

UNIT 3: COLLECTIVE BARGAINING

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1.- Definition and function of collective agreements.

1.1.- Definition of Collective Agreement.

There is a legal concept of collective agreement in art. 82.1 WS, which defines it as the *"expression of a agreement freely adopted by workers' and employers' representatives by virtue of their collective autonomy"*.

There is also a concept in an international standard: Art. 2.1 of Recommendation n° 91 of the ILO (International Labour Organisation) of 1951 defines it as *"any agreement in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other"*.

The latter concept, however, only refers to the normative content of the agreement (working conditions) but not its obligational content (everything related to the agreement parties' rights and obligations) which are usually included in collective agreements. Neither does it refer to the relationship between the employer and the workers' representatives, which are also normally regulated by collective agreements.

For these reasons, we can consider a doctrinal concept of the collective agreement and define it as "the written standard, arising from a bargaining process between employers or their representatives and workers' representatives, aimed at regulating not only working conditions, but also the relationship between employers and workers' representatives and between the signatories of the agreement".

Regarding the legal nature of the collective agreements, they include, both, features from the contracts and from the legal standards¹. Hence they have been conceived as "a hybrid, with a the body of a contract and the soul of law" (CARNELUTTI).

¹ Whilst they stemmed from a negotiation process (as any contract), they also have, as legal standards, an overall personal scope and normative efficacy.

1.2.- Function of the collective agreement.

Since the right to collective bargaining was recognised in the Constitution and implemented in the standards, the regulatory functions of the collective agreements have been broadened considerably. Originally, collective agreements were virtually confined to the regulation of working days and wages. Nowadays, besides regulating the various aspects of the employment relationship (working days, salary, reconciliation of work and family life, prevention of labour risks, etc) they regulate economic issues (e.g. a company's employment policy, or outsourcing policy) and those related to workers' collective action (e.g. rights of workers' representatives, establishment of union sections, workers' right to assembly, etc).

This historical trend towards boosting collective bargaining is also something of our own time. One can say that over the last twenty years the role of collective bargaining in the regulation of working conditions has changed to the point that nowadays it regulates aspects of labour relations before exclusively governed by law.

Traditionally, collective bargaining has played the role of improving working conditions laid down in the rules of the respective mandatory law. This is a typical feature of the first manifestations of collective bargaining in history. However, nowadays collective bargaining continues to have a significant role (e.g. art. 38 WS provides a minimum of 30 calendar days' holidays, which can be extended by the collective agreement).

In fact, collective bargaining has gradually increased its regulatory role with respect to the law, and now has three functions more in addition to the above:

1) Sometimes the law allows collective agreement to regulate certain matters, replacing non-mandatory standards (e.g. art. 14.1 WS - duration of the qualifying period-, art. 29.1 WS -payslip model-).

2) In other cases, the law partly regulates some matters, entrusting the collective agreement to complete the legal regulation; e.g. Art. 23.2 WS (entrusts the collective agreement to establish the terms for the exercise of some rights such as leave to sit examinations, as well as the option to choose work shifts for workers following courses.

3) Also in other cases, the law chooses to enable the collective agreement to regulate some matter. In other words, the law merely mentions said matter, requiring the collective agreement to establish

all regulation; e.g. Art. 24 WS (promotion scheme), Art. 25 WS (terms for economic development).

2.- The constitutional right to collective bargaining.

The Spanish Constitution recognises the right to collective bargaining in art. 37.1: *"The law shall guarantee the right to collective labour bargaining between workers and employers' representatives, as well as the binding force of the collective agreements"*.

The most significant features of this regulation are the following:

1.- Due to its position in the Constitution (section 2, Chapter II of Title I SC) it is a right provided with direct and immediate efficacy, therefore, it is directly enforceable in courts. Furthermore, the regulation shall only be regulated by an Act (*"reserva de ley"*) as stipulated in art. 53.1 Spanish Constitution.

However, it is not a fundamental right but an ordinary constitutional right. Therefore, any breach cannot be challenged in *"amparo"* in the Constitutional Court. Nonetheless, the Constitutional Court has ruled that certain manifestations of collective bargaining are part of the essential content of the fundamental workers' right to freedom of association (article. 28.1 SC). In this indirect way, the constitutional protection of the right could be claimed in *amparo* (as part of the right freely to join a trade union).

Note that the Act regulating the workers' right to freedom of association (the Organic Law 11/1985 on *Right to Association*) establishes the unions' right to deploy union activity which includes the right to collective bargaining. In conclusion, it can be said that the unions' right to collective bargaining is integral to the right of association. Nevertheless, the right of collective bargaining of workers' representatives in the workplace is not. Therefore, it is not entitled to the same constitutional protection.

2.- Concerning the holders of the collective bargaining right, art. 37.1 SC simply refers to them as *"workers and employers' representatives"*.

Consequently, it can be said that the Spanish Constitution sets out the right to collective bargaining in broad terms, since the constitutional provision suggests that any representative body of employers and employees can lawfully negotiate collective agreements.

Nonetheless, while Title III of WS (arts. 82 to 92) develops the constitutional order and regulates the right to collective bargaining, it does not entitle any representative body of workers or employers to negotiate collective agreements since it establishes strict requirements

in order to attribute representatives' legal standing for bargaining and certain procedure bargaining procedure.

Therefore, although the SC attributes the right to collective bargaining to any employers and workers' representatives, Title III of WS (arts. 87 and 88) only confers the right to negotiate collective agreements to some representative employers and employees' bodies² and subjects them to certain procedural rules (arts. 89 and 90 WS).

Two possible conclusions can be reached from this divergence between art. 37.1 SC and Title III of WS:

1) The WS Title III regulation on right to collective bargaining is unconstitutional because it unduly restricts the right to collective bargaining established by art. 37.1 SC.

2) As long as neither appeal nor question of unconstitutionality has been raised against Title III of WS and considering that art. 37.1 SC has direct and immediate efficacy, our legal system shall admit two types of collective agreements:

a) The so-called "*estatutarios*" collective agreements: those negotiated under the legal standing and procedural requirements laid down in Title III of the WS.

b) The so-called "*extraestatutarios*" collective agreements: those which have not been negotiated strictly following the WS' Title III rules (legal standing and procedural rules for bargaining), but whose validity may be directly based on art. 37.1 SC.

Since no appeal nor question of unconstitutionality has been raised against Title III of ET (and, at this stage, is unlikely to be raised), the latter is the position that has been broadly followed by case law and Labour Law scholars. In this regard, the Constitutional Court has stated that in our legal system the regulation of the constitutional right to collective bargaining has not been exhausted by the provisions of Title III of WS. Such provisions have only made a partial regulation of the right laid down by art. 37.1 EC.

Interestingly, this conclusion also seems to be followed by some articles of the WS which indirectly admit the possibility of negotiating collective agreements outside its rules. This indirect way of accepting "*extraestatutaria*" collective bargaining, may be deduced from two WS articles (arts. 82.3 and 90.1), which expressly refer to the "*collective agreements governed by this law*", making it implicit that other kind of collective agreements are legally feasible.

² Only those who reach certain quotas of representation within the collective agreement scope.

3.- *Interpretation of the expression "binding force" contained in art. 37.1 EC.*

According to art. 37.1 SC, the law shall guarantee the "binding force of the collective agreement". The interpretation of this legal has been widely discussed by scholars and case law. Three possible interpretations have been considered:

1) Binding force can be construed as a "duty of relative peace". Such duty means the obligation of workers' representatives to not to go on strikes specifically aimed at claiming an amendment of the collective agreement. This duty has been laid down by Art. 11 c) of the Royal Decree Law 17/1977 of Industrial Relations (which is currently the basic regulatory standard for the right to strike). Article 11 of RDL 17/1977 outlaws the so-called "strikes with amendment purposes" (*huelgas novatorias*), that is, those strikes aimed at altering a collective agreement while it is still in force. Moreover, the Constitutional Court (Constitutional Court ruling 11/1981) has upheld the constitutionality of the so called duty of relative peace regulated by art. 11 RDL 17/1977.

2) Binding force can be construed as "normative legal efficacy" of collective agreements. This would mean that every collective agreement, no matter what type it is (*estatutario or extraestatutario*), would be considered in our system as legal standard (a source of Law) because that is the will of art. 37.1 SC.

This is, precisely, the position which has been held by some Labour Law scholars and which was also underpinned by some Constitutional Court rulings laid down in the eighties, but later abandoned.

3) Binding force can be construed as "normative legal efficacy" of collective agreements. Nevertheless, such legal efficacy is a plus that shall be attributed by ordinary law to collective agreements when establishing its regulation. That interpretation, which nowadays is being followed by most of scholars and case law rulings, is based on the wording of art. 37.1 EC: "the law shall guarantee the binding force of collective agreements." In short, according to this interpretation, art. 37.1 SC entrusts the ordinary law (WS) to attribute this legal efficacy to the collective agreements which it is regulating. Therefore, the normative legal efficacy of the collective agreements does not stem from the Constitution, but the ordinary law.

As a result of this interpretation of art. 37.1 SC, in our legal system, only collective agreements regulated by law (WS)³ shall have a

³ The so-called "*estatutarios*" collective agreements.

normative legal efficacy, whilst collective agreements which have not been negotiated according to law requirements established for collective bargaining⁴ are equally lawful but shall only have a contractual legal efficacy.

3. - Collective agreements' efficacy.

In general, the role of the collective agreement within the legal system depends on two factors:

1) The legal value attributed to it within the other sources of the legal system (that is to say its legal efficacy).

2) The scope of individuals to whom it will be applied (its personal efficacy).

3.1.- Legal efficacy.

In Europe there are two models of collective agreements according to their legal efficacy or binding effects:

1) Collective agreements with normative legal efficacy, i.e. the collective agreement as a source of Law.

2) Collective agreements with contractual legal efficacy, i.e. the collective agreement as a common law contract.

This distinction is important because the legal consequences that entail the existence of one or another model of collective agreement are quite different: In one case, the collective agreement shall be legally considered as a standard (and consequently as another source of Law) and, in the other case, it shall merely be considered as a contract.

Which of these two models of collective agreement predominates in Europe?

Recommendation N° 91 of the ILO states that collective agreements shall have normative legal efficacy⁵. However, in Europe no model is predominant:

⁴ The so-called "*extraestatutarios*" collective agreements.

⁵ According to art. 3 of the Recommendation n° 91: (1) Collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. Employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement. (2) Stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement. (3) Stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement.

1) UK: Neither model prevails. Collective agreements are "Gentlemen's agreements", which are neither binding nor enforceable by Courts. They only have a social or moral efficacy so that workers may initiate industrial action or go on strike if their employers were in breach of the agreement.

2) Italy: The agreements are contracts governed by the common law. However, they have certain normative effects because Italian law does not allow the stipulation of working conditions in employment contracts if inferior to those established in the collective agreement.

3) Germany, France and Spain: Collective agreements have normative legal efficacy. However, as it will be seen in this lesson, in Spain there is also a special type of collective agreement (the so-called "*convenio colectivo extraestatutario*" to which the Supreme Court only attributes contractual legal efficacy (denying normative efficacy).

3.2.- Personal efficacy.

Regarding personal efficacy, two models of collective agreement can be recognised in Europe:

1) Collective agreements with general or *erga omnes* personal efficacy. This means that the collective agreement shall apply to all employers and employees included within its personal scope and throughout its period of validity. That is precisely the case of the Spanish legal system, with the exception of the so-called "extraestatutario" collective agreements which, according to the Supreme Court, are only provided with a limited personal efficacy.

2) Collective agreements with limited personal efficacy. This means that the collective agreement is not provided with *erga omnes* efficacy. They shall only apply to employers and employees directly represented by the signatories of the agreement. That is to say, the collective agreement will only be applied to the employers and employees who were associated or affiliated to the employers' associations and unions that have negotiated and signed it. This is the case of Germany and Italy. In Spain, only *extraestatutarios* collective agreements have a limited personal efficacy.

(4) If effective observance of the provisions of collective agreements is secured by the parties thereto, the provisions of the preceding subparagraphs should not be regarded as calling for legislative measures.

4. The stipulations of a collective agreement should apply to all workers of the classes concerned employed in the undertakings covered by the agreement unless the agreement specifically provides to the contrary.

4.- Collective agreement types.

4.1.- *Estatutario* collective agreements and the so-called *extraestatutario* collective agreements.

As previously mentioned, according to art. 37.1 of the Spanish Constitution (as it has been construed by the Constitutional Court), the Title III of the WS has not exhausted the constitutional mandate to regulate collective bargaining, considering that such right is recognised by the Constitution in very broad terms. For this reason, our legal system has the peculiarity of having two types of collective agreements: *estatutarios* collective agreements (grounded in art 37.1 of the Spanish Constitution and Title III of the WS Act) and *extraestatutarios* collective agreements (grounded solely in art. 37.1 of the Spanish Constitution).

A) Definition.

As mentioned above, *estatutarios* collective agreements are those negotiated under strict legal standing and procedural rules laid down in Title III of WS (arts. 82-92 WS) for collective bargaining and, therefore, are based on that legal provision⁶.

Meanwhile, *extraestatutarios* collective agreements are those that have been negotiated not following strictly the legal standing or the procedural rules laid down in Title III of WS, but whose validity is based on art. 37.1 of the Spanish Constitution, since such a constitutional right has direct and immediate efficacy according to art. 53.1 of the S.C.

According to case law, each type of collective agreement has a different legal status. Their legal and personal efficacy is completely different. Let us analyse it.

B) Legal and personal efficacy of the *estatutario* collective agreement.

1) Legal efficacy.

Case law and scholars conclude that such collective agreements have normative efficacy. This means that, in our legal system, such collective agreements are a source of Law and, consequently, they have to be considered as a legal standard.

There are several major consequences arising from the normative legal efficacy of the *estatutarios* collective agreements that deserve to be mentioned:

⁶ In other words, such collective agreements are those concluded following the WS rules governing the parties' representativeness, the bargaining process, the written form, and their registration and publication by the Administration. They are negotiated by employers and employees' representatives who accrue a certain level of representativeness.

- The collective agreement follows the same rules as any other source of Law. It creates substantive law for employers and employees as any other standard of general application. Consequently its provisions are imperatively and automatically applied to labour relations, with no need to incorporate them into the contract of employment.

- The rights recognized by the collective agreement cannot be waived by the employees.

- The contract of employment cannot establish less favourable terms for the employees than those stipulated by the collective agreement. Otherwise, such contractual provisions shall be deemed null and void.

- The collective agreement, as a legal standard, shall necessarily be published in the appropriate Official Bulletin of the territory (State, Autonomous Region or Province).

- The collective agreement is subjected to the principles of hierarchy and modernity.

- The ruling that breaches the content of the collective agreement may be appealed on the grounds of the infringement of legal rules.

- Employers' acts breaching the collective agreement may be administratively or criminally pursued as the infringement of labour legal standards. In other words, a breach of the collective agreement by the employer may cause his administrative or criminal liability.

The basis of the legal efficacy of the *estatutario* collective agreement lies in art. 37.1 of the SC ("the law shall guarantee ... the binding force of the collective agreements").

2) Personal efficacy.

Case law and scholars attribute to *estatutario* collective agreements a general or *erga omnes* efficacy. This means that such collective agreements are binding on all employers and employees included within their scope of application and throughout the entire time of their validity.

The basis of the *erga omnes* personal efficacy of the *estatutario* collective agreement lies in art. 82.3 WS ("*the collective agreements regulated by this Law are binding on all employers and employees included within their scope of application, throughout the entire time of their validity*").

C) Legal and personal efficacy of the *extraestatutario* collective agreement.

1) Legal efficacy.

The Supreme Court and most scholars deny normative efficacy to the *extraestatutario* collective agreements, so they only recognise them as a contractual status. This means that, in our legal system, such agreements have a contractual nature and, consequently, shall be legally treated as contracts not as legal standards.

The legal implications of the contractual nature of the *extraestatutarios* collective agreements are, mainly, the following:

- The collective agreement is not a source of Law. It does not create substantive law for employers and employees but only subjective rights and obligations for its signatories. Accordingly, its provisions are not imperatively nor automatically applied to labour relations unless such content is incorporated in the contract of employment by an agreement between the employer and the employee.

- The rights recognised in the collective agreement can be legally waived by the employee.

- The contract of employment may contain worse terms for the employees than those included in the collective agreement because the latter does not act as a minimum standard to be respected.

- The collective agreement shall not be necessarily published in the Official Bulletin of the territory which it covers.

- The collective agreement is not subjected to the principles of hierarchy and modernity.

- The ruling that breaches the content of the collective agreement cannot be appealed on the grounds of the infringement of legal standards.

- The entrepreneur's acts violating the agreement do not constitute infringement of labour standards and therefore cannot be administratively or criminally punished as such. As there will only be a contractual liability, it will simply be compensated by payment of damages.

- Employers' acts breaching the collective agreement cannot be administratively or criminally pursued on the grounds of infringement of labour legal standards. In other words, the breach of the collective agreement by the employer cannot cause his administrative or criminal liability. It can only result in the employer's contractual liability and the employee's right to claim compensation for the damages caused.

2) Personal efficacy.

Extraestatutario collective agreements have a limited personal efficacy (not *erga omnes*). This means that they can only be applied to employers and employees directly represented by the bargaining parties of the agreement. Consequently they shall only be applied, on the one hand, to the employers associated to the employers' associations who have negotiated the agreement, and, on the other hand, to the employees affiliated to the unions who have negotiated the agreement.

Nevertheless, when the collective agreement has been negotiated in a company or at a lower level (company bargaining), the effects of its limited personal efficacy will not be observed when it has been negotiated by the works' council or the personnel delegates because all the company's employees are represented by such bodies. However, when the collective agreement is negotiated by a particular union section in the company, it will only be applied to those employees who are affiliated to such union.

Despite its limited personal efficacy, the *extraestatutario* collective agreements can have a wider personal scope. Employers often invite unaffiliated workers to adhere individually to such collective agreement terms. This is usually carried out by employers to avoid the need to apply different work conditions to employees depending on whether or not they are affiliated to the union who signed the agreement. Employers also do this to avoid conflicts within the staff due to comparative harm, or to prevent mass affiliation of employees to the union which signed the agreement.

Adhesion to the collective agreement terms can be expressed or implied (the employer begins to apply the terms of the collective agreement with the employee's acquiescence). Regardless of the situation, case law requires the adhesion to be clear and explicit.

The basis for the limited efficacy of the *extraestatutario* collective agreement lies in a *sensu contrario* interpretation of art. 82.3 WS.

4.2.- The so-called "framework collective agreements" and "collective agreements on specific matters".

As mentioned above, the main purpose of the collective agreement is to establish the working conditions that will determine the labour relations within a certain scope. Yet, social partners (trade unions and employers' associations) may also collectively agree on certain rules that will organise or govern collective bargaining. In

general terms, this is, precisely, the main function performed by the so-called "Framework Collective Agreements".

Framework collective agreements constitute another manifestation of collective bargaining, and therefore, have the same nature and legal treatment as collective agreements (Art. 83.3 ET). They are regulated by art. 83.2 WS. Framework Convention for collective agreements is not intended to set working terms, but the rules for future bargaining at lower levels. In this sense, scholars usually call them "bargaining agreements" because they are higher-level collective agreements that set the structure of the collective bargaining at lower levels.

According to art. 83.2 WS, it can be deduced that there are two types of framework collective agreements. On the one hand, what scholars call, "proper framework collective agreements" (they are the "inter-professional agreements", negotiated statewide –signed at a national level- or for an Autonomous Region, which are referred to by the first paragraph of art: 83.2 WS). On the other hand, the so-called "improper or mixed framework collective agreements" (they are the "sectoral collective agreements" negotiated statewide or at an Autonomous Region level, which are referred to by the second paragraph of art. 83.2 WS).

1) Proper framework collective agreements are inter-professional agreements (they apply to all sectors of production of the State or the Autonomous Regions), negotiated and signed by the most representative unions and employers' associations at a national level or for an Autonomous Region, which aim solely to set the rules that will govern collective bargaining in lower areas (agreements for bargaining). Consequently, such collective agreements do not set working conditions.

Notice that such agreements can only be negotiated by the most representative trade unions and employer's associations of the State or the Autonomous Region. Therefore, these agreements are necessarily statewide (negotiated at a national level) or shall have an Autonomous Region scope.

An example of this kind of collective framework agreement is the "Agreement II for employment and collective bargaining 2012, 2013 and 2014"⁷ signed on January 25, 2012 between CEOE, CEPYME, on the side of the employers, and UGT and CCOO, on the side of the workers.

⁷ *II Acuerdo para el Empleo y la Negociación Colectiva 2012,2013 y 2014.*

2) Improper or mixed framework collective agreements are ordinary collective agreements, that are necessarily negotiated at State or at an Autonomous Region level, which, besides regulating working conditions in a certain production sector (construction, agriculture, cement, etc.), also set the terms for collective bargaining at lower bargaining units.

A good example of this kind of collective agreement is the V National Collective Agreement for Temporary Work Agencies, whose art. 1 establishes the structure of collective bargaining in the sector of temporary work, stating that it must be composed of statewide or Autonomous Region bargaining units (therefore, it excludes the negotiation of agreements on lower bargaining units such as provincial ones). In addition, this collective agreement provides that, in case of conflict between statewide and Autonomous Regions agreements, the statewide ones will prevail.

Finally, notice also that Framework collective agreements (no matter which type they are) play two roles, according to art. 83.2 WS:

a) Firstly, to lay down the structure of the collective bargaining at lower bargaining units (e.g. they can lawfully ban the conclusion of collective agreements at certain bargaining units).

b) Secondly, to set the rules to resolve conflicts between collective agreements from different areas. As we will see in this lesson, despite the fact that there is a general rule banning the concurrence of collective agreements (art. 84 ET), framework collective agreements may allow it, by setting rules aimed at its resolution. For example, the framework collective agreement can solve concurrence conflicts applying the principle of modernity (by enforcing the most recent collective agreement), the principle of favour (the collective agreement containing a more favourable regulation shall be applied) or the principle of specialty (the collective agreement containing a more specific regulation shall be applied), among other possible solutions.

Agreements on certain matters

This type of collective agreements is referred to in art. 83.3 WS, which states that such collective agreements shall be entitled to the same treatment accorded by the Law to collective agreements. Similarly to framework collective agreements, agreements on certain matters are resolved by most representative unions and employers' associations at a national or Autonomous Region level. Therefore, their scope can cover any of these two territories.

Its object is to regulate certain relevant matters, typically governed by such agreements, in the territory of the State or an Autonomous Region. The following are examples of such agreements: IV National Agreement on Continuous Training⁸ of 01-02-2006, signed by CEOE and CEPYME, on the one hand, and UGT and CCOO, on the other. V National Agreement on Collective Labour Disputes Resolution⁹, of 07-02-2012 (BOE 23-02-2012), signed by the same subjects. V Valencian Autonomous Region Collective Agreement on Collective Labour Disputes Resolution¹⁰, of 02-06-2010 (DOCV 08-07-2010), signed by CIERVAL, UGT and CCOO-PV.

4.3.- Workforce agreements.

1.- Definition.

Workforce agreements are another expression of collective bargaining. They are negotiated between the company and the workers' representatives (union representatives, work councils, personnel delegates¹¹) to adapt certain employment conditions (working hours, salary, functions, etc) to the prevailing circumstances. In fact, it is not unusual for WS to entrust workforce agreements to regulate certain issues regarding labour relations.

2. - Background.

The origin of such collective agreements is found in the 1994 labour legislation reform. Such reform introduced in WS a brand-new bargaining product, the workforce agreement, through which the employer and the employees' representatives can reach agreements including a broad range of important issues in order to adapt the employment conditions to its circumstances.

3.- Types.

Depending on their relationship with the applicable collective agreement, scholars distinguish three kinds of workforce agreements: replacement agreements, alternation agreements and opt out agreements.

1) Replacement workforce agreements.

They can be negotiated whenever the WS entrusts the regulation of any issue to the collective agreement and, in its absence, to a

⁸ IV *Acuerdo Nacional de Formación Continua*.

⁹ V *Acuerdo sobre Solución Autónoma de Conflictos Laborales (sistema extrajudicial)*.

¹⁰ V *Acuerdo de Solución Extrajudicial de Conflictos Laborales de la Comunidad Valenciana*.

¹¹ Or the "informal representatives" appointed ad hoc by the entire workforce of the plant or undertaking affected in each case (see art. 41.4 WS).

workforce agreement. Thus, this kind of workforce agreement shall only be negotiated when there is no relevant applicable collective agreement or, if such an agreement did exist, when this collective agreement does not stipulate anything concerning such issues.

WS provides this kind of workplace agreement in order to regulate a wide range of matters. For example:

- Article 22.1 WS: Establishing the employees' professional classification system.
- Article 24.1 WS: Setting the promotion system.
- Article 29.1 WS: Providing an alternative payslip form besides the one established by the Ministry of Labour.
- Article 34.2 WS: Establishing an irregular distribution of the working day throughout the year.
- Article 34.3 WS: Establishing the distribution of the working day.

2) Alternation workforce agreements.

They can be negotiated whenever the WS entrusts both, the collective agreement and the workforce agreement equally, to regulate certain issues. In this case, either the collective agreement or the workplace agreement can lawfully regulate such matters.

There is only one example of this kind of workplace agreement in the WS: The art. 31.1 WS when it states that the month for paying the second bonus or extraordinary payment can be established by either the collective agreement or the workplace agreement.

One could raise the question of which instrument would be applicable (the collective agreement or the workplace agreement) if such second bonus payment were established by both. In my opinion, two possible solutions could be contemplated: 1) the art. 84 WS prohibition of concurrence could be applied and, thus, the agreement which was reached first will prevail.; or 2) To apply the principle of more favourable rule, regulated by art. 3.3 WS, and, thus, the regulation providing better overall conditions would prevail.

3) Opt out workplace agreements.

They can be negotiated whenever the WS entrusts the employer and the employees' representatives, through the negotiation of a workplace agreement, to opt out from some of the provisions established by the collective agreement applicable on a particular issue. In this case, the role played by the workplace agreement is to

waive some of the regulations of the collective agreement in order to adapt it to the undertaking circumstances.

This kind of workplace agreements is contemplated in art. 82.3 WS.

4. - Legal and personal efficacy.

There is no provision in the WS for the legal and personal efficacy of the workplace agreements. However, scholars tend to recognise them as agreements with the same efficacy as the ordinary collective agreements (*estatutario* collective agreements). Mainly due to the fact that the workplace agreements are negotiated by the same subjects empowered by art. 87 WS to negotiate collective agreements at a company level. On the other hand, workplace agreements play an equivalent role in regulating working conditions within the undertaking.

4.4.- Other collective agreements.

In the Spanish legal system, besides the main manifestations of the collective bargaining (*estatutarios* and *extraestatutarios* collective agreements, framework agreements, agreements on specific matters and workplace agreements), there are other manifestations of the collective bargaining that deserve to be mentioned: the agreements achieved through mediation and arbitral awards.

Agreements achieved through mediation and arbitral awards.

Our legal system provides different extrajudicial procedures aimed at reaching legal settlements on collective labour disputes. A typical collective labour dispute is the one which is related to the interpretation and application of the collective agreement. Consequently, the WS establishes extrajudicial mechanisms for settling collective disputes arising from the interpretation and application of collective agreements. These legal procedures also operate to resolve individual disputes if the parties submit to them.

Art. 91.2 WS entrusts framework collective agreements (proper or improper) and agreements on specific matters to regulate extrajudicial mechanisms to solve collective labour disputes arising from the interpretation and application of collective agreements. This is the case of the aforementioned V National Agreement on Collective Labour Disputes Resolution, which regulates mediation and arbitration procedures.

What is most important is the legal value attributed by the law to the settlement reached through mediation or arbitration. . Concerning this, art. 91 WS states the following:

1) Agreements reached through mediation and arbitration awards shall be entitled to the same legal processing as the *estatutario* collective agreements¹². This implies that the settlement and the arbitration award must be in writing and must be registered with the Labour Authority, which must order its official publication in the Official Bulletin corresponding to the territory covered by the agreement or the arbitration ruling.

2) Mediation agreements and arbitration awards shall be entitled to the same legal effect as the *estatutarios* collective agreements¹³.

3) Mediation agreements and arbitration awards shall be subjected to challenge on the same grounds and procedures contemplated by Law for the collective agreements.

5.- “Estatutario” collective agreements.

5.1.- Negotiation units and scope of the collective agreement.

A slight difference should be made between the concepts of “bargaining unit” and “collective agreement scope” because they are fairly close but not necessarily the same. The bargaining unit is the area from which the collective agreement is negotiated (e.g. agriculture in the province of Alicante).

On the other hand, the scope of the collective agreement is the area covered by the collective agreement, so the area in which the collective agreement shall be applied (e.g. all companies who run business of fresh tomato packaging and labeling in the province of Alicante). The bargaining parties shall freely determine the scope of the collective agreement. Hence, art. 83.1 WS rules that “collective agreements shall have the scope of application that was agreed upon by the parties.”

In fact, the scope of application of any collective agreement is formed by its functional, territorial and personal scope.

¹² Provided that those who adopted the agreement or endorsed the arbitration compromise enjoy the legitimacy required, by art. 87, 88 y 89 WS, enabling them to negotiate a collective agreement within the scope of the dispute. Otherwise, they would have the effectiveness of an *extraestatutario* collective agreement.

- The functional scope refers to the production units where the collective agreement shall be applied. It may be a workplace, a whole company, a group of companies or a sector or subsector of the production.

- The territorial scope refers to the geographic space in which the collective agreement shall be applied. It could be a locality, one or several provinces, the State or the territory of an Autonomous Region.

- Finally, the personal scope implies the group of employers and employees who will be affected by the collective agreement. It can be applied to all employees of the functional and territorial scope of the collective agreement or, instead, be just restricted to certain groups or categories of workers. In fact, the latter has been supported by case law. In this case what we have is the so-called "collective agreement for a group" or, in Spanish, "*convenios colectivos de grupo o convenios franja*" (e.g. collective agreement negotiated only for airline pilots).

At the same time, case law allows the exclusion of certain categories of workers, such as management personnel, provided that these groups have enough bargaining power to negotiate their own collective agreement. For this reason, case law has rejected excluding lawfully fixed-term and part-time employees from the personal scope of the collective agreement because this could mean a breach of the principle of equality and non-discrimination.

As has been stated above, the parties are free to agree on the scope of the collective agreement (Art. 83.1 ET). However, in practice they are bound to respect the following limits:

1) The bargaining legal standing rules established by arts. 87 and 88 WS. It is clear that the negotiating parties cannot lawfully determine a scope for a group of workers which they do not represent (e.g. The union of airline pilots cannot lawfully negotiate a collective bargaining agreement for the building sector).

2) Another limit is what case law calls "the nature of things". It means that the functional scope of the agreement must be sensible and not arbitrary, in the sense that companies or subsectors with different features must not be included in a single collective agreement scope. This is mainly due to the fact that different sectors or companies which run different businesses cannot fall under the same working conditions. For example, case law has refused to include photocopying and graphic arts business in the same collective agreement.

3) Finally, as mentioned above, the principles of equality and non-discrimination prevent excluding from the personal scope of the

collective agreement those groups of employees who do not have representatives who could negotiate their own collective agreement (e.g. fixed-term and part-time employees).

5.2.- The structure of collective bargaining. Concurrence of collective agreements.

A) Legal regulation and concept.

The legal regulation of the occurrence of collective agreements can be found in art. 84 WS, a provision that, in short, contains a general rule (concurrence banning) and some exceptions to this general rule. According to art. 84.1 WS: "*During its term, a collective agreement must not be affected by what is set forth in agreements of a different scope, barring....*".

The concurrence of collective agreements arises when two or more conventions share its scope, resulting in a conflict between two or more agreed standards.

B) Types of concurrence.

In practice, two kind of concurrence may arise:

1) Concurrence by inclusion: the scope of a collective agreement already falls into the scope of another one. For example, while a statewide collective agreement for textile business is in force, another textile collective agreement is settled but with a provincial territorial scope.

2) Concurrence by intersection: two or more collective agreements partially share their scope. For example, while the national collective agreement on tax offices is in force, a provincial collective agreement on offices is negotiated and approved (both collective agreements would be applicable in the sector of tax offices in the province of Alicante). Another example would arise if while the collective agreement on agriculture of the Valencian Autonomous Region is in force, an interprovincial agriculture collective agreement for the south east of Spain (for the provinces of Almeria, Murcia and Alicante) comes into force.

C) General banning rule.

Art. 84 WS contains a general rule which bans collective agreements concurrence: "*During its term, a collective agreement must not be affected by what is set forth in agreements of a different scope*".

What is the base for such legal provision? This rule is aimed at ensuring the efficacy of the collective agreement and preventing later negotiators to waive what has been collectively agreed by earlier negotiators.

Concerning this legal banning, at least three issues might be pointed out:

1) The ban continues while the collective agreement is still in force. Consequently, once the collective agreement is terminated by formal repudiation of either of the parties who negotiated it, they can lawfully negotiate a new collective agreement without breaching such ban.

2) To "affect" shall be construed as fully or partly modifying an existing collective agreement but not regulating issues that have not been covered by the first collective agreement. In other words, it is completely lawful and respectful with the concurrence ban to negotiate a new collective agreement regulating matters not covered by the former.

3) The concurrence ban is inserted in Title III of the WS, therefore it only affects the so-called *estatutario* collective agreements, not the *extraestatutarios*.

D) Exceptions to the general rule.

Art. 84 WS contemplates several exceptions to the above mentioned banning general rule. In fact, there are four exceptions in which such prohibition shall not be applied:

1) Framework collective agreements (either proper or improper ones but always negotiated statewide or for an Autonomous Region) can lawfully allow collective agreements concurrence.

As mentioned above, art. ET 83.2 WS provides that Framework collective agreements (either proper or improper ones but always negotiated statewide or for an Autonomous Region) play the role of establishing the structure of collective bargaining and solve concurrence conflicts that may occur at lower levels. This means that, the framework collective agreement may allow concurrence situations setting rules for their solution (e.g. applying the prior or the later agreement, applying the lower level or the upper level one, etc).

2) Case law has ruled that the concurrence banning may be lawfully waived by any collective agreement because such prohibition is non-mandatory law. Consequently, a collective agreement may allow subsequent ones to prevail in case of concurrence (E.g a statewide sectoral collective agreement allows bargaining at a province level). The

basis of this criterion lies in the fact that, in these cases, there is no conflict between collective agreements because, either way, the will of the former negotiators is applied.

3) 2012 Labour reform introduced a new and major exception to the concurrence banning which seeks to promote collective bargaining at a company level and to promote flexible adaptation of the working conditions in each undertaking.

Under this exception, contemplated in art. 84.2 WS, any company can lawfully negotiate its own collective agreement while an upper level one (a sectoral collective agreement) is in force. In this case, the latter collective agreement will prevail but only regarding the following matters:

- Salary rates, including overtime and shift work compensation.
- Work schedule, distribution of working time, shift work regulation and planning of annual holidays.
- Company's adaptation of the professional classification system.
- Company's adaptation of the features of the contracts of employment which WS entrusts to companies' collective agreements.
- Reconciliation of work and family life.
- Any other matters established in framework collective agreements.

Note that, according to art. 84. 2 WS, the above list is open for framework collective agreements, so they may extend it by adding more matters that can be regulated by companies' collective agreements without breaching the concurrence banning.

Nevertheless, it seems unlikely that the framework agreements can either lawfully waive this exception, through a banning rule, or reduce the list of matters mentioned above. This is because the last paragraph of art. 84.2 WS states that "the collective agreements which are referred to in article 83.2 WS (framework collective agreements) can not waive the application priority regulated in this section". Thus, the legal nature of art. 84.2 WS rule, which eases collective bargaining at the company level, is mandatory.

4) Finally, art. 84.3 WS contemplates a fourth exception to the concurrence banning. According to it, at an Autonomous Region level collective agreements affecting a statewide one can be negotiated. For example, while a national textile collective agreement is in force, another one could be negotiated in any of the 17 Spanish Autonomous Regions.

Nevertheless, this legal exception requires the following two conditions to be applicable:

a) Firstly, the decision to negotiate a new collective agreement, at a regional level, concurring with another previously negotiated statewide shall have the support of the majorities required to constitute the negotiation commission in the pertinent negotiation unit. Therefore, such decision shall be supported by the absolute majority of each of the representations that will negotiate the regional collective agreement (trade unions and business associations).

b) Secondly, the regional collective agreement shall not regulate certain matters which must be considered non-negotiable items at this level: qualifying period, contractual arrangements, professional groups, annual maximum working hours, disciplinary regime, geographical mobility and minimum standards on safety and health at work.

The basis of this exception is to ease regional decentralisation of collective bargaining, with the exception of the above mentioned major matters in which the WS makes the statewide collective agreements prevailing.

The origin of this exception is in the 1994 labour reform. In fact, it stems from a political agreement with the Basque nationalist parties who sought to allow negotiation of collective agreements at a regional level while statewide ones were in force.

Note that, unlike the previous exception to the concurrence prohibition, here art. 84.3 ET WS configures this rule as non-mandatory. This is because an opposite regulation could be established by a framework collective agreement (proper or improper), according to which negotiating a collective agreement could be banned at an Autonomous Region level while a statewide one is still in force.

E) How shall the concurrence conflicts be solved?

As seen above, art. 84 WS bans collective agreement concurrence but does not give any indication about how standards conflicts could be solved if they occur.

Supreme Court case law has ruled that, in case of concurrence, the former collective agreement shall prevail over the previous one, so the latter collective agreement shall not be applied until the expiry of the previous one. In other words, the latter collective agreement shall not be declared null and void but simply inapplicable (with no effect).

This solution is based on the grounds that, in spite of not being expressly contemplated in art. 84 WS, it can be said that it is implicit in its regulation. Otherwise, the target sought by the prohibition of

concurrence (to prevent subsequent negotiators modifying what has been previously agreed) could be easily waived.

5.3.- Collective agreement content.

Art. 85 WS contemplates, on the one hand, the matters that may be regulated by the collective agreement and, on the other, the minimum or compulsory content of any collective agreement.

1. - Matters that may be regulated by the collective agreement.

According to art. 85.1 WS, the regulatory content of the collective agreement can be extremely wide. Such article states that "according to the Law" collective agreements may regulate:

1) Matters of economic, labour and union nature and, in general, any other matters affecting working conditions.

2) Matters affecting the relationship between employees and their representatives and employer and employers' associations, including the procedures for solving the disagreements arising during the consultation periods contemplated in arts. 40, 41, 47 and 51 WS.

Therefore two kinds of content for collective agreements could be distinguished.

1) Normative content: Consisting of all the clauses directed at the final beneficiaries of the agreement (employers and employees included under its personal scope). That is, all working conditions (wages, working hours, leave, etc).

The normative content also includes certain collective aspects. Specifically, the conditions governing the relationship between the employer and the workers' representatives in the company (for example, all matters relating to the meetings of the work councils, personnel delegates and union sections, the distribution of union information among the employees, the workers' representatives right to a time-credit, etc).

3) Obligational content: consisting of all the agreement clauses directed specifically at the negotiators (not at employers and employees).

A paradigmatic example of the collective agreement obligational content is the agreement of a "duty of absolute peace". This means banning strikes while the collective agreement is still in force. This possibility is expressly contemplated by arts. 82.2 and 86.3 WS. In addition, the Constitutional Court ruled that this ban in a collective

agreement is completely lawful and it does not breach the fundamental right to strike (Constitutional Court Ruling 11/1981 of 8 April, Legal Basis Num. 14th).

The conditions for terminating the collective agreement and the constitution and powers of the paritary commission¹⁴ are also good examples of the obligational content of the collective agreement since both are issues concerning its signatories.

2.- Minimum content of the collective agreement.

The collective agreement must necessarily contemplate the following five issues that constitute its minimum content (art. 85.3 WS):

1) The parties who have negotiated it.

2) Its personal, functional territorial and temporal scope.

3) The procedures to solve disagreements that may arise from the non-application of the collective agreement referred to in art. 82.3 WS, adapting the procedures regulated in statewide or Autonomous Region professional agreements governing labour disputes resolution.

4) Form and conditions for giving notice of the termination of the collective agreement and the period in advance for such notice.

5) Constitution of a paritary commission made up of both bargaining bodies which will be in charge of any issues entrusted by legislation and by the collective agreement.

5.4.- The non-application of the working conditions regulated by the collective agreement (collective agreement "opting out").

This is one of the major issues which have been affected by the 2012 labour law reform.

As we know, one of the main characteristics of the "estatutario collective agreements is their general personal efficacy (*erga omnes* personal efficacy). The legal basis for such statement can be found in art. 82.3 WS: "*The collective agreements regulated by this Law are binding upon all employers and workers included within their scope of application, throughout the entire time of their validity*".

Nonetheless, art. 82.3 WS also regulates a major exception to the above rule. This exception seeks the possibility of a flexible regulation in the undertaking of certain working conditions established in the collective agreement. For this purpose, art. 82.3 WS provides a

¹⁴ The paritary commission shall be set up to solve the conflicts arising from the construing of the collective agreement clauses.

mechanism that allows any company, through an opt out workplace agreement, negotiated with the employees' representatives, modifying the collective agreement working conditions in order to adapt it to the economic, productive or organisational situation of the company. Thus, such workplace agreements are named by scholars "agreements for the non-application of the collective agreement" or "opt out agreements".

Art. 82.3 WS allows starting the procedure for the non-application of the collective agreement regardless of the scope of the collective agreement (no matter if it is a company collective agreement or if it has an upper scope). Prior to the 2012 labour law reform, which amended art. 82.3 WS seeking to ease its application, this procedure was only applicable to modify the working conditions of sectoral collective agreements. Nevertheless, nowadays, such limitation has disappeared from the regulation. Therefore it is possible to negotiate a collective agreement at a company level and, afterwards, to amend certain working conditions regulated therein through the art. 82.3 WS procedure.

a) Grounds for the non-application of the collective agreement.

The decision to trigger the application of art. 82.3 WS must always be adopted under a justified reason. According to art. 82.3 WS, the employer must prove the existence of "economic, technical, organisational or productive" causes for the non-application of the collective agreement.

In order to ease the control of the existence of those grounds by the employee's representatives, art. 82.3 WS defines each one:

1) Economic causes concur "when the results of the company show a negative economic situation, in cases such as the existence of current or foreseen losses, or a persistent decrease in the level of the company revenue or sales". Art. 82.3 WS states that, "in any case, the decrease shall be considered persistent if, throughout a period of two consecutive trimesters, the level of revenue or sales of each trimester is lower than the level reached in the same trimester of the previous year.

- In short, the law requires the company to prove a negative economic situation. Nevertheless, notice that the persistent decrease in the level of the company revenue or sales is merely an example of such a negative economic situation since the precept says "*in cases such as ...*". So, it is possible that many other circumstances (such as company debt levels, difficulties for accessing to bank credits, customers defaulting, loss of customers, etc.) could also constitute economic grounds.

- According to art. 82.3 WS economic grounds can concur even if the company is obtaining a profit because it is enough to prove the existence of a "*persistent decrease in the level of revenue or sales.*" The regulation helps construe the adjective "persistent", stating that the revenue or sales level has to be lower for two consecutive trimesters than the level reached during the same trimesters of the previous year. Nevertheless it would not be sensible to understand that these grounds can be declared regardless of the amount of the decrease, especially when it is insignificant.

2) Technical causes concur when "changes occur concerning, among others, the means or the instruments of production". The regulation refers to cases such as, for example, the introduction of new equipment that would justify altering certain working conditions.

3) Organisational causes concur when "changes occur, concerning, among others, staff systems and staff working methods or the way production is organised". Consider, for example, the company's decision to outsource part of the production to another company.

4) Finally, productive causes concur when "changes occur, concerning, among others, the demand for the products or services the company intends to place on the market".

Notice that in the relations of production practice it is common to find that the situation which is facing the company is linked to two or more of the above causes. For example, the company decided to outsource part of its production with a Chinese company (organisational grounds) as a reaction to a negative economic situation (economic grounds).

b) Collective agreement terms which allow an opt out.

Art. 82.3 ET does not allow a workplace agreement to amend any working conditions regulated in the collective agreement. It is only allowed to do so with regards to working conditions affecting certain matters listed in art. 82.3 WS. It is a comprehensive listing including major matters, which shows that the lawmaker sought to facilitate the application of art. 82.3 WS. Such matters are the following:

- a. Working days.
- b. Work schedule and working time distribution.
- c. Shift work legal regime.
- d. Compensation system and salary.
- e. Working and performance system.

f. Functions, where these exceed the limits set by Article 39 of this Law for functional mobility.

g. Voluntary improvements to the protective action of the Social Security.

c) Non-application of the collective agreement procedure: consultation period.

As already mentioned, employers cannot proceed to opt out or waive the terms of the collective agreement unilaterally but, instead, they have to endeavour to reach a workplace agreement through a consultation period with the employees' representatives. Art. 82.3 WS refers back to this procedure in art. 41.4 WS which also regulates a period of consultation with the employees' representatives but in this latter case, to allow employers to introduce substantial modifications of the working conditions of collective nature¹⁵.

1.- With whom does the employer need to discuss the consultation period?

According to art. 82.3, "with workers representatives entitled to negotiate a collective agreement under Art. 87.1 WS". Therefore, the consultation can be carried out by the unitary workers' representation (work councils or, where appropriate, personnel delegates) or with the union sections that have major presence in the unitary representation. The consultation period will be developed with either of these two representations. However, art. 41.4 ET (which is referred to by art. 82.3 in order to regulate the procedure) gives preference to the latter ones (union sections) so they can negotiate if they decide to by the agreement of its members.

2.-How can the consultation period be held in companies where there are no bodies of workers' representatives?

If, considering the company's size, there are no workers' representatives with which the consultation could be carried out¹⁶, art. 41.4 WS provides for an alternative mechanism.

¹⁵ Notice that, although the procedure is almost the same, there is a strong difference between the substantial modifications of collective working conditions (regulated by art. 41 WS) and the non-application of the collective agreement (regulated by art. 82.3 WS). Whilst the first one concerns the amendment of contractual working conditions (stemmed from the contract of employment or an *extraestatutario* collective agreement, the latter refers to the modification of the working conditions set by an *estatutario* collective agreement).

¹⁶ Something which is not unusual, considering that in Spain there are many companies with less than 10 workers.

In such cases, employees meeting in assembly may freely agree to attribute representation to either one of these two committees which would be constituted ad hoc:

1) A workforce commission: that is to say, a committee composed of three employees of the company elected among and by themselves.

2) A union commission: that is to say, a commission of up to three members appointed by the most representative trade unions and representative unions of the sector to which the company belongs.

If the employees choose the union commission, art. 41.4 WS allows the employer to entrust his representation during the bargaining process to the employers' association he is affiliated to. Surprisingly, such provision is not contemplated by the legal regulation when employees have chosen the workforce commission.

3.-How long should the consultation period take and what is its purpose?

Art. 41.4 WS states that the consultation period will not last more than fifteen days. Therefore, there is a maximum term established in the law that seeks to accelerate the process, avoiding long bargaining periods. However, since no consequences have been established if such deadline is exceeded, nothing prevents consultations from lasting longer than fifteen days if both parties agree in order to end the consultation with an agreement.

On the other hand, considering such a period is a deadline, it is not necessary to exhaust it because the parties may well reach an agreement before. In addition, art 41.4 WS empowers the parties, "at any time" (that is, before or during the course of the consultation), to replace the consultation period by the submission of the proposed amendment of the working conditions to the mediation or arbitration procedure applicable to the company. Therefore, in these cases, we must see what has been established by the national and Autonomous Regions' agreements on the resolution of collective labour disputes, which usually regulate mediation and arbitration procedures.

With regards to the purpose of the consultation period, art. 41.4 WS sets out the following provisions:

- The consultations will focus on "the reasons for the company's decision and the possibility of preventing or reducing its effects, as well as the measures necessary to attenuate its consequences for the affected workers" (art. 41.4 WS).

Therefore, it is not only and exclusively to exercise control over the reasons for the employer's decision but also to introduce measures

to alleviate it, such as, for example, setting a limit for the validity of the amendments, a plan for a gradual convergence towards the prior working conditions, or even the payment of compensation to any workers affected by the employer's decision.

- "During the consultation period, the parties shall negotiate in good faith with a view to reaching an agreement" (art. 41.4 WS). The duty of good faith is a general principle of law which inspires the exercise of the parties' rights and obligations during the employment relationship. To "negotiate in good faith with the purpose of reaching an agreement" does not necessarily imply the obligation to reach an agreement but the commitment of both parties to seek an agreement.

4.- What can the result of the consultation period be?

According to art. 82.3 WS, the consultation period may end with an agreement or with a disagreement, with different consequences in each case.

a) Consultation period ending with an agreement.

If an agreement is reached, art. 82.3 WS states that reasons invoked by the employers to support their decision will be presumed. Consequently, the same article also states that the agreement can only be challenged before the social courts on the grounds of "fraud, deceit, duress or right abuse".

Thus, in the case of an agreement, the judge or court shall not make a validity ruling over the reasons invoked by the employer; the only option that claimants would have is to prove the existence of fraud, deceit, etc., as mentioned above.

Regarding the content of the agreement, it must:

1) Determine exactly the new working conditions applicable in the company.

2) Determine the length of such new agreed working conditions. This is subject to a limit, since "it may not extend beyond the time when a new collective agreement is applicable in the company." In other words, it will last no more than the collective agreement the non-application procedure of which has been triggered.

Finally, art. 82.3 WS imposes two formalities to the parties when an agreement has been achieved:

1.-The agreement must be notified to the collective agreement paritary commission since, as we know, such a body is responsible for the enforcement and the interpretation of the collective agreement.

2.-The agreement must be communicated to the labour public authority (the Labour Public Administration corresponding to the scope of the agreement) for the sole purpose of its deposit there.

b) Consultation period ended with a disagreement.

Art. 82.3 WS regulates several steps aimed at solving a disagreement during the consultation period.

1) Disagreement submission to the collective agreement paritary commission:

Firstly, any of the parties may submit the disagreement to the collective agreement paritary commission. Notice that this possibility is completely voluntary for the parties, that is to say, non-mandatory. In the event that the disagreement is submitted to the paritary commission, art. 82.3 WS establishes a maximum of seven days to solve the dispute.

2) Conventional mechanisms for collective dispute resolution:

When none of the parties has requested the intervention of the paritary commission or it has not solved the conflict, they shall trigger the procedures for collective disputes resolution established in State or Autonomous Regions Collective agreements (agreements on specific matters¹⁷) which regulate this kind of mechanism¹⁸.

3) Arbitration through *the National Consultative Commission on Collective Agreements*:

According to art. 82.3 WS, if the above extrajudicial mechanisms have not solved the disagreement, (which would be impossible if the parties submitted it to arbitration, given the binding nature of the arbitration decision), its final resolution can be entrusted to the *National Consultative Commission on Collective Agreements* or the corresponding public body of the Autonomous Region¹⁹.

The *National Consultative Commission* (or the equivalent body of the Autonomous Region) may solve the conflict by itself or entrust the

¹⁷ Vid. section 4.2 of this lesson.

¹⁸ Do not forget that arbitration and mediation procedures for solving collective labour disputes are regulated in State and Autonomous Regions collective agreements which regulate this issue. For statewide conflicts the *V National Agreement on Collective Labour Disputes Resolution is applicable*, of 07-02-2012 (BOE 23-02-2012), signed by CEOE and CEPYME, on the one hand, and UGT and CCOO, on the other. In the Valencian Autonomous Region the *V Valencian Autonomous Region Collective Agreement on Collective Labour Disputes Resolution*, of 02-06-2010 (DOCV 08-07-2010), signed by CIERVAL, UGT and CCOO-PV is applicable.

¹⁹ if the opt out workplace agreement affects several company work centers located in different Autonomous Regions, the body empowered to carry out the arbitration is the National Consultive Commission. Otherwise, such body would be the equivalent in the Autonomous Region where the work centres are.

decision to an impartial arbitrator appointed by the Commission. Art. 82.3 WS gives the Commission (or the appointed arbitrator) a maximum of twenty-five days to solve the conflict through arbitration. Such a deadline shall be counted from the date on which the dispute is submitted.

The arbitration award from the National Consultative Commission (or the equivalent body of the Autonomous Region) will have the same legal efficacy as the workplace agreements reached through the consultation period. In addition, such arbitration award can be appealed before social courts following the proceedings provided by law to challenge collective agreements.

5.5.- Length and validity of the collective agreement.

Collective agreements are subjected to an expiration term since, according art. 82.3 WS, they are binding (upon all employers and workers included within their scope of application), "*throughout the entire time of their validity*". Everything related to the length of the collective agreement is set out in art. 86 WS. The regulation in this aspect is, in summary, as follows:

1) The parties set the length of the collective agreement.

The collective agreement length is agreed by the parties. The parties may establish both the date on which it will come into force and (art. 90.4 WS) the period of its duration. (art. 86.1 WS). Even art. 86.1 WS admits the establishment of different periods for different matters in the collective agreement. For example, the collective agreement regulation on wages often contemplates an annual revision of the pay scales according to the CPI (Consumer Price Index).

Negotiators can also lawfully trigger the amendment of the collective agreement without waiting for the date of its termination. The 2012 labour law reform, in order to facilitate the adaptation of the collective bargaining to the changes in the company's productive activity, introduced this prevision in art. 86 WS.

2) Express notice of termination.

Having reached the final term established in the collective agreement, any of the parties who negotiated it shall give notice of its termination in order to end its validity (art. 86.2 WS).

It should not be forgotten that form, conditions and time in advance for the termination notice of the collective agreement are part of its minimum content (art. 85.2 d) WS). In this regard, collective

agreements frequently establish certain periods of time in advance for the notice of termination. It is even possible that the notice of termination is not needed in order to cease the agreement being in force.

3) Automatic extension of the collective agreement, unless otherwise agreed.

If once reached the expiration term of the collective agreement, nobody gives notice of its termination, art. 86.3 WS establishes the rule of the automatic extension of the collective agreement for a year. This implies that the collective agreement shall continue in force for the next year and yearly until the notice of its termination is formally given. This effect is the so-called "automatic extension" of the collective agreement.

Among other effects, the automatic extension will determine that the concurrence legal prohibition (art. 84 WS) will persist during the length of the extension because the collective agreement will still be in force. Nevertheless, notice that, according to art. 86.3 WS, the automatic extension applies "unless otherwise agreed", which means that the collective agreement can lawfully set its automatic termination once its period of duration has been reached, without needing a notice of termination.

4) Limited "ultra-activity" of the noticed collective agreement.

If the collective agreement is lawfully given notice, the so-called "ultra-activity" (*ultraactividad*) will be triggered. According to art. 86 WS, once the collective agreement is given notice, during the negotiation of a new one the normative content of the previous one will continue in force and only the collective agreement clauses regulating a strike waiving during the validity of the collective agreement will no longer be in effect (obligational content).

Ultra-activity is a situation of provisional validity of the collective agreement. This rule is aimed at avoiding regulatory gaps on working conditions while a new collective agreement is being negotiated. However, this rule is severely restricted in art. 86 WS, which subjects it to three major conditions:

1) The ultra-activity rule only operates "unless otherwise agreed" because art. 86 WS says that the collective agreement validity "will operate in the terms established in the collective agreement". This implies that the collective agreement can lawfully regulate what content continues in force and what content does not during the negotiation of the new agreement. It can also lawfully set a limited period of time during which the collective agreement remains provisionally in force.

Hypothetically, even the collective agreement may establish the automatic expiration of all its content once it has been given notice of its termination.

2) During the negotiation process, the parties may achieve partial agreements in order to adapt the content of the collective agreement to the production circumstances. Such agreements shall be decided by both parties.

3) The parties shall solve the disagreements that may arise during the negotiation of the new collective agreement according to the procedures for collective labour disputes resolution regulated by State or Autonomous Regions collective agreements on this matter (agreements on specific matters). Such collective agreements must necessarily regulate the possibility of going to arbitration in these cases and, furthermore, they should establish its voluntary or mandatory nature. In the absence of express stipulation on this regard, art. 86.3 WS states that the arbitration procedure will be binding.

4) One year after the collective agreement notice of termination has been given and a new agreement has not been reached (nor an arbitration award has been laid down) art. 86.3 WS provides that the collective agreement will no longer be in force, unless otherwise agreed. In this case, the collective agreement of higher level will apply, if any.

5.5.- Adhesion and extension of the collective agreement.

The ordinary procedure by which a collective agreement comes into force requires, basically, that once an agreement has been reached by the individuals entitled to negotiate, it shall be registered and deposited before the Labour Public Authority and subsequently published in the Official Bulletin corresponding to its scope. Only from that point onwards, will the collective agreement be in effect.

Along with this normal or ordinary procedure, art. 92 WS ET regulates two specific mechanisms through which a collective agreement may apply to a certain group of employers and workers who were not initially included in their personal scope.

A) The adhesion.

Through the adhesion, the parties entitled to negotiate a collective agreement, instead of doing so, they may lawfully join a pre-existing one.

In order to establish an adhesion, three conditions shall be fulfilled:

1) The adhesion must be decided by individuals empowered to negotiate a collective agreement in the respective scope.

2) The decision of adhesion must be communicated to the Labour Public Authority for registration purposes, as if it were a new collective agreement.

3) Art. 92 WS also requires the adhesion to be to the whole collective agreement. Therefore, it is not lawfully possible to adhere partially to a collective agreement (to only some of its clauses). This could be questioned since the parties are empowered to negotiate a whole collective agreement and therefore should be legally able to adhere partially to any collective agreement. In any case, this obstacle could be solved by the parties copying the parts of the collective agreement they choose (stepping aside the contents they are not interested in) and submitting it for registration to the Labour Public Authority as if it were their own collective agreement recently negotiated.

B) Extension.

Like adhesion, it is a legal mechanism that allows the application of a collective agreement to a particular group of employers and workers who are not initially included in its scope. But, unlike adhesion, extension is not decided by individuals empowered to negotiate a collective agreement, but rather by the State or the Autonomous Region Labour Administration through an administrative act. Regardless, extension acts are not decided automatically (*ex officio*) by the Administration but must be requested by the stakeholders.

The extension is therefore an administrative act by which the Labour Administration decides, at request of a party, to extend the provisions of a collective agreement to a plurality of workers and employers or a production sector or subsector.

It is a mechanism aimed at avoiding a gap in the regulation of working conditions in those cases where an administrative intervention is justified. Consequently, art. 92 WS requires two conditions to proceed with the extension:

1) The existence of a group of employers and workers or a production sector or subsector with no applicable collective agreement and who cannot negotiate a new one because there are no individuals legally entitled to do so.

2) Such groups may be harmed by the impossibility of subscribing an own collective agreement.