of the Civil Code,<sup>90</sup> which regulates the binding force of a contract, nor the principles of contractual liability are applicable to collective agreements: Article 4 of the 1968 Act excludes the typical contractual remedies and organises a specific system of liability in respect of the contracting parties to a collective agreement<sup>91</sup>.

## II.2 A collective agreement is a form of legislation

A collective agreement is a form of legislation<sup>92</sup> insofar as its normative provisions are legally binding on all the persons falling within its scope of application.

Any collective agreement falling within the scope of application of the 1968 Act, whether declared generally binding or not, or concluded within a joint body or not, is binding on third parties<sup>93</sup>.

In this regard, it must be observed that the normative provisions<sup>94</sup> of a collective agreement do not bind the contracting parties, but bind employers and employees who have not participated in negotiations (i.e. members of the contracting parties). In this respect, a collective agreement appears to be a form of legislation. The law of

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"obligatory provisions".

<sup>88</sup> A. Mazy, "Commentaires de la loi du 5 décembre 1968 sur les conventions collectives de travail et les commissions paritaires", *Rev. dr. trav.*, 114, V. Vannes, *op cit.*, 25

<sup>89</sup> See G. Magrez-Song, "Le rôle des CCT ou l'élaboration parallèle" in *Revue de l'ULB*, 1978, 101.

<sup>90</sup> This Article provides that a contract is binding *inter partes* only.

<sup>91</sup> Damages resulting from a breach of a collective agreement may only be recovered when the collective agreement specifically provides for it, which is seldom the case. See also W. Rauws, "De binding van de normatieve bepalingen" in *Actuele problemen van het Arbeidsrecht*, t. III, Antwerpen, Kluwer, 1990, 38 who holds that a collective agreement is "een overeenkomst met specifieke kenmerken die de wettelijke en beperkte autonomie van het sociaal recht aantoonst."

<sup>92</sup> If one recognises that trade unions and employers' organisations have the right to conclude collective agreements which constitute a form of legislation, it means that those organisations have a type of legislative power. However, nowhere is it stated in the Belgian Constitution that these organisations have a "quasi-legislative power"; for further details, see L. François, *op cit.*, 355. This author goes as far as questioning the constitutionality of the 1968 Act; see also B. Haubert, "La nature des conventions collectives et des commissions paritaires", *J.T.T.*, 1992, 85.

<sup>93</sup> M. Jamoulle, *Seize leçons sur le droit du travail*, Fac. Dr. Liège, ed. 1994, 36. V. Vannes, *op cit.*, 26

<sup>94</sup> See *infra*, section III.

contract might provide legal grounds for the enforceability of a collective agreement between employers and employees who are members of a contracting party, but it cannot explain how a collective agreement can be binding on employers and employees not affiliated to a contracting party, and to employers and employees who have not departed, by individual written agreement, from a collective agreement concluded within a joint body and not extended by Royal Decree<sup>95</sup>.

### **II.3 The hybrid character of collective agreements**

The collective agreement has a hybrid character. It has a peculiar status which cannot be explained only by civil or public law. P. Durand held that collective agreements have a “*dualistic nature*”<sup>96</sup>.

When a collective agreement is extended to non-parties, its nature changes: it becomes a regulation (i.e. a form of legislation), but it maintains, to a certain extent, its contractual nature. It is a contract as far as obligatory provisions are concerned, and a regulation with regard to normative provisions.

## **III CONTENT OF COLLECTIVE AGREEMENTS**

A collective agreement is composed of two parts: a normative part, imposing obligations on persons bound by the collective agreement, and an obligatory part determining the rights and obligations of contracting parties<sup>97</sup>.

The normative part is the most important: it establishes and regulates the rights and obligations of employers and employees bound by the collective agreement.

The normative part comprises individual normative clauses and collective normative clauses. The distinction between these two parts is not merely academic. These clauses have different legal effects: the former have a “higher compulsory force” than the latter and remain in force even after the agreement that created them expires, and until a new collective agreement replaces them.

Obligatory provisions relate only to contracting parties, i.e. employers’ organisations

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<sup>95</sup> On the binding force of collective agreements, see section VI *infra*.

<sup>96</sup> Durand, *Traité de droit du travail*, V. I, Paris, Dalloz, 132; G. Cox, “De juridische binding an afdwingbaarheid van obligatoire C.A.O. bepalingen”, in *Actuele problemen van het Arbeidsrecht*, t. III, Antwerpen, Kluwer, 134.

<sup>97</sup> W. Rauws, *op cit.*, 34 alleges that this division between normative and obligatory provisions finds its origin in Dutch literature.



and trade unions. They do not have any regulatory force and their binding force ceases at the expiration of the duration of the collective agreement which created them.

### **III.1 The normative provisions of collective agreements**

#### **III.1.1 Definitions**

The normative part of collective agreements comprises provisions which regulate the rights and obligations of persons bound by the collective agreement. R. Blanpain defines it as those norms which regulate labour relations between employers and employees<sup>98</sup>.

“Normative” means that these provisions are automatically compulsory. They are binding on employers and employees bound by the collective agreement, as if it were a form of legislation.

Normative provisions of collective agreements can be individual or collective.

Individual normative provisions regulate individual labour relations between employers and employees. They regulate matters such as: remuneration, working hours, job grading, social benefits, employment stability etc., and are incorporated into individual employment contracts.

Collective normative provisions regulate labour relations between employers and employees, at a collective level and generate neither obligations for contracting parties nor for the individual employer in relation to individual employees. “*They are almost ‘in-between rules’ (between individual normative and obligatory) regulating collective labour relations*”<sup>99</sup>. They usually regulate the general functioning of the union delegation, works council, conciliation procedures that must be followed in case of collective dispute, etc.

#### **III.1.2 Legal effect of the distinction between individual and collective normative provisions**

The distinction between individual and collective normative provisions is not merely

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<sup>98</sup> R. Blanpain and C. Engels, ‘Belgium’, in *International Encyclopaedia for labour law*, Kluwer, 242.

<sup>99</sup> R. Blanpain and C. Engels, *op cit.*, 243.

academic. These provisions have different legal effects.

### III.1.2.1 Individual normative provisions

These provisions have a “more binding effect” than collective normative provisions: they are incorporated in the employment contract and are binding on non-parties.

#### *III.1.2.1.1 Incorporation of individual normative provisions in employment contracts*

Article 23 of the 1968 Act provides that:

*“An individual employment contract implicitly modified by a collective agreement shall remain unchanged if the agreement ceases to be in force, unless there is a provision to the contrary in the agreement itself.”*

It follows from this provision that individual normative provisions:

- implicitly modify the provisions of a contract of employment which are contrary to the provisions of a collective agreement without an amendment to the letter of appointment being necessary. Those provisions are incorporated into the individual<sup>100</sup> employment contract as they are hierarchically superior to the provisions of an employment contract<sup>101</sup>;
- remain in force even after the collective agreement that generated them ceases to be in force, unless the collective agreement contains a stipulation to the contrary<sup>102</sup>, and
- once incorporated into the individual employment contract, they will only cease to be in force by virtue of a new agreement<sup>103</sup>.

#### *III.1.2.1.2 Binding force of individual normative provisions on non-parties*

Article 26 of the 1968 Act provides that:

*“The clauses of an agreement concluded in a joint body which deal with individual*

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<sup>100</sup> By virtue of Article 11 of the 1968 Act.

<sup>101</sup> See section V *infra* and Article 51 of the 1968 Act which sets out in hierarchical order a list of the legal sources regulating employment contracts.

<sup>102</sup> See Articles 22 and 13 of the 1968 Act.

<sup>103</sup> G. Magrez-Song, “Le rôle de la CCT dans l’élaboration parallèle”, in *A l’enseigne du droit social belge*, ed. U.L.B., 1978, 101. V. Vannes, *op cit.*, 31

*relations between employers and employees shall bind all employers and employees other than those referred to in section 19, who are covered by the joint body, insofar as they fall within the scope of the agreement, unless the individual employment contract contains a written clause to the contrary.*

*This provision shall apply as from the fifteenth day following the publication referred to in section 25, first paragraph."*

Article 26 extends the binding force of a collective agreement concluded within a joint body to non-parties.

Consequently, the individual normative provisions of a collective agreement, which has been concluded within a joint body and has not been extended,<sup>104</sup> also bind employers who are not affiliated to a signatory organisation, and therefore their employees, whether they are unionised or not, provided the employers fall within the scope of the joint body. However, the collective agreement has only a "supplementary binding effect" as the employer and his employees may depart from it by inserting a written clause to the contrary in the individual contract of employment<sup>105</sup>.

### III.1.2.2 Collective normative provisions

Collective normative provisions are not incorporated in individual employment contracts and cease to be binding upon the collective agreements' expiry.

These provisions are, however, binding on all persons who fall within the scope of the agreement.

## **III.2 The obligatory part of collective agreements**

The obligatory part of collective agreements determines the rights and obligations of signatory parties, i.e. employers' organisations and trade unions. It only binds those organisations which have taken part in the negotiation, regardless of whether the

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<sup>104</sup> On extension, see section VII *infra*.

<sup>105</sup> See Exposé des Motifs, Doc. Parl., Sén., session 1966-1967, 33 which justifies this solution on the basis that trade unions and employers organisations act for their entire sector when they conclude collective agreements within joint bodies.

It must however be noted that the question as to whether this written clause must be inserted before or after the coming into force of the collective agreement is controversial. The majority of the authors are however of the opinion that such a clause could be inserted prior to the coming into force of the collective agreement and expressed in a broad way; see S. Du Bled, "La hiérarchie des normes en droit du travail", *Orientations*, 1993, 269; P. Horion, "Syndicats, Conventions collectives de travail, organes

collective agreement has been extended by Royal Decree or not<sup>106</sup>. It regulates certain aspects such as the cancellation, renewal, re-negotiation, and interpretation of the collective agreement, etc.

Most commentators<sup>107</sup> are of the view that two obligations are implicitly contained in any collective agreement: that of social peace and that of the loyal execution of the agreement.

### **III.2.1 Social peace**

The social peace obligation obliges parties to refrain, during the collective agreement's period of validity, from formulating any additional claims concerning matters regulated by the collective agreement during its existence<sup>108</sup>. It can also be wider in that it may prohibit any additional claim during the duration of the agreement.

This obligation may be expressed tacitly or expressly.

Where the collective agreement does not expressly provide for social peace, this obligation is considered to be relative<sup>109</sup>, i.e. that it only relates to matters regulated by the collective agreement.

The social peace obligation is the transposition into labour law of the principles of civil law relating to the execution of contracts, i.e. the autonomy of will, the obligatory (binding) force of contracts and their execution in good faith: once it has been negotiated and concluded, a contract must be executed in accordance with the parties' agreement.

In general, social peace clauses form part of the obligatory part of the collective agreement. This means that they bind neither employers nor employees, whether

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paritaires", *Ann. Fac. Dr. Liège*, 1969, 132; L. François, *op cit.*, 332; W. Rauws, *op cit.*, 47.

<sup>106</sup> C.T. Anvers, 27 May 1988, *J.T.T.*, 1988, 357; see also G. Cox, *op cit.*, 117-134; M. Rigaux, "Omtrent de juridische afdwingbaarheid van obligatoire C.A.O. bepalingen", *R.W.*, 1985-86, 913-918.

<sup>107</sup> P. Van der Vorst, *op cit.*, 179; L. François, *op cit.*, 336; J. Piron and P. Denis, *Le droit des relations collectives du travail en Belgique*, Bruxelles, Larcier, 1970, 67; V. Vannes, *op cit.*, 29; G. Cox, *op cit.*, 122; *contra* M. Magrez, "Le statut des conventions collectives de travail", *J.T.*, 1969, 202.

<sup>108</sup> J. Piron, "Qu'est-ce qu'une grève irrégulière et quels en sont ses effets?", *J.T.T.*, 1979, 74; M. Magrez, note sous T.T. Namur, 11 February 1976, *R.C.J.B.*, 1977, 587; G. Cox, *op cit.*, 124.

<sup>109</sup> J. Piron, *op cit.*, 74.

unionised or not, but bind the parties only<sup>110</sup>. However, social peace clauses could also be considered as forming part of the normative provisions when their wording is such that their scope of application is broader than that of signatory parties<sup>111</sup>.

The wording of the social peace clause therefore determines which persons are bound by it.

### **III.2.2 Obligation of loyal execution**

In terms of the obligation of loyal execution, signatory parties to a collective agreement are obliged to inform their members of the content of collective agreements and exert influence on their members to live up to the normative provisions of the agreement<sup>112</sup>. This obligation is relative (i.e. not absolute), since signatory parties are not responsible for the final conduct of their members<sup>113</sup>.

Furthermore, when a signatory party violates the social peace obligation, the right of the other party to be indemnified is limited. Article 4 of the 1968 Act specifically provides that in the case of non-performance of contractual obligations, damages can only be recovered from an organisation when the collective agreement specifically provides for such a possibility. This is however never done in practice.

## **IV CONDITIONS OF VALIDITY OF COLLECTIVE AGREEMENTS**

### **IV.1 Substantial formalities**

Articles 13, 14 and 16 of the 1968 Act set out a list of conditions which have to be met, failing which the collective agreement will be declared null and void<sup>114</sup>.

Any collective agreement must:

- be made in writing. No specific formalities are required and an exchange of

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<sup>110</sup> As trade unions lack legal personality, they cannot be sued. In other words, although the obligatory provisions are binding upon the parties to the agreement, they are not enforceable in court. See T.Lagneaux and J. Vandrooghenbroek, "note sous C.T. Liege 2 August 1984", *R.D.S.* 1984, 588; C.T. Bruxelles, 1 December 1989, *J.T.T.*, 1990, 80 where it was held that the clauses of social peace do not bind employees considered individually; T.T. Charleroi 12 June 1989, *C.D.S.*, 1989, 349.

<sup>111</sup> See V. Vannes, *op cit.*, 30; R. Roels, "La grève et ses conséquences sur la relation contractuelle", *J.T.T.* 1977, 232; T.T. Charleroi 12 June 1989, *C.D.S.*, 1989, 349; M. Demanet, "Réflexions sur le droit de grève dans le secteur privé", *J.T.T.*, 1990, 69.

<sup>112</sup> *Contra*, L. François, *op cit.*, 336.

<sup>113</sup> P. Denis, *Droit du travail*, Larcier, ed. 1992, 310.

<sup>114</sup> C.T. Mons, 18 June 1990, *J.T.T.*, 1990, 492.

correspondence is sufficient<sup>115</sup>;

- be drafted in French and in Flemish, with the exception that when the collective agreement refers exclusively to one linguistic region<sup>116</sup>, it must only be drafted in the language of the region in which the collective agreement will be applicable, and
- be signed by the persons concluding the agreement, on their or their organisation's behalf<sup>117</sup>.

Furthermore, the collective agreement must contain the following compulsory information aimed at identifying the contracting parties:

- the name of the organisations concluding the agreement;
- the name of the joint body, if the agreement is concluded in such a body;
- the names of persons concluding the agreement, and if the agreement is concluded outside a joint body, the capacity in which such persons act, and, where applicable, their function within the organisation;
- the persons, branch of activity or undertaking and the territorial scope to which the agreement applies, unless the collective agreement binds all employers and employees falling within the scope of the joint body where such collective agreement has been concluded;
- the period of validity, where the collective agreement has been concluded for a definite period, and the notice period to be given where the collective agreement has been concluded for an indefinite period;

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<sup>115</sup> P. Van der Vorst, *op cit.*, 189.

<sup>116</sup> Belgium is divided into three linguistic regions - French, Flemish and German-. Contrary to South Africa, where the 11 national languages are spoken throughout the entire country, in Belgium each language corresponds to one particular region.

<sup>117</sup> Article 14 of the 1968 Act provides that these signatures may be replaced by a mention that the chairperson and the secretary of the joint body have signed the minutes of the meeting approved by the members; the signature of a member of each organisation represented on the joint body in which the agreement was concluded; or the signature of the person who brought about conciliation between the parties in the case of a labour dispute and testifies that the parties have indicated their agreement on the written terms of conciliation.

- the date of coming into force in cases where the collective agreement does not come into force on the date of its conclusion;
- the date of conclusion, and
- the signature of the persons having signatory capacity<sup>118</sup>.

## IV.2 Deposition of collective agreements

Article 18 of the 1968 Act provides that:

*"The agreement shall also be deposited with the Ministry of Employment and Labour. Deposition shall not be accepted if the agreement fails to fulfil the conditions laid down in Article 13, 14 and 16.*

*The following documents shall be deposited at the Ministry of Employment and Labour:*

- 1. the accession of an organisation or an employer to the agreement;*
- 2. the notice of intention to terminate an agreement of unspecified duration or an agreement of specified duration containing a renewal clause;*

*Any person may obtain a copy of the agreement deposited upon payment of a fee, the amount of which shall be fixed by the Crown."*

The deposition of a collective agreement shall be refused when the agreement does not contain the provisions prescribed by Articles 13, 14 and 16 of the 1968 Act<sup>119</sup>.

Deposition is required for all collective agreements within the meaning of the 1968 Act, i.e. regardless of whether they have been concluded in or outside a joint body<sup>120</sup>.

The deposition of a collective agreement has been described as a "*substantial procedure, without which the legal existence of a collective agreement would be*

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<sup>118</sup> Article 16 of the 1968 Act.

<sup>119</sup> It must be noted that the Department of Labour may not question the legality of the content of a collective agreement; when the requirements set down by Articles 13, 14 and 16 of the 1968 Act have been fulfilled, the Ministry of Labour must register the collective agreement - See A. Mazy, "Commentaires de la loi du 5 décembre 1968 sur les conventions collectives de travail et les commissions paritaires", *R.T.*, 1970, 68.

<sup>120</sup> J. Piron and P. Denis, "Le droit des relations collectives de travail en Belgique", *Larcier* 1970, 74; T.T. Charleroi, 18 February 1980, *J.T.T.* 1981, 57; C.T. Mons, 19 November 1981, *J.T.T.*, 1982, 204; C.T. Liege, 17 February 1981, *J.L.*, 1981, 319; T.T. Arlon, 28 February 1984, *J.T.T.*, 1984, 402.

paralysed"<sup>121</sup>.

The status of collective agreements, depending on their deposition, can be described as follows:

#### **IV.2.1 Collective agreements deposited with the Ministry of Labour**

Although collective agreements deposited with the Ministry of Labour are referred to by the 1968 Act as "agreements" and are the result of negotiations which took place at sectoral or plant level, they are not "contracts" within the meaning of the Civil code.

By virtue of Article 19 of the 1968 Act, these collective agreements have normative effects on persons represented both within and outside of the joint body, and, by virtue of Article 26, have supplementary normative effects on persons not represented and who therefore neither consented to nor participated in their establishment<sup>122</sup>.

#### **IV.2.2 Collective agreements not deposited with the Ministry of Labour**

Collective agreements which have not been deposited with the Ministry of Labour are not collective agreements in the sense of the 1968 Act. Consequently, they do not have the normative force provided by Article 19 and have no binding force whatsoever on non-parties.

However, they retain a legal existence vis-à-vis the signatory parties.

In a decision made on 30 May 1988, the *Cour de Cassation* held that a collective agreement is legally binding on those who signed it, despite not having been deposited<sup>123</sup>.

Consequently, signatory parties to a collective agreement could not claim not to be bound by a collective agreement they have concluded because it is not a collective

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<sup>121</sup> Exposé des motifs, Doc. Parl., Sén., session 1966-1967, 27; C. Wantiez, note sous Cass. 30 May 1988, *J.T.T.*, 1988, 353.

<sup>122</sup> See *infra*, section VI.

<sup>123</sup> Cass. 30 May 1988, *J.T.T.*, 1988, 352; see also M. Colens, *Le contrat d'emploi*, Bruxelles, Larcier, 1980, 78; V. Vannes, *op cit.*, 50; C.T. Mons, 19 November 1981, *J.T.T.*, 1982, 204; C.T. Liège, 17 February 1981, *J.L.*, 1981, 319; C.T. Bruxelles, 3 April 1987, *C.D.S.*, 1988, 40; T.T. Charleroi, 6 January 1989, *J.T.T.*, 1989, 271; C.T. Mons, 18 June 1990, *J.T.T.*, 1990, 472.



agreement in the sense of the 1968 Act. The agreement exists between those parties by application of common law rules, and the provisions negotiated are enforceable.

### **IV.3 Publication in the Moniteur Belge**

A collective agreement concluded in a joint body must be published by means of a notice inserted in the *Moniteur Belge*. Publication must take place regardless of whether the collective agreement has been extended to non-parties or not.

Article 25 of the 1968 Act provides that:

*"The object, date, duration, scope and place of deposition of an agreement concluded in a joint body must be published by means of a notice inserted in the Moniteur Belge.*

*Notice of intention to terminate an agreement of unspecified or specified duration, containing a renewal clause, must also be published by means of a notice inserted in the Moniteur Belge."*

This act of publication is necessary, in view of the supplementary binding effect of individual normative provisions contained in a collective agreement on all employers and employees who are not already bound by the collective agreement by virtue of their membership to a signatory organisation, 15 days after the publication in the *Moniteur Belge*<sup>124</sup>.

In addition, when the Crown extends the binding force of collective agreements, a further notice must be published in the *Moniteur Belge*<sup>125</sup>.

### **IV.4 Endorsement by joint committees**

When the Royal Decree adopted on recommendation from the joint committee requires this, collective agreements which have been concluded within joint subcommittees must be endorsed by the joint committee.

Article 8 of the 1968 Act provides that:

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<sup>124</sup> See *supra* section III; R. Blanpain and C. Engels, *op cit.*, 237; P. Van der Vorst, *op cit.*, 197.

<sup>125</sup> Article 30 of the 1968 Act.

*"If endorsement is required, the joint committee shall make its decision within the month following the date on which the agreement is transmitted to it, failing which the agreement shall be deemed to be endorsed."*

Article 8 of the 1968 Act consequently provides joint committees with a right of veto over decisions of joint sub-committees.

## **V NULLITY OF THE NORMS CONTRARY TO HIERARCHICALLY SUPERIOR NORMS**

To ensure collective bargaining efficiency, the sources of labour law have been strictly organised into a hierarchy by the legislator.

As a result, although social partners have total freedom to conclude collective agreements, and to define their content, employers' organisations and trade unions are bound by the hierarchy of sources of labour law<sup>126</sup>.

### **V.1 Compliance with peremptory provisions superior to collective agreements**

Article 9 of the 1968 Act provides that:

*"The provisions of an agreement which*

- 1. are contrary to the peremptory provisions of Acts of Parliament and other statutory instruments, treaties and international agreements which have binding force in Belgium; (or which)*
- 2. provide for the settlement of individual disputes by arbitrators , shall be declared null and void."*

Collective agreements may consequently not contain provisions which would be contrary to international or national legislation.

#### **V.1.1 International provisions**

Any provisions of a collective agreement which are contrary to European or international provisions which have binding force in Belgium, are null and void<sup>127</sup>.

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<sup>126</sup> See S. Du Bled, "La hiérarchie des normes en droit du travail", *Orientations*, 1993, 265-272; V. Vannes, *op cit.*, 81; W. Van Eeckhoutte, *Compendium Social 1997-98*, t. I, Antwerpen, Kluwer, 1997, 43.

<sup>127</sup> Cass. 27 May 1971, *R.W.*, 1971-1972, 431.

The *Cour de Cassation* held that a collective agreement which permits air stewards to work after the age of legal retirement, and that does not grant the same advantage to air hostesses, is contrary to *the principles of equality of treatment as laid down in the European Directive of 9 February 1976*, in Article 6 of the Belgian Constitution<sup>128</sup> and in Article 116 of the 1978 Act for economic reorientation<sup>129</sup>. These provisions are superior to those of a collective agreement concluded within or outside of a joint body<sup>130</sup>.

In a decision of 7 February 1991, the European Court of Justice held that Article 119 of the EEC Treaty must be interpreted as preventing a collective agreement from indirectly discriminating between men and women. According to the Court, when a collective agreement is discriminatory, the national judge must disregard it without having to demand or expect the deletion of the discriminating provision through collective bargaining or any other means<sup>131</sup>.

### ***V.1.2 National provisions***

A collective agreement must also comply with peremptory provisions of national law<sup>132</sup>. As it is not possible to enumerate an exhaustive list of peremptory provisions of national law, the writer proposes to analyse three topics which have been considered by Belgian courts: equality of treatment between men and women, the regulation of notice periods for the termination of employment and the competence of labour courts.

#### ***V.1.2.1                      Equality of treatment between men and women***

On 27 January 1994, the *Cour de Cassation* held that the nullity of a provision of a collective agreement only affects this provision, and not the whole agreement. Moreover, it does not affect the rights of employees who are not prejudiced by the provisions<sup>133</sup>.

The facts of the case were as follows: a collective agreement granted a bonus to male employees who had reached the age of retirement. Female employees

<sup>128</sup> Article 6 of the Constitution lays down the principles of equality of treatment of Belgian people.

<sup>129</sup> Article 116 of the 1978 Act describes the scope of application of Article 6 of the Constitution in labour-related matters.

<sup>130</sup> Cass. 27 January 1994, *C.D.S.*, 1994, 75; see also C.T. Bruxelles, 12 November 1984, *C.D.S.*, 1984, 531.

<sup>131</sup> C.J.C.E. 7 February 1991, *J.T.T.*, 1991, 346.

<sup>132</sup> Cass., 12 October 1992, *J.T.T.*, 1992, 478.

<sup>133</sup> Cass. 27 January 1994, *C.D.S.*, 1994, 75.

claimed indirect discrimination, and that this provision was null and void by virtue of Article 130 of 1978 Act for Economic Reorientation<sup>134</sup>, in that they could not benefit from such a bonus.

The *Cour de Cassation* ruled that the consequence of the nullity of a provision contrary to Article 130 of the 1978 Act which is aimed at prohibiting collective agreements from discriminating on the grounds of sex, meant that those employees had to be offered the same treatment. Therefore, the bonus had to be granted to both female and male employees upon reaching the age of retirement.

#### V.1.2.2 Prohibition of collective agreements regulating notice periods for the termination of employment

Article 82 of the 1978 Act relating to employment contracts provides that for senior employees:

*“the duration of the notice period to be respected by employers and workers is determined either by agreements concluded not earlier than the date on which notice of termination is given, or by the judge<sup>135</sup>.”*

In a decision of 16 March 1987<sup>136</sup>, the *Cour de Cassation* held that a collective agreement cannot regulate notice periods. The right to a notice period has a personal character: its duration is determined by individual bargaining between the employer and employee. In the absence of an agreement, the judge has the exclusive power to determine the duration of the notice period. It is consequently not possible to determine the duration of notice periods through collective bargaining<sup>137</sup>.

In a decision of 17 October 1990, the *Cour de Cassation* confirmed its previous jurisprudence: the right to determine the notice period cannot be limited by a

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<sup>134</sup> Article 130 of the 1978 Act provides that any provisions which conflict with the principle of equality of treatment are null and void.

<sup>135</sup> In terms of Belgian law, the dismissal of white-collar workers does not have to be motivated. The only obligation resting on an employer is to terminate the employment contract on notice. The 1978 Act on employment contracts provides that the notice period cannot be less than three months per five years of service, or part thereof. An employee with six years of service is therefore entitled to six months' notice of termination.

<sup>136</sup> Cass. 16 March 1987, *C.D.S.*, 1987, 188.

<sup>137</sup> Cass. 9 May 1994, *J.T.T.*, 1995, 8.

collective agreement <sup>138</sup>.

### V.1.2.3. Competence of labour courts

A collective agreement cannot depart from the provisions of public order contained in the Judicial Code regulating the courts' competence. As these provisions are related to public order, the judge has to raise then *mero motu*<sup>139</sup>.

A collective agreement, even though declared generally binding, may consequently not extend, reduce or modify the courts' jurisdiction.

## **V.2 Compliance with superior conventional provisions**

Collective bargaining takes place at various levels. In order to prevent conflicts between collective agreements concluded at different levels, but covering the same industry, the legislator has established a hierarchy of collective agreements<sup>140</sup>.

Article 51 establishes a hierarchy between collective agreements concluded within the National Labour Council, a joint committee, a joint subcommittee and outside a joint body, as follows:

*"The sources of obligations arising out of the employment relationship between employers and employees shall be as follows, in descending order of precedence:*

1. *the law in its peremptory provisions;*
2. *collective agreements declared to be generally binding, in the following order:*
  - a. *agreements concluded in the National Labour Council;*
  - b. *agreements concluded in a joint committee*
  - c. *agreements concluded in a joint subcommittee;*
3. *collective agreements which have not been declared to be generally binding, where the employer is a signatory thereof or is affiliated to an organisation signatory to such an agreement, in the following order:*
  - a. *agreements concluded in the National Labour Council;*
  - b. *agreements concluded in a joint committee;*
  - c. *agreements concluded in a joint subcommittee;*
  - d. *agreements concluded outside a joint body;*
4. *an individual agreement in writing;*

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<sup>138</sup> Cass. 17 October 1990, *J.T.T.*, 1992, 177.

<sup>139</sup> Cass. 14 April 1955, *J.T.*, 1955, 494.

5. *collective agreements concluded in a joint body, but not declared generally binding, where the employer, although not a signatory thereof or not affiliated to an organisation signatory thereto, falls within the jurisdiction of the joint body in which the agreement was concluded;*
6. *workrules;*
7. *the supplementary provisions of the law;*
8. *a verbal individual agreement;*
9. *custom."*

By virtue of Article 51, certain provisions of a collective agreement may therefore be declared null and void on the basis that they are contrary to provisions contained in a hierarchically superior collective agreement.

Consequently, the outcome of collective bargaining which has taken place in a body which has the largest sphere of influence prevails over the others.

To enforce this hierarchy, Article 10 of the 1968 Act provides that the provisions of a collective agreement which conflict with a peremptory provision of another collective agreement concluded within a hierarchically superior body are null and void<sup>141</sup>.

According to this Article:

*"The following shall be null and void:*

1. *the provisions of an agreement concluded in a joint committee which are contrary to an agreement concluded in the National Labour Council;*
2. *the provisions of an agreement concluded in a joint subcommittee which are contrary to an agreement concluded in the National Labour Council or in the joint committee of which it is a sub-committee;*
3. *the provisions of an agreement concluded outside a joint body which are contrary to an agreement concluded in the National Labour Council or a joint committee or joint subcommittee which is competent for the undertaking concerned."*

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<sup>140</sup> Exposé des motifs, Doc. Parl., Sénat, session 1966-1967, n° 148, 21 and 22.

<sup>141</sup> See C.T. Liège, 24 July 1990, *J.T.T.*, 1991, 261 where it was held that a collective agreement concluded at plant level must be declared null and void when it provides for higher wages than those provided by a collective agreement concluded at sectoral level, and are contrary to the legislation regulating maximum salaries. See also O. De Leye, "De betekenis van artikel 10 van de C.A.O.-wet",

A provision of a collective agreement is null and void if it conflicts with a collective agreement which is concluded at a higher hierarchical levels, regardless of whether the conflicting provision is less or more favourable. Therefore, a collective agreement concluded in a joint committee and providing actual wages may not be departed from by a collective agreement concluded at plant level, even if the latter provides higher wages<sup>142</sup>.

### **V.3 Nullity of provisions contained in an employment contract**

Article 11 of the 1968 Act provides that:

*"The clauses of an individual contract of employment and the provisions of workrules which are contrary to those of a collective agreement which is binding on the employers and employees, are null and void.*

Collective agreements concluded at any level prevail over the individual contract of employment, even if their provisions are less favourable than those included in the contract of employment<sup>143</sup>. This provision is, however, not applicable to a settlement agreement concluded after the termination of an employment contract<sup>144</sup>.

## **VI PERSONS BOUND BY COLLECTIVE AGREEMENTS**

The persons bound by a collective agreement vary according to whether the employer falls within the scope of the joint body which has concluded the agreement, whether the collective agreement has been declared generally binding by Royal Decree, and whether the employer belongs to one of the employers' organisations that has concluded the collective agreement.

The forum of conclusion -whether the collective agreement was concluded in a joint body or not - must also be taken into consideration.

In this section, only the "normal" binding force of collective agreements will be analysed; the process of extension will be dealt with in section VII *infra*.

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*J.T.T.*, 1988, 153-156.

<sup>142</sup> Cass. 3 April 1987, *Pas.*, 1987, I, 846; C.T. Liege, 11 October 1984, *J.T.T.*, 1984, 314; C.T. Liege, 24 July 1990, *J.T.T.*, 1991, 261.

<sup>143</sup> C.T. Anvers, 4 July 1985, *J.T.T.*, 1986, 172; C.T. Liege, 11 October 1984, *J.T.T.*, 1984, 314.

<sup>144</sup> Cass. 12 September 1989, *J.T.T.*, 1992, 128.

## **VI.1 Collective agreements concluded within a joint body**

Collective agreements concluded within a joint body may either have an imperative binding force or a supplementary binding force on employers who fall within the scope of the body which concluded the collective agreement.

### **VI.1.1 Imperative effect of collective agreements**

Articles 19 and 26 of the 1968 Act regulate the binding force of collective agreements.

Article 19 of the 1968 Act provides that:

*"The agreement shall be binding on-*

- 1. those organisations which concluded it, and the employers who are members of such organisations which concluded the agreement, as from the date of its coming into force;*
- 2. those organisations and employers subsequently acceding to the agreement, and the employers' members of such organisations, as from the date of their accession;*
- 3. employers who become affiliated to an organisation bound by the agreement, as from the date of their affiliation;*
- 4. all the workers in the service of an employer bound by the agreement."*

The employers and employees referred to in Article 19 are bound by collective agreements concluded in joint bodies. Any clauses contained in an employment contract which are contrary to the provisions of such collective agreements are null and void by virtue of Article 11.

It is important to note that all employees in the service of an employer bound by a collective agreement, are bound by that collective agreement <sup>145</sup>. In a decision of 1 February 1993, the *Cour de Cassation* held that the dissatisfaction of some employees with the content of a collective agreement is irrelevant to the binding force of this collective agreement <sup>146</sup>.

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<sup>145</sup> See W. Rauws, *op cit.*, 47: "de wetgever heeft die bijkomende aanvullende binding aanvaard omdat al de representatieve organisaties vertegenwoordigd in het paritair orgaan de belangen behartigen van de ganse bedrijfstk of van het ganse bedrijfsleven".

<sup>146</sup> Cass. 1 February 1993, *J.T.T.*, 1993, 327.



Apart from the supplementary effect of its individual normative provisions<sup>147</sup>, a collective agreement only binds the employers represented within the joint body. It is not binding on employers who are not represented in the joint body.

Article 19 of the 1968 Act has a dual purpose:

- firstly, it determines those employers and employees bound by a collective agreement concluded in a joint body, even though they may not have participated in its negotiation or conclusion. The binding effect of these collective agreements can be explained either by the fact that employers' organisations represent their members or that they voluntarily acceded to the collective agreement;
- secondly, it gives the collective agreement its normative character.

By virtue of Article 23 of the 1968 Act, the individual normative provisions are incorporated in the individual contract of employment. They apply automatically to current contracts<sup>148</sup>. Employers bound by Article 19 may not deviate from the application of the individual normative provisions of an agreement concluded in a joint body.

### **VI.1.2 Supplementary binding force of collective agreements**

The normative force given to an agreement concluded in a joint body and not declared generally binding by Royal Decree is one of the main features of the Belgian legal system.

Article 26 of the 1968 Act provides that:

*"The clauses of an agreement concluded in a joint body which deal with individual relations between employers and employees shall bind all employers and employees other than those referred to in Article 19, who are covered by the joint body, in so far as they fall within the scope of the agreement, unless the individual contract of employment contains a written clause to the contrary. This provision shall apply as from the fifteenth day following the publication referred to in Article 25, first*

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<sup>147</sup> See section III *supra* and Article 26 of the 1968 Act.

<sup>148</sup> See A. Mazy, "Commentaires de la loi du 5 décembre 1968", *Rev. Trav.*, 1969, 24; V. Vannes, *op*

paragraph.”

Employers falling within the scope of Article 26 are those who are not members of a signatory organisation at the time of the conclusion of the collective agreement, who have not acceded to the agreement and who are not have not become affiliated to an organisation bound by the agreement subsequently to its conclusion. The employers falling within the scope of the joint body, whose activities fall within the scope of the agreement, and all the employees who are in their service are consequently bound by Article 26<sup>149</sup>.

The supplementary normative force of a collective agreement results from the fact that a collective agreement regulates the rules applicable in a particular sector of the economy. Professional organisations which conclude a collective agreement in a joint body act for the whole branch of activity covered by the scope of the joint body<sup>150</sup>.

Therefore, the individual normative provisions of a collective agreement not declared generally binding and concluded in a joint body also bind employers who are not members of a signatory organisation and employees in their service, within 15 days, following the publication in the *Moniteur Belge*.

This extension of the binding force of the individual normative provisions is subject to one proviso: the employers may depart from these provisions by inserting a clause to this effect in the contract of employment. It must be stressed that this clause may only be inserted in the employment contract *a posteriori*, i.e. after the conclusion of the agreement that the parties wish to exclude. In other words, the parties could not insert a general clause in the individual employment contract whereby they exclude the application of any future collective agreement concluded within a joint body and which has not been extended by Royal Decree<sup>151</sup>.

## **VI.2 Collective agreements concluded outside a joint body**

In order to determine the persons bound by a collective agreement concluded at

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*cit.*, 68.

<sup>149</sup> C.T. Mons, 3 March 1995, *J.T.T.*, 1996, 377.

<sup>150</sup> See W. Rauws, *op cit.*, 38: “representatieve organisaties in een paritair orgaan traditioneel een bedrijfsreglement wensten op te stellen voor de ganse bedrijfstak.”

<sup>151</sup> See S. Du Bled, *op cit.*, 269.

plant level, a distinction must be drawn between those agreements deposited with the Ministry of Labour and those which are not.

### **VI.2.1 Collective agreements deposited**

Collective agreements deposited with the Ministry of Labour constitute collective agreements within the meaning of the 1968 Act. They have a normative force: they bind all employees employed by the signatory employer, whether they are unionised or not and whether they belong to the signatory trade union or not.

It must be noted that in respect of collective agreements concluded outside a joint body, the 1968 Act provides no guidance regarding as to who the parties must be.

Consequently, even when two or more trade unions are represented within an undertaking, an employer may conclude a collective agreement with one trade union only (even if it is a minority union) that will be binding not only on non-unionised workers, but also on employees belonging to another trade union<sup>152</sup>.

The *Conseil d'Etat*<sup>153</sup> has held that there is no Act of Parliament which prescribes that a collective agreement concluded outside a joint body can only be concluded with the consent of all the represented organisations, or only with the consent of the majority organisation<sup>154</sup>. Any organisation empowered to conclude collective agreements is, within the meaning of the 1968 Act, deemed to be representative of employees, and may therefore conclude a collective agreement which will bind all employees of the undertaking, regardless of its representivity<sup>155</sup>.

Those trade unions represented in the enterprise, but which did not take part in the

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<sup>152</sup> C.T. Bruxelles, 20 March 1987, *J.T.T.*, 1987, 238.

<sup>153</sup> The *Conseil d'Etat*, or Council of State, can be described as the Supreme Administrative Court. It was created by an Act of Parliament in 1946 and constitutes a body which does not belong to the judiciary and that gives final and conclusive judgements.

As an advisory and jurisdictional institution of the executive authority, but situated at the juncture of the three powers, the Council of State owes its existence essentially to the wish of the legislator to offer all natural and legal persons the possibility of an effective appeal against irregular administrative acts that might have damaged their interests, in as far as no other judicial body is competent.

As a result, the most important task of the Council of State is related to its power to annul administrative acts that are contrary to the legal rules in force.

However, protection against arbitrary acts of public administration is not the only task of the Council. It is also an advisory body in legislative and regulatory matters.

<sup>154</sup> C.E. 8 January 1986, *C.D.S.*, 1986, 5.

<sup>155</sup> Nothing precludes the parties, however, to specifically exclude certain categories of employees from the scope of application of the agreement.

conclusion of the collective agreement can therefore not claim that it has not been concluded in the interests of their members, nor that the collective agreement should be negotiated and concluded by all organisations represented in the enterprise.

Thus, the validity of a collective agreement concluded outside a joint body is not affected in circumstances where it has not been signed by all trade unions represented in the enterprise. The agreement does not have to represent the interests of all different categories of unionised workers.

### **VI.2.2 Collective agreements not deposited**

The deposition of a collective agreement is a substantive condition that confers its legal existence.

Consequently, a collective agreement not deposited is not a collective agreement within the meaning of the 1968 Act; it does not have the normative force provided by Article 19 of the Act, i.e. it does not bind non-parties<sup>156</sup>.

In a decision of 30 May 1988, the *Cour de Cassation* held that the mere fact that a collective agreement has not been deposited does not mean that the parties to the agreement are not bound by it<sup>157</sup>.

The binding force of collective agreements which have not been deposited is regulated by the rules of civil law<sup>158</sup>, and a distinction must then be drawn between signatory parties, unionised employees, non-unionised employees, and non-signatory organisations.

#### **VI.2.2.1 The signatory parties**

In a decision of 30 May 1988, the *Cour de Cassation* held that a collective agreement that has not been deposited retains its legal existence in respect of those who signed it. The signatory employer and trade unions could not, for this reason, refuse to comply with an obligation contained in such a collective agreement.

The *Cour du Travail* held that the absence of deposition does not amount to the

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<sup>156</sup> C.T. Liège, 11 October, 1984, *J.T.T.*, 1985, 314; T.T. Arlon, 28 December 1984, *J.T.T.*, 1985, 402.

<sup>157</sup> Cass. 30 May 1988 and obs. Wantiez, *J.T.T.*, 1988, 352; C.T. Mons, 19 November 1981, *J.T.T.*, 1982, 204; J.F. Gérard, "Les effets de l'absence de dépôt d'une convention collective de travail et la place du droit commun des obligations", *J.T.T.*, 1990, 169.

non-execution of a legal obligation. Therefore, the employer could not allege that, since the agreement had not been deposited, it was entitled to breach the obligations contained in the agreement concluded<sup>159</sup>.

Since trade unions are also bound by collective agreements they have concluded but which have not been deposited, they would be obliged to comply with a social peace clause contained in such agreements<sup>160</sup>.

#### VI.2.2.2. Employees affiliated to the signatory trade union

Those employees who are members of the trade union which concluded the agreement are bound by the provisions of the collective agreement. Although this situation has not been regulated by the 1968 Act, this conclusion is inferred from the law of contract: the agreement binds the employees who are members of the trade union which concluded it, by means of the general mandate given to the union delegation to bargain collectively<sup>161</sup>.

The members of the signatory trade union cannot avoid the binding force of the agreement on them on the basis that, for example, they had not given a special mandate to conclude a collective agreement, to the trade union's officials<sup>162</sup>.

It should be noted that a collective agreement which has not been deposited may restrict the contractual rights of a worker, provided that the agreement does not contradict the rights hierarchically superior to those provided by the collective agreement<sup>163</sup>.

#### VI.2.2.3. Non-signatory organisations and non-unionised workers

Non-unionised employees are not bound by a collective agreement which has not been deposited with the Department of Labour. However, they could rely on the agreement in support of a claim that the benefits should be extended to them, on the basis that the employer unilaterally bound himself to offer the same benefits to his

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<sup>158</sup> Horion, "Syndicats, conventions collectives, organes paritaires", *Annales Fac. Dr.*, 1969, n° 70

<sup>159</sup> C.T. Bruxelles, 20 March 1987, *J.T.T.*, 1987, 238.

<sup>160</sup> See C. Wantiez, note sous Cass. 30 May 1988, *J.T.T.*, 1988, 355.

<sup>161</sup> C.T. Liege, 11 October 1984, *J.T.T.*, 1985, 314; T.T. Arlon, 28 December 1985, *J.T.T.*, 1986, 402

<sup>162</sup> C.T. Mons 19 November 1981, *J.T.T.*, 1982, 204; T.T. Charleroi, 18 February 1980, *J.T.T.*, 1980, 157; C.T. Bruxelles, 6 June 1979, *J.T.T.*, 1980, 80; it should be borne in mind that, at plant level, collective agreements are negotiated by the union delegation, but concluded by the trade union's officials - see *supra*.

<sup>163</sup> C.T. Bruxelles, 7 November 1987, *J.J.T.B.*, 1988, 1190; C.T. Anvers, 4 July 1985, *J.T.T.*, 1986,

entire workforce, i.e. regardless of their affiliation to a trade union<sup>164</sup>.

## **VII EXTENSION TO NON-PARTIES**

### **VII.1 Binding force conferred by Royal Decree**

Only collective agreements which have been concluded in joint bodies may be declared generally binding by Royal Decree. Once a collective agreement has been extended, the provisions of the agreement become binding without any possibility of deviation on all employers and the employees in their service, provided they fall within the territorial and professional scope of the agreement<sup>165</sup>.

Two consequences flow from the extension to non-parties:

- collective agreements declared generally binding will bind all employers and workers falling within the jurisdiction of the joint body, insofar as they fall within the scope stipulated in the agreement<sup>166</sup>, and
- if an employer does not comply with the normative provisions of a collective agreement, he commits a criminal offence.

Articles 56 to 60 of the 1968 Act provide that an employer or his representative or agent found guilty of violating an agreement declared to be generally binding, or any person obstructing inspections under this Act are liable for a term of imprisonment or a fine, or both.

In respect of the employers who are members of a signatory organisation or who have themselves concluded or acceded to the agreement, and their employees, the only consequence resulting from the extension by Royal Decree is that the infringement of normative provisions constitute a criminal offence subject to penal sanctions.

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172; T.T. Bruxelles, 1 September 1986, *J.J.T.B.*, 1987, 29.

<sup>164</sup> C.T. Bruxelles, 9 November 1977, *FEB*, 1978, 2322; C.T. Bruxelles, 3 April 1987, *C.D.S.*, 1988, 40.

<sup>165</sup> See T.T. Bruxelles, 13 June 1989, *C.D.S.*, 1991, 34 where it was held that where the employer is not a party to a collective agreement, nor affiliated to a signatory organisation, and where the collective agreements has not been declared generally binding, obligatory provisions do not bind that employer.

<sup>166</sup> Article 31 of the 1968 Act.

In respect of employers who are not members of a signatory organisation and who have not concluded or acceded to the agreement, and their employees, the extension of a collective agreement has various consequences:

- individual normative provisions, which had only a supplementary binding effect, become compulsory;
- collective normative provisions, which were not applicable, become applicable and compulsory, and
- non-compliance with these provisions constitutes a criminal offence<sup>167</sup>.

It should be stressed that collective agreements, whether declared generally legally binding or not, "belong" to the contracting parties. This means that the parties retain the right to terminate the agreement, even if it has been declared generally binding. In addition, when the Crown extends the binding force of a collective agreement, it may not modify its content.

## **VII.2 Collective agreements and clauses susceptible of extension**

Only collective agreements concluded in a joint body may be declared generally binding by Royal Decree. This is because these agreements are presumed to be concluded by representatives of the entire branch of activity<sup>168</sup>.

Furthermore, only the normative provisions of the agreement, whether individual or collective, may be declared generally binding by Royal Decree.

Since the obligatory provisions of collective agreements bind only the contracting parties, they cannot be extended by Royal Decree.

## **VII.3 Procedures**

A collective agreement may be extended to non-parties only upon request, either by the joint body within which the agreement has been concluded, or by one of the employers' organisations or trade unions that is a member of the joint body<sup>169</sup>.

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<sup>167</sup> This last consequence only applies to employers, their representatives and their agents, i.e. not to employees.

<sup>168</sup> See *supra*.

<sup>169</sup> Article 28 of the 1968 Act; see also Cass. 11 April 1951, *Pas.*, 1951, I, 692 where it was held that

The request can be made at the time of the conclusion of the collective agreement or afterwards.

The Crown is free to grant or to refuse the extension of the agreement. If the extension is refused, the Crown must give the reasons for its refusal to the joint body<sup>170</sup>. Such a refusal could occur when the content of the collective agreement is contrary to "imperative"<sup>171</sup> statutory provisions<sup>172</sup>, or when the Crown is of the opinion that the collective agreement does not promote the public interest. In the latter circumstance, however, the collective agreements' validity is not affected as far as the binding force towards the parties who signed the agreement is concerned<sup>173</sup>.

#### **VII.4 Publication**

A collective agreement extended by Royal Decree is published in the *Moniteur Belge*, together with the Royal Decree declaring it to be generally binding<sup>174</sup>. The publication of the agreement is carried out in French and Flemish, even if the agreement was drawn up in only one language.

#### **VII.5 Termination of the general binding force**

The Royal Decree declaring a collective agreement to be generally binding shall cease to be in force

- either upon the expiration of the specified duration of the agreement; or
- in case of agreements of unspecified duration, or agreements of specified duration containing a renewal clause, in terms of a "new" Royal Decree repealing the order declaring the agreement to be generally binding, with effect from the date on which the agreement is terminated by the parties<sup>175</sup>.

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a Royal Decree extending the binding force of a collective agreement where such extension had not been requested, is invalid.

<sup>170</sup> Article 29 of the 1968 Act.

<sup>171</sup> See footnote 20.

<sup>172</sup> See for example C.E., 3 June 1978, *Rev. Administration Publique*, 148 where a Royal Decree extending the binding force of a collective agreement which had the effect of preventing distribution of pharmaceutical products in cases of emergency (contrary to an Act regulating the distribution of pharmaceutical products), was cancelled.

<sup>173</sup> See P. Van der Vorst, *op cit.*, 200; V. Vannes, *op cit.*, 55.

<sup>174</sup> Article 30 of the 1968 Act.

<sup>175</sup> Article 33 of the 1968 Act.



The expiry of the general binding force of a collective agreement of specified duration does not cause any problem since the Royal Decree extending the binding force of the agreement indicates the same date of expiration as that contained in the collective agreement.

With regard to collective agreements concluded for an unspecified duration, or for a specified duration and containing a renewal clause, it has already been noted that parties involved are free to terminate the agreement even when it has been declared generally binding by Royal Decree.

A Royal Decree of abrogation must be passed after the formalities of cancellation have been complied with, and once the cancellation has been communicated to the Crown. The Royal Decree of abrogation officially terminates the general binding force which had been conferred on the agreement. As long as the Royal Decree of abrogation has not been passed, the general binding force of the collective agreement continues.

#### **VII.6 Anticipated abrogation of the general binding force**

The Crown may repeal a Royal Decree declaring an agreement to be generally binding, totally or partially in the following circumstances<sup>176</sup>:

- the agreement no longer addresses the situation or fulfils the conditions which justified the declaration making it generally binding. In this case, the repeal of the Royal Decree can be total or partial. The repeal by the Crown is then subordinate to the consent of the joint body in which the agreement was concluded;
- the collective agreement contains a provision which is null and void by virtue of Articles 9 or 10 of the 1968 Act<sup>177</sup>: the Crown may repeal the generally binding force on its own initiative. Prior notice must, however, be given to the joint body concerned. If the provision becomes null on a date later than the date on which the Royal Decree comes into force, the Royal Decree shall be repealed as from the later date. Prior notice must also be given to the joint body concerned.

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<sup>176</sup> See Article 34 of the 1968 Act.

<sup>177</sup> These Articles relate to the compliance with norms which are hierarchically superior. See Section V *supra*.

The Act has not made provision for the case where nullity already existed at the date of the conclusion of the agreement or at the date of the extension of the binding force. By analogy with the solution given by the legislator when the nullity is subsequent to the Royal Decree, it can be concluded that the Royal Decree of repeal must have retrospective effect to the date on which the Royal Decree extended the agreement<sup>178</sup>.

If the collective agreement contains a provision which is null and void by virtue of Article 9 of the 1968 Act, the repeal of the Royal Decree which extended the binding force has no consequence on the collective agreement itself, and the null and void provisions remain binding between the parties. In other words, the power given to the Crown concerns only the general binding force of the agreement itself; the agreement being the work of the contracting parties, it subsists after the Royal Decree of repeal<sup>179</sup>.

## **VIII BINDING FORCE AND MANDATE OF THE ORGANISATIONS' REPRESENTATIVES**

### **VIII.1 Irrebuttable presumption of the mandate of the representatives**

Article 12 of the 1968 Act provides that:

*"Representatives of organisations shall be presumed to have the power to conclude collective agreements on behalf of their organisation. This presumption is irrefutable.*

*If the agreement is concluded in the National Labour Council, all the organisations referred to in section 3, clause 2, shall be deemed to be one sole organisation represented by the members nominated on the recommendation of the High Council for the Middle Classes."*

The objective of the legislation is to avoid trade unions and employers' organisations or their members, questioning the validity of a collective agreement concluded by their representatives for reasons relating to their mandate<sup>180</sup>.

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<sup>178</sup> See J. Piron and P. Denis, *op cit.*, 88; C.T. Liège, 24 July 1990, *J.T.T.*, 1991, 261. The writer is not aware of any decision dealing with the consequences of such repeal on rights which had previously been granted.

<sup>179</sup> Cass. 12 October 1992, *J.T.T.*, 1992, 478 where it was held that the collective agreement subsists between the parties to the agreement and the provisions which are not null and void remain binding.

<sup>180</sup> Doc. Parl., Sén., session 1967-1968, 23.

## **VIII.2 The mandate of the representatives**

The nature of the mandate given by the 1968 Act to trade unions' and employers' organisations' representatives has different implications.

### **VIII.2.1 *Binding force of collective agreements on trade unions and employers' organisations affiliated to a signatory organisation***

A collective agreement concluded by an organisation's representative binds that organisation, as well as all trade unions or employers' organisations which are affiliated to such organisations<sup>181</sup>.

It must be noted that trade unions and employers organisations have no obligation to sign the collective agreements negotiated by union delegations<sup>182</sup>.

### **VIII.2.2 *Binding force of collective agreements between trade unions or employers' organisations and their members***

Trade unions' representatives<sup>183</sup> are given a general mandate in respect of the negotiation and conclusion of collective agreements<sup>184</sup>.

According to consistent jurisprudence, an employee who becomes a member of a trade union gives the union a general mandate to negotiate and conclude collective agreements which are regulated by the 1968 Act.

Therefore, an employee can not allege that he is not bound by a collective agreement negotiated by his union on the grounds that he has not given a special mandate to negotiate this agreement<sup>185</sup>.

It follows from this rule that employees are bound to the agreements concluded by their representatives, provided these agreements have been validly concluded, i.e.

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<sup>181</sup> Doc. Parl., Sén., session 1967-1968, 66.

<sup>182</sup> See C.T. Bruxelles, 7 November 1986, *C.D.S.*, 1987, 224 where it was held that a collective agreement concluded by a union delegate is not a collective agreement within the meaning of the 1968 Act, save where the union delegate holds a special mandate; C.T. Bruxelles, 26 May 1989, *J.J.B.*, 1989, 378; T.T. Bruxelles, 7 January 1988, *J.T.B.* 1988, 44.

<sup>183</sup> And the employers' organisation's representative.

<sup>184</sup> C. Willems and F. Lagasse, "Le mandat syndical: principes, portée, effets" *J.T.T.*, 1990, 1; T.T. Charleroi, 12 November 1984, *C.D.S.*, 1984, 521; T.T. Arlon, 28 February 1984, *J.T.T.*, 1984, 402

<sup>185</sup> C.T. Mons, 19 November 1981, *J.T.T.*, 1981, 204; T.T. Arlon, 28 February 1984, *J.T.T.*, 1984, 402; T.T. Charleroi, 12 June 1989, *C.D.S.*, 1989, 349.

they comply with the conditions for validity of collective agreements as laid down in the 1968 Act<sup>186</sup> and have been deposited with the Ministry of Labour<sup>187</sup>.

### **VIII.2.3      *Nature of the relationship between trade unions and non-unionised employees***

The *travaux préparatoires* of the 1968 Act state that most representative organisations represent not only their members but also all employees, whether unionised or not<sup>188</sup>. As a result of the fiction created by the 1968 Act, trade unions are presumed to represent all the employees.

It follows from this presumption of representation that non-unionised employees are bound by collective agreements<sup>189</sup>. They cannot claim that they are not bound by reason of not being affiliated to a signatory representative organisation or not having given a specific mandate to the trade union.

## **IX      COMING INTO FORCE OF COLLECTIVE AGREEMENTS**

### **IX.1      Collective agreements not extended to non-parties**

The date on which a collective agreement concluded in a joint body comes into force varies according to whether the agreement binds employers who are members of a signatory employers' organisation, employers who accede to the agreement, or employers who are not members of a signatory organisation, but fall within the scope of the body which concluded it.

#### ***IX.1.1 Employers represented in the joint body***

Employers represented in the joint body which concluded a collective agreement (either because they are members of the employers' organisation or because they become affiliated to the organisation) or who accede to the agreement, are bound by such agreement in accordance with principles of civil law.

For these employers, and according to Article 19:

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<sup>186</sup> See Section IV *supra*.

<sup>187</sup> C.T. Brussels, 6 June 1979, *J.T.T.* 1980, 85; T.T. Bruxelles, 9 September 1977, *J.T.T.* 1977, 334.

<sup>188</sup> Doc. Parl., Sén., session 1967-1968, 15.

<sup>189</sup> Provided that they are in the service of an employer who is bound by the agreement. It must also be reminded that towards employers who are not members of a signatory organisation, collective agreements which have not been declared generally binding have a supplementary binding force only. See section VI.1.2. *supra*.

*“The agreement shall be binding on:*

- 1. those organisations which concluded it and those employers who are members of such organisations which have concluded the agreement, as from the date of its coming into force<sup>190</sup>;*
- 2. those organisations and employers subsequently acceding to the agreement, and those employers’ members of such organisations, as from the date of their accession;*
- 3. employers who become affiliated to an organisation bound by the agreement, as from the date of their affiliation;*
- 4. all the workers in the service of an employer bound by the agreement.”*

### **IX.1.2 Employers not represented in the joint body**

The employers who must be considered as third parties to a collective agreement, either because they are not affiliated to an employers’ organisation which is a party to the agreement, or because they have not acceded to the agreement, are bound as from the fifteenth day following its publication in the *Moniteur Belge*, unless the contract of employment contains a written clause to the contrary<sup>191</sup>.

### **IX.2 The collective agreement is extended to non-parties**

Where collective agreements have been extended to non-parties, employers and employees are bound from either the date chosen by the parties to the agreement, or from the date of its conclusion, irrespective of the date on which the Royal Decree has been adopted<sup>192</sup>.

### **IX.3 Retrospectivity of collective agreements**

Only collective agreements which have been declared generally binding may be retrospective to a limited extent.

Article 32 of the 1968 Act provides that:

*“The Royal Decree declaring an agreement to be generally binding shall come into force as of the date of coming into force of the agreement itself: provided that it may not have retrospective effect for more than one year preceding the date of its*

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<sup>190</sup> The date of coming into force is the one that the parties determine; otherwise, it is the date of conclusion of the collective agreement.

<sup>191</sup> Article 26 of the 1968 Act.

<sup>192</sup> Article 32 provides amongst others that “the Royal Decree extending the binding force of a

*publication.”*

The legislator has thus allowed collective agreements to have retrospective effect to a certain extent. First of all, a collective agreement may be retrospective only if the parties to the agreement request this<sup>183</sup>. Secondly, when the collective agreement is declared generally binding, the Royal Decree may not have retrospective effect for more than one year preceding the date of its publication. It seems that this possibility offered to parties to request the Crown to give retrospective binding force results from the possibility that a certain amount of time might elapse between the moment the parties request the extension of the agreement and the date the Crown grants the extension. Since the principles of civil law provide that agreements are only prospectively binding, it was necessary that a provision allowing for retrospectivity be adopted<sup>194</sup>.

It should be noted that when a collective agreement has been extended by Royal Decree, the infringement of its normative provisions constitute a criminal offence. However, when a collective agreement is retrospective, only infringements committed after the date of the extension of the collective agreement by Royal Decree may be subject to penal sanctions<sup>195</sup>.

## **X PARTICULAR SITUATIONS**

The 1968 Act regulates certain particular situations which can affect collective agreements, namely: the transfer of an undertaking, the disaffiliation of the employer from the signatory employers' organisation, the dissolution of an organisation and the modification of the scope of jurisdiction of a joint committee.

### **X.1 Transfer of an undertaking**

Article 20 of the 1968 Act provides that:

*“In the case of a total or partial transfer of an undertaking, the new employer shall be bound to observe the terms of the agreement which bound the former employer, until*

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collective agreement takes effect from the date of coming into force of the agreement.”

<sup>183</sup> See Exposé des motifs, Doc. Parl., Sén., 39; Hayoit de Termicourt, conclusions preceding Cass. 24 February 1968, *Pas.*, 1968, I, 819; Cass. 19 November 1973, *Pas.*, 1974, I, 340; Cass. 25 June 1980, *Pas.*, 1980, I, 1324.

<sup>194</sup> C.E., 10 January 1964, *R.J.D.A.*, 1964, 30; Doc. Parl., Sén., 30.

<sup>195</sup> Cass. 1 January 1993, *J.T.T.*, 1993, 225; see also Cass. 25 June 1980, *Pas.*, 1980, I, 1324; J. Piron and P. Denis, *op cit.*, 91; V. Vannes, *op.cit.*, 62; P. Van der Vorst, *op cit.*, 203.

*the agreement is no longer in force."*

This provision guarantees the upholding of terms and conditions of employment contained in collective agreements which bound the former employer to employees affected by a transfer of an undertaking, irrespective of whether these collective agreements were concluded at a sectoral or enterprise level.

It must be emphasised that, although the new employer is bound by the individual and collective normative provisions of the collective agreement, it is not obliged to comply with the obligatory provisions which bind only the signatory parties to the agreement<sup>196</sup>.

However, the new employer is not bound by collective agreements which bound the previous employer when he undertakes another activity. In this case, the transferred undertaking no longer falls within the scope of the previous collective agreement<sup>197</sup>.

## **X.2 Disaffiliation of the employer**

An employer cannot avoid the application of normative provisions by disaffiliating from the signatory employers' organisation.

According Article 21 of the 1968 Act:

*"An employer whose affiliation to an organisation bound by the agreement comes to an end shall remain bound by the said agreement unless and until the terms of the said agreement are so amended as to bring about a considerable modification of the obligation arising out of the agreement."*

This provision guarantees some stability in labour relations and avoids the situation where an employer who is dissatisfied with a collective agreement negotiated in a joint body attempts to avoid its application by disaffiliating from the signatory organisation<sup>198</sup>.

The collective agreement therefore remains applicable until the agreement itself comes to an end, or until its terms are so amended as to bring about a considerable

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<sup>196</sup> Cass. 30 November 1989, *J.T.T.*, 1990, 37.

<sup>197</sup> Doc. Parl., Sén., session 1967-1968, 29; W. Rauws, *op cit.*, 54.

<sup>198</sup> W. Rauws, *op cit.*, 44.

modification of the obligation arising out of the agreement<sup>199</sup>.

### **X.3 Modification of the scope of a joint committee**

Article 27 of the 1968 Act establishes an interim system for the application of collective agreements where the amendment of the scope of jurisdiction of a joint committee results in an employer no longer falling within the jurisdiction.

According to this Article:

*"In the case of modification of the scope of a joint committee or joint subcommittee, agreements concluded within the latter shall continue to be binding on employers and workers to which they applied before such modification, until such time as the committee within whose jurisdiction they fall after such modification has arranged for the application to the said employers and workers of agreements concluded in such committee."*

Consequently, employers and workers will remain bound by the collective agreement until the new joint body has solved the problem of the application of these agreements, either by replacing them by another agreement, or by repealing their content<sup>200</sup>.

### **X.4 Dissolution of a representative organisation**

Article 22 of the 1968 Act provides that:

*"In the case of dissolution of an organisation bound by an agreement, the rules governing individual relations between employers and workers, drawn up by virtue of the agreement shall continue to apply to the members of the organisation until the agreement itself is so amended as to bring about a considerable modification of the said relations."*

Contrary to the situation where the scope of a joint committee is amended, only individual normative provisions remain in force. This can be explained by the fact that, as the representative organisation no longer exists, collective normative

<sup>199</sup> On the meaning of "considerable modification", see J. Piron and P. Denis, *op cit.*, 81.

<sup>200</sup> See O. De Leye, "Zin en toepassing van artikel 27 van die C.A.O.-wet van 5 December 1968", *J.T.T.*, 1989, 449; W. Rauws, *op cit.*, 49.



provisions are no longer supported<sup>201</sup>.

## **XI ENFORCEMENT AND SANCTIONS**

### **XI.1 Enforcement**

The surveillance of collective agreements differs according to whether the collective agreement has been declared generally binding by Royal Decree or not.

When a collective agreement is not declared generally binding by Royal Decree, the signatory parties must themselves ensure its correct implementation, *inter alia* by suing in court for the enforcement of the agreement. It can be said, however, that the observance of the collective agreement is secured in the first place by the union delegation, whose functions are, amongst others, to ensure that the employer complies with social legislation<sup>202</sup>.

Where a collective agreement is declared generally binding, public servants of the Ministry of Labour are responsible for the enforcement of the Act, and therefore collective agreements which have been extended<sup>203</sup>. They have extensive powers at their disposal: the right to enter freely into any workplace, to conduct to any examination, to control and audit, to receive any documents, etc.<sup>204</sup>

### **XI.2 Sanctions**

The sanctions in the case of violation of a collective agreement differ depending on whether the person committing the violation is the employer, the employees or a signatory party, and further on whether the collective agreement has been declared generally binding or not.

#### **XI.2.1 Civil sanctions**

Individual normative provisions of a collective agreement are incorporated in a contract of employment. Therefore, when the collective agreement is not generally binding, the employees, the employer and the signatory parties may institute legal proceedings to enforce compliance with normative provisions, to recover damages<sup>205</sup> and even to cancel the agreement. The sanction is of a civil nature.

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<sup>201</sup> P. Van der Vorst, *op cit.*, 195.

<sup>202</sup> See *supra*, Chapter III, Section III.3.2.

<sup>203</sup> Article 52 of the 1968 Act.

<sup>204</sup> See Articles 4 and 5 of the Act of 16 November 1972 re the Social Inspection.

<sup>205</sup> See C.T. Mons, 4 May 1987, *C.D.S.*, 1988, 42.

In terms of Article 4 of the 1968 Act:

*"The organisations shall have the capacity to sue and to be sued in all litigation arising out of the application of this Act, and to defend their members' rights arising out of the agreement concluded by them. This representation by the organisations shall not affect the right of the members to bring an action individually on their own behalf, to join in the action, or to intervene therein at any stage."*

In principle, the action arising out of the execution of individual normative provisions is exercised by the employee as it implies new rights for him.

Regarding the action arising out the execution of collective normative provisions, even if these provisions are not incorporated in the individual employment contract, they constitute the rules of the profession. Therefore, both the representative organisations and their members individually, would have an interest to sue in order to enforce compliance with the collective normative provisions, for example the peace obligation.

When the object of the action is to recover damages, or to obtain cancellation of the agreement, it must be noted that:

- damages for non-performance of the obligations arising out of an agreement may be claimed from the organisation, only insofar as the agreement expressly provides therefor;
- when the object of the action is to obtain cancellation of the collective agreement, the cancellation may not have any retrospective effect, and has prospective effect only.

### ***XI.2.2 Criminal sanctions***

Article 56 of the 1968 Act provides that:

*"Without prejudice to the provisions of section 269, to 274 of the Penal Code, the following persons shall be liable to a term of imprisonment of eight days to one month or a fine of 26 to 500 francs, or both:*

- 1. an employer or his representative or agent found guilty of violating an*

*agreement declared to be generally binding;*

2. *any person obstructing inspections under this Act."*

It should be noted that only collective agreements extended to non-parties are subject to criminal sanctions<sup>206</sup>.

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<sup>206</sup> See Section VII.1 *supra*; Tournai, 10 January 1989, *J.T.T.*, 1989, 134; Cass. 29 October 1990; *J.T.T.*, 1991, 195; Cass. 18 April 1983, *J.T.T.*, 1984, 165.

## **PART B**

### **SOUTH AFRICAN LAW**

## CHAPTER I HISTORICAL BACKGROUND

The history and development of South African collective bargaining is linked not only to the process of industrialisation which characterised the twentieth century but also to the political context of apartheid which marked this century. These two factors created a "dualistic system of labour relations"<sup>207</sup>.

The history of the period from 1652, when Jan Van Riebeck landed at the Cape, until the discovery of diamonds circa 1870 shows, that South Africa's economy was based mainly on agriculture. There was not much, if anything, that might be described as industrial relations.<sup>208</sup>

The discovery of diamonds and gold attracted more than 600 000 immigrants, mainly skilled white workers, to South Africa between 1875 and 1900. The majority of these immigrants came from Britain, and with them came the British trade union system. This marked the beginning of South Africa's industrial revolution.<sup>209</sup>

The first Act regulating collective relations resulted from industrial unrest in the mining industry at the beginning of the century. The importation of Chinese labour in 1904 and widespread unemployment among the whites afforded employers in the mining industry an opportunity to attempt to break the white trade unions' monopoly of skilled work, by engaging black workers at lower wages to take the whites' place. This led to the 1907 strike, which resulted in the promulgation of an Act aiming at preventing industrial disputes.<sup>210</sup> The Transvaal Industrial Disputes Act of 1909 had as its purpose to combat strikes in the industry, and introduced procedural bars to unilateral action. This Act is considered as being an "*important first step down the road to industrial self-regulation*"<sup>211</sup>.

From 1920 onwards, the government had a clear concern to provide preferential employment opportunities to white workers as opposed to blacks, and to prevent

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<sup>207</sup> J. Piron, *Recognising trade unions*, Southern Book Publishers, 1990, 16.

<sup>208</sup> The Complete Wiehahn Report - Part 1 to 6, xvii.

<sup>209</sup> R. Jones & H. Griffiths, *Labour legislation in South Africa*, McGraw-Hill Book Company, Johannesburg, 1980, 1.

<sup>210</sup> The Complete Wiehahn Report - Part 1 to 6, xix.

<sup>211</sup> C. Thompson & P. Benjamin, *South African Labour Law*, Juta 1965, 3<sup>rd</sup> ed, A1-22.

"white wages from falling to 'uncivilised' levels in the face of black competition"<sup>212</sup>.

The 1920's were marked by the violent revolts and protest actions of white mineworkers due to various attempts by employers to open the door to non-whites in certain categories of skilled work monopolised by white trade unions. This led to a fundamental legislative re-think and the enactment of the first statute to be fashioned around the concept of collective bargaining: the Industrial Conciliation Act No 11 of 1924<sup>213</sup>. This Act created a statutory industrial council system, as well as a system for the registration of trade unions, employers' organisations, and industrial councils. Black employers were not excluded from the system, but black employees were excluded through the definition of "employee" in the Act, which was so formulated as to exclude blacks from participation in the statutory systems.

The industrial council was a voluntary body which could be formed and used by employers and employees as a vehicle for the negotiation of all matters of mutual interest to them, such as wage levels, working conditions, hours of work, annual leave and so on. All industrial councils so established had to be formally registered, one of the conditions being that it had to be sufficiently representative within any area of the particular undertaking, industry, trade or occupation<sup>214</sup>. The agreements concluded by such councils could be published by the Minister of Labour in the Government Gazette, the terms of which were then binding upon all the parties concerned for the period of the agreement. Penalties were stipulated for a breach of any of the terms of the agreement. Should any dispute arise between the parties concerned in connection with matters of mutual interest, the industrial council could be used as the forum for its negotiation and settlement. No strike or lock-out could

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<sup>212</sup> See R. Jones and H. Griffiths, *op cit.*, 19 and 26. The government was of the view that "because of the differences in the standards of living of the different races, the Commission is unable to recommend the adoption of the proposal that there should be no racial discrimination in industrial legislation... However notwithstanding unsatisfactory features characterising the Native trade union movement, the Commission is satisfied that there are a number of unions which are well organised and run on correct lines. The leaders of some of these unions have in the past rendered considerable assistance by advising against, and restraining their members from taking drastic action (...) The Commission therefore recommends recognition in separate legislation which will bring them into official cognisance (...) rather than leave them to adopt dangerous advice of some unbalanced semi-educated Native or the prompting of disreputable Europeans who batten on Native ignorance and cupidity... However the Commission recommends strongly against any course which would enable Native workers to hold the balance of power in or dominate the process of collective bargaining.", *Report of the Industrial Relations Legislation Commission of Enquiry*, quoted from *Essays in Southern Africa Labour History*, Ravan Labour Studies, 1978, 80.

<sup>213</sup> See *Essays in southern Africa Labour History*, Ravan Labour Studies, 1978, 69.

<sup>214</sup> See *Amalgamated Clothing & Textile Workers Union of SA v National Industrial Council of the Leather Industry of SA*, (1989) 10 ILJ 894 (IC).

be called in respect of any dispute until the matter forming the subject of the dispute had been submitted to, considered by, and reported on, by the relevant industrial council.

If no industrial council existed in any area, then any number of employees or employers considered by the Minister to be sufficiently representative of the industry, undertaking, trade or occupation in that area could apply to the Minister for the appointment of a conciliation board in order to consider and determine any dispute<sup>215</sup> in that area between any employer and any of his employees in that particular industry, trade, or occupation. The board would then be appointed by the Minister, and consisted of one half employers' representatives, and one half employees' representatives. An agreement reached at a conciliation board could be published by the Minister in the Government Gazette, and the terms thereof would then be binding on all parties for the period of the agreement.

R. Jones and H. Griffiths, commenting on this Act, stated that:

*"there can be little doubt, in retrospect, that this Act has been successful in creating viable machinery for industrial negotiation and the settlement of disputes. However, by excluding the majority of male black workers from membership of registered trade unions, it effectively eliminated their representation on industrial councils and denied them a say in the collective bargaining process. In subsequent years, white workers were able, therefore, to enhance their position through the mechanism of free bargaining and trade union membership."*<sup>215</sup>

In the thirties, due to severe droughts and economic recession, close to 300 000 white farmers left the rural areas for the cities in search of job opportunities. This migration gave rise to the appointment of the Van Reenen Commission in 1934, whose task was to revise the Industrial Conciliation Act, No 11 of 1924. This Commission's recommendations led to the promulgation of the second Industrial Conciliation Act, No 36 of 1937. The industrial council system with its components of employers' organisations and trade unions was retained; black employers could register, but black employees were still essentially largely excluded.

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<sup>215</sup> Certain types of dispute, such as disputes in regard to engagement, promotion, transfer etc. could however not be considered by a conciliation board.

After the Second World War, black workers started to move to the cities, this movement being accelerated by the white manpower shortage caused by the whites' participation in the war.

In 1948, the National Party came to power. This resulted in the institutionalisation of the principle of segregation between blacks and whites in all spheres.

In the same year the government appointed the Botha Commission to revise four Acts, among others the Industrial Conciliation Act, No 36 of 1937. The Commission's Report led to the passing of the Black Labour (Settlements of Disputes) Act, No 48 of 1953 and the third Industrial Conciliation Act, No 28 of 1956.

The Black Labour (Settlements of Disputes) Act, No 48 of 1953 aimed to create differentiated machinery for industrial negotiation and the settlement of disputes amongst black workers. As black workers were prevented from using the collective bargaining institutions set up by the Industrial Conciliation Act, it provided for the establishment of four different types of committee at plant level, having as their function the negotiation and conclusion of agreements in relation to wages or other conditions of employment. The agreements concluded were binding on the employer and the black workers concerned<sup>217</sup>. These committees were the liaison committee, the co-ordinating liaison committee, the works committee and the co-ordinating works committee. By means of this committee system, black workers were enabled to participate in plant-level negotiations only with their employer<sup>218</sup>. The system created by this Act never attained any credibility, primarily because the committees were initiated and controlled by management<sup>219</sup>.

The Industrial Conciliation Act No 28 of 1956 retained the industrial council system, with its employers' organisations and trade unions. Black unions were, however, totally excluded from the statutory trade union system.

*"In other words the politics of separation that existed in other spheres of society*

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<sup>216</sup> R. Jones & H. Griffiths, *op cit.*, 26.

<sup>217</sup> R. Jones & H. Griffiths, *op cit.*, 90 to 98.

<sup>218</sup> The concept of industrial black trade unions had always been regarded with suspicion and distrust on the grounds that they would be "slumbering giants" and could be used as a vehicle for infiltration, and used as a weapon aimed at securing political and social change. See R. Jones and H. Griffiths, *op cit.*, 98.

<sup>219</sup> See A. Rycroft and B. Jordaan, *A guide to South African labour law*, Juta, 1990, 117.



*were extended to an economy which in reality, however, was increasingly showing signs of integration.*"<sup>220</sup>.

It should be noted that the exclusion of black workers from the definition of "employee" only excluded them from forming or becoming members of registered trade unions which would utilise the collective bargaining mechanisms of the Act. It did not, however, prevent them from forming or joining a trade union of their own<sup>221</sup> and to approach an employer to negotiate outside statutory structures.

A combination of various factors such as a decline in the white birth rate, a phenomenal development in the economy multiplying the demand for skilled labour, the international community threatening economic sanctions unless the country's internal policies were reformed and the increasing organisation and assertiveness of black labour, forced the government to re-think its legislative system. In 1977, the Wiehahn Commission was appointed to report and make recommendations in connection with existing labour legislation. The Wiehahn Commission issued a number of reports from 1979 onwards, resulting in a series of legislative reforms during the period 1979-1983. With regard to collective bargaining, the Wiehahn Report suggested that:

*"the industrial council system must be preserved as the most important mechanism for negotiation and bargaining between employers and trade unions, i.e. in the organised sector. But this does not mean to say that industrial relations at enterprise level should be neglected. On the contrary, such a system can be developed as an essential means of complementing the industrial council system. In the unorganised sector it has an even more important role to play."*<sup>222</sup>

The main changes resulting from the Wiehahn Commission's Report were the following:

- The Labour Relations Act, as the Industrial Conciliation Act was known after the passing of Act No 57 of 1981, was deracialised, and the Black Labour Relations

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<sup>220</sup> The Complete Wiehahn Report - Part 1 to 6, xxiv.

<sup>221</sup> In fact, black trade unions were created as early as 1917 and were established on a fairly large scale, but were concentrated in specific areas or in single factories of large employers. See P.A.K. Le Roux and A. C. Basson, *Labour law - Workbook 3*, UNISA, 1996, 14 and The Complete Wiehahn Report - Part 1 to 6, xxi and xxiv.

<sup>222</sup> The Complete Wiehahn Report - Part 1 to 6, xxvi.

Regulation Act was repealed;

- The creation of the Industrial Court, with an extensive unfair labour practice jurisdiction. An unfair labour practice was originally defined as "any labour practice which in the opinion of the Industrial Court is an unfair labour practice."

The Labour Relations Act was then amended on various occasions, most importantly in 1988, by the introduction of a broad definition of specified unfair labour practices, and in 1991, by the reintroduction of an earlier unfair labour practice definition<sup>223</sup>.

Until 11 November 1996, the date of coming into force of the new Labour Relations Act, No 66 of 1995, the main problem regarding collective agreements was that their binding nature was only partially regulated<sup>224</sup>. Collective agreements concluded in industrial councils were binding and enforceable on the parties and their members, and could be extended to non-parties, provided that they had been promulgated by the Minister of Labour in the Government Gazette. These agreements were even regarded as a type of subordinate legislation<sup>225</sup>.

In *SA Association of Municipal Employees v Pretoria City Council*<sup>226</sup>, it was held that:

*"the so-called industrial agreement is not really an agreement or contract, but a form of permitted domestic legislation by which the will of a statutory body is by a majority vote imposed on all the members of a designated group of employers and employees, irrespective of any concurrence by the individual affected, and notwithstanding any positive disapproval by any such individual."*

However, collective agreements concluded in industrial councils, but which were not promulgated<sup>227</sup>, and agreements concluded outside the institutions created by the

<sup>223</sup> C. Thompson, "A bargaining Hydra emerges from the unfair labour practice swamp", (1989) 10 ILJ 808.

<sup>224</sup> J. Wilson & G. Giles, "Collective agreements: some present and future implications", *Labour Law News and Court Reports*, vol.5, No 3, Oct. 1995, 3; R.G. Beaton, "The enforceability of labour agreements", (1989) 10 ILJ 388.

<sup>225</sup> *S v Prefabricated Housing Corporation (Pty) Ltd*, 1974 (1) SA 535 (A); *SAAME v Pretoria City Council*, 1948 (1) SA 11 (T); *Nouwens Carpets (Pty) Ltd v National Union of Textile Workers*, (1989) 10 ILJ 44 (N); *Consolidated Frame Cotton Corporation v Minister of manpower & others*, (1984) 5 ILJ 309 (D).

<sup>226</sup> 1948 (1) SA 11 (T).

<sup>227</sup> *Nouwens Carpets (Pty) Ltd v National Union of Textile Workers* (1989) 10 ILJ 44 (N).

Labour Relations Act of 1956, were not regulated and were not legally binding<sup>228</sup>.

In *Consolidated Frame Cotton Corporation v Minister of Manpower & others*<sup>229</sup>, it was held that:

*"agreements concluded at industrial council level do not constitute contractually binding agreements but take the form of gentlemen's agreements until promulgation, whereupon they acquire the force of subordinate legislation."*

Agreements concluded outside the statutory bodies were known as "non-statutory agreements". The rationale behind these agreements is closely linked to the development of trade unions catering for black workers.

Because these trade unions could not be registered in terms of the Labour Relations Act, they could not take part in collective bargaining within the statutory bodies. The practice therefore developed that once they had recruited sufficient members in a specific company, they would approach its management and ask for recognition. If management agreed to grant recognition, it was often formalised in a "recognition agreement". This negotiated agreement would then regulate the relationship between the employer and the union concerned, and create collective bargaining institutions and procedures to be utilised by the parties. It would also include the parties' undertaking to negotiate at regular intervals over amendments to existing conditions of employment. These negotiations would then result in the conclusion of a "substantive agreement" regulating terms and conditions of employment<sup>230</sup>.

The system of non-statutory agreements carried on even after black trade unions became entitled to registration in terms of the Act, for various reasons<sup>231</sup>. Alec Erwin of the Federation of South African Trade Unions indicated that the reasons for rejecting participation in industrial councils was that they had provided a shelter for some industrial unions that had represented racial minorities<sup>232</sup>.

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<sup>228</sup> AA Landman, "Collective agreements - Which judicial pigeon hole for new bargaining agreements?", *CLL* 1996, 71. See also R.G. Beaton, "The enforceability of labour agreements", (1989) 10 *ILJ* 388.

<sup>229</sup> *Consolidated Frame Cotton Corporation v Minister of manpower & others*, (1984) 5 *ILJ* 309 (D).

<sup>230</sup> J. Piron, *Recognising trade unions*, Southern Book Publishers, 3<sup>rd</sup> edition, 1990, 46; J. Grogan, *Collective Labour Law*, Juta, 1993, 52.

<sup>231</sup> A.A. Landman, "The registration of trade unions - The divide narrows", (1997) 18 *ILG* 1183.

<sup>232</sup> A. Erwin, "Adequate Collective Bargaining structures", (1981) *Industrial Relations Journal of*

The Labour Relations Act contained no provision regarding the status or enforcement of non-statutory collective agreements, and their legal status and binding force had to be analysed in the light of the common law. Although they were binding on the parties on the basis that a collective agreement is nothing more than an ordinary contract<sup>233</sup>, various legal techniques had to be employed to enforce these agreements on the union's members. Because they are not parties to collective agreements, they would not directly acquire contractual rights or obligations in terms of these agreements.

Among the theories utilised to confer binding force on these agreements, one can identify the theory of agency and the automatic incorporation of the content of collective agreements into individual employment contracts, the theory of *stipulatio alteri*, the unfair labour practice theory, and the fact that equity demands that collective agreements should be binding<sup>234</sup>. Each of these theories were, however, to some extent unsatisfactory.

- Agency

In terms of this theory, the binding effect of collective agreements resulted from a mandate given by the union members to their representatives to negotiate working conditions on their behalf<sup>235</sup>.

This theory could however only partially explain the binding effect of collective agreements. Furthermore, it could not prohibit the employer from bypassing the union by negotiating directly with its employees<sup>236</sup>. In *Food and Allied Workers Union v Ko-operatief Wijnbouwers Vereniging van ZA*, it was held that:

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*South Africa*, 1 (3) 71-73.

<sup>233</sup> J. Grogan, *op cit.*, 53.

<sup>234</sup> S. Christie, "Majoritarianism, Collective Bargaining and Discrimination", (1994) 15 *ILJ* 708; J. Wilson & G. Giles, "Collective agreements: some present and future implications", *Labour Law News and Court Reports*, Vol 5, No 3, Oct 1995, 3; For a case where all those mechanisms were invoked together to justify the binding force, see *Chemical Industrial Union & others v Indian Ocean Fertilizer* (1991) 12 *ILJ* 822 (IC).

<sup>235</sup> See *Ntsangani and others v Golden Lay Farms Ltd* (1992) 13 *ILJ* 1199 (IC); *Ramolesane and another v Andrew Mentis and another* (1991) 12 *ILJ* 329 (LAC); *Don Products (Pty) Ltd v Manage and others* (1992) 13 *ILJ* 900 (LAC); *Mngomezulu v Khutala Mining Services (Pty) Ltd* (1994) 15 *ILJ* 374 (IC); *SA Society of Bank Officials v Standard Bank of SA Ltd* (1994) 15 *ILJ* 332 (IC); *Collins v Volkskas Bank* (1994) 15 *ILJ* 1398 (IC); *Broodryk and others v SA Airways* (1996) 17 *ILJ* 278 (IC); *Mazibuko and others v Hotels, Inns and Resorts (SA) (Pty) Ltd* (1996) 17 *ILJ* 263 (IC).

*"in strict contract, to agree to recognise a representative agent does not mean that negotiation with the principal in his personal capacity is thereby excluded. The contention that the union is not only a conventional common-law agent of its members, but in fact is also principal in its own right, with separate entitlements under the recognition agreement, consequently has in this regard to be treated at the very least, with some circumspection. The fact that the union is acknowledged, in fact and in deed, to be the representative agent of its members could in strict contract not prohibit the employer from negotiating directly with an employee member in his personal capacity. An agent, even sole agent, cannot claim the right to representation which excluded his principal from acting in his personal capacity if he so desires unless this is expressly so stipulated."*<sup>237</sup>

Another difficulty arose from the fact that an employee could not withdraw his union's mandate to negotiate on his behalf on a particular issue because such negotiations do not happen to be going his way. It was held that:

*"if employees were allowed to withdraw their union's mandate at will because they did not like the way certain negotiations seem to be going for them, both the employer's and the union's position in the collective bargaining process would become untenable"*<sup>238</sup>.

- Stipulatio alteri

In terms of this theory<sup>239</sup>, the union acts as a *stipulans* whilst concluding a collective agreement. The benefits conferred in the collective agreement are regarded as a form of *stipulatio alteri*, the third parties in whose favour the benefits are conferred being the union members and other employees. In *Mngomezulu v Khutula Mining Services (Pty) Ltd*, Marcus held that :

*"I am prepared to accept that the employees must be deemed to have authorised the trade union to negotiate and conclude with the employer both the recognition agreement and the wage agreement. In the absence of sufficient evidence of the*

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<sup>236</sup> S. Christie, "Majoritarianism, Collective Bargaining and Discrimination", (1994) 15 ILJ 708.

<sup>237</sup> *Food and Allied Workers Union v Ko-operatief Wijnbouwers Vereniging van ZA Beperkt, Worcester* (1994) 15 ILJ 1065.

<sup>238</sup> *Mazibuko and others v Hotels, Inns and Resorts (SA) (Pty) Ltd*, (1996) 17 ILJ 263 (IC).

<sup>239</sup> On the general principles of *stipulation alteri*, see RH Christie, *The Law of Contract in South Africa*,

*requisite authority being present, one could, alternatively, view the collective agreement in question as being in nature of contracts for the benefit of a third party (the employee in casu, i.e. stipulatores alteri), whereby the trade union concluded agreements with the employer for the employee's benefit which were tacitly accepted by the employee*<sup>240</sup>.

This theory was referred to in various court cases, but just as the theory of mandate, it could not satisfactorily explain the binding effect of collective agreements, especially when employees reject an agreement concluded by their union<sup>241</sup>.

- Unfair labour practice

Another means to enforce non-statutory collective agreements was by arguing that the failure to comply with a provision of a collective agreement constituted an unfair labour practice<sup>242</sup>. Under previous legislation, the industrial court had a very broad unfair labour practice jurisdiction, in terms of which any act or omission which in an unfair manner infringed or impaired the labour relations between an employer and employees constituted an unfair labour practice.

- Equity

Some Presiding Officers of the Industrial Courts enforced collective agreements

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3rd ed., Butterworths, Durban, 1996, 289-300.

<sup>240</sup> (1994) 15 ILJ 374 (IC); see also *Collins v Volkskas Bank*, (1994) 15 ILJ 1398 (IC).

<sup>241</sup> *Food And General Workers Union & others v Sundays River Citrus Co-operative Co Ltd* NHE 11/2/179 (PE) (unreported); *Gubb and Inggs Ltd v SA Clothing and Textile Workers Union of South Africa*, (1991) 12 ILJ 415 (Arb); S. Christie, *op cit.*, 710; D. du Toit, "An Ill Contractual Wind Blowing Collective Good? Collective Representation in Non-statutory Bargaining and the Limits of Union Authority", (1994) 15 ILJ 39; J. Grogan, *op cit.*, 53.

<sup>242</sup> *Consolidated Frame Cotton Corporation v Minister of Manpower*, (1984) 5 ILJ, 309 (D); *MMAWU v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd* (1986) & ILJ, 703 (IC); *National Union of Mineworkers v Goldfields of SA Ltd & others*, (1989) 10 ILJ 86 (IC); *SACCAWU & others v Checkers SA Ltd & another*, (1992) 13 ILJ 411 (IC); *Chemical Workers Industrial Union and others v Electric Lamp Manufacturing of SA (Pty) Ltd* (1989) 10 ILJ 347 (IC); *Transport & General Workers Union & others v SA Stevedores*, (1994) 15 ILJ 358 (IC); R.G. Beaton, "The enforceability of labour agreements", (1989) 10 ILJ 390 who stated that "a collective bargaining agreement concluded outside an industrial council may or may not be enforceable as a contract, depending on the presence of the *animus contrahendi* of the parties. Even where this factor cannot be inferred the aggrieved party will have a remedy in the industrial court since a breach of such an agreement will constitute an unfair labour practice."

on the basis of equity<sup>243</sup>. In *Mngomezulu v Khutala Mining Services (Pty) Ltd*<sup>244</sup>, it was held that even if there is insufficient evidence of authority in terms of common law requirements of agency, or of the existence of *stipulatio alteri*, this would not in itself preclude the industrial court from recognising and enforcing collective agreements on the equitable ground that it would be contrary to the interests of sound labour relations and labour peace, were the court to allow an individual employee to appoint a union to negotiate working conditions and procedures with management on his behalf, and thereafter permit such employee to ignore with impunity the provisions of the ensuing agreement reached. In *Collins v Volkskas Bank*<sup>245</sup>, it was held that conditions of employment negotiated collectively are binding and enforceable against individual union members, whether through the common law principles of agency or *stipulatio alteri*, or on equitable considerations such as the promotion of collective bargaining which is the prime means of resolving labour disputes contemplated by the Labour Relations Act.

A further problem arose when collective agreements concluded outside the statutory bodies were extended to non-parties, i.e. to all the employees falling within the bargaining unit, whether unionised or not. At common law, a person may not contract for another unless that other person has authorised him to do so<sup>246</sup>. It however became a common practice for employers to apply a collective

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<sup>243</sup> *Mngomezulu v Khutala Mining Services (Pty) Ltd* (1994) 15 ILJ 374 (IC); See also *BCAWU v Masterbilt CC* (1987) 8 ILJ 670 (IC) where the Presiding Officer held that: "I am not particularly concerned whether the agreement was or became a contract between the respondent and its employees or union members... it is far more important to see the agreement as the foundation of a relationship between the employer, the union and the union members who are employees of the employer. The fact of the matter is that within a certain closed community consisting of the employer, the union and the employees/union members, the rules made between the employer and organised labour are regarded as having binding authority. This authority may be complemented if the recognition agreement constitutes a contract at common law. However, a recognition agreement does not require force at common law or in statutory law for this court to take cognisance of its rules. This is particularly the case where no attempt is being made by either party to enforce the procedural agreement as a legally binding contract... The approach which will be adopted is one which is based on the recognition by this court that recognition agreements provide rules which are acknowledged by the parties to a particular relationship to be binding upon themselves. These parties legitimately expect that the rules will be observed by all the parties concerned. It is of utmost importance for this court to give effect to the rules of such procedural agreement because in this way the court will be fostering the concept of collective bargaining and the related concept of self-government."

<sup>244</sup> (1994) 15 ILJ 374 (IC).

<sup>245</sup> (1994) 15 ILJ 1398 (IC).

<sup>246</sup> JC De Wet, "Agency and representation" in Joubert, *The Law of South Africa*, Vol I, Butterworths, Durban, 1993, 97; (1994) 15 ILJ 1398 (IC); J. Grogan, *Collective Labour Law*, Juta, 1993, 54 who held that "no collective agreement can be imposed upon an unwilling employee who is not represented in the negotiation preceding it." *Radio Television Electronic and Allied Workers Union v Tedelex (Pty) Ltd and another* (1990) 11 ILJ 1272 (IC).

agreement concluded with a majority union throughout the bargaining unit, therefore binding non-parties. The Industrial Court failed to provide a clear and unambiguous jurisprudence on the issue as to whether or not non-parties to collective agreements could be bound on the basis that the agreement was concluded by a trade union representing the majority of the employees in a bargaining unit<sup>247</sup>. The theory which was used to grant or deny such extension is known as the doctrine of majoritarianism.

The doctrine of majoritarianism was defined as follows by Copeling AM in *Food Workers Council of SA v Bokomo Mills*:

*"In general terms, the doctrine of majoritarianism may be described as that doctrine whereby representatives (including a trade union) designated or selected for the purposes of collective bargaining by the majority of the employees in a particular bargaining unit are deemed to be the representatives of all employees in that unit for the purpose of such collective bargaining"*<sup>248</sup>.

This doctrine has been applied on various occasions by the Industrial Court. Whilst the trade union represents the majority of the employees in the delineated bargaining unit, all the employees within that bargaining unit will generally be bound by such an agreement<sup>249</sup>. It seemed that the legal rationale behind such extension was equity. In *Food Workers Council of SA v Bokomo Mills*<sup>250</sup>, it was held that:

*"the employee's right to negotiate with his employer, albeit an absolute right, must bow to the legitimate and reasonable interest of others where considerations of equity objectively judged so dictate."*

The problem resulting from the theory of majoritarianism was that it lacked legal

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<sup>247</sup> B. Grant, "In Defence of Majoritarianism: Part 1 -Majoritarianism and Collective Bargaining", (1993) 14 ILJ 305.

<sup>248</sup> *Food Workers Council of South Africa v Bokomo Mills* (1994) 15 ILJ 1371 (IC).

<sup>249</sup> *SA Polymer Holdings (Pty) Ltd v Llaie & others* (1994) 15 ILJ 277 (LAC), *Luthuli & others v Flortime (Pty) Ltd & another* (1988) 9 ILJ 287 (IC); *Ngiba & others v Van Dyck Carpets (Pty) Ltd & another* (1988) 9 ILJ 453 (IC); *Mineworkers Union v East Rand Gold & Uranium Co Ltd* (1990) 11 ILJ 1070 (IC); *Mtuzimele v Coverland Roof Tiles* (1996) 7 BLLR 789 (IC); *Ramolesane and Another v Andrew Mentis*, (1991) 12 ILJ 329 (LAC); *TAWU v Motoravia (Pty) Ltd*, (1996) 9 BLLR 1189 (IC)

<sup>250</sup> (1994) 15 ILJ 1371 (IC).



support<sup>251</sup>.

The Ministerial Legal Task team appointed by the Cabinet in July 1994 to overhaul the laws regulating labour relations described the problems encountered by the legal system in the following terms:

*"the fundamental problem with the existing law is the lack of conceptual clarity as to the structure and functions of collective bargaining [...] the result of (the lack of commitment to an orderly system of industry-level bargaining and the separate tradition of black workers of bargaining at the level of the workplace) is that there is no existing statutory framework which can properly accommodate and facilitate an orderly relationship between bargaining at the level of industry and at the level of the workplace."*<sup>252</sup>

The Labour Relations Act, No 66 of 1995 (hereafter referred to as "the Act" or "the LRA 1995") marked a major change in South Africa's statutory industrial relations system. Following the transition to political democracy, the Act encapsulates the new government's aims to reconstruct and democratise the economy and society in the labour relations arena<sup>253</sup>.

As far as collective agreements are concerned, the LRA 1995 promotes collective bargaining at industry level<sup>254</sup>. It also recognises the validity and binding effect of any collective agreements, provided that they are concluded by registered trade unions on the one side and one or more employers and or employers' organisations on the other side.

The debate over the legal status of collective agreements concluded outside the

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<sup>251</sup> *National Union of Mineworkers v Henry Gould (Pty) Ltd & another* (1988) 9 ILJ 1149 (IC); *Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another* (1989) 10 ILJ 870 (IC); *Radio Television Electronic & Allied Workers Union v Tedelex (Pty) Ltd & another* (1990) 11 ILJ 1272 (IC); contra, B. Grant, *op cit.*, 306; *Ramolesane & another v Andrew Mentis & another* (1991) 12 ILJ 329 (LAC).

<sup>252</sup> Explanatory Memorandum prepared by the Ministerial Task Team, January 1995, *Government Gazette*, 10 February 1995, No 16259, 121.

<sup>253</sup> D. du Toit, D. Woolfrey, J. Murphy, S. Godfrey, D. Bosch and S. Christie, *The Labour Relations Act of 1995*, Butterworths, Durban, 1996, 3.

<sup>254</sup> See though the brief to the Ministerial Legal Task team to prepare a negotiating document in draft Bill form which would "promote and facilitate collective bargaining in the workplace and at industry level", Explanatory Memorandum prepared by the Ministerial Task Team, January 1995, *Government Gazette*, 10 February 1995, No 16259, 111, and the long title to the LRA 1995 which gives equal weight to plant level and sectoral bargaining.

statutory institutions has ended with the LRA 1995. They are expressly made binding for their duration on each party and its members, and, in certain circumstances, on employees who are not members of the union-party. Collective agreements, moreover, vary any individual contracts of employment insofar as they subsume their terms<sup>255</sup>.

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<sup>255</sup> X, "Collective bargaining", *Employment law*, September 1995, vol 12, No 1, 2; J. Grogan, *Workplace law*, Juta, 1997, 215.

## CHAPTER II PARTIES TO COLLECTIVE AGREEMENTS

The right to bargain and conclude collective agreements within the meaning of the LRA 1995 belongs exclusively to registered trade unions, employers and registered employers' organisations.

The LRA 1995 is characterised by the absence of a statutory duty to bargain. The legislator has opted for a model which allows the social partners through the exercise of power, to determine their own arrangements. The power play is given statutory impetus by the provisions on organisational rights and the protected right to strike<sup>256</sup>.

Strictly speaking, the requirement to be a registered organisation is the only condition laid down in the Act. However, the exercise of power play by the social partners often results in the fact that only trade unions and employers' organisations enjoying a certain level of representivity will conclude collective agreements.

### I REGISTRATION OF TRADE UNIONS AND EMPLOYERS' ORGANISATION

According to section 95 of the LRA 1995:

*"Registration shall be granted by the Registrar of Labour Relations appointed by the Minister of Labour, to any trade unions or employers' organisations that:*

- have adopted a name which does not resemble so closely the name of another trade union or employers' organisation that it could mislead or cause confusion;*
- have adopted a constitution that meets the requirements of subsections (5) and (6)<sup>257</sup>;*

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<sup>256</sup> Explanatory Memorandum prepared by the Ministerial Task Team, January 1995, *Government Gazette*, 10 February 1995, No 16259, 121; See also *SANSEA v NUSOG*, (1997) 4 BLLR 486 where Commissioner Christie held that "collective bargaining is based on the socio-economic power of the parties who participate in it."

<sup>257</sup> Subsections (5) and (6) of section 95 of the LRA 1995 provide that the constitution of any trade union or employees' organisation that intends to register must in particular, contain no provision that unfairly discriminates against any person on the ground of race or gender. C. Thompson and Benjamin described the constitutional requirements as "not onerous and aiming simply at promoting good organisational governance", *South African Labour Law*, Juta, 2nd, 1965, as amended by service 34 of 1996, AA1-4.

- *have an address in the Republic of South Africa; (...)*"

Furthermore, trade unions seeking registration must be independent from any control or influence from any employer or employers' organisation, through financial assistance or by any other means.

The Registrar has no discretionary power to grant or reject registration when the requirements are met<sup>258</sup>.

According to Landman:

*"...registration has been deliberately made a mere formality. Recognition is encouraged because it permits the state and employers to know with whom they are dealing, to have access to the constitution of the trade union as a public document, to contribute towards the maintenance of the principles of democracy in the union, to secure protection for union members, also as regards the financial circumstances of the union and to enable society to measure the progress and development of trade unions."*<sup>259</sup>

Even though registration of trade unions is a mere formality, the LRA 1995 encourages such registration by conferring exclusive advantages to registered trade unions. For instance, only registered trade unions are eligible for membership of a bargaining council, may qualify for the exercise of organisational rights, or may enter into collective agreements within the meaning of the LRA 1995. Any collective agreement entered into by an unregistered trade union cannot be enforced under the LRA 1995. Such an agreement would have to be enforced in the civil courts as if it was a common-law contract<sup>260</sup>.

<sup>258</sup> Under the previous legislation, the registrar had wide discretionary powers to register an organisation and no trade union could be registered where an existing union was considered to be representative.

<sup>259</sup> A.A. Landman, "The registration of trade unions – The divide narrows", (1997) 18 *ILJ* 1190; see also the Explanatory Memorandum prepared by the Ministerial Task Team, January 1995, *Government Gazette*, 10 February 1995, No 16259, 146.

<sup>260</sup> A.A. Landman, "The registration of trade unions – The divide narrows", (1997) 18 *ILJ* 1191; *FAWU v Simba (Pty) Ltd* (1997) 4 *BLLR* 408 (LC) at 409; A. Rycroft & B. Jordaan, *A guide to South African Labour Law*, 2ed (1992) 49.

## **II REPRESENTATIVE ORGANISATION**

### **II.1 At sectoral level**

#### ***II.1.1 Bargaining council***

Although the only objective criterion laid down in the LRA 1995 to register a bargaining council<sup>261</sup> as far as the status of the parties is concerned, is that the parties to a bargaining council must be registered organisations, their level of representivity can be a decisive factor.

Section 29(11)(b)(iv) of the LRA of 1995 provides that prior to registering a bargaining council in respect of a sector and area, the registrar must determine that the parties to the bargaining council are sufficiently representative within the sector and area. The Act, however, does not give any clear indication with regard to the concept of “sufficiently representative”. Section 49 of the LRA 1995 provides that:

*“When considering the representativeness of the parties to a council, or parties seeking registration of a council, the registrar, having regard to the nature of the sector and the situation of the area in respect of which registration is sought, may regard the parties to a council as representative in respect of the whole area, even if a trade union or employers’ organisation that is a party to the council has no members in part of that area.”*

Du Toit suggests that when the registrar has to determine the representivity of employers’ organisations for the purpose of section 29 (11), he should have regard to both the number of employer members of an employers’ organisation as a proportion of the total number of employers in a sector and area, as well as the total number of employees employed by those employers as a proportion of the total number of employees in the sector<sup>262</sup>.

#### ***II.1.2 Statutory council***

Since statutory councils are established<sup>263</sup> at the request of one party only, i.e. at the request of a trade union or an employers’ organisation, the parties to collective

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<sup>261</sup> The establishment of bargaining councils is regulated by section 27 of the LRA of 1995 and is reviewed in more detail in Chapter III *infra*.

<sup>262</sup> D. du Toit et al, *op cit.*, 142.

<sup>263</sup> The establishment of statutory councils is dealt with in detail *infra*, in Chapter III.

bargaining at this level might be somewhat unusual.

An applicant for the establishment of a statutory council must be a registered, representative trade union or registered, representative employers' organisation.

The concepts of "representative trade union" and "representative employers' organisation" are defined in section 39 (1) of the LRA 1995 as:

*"a registered trade union, or two or more registered trade unions acting jointly, whose members constitute at least 30 per cent of the employees in a sector and area; and*

*a registered employers' organisation, or two or more registered employers' organisation acting jointly, whose members employ at least 30 per cent of the employees in a sector and area."*

Because a statutory council may be established at the request of one party, with no need for co-operation between employers and unions, the law provides a strict threshold of representivity to be complied with by the applicant as a requirement for its establishment. Taking into account the primary object of the Act, the diversity of registered trade unions and registered employers' organisations in the sector and area and the principle of proportional representation, the Minister might however, decide that other registered trade unions or registered employers' organisations in the sector and area should be admitted, regardless of their threshold of representivity<sup>264</sup>.

It should be noted that once the applicant to a statutory council meets the statutory representivity requirements, the other party does not have to meet any particular requirements, except that of being a registered organisation.

Normally, the other party will be one or more registered trade unions or one or more registered employers' organisation active in the sector and area.

Sections 41 (6) and (7) of the LRA 1995 provide specifically for the situation where there is no "counterpart" registered organisation. In such cases, the Minister must

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<sup>264</sup> Section 41 (3) of the LRA 1995.

consult the Commission for Conciliation, Mediation and Arbitration and thereafter appoint suitable persons as representatives and alternates. Technically, it is therefore possible that a statutory council will be composed of a registered representative organisation on one side, and individuals on the other side.

At the time of editing this dissertation, the writer is, however, unaware of the establishment of any statutory council.

## **II.2 At plant or enterprise level**

The level of representivity of a trade union wishing to bargain at plant or enterprise level will depend on the willingness of the employer to enter into an agreement.

An important feature of the LRA 1995 is the absence of a legally enforceable duty to bargain. Collective bargaining has been left to power play between the parties, with the result that it is up to each employer to determine the criteria under which it will be prepared to enter into collective bargaining with a registered trade union, taking into account the possibility that the union may take recourse to strike action to obtain recognition.

In order to encourage collective bargaining at plant or enterprise level, the LRA 1995 provides for the granting of organisational rights to representative trade unions, namely:

- the right of access to employers' premises for union-related purposes;
- the right to hold meetings;
- the right to conduct ballots;
- the right to stop order facilities;
- the right of union office-bearers to time off for union activities;
- the right to elect trade union representatives with specified rights, and
- the right to information for collective bargaining purposes.

It is assumed that these rights will assist unions in building up a degree of power that will enable them to coax reluctant employers to the negotiating table<sup>265</sup>. It must, however, be emphasised that an employer could validly conclude a binding collective agreement with a trade union which is not sufficiently representative for

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<sup>265</sup> D. du Toit et al, *op cit.*, 87.

the purpose of obtaining organisational rights.

Depending on the organisational rights that the registered trade union seeks to secure, it will have to establish that it either represents the majority of employees within the workplace or that it is sufficiently representative of such employees.

Section 21 (8) of the LRA 1995 gives some guidance to the CCMA when establishing whether a registered trade union is sufficiently representative. It provides that the commissioner must seek to minimise the proliferation of trade union representation in a single workplace, as well as the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union.

The commissioner must also consider the nature of the workplace, the nature of the organisational rights that the union seeks to exercise, the nature of the sector in which the workplace is situated and the organisational history at the workplace of the employer<sup>266</sup>.

In *South African Workers Union v Mondi Kraft*<sup>267</sup> Commissioner Vetter held that:

*"The Act grants organisational rights to representative unions (but) these rights can be seen as a 'means' to securing an 'end' namely, collective bargaining rights. In the final analysis, however, it is the relative strength of the parties which will determine the 'end'."*

In *SACCAWU v Metlife*<sup>268</sup>, Commissioner Freemantle held that the LRA 1995 *"does not set out to regulate or establish any right to bargain, or create any concomitant duty to do so. Equally clear is the concept that parties may set out to position themselves in these matters by the exercise of power or persuasion."*

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<sup>266</sup> See C. Thompson, "Collective bargaining" in *Current Labour Law 1997*, Juta, 1997, 2-21; For cases of application of these guidelines, see *Chemical Workers Industrial Union v Millner's Dental Suppliers (Pty) Ltd*, quoted by C. Thompson, in *Current Labour Law 1997*, Juta, 1997, 17; *SACCAWU v Metlife*, CCMA WE735, 7 May 1997, *SA Clothing & Textile Workers Union v Sheraton Textiles*, (1997) 18 ILJ 1412 (CCMA); *UPUSA v Komming Knitting*, (1997) 4 BLLR 508 (CCMA); *SACTWU v WM Eachus & Co*, CCMA WE152, 15 April 1997; *NUMSA v Feltex Foam*, (1997) 6 BLLR 798 (CCMA); *SACWU v Technical Systems*, CCMA WE3341, 4 August 1997.

<sup>267</sup> (CCMA) KN544, 7 August 1997.

<sup>268</sup> Quoted by C. Thompson in *Current Labour Law 1997*, Juta, 1997, 18.



Since practice shows that collective agreements are mostly concluded with trade unions which enjoy organisational rights, it can be said as a matter of practice, that in order to enter into a collective agreement at company level, a trade union must enjoy sufficient representivity.

## CHAPTER III FORUMS FOR COLLECTIVE BARGAINING

Collective bargaining can take place at a variety of levels: at sectoral level, through bargaining councils, statutory councils or even through other non-statutory centralised forums<sup>269</sup>, at company<sup>270</sup> or plant level, or at any other level agreed to by the social partners.

### I BARGAINING COUNCILS

#### I.1 Origin of bargaining councils

Bargaining councils are the successors to the industrial councils already established in terms of earlier legislation<sup>271</sup>. Except for a few differences, they are very similar to their predecessors. The LRA 1995 provides that the industrial councils established under the LRA 1956 are deemed to be bargaining councils under the LRA 1995, and continue to be bodies corporate<sup>272</sup>.

The notion of a bargaining council has not been defined in the LRA 1995, but can be defined as a registered forum voluntarily established for a particular economic sector<sup>273</sup> and area, by one or more registered trade unions and one or more registered employers' organisations for purposes of concluding and enforcing collective agreements regulating any matters of mutual interest in that particular sector and area, preventing and resolving labour disputes, and advising NEDLAC or any appropriate forum on policy and legislation that may affect that sector and area.

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<sup>269</sup> See for example the bargaining forum for the Chemical Industry which has been in place for the last 2 years. The social partners have bargained through this forum, and have now applied for the registration of the forum as a Bargaining Council.

<sup>270</sup> The writer has come across a variety of agreements concluded at company level. In some instances, wages and terms and conditions of employment are negotiated at "group" level, disciplinary, grievances and retrenchment procedures at "divisional" level, and any other terms and conditions not specifically dealt with at other levels are dealt with at plant level. The variety of levels where collective bargaining may take place is infinite, and for the purpose of this dissertation, the writer will refer to "Company level" when referring to collective agreements concluded between one or more trade unions and one employer, and regulating terms and conditions of employment in an undertaking.

<sup>271</sup> Industrial councils have been renamed bargaining councils because the LRA 1995 applies to all sectors of the economy, not just the industrial or private sector. They now permit membership by the State, educational and other non-industrial sectors. See Explanatory Memorandum prepared by the Ministerial Task Team, January 1995, *Government Gazette*, 10 February 1995, No 16259, 124; X., "Collective bargaining", *Employment Law*, September 1995, Vol 12, No 1, 4.

<sup>272</sup> Schedule 7, Part C, item 7 (1).

<sup>273</sup> A sector is defined by section 213 of the LRA 1995 as an industry or service, with the public service

## **1.2 Establishment of bargaining councils**

Bargaining councils are bipartite forums voluntarily established by one or more registered trade unions and one or more registered employers' organisation for one or more sectors and an area. The establishment therefore requires the collaboration of both social partners<sup>274</sup>.

The LRA 1995 lays down certain requirements that the parties must meet in order to establish a bargaining council<sup>275</sup>. Those conditions are the following:

### **1.2.1 Constitution**

Section 27 (1) (a), read with section 30 of the LRA 1995, prescribes certain requirements that must be contained or addressed in the bargaining council's constitution.

It appears from section 30 of the LRA 1995 that the legislator has adopted a non-interventionist policy as far as the establishment of bargaining councils is concerned. It sets up a framework within which the parties must regulate a minimum set of matters, but leaves at their discretion how these matters must be regulated, thereby enhancing the principle of free collective bargaining.

### **1.2.2 Registration**

Section 27 (1) (b), read with section 29 of the LRA 1995, provides that in order to establish a bargaining council in terms of the Act, the parties must obtain the registration of that council.

In order to acquire registration from the registrar, the parties to the bargaining council must submit their application on the prescribed form, together with a copy of its constitution and any other information that may assist the registrar to determine whether or not the bargaining council meets the requirements for registration.

A notice is thereafter published by the registrar in the Government Gazette inviting

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<sup>274</sup> D. du Toit et al, *op cit.*, 139; See also *Paper, Printing, Wood & Allied Workers Union v SA Printing & Allied Industries Federation* (1990) 11 ILJ 345 (IC), where the Industrial Court held that "the voluntary nature of an industrial council is an element which contributes to its usefulness... The principle of voluntarism entails that as a general rule no eligible party could be compelled to join, or to remain in, or to resign from, an industrial council."

<sup>275</sup> For an application of these principles, see *National Manufactured Fibres Employers' Association v*

the general public to object to the establishment of the bargaining council on the grounds that the applicant is not sufficiently representative of the sector and area in respect of which the application is made, or the sector and area in respect of which the application is made is not appropriate, or because the applicant has not complied with the provisions relating to registration<sup>276</sup>.

After a certain period of time has elapsed and the applicant has been given the opportunity to respond to the objections raised by the general public, the registrar must send the application, objections and responses to NEDLAC for consideration. NEDLAC then has to consider the appropriateness of the sector and area in respect of which the application is made, demarcate<sup>277</sup> the appropriate sector and area in respect of which the bargaining council should be registered, and report to the registrar in writing. Should NEDLAC fail to agree on a demarcation, the onus is then on the Minister of Labour to do so. In determining the appropriateness of a sector and area, he must seek to give effect to the primary objects of the Act.

Thereafter, if the registrar is satisfied that the constitution complies with section 30 (see *supra*), that adequate provision is made in the constitution of the bargaining council for the representation of small and medium enterprises, that the parties are sufficiently representative of the sector and area for which they seek registration, and that there is no other council registered for the sector and area in respect of which the application is made, he must register the bargaining council by entering the applicant's name in the register of councils and issuing a certificate of registration.

The registrar accordingly has very little discretionary power in registering a bargaining council. The main discretionary reason for which he may refuse to register a bargaining council relates to the representation of small and medium enterprises which may not be adequate. The LRA 1995, however, is not explicit

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*CWIU & others*, Labour Court, D101/97, 15 August 1997.

<sup>276</sup> For an example of such an application under the LRA 1956, see *Amalgamated Clothing & Textile Workers Union of SA v National Industrial Council of the Leather Industry of SA*, (1989) 10 ILJ 894 (IC).

<sup>277</sup> Landman held in *National Manufactured Fibres Employers' Association v CWIU & others*, Labour Court, D101/97, 15 August 1997, that "the determination or demarcation of a sector takes place in two distinct situations. First a demarcation is performed when a bargaining council or similar institution is in the process of being set up. The second situation deals with the case where a sector has already been authoritatively established in respect of a bargaining council, statutory council or statutory instrument (a collective agreement) and the question is whether or not an employer or employees fall within the ambit of a particular sector and thereby also fall within the ambit of the council concerned or the legislative instrument."

about the notion of “adequate provision”.

Once a bargaining council has been established, it is deemed to be representative for one year. Thereafter, the council will have to satisfy the registrar on an annual basis that it remains representative, at the risk of losing its certificate of representativeness.

### **1.3 Composition of bargaining councils**

Subject to the requirement that a bargaining council must be a bipartite body consisting of registered trade unions and registered employers' organisations, the parties to the council are free to determine its composition. However, half of the representatives must be appointed by the trade unions and the other half by the employers' organisations that are party to the bargaining council.

### **1.4 Competence of bargaining councils**

Section 28 of the LRA 1995 deals with the powers and functions of bargaining councils. It provides that:

*“The powers and functions of a bargaining council in relation to its registered scope include the following:*

- (a) to conclude collective agreements;*
- (b) to enforce those collective agreements;*
- (c) to prevent and resolve labour disputes;*
- (d) to perform the dispute resolution functions referred to in section 51<sup>278</sup>;*
- (e) to establish and administer a fund to be used for resolving disputes;*
- (f) to promote and establish training and education schemes;*
- (g) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;*
- (h) to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area;*
- (i) to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lock-out at the workplace, and*

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<sup>278</sup> Section 51 of the LRA 1995 relates to the resolution of disputes about matters of mutual interest.

(j) to confer on workplace forums additional matters for consultation.”

Those powers and functions are not exhaustive; the fact that section 28 provides that the powers and functions “include the following” implies that other functions could be performed by the bargaining council.

It must be noted that a bargaining council is competent to exercise these functions and powers only within its registered scope, i.e. for the sector and area for which it obtained registration<sup>279</sup>.

## II STATUTORY COUNCILS

### II.1 Origin of statutory councils

In order to accommodate COSATU's demand for greater compulsion towards centralised bargaining, the LRA 1995 provides for the establishment of statutory councils in sectors and areas where no bargaining council exists.

Their creation resulted from a compromise between COSATU, which insisted on compulsory centralised bargaining during the negotiation of the new Labour Relations Act, and business, which wanted to retain the principle of voluntarism as the basis on which participation in centralised bargaining forums should be premised.

The new legislation kept this voluntarist principle, but introduced a measure of compulsion by permitting the establishment of statutory councils with attenuated functions<sup>280</sup>.

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<sup>279</sup> The writer has not found any decision issued under the LRA 1995 dealing with the situation where a bargaining council has acted *ultra vires*, and the consequences on the binding force of collective agreements. For cases of application under the LRA 1956, see *S. v Prefabricated Housing Corp. (Pty) Ltd & another*, (1974) 1 SA 535 (A); *Transvaal Manufacturers' Association and another v Bespoke Tailoring Employers' Association and others*, (1953) 1 SA 47 (A); *NICISEMI v Photocircuit SA & 11 others*, NH16326/91, IC, 14 May 1993; See also *Photocircuit SA (Pty) Ltd v De Klerk No & others* (1991) 12 ILJ 289 (A), where the Appellate Division held that “an industrial council can only exercise its powers in regard to the undertaking, industry, trade or occupation in respect of which it has been registered – an occupational limitation; and in the area in respect of which it has been registered – a territorial limitation.”

Regarding the question of which criteria must be used to determine whether a company falls within the scope of an industrial council, Jacobs held in *Industrial Council for the Motor Transport Undertaking (Goods) v Bothma & Sons (Pty) Ltd*, (1997)2 BLLR 140 (IC) that it depends on whether the activities carried on by the Company are regular and ongoing.

<sup>280</sup> D. du Toit et al, *op cit.*, 145.

It is noteworthy that nearly two years after the coming into force of the LRA 1995 which made provision for the establishment of such institution, no statutory council has yet been established <sup>281</sup>.

## **II.2 Establishment and composition of statutory councils**

The LRA 1995 provides a two-step procedure for the formation of statutory councils. The first is the establishment of the council, and the second is the registration of the council<sup>282</sup>.

### **II.2.1 The establishment of statutory council**

A statutory council can only be established on application by one or more registered representative trade unions or one or more registered representative employers' organisations, for a sector and area in respect of which no bargaining council is registered<sup>283</sup>.

It has been stated that *"the most notable feature of the process is that there is no need for cooperation between employers and unions. Either party may unilaterally make application for the establishment of a statutory council."*<sup>284</sup>

The establishment of statutory councils is subject to requirements similar to those for bargaining councils.

### **II.2.2 The registration of statutory councils**

Le Roux describes the process leading up to registration as the filling of a "shell":

*"the establishment of a statutory council leads to the creation of a 'shell', the content of which still has to be filled. This is done by determining who the parties to the council will be, as well as deciding on the provisions of its constitution."*<sup>285</sup>.

The process of registration is marked by the intervention of the CCMA. All the

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<sup>281</sup> It seems, however, that one application was made on 7 April 1998 to establish a statutory council for the Printing Industry. Information retrieved from CCMail, Legalinfo System site.

<sup>282</sup> Due to the fact that statutory councils do not seem to have met the favour of the social partners, the writer will not analyse this institution in detail. For further details, see P.A.K. Le Roux, "Statutory councils: their powers and functions", *C.L.L.*, Vol 5 No 7, February 1996, 62.

<sup>283</sup> For the meaning of "representative" in the context of statutory councils, see *supra*, Chapter II. See also section 39 (1) and (2) of the LRA 1995.

<sup>284</sup> D. du Toit, D. Woolfrey, J. Murphy, S. Godfrey, D. Bosch, S. Christie, *The Labour Relations Act of 1995*, Butterworths, Durban, 1996, 145.

<sup>285</sup> P.A.K. Le Roux, "Statutory councils: their powers and functions", *op cit.*, 63.

registered trade unions and registered employers' organisations in the sector and area, as well as any interested parties in that sector and area who nominate representatives for the statutory council<sup>286</sup>, are invited by the registrar to attend a meeting that will be chaired by a commissioner appointed by the CCMA.

The Act is not specific as to what it considers to be interested parties in the sector and area. It seems that "*individual employers, employees or group of employees and perhaps administrative regulatory bodies (acting in their capacity as administrators and regulators) are most likely intended*"<sup>287</sup>.

During the meeting chaired under the auspices of the CCMA, the commissioner must try to facilitate the conclusion of an agreement regarding the registered trade unions and registered employers' organisations that are to be parties to the statutory council, and a constitution that meets the same requirements as those for a bargaining council<sup>288</sup>. At this stage, the parties either reach an agreement during the meeting chaired under the auspices of the CCMA, or they do not. In the latter case, the Minister of Labour is given extensive powers to appoint the parties. Furthermore, sections 41 (6) and (7) of the LRA 1995 expressly regulates the situation where there is no corresponding trade union or employers' organisation to the applicant.

The Minister is then empowered, after consulting the CCMA, to appoint suitable persons as representatives and alternates, taking into account the nominations<sup>289</sup> received from employees and trade unions, or from employers and employers' organisations. It has been argued that this mechanism which gives the Minister power to appoint representatives over whom employers or unions have no control provides a powerful incentive for them to take part in the process<sup>290</sup>.

### **II.3 Competence of statutory councils**

In terms of section 43 of the LRA 1995:

*"(1) the powers and functions of a statutory council are-*

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<sup>286</sup> Section 40 (2) of the LRA 1995.

<sup>287</sup> D. du Toit et al, *op cit.*, 146.

<sup>288</sup> Section 40 (3) of the LRA 1995.

<sup>289</sup> Those nominations were received after the registrar published a notice in the Government Gazette establishing the statutory council and inviting the interested parties to nominate representatives for the statutory council - section 40 (2) (b) of the LRA 1995.



- (a) *to perform the dispute resolution functions referred to in section 51;*
- (b) *to promote and establish training and education schemes;*
- (c) *to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the statutory council or their members; and*
- (d) *to conclude collective agreements to give effect to the matters mentioned in paragraphs (a), (b), and (c).*

*(2) A statutory council, in terms of its constitution, may agree to the inclusion of any of the other functions of a bargaining council referred to in section 28."*

The limited powers of statutory councils in respect of the conclusion of collective agreements can be explained by the way those councils are established, and the fact that they can be formed by parties with a low threshold of representivity.

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<sup>290</sup> P.A.K. Le Roux, "Statutory councils: their powers and functions", *op cit.*, 64.

## CHAPTER IV COLLECTIVE AGREEMENTS

The Labour Relations Act of 1995 regulates the conclusion of collective agreements and their binding force.

### I SCOPE OF APPLICATION OF THE LRA 1995

The LRA 1995 covers employers and employees in all sectors of the economy, barring three exceptions: the National Defence Force, the National Intelligence Agency and the South African Secret Service<sup>291</sup>.

For the purpose of this Act, an employee is defined as:

- “(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and*
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer,*

*and ‘employed’ and ‘employment’ have meanings corresponding to that of ‘employee’<sup>292</sup>.*

The notion of ‘employer’ has not been defined by the Act. The definition of employee consequently has to serve as the point of reference for determining who is an employer. An ‘employer’ can, however, be defined as *“any person who receives services from an employee for remuneration or is assisted in the conduct of its business by an employee.”<sup>293</sup>*

The scope of application is consequently very wide and includes nearly anybody engaged in an employment relationship<sup>294</sup>.

The Act makes no reference to the validity of the employment contract as a pre-

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<sup>291</sup> Section 2 of the LRA 1995.

<sup>292</sup> Section 213 of the LRA 1995.

<sup>293</sup> D. du Toit et al, *op cit.*, 56.

<sup>294</sup> For further details regarding the rationale behind the very broad scope of application of the LRA 1995, see Explanatory Memorandum prepared by the Ministerial Task Team, January 1995,

requisite for its application. The CCMA and the Labour Court will have to construe the necessary guidelines in determining which defect in an employment contract could affect the binding effect of a collective agreement. The proposal that the LRA 1995 is applicable, regardless of the validity of the employment relationship has been upheld in a matter concerning the employment of an illegal alien<sup>295</sup>.

## **II FEATURES OF COLLECTIVE AGREEMENTS**

### **II.1 The notion of a collective agreement**

A collective agreement is defined by section 213 of the LRA 1995 as:

*“a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand -*

- (a) one or more employers;*
- (b) one or more registered employers' organisations; or*
- (c) one or more employers and one or more registered employers' organisations.”*

This definition shows that on the employees' side, only employees acting collectively through registered trade unions may enter into a collective agreement, whilst on the employers side, individual employers may enter into such an agreement. The same condition of registration is applicable when employers' organisations wish to enter into a collective agreement within the meaning of the LRA 1995<sup>296</sup>.

### **II.2 Collective agreements and temporary employment services**

The Act contains a provision which has not been tested by the courts yet, however,

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<sup>295</sup> *Kabey v Bester* CCMA GA635, 11 March 1997; *contra* see *Mthethwa v Vorna Valley Spar*, CCMA GA15771; see also D. du Toit et al, *op cit.*, 54 who held that “since the definition does not require that there be a valid and binding employment contract between employer and employee, the Act will also apply to employees who do not have valid contracts of employment, such as unassisted minors whose contracts of employment have not been ratified by their legal guardians.”

<sup>296</sup> See *SANSEA v NUSOG*, (1997) 4 BLLR 486 (CCMA) where Commissioner Christie held that “there is nothing in the LRA or any other law which states that a collective agreement can only be made in a registered collective bargaining structure. Although a union must be registered, the forum does not need to be.” NUSOG's argument that the bargaining forum was not registered, and that no agreement concluded in an unregistered body can be a ‘collective agreement’ as defined in the LRA, was therefore dismissed. See also *Fidelity Guards v Professional Transport Workers Union & others*, case No J843/97 (LC) where it was admitted that the constitution of an unregistered industrial council constitutes a collective agreement within the meaning of the LRA 1995.

## II.2 Collective agreements and temporary employment services

The Act contains a provision which has not been tested by the courts yet, however, and which causes some confusion as to the parties to collective agreements. Section 198 (5) of the LRA 1995 refers to the possibility of two or more bargaining councils agreeing to bind a temporary employment service, its employees and clients who fall within their combined registered scope, to a collective agreement concluded in any one of them. This does not create any particular problem<sup>297</sup>. However, subsection (7) refers to the possibility of two or more bargaining councils agreeing to bind a temporary employment service, its employees and clients who fall within their combined registered scope, to a collective agreement. In order to avoid being a duplication of the previous subsection, this can only refer to a “newly concluded” collective agreement. The questions then arise: “who are the parties to this agreement, and in which forum is the agreement concluded?” As subsection (8) provides that *an agreement concluded in terms of subsection (7) is binding only if each of the contracting bargaining councils (...) it can only be assumed that the parties are the bargaining councils themselves*. If this were the correct answer, one would face a situation where the binding effect of such collective agreements is not regulated at all by the LRA 1995: the legal definition of collective agreements does not contemplate bargaining councils being parties to them. Neither section 23<sup>298</sup> nor section 31<sup>299</sup> of the LRA 1995 can justify the binding effect of such agreements. Furthermore, section 198 (8) refers to the obligation to extend such agreements to give them binding effect, but does not specify the process to be followed to grant such extension, and section 32 seems to be inappropriate for the situation

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<sup>297</sup> Save that the expression “falling within their combined registered scope” is subject to confusion. A bargaining council may only be registered in respect of a sector and area for which a bargaining council does not exist already (section 29 (11)(b)(v) of the LRA 1995). Furthermore, section 62 of the LRA 1995 establishes a procedure for demarcation when there is a dispute about whether or not an employer falls within the ambit of a particular sector, and thereby also falls within the ambit of the council concerned or the legislative instrument. Subsection 12 even provides that the registrar must amend the certificate of registration of a council in so far as is necessary in the light of the award made by the Commissioner. This last subsection implies that, should the scope of one council overlap the scope of another council, the scope of registration of one of the two councils must be amended.

<sup>298</sup> Section 23 provides that a collective agreement binds the parties - which in this case would mean the bargaining councils - and their members - which would mean the trade unions and employers' organisations. Provided that it is accepted that an agreement concluded by bargaining councils constitutes a collective agreement within the meaning of section 213 of the LRA 1995 (and this is arguable), the question would then be “how does it bind the ‘members of the members’, i.e. the employees and employers taken individually?”

<sup>299</sup> Section 31 regulates the binding nature of collective agreements concluded in bargaining councils. The collective agreements referred to in section 198 (7) are not concluded in a bargaining council but by bargaining councils, as opposed to the agreements referred to in section 198 (5) which are concluded in *any one* of the bargaining councils. The provisions of section 31 would therefore not be applicable to these collective agreements.

contemplated by section 198<sup>300</sup>.

### II.3 Hybrid character of collective agreements

The LRA 1995 brought some clarification as to the nature of collective agreements. Under the previous legislation, the binding nature of collective agreements was uncertain. It was sometimes described as a contract regulated by the common law<sup>301</sup>, and sometimes as a form of subordinate legislation<sup>302</sup>.

Under the LRA 1995, collective agreements remain agreements voluntarily entered into by the parties, but their binding force is regulated by the law. It is no longer necessary to have recourse to various theories of the law of contract to enforce a collective agreement concluded within the parameters of the Act.

According to Landman<sup>303</sup>, the LRA 1995 has not resolved what the legal foundation of a collective agreement is. From a reading of section 23 of the LRA 1995, he concludes that a collective agreement is a form of delegated legislation, "*albeit in a most unconventional setting*". He draws this conclusion from the fact that a collective agreement goes far wider than the boundaries of a common law contract, especially when it constitutes a bond between the parties and non-parties. He adds, however, that it could also be a common law agreement if there was the intention (by the parties) to enter into a common law agreement. But, "*at the same time, and irrespective of the intention to contract, the agreement will become enforceable by virtue of the provisions of section 23 of the LRA 1995.*" Other writers are however of the view that in as much as collective agreements do not need to be Gazetted, save when they are concluded in bargaining councils and extended to non-parties, they

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<sup>300</sup> Not only is section 32 applicable to collective agreements concluded in a bargaining council only, but the requirements laid down to grant the exemption, and more particularly the conditions of representivity, do not address the problem of temporary employment service.

<sup>301</sup> *Radio Television Electronic and Allied Workers Union v Tedelex (Pty) Ltd and another*, (1990) 11 ILJ 1272 (IC) where it was held that a collective agreement concluded with a majority union cannot be binding on non-members by virtue of the common law. *Collins v Volkskas Bank* (1994) 15 ILJ 1398 (IC) where it was held that "conditions of employment so negotiated in the course of collective bargaining are generally binding and enforceable against individual union members, whether through the common law principle of agency or stipulatio alteri, or on equitable considerations such as the promotion of collective bargaining which is the prime means of resolving labour disputes contemplated by the LRA."

<sup>302</sup> See *supra*, Historical background.

<sup>303</sup> A.A. Landman, "Collective Agreements – Which judicial pigeon hole for new bargaining agreements?", *C.L.L.*, Vol 5, No 8, March 1996, 74; see also D. du Toit et al, *op cit.*, 161 who view a collective agreement as a "statutory contract".

cannot be held as being a form of subordinate legislation, but constitute a contract<sup>304</sup>.

The question of the true nature of a collective agreement is, according to Landman an important one. He believes that if the agreement is a contract then it means that a party to the contract can challenge it on the basis of misrepresentation, but not that the bargain which it reflects is unreasonable. If, however, it is a species of delegated legislation, then it would be open to any affected person, including a signatory, to complain that the "law" is invalid because it allows for an unreasonable, unfair or unjustified consequence or is void for vagueness.

The writer is of the opinion that a collective agreement is a contract with a hybrid nature. In other words, it is a common law contract in as much as it can only be voluntarily entered into by the parties, and all the conditions for a valid contract (capacity, consent<sup>305</sup> and object) must be present at the time of conclusion<sup>306</sup>. The effect of such contract is however not regulated by the law of contract, but by the LRA 1995. It is therefore not possible to describe a collective agreement as falling in the category of contract only, or in the category of subordinate legislation only. Both the contractual and the legislative regulation components are intrinsic to the concept of collective agreement, and this, regardless of the level of conclusion or the extension of such agreement.

It further appears that the arguments used prior to the coming into force of the LRA 1995, to consider a collective agreement a piece of subordinate legislation are no longer valid. In *S. v Prefabricated Housing Corp. (Pty) Ltd & another*<sup>307</sup>, the Appellate Division ruled that a collective agreement was a piece of subordinate legislation on the following basis:

*"It is true that the type of document now under consideration is termed under the Act*

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<sup>304</sup> X., "Collective bargaining", *Employment Law*, September 1995, Vol 12, No 1, 5; see also SR van Jaarsveldt and BPS van Eck, *Kompendium van Suid-Afrikaanse Arbeidsreg*, 2<sup>nd</sup> edition, 187, quoted by A.A. Landman in *FAWU v Simba (Pty) Ltd*, Labour Court D15/97.

<sup>305</sup> In *Deukers Bosveld Gold Mine v National Union of Mineworkers*, (1993) 14 ILJ 778 (ARB), Revelas held that "any party who enters into an agreement under duress cannot be held to it in accordance with the common law governing contract. In industrial relations, collective bargaining forms the focus of agreements and the common law contract to a great extent falls away as a guideline. Duress, in itself, cannot render agreements arrived through negotiations invalid."

<sup>306</sup> For an example of a lack of consent and error on the cause, see *Chemical Workers Industrial Union v Lutheni Plastics*, CCMA, EC3147, 23 March 1998.

<sup>307</sup> 1974 (1) SA 535 (A).

and in industrial parlance an 'agreement', and it is said to be 'negotiated' or 'entered into', but technically it is not a contract in the legal sense. The parties to the industrial council are the employer(s) or employers' organisation(s) and trade union(s) or their representatives. They do not contract inter se to produce the measures. They may 'negotiate' or 'enter into' the agreement, but it is the industrial council as the corporate body that decides whether to adopt it and transmit it to the Minister for consideration and promulgation. Moreover, it only becomes effective if and when the Minister deems it expedient to declare it binding by notification in the Gazette. It is noteworthy, too, that it is the Minister who fixes the period of its duration, and that he can also declare it (or parts of it) to be binding on employers and employees in the industry other than those who entered into the agreement and for an area additional to the area for which the industrial council is registered.

*From all those provisions it is clear, I think, that an industrial agreement is not a contract but a piece of subordinate, domestic legislation made in terms of the Act by the industrial council and the Minister. In that respect it does not differ from by-laws made by the council of a local authority and approved by the Administrator of a Province under its Local Government Ordinance, or from a wage determination made by the Minister on the recommendation of the Wage Board under the provisions of the Wage Act, presently 5 of 1957, both of which are similarly regarded."*

Under the LRA 1995, a collective agreement concluded in a bargaining council does not have to be adopted by a majority vote to be binding, nor does it have to be transmitted to the Minister for consideration and promulgation. As soon as it is concluded, a collective agreement is binding by virtue of section 23 or 31, regardless of the forum in which it has been concluded<sup>308</sup>. The Minister only intervenes when the bargaining council wishes to extend the agreement to non-parties, and then his powers are limited to verifying that the requirements laid down by the Act have been met. As soon as he is satisfied that the requirements have been met, he must extend the agreement<sup>309</sup>, as requested by the council, and

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<sup>308</sup> Whilst under the prior legislation, an agreement concluded at industrial council level did not constitute a contractually binding agreement, but took the form of a gentlemen's agreement until promulgation. See *Consolidated Frame Cotton Corp. v Minister of Manpower*, 1985 (1) SA 189 (D). But see *Nouwens Carpets (Pty) Ltd v National Union of Textile Workers* 1989 (2) SA 363 (N) in which it was held that an agreement reached by parties to a conciliation board was binding in terms of the ordinary principles of contract until it was promulgated by the Minister.

<sup>309</sup> Section 48(1) of the LRA 1956 provides that "the Minister may, if he deems it expedient to do so,"

cancel the extension as and when requested by the council. From all those provisions, it could be argued that under the LRA 1995, a collective agreement does not constitute a piece of subordinate legislation anymore<sup>310</sup>.

It results from these arguments that a collective agreement does not fit into any delimited, fixed category of source of rights and obligations. It is neither totally a contract, nor totally a piece of legislation. In this respect, it must be accepted that collective agreements constitute *sui generis* acts peculiar to labour law.

Commissioner Christie held in *SANSEA v NUSOG*<sup>311</sup> that:

*"collective bargaining is based on the socio-economic power of the parties who participate in it. The law does not interfere in the decisions of the parties unless the process or decisions are discriminatory or there is fraud or some other serious abuse of the process."*

Regardless of the "true" nature of collective agreements, and whether considered as a contract or as a piece of subordinate legislation, it therefore seems that the mere "unreasonableness" would not be sufficient ground to strike out a collective agreement, and some kind of public policy should be invoked in order to obtain relief from the court<sup>312</sup>.

#### **II.4 Interpretation of collective agreements**

The LRA 1995 deals with the interpretation of collective agreements under section 24, headed "Disputes about collective agreements".

This section provides that any dispute about the interpretation or application of a

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declare the provisions of the agreement to be binding.

<sup>310</sup> See *Bargaining Council for the Clothing Industry (Natal) v Confederation of Employers of Southern Africa & others*, Labour Court D136/98, 15 June 1998 where Landman held that an industrial council agreement is not deemed by the LRA 1995 to be a collective agreement.

<sup>311</sup> (1997) 4 BLLR 486 (CCMA).

<sup>312</sup> See *Collins v Volkskas Bank* (1994) ILJ 1398 (IC) where it was held that "only if such agreements are, after all, the outcome of a manifestly gross unfair labour practice being perpetrated against an individual member or employee, would this court possibly be justified in intervening or striking down the provisions of a collective agreement."; *BCAWU v Masterbilt CC* (1987) ILJ 670 (IC) where it was held that "it is a well established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved."; *SACCAWU v Garden route Chalets Pty Ltd*, (1997) 3 BLLR 325 (CCMA); *FAWU v Royal Beechnut (Pty) Ltd*, (1988) 9 ILJ 1033 (IC); See also J. Wilson and G. Giles, "Collective agreements: some present and future implications", *Labour Law News & Court reports*,



collective agreement must be referred to conciliation and arbitration in accordance with the dispute resolution procedures contained in the collective agreement, and if these procedures are not provided or are inoperative, to the CCMA for conciliation and if the dispute remains unresolved, for arbitration<sup>313</sup>.

It seems from the most recent jurisprudence that the CCMA will be reluctant to depart from the plain meaning of the wording of a collective agreement, save when the consequences of doing so would create some absurdity. In *SACTWU v Best Clothing (Pty) Ltd*<sup>314</sup>, Commissioner Murphy held that:

*"when the terms of a contract are clear and unambiguous no evidence may be given to alter such plain meaning... Even if the application of the agreement seems somewhat anomalous, the consequences of giving the words their plain meaning are not so absurd that I am permitted to depart from them."*

This approach is consistent with the rules of interpretation that apply to South African law of contract.

### III CONTENT OF COLLECTIVE AGREEMENTS

#### III.1 Matters of mutual interest

A collective agreement is an agreement, which regulates terms and conditions of employment<sup>315</sup> or any other matter of mutual interest between the signatory parties.

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Vol 5, No 3, October 1995, 3.

<sup>313</sup> In *SA Motor Industry Employers Association & another v NUMSA* (1997) 18 ILJ 1301 (LAC), the Labour Appeal Court considered that the scheme of section 24 is to compel the parties to a collective agreement to resolve a dispute about the interpretation of a collective agreement by conciliation, and if that fails, by arbitration, either in terms of an agreed procedure or, in the absence of an agreed procedure, by the CCMA. In terms of section 157 (5) the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the LRA requires the dispute to be resolved through arbitration, except if, in terms of section 158 (2), the parties consent to the Labour Court sitting as arbitrator. In this matter the parties had not given their consent. See also *SACCAWU v Woolworths (Pty) Ltd*, (1998) 19 ILJ 57 (LC).

<sup>314</sup> (1997) 5 BLLR 658 (CCMA); see also *SACCAWU v Crown Furnishers*, (1998) 19 ILJ 663 (CCMA), where it was held that the mechanisms for resolving disputes about collective agreements are not available only to the parties to the agreement. These mechanisms in fact remain available to non-parties bound by the agreement. Commissioner Le Roux therefore ruled that "it could not have been the intention of the legislature to leave all persons other than the collective bargaining agents who entered into the agreement without any recourse to the mechanisms provided by section 24."; For further cases on the application of section 25 of the LRA 1995 and the interpretation of collective agreements, see *Towerkop Dairies (Pty) Ltd v SACWU*, CCMA WE7551, 20 March 1998; *FAWU v Bromor Foods (Pty) Ltd*, CCMA KN11973, 24 May 1998; *NUMSA v Merkim Motors*, CCMA NC1595, 22 July 1998; *CAWU v Grinaker Durasel*, CCMA NC57, 18 March 1997; *Food and Allied Workers Union v Premier Food Industries*, Labour Court, J205/97; 19

In *Rand Tyres and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Tvl) and Two Others*, it was held that “whatever can be fairly and reasonably regarded as calculated to promote the well-being of the industry concerned is a matter of mutual interest to employers and employees in that industry.”<sup>316</sup>

Its content may accordingly be very wide, and may include wages, leave, sick leave, hours of work, overtime, pension, provident fund, social peace provisions, stop orders etc.

### III.2 Incorporation in the individual employment contract

Section 23 (3) of the LRA 1995 provides that:

*“where applicable, a collective agreement varies any contract of employment between an employee and an employer who are both bound by the collective agreement.”*

This provision, read in conjunction with section 199 of the LRA 1995, regulates the effect of collective agreements on the contract of employment. It follows from these sections that:

When the employee’s treatment provided for in the employment contract is less favourable than the one provided by the collective agreement, the contract of employment is implicitly modified, without an amendment to the letter of appointment being necessary. The provisions of the collective agreement are automatically incorporated into the individual employment contract and remain in force even after the collective agreement that generated them terminates<sup>317</sup>.

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May 1997; *Reactor Clothing (Pty) Ltd v Robertson & others*, Labour Court, D146/97, 13 February 1998; for a case of interpretation of collective agreement under the LRA 1956, see *SASBO v First National Bank*, (1996) 17 ILJ 135 where AM van Wyk held that when the court is “confronted with a lacuna in the written record in that both parties wish the Court to read into the written record a qualification, (...) I fail to see how the Court can come to a conclusion on this point other than allowing evidence extraneous to the written document. (...) Every document should be read in the light of the circumstances existing at the time, and evidence may rightly be given of every material fact which will place the court as near as may be in the situation of the parties to the instrument (...) I can see no obstacle either in principle or in contract for the Court, where the wording is equivocal and the contending interpretations are finely balanced, prohibiting the Court from invoking equity in coming to a decision to accept one interpretation rather than the other.”

<sup>315</sup> According to D. du Toit et al, *op cit.*, 159, the expression “terms and conditions of employment” is taken to refer to the express or implied terms of the contract of employment in the narrow sense, and does not include the physical conditions or the surrounding circumstances of employment.

<sup>316</sup> 1941 TPD 108.

<sup>317</sup> See section 199 of the LRA 1995 and the comment under section V. For an application of this

The position is, however, uncertain when the collective agreement treats the employee less favourably than the employment contract. A reading of section 23 (3) of the LRA 1995 could imply that even if the collective agreement contains a less favourable provision, the agreement will take precedence over the contract of employment. On the other hand, it could be argued that the words "where applicable" contained in section 23 (3) refer to such circumstance, and therefore exclude the precedence of the collective agreement over the employment contract when the latter is more favourable to the employee, unless the collective agreement makes it clear that this is not the case.

It is submitted that the CCMA and the Labour Court will have to construe the necessary guidelines for determining when section 23 (3) of the LRA 1995 applies, and when an employment contract is varied by a collective agreement. In other words, the expression "where applicable" will have to be defined<sup>318</sup>.

#### IV CONDITIONS OF VALIDITY OF COLLECTIVE AGREEMENTS

Provided that a collective agreement is recorded in writing, the LRA 1995 does not require any specific formalities such as the signature of the parties, or the inclusion of the date of the agreement, or other information to be included in the agreement. It can therefore be submitted that labour law does not depart at all from the common law of contract in regulating the form of collective agreements<sup>319</sup>, barring the requirement of it being recorded in writing.

Even though section 24 (1) of the LRA 1995 seems to make it obligatory that "every collective agreement must provide for a procedure to resolve any dispute about the

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principle, see *Towerkop Dairies (Pty) Ltd v SACWU*, CCMA WE7551, 20 March 1998, where it was held that "the collective agreement being considered here contains new conditions of employment for all those employees covered by the agreement and supersedes any other contract or practice unless the agreement contains a clause excluding certain provisions governed by another agreement or practice."

<sup>318</sup> For example, do the provisions contained in a collective agreement regulating retrenchment procedures vary an employment contract? In *Transport & General Workers Union & others v SA Stevedores*, (1994) 15 ILJ 358 (IC), Van Zyl held that these were not incorporated into individual employment contracts. See also *SACWU v Engen Petroleum Ltd & Colas International (Pty) Ltd*, unreported case, (LC) C240/97.

<sup>319</sup> See *TGWU obo Dube v Value Truck Rental*, CCMA GA17683, 28 January 1998, where Commissioner Seedat held the inquiry into the validity of a collective agreement is strictly contractual. In casu, when the union communicated the agreement to the employer, a covering letter was attached, stating 'if in agreement, please contact the writer for the purposes of signing the contract.' Commissioner Seedat held that "Besides in the often volatile milieu of industrial relations negotiations, the practice has developed to formalise an agreement only after the terms have been reduced to writing and signed by the parties. Otherwise disputes about interpretation and implementation would abound."

*interpretation or application of the collective agreement*”, this cannot be considered a condition of validity. Indeed, section 24 (2) goes on to state that *“if there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if the collective agreement does not provide for a procedure as required by subsection (1).”* Therefore, the lack of a dispute resolution procedure does not invalidate the agreement<sup>320</sup>.

## **V NULLITY OF THE NORMS CONTRARY TO HIERARCHICALLY SUPERIOR NORMS**

### **V.1 Compliance with statutory provisions superior to collective agreements**

Section 1 of the LRA 1995 provides that:

*“The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-*

- a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;*
- b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;*
- c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-*
  - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
  - (ii) formulate industrial policy; and*
- d) (...)”*

Furthermore, section 3 provides that:

*“Any person applying this Act must interpret its provisions-*

- (a) to give effect to its primary object;*
- (b) in compliance with the Constitution; and*

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<sup>320</sup> A.A. Landman, “Collective agreements – Which judicial pigeon hole for new bargaining agreements”, *C.L.L.*, Vol 5, No 8, March 1996, 75 states that the LRA 1995 in effect allows the parties two options. The first allows them to provide for their own conciliation and arbitration processes. The second option, which one can choose by default e.g., by failing to insert one's own dispute resolution procedure in a collective agreement, is to access the conciliation and arbitration mechanism of the CCMA.

(c) *in compliance with the public international law obligations of the Republic."*

Any collective agreement must therefore comply with the Constitution, peremptory statutory provisions and international provisions that have binding force in South Africa. Should any provision of a collective agreement be contrary to such hierarchically superior norms, this provision may be declared null and void.

In *SACCAWU V Garden Route Chalets (Pty) Ltd*<sup>321</sup>, Commissioner Murphy analysed the extent to which parties can exclude statutory remedies by means of collective agreements. The circumstances of the case were as follows: The company and SACCAWU entered into a collective agreement in terms of which the company would make travel arrangement for employees living in certain towns. The parties could not reach agreement with regard to employees living in George, and agreed to refer this issue to the CCMA for mediation. The agreement also contained a clause providing that the parties would not institute any industrial action in respect of the above issue. The dispute remained unresolved after mediation, and the union referred the dispute to the CCMA for arbitration, alleging that by excluding the George employees, the company committed an act of unfair discrimination. The company submitted *in limine* that the union had waived its right to refer the matter to arbitration in terms of item 3 Schedule 7 of the LRA 1995<sup>322</sup>.

Commissioner Murphy stated that the role of an arbitrator is to safeguard the constitutional and statutory right to equality and fairness. Although section 23 of the LRA 1995 contains no mention that a collective agreement can exclude statutory rights to refer an unfair labour practice dispute to arbitration, if "*the legislature had intended collective agreements generally to override statutory rights, presumably it would have said so. That it has expressly done so in the specific instances contemplated by section 65 (1) and section 64 (3) is a further indication that usually the statutory rights shall prevail.*"

Analysing the circumstances in which an employee is entitled to enter into a contract whereby he undertakes not to invoke the remedies prescribed in Item 3 of Schedule 7, the commissioner ruled as follows:

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<sup>321</sup> (1997) 3 *BLLR* 325 (CCMA); see also *SANSEA v NUSOG*, (1997) 4 *BLLR* 486 (CCMA) where it was held that "the law does not interfere in the decisions of the parties unless the process or decisions are discriminatory or there is fraud or some other serious abuse of the process."

<sup>322</sup> This item provides for dispute resolution procedures for unfair labour practices.

*"Apart from cases where the statute expressly or by necessary implication prohibits waiver, the general rule is that any person can enter into a binding contract to waive a benefit conferred upon him by law for his sole benefit. But where public as well as individual interests are concerned, in other words where public policy demands the observance of a statute, then the benefit of its provisions cannot be waived by the individual, because he is not the only person interested. There is no express provision prohibiting the waiver of the right of an employee or employer to refer an unfair labour practice to arbitration by the CCMA or an accredited bargaining council or agency in terms of Item 3 of Schedule 7... In regard to the question of whether the Act by necessary implication prohibits waiver, the existence of express provisions such as section 65 (1) and section 64 (3)(b) suggests that the statutory rights can be waived by contract only where the Act expressly allows waiver or variation"<sup>323</sup>....Moreover, there are sound reasons of public policy why employees should not be permitted to contract out of the equitable jurisdiction of the CCMA... Accordingly, for these reasons alone I would be reluctant to hold that the collective agreement... excluded the union's right to refer the alleged unfair labour practice to the CCMA."*

He then analysed the European jurisprudence regarding the principle of equal pay in European Community law, and concluded that by excluding the George employees from the transport benefit, the company committed an unfair labour practice. He made an award granting the George employees a transport allowance.

The possibility of exclusion of the Basic Conditions of Employment Act 1983 by means of collective agreements is uncertain. Section 1 (3) of the Basic Conditions of Employment Act 1983 (BCEA 1983) provides that ... *the Labour Relations Act 1995, or any matter regulated thereunder in respect of an employee, shall not be affected by this Act, but this Act shall apply in respect of any such employee in so far as a provision thereof provides for any matter which is not regulated by or under any of the said Acts in respect of such employee.*

Wallis states that *"what is required is express regulation of a matter otherwise covered by the Act. Any matter not so regulated is to be dealt with under the*

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<sup>323</sup> See, however, *Johnson Mambo & 45 others v Macrall Timbers*, CCMA EC1618, 17 August 1997, where Commissioner Mias enforced a collective agreement in respect of retrenchment providing for one week severance week per completed year of service, up to a maximum of ten weeks. The question

Neither Wallis, nor the BCEA 1983, however, defines the term 'regulate'.

Thompson and Benjamin state that "*the act of putting an industrial council agreement, a wage determination, ... into effect therefore suspends the operation of the Act in respect of matters regulated by that measure.*"<sup>325</sup>

Under the Labour Relations Act 1956, collective agreements were regulated only as far as they were concluded by an industrial council and published in the Government Gazette. The departure from the BCEA 1983 was therefore effected by means of a piece of "subordinate legislation"<sup>326</sup> which could even provide for conditions of employment less favourable than those provided in the BCEA<sup>327</sup>. The LRA 1995 does not provide for the publication of collective agreements, save when they are concluded in a bargaining council and are extended to non-parties. The argument that a collective agreement constitutes a piece of subordinate legislation could therefore have fallen away<sup>328</sup>. However, the LRA 1995 clearly regulates collective agreements, whether concluded at bargaining council or elsewhere. It could therefore be argued that parties could negotiate terms and conditions of employment, which conflict with or purport to vary the BCEA 1983, without having to request an exemption. This interpretation would be in line with the LRA 1995, which promotes and encourages self-regulation at sectoral level.

In *Simba (Pty) Limited v FAWU & others*<sup>329</sup>, the employer had concluded a collective

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of waiving statutory rights was not analysed in this decision.

<sup>324</sup> MJD Wallis, *Labour and Employment Law*, Butterworths, Durban, 1992, Part 2, 9-11.

<sup>325</sup> C. Thompson & Benjamin, "Commentary on the Basic Conditions of Employment Act", in *South African Labour Law*, Juta, 2nd ed, 1965 as amended by service No 30, B1-4.

<sup>326</sup> See *S. v Prefabricated Housing Cor (Pty) Ltd & another*, 1974 (1) SA 535 (A).

<sup>327</sup> See *Photocircuit SA (Pty) Ltd v De Klerk No & others*, (1991) 12 ILJ 289 (A), where a collective agreement concluded in an industrial council under the LRA 1956 and extended by the Minister, prohibited the employer from making any deduction from an employee's salary. Some employee members of a trade union not party to the agreement requested check off facilities from the employer,, which were refused on the basis that the employer was bound by the collective agreement. One of the argument raised at the Appellate division was that this provision of the collective agreement was in conflict with the BCEA 1983. The Court held that "the matters regulated in (the collective agreement) are obviously matters regulated under the LRA 1956 in respect of employees. It follows that Act 3 of 1983 cannot be invoked to override the prohibition in clause 8 (3) of the agreement."; see also *Chetty v Raydee (Pty) Ltd t/a St James Accommodation*, (1988) 9 ILJ 318 (IC) where in terms of an industrial council agreement, the hours of work of 'other employees' could not exceed 54 hours whilst the BCEA provides for a maximum of 46 ordinary hours of work.

<sup>328</sup> See Section II *supra*.

<sup>329</sup> LC J40/97, 20 March 1997.

agreement with FAWU regulating tea and lunch breaks. In terms of this agreement, certain employees would work continuously for longer than five hours without a meal interval. The Labour Court held that this constituted a contravention of the BCEA 1983. Zondo J ruled that:

*"to the extent that the terms of the agreement between the parties may be in conflict with the provisions of the BCEA, such terms are, to the extent of such conflict, unenforceable. In my view the workers do not lose any of the rights they have under the Act by virtue of the fact that they have chosen to exercise such a right collectively in circumstances where we are not dealing with the unfair labour practice jurisdiction... The BCEA is a very important piece of legislation laying down the so-called "floor of rights" which every employee covered thereby is obliged to comply with. In this regard there may seem to be a conflict between the approach I have adopted in this matter and one of the principles which underpin the new Act, namely to promote self-regulation. There is, however no conflict between the two because self-regulation is promoted in so far as it does not violate the basic rights which are laid down in the BCEA."*

It is regrettable that Zondo J did not enquire into the effect of section 23 of the LRA 1995 which provides that collective agreements are binding, nor into the meaning of section 1 (3) of the BCEA 1983. Section 1(3) seems to deal with the scope of application of the Act<sup>330</sup>, and provides that it shall not affect any matter regulated under the LRA 1995<sup>331</sup>. If one accepts that collective agreements are regulated by the LRA 1995, it should be accepted that all terms and conditions of employment which are regulated by a collective agreement override the BCEA 1983.

Although not yet in force at the time of the submission of this dissertation, it must be noted that the Basic Conditions of Employment Act 75 of 1997 specifically regulates the circumstances in which a basic condition of employment may be varied by a

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<sup>330</sup> It is noteworthy that section 1 is headed "Definitions" and does not expressly state that section 1 (3) regulates the scope of application of the Act.

<sup>331</sup> See also A. Rycroft & B. Jordaan, *A guide to South African Labour Law*, 2<sup>nd</sup> ed., Juta, 1992, 47. They stated that "section 2(3) (sic) of the Basic Conditions of Employment Act makes it clear that this Act is weaker in its operation than any of the other measures referred to in that section. This includes wage determinations in terms of the Wage Act and wage-regulating measures in terms of the Labour Relations Act. The latter, in turn, prevail over conflicting provisions in any wage determination made in terms of the Wage Act. Thus, in the event of conflict, wage-regulating measures in terms of the Labour Relations Act prevail over the provisions of both the Basic Conditions of Employment Act and wage determination made in terms of the Wage Act."



collective agreement<sup>332</sup>.

The BCEA 1997 distinguishes between collective agreements concluded by bargaining councils and other collective agreements. A bargaining council agreement may vary any provision of the Act provided that the agreement is in keeping with the purpose of the Act and does not vary a core right<sup>333</sup>.

The ability of other collective agreements to vary conditions of employment is considerably more restricted. Collective agreements may be used to introduce flexibility arrangements such as the averaging of working time, to vary the provisions of family responsibility leave, or to alter the requirements for the giving of notice to terminate contracts of employment within the limits set in the Act. It can also vary the provisions relating to overtime, weekly rest periods, Sunday work and sick-pay.

## **V.2 Compliance with superior conventional provisions**

### **V.2.1 Collective agreements**

Neither the LRA 1995, nor other current legislation regulates the hierarchy between collective agreements. In other words, nothing seems to preclude the conclusion of a collective agreement at plant level which departs from the provisions of a collective agreement concluded in a bargaining council, and vice versa. In terms of sections 23 and 31 of the LRA 1995, both agreements have statutory force.

Following approaches may be adopted to resolve this issue, namely:

- Plant or enterprise level agreements override sectoral level agreements  
It has been suggested that in such circumstance, the ordinary principles of interpretation should apply to reconcile the two agreements<sup>334</sup>. "Where the conflict between the provisions is irreconcilable the principles *generalia specialibus non derogant* could be applied to give force to the specific plant or enterprise collective agreement."
- Sectoral collective agreements prevail over any other agreements  
Such an approach would seem to be in accordance with the Act's primary object

<sup>332</sup> See section 49 of the BCEA 1997.

<sup>333</sup> P. Benjamin, "The basic conditions of employment bill", in *Current Labour Law*, Juta, 1997, 110

<sup>334</sup> D. du Toit et al, *op cit.*, 168.

to promote collective bargaining at sectoral level. By using a purposive interpretation of the LRA 1995, preference should then be given to sectoral agreements<sup>335</sup>.

- The most recent agreement overrides any other agreement, regardless of the level of conclusion. In terms of this approach, the normal principles of the law of contract are applied<sup>336</sup>. By entering into a new collective agreement, the parties have replaced an existing obligation by a new one.
- The more favourable agreement to the employees overrides any other agreement

Whatever approach is preferred must be applied consistently, i.e. applied throughout all possible situations.

Although, from a strictly legal perspective, the principle that the latest agreement overrides any other agreement should be applied, the writer is of the opinion that the second approach listed above must be preferred for pragmatic reasons. A purposive interpretation of the LRA 1995 also supports such approach. The Explanatory Memorandum states that the LRA “promotes industry-level bargaining and gives to industry-level bargaining forums the power to determine the matters that can be bargained at plant level.”<sup>337</sup> It must, however, be admitted that this approach could also be opposed on legal grounds.

The following example demonstrates the problems caused by the lack of legislative

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<sup>335</sup> Explanatory Memorandum prepared by the Ministerial Task Team, January 1995, *Government Gazette*, 10 February 1995, No 16259, 115.

<sup>336</sup> See RH Christie, *The Law of Contracts in South Africa*, Butterworths, Durban, 3<sup>rd</sup> ed, 1996, 498: “as a generic term for replacing an existing obligation by a new one, novation includes voluntary novation, which is what happens when an existing obligation is replaced by a new contract between the same parties, and is usually referred to as novation, without qualification.”

<sup>337</sup> Explanatory Memorandum prepared by the Ministerial Task Team, January 1995, *Government Gazette*, 10 February 1995, No 16259, 115; This approach was adopted by P. Benjamin sitting as an arbitrator in *Simba Group v FAWU*, (1993) 14 ILJ 1110 (ARB). In casu, a national bargaining forum was established between the employer and the union, which negotiated terms and conditions of employment nationally for its employees who fell in the bargaining unit. One division of the Company subsequently entered into an agreement governing the terms and conditions of employment of employees falling in the bargaining unit, which agreement was signed by the local shop steward. Benjamin considered that this undermined the national bargaining forum, and made an order upholding the primacy of national bargaining in terms of the agreement. Benjamin did not, however, expand on the binding force of the respective agreements entered between the same parties, nor on the principles supporting the primacy of centralised bargaining.

regulation on this issue: assume that Employers' Organisations A and B, and Trade Unions C and D conclude a collective agreement at sectoral level which provides for payment of overtime at twice the hourly rate. If thereafter Employer X, (a member of Employers' Organisation A) concludes an agreement at plant level with Trade Union C providing for payment of overtime at one and a half times the hourly rate, it could be argued that by doing so, the parties have novated their first collective agreement in so far as that particular plant is concerned on the basis that the latest agreement overrides any other agreement. The plant level agreement will be binding by virtue of section 23 of the LRA 1995.

Assume now in the same example but add the fact that 65% of Employer X's workforce is affiliated to Trade Union C, and 15% to Trade Union D, and that the parties have decided to bind employees who are not members of Trade Union C. The position becomes then more difficult. By virtue of section 23 (1)(d), such an agreement would be binding on the employee members of Trade Union D, even though Trade Union D had agreed at sectoral level that overtime would be paid at a higher rate.

If the sectoral collective agreement was extended to non-parties by the Minister, and if one accepts that parties to a collective agreement may agree to vary it at plant level, one would face a problem with regard to non-parties. Section 31 (3) of the LRA 1995 provides that the collective agreement must establish an independent body to grant exemptions to non-parties. The Act does not make reference to the granting of exemptions to parties. One could argue that whilst Employer Z and Trade Union E, who are not parties to the sectoral agreement, would need an exemption to conclude an agreement which departs from the sectoral agreement, Employer X and Trade Union C, being parties to the sectoral agreement, could vary it without any difficulty. To avoid this last situation, one would have to argue that a collective agreement concluded at sectoral level and which has been extended constitutes a piece of subordinate legislation<sup>338</sup>, which can therefore only be varied by another piece of subordinate legislation.

The new BCEA No 75 of 1997 provides that:

*"no provision in this Act or a sectoral determination may be interpreted as permitting*

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<sup>338</sup> See however our comments under Section II *supra*.

- ...
- *a collective agreement contrary to the provisions of a collective agreement concluded in a bargaining council*<sup>339</sup>.

This provision creates some ambiguity in so far as it neither prohibits nor allows the variation of a collective agreement concluded at bargaining council by any other collective agreement. As indicated *supra*, the LRA 1995 does not regulate the hierarchy between collective agreements, and therefore this provision of the BCEA 1997 could be nothing more than an "empty shell".

### **V.2.2 Nullity of provisions contained in employment contracts**

Section 199 of the LRA 1995 provides that:

*"1) A contract of employment, whether concluded before or after the coming into operation of any applicable collective agreement or arbitration award, may not-*

- (a) Permit an employee to be paid remuneration that is less than that prescribed by that collective agreement or arbitration award;*
- (b) Permit an employee to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that collective agreement or arbitration award;*
- (c) Waive the application of any provision of that collective agreement or arbitration award.*

*2) A provision in any contract that purports to permit or grant any payment, benefit, waiver or exclusion prohibited by subsection (1) is invalid."*

Collective agreements concluded at any level prevail over the individual employment contract<sup>340</sup>. Any provision in an employment contract contrary to section 199 (1) will be invalid, whether concluded before or after the coming into operation of the collective agreement.

The new BCEA No 75 of 1997 contains a similar provision in section 49, providing that *"no provision in this Act or a sectoral determination may be interpreted as permitting*

<sup>339</sup> Section 49 (4)(a) and (b) of the BCEA 1997.

<sup>340</sup> See, however, our comments under Section III.2 *supra*.

- *a contract of employment or agreement between an employer and an employee contrary to the provisions of a collective agreement.*
- (...)”

This provision, combined with section 199 of the LRA 1995, provides unambiguously for the supremacy of collective agreements over individual employment contracts, when the provisions contained in collective agreements are more favourable to the employees than the ones provided for in the employment contract<sup>341</sup>.

## **VI PERSONS BOUND BY COLLECTIVE AGREEMENTS**

The binding force of a collective agreement will vary according to the forum where it has been concluded, and also depending on whether it has been extended or not.

Only the “normal” binding force of collective agreements will be analysed in this section; the process of extension will be dealt with in section VII *infra*.

### **VI.1 Collective agreements concluded within a council**

Section 31 of the LRA 1995 provides that:

*“Subject to the provisions of section 32<sup>342</sup> and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds-*

*(a) the parties to the bargaining council who are also parties to the collective agreement;*

*(b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and*

*(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers’*

<sup>341</sup> Whilst in the context of hierarchy between collective agreements, section 49 of the BCEA only creates ambiguity. The difficulty created by section 49 in this latter context results from the fact neither the BCEA 1997 nor the LRA 1995 regulates the hierarchy between collective agreements, nor their variation by other collective agreements. Section 49 only provides that “no provision may be interpreted as permitting...”. This does not mean that the variation of a bargaining council agreement by a plant level agreement is prohibited. In the context of collective agreement taking precedence over employment contract, section 49 of the BCEA 1997 enjoys the “back up” of section 199 of the LRA 1995 which expressly prohibits employment contract to treat employees less favourably than prescribed by a collective agreement.

<sup>342</sup> Section 32 regulates the extension of collective agreements concluded in a bargaining council. See Section VII *infra*.

*organisation that is such a party, if the collective agreement regulates-*

- (i) terms and conditions of employment; or*
- (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers."*

Collective agreements concluded in a statutory council have to the same binding force as those concluded in a bargaining council<sup>343</sup>.

Collective agreements concluded in a council therefore have a "limited" binding force in as much as they only bind the parties to the agreement, and their members. All of the parties to the bargaining council will only be bound if they are also parties to the agreement<sup>344</sup>.

### ***VI.1.2 Provisions binding on the parties to the agreement***

The normal principles of the law of contract regulate these provisions. They have a contractual nature and are binding on the parties. Examples of such provisions are found in the provisions of collective agreements dealing with communication channels between the parties to the agreement. These provisions create neither rights nor obligations for the union's members, and purely regulate the relationship between the parties *sensus stricto*.

### ***VI.1.2 Provisions binding on each party and the members of every other party***

Section 31 (b) of the LRA 1995 provides that a collective agreement binds each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between such a party and the members of such other party.

Section 31 (b) thus regulates the binding effect of a collective agreement between a trade union and individual employer members of an employers' organisation party to the agreement, and between an employers' organisation and the employee members of the union party to such agreement.

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<sup>343</sup> See section 43 (3) which provides that *if a statutory council concluded a collective agreement ..., the provisions of sections 31, 32, 33 apply, read with the changes required by the context.*

<sup>344</sup> Thus, the parties to the council who are not party to the agreement will not be bound by it, unless it is extended to them under section 32.

Examples of such provisions are the clauses regulating the right to picket<sup>345</sup>: should a collective agreement provide, for instance, that the union will only call for a picket after 24 hours notice has been given, such provision will be binding between the union and the employer member of the employers' organisation party to the collective agreement, and will also apply to the relationship between the union and the members of the employers' organisation. Should an individual employer try to obtain an interdict, the union could not argue that the employer concerned is not a party to the agreement and is therefore not entitled to rely on it.

### ***VI.1.3 Provisions binding on the members between themselves***

Section 31 (c) of the LRA 1995 further provides that a collective agreement binds the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates -

- (i) terms and conditions of employment; or
- (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.

## **VI.2 Collective agreements concluded outside a council**

Although the Act does not expressly state that section 23 regulates the binding force of collective agreements concluded outside a bargaining or statutory council, this can be deduced from section 31 which expressly regulates such agreements. It is peculiar, however, that section 23 makes reference to an "employers' organisation", as outside a bargaining or statutory council, it is more than probable that the "employer party" will be an individual employer<sup>346</sup>. Section 23 also makes reference to a "workplace" which is delimited by reference to a single employer.

Section 23 of the LRA 1995 provides the following:

*"A collective agreement binds-*

*(a) the parties to the collective agreement;*

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<sup>345</sup> In South African law, only a registered trade union may authorise a picket by its members and supporters. Although it is not the subject of this dissertation, it must be noted that even though a protected strike can be organised without the support or intervention of a trade union, employees may not picket without the authorisation of a registered trade union.

<sup>346</sup> It could also be collective agreements concluded in centralised bargaining forums which are not registered. It is the case for example in the chemical industry and the mining industry.

- (b) *each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;*
- (c) *the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates-*
  - (i) *terms and conditions of employment; or*
  - (ii) *the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;*
- (d) *employees who are not members of the registered trade union or trade unions party to the agreement if -*
  - (i) *the employees are identified in the agreement;*
  - (ii) *the agreement expressly binds the employees; and*
  - (iii) *that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace."*

Such collective agreements accordingly bind the signatory parties and their members<sup>347</sup>, but may also bind employees who are not members of the trade union parties to the agreement provided that the requirements provided for in subsection (1) (d) are met.

Landman is of the opinion that the last requirement (1 (d) (iii)) must be present at the time when the written agreement is concluded. He adds, however, that *"the agreement could contain a suspensive condition providing that it will not be operational until a ballot has been taken and it has been established that the majority of the employees employed by the employer party are members of the trade union(s) parties."*<sup>348</sup> The writer is of the view that this last requirement could be met at a later stage. The Act does not specify that the majority representation must be present on the day the agreement is concluded. In other words, it could contain a suspensive condition providing that the collective agreement will be binding in any workplace in which the trade union(s) party to the agreement reaches a majority membership at a later date. Nothing in the Act seems to prohibit the inclusion of

<sup>347</sup> A.A. Landman refers to "the principals and the components of the principals who are bound to each other." , "Collective agreements – Which judicial pigeon hole for new bargaining agreements?", *C.L.L.*, Vol 5, No 8, March 1996, 72.

<sup>348</sup> A.A. Landman, "Collective agreements – Which judicial pigeon hole for new bargaining agreements?", *C.L.L.*, Vol 5, No 8, March 1996, 72.



such suspensive condition and the general principles of the law of contracts should therefore be applicable<sup>349</sup>.

Through section 23 (1)(d), the Act therefore recognises the principle of majoritarianism in a limited way: one or more trade unions acting jointly who represent the majority of the employees employed by an employer in a workplace may conclude a collective agreement which will be binding on non-unionised employees or employees affiliated to a minority union<sup>350</sup>. A workplace is the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or place where employees work in connection with each independent operation, constitutes the workplace for that operation<sup>351</sup>.

The "extension" of the binding force of collective agreements to non-members of the majority union could however be problematic in as much as the union party to the agreement must represent the majority of the employees employed in a workplace

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<sup>349</sup> Should this proposition be correct, it will then rest on the parties to verify regularly whether the suspensive condition is met, and to ensure the implementation of the agreement as soon as the condition comes to existence.

<sup>350</sup> Under the LRA 1956, it often occurred that an employer extended the collective agreement to employees who were not members of the union party to the agreement but fell within the bargaining unit. The enforceability of the agreement against non-unionised employees or employees belonging to minority unions was often problematic. Where unrepresented employees acquiesced in the change, their contracts could be deemed to have been varied by implied consent. But where they objected, such holistic agreements could not be justified by any principle of common law. The Industrial Court vacillated between declaring that these employees were bound by virtue of the principle of majoritarianism and declaring that such extension constituted an unfair labour practice. See B. Grant, "In Defence of Majoritarianism: Part 1 – Majoritarianism and Collective Bargaining", (1993) 14 *ILJ* 305; Among the decisions in favour of majoritarianism, the following can be referred to: See *SA Polymer Holdings (Pty) Ltd versus Llaie and others*, (1994) 15 *ILJ* 277, where the Labour Appeal Court held that "whilst the trade union represents the majority of the employees in the delineated bargaining unit all the employees within that bargaining unit will generally be bound by such agreement. This is the consequence of the process of majoritarianism"; *Food Workers Council of SA v Bokomo Mills* (1994) 15 *ILJ* 1371 where the Industrial Court defined the doctrine of majoritarianism as that doctrine whereby representatives (including a trade union) designated or selected for the purpose of collective bargaining by the majority of the employees in a particular bargaining unit are deemed to be the representatives of all employees in that unit for the purpose of such collective bargaining; *Tsambo v Ovestone Farms (Pty) Ltd*, (1996) 17 *ILJ* 418 (ALC).

*Contra*, see *Radio Television Electronic and Allied Workers Union v Tedelex (Pty) Ltd and another* (1990) 11 *ILJ* 1272 where the Industrial Court held that "any change in wages and other conditions of employment agreed on between an employer and a majority union will not be and cannot be made binding on non-members unless they agree. The fact that an employer has agreed to negotiate with a majority union or even granted it the sole right to bargain cannot negate the rights of others to negotiate collectively with their employer. (...) A representative for the purposes of negotiation cannot be forced upon the employee, be it by the way of majoritarianism or otherwise. In order to represent another, one must enjoy a mandate by him to that effect."

as defined above<sup>352</sup>. Practice has shown that most collective agreements are entered into with unions which represent a majority of employees falling in a particular bargaining unit, for example non-managerial and non-administrative staff. Unless the courts were to accept that the parties may collectively vary the definition of a "workplace" for the purpose of collective agreements, section 23 (1) (d) could be of limited use.

It is noteworthy that the LRA 1995 does not specify that the binding force of a collective agreement in terms of section 31 is exclusive of the binding force conferred by section 23. In other words, section 23 could be used as a means to extend a collective agreement concluded in a bargaining council to a limited extent, without having to resort to the mechanisms provided by section 32 of the LRA 1995. Indeed, nothing seems to preclude the conclusion of a collective agreement at bargaining council level which provides that such agreement will be binding on all employees defined in the agreement, whether unionised or not, provided that the union parties to the agreement represent the majority of the employees employed by an employer in the workplace<sup>353</sup>.

## VII EXTENSION TO NON-PARTIES

Although collective agreements normally only bind the parties to the agreement and their members, the LRA 1995 provides for the possibility to extend their binding force to employees and employers who have not concluded the agreement and were not represented by their respective organisations during the negotiation, but fall within the scope of the bargaining council<sup>354</sup>.

Such a procedure may, however, only be applied to collective agreements

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<sup>351</sup> Section 213 of the LRA 1995.

<sup>352</sup> According to D. du Toit et al, *op cit.*, 162, section 23 (1) (d) consequently does not altogether settle the problems posed by collective bargaining practice.

<sup>353</sup> In terms of section 31, a collective agreement concluded at bargaining council binds the parties to the agreement and their members. In the example contemplated, one could have the situation where Employers' Organisations A and B conclude a collective agreement with Trade Unions C and D in terms of which all employees (whether unionised or not) performing specific functions will be required to work overtime, provided that Trade Unions C and D represent the majority of employees in the workforce of a particular employer. By virtue of section 23 (1)(d), Employer A being a member of Employers' Organisation A could then enforce such agreements on employees who are members of Trade Union F, which is not a party to the agreement.

<sup>354</sup> See *SAEWA v GA Motor Winders (East Cape) CC*, CCMA EC4379, 10 February 1998; under the LRA 1956, see *Photocircuit SA v De Klerk No & others*, (1991) 12 ILJ 289 (A) where it was held that an employer would commit an unlawful act constituting of a criminal offence should he accede to his employees' demand to grant check off facilities, whilst a collective agreement which has been extended prohibits this.

concluded in a bargaining or statutory council, and is regulated by section 32 of the Act. The non-parties must fall within the registered scope of the council and must be identified in the request referred to in section 32.

A collective agreement may only be extended at the written request of the bargaining council. The request for extension must have the support of one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the council, and by the employers' organisations whose members employ the majority of the employees employed by the members of the employers' organisations party to the council.

The extension of the binding force of collective agreements is characterised by the intervention of the Minister of Labour whose power to grant the extension varies according to the level of representivity of the parties to the council.

#### **VII.1 Majority representivity**

When the majority of all the employees who will fall within the scope of the agreement upon extension thereof are members of the trade unions that are parties to the council, and when the members of the employers' organisation that are parties to the council will employ the majority of all the employees who fall within the scope of the collective agreement upon such extension, then the Minister of Labour must grant the extension, provided that the following requirements are met:

1. The non-parties who will be bound by the agreement must fall within the registered scope of the council and must be identified in the request for extension;
2. the collective agreement must establish or appoint an independent body to grant exemptions to non-parties and to determine the terms of those exemptions from the provisions of the collective agreement as soon as possible;
3. the collective agreement must contain criteria that must be applied by the independent body when it considers applications for exemptions, which criteria are fair and promote the primary objects of the Act, and
4. the terms of the collective agreement may not discriminate against non-parties.

The Minister has no discretionary power in extending collective agreements in these circumstances. If all the above conditions are met, he must publish a notice in the

*Government Gazette* within 60 days of the request declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.

## **VII.2 Sufficient representation**

Section 32 (5) of the LRA 1995 allows the Minister of Labour to extend the agreement to non-parties, even though the parties to the agreement do not enjoy the representation referred to above. In such a case, the Minister must, however, ascertain that the parties to the bargaining council are sufficiently representative within the registered scope of the council in the area in respect of which the extension is sought.

Although the concept of 'sufficiently representative' is not defined in the Act, the Minister does not have to take the whole area for which the council is registered into account for the purpose of determining such representivity, but only the area for which extension is sought<sup>355</sup>. Furthermore, the Minister of Labour must be satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level.

Notwithstanding that a notice extending the binding force of a collective agreement might have been published, the bargaining council remains in control of the agreement: the Minister may extend or renew the period of validity of the agreement only on request of the bargaining council. The conditions mentioned above must, however, be met before the Minister implements the request.

Furthermore, should the bargaining council request the Minister to cancel all or any part of the notice published, the Minister has no discretionary power: he must cancel the extension<sup>356</sup>.

In addition, should there be any amendment, amplification or replacement of a collective agreement in respect of which a notice has been published, the Act provides that a new collective agreement has been concluded. Therefore, should the parties to the agreement wish the non-parties to be bound by the amendments, amplifications or replacement, they will have to request the Minister in writing to extend same. Prior to granting the extension, the Minister must ascertain that the

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<sup>355</sup> Section 32 (5) (a) of the LRA 1995.

above-mentioned conditions have been complied with<sup>357</sup>.

## VIII BINDING FORCE AND MANDATE OF THE ORGANISATIONS' REPRESENTATIVES

The LRA 1995 is totally silent about the nature of the relationship between a trade union or employers' organisation and its members<sup>358</sup>.

The question which consequently arises is the nature of the mandate given by the members of such organisations and the extent to which the members could contest or repudiate the acts done by their representatives because they were not properly authorised<sup>359</sup>.

The purpose of the LRA 1995 is to promote collective bargaining, and to this effect, it accordingly regulates the binding force of collective agreements.

In terms of sections 23 and 31 of the LRA 1995, a collective agreement is automatically binding on the members of the signatory organisations if such agreement regulates terms and conditions of employment, or the conduct of their members in relation to their employer or employees, or the relationship between the organisation and the members of the other party.

These sections address the difficulty experienced in explaining the incorporation of the provisions of collective agreements into individual contracts of employment in terms of the common law.

*"Reliance on the law of agency in which the union acts as the representative of its members to negotiate terms and conditions on their behalf, does not take account of the reality that frequently specific mandates are not given to the union nor are they always possible."*<sup>360</sup>

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<sup>356</sup> Section 32 (6) and (7) of the LRA 1995.

<sup>357</sup> Section 32 (8) of the LRA 1995.

<sup>358</sup> It is noteworthy that section 95 of the LRA 1995, which regulates the registration of trade unions and employers' organisations, does not require the organisations to provide in their constitution for the governing principles of relationships between the organisation and their members.

<sup>359</sup> Regarding the question of the union acting ultra vires its constitution, see *Fraser Alexander Bulk Materials Handling (Pty) Ltd v CWIU*, (1996) 3 BLLR 314 (IC); *SA Cleaners Security & Allied Workers Union v Masonic Haven (Pretoria)*, (1996) 17 ILJ 193 (IC).

<sup>360</sup> D. du Toit et al, *The Labour Relations Act of 1995*, Butterworths, Durban, 1996, 161; see also D. du Toit, "An Ill Contractual Wind Blowing Collective Good? Collective Representation in Non-statutory Bargaining and the Limits of Union Authority", (1994) 14 ILJ 39; D. du Toit, "Statutory Collective Bargaining: A duty of Fair Representation?", (1993) 14 ILJ 1167. Under the LRA 1956,

Therefore, if by regulating the binding force of collective agreements, the intention of the legislator was to acknowledge the inability of the common law, (and more specifically the law of agency), to regulate agreements concluded collectively, it could be argued that it should not be possible to escape the binding force of a collective agreement by invoking an irregularity or a lack of mandate<sup>361</sup>.

Such interpretation is in line with the purpose of the LRA 1995, which promotes collective bargaining and sound industrial relations. It would be extremely prejudicial should the members be allowed to claim that they did not give a mandate to negotiate certain terms and conditions of employment in order to avoid the binding effect of a validly concluded agreement. The LRA 1995 does not provide any conditions regulating the validity of a collective agreement, except that it should be concluded in writing. In addition, the dispute resolution mechanisms provided in the LRA 1995 relate to disputes in the application or interpretation of a collective agreement; they do not contemplate disputes arising from a lack of mandate, or an allegation to this effect.

Du Toit is however of the opinion that a collective agreement must clearly be valid in order to be binding, although "*the act sheds little light on when an agreement will be*

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the Industrial Court relied on the theory of mandate to justify the binding effect of a collective agreement on the union members. In *Ramolesane and another v Andrew Mentis and another* (1991) 12 ILJ 329 (LAC), the appellants argued that the union official had not been authorised to conclude an agreement on their behalf. The Industrial Court upheld the employer's plea, ruling that there had been "an implied authority and also an ostensible authority" for the official to do so. The Labour Appeal Court held that an agreement which goes against the interests of a minority must be enforceable against them provided that the agreement is in the interest of the union as a whole and of the majority of those persons affected thereby. If one argues that one "has an implied authority to conclude an agreement that is beneficial to the union, then the implied authority is not proven until evidence of that benefit is given". The court held that there had been no such evidence in this case. Nevertheless, it found that the appellants were estopped from relying on an absence of authorisation. The official had stipulated in writing that he was duly authorised to conclude the agreement on behalf of the applicants. "It is not necessary for the party relying upon estoppel to show that the employee authorised each of the acts done by the union representative. What is important is that their course of conduct created the impression that the union was acting on their behalf and upon their authority." In *Gubb & Inggs Ltd v Clothing and Textile Workers Union of South Africa*, (1991) 12 ILJ 415 - Arb, the arbitrator held that "in concluding the procedural agreement, the union was acting as agent and representative of the employees. The workers have accepted the benefits of the collective agreement. Consequently, in agency and on *stipulatio alteri*, the terms of the collective agreement form part of the workers individual terms of employment." In *Don Products (Pty) Ltd v Monage and others* (1992) 13 ILJ 900 (LAC) the Labour Appeal Court held that "the onus is upon the employer to establish not only that the agreement is enforceable in its terms, but also that the representatives who appeared on behalf of the workforce were duly authorised to conclude an agreement in the terms stipulated." See also *Food & General Workers Union & others v Sundays River Citrus Co-operative Co Ltd*, NHE 11/2/278 (PE) (IC).

<sup>361</sup> *Contra*, D. du Toit, see references quoted above.

invalid<sup>362</sup>. He stated that "to the extent that the legislature refrained from legitimising unauthorised acts by representatives, it is submitted, agreements should be open to challenge if such representatives acted in breach of their authority."<sup>363</sup>

Should the common law of agency or representation apply, the members of a party to a collective agreement could escape the binding force of the agreement on the basis that the trade union or employers' organisation did not have authority<sup>364</sup>. The difficulty caused by the common law of agency is that it is unable to deal adequately with collective phenomena. A trade union acts not only as the agent of its members but also as a principal. Often, a trade union does not have a specific mandate from its constituents, as its mandate results from membership of the organisation, whose constitution empowers it to perform several duties, including negotiating terms and conditions of employment that will be binding on its members<sup>365</sup>.

However, an employer who faces the argument of a lack of authority in concluding a collective agreement could then rely on the theory of estoppel to enforce the agreement. In terms of this theory,

*"a person who has not authorised another to conclude a juristic act on his behalf may nevertheless in appropriate circumstances be estopped from denying that he had authorised the other to act on his behalf. The effect of a successful reliance on estoppel is that the person who has been estopped is liable as though he had authorised the other to act."*<sup>366</sup>

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<sup>362</sup> D. du Toit et al, *op cit.*, 109.

<sup>363</sup> D. du Toit, "Statutory collective bargaining: A duty of fair representation?", (1993) 14 *ILJ* 1169

<sup>364</sup> JC De Wet, "Agency and representation", in Joubert, *The Law of South Africa*, Vol. 1, Butterworths, Durban, 1993, 99, par. 102: "If one person concludes a contract on behalf of another without authority to do so, the purported principal does not acquire any rights or incur any obligations under the contract. However, he can ratify the would-be agent's act." See also at par 112: "In order to conclude juristic acts on behalf of another so as to affect that other's legal relationships the representative has to have the necessary authority. Where a person acts for another without authority the lack of authority may in appropriate circumstances be cured by ratification. The person on whose behalf another has acted may also be estopped from denying that the latter had authority to conclude the juristic act on his behalf. As one person is not by nature endowed with the power of concluding juristic acts on behalf of another the existence of authority will have to be proved by the person who alleges that the person concluding a juristic act for another has authority to do so."

<sup>365</sup> See for example the Constitution of the National Petroleum Employers Association which provides that the members must endeavour to abide by collective agreements concluded by the Association with unions and not to undermine such agreements in any manner.

<sup>366</sup> JC De Wet, "Agency and Representation", *op cit.*, 129, par. 135; see also PJ Rabie, *The law of estoppel*, Butterworths, Durban, 1992; Joubert, *The Law of South Africa*, Vol 9, Butterworths, Durban, 1993, 287, par. 453 onwards.

The employer who relies on estoppel will have to show that he was misled by the members of the trade union, as principals, to believe that the trade union representative who ostensibly acted on their behalf had authority to conclude the collective agreement<sup>367</sup>. This would be the case; for example, where the employees accepted certain benefits from the collective agreement, but reject the obligations.

Another argument which could be used in favour of the application of common law principles might be found in section 206 of the LRA 1995, which provides that a collective agreement will not be invalidated by a defect in the election of a representative to a council<sup>368</sup>. By providing specifically for this situation, it could be argued by analogy that defects occurring in other circumstances will invalidate an agreement. The Labour Court and the CCMA will have to construe the necessary guidelines in this regard.

## **IX COMING INTO FORCE OF COLLECTIVE AGREEMENTS**

The LRA 1995 does not regulate the coming into force of a collective agreement. It is left to the parties to decide when the agreement will become binding, and to arrange for communication of the agreement to their members.

It is interesting to note that the LRA 1995 does not provide for the publication of collective agreements in the Government Gazette, save when such agreement is concluded in a bargaining council and extended to non-parties. However, section 54, which is headed "Duty to keep records and provide information to Registrar", provides in subsection (3) that *every council must provide to the Commission (CCMA) certified copies of every collective agreement concluded by the parties to the council, within 30 days of the signing of that collective agreement*. The purpose of such communication is unclear, and no sanction is provided for failure to do so.

Collective agreements concluded in a bargaining council and which are extended are binding from the date specified by the Minister in the notice published in the Government Gazette.

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<sup>367</sup> *Ramolesane & Another v Andrew Mentis & Another*, (1991) 12 ILJ 329 (LAC).

<sup>368</sup> Section 75 of the LRA 1956 provided that no irregularity in the election or appointment of any representative on an industrial council shall invalidate any agreement... which, but for that .... irregularity ... would be binding in terms of section 48". Commenting on this provision, D. du Toit in "Statutory collective bargaining: A duty of fair representation?" *op cit.*, 1169, held that "it will be noted, however, that the section is concerned with formal defects only and not with the conduct of representatives who have been or are deemed to be duly appointed. To the extent that the legislature refrained from legitimising unauthorised acts by representatives, it is submitted, agreements should be open to challenges if such representatives acted in breach of their authority."



## **X PARTICULAR SITUATIONS**

The LRA 1995 regulates some particular situations which could affect the binding effect of collective agreements namely: the transfer of an undertaking, the disaffiliation from an organisation, the modification of the scope of a council, the dissolution of a representative organisation and the amalgamation of bargaining councils.

### **X.1 Transfer of undertaking**

This question is dealt with in section 197 of the LRA 1995, which provides that:

*"(2) (a) If a business, trade or undertaking is transferred (as a going concern), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they were rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.*

*(b) If a business is transferred (as a going concern resulting from the employer being insolvent and wound up or sequestrated or to avoid the employer being wound up or sequestered for reasons of insolvency), unless otherwise agreed, the contracts of all employees that were in existence immediately before the old employer's winding up or sequestration transfer automatically to the new employer, but all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee, and anything done before the transfer by the old employer in respect of each employee will be considered to have been done by the old employer."*

Consequently, depending on the underlying reason for the transfer, the collective agreements<sup>369</sup> which were in existence will remain applicable between the new employer and the employees<sup>370</sup>, even though the new employer has not concluded

<sup>369</sup> i.e. the provisions of collective agreements which create rights and obligations between the employer and its (unionised) employees. Provisions of collective agreements which regulate the rights and obligations between the parties *sensus stricto* to the agreement, i.e. between the employer and the trade union party, are not covered by this section. In the context of organisational rights, for example, this would imply that the provisions regulating the right of office-bearers or officials of a trade union to enter the workplace, would not be transferred to the new employer.

<sup>370</sup> *SACWU v Engen Petroleum Ltd & Colas International (Pty) Ltd*, (LC) C240/97.

the agreement, nor belongs to the employers' organisation that concluded it. If the transfer results from the company being wound up or sequestered, the new employer will not have to comply with the provisions of a collective agreement binding on its predecessor, save for the provisions which were incorporated in the relevant contracts of employment.

## **X.2 Disaffiliation**

In order to prevent that a person, whether an employee or an employer, who is dissatisfied with the terms and conditions collectively concluded on his behalf by his organisation, resigning from that organisation in order to escape from the obligations imposed by a collective agreement, section 23 (2) provides that:

*"A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement."*

It must be noted that subsection (1) (c) relates only to the provisions which are legally binding between the members of the signatory parties of the agreement, and which regulate terms and conditions of employment or the conduct of the employers in relation to their employees, or vice versa.

The Act does not regulate the situation where an employee who belongs to a registered trade union party to an agreement concluded with a single employer, resigns from his organisation in order to escape the terms and conditions of employment concluded on his behalf. Section 23 (2) refers only to the persons who are bound in terms of subsection (1) (c). In the example contemplated in this paragraph, the employee is bound in terms of subsection (1) (b). He could therefore easily escape the application of the agreement by resigning from his trade union.

This omission in the Act could have important implications in the collective bargaining process. For instance, the conciliation procedures prior to embarking on a strike would no longer be binding on an employee who resigned from the union which concluded a collective agreement on strikes.

As far as the individual terms and conditions of employment are concerned, the above omission has less significance, since section 23 (3) of the LRA 1995 specifically provides that, where applicable, a collective agreement varies any employment contract between an employee and employer who are both bound by the collective agreement. Resignation from the union would therefore not affect the terms and conditions of employment which were incorporated in the employment contract.

### **X.3            Modification of the scope of a council**

Although the Act provides for the variation of the registered scope of a bargaining or statutory council by the registrar acting independently or in response to an application from the council<sup>371</sup>, it is silent about the effect of such a variation on the binding effect of the collective agreements concluded by that council, in respect of the area or activities which has been varied.

Sections 61 (8) and (9)<sup>372</sup> of the LRA 1995 regulate the situation where registration of a bargaining council is cancelled. These provide as follows:

*"8) Any collective agreement concluded by parties to a council whose registration has been cancelled, whether or not the collective agreement has been extended to non-parties by the Minister in terms of section 32, lapses 60 days after the council's registration has been cancelled.*

*9) Despite subsection (8), the provisions of a collective agreement that regulates terms and conditions of employment remain in force for one year after the date that the council's registration was cancelled, or until the expiry of the agreement, if earlier."*

Perhaps these provisions could be applied by analogy to the variations in the scope of registration. These variations could also be dealt with administratively by the council or the Minister, in that the variation of the scope could take place after the collective agreement has expired or been cancelled.

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<sup>371</sup> Section 58 (1) of the LRA 1995.

<sup>372</sup> Section 61 regulates the cancellation of registration of a council.

## **X.4 Dissolution of a representative organisation**

### ***X.4.1 Through amalgamation***

Should two or more trade unions or employers' organisations decide to amalgamate, the collective agreements conclude by them will not be affected. Section 102 (5) (b) provides that the amalgamated trade union or employers' organisation succeeds the amalgamating organisations in respect of any collective agreement or other agreement and membership of any council.

### ***X.4.2 Through winding-up***

Section 106 (2) and (3) provide that any registered organisation which is wound up must have its registration cancelled, with the consequence that all the rights it enjoyed as a result of registration will cease. Although the Act is silent about the consequences on collective agreements concluded prior to the cancellation, it must be deduced that they cease to be applicable to the organisation and its members.

## **X.5 Amalgamation of bargaining councils**

The Act contains a provision<sup>373</sup> regulating the applicability of collective agreements where two or more bargaining councils resolve to amalgamate. In such case, *"all the collective agreements of the amalgamating bargaining councils, regardless of whether or not they were extended in terms of section 32, remain in force for the duration of those collective agreements, unless amended or terminated by the amalgamated bargaining council."*

The amalgamation of bargaining councils consequently has no effect on the collective agreements concluded prior to the amalgamation; they will remain in force for their normal duration, unless they are terminated or amended by the new bargaining council.

## **XI ENFORCEMENT AND SANCTIONS**

### **XI.1 Enforcement**

In terms of section 14 of the LRA 1995, a trade union representative has the right to monitor the employer's compliance with the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective

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<sup>373</sup> Section 35 (5) (b) of the LRA 1995.

agreement binding on the employer, and to report any alleged contravention to-

- (i) the employer;
- (ii) the representative trade union, and
- (iii) any responsible authority or agency.

When the agreement has been extended, section 33 of the LRA 1995 authorises the Minister, at the request of the bargaining council, to appoint any person as the designated agent of that bargaining council to help it enforce any collective agreement concluded in that bargaining council<sup>374</sup>.

The intention of the legislator was to provide for a system wherein the social partners are responsible for ensuring the enforcement of collective agreements through arbitration rather than through the criminal or civil courts. Such system is said to accord with the policy of self-regulation which underlies the LRA 1995<sup>375</sup>.

It must be stressed that even when the collective agreement contains a dispute resolution procedure, *"the interests of justice are paramount and, as in any arbitration proceedings, a court having jurisdiction may intervene when justice and equity calls for it."*<sup>376</sup>

According to Thompson, if the parties to collective agreements desire that their agreements be properly supervised and enforced, they need to incorporate in it appropriate rights and duties and, even more importantly, to extend adequate remedial powers (including the power to give urgent relief) to arbitrators. While all interpretation and application disputes relating to collective agreements must proceed to conciliation and arbitration under section 24, arbitrators can only direct what the agreement gives them authority to do.<sup>377</sup> In *SAEWA v GA Motor Winders (East Cape) CC*<sup>378</sup>, Commissioner Le Roux considered whether the CCMA had

<sup>374</sup> See *Metal & Electrical Workers of SA v Alpine Electrical Contractors*, (1997) 18 ILJ 1430 (CCMA).

<sup>375</sup> Explanatory Memorandum prepared by the Ministerial Task Team, January 1995, *Government Gazette*, 10 February 1995, No 16259, 123; see also *Rainbow Chicken farms (Pty) Ltd v FAWU & others*, (1997) 18 ILJ 1307 (LC), where Landman held that the Labour Court should strive to promote domestic arrangements; *North East Cape Forests v SAAPAWU & others*, (1997) 18 ILJ 729 (LC)

<sup>376</sup> *FAWU v Simba*, (1997) 4 BLLR 408 (LC).

<sup>377</sup> C. Thompson, "Collective bargaining" in *Current Labour Law*, Juta, 1997, 19.

<sup>378</sup> *SAEWA v GA Motor Winders (East Cape) cc*, CCMA EC4379, 10 February 1998; see also *FAWU v Country Home Bakery (Pty) Ltd*, CCMA KN1389, 12 June 1997 where Commissioner Stone did no more than make a declaration that the employer was in breach of the collective agreement; quoted by

jurisdiction to issue an order requiring compliance with a bargaining council agreement. He held that:

*"it is not readily apparent what mechanism is available to an aggrieved party to force a recalcitrant employer to heed the provisions of a particular bargaining council agreement. It should be borne in mind that the current Labour Relations Act does not echo the provisions of Act 28 of 1956 insofar as the latter act criminalises non-compliance with industrial council agreements (...) Presumably a party who has obtained an award stipulating that a given employer, employee, class of employer or class of employees is bound by a particular collective agreement, would be able to enforce that award in the same manner as any other arbitration award, as provided for in section 143 of the Act<sup>379</sup>."*

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more than make a declaration that the employer was in breach of the collective agreement; quoted by C. Thompson in *Current labour Law 1997*, Juta, 1997, 18.

<sup>379</sup> Section 143 of the LRA 1995 provides that arbitration awards issued by the CCMA may be made an order of the Labour Court.

## **PART C**

### **COMPARATIVE LAW**

# CHAPTER I

## BACKGROUND TO THE REGULATION OF COLLECTIVE AGREEMENTS

Both in Belgium and in South Africa, the development of trade unionism, and therefore collective bargaining are closely linked to the process of industrialisation which marked the end of the last century and the beginning of the twentieth century.

It is noteworthy that the Belgian labour movement arose out of a situation of economic liberalism marked by violent labour unrest, under the influence of the Christian Social doctrine and of Marxism. Although the first collective agreements appeared as early as 1906, it was only in 1921 that the freedom of association was recognised by Parliament. The Act of 1921 guarantees both positive and negative freedom of association, it abolishes the provisions of the Penal Code outlawing strikes and provides criminal sanctions for anybody who infringes the freedom of association.

The development and recognition of trade unions seems to have been less "conscious" in South Africa. Le Roux and Piron described the development of trade unions (catering for white workers) in South Africa as being a result of sentiment rather than a need for collective bargaining, because the colonists had been members of unions at home and wanted to establish the same type of institutions in South Africa. Although early trade unions met with hostility from employers, the law itself placed few restrictions on the formation of such bodies. The courts never developed common law delictual or criminal principles restricting the existence of such bodies, and no statutory restrictions were placed on them. There was however a restriction on the right to strike<sup>380</sup>.

Whether to end a lock out in the textile industry, or to put an end to industrial unrest in the mining industry, there is little doubt that the coming into existence of collective agreements took place in rather conflictual situations, with the view to resolving labour disputes by way of compromise.

From the outset, collective bargaining took place at centralised industry level, and

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<sup>380</sup> P.A.K. Le Roux and J. Piron, "South Africa", in *International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer, 1993, 23



due to the success encountered by self-regulation, the practice developed very quickly across the various industrial sectors.

It is now a predominant feature of both Belgian and South African industrial relations that the determination of most working conditions are made by the social partners, through social concertation.

The problems encountered by the social partners regarding the enforcement of these agreements were the same in both countries: there was at the time no labour law, independent from the common or civil law of contracts which could tackle the particular situation created by the collective negotiation of agreements purported to be binding on parties who did not take part to their conclusion.

Both countries had recourse to the same contractual principles in order to enforce these agreements, but unsatisfactorily. Whether it was the theory of mandate or the *stipulatio alteri*, none of these contractual principles could secure the enforcement of, and compliance with, these agreements on “dissident” members.

The only way to confer a binding effect on these agreements was through the intervention of the legislator.

Such intervention took place in South Africa as early as 1924, with a very sophisticated system providing for the conclusion of collective agreements within forums established at sectoral level. These forums, composed of representatives of labour and of employers, were given the right to negotiate agreements which would be made binding on all the parties represented in the forum as well as their members, and could even be declared binding upon all the persons active in the sector, through their promulgation in the Government Gazette.

Such legislative intervention only took place in Belgium in 1945. It is interesting to note that in both cases, the legislator first regulated the binding force of collective agreements concluded within statutory sectoral forums. This could be an indication of the legislator's preference for centralised collective bargaining. Collective agreements concluded outside these forums were in both countries considered at the utmost as gentlemen's agreement<sup>381</sup>.

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<sup>381</sup> Cass. 20 December 1950, *Pas.* 1951, I, 267 and *Nouwens Carpets (Pty) Ltd v National Union of*

It was only in 1968 in Belgium, and 1995 in South Africa, that the legislator regulated collective agreements and their enforceability globally, i.e. acknowledging the practice of the social partners to regulate terms and conditions of employment at various levels, and the need to sometimes extend the effects of such agreements to non-parties. The tardiness of the South African legislator to regulate agreements concluded outside the statutory forums, mainly concluded under the influence of trade unions catering for black workers, might probably be explained by the political situation that prevailed until very recently.

Such regulation does not, however, infringe the independence of the social partners in the determination of working conditions. To the contrary, by setting up a broad statutory framework which aims at accommodating and facilitating collective bargaining, and by specifying the binding force of collective agreements, the respective legislators adopted a very non-interventionist attitude, therefore promoting self-regulation of matters of mutual interests between labour and business.

## **CHAPTER II      PARTIES TO COLLECTIVE AGREEMENTS**

Both countries reserve exclusively the right to enter into collective agreements to representative organisations. The concept of representative organisation has however totally different meaning in each country.

Whilst Belgium has opted for a political approach to a definition of a “representative organisation”, over which trade unions and employers’ organisations have very little control, South Africa has opted for a more “liberal approach”, which is in conformity with the principles established by the International Labour Organisation.

In Belgium only the trade unions affiliated to one of the three federations represented at the National Labour Council have been granted the right to conclude collective agreements within the meaning of the 1968 Act. If one considers the fact that these federations are closely linked to the three political players on the Belgian scene, and the fact that trade unions which are refused affiliation to one of the three federations have no legal remedy available, and cannot therefore conclude collective agreements, one can query about this monopoly over collective bargaining.

It must, however, be said that in as much as approximately 70% of the Belgian workforce belong to a trade union which is affiliated to one of the three federations, and two of these federations are represented in every single joint committee, this characteristic has not been openly criticised nor challenged by the workforce.

South Africa has opted for a more democratic system of representation, giving total freedom to the social partners to decide, through the power play, on the level of representivity required to enter into collective bargaining. Save for the fact that the organisations need to be registered, a process which is purely administrative, no legal requirements are laid down as to the representivity of the parties to collective agreements.

Another difference between Belgium and South Africa is found in the status of the parties: whilst the LRA 1995 provides for the conclusion of collective agreements by registered “trade unions” and “employers’ organisations”, the Belgian 1968 Act

makes reference to "organisations representative of workers" and "organisations representative of employers" ("organisation représentative des travailleurs" and "organisation représentative des employeurs"). This difference is not purely linguistic and bears important consequences. The use of the expression "organisation representative of workers" instead of "trade union" (syndicat) allows in practice federations of trade unions to conclude collective agreements within the meaning of the 1968 Act, and to enjoy the provisions of the law regarding the binding force of the agreements so concluded.

By referring exclusively to "trade unions" and "employers' organisation" in the definition section of the LRA 1995, the South African legislator has closed the door on the opportunity to permit federations of trade unions and employers' organisations to conclude collective agreements with a "national-multi sectoral" ambit. Topics such as the implementation of a minimum guaranteed wage throughout all the sectors of the economy could hardly be achieved through collective bargaining. Should the various federations of trade unions and employers' organisations active in South Africa set up a collective bargaining forum for such purpose, any agreement reached within such forums would not be considered as a collective agreement for the purpose of the LRA 1995. Although the LRA 1995 considers expressly the concept of "federation", it does not encompass it when dealing with the definition, or the binding force of, collective agreements. The Act does not allow for federations to be parties to collective agreements.

However, should it be argued that federations may conclude collective agreements within the meaning of the LRA 1995, the binding force of such agreements would be very limited, as they would only be enforceable in terms of section 23 of the Act, with no possibility of extension towards employers and employees not members of the employers' organisations and trade unions affiliated to the federation party to the agreement.

Section 31 of the LRA 1995 could not be referred to in order to extend the binding force as it only permits the extension of collective agreements concluded within a bargaining (or statutory) council as established in terms of the Act. Bargaining (or statutory) councils may only be established by one or more registered trade unions and one or more registered employers' organisations (no reference being made to "federation"), and with regard to a sector and area, considered as a single sector or service, as demarcated by NEDLAC. Although the social partners could adopt a

very broad definition of a sector (such as in the chemical industry, which encompasses a wide variety of activities such as the pharmaceutical industry, pottery, the glass industry and explosives), in no way could they simply include all the various sectors of the economy active in the entire country within the scope of a council.

It can therefore be said that by not having included "federations" as potential parties to collective agreements, the South African legislator prevents the social partners from bargaining efficiently<sup>382</sup> over issues of mutual interests which affect the economy as a whole, and not a particular sector.

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<sup>382</sup> It must, however, be noted that some trace of collective bargaining can be found at NEDLAC. However, the "agreements" reached at NEDLAC between the social partners are not collective agreements within the meaning of the LRA of 1995, nor are they binding upon the parties.

### **CHAPTER III FORUMS FOR COLLECTIVE BARGAINING**

Although both Belgium and South Africa in practice allow collective bargaining to take place at a variety of levels and forums, both legislators have only expressly provided for centralised forums. Even here, the regulation of statutory centralised forums in each case does not prohibit collective bargaining within non-statutory collective bargaining forums. In other words, even though both legislators clearly favour centralised bargaining, it is apparent that they have not attempted to circumscribe the forums within which the social partners must bargain collectively.

In practice, very little differentiates Belgian joint committees from South African bargaining councils. In both countries, centralised-sectoral bargaining is the legislator's preferred level of collective bargaining. This preference translates into the enactment of provisions regulating the establishment and competencies of these centralised forums, and more particularly the possibility of extending the binding force of collective agreements concluded therein to all the persons falling within the scope of the sector.

It is noteworthy, however, that the South African legislator has not made provision for the establishment of a bargaining forum which could cover all the sectors of the economy. As the LRA 1995 currently reads, and even though it openly promotes collective bargaining and self-regulation, the social partners have not been empowered to conclude collective agreements which would apply across all the sectors, and bind all employers and employees, active in the Republic. It is submitted that, in practice, this lack could undermine collective bargaining, and therefore the purpose of the LRA 1995. Even if all the trade unions and employers' organisations present in the country had to establish a bargaining forum for the purpose of concluding collective agreements fixing minimum terms and conditions of employment, the force of such agreements would be undermined by the circumstance that they cannot be extended to non-parties (because they are not concluded with a bargaining council, within the meaning of the act).

## **CHAPTER IV     COLLECTIVE AGREEMENTS**

### **I         SCOPE OF APPLICATION OF THE RESPECTIVE LEGISLATIONS**

As mentioned in the introduction, Belgian labour law applies exclusively to private economic sectors. Civil servants and other employees of the State do not fall under the scope of labour law, but under administrative law. The Belgian 1968 Act regulating collective agreements and joint committees therefore expressly excludes all persons employed by the State from its scope of application.

Save for this exclusion, the legislation in both countries has a very wide scope of application and tends to cover nearly every person engaged in an employment relationship. Both countries, however, specifically exclude independent contractors from their industrial relations legislation.

It must be noted that the South Africa legislator, contrary to the Belgian one, has not deemed it necessary to regulate the application of the LRA 1995 in cases where the employment contract is null and void. It is therefore left to the courts to provide and construe the necessary guidelines in this regard.

It is submitted that, as disputes relating to the interpretation and application of collective agreements must be arbitrated either according to the parties' own dispute resolution procedures, or through the auspices of the CCMA, there is a risk that the consequences of the invalidity of an employment contract on the binding force of a collective agreement may not be treated on a consistent basis by the CCMA.

### **II        FEATURES OF COLLECTIVE AGREEMENTS**

Although expressed in different terms, the concept of a "collective agreement" bears the same meaning, save for the status of the groupings that may be party to such agreements. They are agreements concluded by the social partners for the purpose of regulating in an undertaking, a sector, or any other level chosen by the social partners, the terms and conditions of employment of their members or any other matter of mutual interest, including the rights and obligations of the parties towards each other.

In certain instances, those terms and conditions may even be declared binding upon non-members of the contracting parties, thus bringing the true nature of collective

agreements into question. However, since the law in both countries now regulates the binding force of collective agreements the debate over their contractual or statutory nature has been rendered largely academic. It must be accepted that collective agreements have a peculiar status, which cannot be explained exclusively either by reference to the common law contractual principles or to public law.

### **III CONTENT OF COLLECTIVE AGREEMENTS**

Belgian law refers to “the regulation of individual and collective relations between employers and employees and the rights and obligations of the contracting parties”, whilst South African law refers to “terms and conditions of employment or any other matter of mutual interest”.

This difference of terminology bears no consequence, and it can therefore be submitted that the content of collective agreements is similar in each country.

Through the recognition of the right to bargain collectively, both the South African and the Belgian legislators have delegated a part of their law-making function to the social partners, therefore promoting self-regulation. Even though many areas of labour relations – whether individual or collective – are still marked by Government intervention, the rules laid down by the social partners in the course of concluding collective agreements play a very important role in the shaping of the rules of labour law.

There is virtually no limit to the range of topics which can be bargained collectively, and save for statutory restrictions on the autonomy of the social partners which are mainly dictated by compliance with the Constitution, public international laws, or provisions stipulating minimum standards, collective agreements may regulate all aspects of labour relations in their broadest sense. It must be noted that the prohibition in Belgium of collective agreements providing for a closed shop or an agency shop is based on the constitutional right of freedom of association.

For the sake of completeness, it must, however, be added that since the 1980's, collective bargaining in Belgium has been marked by government intervention which has affected the social partners' autonomy. An Act of Parliament allows for the government to intervene in collective bargaining on wages, when the competitiveness of the country's economy is threatened and after having granted the social partners a limited period of time to take the necessary measures



themselves.

Another Act adopted in 1996 provides that wage increases in Belgium may not exceed the average increases of Belgium's three major trade partners: Germany, France and the Netherlands. Because of the expected wage increases in these countries, the maximum margin has been set at 6.1% for the 1997-1998 period. All wage increases negotiated in Belgium at all levels (sectoral, company or individual levels) must therefore be below this upper limit, and this for a two-year period.

It is interesting to note that the question of a social peace obligation has been approached differently, - and more efficiently in the writer's view -, in South Africa than in Belgium. The Labour Relations Act of 1995 not only regulates the right to strike and its conditions of exercise in order to enjoy the protection of the law in detail, but also expressly provides in section 65 (3) (a) that no party may take part in a strike if that person is bound by a collective agreements that regulates the issue in dispute.

Belgian law, on the other hand, is marked by a total absence of legislative regulation of the right to strike. Industrial conflict is characterised by the almost complete freedom of the social partners to engage in industrial warfare, as well as the lack of legal rules prescribing a particular course of action.

The right to strike was only formally acknowledged by the Supreme Court in 1981, and it was only in 1991 that the employees' right of recourse to industrial action was enacted, through the ratification by Belgium of the European Social Charter, signed in Turin on 18 October 1961.

All of the rules regulating the exercise and the consequences of the right to strike are therefore jurisprudential creations. The uncertainty as to whether or not parties may strike on matters regulated by a collective agreement, and thus whether there is an obligation of social peace, is the direct consequence of the lack of legislative intervention on the right to strike, which was dictated by politically powerful trade unions who are reluctant to acquire legal personality, which could affect their total freedom to resort to industrial actions.

As a result of the lack of a guarantee that terms and conditions of employment negotiated collectively would be complied with, and would not be brought back to

the bargaining table during the duration of the agreement, Belgian employers have adopted an empirical approach. They include clauses in collective agreements whereby bonuses would only be paid to union members if the agreement, and particularly the peace obligation, has been respected. This encourages trade unions and their members to comply with collective agreements for their duration.

Until trade unions agree to adopt legal personality, the effect of a collective agreement on the right to strike will therefore remain uncertain.

#### **IV CONDITIONS OF VALIDITY OF COLLECTIVE AGREEMENTS**

Whilst a collective agreement must comply with numerous conditions to be binding in Belgium, South African law only requires collective agreements to be entered into in writing by registered organisations.

The requirements laid down by the Belgian legislator which must be complied with on pain of invalidity, do not, however, constitute an undue interference in collective bargaining and principles of self-regulation. The conditions of validity prescribed by Belgian law are mainly dictated by the legislator's preoccupation with protecting the interests of workers who do not belong to signatory organisations, but are, however, bound by collective agreements. They do not affect the freedom of the social partners to regulate matters of mutual interest, but set up a framework within which collective agreements must be concluded.

Although South African law does not provide for the binding effect of collective agreement "as extensive" as in Belgium, which may justify a less formalistic approach, it is submitted that formal requirements constitute a means to promote and secure sound labour relations, by reducing the risk of disputes arising as to the existence of a collective agreement, the capacity of the parties who entered into the agreement, the date of coming into force, etc. It is furthermore submitted that these concerns are reinforced by the relative ease with which groupings of employees whose principal purpose is to regulate relations between employees and employers may now register as "trade unions" and therefore gain access to the bargaining instruments. In the writer's view, there is a risk that small trade unions may emerge locally, and enter into collective agreements the application and binding force of which could be undermined by reasons linked to formal legal aspects. It is too early, however, to establish whether such concerns are well-founded or not, and this will only be seen with the passing of time.

Another point which deserves comparison is the question of publicity surrounding the entering into force of collective agreements.

Belgian law requires that every collective agreement be deposited with the Minister of Labour to become binding, regardless of the forum within which its negotiation took place.

The Department of Labour's only task in the deposition process is to verify that the formal requirements have been met, and it has no power whatsoever to determine the legality of the contents of agreements which are deposited for registration.

Compliance with this requirement, without which the agreement does not constitute a collective agreement for purposes of the Act, ensures the publication of agreements which bind persons who did not take part – directly or indirectly – in their negotiation. It also constitutes a means for the government to be kept informed as to the directions taken by the social partners.

The South African legislator entrusted the social partners with the task to communicate the content of collective agreements to the workers and employers bound by them (except when the collective agreements are concluded in bargaining councils and are extended to non-parties). Practice will show whether compliance with collective agreements will be undermined by this lack of compulsory publication.

It is submitted that sound industrial relations would be promoted by a system in terms of which every collective agreement must be registered with an independent body, which could ensure that the binding force of these agreements may not be disputed for reasons linked to legal technicalities. With registration taking place in the early stages after the conclusion of the agreements, any defect could then be easily remedied in a climate free of disputes, which would avoid collective bargaining being undermined *a posteriori*.

As the LRA 1995 already requires bargaining councils to provide the CCMA with copies of all collective agreements they conclude, and the CCMA is further charged with the resolution of disputes linked to the application and interpretation of collective agreements, it is submitted that the CCMA (which has an established

presence throughout the country) could be entrusted with the task of registering collective agreements.

## **V NULLITY OF THE NORMS CONTRARY TO HIERARCHICALLY SUPERIOR NORMS**

Both countries provide that collective agreements must comply with the Constitution, public international law obligations and the object of the legislation. Belgium does so through an express provision which prohibits the inclusion in agreements of provisions which conflict with hierarchically superior norms, while South Africa does so through the interpretation clause inserted in the LRA 1995.

The Belgian legislator did not, however, limit its intervention to this aspect, but also created a hierarchy between the different sources of labour law, and a “sub-hierarchy” between collective agreements.

The order of preference provided by the Belgian 1968 Act places centralised - inter-industry wide bargaining at the top of the hierarchy of collective agreements, with centralised - sectoral, centralised - sub-sectoral and company level bargaining (in that order) ranking thereafter.

This choice has the advantage of ensuring that centralised bargaining, - which is the legislator and social partners’ preferred level of bargaining – is not undermined by collective bargaining taking place at other levels. This hierarchy does not affect the freedom of the parties to determine the appropriate level of bargaining, as they remain free not to bargain collectively at central level. It must, however, be noted that the Belgian social partners often bargain concurrently at the various levels.

South Africa has opted not to create an order of preference between collective agreements, leaving this question to be addressed by the social partners on an ad hoc basis. It is submitted that this question should be addressed by the legislator as many conflicting legal arguments may be adopted to resolve this issue. This would create a climate even more favourable to collective bargaining. Should the CCMA be left to address this question on a discretionary basis, this would undermine collective bargaining to the extent that the parties will have no guarantees as to the binding force of agreements concluded collectively at a particular bargaining level.

This could eventually also affect the social partners’ constitutional right of recourse to industrial action, as it creates a situation where the answer to the question as to whether the issue in dispute is regulated by a collective agreement –which

determines whether the industrial action enjoys legal protection or not –may vary according to the legal position adopted by the CCMA.

With regard to the effect of collective agreements on individual employment contracts, both countries have opted for a system in terms of which collective agreements vary individual employment contracts to the extent that the latter contain conflicting rules. South African law refers to such incorporation “where applicable” whilst Belgian law refers to provisions which are “contrary”. The difference in terminology indicates that Belgium opted for a more rigid approach: a collective agreement will automatically vary a conflicting provision in an employment contract, regardless of whether the conflicting provision is more or less generous than the one contained in the collective agreement.

It could be argued that the South African legislator’s references to “where applicable” and “to be treated in a manner that is less favourable” indicate a more flexible approach in terms of which a conflicting clause will only be varied when it – weighed against the whole collective agreement – happens to be less favourable. The test would therefore imply the consideration of a “collective compromise” and not a “one to one” comparison. This test would not apply with regard to remuneration however: an employee may not in any circumstances be paid a remuneration which is inferior to the one prescribed by a collective agreement.

It must finally be underlined that in both countries, the termination of a collective agreement does not affect the terms and conditions which were incorporated in the employment contract, and which are deemed to vary the employment contract. Those remain in force, until amended by a new collective or individual agreement.

## **VI PERSONS BOUND BY COLLECTIVE AGREEMENTS**

The mechanism used to bind persons to collective agreements, and therefore the persons bound by them, are probably the main differences between South African and Belgian law.

In Belgium, the binding force of a collective agreement on the workforce, regardless of its level of conclusion, is determined by the fact that the employer is bound by an agreement – either because he is a member of an employers’ organisation party to an agreement, he is a party to such agreement himself, or because he falls within the scope of the joint body which concluded the agreement.

In other words, the unionised status of an employee is of little importance in Belgium in determining whether or not he or she is bound by a collective agreement. As soon as the employer is bound by a collective agreement, all its employees, whether unionised or not, and whether members of the union parties to the agreement or not, will become bound by this agreement. This guarantees the application of uniform terms and conditions of employment on all employees covered at either company or centralised level. At centralised level, however, it must be noted that a collective agreement which is not extended to non-parties by Royal Decree, only has a supplementary binding force on employees and employers who were not represented – directly or indirectly – in the joint body concluding the agreement. They can however avoid the binding force of the collective agreement by inserting a clause to this effect in the employment contract.

In practice, this system encourages employers to join employers' organisations in order to be able to influence collective agreements negotiated within joint bodies.

At plant level, the application of this principle implies that even in case of a collective agreement being concluded with a minority union, its binding force will be extended to the entire workforce.

Various factors may explain the rationale behind this system and the reasons why neither employers nor individual employees have challenged the binding force of these collective agreements. Belgian trade unions are deemed to be representative of all employees in a branch of activity and therefore to act for the entire branch of activity. Furthermore, factors such as the high rate of union membership in Belgium (approximately 70%), the size of the country and consequently the absence of significant disparities between the different regions of the country, the links between the three federations of trade unions and the three political parties which have shared the power in Belgium since the independence of the country, the fact that only these three federations have been given the right to conclude collective agreements and often establish common programmes of negotiation which are presented jointly to the employers, the fact that 2 of the 3 federations are represented in each joint committee, (and are thus omnipresent at sectoral level), the fact that collective agreements are adopted unanimously within joint bodies, and the circumstance that numerous pieces of legislation regulate employment relationships and lay down peremptory minimum standards all have a big influence

on the way collective bargaining takes place in Belgium.

Regarding this last factor, it should be stressed that the extent of labour legislation laying down minimum legal standards, may result in collective bargaining only taking place to improve these minimum standards. Very few matters of mutual interest regarding employment relationships have been left unregulated by the legislator.

South Africa has adopted an arguably more traditional approach, by linking the binding force of a collective agreement to the status of a party to the agreement or of members of a contracting party. At plant level, employees who are not members of the union parties to the collective agreement may only be bound if these union parties represent the majority of the employees employed in the workplace.

Because of the reference to workplace rather than bargaining unit, it is submitted that it may be difficult in practice to extend company level agreements to non-parties. This means that an employer would possibly be obliged to provide for different sets of working conditions, depending on the trade union membership of its employees. This will probably not facilitate collective bargaining at company level, and could be the source of claims of discrimination.

The adversarial relationship between the various federations of trade unions in South Africa is probably a factor which would make it impossible to transpose the principles prevailing in Belgium. Although the writer has been unable to establish whether such adversity finds its source in ideological, cultural, political or other reasons, it seems impossible at this stage to envisage a system in South Africa whereby a minority trade union could, at plant level, enter into an agreement binding upon the entire workforce, including the employees belonging to a more representative union. South African collective labour law is based on the principle of representivity within a sector or a workplace, whilst Belgian law considers it at national, inter-industry wide level.

It is, however, submitted that at centralised level, the South African system could take inspiration from the Belgian experience.

Both countries promote centralised bargaining, but through different mechanisms. In South Africa, the primacy of sectoral level bargaining is endorsed in the LRA

1995<sup>383</sup>, but its result is not dictated.

In Belgium, the supremacy of centralised bargaining is not affirmed in unambiguous terms, but the consequences attached by the legislator to collective agreements reached at centralised level clearly demonstrate this principle. This supremacy is established through Articles 10 and 11 of the 1968 Act (regulating conflicting collective agreements), Article 51 of the 1968 Act (regulating the hierarchy of sources of obligations in employment relationships) and through the supplementary effect of collective agreements concluded in a joint body, and which have not been extended by Royal Decree, conferred by Article 26 of the 1968 Act.

Although South African law has opted for a system promoting sectoral bargaining, it is submitted that, save for the declaration of intent contained in the Labour Relations Act of 1995, and the fact that collective bargaining concluded in a bargaining council may be extended to non-parties under strict conditions, none of its provisions practically promote or encourage centralised bargaining.

A reading of sections 23 and 31 of the LRA 1995, dealing respectively with the binding force of collective agreements and the binding force of collective agreements concluded in bargaining councils, shows that the binding force and binding mechanism of collective agreements are exactly the same, regardless of their level of conclusion. (It is noteworthy that the wording of these two provisions is also nearly identical.)

Without imposing a specific bargaining level on the social partners, and while respecting the principle of voluntarism, it is submitted that the promotion of centralised bargaining could be better achieved by a system such as the Belgian one. The creation of a national, inter-professional bargaining forum, having similar competence regarding the conclusion of collective agreements<sup>384</sup>, and the granting of supplementary binding force to collective agreements reached in bargaining councils or in this national forum, could prove to be more efficient in promoting centralised bargaining than the current system of statutory councils (which have not

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<sup>383</sup> See section 1 – purpose of the Act, “to promote collective bargaining at sectoral level”, but see also the title of the Labour Relations Act 1995 “to promote and facilitate collective bargaining at the workplace and at sectoral level”; The Explanatory Memorandum prepared by the Ministerial Legal Task Team, *Government Gazette*, No. 16259, 10 February 1995, stated in unambiguous terms that the LRA 1995 aims at promoting “industry-level bargaining and gives the industry-level bargaining forums the power to determine the matters which can be bargained at plant level.”



met the favour of the social partners to date).

In South Africa, the primacy of sectoral collective bargaining is therefore undermined by two factors:

- the promotion of collective bargaining at sectoral level has not been translated into a principle that “its fruits” are superior to those of collective agreements concluded at other levels; and
- sectoral collective agreements are only binding on the parties to the agreement and their members, save when the agreement has been extended to non-parties by the Minister. Towards non-parties, collective agreements have no binding force whatsoever and they do not serve as guidelines for the regulation of terms and conditions of employment in a determined sector.

## **VII EXTENSION**

Both countries provide for a system of extension to non-parties of collective agreements concluded in statutory centralised forums. Once extended, a collective agreement becomes binding upon all employers and employees falling within the scope of the bargaining forum. A difference exists, however, between Belgium and South Africa regarding the possibility of departure from the provisions of a collective agreement: South Africa provides for procedures of extension and Belgium does not allow for the departure from a collective agreement extended by Royal decree.

It must however be noted that the Belgian Minister is given wider powers than his South African counterpart in extending collective agreements: whilst the South African Minister must grant the extension where all the requirements laid down by the Act are met, the Belgian Minister retains a discretion to grant or refuse the extension.

## **VIII BINDING FORCE AND MANDATE OF THE ORGANISATIONS' REPRESENTATIVES**

In order to prevent members of signatory parties to collective agreements from escaping their binding force by alleging that they did not give a mandate or that their organisation's representative exceeded the terms of its mandate, Belgian law has introduced a provision stating that organisation's representatives are irrefutably

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<sup>384</sup> Which is not the case of NEDLAC

presumed to have the power to conclude collective agreements on behalf of their organisation.

The LRA 1995 does not contain any such provision, therefore leaving open the question as to whether the binding force of collective agreements could be affected by reasons relating to the mandate of the organisations' representatives.

It is submitted that the inclusion of a clause in the LRA 1995, providing that the parties to a collective agreement are irrefutably presumed to have a mandate from their members, would promote and secure collective bargaining.

Arguments for this submission may be found in the very circumstance that the necessity for the legislator to regulate the binding force of collective agreements resulted from the inadequacy of the contractual law principles, (and more particularly the law of mandate) to address the situation created by the collective negotiation of labour agreements.

## **IX COMING INTO FORCE OF COLLECTIVE AGREEMENTS**

Whilst the Belgian legislator has regulated the coming into force of collective agreements at length, the South African legislator has left this issue to the social partners, and has not enacted any provisions dealing with the starting date of the binding force of a collective agreement. Although the initial draft to the Labour Relations Act of 1995 provided that collective agreements were to become binding 30 days after signature unless otherwise provided, this provision has been abandoned in the final draft. Social partners in South Africa enjoy total freedom determining and enforcing their own arrangements. Only time and practice will establish whether this empowerment of the social partners in the determination of the rules regarding the coming into force of collective agreements will promote legal certainty.

## **X PARTICULAR SITUATIONS**

Whether with regard to the consequences of a transfer of undertaking, the disaffiliation of a member from an organisation party to an agreement, or the dissolution of a trade union or employers' organisation, both the South African and Belgian legislators have opted for a system protecting and promoting collective bargaining. They have expressly provided that such incidents have no influence on the binding force of collective agreements, which remain in force for their duration,

and until replaced by a new agreement. It must also be added that the provision in both acts for the incorporation of individual terms and conditions of employment negotiated collectively into individual employment contracts is an important factor in ensuring the maintenance of terms and conditions of employment in case of any of these particular situations occurring.

## **XI      ENFORCEMENT AND SANCTIONS**

In order to accord totally with the policy of self-regulation which underlies the LRA 1995, the South African legislator has opted for a system whereby the social partners are required to be responsible for the enforcement of collective agreements, and non-compliance with such agreements has been decriminalised. A reading of the Explanatory Memorandum to the LRA 1995 indicates that another reason behind the preference for enforcement by arbitration rather than through the criminal courts is financial, and reveals that to recover an average claim of R250, the State may spend approximately R3 000.

Only practice will show whether the decriminalisation of non-compliance with collective agreements will affect the effective authority of collective agreements. In Belgium, only the infringement of collective agreements which have been extended to non-parties by Royal Decree gives rise to criminal sanctions. Although it is only on very rare occasions that offenders have been criminally prosecuted, it seems that the fear of being held criminally liable acts as an incentive in ensuring compliance with collective agreements.

## CONCLUSION

A comparative study of Belgian and South African law of collective agreements shows that in both countries, the principle of self-regulation by the social partners of any matters of mutual interest is a main feature of their collective labour law.

This principle seems, however, to be even stronger in South Africa, since, save to determine who is bound by a collective agreement, and under which conditions a collective agreement may be extended, South African law contains very little provisions regulating such agreements.

In her introduction, the writer was referring to the fact that "if reference was still being made to the law of agency and *stipulatio alteri*, a comparative study with the Belgian system could surely contribute to the development of South African law."

There is no doubt that if any contribution to the development of South African law can be made, it will not be by stating that collective agreements cannot be satisfactorily enforced by relying on the principles of agency or *stipulatio alteri*. This has been acknowledged and enacted by the legislator in 1995 through the adoption of sections 23 and 31 of the Labour Relations Act of 1995, which regulate the binding force of collective agreements.

However, the lack of legislative regulation on aspects such as the nature of the mandate held by the social partners to conclude collective agreements, and the hierarchy between collective agreements concluded at various levels, could prove detrimental to the promotion of collective bargaining. For these particular aspects, it is submitted that legislation should be enacted. Whatever position the South African legislator adopts regarding the questions as to whether or not there must be an irrebuttable presumption that the social partners hold a mandate to negotiate collective agreements, or whether sectoral agreements must take precedence over agreements concluded at other levels, it is submitted that a clear position should be adopted in order to promote legal certainty.

Another aspect which, it is submitted, could be looked at with a view to promote collective bargaining in South Africa relates to the concept of "national inter-industry wide collective bargaining". Even though the final decision to bargain or not at this

level should be left to the social partners, the Labour Relations Act of 1995, in its current form, does not allow the regulation of matter of mutual interest at a level higher than sectoral. A reading of the Act, however, does not seem to indicate that the legislator had in mind to exclude specifically such bargaining, but rather did not "see" the implication of limiting the parties to collective agreements in the definition section to trade unions and employers' organisations.

## BIBLIOGRAPHY

### BELGIAN LAW

#### I. Text books

P. DENIS, *Droit du travail*, Bruxelles, Larcier, 1992

H. DE PAGE, *Traité élémentaire de droit civil belge*, t. II, 3<sup>rd</sup> ed., Bruxelles, Bruylant, 1964

H. DE PAGE, *Traité élémentaire de droit civil belge*, t. V, 4th ed., Bruxelles, Bruylant, 1975

P. DURAND, *Traité de droit du travail*, t. VI, Paris, Dalloz, 1965

L. FRANCOIS, *Théories des Relations Collectives du Travail en Droit Belge*, Bruxelles, Bruylant, 1980

M. JAMOULLE, *Seize leçons sur le droit du travail*, Fac. Dr. Liège, 1994

F. LAGASSE AND C. WILLEMS, *Les conflits collectifs du travail*, Diegem , Ced. Samson, 1993

M. MAGREZ, *Droit collectif du travail*, Bruxelles, P.U.B., 1986-87

J. PIRON, AND P. DENIS, *Le droit des relations collectives du travail en Belgique*, Bruxelles, Larcier, 1970

P. VAN DER VORST, *Introduction au droit social*, Bruxelles, P.U.B., 1990

W. VAN EECKHOUTTE, *Compendium Social 1997-98*, tome I, Antwerpen, Kluwer-Ced. Samson, 1997

V. VANNES, *Questions approfondies de droit du travail*, volume II, Bruxelles, P.U.B., 1994-95

V. VANNES, *Droit paraétatique*, Bruxelles, P.U.B., 1994-1995

X., *Actuele Problemen van het Arbeidsrecht*, tome III, Antwerpen, Kluwer, 1990

X., *Arbeidsrecht C.A.D.*, Bruges, La Charte

X., *Cent ans de droit social*, Bruxelles, Bruylant, 1986

X., *International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer

## II. Journals

### List of abbreviations

T.T.	Tribunal du travail
C.T.	Cour du travail
Cass.	Cassation
C.E.	Conseil d'Etat
C.D.S.	Chroniques de droit social
J.T.	Journal des Tribunaux
J.T.T.	Journal des Tribunaux du travail
R.W.	Rechtskundige Weekblad
Ann. Fac. Dr. Liège	Annales de la Faculté de Droit - Liège
J.L.	Jurisprudence de Liège
J.J.T.B.	Journal des Tribunaux de Bruxelles
R.T.	Revue du Travail
Pas.	Pasicrisie
R.D.S.	Revue de droit social
R.C.J.B.	Revue critique de jurisprudence belge
R.J.D.A.	Revue de droit administratif
Rev. Adm. Publ.	Revue de l'administration publique

O. DE LEYE, "C.A.O. en het Hof van Cassatie", *J.T.T.*, 1995, 165-170

O. DE LEYE, "De betekenis van artikel 10 van de C.A.O. – wet", *J.T.T.*, 1988, 153-156

O. DE LEYE, "Zin en toepassing van artikel 27 van de wet van 5 december 1968", *J.T.T.*, 1989, 449-452

M. DEMANET, "Réflexions sur le droit de grève dans le secteur privé", *J.T.T.*, 1990, 69-78

S. DU BLED, "La hiérarchie des normes en droit du travail", *Orientations*, 1993, 265-272

J.F. GERARD, "A propos des conventions collectives et du Conseil d'Etat", *J.T.T.*, 1991, 321-323

J.F. GERARD, "Les effets de l'absence de dépôt d'une convention collective de travail et la place du droit commun des obligations", *J.T.T.*, 1990, 169-181

B. HAUBERT, "La nature des conventions collectives et des commissions paritaires", *J.T.T.*, 1992, 85-92

P. HORION, "Syndicats, conventions collectives de travail et organes paritaires", *Ann. Fac. Dr. Liège*, 1969, 44-132

H. LENAERTS, "De C.A.O.-wet 25 jaar", *R.W.*, 1993-94, 657-663

N. LEPOIVRE, "Du ressort des commissions paritaires", *C.D.S.*, 1989, 161-178

M. MAGREZ, "Le statut des conventions collectives de travail", *J.T.*, 1969, 201-264

G. MAGREZ-SONG, "Le rôle des CCT ou l'élaboration parallèle", *Rev. U.L.B.*, 1978, 101-123

A. MAZY, "Commentaires de la loi du 5 décembre 1968 sur les conventions collectives de travail et les commissions paritaires", *Rev. dr. trav.*, 1969, 114-193

B. PATERNOSTRE, "Chronique de jurisprudence 1988 à 1992. Les conventions collectives de travail et les commissions paritaires", *Orientations*, 1993, 253-264



J. PIRON, "Le rôle de la délégation syndicale et ses contradictions", *J.T.T.*, 1982, 153-159

J. PIRON, "Qu'est-ce qu'une grève irrégulière et quels en sont ses effets?", *J.T.T.*, 1979, 74-79

A. RENARD, "La non-application de la loi sur les conventions collectives de travail et les commissions paritaires au personnel engagé dans les services publics", *C.D.S.*, 1986, 2-5

M. RIGAUX, "Omtrent de juridische afdwingbaarheid van obligatoire C.A.O. bepalingen", *R.W.*, 1985-86, 913-928

R. ROELS, "La grève et ses conséquences sur la relation contractuelle", *J.T.T.*, 1977, 232-264

J. ROMBOUTS, "Prise de décision et décisions des commissions paritaires", *R.T.*, 1992, 5-27

C. WILLEMS, and F. LAGASSE, "Le mandat syndical: principes, portées, effets", *J.T.T.*, 1990, 1-13

### **III. Cases law**

#### **III.1. European Court of Justice**

C.J.C.E., 7 February 1991, *J.T.T.*, 1991, 346

#### **III.2. Conseil d'Etat**

C.E., 13 July 1953, *R.J.D.A.*, 1953, 290

C.E., 5 June 1959, *J.T.*, 1959, 52

C.E., 10 January 1964, *R.J.D.A.*, 1964, 30

C.E., 3 June 1978, *Rev. Adm. Publ.*, 1978, 148

C.E., 8 January 1986, *J.T.T.*, 1986, 171

C.E., 12 April 1989, *R.C.J.B.*, 1991, 653

C.E., 30 April 1996, *J.T.T.*, 1996, 370 and rapport Aud. B. Haubert

### **III.3. Cour de Cassation**

Cass., 20 December 1950, *Pas.*, 1951, I, 267  
Cass., 22 January 1953, *Pas.*, 1953, I, 362  
Cass., 14 April 1955, *J.T.*, 1955, 494  
Cass., 24 February 1968, *Pas.*, 1968, I, 819  
Cass., 27 May 1971, *R.W.*, 1971-72, 431  
Cass., 19 November 1973, *Pas.*, 1974, I, 340  
Cass., 14 April 1980 and concl. Av. Gén. Lenaerts, *R.W.*, 1980-81, 112  
Cass., 25 June 1980, *Pas.*, 1980, I, 1324  
Cass., 2 March 1981, *Pas.*, 1981, I, 726  
Cass., 21 December 1981, *J.T.T.*, 1982, 329  
Cass., 11 February 1982, *J.T.T.*, 1982, 54  
Cass., 14 February 1983, *R.W.*, 1983-84, 2104  
Cass., 18 April 1983, *J.T.T.*, 1984, 165  
Cass., 16 March 1987, *C.D.S.*, 1987, 188  
Cass., 3 April 1987, *Pas.*, 1987, I, 846  
Cass., 30 May 1988, *J.T.T.*, 1988, 352 and note C. Wantiez  
Cass., 12 September 1989, *J.T.T.*, 1992, 128  
Cass., 30 November 1989, *J.T.T.*, 1990, 37  
Cass., 17 October 1990, *J.T.T.*, 1992, 177  
Cass., 29 October 1990, *J.T.T.*, 1991, 195  
Cass. 24 December 1990, *C.D.S.*, 1991, 244  
Cass. 9 September 1991, *J.T.T.*, 1992, 398  
Cass., 12 October 1992, *J.T.T.*, 1992, 478  
Cass., 16 November 1992, *C.D.S.*, 1993, 113 and note J. Jacqmain  
Cass., 1 February 1993, *C.D.S.*, 1993, 304  
Cass., 27 January 1994, *C.D.S.*, 1994, 75  
Cass., 9 May 1994, *J.T.T.*, 1995, 8  
Cass., 5 September 1994, *J.T.T.*, 1995, 7  
Cass., 29 April 1996, *J.T.T.*, 1996, 367  
Cass., 17 June 1996, *J.T.T.*, 1996, 365

### **III.4. Cour du Travail**

C.T. Bruxelles, 9 November 1977, *F.E.B.*, 1978, 2322  
C.T. Bruxelles, 6 June 1979, *J.T.T.*, 1980, 85  
C.T. Bruxelles, 24 November 1980, *R.W.*, 1980-81, 2262, note M. Rigaux

C.T. Liège, 17 February 1981, *J.L.*, 1981, 319  
 C.T. Bruxelles, 14 September 1981, *R.W.*, 1983-84, 1011  
 C.T. Liège, 16 October 1981, *J.L.*, 1982, 161  
 C.T. Mons, 19 November 1981, *J.T.T.*, 1982, 204  
 C.T. Liège, 2 August 1984, *R.D.S.*, 1984, 588 and note T. Lagneaux and J. Vandrooghenbroek  
 C.T. Bruxelles, 2 October 1984, *J.T.T.*, 1985, 116  
 C.T. Liège, 11 October 1984, *J.T.T.*, 1984, 314  
 C.T. Bruxelles, 12 November 1984, *C.D.S.*, 1984, 531  
 C.T. Antwerpen, 4 July 1985, *J.T.T.*, 1986, 172  
 C.T. Bruxelles, 7 November 1986, *C.D.S.*, 1987, 224  
 C.T. Bruxelles, 20 March 1987, *J.T.T.*, 1987, 238  
 C.T. Bruxelles, 3 April 1987, *C.D.S.*, 1988, 40  
 C.T. Mons, 4 May 1987, *C.D.S.*, 1988, 42  
 C.T. Bruxelles, 21 April 1988, *J.T.T.*, 1990, 117  
 C.T. Antwerpen, 27 May 1988, *J.T.T.*, 1988, 357  
 C.T. Liège, 1 March 1989, *J.T.T.*, 1990, 430  
 C.T. Bruxelles, 26 May 1989, *J.T.B.*, 1989, 378  
 C.T. Gand, 8 November 1989, *J.T.T.*, 1990, 116  
 C.T. Bruxelles, 1 December 1989, *J.T.T.*, 1990, 80  
 C.T. Liège, 20 December 1989, *J.T.T.*, 1990, 360  
 C.T. Mons, 15 January 1990, *J.T.T.*, 1990, 181  
 C.T. Mons, 18 January 1990, *J.T.T.*, 1990, 492  
 C.T. Liège, 24 July 1990, *J.T.T.*, 1991, 261  
 C.T. Antwerpen, 25 March 1994, *R.W.*, 1994-95, 922  
 C.T. Mons, 3 March 1995, *J.T.T.*, 1996, 377  
 C.T. Antwerpen, 20 March 1995, *R.W.*, 1995-96, 1031

### **III.5. Tribunal du travail**

T.T. Bruxelles, 27 June 1972, *J.T.*, 1972, 278  
 T.T. Namur, 11 February 1976, *R.C.J.B.*, 1977, 587 and note M. Magrez  
 T.T. Bruxelles, 9 September 1977, *J.T.T.*, 1977, 334  
 T.T. Mons, 6 April 1979, *J.T.T.*, 1980, 199  
 T.T. Antwerpen, 5 October 1979, *R.D.S.*, 1979, 435  
 T.T. Charleroi, 18 February 1980, *J.T.T.*, 1981, 57  
 T.T. Arlon, 28 February 1984, *J.T.T.*, 1984, 402

T.T. Charleroi, 12 November 1984, *C.D.S.*, 1984, 531  
 T.T. Arlon, 28 December 1984, *J.T.T.*, 1985, 402  
 T.T. Charleroi, 10 February 1986, *C.D.S.*, 1987, 154  
 T.T. Bruxelles, 1 September 1986, *J.J.T.B.*, 1987, 29  
 T.T. Bruxelles, 7 January 1988, *J.T.B.*, 1988, 44  
 T.T. Charleroi, 6 January 1989, *J.T.T.*, 1989, 271  
 T.T. Charleroi, 12 June 1989, *C.D.S.*, 1989, 349, and note J. Jacqmain  
 T.T. Bruxelles, 13 June 1989, *C.D.S.*, 1991, 34  
 T.T. Liège, 18 May 1993, *C.D.S.*, 1995, 343  
 T.T. Antwerpen, 16 November 1995, *J.T.T.*, 1995, 274

### **III.6. Tribunal de première instance**

Tournai, 10 January 1989, *J.T.T.*, 1989, 134

## **SOUTH AFRICAN LAW**

### **I. Text books**

BENJAMIN, JACOBUS & ALBERTYN, *Strikes, Lock-Outs and Arbitration in South African Labour Law*, Cape Town, Juta, 1989

J. BLOCH, *The Legislative Framework of Collective Bargaining in South Africa*, University of London, 1977

M. BRASSEY, E. CAMERON, H. CHEADLE & M. OLIVIER, *The New Labour Law*, Juta, 1987

CAMERON, CHEADLE & THOMPSON, *The New labour Relations Act*, Juta, 1989

CHEADLE, LE ROUX, THOMPSON, *Current Labour Law*, Cape Town, Juta, 1994

CHEADLE, LE ROUX, THOMPSON & VAN NIEKERK, *Current Labour Law*, Cape Town, Juta, 1995

CHEADLE, LE ROUX, THOMPSON & VAN NIEKERK, *Current Labour Law*, Cape Town, Juta, 1996

CHEADLE, LE ROUX, THOMPSON & VAN NIEKERK, *Current Labour Law*, Cape Town, Juta, 1997

RH CHRISTIE, *The Law of Contract in South Africa*, 3<sup>rd</sup> ed., Butterworths, Durban, 1996

JV DU PLESSIS, MA FOUCHE, B. JORDAAN & MW VAN WYK, *A practical guide to labour law*, Butterworths, Durban, 1996

D. DU TOIT, D. WOOLFREY, J. MURPHY, S. GODFREY, D. BOSCH & S. CHRISTIE, *The Labour Relations Act of 1995*, Butterworths, Durban, 1996

J. GROGAN, *Workplace law*, Juta, 2<sup>nd</sup> ed., 1996

J. GROGAN, *Collective Labour Law*, Juta, 1993

R.A. JONES & H.R. GRIFFITHS, *Labour Legislation in South Africa*, Mc Graw, Hill Book Company, Johannesburg, 1980

JOUBERT, *The Law of South Africa*, Volume 1, Butterworths, Durban, 1993

J. PIRON, *Recognising trade unions*, Southern Book Publishers, Johannesburg, 3<sup>rd</sup> edition, 1990

P.J. RABIE, *The Law of Estoppel in South Africa*, Butterworths, Durban, 1992

A. RYCROFT & B. JORDAAN, *A Guide to South African Labour Law*, Juta, 2<sup>nd</sup> edition, 1992

M. SCHAEFFER, *Regulation of employment and Industrial Conciliation in South Africa*, Juta, 1957

C. THOMPSON & P. BENJAMIN, *South African Labour Law*, Juta, 1965, 2<sup>nd</sup> edition, as amended by service No 37 1997

M.J.D. WALLIS, *Labour and Employment Law*, Butterworths, Durban, 1992

X., *Essays in Southern African Labour History*, Ravan Press, Johannesburg, 1978

X., *Fundamental rights in the Constitution*, Juta, 1998

X. *International Encyclopaedia for Labour Law and Industrial Relations*, Deventer, Kluwer 1990

X., *Labour Law*, Juta, Cape Town, 1991

## **II Journals**

### List of abbreviations

ILJ	=	Industrial Law Journal
CCMA	=	Commission for Conciliation, Mediation & Arbitration
C.L.L.	=	Contemporary Labour Law
LC	=	Labour Court
LAC	=	Labour Appeal Court
IC	=	Industrial Court

R.G. BEATON, "The Enforceability of Labour Agreements", (1989) 10 *ILJ* 388-391

W. BROWN, "Bargaining at Industry Level and the Pressure to Decentralize", (1995) 16 *ILJ* 979-989

S. CHRISTIE, "Majoritarianism, Collective Bargaining and Discrimination", (1994) 15 *ILJ* 708-719

D. DU TOIT, "Statutory Collective Bargaining: A duty of Fair Representation", (1993) 14 *ILJ* 1167-1173

D. DU TOIT, "An Ill Contractual Wind Blowing Collective Good? Collective Representation in Non-statutory Bargaining and the Limits of Union Authority", (1994) 15 *ILJ* 39-53

B. GRANT, "In Defence of Majoritarianism: Part 1-Majoritarianism and Collective Bargaining", (1993) 14 *ILJ* 305-314

A.A. LANDMAN, "Collective agreements – Which judicial pigeon hole for new bargaining agreements?", *C.L.L.*, Vol 5, No 8, March 1996, 71-76

A.A. LANDMAN, "The Registration of Trade Unions – The Divide Narrows", (1997) 18 *ILJ* 1183-1197

P.A.K. LE ROUX, "Statutory Councils: their powers and functions", *C.L.L.* Vol 5, No 7, February 1996, 61-67

C. THOMPSON, "A Bargaining Hydra emerges from the unfair labour practice swamp", (1989) 10 *ILJ* 808-813

J. WILSON & G. GILLES, "Collective agreements: some present and future implications", *Labour Law News & Court Reports*, Vol 5, No 3, Oct 1995, 3-5

J. WILSON & G. GILLES, "Collective agreements: unilateral changes to agreed procedures", *Labour Law News & Court Reports*, Vol 3, No 6, January 1994, 4-5

C. THOMPSON, "The Politics of the Judiciary", (1993) 14 *ILJ* 315-321

X., "Collective bargaining", *Employment Law*, Vol 12, No 1, September 1995, 2-6

### **III Jurisprudence**

- *Amalgamated Clothing & Textile Workers Union of SA v National Industrial Council of the Leather Industry of SA*, (1989) 10 *ILJ* 894 (IC)
- *Bargaining Council for the Clothing Industry (Natal) v Confederation of Employers of Southern Africa & others*, Labour Court D136/98, 15 June 1998
- *BCAWU v Masterbilt CC*, (1987) 8 *ILJ* 670 (IC)
- *Broodryk and others v SA Airways*, (1996) 17 *ILJ* 278 (IC)
- *CAWU v Grinaker Duraset*, CCMA NC57, 18 March 1997
- *Chemical Workers Industrial Union and others v Electric lamp Manufacturing of SA (Pty) Ltd*, (1989) 10 *ILJ* 347 (IC)

- *Chemical Workers Industrial Union & others v Indian Ocean Fertilizer*, (1991) 12 ILJ 822 (IC)
- *Chemical Workers Industrial Union v Lutheni Plastics*, CCMA EC3147, 23 March 1998
- *Chetty v Raydee (Pty) Ltd t/a St James Accommodation*, (1988) 9 ILJ 318 (IC)
- *Collins v Volkskas Bank*, (1994) ILJ 1398 (IC)
- *Consolidated Frame Cotton Corporation v Minister of manpower & others*, (1984) 5 ILJ 309 (D)
- *Deukers Bosveld Gold Mine v National Union of Mineworkers*, (1993) 14 ILJ 778 (ARB)
- *Don Products (Pty) Ltd v Manage and others*, (1992) 13 ILJ 900 (LAC)
- *FAWU v Bromor Foods (Pty) Ltd*, CCMA KN11973, 25 May 1998
- *FAWU v Country Home Bakery (Pty) Ltd*, KN1389, 12 June 1997
- *FAWU v Freshmark*, CCMA WE, 18 March 1997
- *FAWU v Premier Foods Industries (Epic Foods Division)*, J205/97, 19 May 1997
- *FAWU v Royal Beechnut (Pty) Ltd*, (1988) 9 ILJ 1033 (IC)
- *FAWU v Simba (Pty) Ltd*, (1997) 4 BLLR 408 (LC) at 409
- *Fidelity Guards v Professional Transport Workers Union & others*, Labour Court, J843/97 (LC)
- *Food and General Workers Union & others v Sundays River Citrus Co-operative Co Ltd*, NHE 11/2/278 (PE) (IC)
- *Food and Allied Workers Union v Ko-operatief Wijnbouwers Vereniging van ZA Beperkt, Worcester*, (1994) 15 ILJ 1065
- *Food Workers Council of South Africa v Bokomo Mills*, (1994) 15 ILJ 1371 (IC)
- *Fraser Alexander Bulk Materials Handling (Pty) Ltd v CWIU*, (1996) 3 BLLR 314 (IC)
- *Gubb & Inggs Ltd v Clothing and Textile Workers Union of South Africa*, (1991) 12 ILJ 415 – Arb
- *Industrial Council for the Motor Transport Undertaking (Goods) v Bothma & Sons (Pty) Ltd*, (1997) 2 BLLR 140 (IC)
- *Johnson Mambo & 45 others v Macrall Timbers*, CCMA EC1618, 17 August 1997
- *Julius Solomon (Pty) Ltd and ACTWUSA*, Arbitration, 27 March 1988
- *Kabey v Bester*, CCMA, GA635, 11 March 1997
- *Luthuli & others v Flortime (Pty) Ltd & another*, (1988) 9 ILJ 287 (IC)
- *Marievale Consolidated Mines Ltd v President of Industrial Court*, (1986) 7 ILJ 152 (T)



- *Mazibuko and others v Hotels, Inns and Resorts (SA) (Pty) Ltd*, (1996) 17 ILJ 263 (IC)
- *Metal & Electrical Workers of SA v Alpine Electrical Contractors*, (1997) 18 ILJ 1430 (CCMA)
- *Mine Service Officials Association of SA v President of Industrial Court & others*, (1987) 8 ILJ 51 (T)
- *Mineworkers Union v East Rand Gold & Uranium Co Ltd*, (1990) 11 ILJ 1070 (IC)
- *Metal & Allied Workers Union & others v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd*, (1986) 7 ILJ, 703 (IC)
- *Motor Industries Bargaining Council v SA Motor Industry Employers Association and others*, Labour Court J569/97, 29 August 1997
- *Mngomezulu v Khutala Mining Services (Pty) Ltd*, (1994) 15 ILJ 374 (IC)
- *Mtuzimele v Coverland Roof Tiles*, (1996) 7 BLLR 789 (IC)
- *Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another*, (1989) 10 ILJ 870 (IC)
- *National Manufactured Fibres Employers' Association and another v CWIU and others*, Labour Court, D101/97, 15 August 1997
- *National Union of Metalworkers of SA v Feltex Foam*, (1997) 18 ILJ 1404 (CCMA)
- *National Union of Mineworkers v Goldfields of SA Ltd & others*, (1989) 10 ILJ 86 (IC)
- *National Union of Mineworkers v Henry Gould (Pty) Ltd & another*, (1988) 9 ILJ 1149 (IC)
- *Ngiba & others v Van Dyck Carpets (Pty) Ltd & another*, (1988) 9 ILJ 453 (IC)
- *North East Cape Forests v SAAPAWU & others*, (1997) 18 ILJ 729 (LC)
- *Nouwens Carpets (Pty) Ltd v National Union of Textile Workers*, 1989 (2) SA 363 (N)
- *Ntsangani and others v Golden Lay Farms Ltd*, (1992) 13 ILJ 1199 (IC)
- *NUMSA & others v MacSteel (Pty) Ltd*, (1992) 13 ILJ 826 (A)
- *NUMSA v Merkim Motors*, CCMA NC1595, 22 July 1998
- *Paper, Printing, Wood & Allied Workers Union v SA Printing & Allied Industries Federation*, (1990) 11 ILJ 345 (IC)
- *Photocircuit SA (Pty) Ltd v De Klerk No & others*, (1991) 12 ILJ 289
- *Radio Television Electronic and Allied Workers Union v Tedelex (Pty) Ltd and another*, (1990) 11 ILJ 1272 (IC)
- *Rainbow Chicken Farms (Pty) Ltd v Food & Allied Workers Union & others*,

(1997) 18 ILJ 1307 (LC)

- *Ramolesane and another v Andrew Mentis and another*, (1991) 12 ILJ 329 (LAC)
- *Rand Tyres and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Tvl) and Two Others*, 1941 TPD 108
- *Reactor Clothing (Pty) Ltd v Robertson & others*, Labour Court D146/97, 13 February 1998
- *S. v Prefabricated Housing Corp. (Pty) Ltd & another*, 1974 (1) SA 535 (A)
- *SA Association of Municipal Employees v Pretoria City Council*, 1948 (1) SA 11 (T)
- *SA Clothing & Textile Workers Union v Sheraton Textiles (Pty) Ltd*, (1997) 18 ILJ 1412 (CCMA)
- *SA Commercial Catering & Allied Workers Union v Crown Furnishers*, (1998) 19 ILJ 663 (CCMA)
- *SA Commercial Catering & Allied Workers Union v Woolworths (Pty) Ltd*, (1998) 19 ILJ 57 (LC)
- *SA Motor Industry Employers Association & Another v National Union of Metalworkers of SA & others*, (1997) 18 ILJ 1301 (LAC)
- *SA Polymer Holdings (Pty) Ltd v Llaie & others*, (1994) 15 ILJ 277 (LAC)
- *SA Security & Allied Workers Union v Masonic Haven (Pretoria)*, (1996) 17 ILJ 193 (IC)
- *SA Society of Bank Officials v Standard Bank of SA Ltd*, (1994) 15 ILJ 332 (IC)
- *SAAME v Pretoria City Council*, 1948 (1) SA 11 (T)
- *SACCAWU & others v Checkers SA Ltd & another*, (1992) 13 ILJ 411 (IC)
- *SACCAWU v Elite Industrial Cleaning*, CCMA GA7877, 29 July 1997
- *SACCAWU v Garden Route Chalets (Pty) Ltd*, (1997) 3 BLLR 325 (CCMA)
- *SACCAWU v Metlife*, (1997) 18 ILJ (CCMA)
- *SACTWU v Best Clothing (Pty) Ltd*, (1997) 5 BLLR 658 (CCMA)
- *SACTWU v W M Eachus and Co (Pty) Ltd*, CCMA WE152, 15 April 1997
- *SACWU v Engen Petroleum Ltd & Colas International (Pty) Ltd*, Labour Court C240/97
- *SACWU v Technical Systems*, CCMA WE3341, 4 August 1997
- *SAEWA v GA Motor Winders (East Cape) CC*, CCMA EC4379, 10 February 1998
- *SANSEA v NUSOG*, (1997) 4 BLLR 486 (CCMA)
- *SASBO v First National Bank*, (1996) 17 ILJ 135
- *SAWU v Mondi Kraft*, CCMA KN544, 7 August 1997

- *SAEWA v GA Motor Winders (East Cape) CC*, CCMA EC4379, 10 February 1998
- *South African Motor Industry and South African Vehicle Body Builders' & Repairers Association v National Union of Metalworkers of South Africa, Motor Industry Bargaining Council, Motor Industry Employees' union of South Africa & Motor Industry Staff Association*, unreported case (LAC)
- *TAWU v Motoravia (Pty) Ltd*, (1996) 9 BLLR 1189 (IC)
- *TGWU obo Dube v Value Truck Rental*, CCMA GA17683, 28 January 1998
- *Towerkop Dairies (Pty) Ltd v SACWU*, CCMA WE7551, 20 March 1998
- *Transport & General Workers Union & others v SA Stevedores*, (1994) 15 ILJ 358 (IC)
- *Tsambo v Ovestone Farms (Pty) Ltd*, (1996) 17 ILJ 418 (ALC)
- *UPUSA v Komming Knitting*, (1997) 4 BLLR 508 (CCMA)