

JILL ForumSpecial Series No.11

March 2000

Flexibility in Dutch Labour Law

Gustav J.J. Heerma van Voss*

The Japan International Labour Law Forum
The ILO Association of Japan, Inc.

Copyright:

The Japan International Labour Law Forum

3-15 Kanda, Nishikicho, Chiyoda-ku

Shinshu-Meitetsu-Yasuda Bldg.,

Tokyo, Japan

FAX:81-(0)3-3294-8220

NOT TO BE CITED WITHOUT AUTHOR'S AUTHORIZATION

Special Series Back No. List

- No.1 Benjamin Aaron, Industrial Relations and Labor Law in the United States: A Comparative View, (1997)
- No.2 金 裕盛, 韓国における1996・97年労働関係法改正, (1998)
- No.3 Rolf Wank, Recent Developments of German Industrial Relations and Law, (1998)
- No.4 Dunston Ayadurai, Malaysian and Japanese Industrial Relations: A Comparative Study, (1998)
- No.5 劉 志鵬, 日本労働法における解雇権濫用法理の形成
—戦後から昭和35年までの裁判例を中心として, (1999)
- No.6 Peter G. Gahan, From Domestic Protection to Market Liberalization
Labour Law & Public Policy in Australia in the 1990s, (1999)
- No.7 Michal Sewerynski, Collective Labour Law in Poland, (1999)
- No.8 Chiao Cing-Kae, Democratization and the Development of Labor Law
in Taiwan, 1987-1999, (1999)
- No.9 Bruno Veneziani, Labour Flexibility, The Law and Collective
Bargaining in EC Countries, (2000)
- No.10 高 準基, 韓国における企業構造調整の実態と労働法的問題,
(2000)

PREFACE

The Japan International Labor Law Forum was established in January 1993 under the leadership of Professor Kichiemon Ishikawa, Professor Emeritus of the University of Tokyo and the former Chairman of the Central Labor Commission, for the scientific study of labor law and industrial relations from an international perspective. The Forum is affiliated with the ILO Association of Japan, Inc., and has its office in the Association Headquarters (3-12 Kanda, Nishikicho, Chiyoda-ku Shinshu-Meitetsu-Yasuda Bldg., Tokyo Japan, Fax: 81-(0) 3-3294-8220).

The Forum promotes several research projects. One of which is to analyze and describe Japanese labor law and industrial relations systems to scholars and practitioners in foreign countries who have interests in Japanese industrial relations. The results of the project have been published as JILL Forum Papers (No.1-9 by Professor Kazuo Sugeno and Professor Yasuo Suwa).

Another project of the Forum is to invite distinguished scholars to Japan and exchange opinions on labor and employment relations from a comparative viewpoint. This publication entitled JILL Forum Special Series is the product of the project. On March 17, 2000, the Forum had the great honor of having Professor Gustav J.J. Heerma van Voss, Professor of Labour Law and Social Security, University Leiden, The Netherlands, as a special guest of the Forum international seminar. It is our great pleasure to publish Professor van Voss's paper describing the recent changes in Dutch Labor Law.

Finally, we would like to express our deepest gratitude to Professor Ishikawa, Chairman of the Forum, for making this invaluable academic project possible.

March 31, 2000

Kazuo Sugeno	Takashi Araki
Professor of Law	Associate Professor of Law
University of Tokyo	University of Tokyo

Executives of the Japan International
Labor Law Forum

TABLE OF CONTENTS

Flexibility in Dutch Labour Law

by Gustav J.J. Heerma van Voss

1. Introduction.....	1
2. Some figures	1
3. Historic development	4
4. Part-time workers	10
5. Fixed-term contracts.....	11
6. On-call contracts	13
7. Worker dispatching services	16
8. Evaluation of the new legislation.....	19
ANNEX.....	21

Flexibility in Dutch Labour Law¹

by Gustav J.J. Heerma van Voss.

1. Introduction

In this paper I will explain the recent changes in Dutch labour Law, as a result of the Act on Flexibility and Security, that entered into force on January 1, 1999. The Act is the result of a longer development in the direction of more flexibility in Dutch labour law in order to reduce unemployment. I will first give some figures, then explain the history of the legislation and finally discuss four forms of flexible labour relations that are regulated more extensively in the recent legislation.

2. Some figures

During the 1980s the Netherlands suffered with a high unemployment and a relatively low economic growth. During the 1990s this picture is drastically changed. The following figures may illustrate this.

¹ This paper is partly based on my contribution 'Deregulation and Labour Law in the Netherlands', in: Takashi Araki a.o., *Deregulation and Labor Law: in Search of a Labor Law Concept for the 21st Century*, Tokyo: The Japan Institute of Labour 1999, and on 'The 'Tulip Model' and the New Legislation on Temporary Work in the Netherlands', *The International Journal of Comparative Labour Law and Industrial Relations*, Volume 15/4, 419-430, 1999.

• Professor of Labour Law and Social Security, Universiteit Leiden, The Netherlands

Real Gross Domestic Product²

	1983	1985	1990	1995	1998	1999*
Japan	2.3	4.4	5.1	1.5	-2.8	1.4
NL	1.7	3.1	4.1	2.3	3.7	3.0
EU	1.7	2.6	3.0	2.4	2.7	2.1
USA	4.0	3.6	1.7	2.7	4.3	3.8

Standardised unemployment rates³

	1980	1985	1990	1995	1998
Japan	2.0	2.6	2.1	3.1	4.1
NL	6.0	9.3	6.2	6.9	4.0
EU	-	-	8.2*	10.7	10.0
USA	7.2	7.2	5.6	5.6	4.5

Other European countries are looking envious to the Dutch unemployment rate of this moment, which is at present (March 2000) even below the figure for 1998, namely around 3.4. Many different factors may be responsible for this situation:

- the fact that the Netherlands as trade nation is favoured by the economic growth in the United States;
- the tax reductions that were introduced by the Government since 1994;

² Percentage change from previous period, Source: OECD, *Economic Outlook 66*, December 1999, p. 195. Figure for 1999 is estimation.

³ Per cent of Civilian Labour Force. Source: OECD, *Economic Outlook 66*, December 1999, p. 216.

- the moderate wage demands of the unions;
- the high amount of disability benefits, that may reflect a hidden unemployment;
- the high rate of part-time work.

But the idea is generally accepted that at least one of the explaining factors is the promotion of flexibility in the employment relations since the 1980s.

Recent statistics show that from the 7.080.000 jobs in the Netherlands:

- 4.126.000 are fulfilled by full-timers (58%), and
- 2.954.000 by part-timers (42%).

From the 7.080.000 jobs are:

- 6.340.000 permanent relations (89,5 %),
- 740.000 are flexible employment relations (10,5 %).

From the last group of 740.000:

- 269.500 were dispatched workers, employed by Dispatched Work Agencies (3,80 of the total workforce; 36,4% of the flexible employment relations)⁴.

These figures can only be understood, if one knows that part-time work is so well accepted in the Netherlands, that most part-time workers have a permanent position. The name 'part-time work' in the Netherlands only refers to the working hours, compared to the standard working hours in the company.

EU-figure under 1990 is figure for 1991.

⁴ Data of the 3rd quarter of 1999. Source: Central Bureau of Statistics, The Netherlands.

3. Historic development

Foundation of Labour

Historically, the strong co-operation on the national level of employers' associations and trade unions in the Netherlands dates back to the end of World War II. At that moment the need of national reconstruction was felt so strongly, that employers' associations, labour unions and government decided to co-operate very closely in order to restore the nation's economy. Thus, a private organisation of the national employers' associations and trade unions, the *Foundation of Labour*, was established. This co-operation included a national decision-making process on wage increases. During the 1950s, wage levels were kept low in order to rebuild the national economy and to establish a national social security system with a high level of protection. The co-operation also promoted a low rate of strikes. During the 1960s this system gradually weakened as workers started to demand higher wages in line with the growth of the economy. In the new Wage Act of 1970 the wage negotiations were almost completely undone from government interference. Although a form of national consultation, co-ordination and orchestration has remained until the present, the negotiators on the branch and company level today decide freely on the level of wages in collective agreements.

Wassenaar Agreement

However, the tradition of modest demands of the unions still remained over the years. The trade unions in the Netherlands have always put great emphasis on items such as solidarity, which includes a high level of social security and wage increases that are in line with the growth of economy in order to protect job creation. During the 1960s, the level of social security costs gradually increased and in the 1970s automatic price compensation for inflation was introduced as general principle in collective agreements. After the two oil shocks of the seventies these

factors then created a high unemployment rate at the beginning of the 1980s⁵.

In 1982 in the village of Wassenaar, near The Hague, the leaders of the most important national trade union FNV, Wim Kok (the present Prime Minister), and the most important employers' association VNO, Chris van Veen, reached a historic agreement. They agreed to end the system of automatic compensation of inflation in the wages and, alternatively, to start with working time reduction so as to fight unemployment. With this agreement they prevented the Government's plans to interfere in wage negotiations using Government measures. An important aspect of the working time reductions was that this would be implemented with flexibility: not a general reduction of working time for everybody to, for instance, 36 hours a week, but different forms to be chosen at branch and company level. The impact of the Wassenaar Agreement on the Dutch labour relations was important in three ways.

1. During the 1980s the reduction of working hours was achieved, with a 38-hour working week as average, but in many different forms (e.g. more free days, some days not scheduled, every 14 days one afternoon free etc.).
2. At the same time the Government started the promotion of part-time work. Due to the strong tradition in the Netherlands for women with children stay at home to take care of them, the Netherlands had known a relatively low participation of women on the labour market. Therefore, with women striving for emancipation in the 1970s, part-time work offered a practical compromise. Many women with children started to work in part-time jobs, thus, the participation rate of women increased substantially.
3. Employers also promoted the external flexibility of their workforce, by introducing more temporary contracts and employing more workers through Dispatched Work Agencies. The labour unions gradually softened their resistance against this development. Many job seekers found that the ordinary State employment offices could not provide them with work, while Dispatched Work Agencies could practically offer them jobs. Although these

⁵ The unemployment rate raised from 1.3 in 1971 to 6.0 in 1980 and 12.0 in 1983. After 1983 it decreased again. Source: OECD, *Economic Outlook 50*, Paris 1991.

jobs were temporary, in many cases a worker, once introduced in a company, could stay on after the first period in a permanent position. Besides this, the so-called 'on call'-contracts became very popular and were accepted by the courts and, generally, also by the trade unions.

The result is, that in 1998 only 56% of the workforce in the Netherlands had a regular full-time job, 13% had a fixed-term contract, 37% worked part-time, of whom 75% women⁶.

Dismissal Regulations

The Netherlands have a quite unique system of protection against dismissals. In principle notice of an employment contract is not possible without the previous permission of the Regional Director of the Labor Service Organisation. Despite the critics of the large companies, this system is still prolonged.

The labour unions and the small enterprises are in favour of the system. The unions because of its preventive effect: employers can only dismiss a worker on the basis of reason. The small enterprises see the system as a guarantee against lawsuits from employees for wrongful dismissals.

Nevertheless the ordinary dismissal procedure for permanent employees was seen as complicated by employers. Although the permission of the Regional Director in most of the cases in which it is asked is granted (around 90%), employers do not appreciate to be dependant from permission for dismissal from a government authority.

In practice more and more employers started to avoid the 'permission procedure' by asking the court for dissolution of the employment contract (Article 7:685 Civil Code). Although this is only possible in case of 'severe reasons', for practical reasons the courts accepted this as a

⁶ Figures based on W. van Eeckhoutte, 'Aspecten van flexibilisering', in: F.J.L. Pennings (red.), *Flexibilisering van het sociaal recht in België en Nederland*, Deventer: Kluwer 1998, p. 1-7, 6.

normal dismissal procedure, which indeed became very popular among employers and lawyers. In 1998, half of the dismissal procedures were effected this way. The only disadvantage for the employer is that the court can oblige him/her to pay the worker, which is usually done. In 1997 the 'circle' of competent judges published a recommendation that contained a formula to calculate these payments. The formula is $A \times B \times C$, standing for seniority \times monthly wage \times correction factor. The correction factor is more than 1 when the employer is responsible for the dismissal, less than 1 when the employee is more responsible. In practice, this, more or less, introduces a right to a severance payment for dismissed workers, at least when this procedure is followed.

Practical introduction of more flexibility

In order to make the labour market more flexible, several different forms of 'flexible work' became popular. Especially in the economic uncertain period of the 1980s employers started to make more often use of fixed-term contracts. But the renewal of these contracts was also restricted by statute: after the first renewal of a fixed-term contract it could only be terminated by notice and therefore the governmental permission was required again. Consequently, many employers also started to work with other forms of flexible labour relations like the use of Dispatched Work Agencies and 'on-call-contracts'. Thus, the use of these flexible labour relations became very popular during the 1990s. The courts accepted these new forms of flexible labour relations, but in case of long-standing relations they often granted the worker with the regular protection of employment contracts. The labour unions gradually accepted the need of flexibility in the employment contract. For instance, in many collective agreements during the 1990s it was accepted that fixed-term contracts were renewed without the need to give notice when the second or consecutive contract was terminated within a term of for instance two years after the beginning of the first contract. This derogation of the Civil Code was allowed as long it was agreed upon in a collective agreement. Also the use of Dispatched Work Agencies was more accepted by the unions once they noticed that many workers appreciated that it would be of help

for being introduced in a company where they could continue to work on a permanent basis, once they were accepted.

Flexibility and security

In 1996 a new deal was reached by the Foundation of Labour. The central organisations of management and labour agreed upon a report called 'Flexibility and security'. This report was a 'package-deal': the unions wanted to preserve the system of preventive checks on dismissals of regular contracts by the government in order to protect workers against unfair dismissals. The employers accepted this in exchange for greater flexibility in other types of contracts, especially fixed-term contracts. The unions also accepted the 'on call-contracts' and Dispatched Work Agencies in exchange for a stronger position of workers dependant of these types of work.

The general idea of the report was that in the beginning of any labour relation flexibility is allowed. But the longer it lasts, the stronger the security of the worker should be (as well as the responsibility of the employer), no matter the form of the contract that was eventually chosen.

Consequently, it was proposed that more flexibility be introduced in the dismissal legislation for contracts of indefinite period as well as those of fixed-terms. Dispatched Work Agencies would get fewer restrictions, while, the position of the workers from Dispatched Work Agencies would be improved, especially after having worked for a longer period. The same would apply for those workers hired on an 'on call'-basis. The government changed the legislation almost completely following the lines set out in the Foundation of Labour's report. Thus, the Act on Flexibility and Security was introduced on 1 January 1999.

The term 'Polder Model' was coined in recent years in the Netherlands for this newly found form of co-operation between employers' organisations and national trade unions. Based on the older tradition of close co-operation on the national level, the organisations understood that labour relations had to be changed in order to cope with the high unemployment and the new demands resulting from the globalisation of industries. The 'polders' are the pieces of land in the

Netherlands that are obtained from the water - Building dikes around the water and pumping the water away achieves this. The romantic idea is that the Dutch culture is formed in the everlasting struggle with the water, which, hence, forces the Dutch to co-operate and accept compromises. Today, the 'Polder model' stands for the great ability of employers and unions to co-operate in the interest of both.

The new legislation

The new legislation consists of two Statutes:

- a. The Act on Allocation of Workers by Intermediates of 1 July 1998 and
- b. The Act on Flexibility and Security of 1 January 1999.

The first Act is an independent Statute. The latter contains a modification of several Acts. Most important are the changes in the Civil Code. The English translation of the most important new or revised Articles in the Civil Code is to be found in the annex to this paper.

In order to make the dismissal procedure more efficient, several measures were taken in the Act on Flexibility and security. These measures are shortening of notice periods, easier access to unemployment benefits in case of dismissals on economic grounds, and a procedure of 'no objection' in case the worker accepts his dismissal and only claims an unemployment benefit. In order to prevent abuse of rights, the ban on dismissal of sick workers is lifted in case the sickness came up after the Regional Director of the Labor Service Organisation received the request for permission to dismiss.

Now we will focus more precisely on the regulation of the most important flexible labour relations, which are part-time work, fixed-term contracts, on call-contracts and dispatched workers.

4. Part-time workers

The Netherlands is 'world champion' in part-time work. Most of the part-time workers are women, but also men sometimes prefer to work part-time. Part-time work is generally accepted as 'normal' work. In principle, many companies do treat part-time workers and full-timers equally, in proportion to the amount of working hours. Though, there are problems, like in pension schemes and in promotion changes. Part-time work is not accepted in every branch alike, mostly in the service branches. It is also still not accepted for the highest positions. That is seen as one of the causes of the so-called 'glass ceiling': many women have in practice problems in reaching the higher positions.

The position of part-time workers in the Netherlands is also legally in principle no different from that of full-time workers. Since 1996 the Civil Code even prescribed the equal treatment of part-time and full-time workers, in proportion to their amount of working hours. Consequently, the implementation of the Part-time Directive of the European Union will be not a big problem in the Netherlands⁷.

In July 2000 a new Act will be introduced in the Netherlands, the so-called 'Act on Adjustment of Working Hours'. This Act allows the employee to demand an adjustment of working hours, either downward or upward. The employer may reject such a demand only on severe company reasons. The Act also gives examples of such reasons. For instance, to reject a request to reduce working hours the employer should show that this would cause serious problems with designing work schedules. To reject a request to extend working hours, the employer could argue that he has no vacancies or no budget to afford this.

In practice, this Act is seen as a considerable restriction of the freedom of employers. It is

⁷ Directive 97/81/EG of the Council of December 15, 1997 concerning the Framework agreement on part-time work, *Official Journal* January 20, 1998, L 14, p. 9-14.

the expression of the care of the Dutch lawmakers for the possibilities of men and women to conciliate work and family responsibilities. It is also a reflection of the acceptance in the Netherlands of part-time work.

5. Fixed-term contracts

It has always been possible in the Netherlands to conclude a first fixed-term contract freely, for whatever purpose and whatever period. In principal, its use has not been legally restricted. However, up until 1999 the Civil Code stipulated that a second consecutive fixed-term contract could not be ended without notification. This implied the requirement of the previous permission of the Regional Director of the Employment Service Organisation (who checks the validity of the reason for dismissal) and the observance of a notice period. Since these restrictions are no different from that of a contract for an indefinite period, employers felt this legislation was very restrictive.

Thus, to avoid these restrictions in principal two ways were open:

- a. The employer could observe a period of at least 31 days between two contracts. After this period, the second contract was not seen as a consecutive contract. In practice, employers often hired the same worker in the meantime for the same job through a Worker Dispatching Agency (so-called 'revolving door construction' - *draaideurconstructie*). The Hoge Raad (Supreme Court) decided in the 1991 *Campina*-case, that when an employer uses this arrangement for several years, a reasonable application of the law implies that the fixed term-contract should be considered as a consecutive fixed-term contract in the sense of the Civil Code⁸. Another case concerned a situation in which the worker was hired in the first instance through a Workers

⁸ Hoge Raad (Supreme Court) 22 November 1992, *Nederlandse Jurisprudentie* (Dutch Case-Law) 1992, 707 (a.o./Campina).

Dispatching Office and then continued the same work employed by the hiring company. In this case, it was determined that the time worked for the Workers Dispatching Office was included in the calculation of the maximum probation period of two months as foreseen in the Civil Code⁹.

- b. To make use of the possibility in the Civil Code to deviate from this rule by collective agreement. Due to the high unemployment during the eighties the unions often accepted exceptions on this rule in collective agreements. In several collective agreements on branch and company level it therefore was agreed that the duty to give notification was only applicable after the worker had worked a certain period (often two years) for the same employer.

Since the courts, as indicated, restricted the first possibility, the latter option became important. As a result of the aforementioned agreement on flexibility and security of 1996 between the national organisations of employers and trade unions, the Dutch government introduced a new system of fixed-term contracts in the 1999 Act on Flexibility and Security. This may be the most important change of the new Act.

Under the present rule (article 7:668a Civil Code), it is possible to have 3 consecutive contracts that may be ended without having to give notice, as long as they fall within a period of 3 years. The fourth contract, or the contract that makes the total working period from the beginning exceeding 36 months, will change automatically ('ex lege') in a contract for an indefinite term, which gives the worker the aforementioned protection against dismissal.

This change is an important form of deregulation that is expected to make the fixed-term contract more attractive for employers.

⁹ Hoge Raad (Supreme Court) 13 September 1991, *Nederlandse Jurisprudentie* (Dutch Case-Law) (Dingler/Merkelbach).

Three principles are introduced to avoid abuse of the possibilities of the new articles:

- Contracts that are following each other within a period of three months are considered to be consecutive.
- For consecutive fixed-term contracts between the same employer and the same employee it is not imported whether the work that is done under the different contracts is identical or not.
- Fixed-term contracts where the same employee works for two consecutive employers who should be considered to be each other successors with regard to the work are also considered as consecutive contracts. Thus, also if the worker worked under some of the consecutive contracts for a Dispatched Work Agency, the rule is applicable. The fourth contract is decisive: the employer that employs him/her at that time is the employer with a contract for an indefinite term. Of course, in this case the work under the consecutive contracts should be the same.

The new regulation is in line with the recent EC-directive on fixed-term contracts. However, the Directive also requires that the principle be introduced of equal treatment of permanent and fixed-term workers. This should probably require legislation in the Netherlands, although for practice it might often bring not a substantial change. However, some companies that might differ in wage schemes for permanent and temporary personnel may have problems with this principle.

6. On-call contracts

Under the original type of these contracts the amount of hours and the time when the work is to be done are not set in advance. The popularity of this type of contract in the Netherlands is very high. Around 6% of the workforce work under this type of contract. It is used by 16% of the

companies and they have on average 17% of their personnel employed on this basis¹⁰. There is a wide range of contracts - from a low number of hours with a high degree of uncertainty of work to a high number of hours, for instance 20-30 hours a week, with a high level of certainty of employment.

The legal position of workers working on the basis of an on-call contract was often not strong. In theory, two forms of on call-contracts were distinguished:

- *Zero hours-contract*. This contract does not guarantee that labour will be done or offered. Both sides are entirely free to (give) work once work is available. This is not an employment contract, but only a framework agreement that sets possible wages and details. Every time a worker responds to a concrete call for work he/she will conclude a fixed-term employment contract with the employer.
- *Min/max contract*. This contract offers a minimum amount of working hours. It might provide for example that the working hours will be between 20 and 30 hours a week. This contract will be an employment contract, even though working schemes are very flexible not set long in advance.

However, employers often used a so-called 'zero hours-contract', but in practice very often made use of the worker. The courts interpreted this practice such, that the more intensive the employment relation, the earlier it would be recognised as an employment contract under the Dutch Civil Code. This would entitle the worker to demand wages and access to work. Often, courts declared that since the worker had a regular pattern of work, he/she was therefore entitled to work according to the average of the amount of hours that he/she worked during the preceding period.

¹⁰ Figures based on I. Plets & D. de Wolff, 'De oproepovereenkomst naar Belgisch en Nederlands recht', in: F.J.L. Pennings (red.), *Flexibilisering van het sociaal recht in België en Nederland*, Deventer: Kluwer 1998, p. 31-61, 32.

Principally, this was recognised by the Dutch Supreme Court in the 1994 landmark-case of *Agfa vs. Schoolderman*. Ms. Schoolderman had worked for several years on so-called 'zero hours-contracts' and also was hired sometimes as dispatched worker through an agency. These contracts were used for persons who were hired by hour to fill gaps in the workforce. The relation was developed such that Ms. Schoolderman in practice did exactly the same work as the permanent personnel, but was paid less and was less sure of her position. The Supreme Court concluded that the originally agreed terms of the contract are not decisive. Also significance must be given to the way the parties have given in practice to the employment contract and thus have given it a different content. The Supreme Court also concluded that the general accepted principle of equal pay for equal work under equal conditions should be taken into consideration, unless objective grounds justify a different payment¹¹. The first rule was not new, but never so principally formulated. The principle of equal pay for equal work was in fact not discussed in labour law circles intensively before, besides for differences between men and women. This point opens new discussions, outside the scope of this paper.

The Act on Flexibility and Security *firstly* aims to strengthen the position of the workers with on-call contracts in order to prevent that they always have to go to a court. However, general rules are hard to give. Therefore, in the Civil Code two so-called '*presumptions of fact*' were introduced:

- Article 7:610a Civil Code determines that when a worker performs work for the benefit of another person for three consecutive months, weekly or for not less than twenty hours per month, it is presumed that this was done on the basis of an employment contract.
- Article 7:610b Civil Code states that in case an employment contract has lasted for at least three months, the contracted work in any month is presumed to amount to the

¹¹ Dutch Supreme Court 8 April 1994, *Nederlandse Jurisprudentie* (Dutch Case-law) 1994, no. 794 (*Agfa-Gevaert vs. Schoolderman*).

average working period per month over the three preceding months. This new article may have important effects in cases in which the employer reduces the amount of hours of any worker.

In both cases it is possible for the employer to prove that it was agreed otherwise, for instance in case of temporary overwork and seasonal work. The employer has to prove this and this will, consequently, promote a proper composition of contracts and more transparency in working schedules for the worker.

The *second* measure is that it is more difficult for the employer to contract away his/her obligation to pay wages in case there is no work under his/her responsibility. This obligation may in the future only be contracted away for the first six months of a contract, unless the applicable collective agreement allows doing so for a longer period (article 7:628 Civil Code).

The *third* improvement for the workers on 'on-call contracts' is the obligation to pay at least three hours of work for any call. This obligation rests on the employer in case of small contracts (less than 15 hours a week and no certainty of the exact hours of work or no certainty of the amount of hours at all). The purpose is that those workers should not be forced to sit the whole day near the telephone waiting to be called for just one hour of work or to travel to work just for a very short period.

For instance, when a worker is working from Monday to Friday from 9 to 11 a.m. each day, the rule is not applicable: he/she works less than 15 hours each week, but the exact hours are determined. But if the worker is working 2 hours a day, but on different not predictable hours, the rule is applicable, and he/she should be paid for 3 hours every time he works.

7. Worker dispatching services

Since 1975 the restrictions on Worker dispatching services have been step-by-step drastically

reduced to the point of almost being abolished. In 1975 the official ban on these services was replaced by a system of license. A worker dispatching service needed a government permit to operate, as the government wanted to watch closely whether the service was following good practices or not. It demanded that social security premiums be paid by the agencies, that they keep a proper administration and that workers earn wages equal to those of ordinary workers in the same company who performed the same job. In some areas (e.g. the construction sector) these services were continuously abolished because of previous bad experiences with uncontrollable 'black work'. In other branches, dispatched workers were eventually allowed to be sent for a period of three months at most. Later, this period was prolonged to six months and, in the end, one year was tolerated.

However, over the years this type of work became very popular in the Netherlands. Indeed, dispatched work became a form of 'employee recruiting'. On the other hand though the legal position of dispatched workers remained uncertain. Dispatched Work Agencies for example denied that they concluded employment contracts with their workers. But the growth of this type of work and the desire of Dispatched Work Agencies to have credibility gradually brought about change. During the 1980s the general trade unions managed to reach a nation-wide collective agreement for dispatched workers with the Organisation of Dispatched Work Agencies (*ABU*), and more and more courts considered that a dispatched worker after starting to work was working on the legal basis of an employment contract. Finally, the Advocate-General concluded before the *Hoge Raad* (Supreme Court of the Netherlands) that this was the leading legal opinion¹². At this point, the *ABU* changed its previous position and in a 1996 Agreement with the unions¹³ accepted the principle that dispatched workers were working on the basis of an employment contract. In exchange, the unions accepted Dispatched Work Agencies as normal

¹² Conclusion Advocate-General T. Koopmans 7 april 1996, *Jurisprudentie Arbeidsrecht* (Case-law Labor Law) 1996/168. The Hoge Raad did not give a judgment in the case, because it was withdrawn.

¹³ This Agreement was concluded on branch level, but connected with the nation-wide agreement on Flexibility and security.

employers who, as such, do not require specific Government supervision.

By January 1999 this agreement was formalised in the Civil Code by the introduction of the articles 690 and 691 of Book 7 as a result of the Act on Flexibility and Security. Article 7:690 defines the 'secondment contract' as a special type of employment contract. Its flexibility is guaranteed by the exclusion of restrictions on dismissals of prolonged contracts for dispatched work during the first 26 weeks, and the possibility to agree on a clause that terminates the contract immediately in case the hiring company ends its assignment during this period. In the case of such a clause, the dispatched worker is also allowed to terminate his/her work at any time. It is possible, however, to extend these periods of 26 weeks by collective agreement.

A legal question is whether employees who are not member of the contracting union are bound by this derogation of the Civil Code, since the Minister of Labour did not (yet) extend the Collective Agreement. Not many dispatched workers are members of a union in practice. The majority of the legal authors, however, has the opinion that they are bound by the derogation, mostly for practical reasons. Theoretically this point is not easy to tackle under the Dutch system of collective agreement legislation.

In the New Collective Agreement for Dispatched Workers (1999-2001) an important derogation was made: the legal exceptions are extended from 26 weeks to one full year and even longer. In return, the unions stipulated the right to training and access to a pension scheme for the dispatched workers when they work longer than 26 weeks for a Dispatched Work Agency. It is expected that the larger Dispatched Work Agencies will hire dispatched workers for longer periods in the future.

Since these offices are generally accepted today, the system of permits was abolished on 1 July 1998, according to the new 'Act on Allocation of Workers by Intermediates'.¹⁴

Dispatched Work Agencies are now free to operate like any other company. Only two

¹⁴ Wet Allocatie van arbeidskrachten door intermediairs (Waadi), *Staatsblad* (Bulletin of Acts and Orders) 1998, 306.

principles were sustained in the new Act. The first principle is that dispatched workers may not be used to undermine a strike. The second principle is that the wage of a dispatched workers should be the same as that of a worker who does the same work as an employee of the company where the work is done. However, the latter rule may be set aside by collective agreement (either that of the hiring company or that of the Workers Dispatching Agency). The Workers Dispatching Agencies are in favour of such an independent wage policy with the argument of being employers with their own employment policies. Sometimes they hire workers for several years and send them to different companies in consecutive periods. Therefore, they want to give workers with a higher seniority or a better performance a higher salary in order to bind them to their company.

8. Evaluation of the new legislation

The first reaction to the 'Act on Flexibility and security' was that it made dismissal regulations even more complicated than before. According to a survey that was held in the first months after the introduction of the new Act many employers were reluctant to work with fixed-term contracts, although the Act aimed to promote this. In order to prevent legal problems, employers often preferred to hire temporary personnel from Dispatched Work Agencies. But this is typical for new legislation: it takes time to make the possibilities clear to everybody. The real results are to be seen on the long run.

A second phenomenon was that a group of workers of Dispatched Work Agencies were to get a contract for an indefinite period on 1 July 1999 as a result of the new Collective Agreement in this branch. This group was dismissed before this date. The national labour union, FNV, warned in the spring that the position of 10.000 workers would be at stake. Later, the branch organisation announced that only 1,500 workers were fired for this reason. This group was supposed not to be employable in the long run. Others were accepted as permanent workers.

The general result of the new legislation seems to be, that the dispatching work agencies have a freedom to operate that is quite unique in Europe. Only Sweden has this type of liberal system while other countries still know many restrictions. However, this is compensated for by a collective agreement that improves the position of the workers involved.

The Netherlands now have two systems: the still very strong position of the government in controlling dismissals of regular workers on the one hand and a high amount of flexibility for other types of employment relations on the other.

It seems likely that in the forthcoming years the dismissal procedures will continuously be under discussion. The Minister of Social Affairs and Employment has already installed an Evaluation Committee on the 'Dual System of Dismissals', which refers to control of dismissal of regular workers by government or by the courts. However, the position of the workers on flexible contracts should be monitored as well. Only in the long run will the effects be clearly identified.

Some governments will look jealously to the Dutch government because the trade unions are willing to negotiate on long entitled rights in order to break through a deadlock-situation with regard to unemployment. Also on the European level the co-operation between employers organisations and trade unions is growing, resulting in certain agreements on this level. In the United Kingdom the government promotes flexibility of labour law. In Germany it is heavily discussed. In the meantime, in Belgium, France and some other countries the resistance to introduce more flexibility on the labour market is still high. It is feared there, that introduction of more flexibility in employment contracts could undermine the system of labour law.

In the Netherlands it seems that the attention is now turning from the so-called external flexibility (flexible contracts, dismissals) to internal flexibility (mobility within the enterprise). More and more workers are demanding that the company finds a balance between working and private life and companies are requesting that workers are more open for adaptations in the work place.

ANNEX

EXCERPT OF THE CIVIL CODE OF THE NETHERLANDS

BOOK 7. SPECIFIC CONTRACTS

TITLE 10. CONTRACT OF EMPLOYMENT

Section 1. General Provisions

Article 610a.

A person who, for the benefit of another person, performs work for remuneration by such other person for three consecutive months, weekly or for not less than twenty hours per month is presumed to perform such work pursuant to a contract of employment.

Article 610b.

Where a contract of employment has lasted for at least three months, the contracted work in any month is presumed to amount to the average working period per month over the three preceding months.

Section 2. Remuneration

Article 628.

1. An employee retains the right to remuneration fixed per unit of time if he has not performed the contracted work due to a cause which, reasonably, should be for the account of the employer.
2. If he is entitled to a pecuniary benefit pursuant to any insurance prescribed by law or

pursuant to any insurance policy or from any fund in which participation has been agreed or which results from the contract of employment, the remuneration shall be reduced by the amount of that benefit.

3. If the remuneration is fixed in money other than by reference to a unit of time, the provisions of this article shall apply, provided that remuneration is deemed to mean the average remuneration which the employee could have earned during that period if he had not been so prevented.
4. The remuneration shall, however, be reduced by the amount of the expenses which the employee has saved by not performing the work.
5. During the first six months of the contract of employment there may be derogation from paragraphs 1 to 4 inclusive to the detriment of the employee by written contract only.
6. In the case of consecutive contracts of employment within the meaning of article 668a, in a derogation referred to in paragraph 5 may be agreed for not more than six months in the aggregate.
7. Upon expiry of the period referred to in paragraph 5 there may be derogation from this article to the detriment of the employee only by collective labour agreement or by a scheme made by or on behalf of a competent authority.

Article 628a.

1. Where a period of less than fifteen hours of work per week has been agreed and the times on which the work must be performed have not been fixed or, if the working time has not or not clearly been fixed, the employee shall be entitled to the remuneration to

which he would have been entitled if he had performed work for three hours for every period of less than three hours in which he performed work.

2. There shall be no derogation from this article to the detriment of the employee.

Section 5. Some Special Stipulations in the Contract of Employment

Article 652.

1. Where the parties have agreed a probationary period, it shall be equal for both parties.
2. The probationary period shall be agreed in writing.
3. Upon entering into a contract of employment for an indeterminate term, a probationary period of not more than two months may be agreed.
4. Upon entering into a contract of employment for a fixed term, a probationary period may be agreed of not more than:
 - a. one month if the agreement is entered into for less than two years;
 - b. two months if the agreement is entered into for two years or more.
5. If the end of a contract of employment for a fixed period has not been set at a calendar date, a probationary period of not more than one month may be agreed.
6. Derogation from paragraph 4, subparagraph *a*, and 5 to the detriment of the employee may be made only by a collective labour agreement or by a scheme made by or on behalf of a competent authority.

7. Any stipulation whereby the probationary period is not the same for both parties or is fixed for longer than two months and every stipulation whereby the parties enter into a new probationary period as a result of which the probationary periods together exceed two months is a nullity.

Section 9. Termination of the Contract of Employment

Article 668a.

1. From the time when, between the same parties,
 - a. fixed term employment contracts have succeeded one another over a period of 36 months or more at intervals of at most 3 months, the last employment contract shall be deemed to have been entered for an indeterminate term as from that time;
 - b. more than three fixed term employment contracts have succeeded one another at intervals of not more than 3 months, the last employment contract shall be deemed to have been entered for an indeterminate term.
2. Paragraph 1 shall apply, *mutatis mutandis*, to consecutive contracts of employment between an employee and different employers who must reasonably be considered each other's successor with regard to the work performed.
3. Paragraph 1, subparagraph *a* and the last part of the sentence shall not apply to a contract of employment entered into for not more than 3 months which is immediately consecutive to a contract of employment entered into for 36 months or more between the same parties.
4. The notice period shall be calculated from the time the first contract of employment

referred to in subparagraph *a* or *b* of paragraph 1 was entered into.

5. Derogation to the detriment of the employee from paragraphs 1 to 4 inclusive may be made only by collective labour agreement or a scheme made by or on behalf of a competent authority.

Section 11. Special Provisions in respect of Secondment Contracts

Article 690.

A secondment contract is a contract of employment whereby, within the framework of the conduct of a profession or business of the employer, the employee is placed by the employer at the disposal of a third party in order to perform work under the supervision and direction of the latter by virtue of a contract for services granted by the latter to the employer.

Article 691.

1. Article 668a shall apply to a secondment contract only once the employee has performed work in a period of more than 26 weeks.
2. In a secondment contract it may be stipulated in writing that such contract shall end by law because the placing of the employee by the employer at the disposal of a third party referred to in article 690 ends upon the request of such third party. If a stipulation referred to in the preceding sentence is included in a secondment contract, the employee may forthwith give notice of termination of that contract.
3. A stipulation referred to in paragraph 2 shall no longer be in force if the employee has performed work for the employer in a period of more than 26 weeks. On expiry of this period the right of the employee to give notice as referred to in paragraph 2 shall lapse.

4. For the calculation of the periods referred to in paragraphs 1 and 3, successive periods in which work is performed with intervals of less than one year shall also be taken into account.
5. For the calculation of the periods referred to in paragraphs 1 and 3, the periods in which work is performed for different employers who, in respect of the work performed, must reasonably be considered to be each other's successors, shall also be taken into account.
6. This article shall not apply to a secondment contract whereby the employer and the third party form part of a group referred to in article 24b of Book 2 or where one is a subsidiary of the other as referred to in article 24a of Book 2.
7. Derogation may be made to the detriment of the employee for the periods referred to in paragraphs 1, 3 and 4 and of paragraph 5 only by collective labour agreement or by regulation made by or on behalf of a competent authority.