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‘Changes in the organization of collective bargaining’

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1. The practice of collective bargaining in the Netherlands

1.1 The major unions and organizations

Most unions in the Netherlands are organized as (con)federations on a national level. These associations have an umbrella function as a confederation for the unions at sectoral level and coordinate their proceedings.

The three main players are the Trade Union Confederation (known as FNV)
the Christian Trade Union Federation (known as CNV) and the Trade union federation for Professionals (known as VCP). The Trade Union Confederation is the largest confederation of unions in the Netherlands, this is a general union. Affiliated are 16 (mainly) industry unions. The Christian Trade Union Federation is similar to the Trade Union Confederation but smaller with 7 unions affiliated. The Trade union federation for Professionals is the confederation for midlevel and higher employees, 50 organisations are affiliated. Beside the confederations there are also profession based unions that are not affiliated to a (con)federation. They operate by themselves.[1]

The largest employer's confederation is the Confederation of Netherlands Industry and Employers (known as VNO-NCW). They represent the common interests of the Dutch business. VNO-NCW represents (sector) organizations and all kinds of enterprises, both large, medium and small enterprises.
Overall, VNO-NCW represents 115.000 Dutch enterprises, of which 80 percent are enterprises with 10 to 100 employees and 92 percent are enterprises with 100 to 500 employees. Almost all enterprises that have more than 500 employees are member.

The second employer's organization is the Dutch Federation of Agriculture and Horticulture (known as LTO Nederland), which focuses on the agricultural sector. Approximately 50,000 agricultural enterprises are member. The confederations work together in the Council of Central Employers Organizations[2], which has an umbrella function.

Nationally organised consultation bodies consult in collective bargaining.

[1] H.L. Bakels e.a., *Schcourtederlandse arbeidsrecht*, Deventer: Kluwer 2013, p. 219.
[2] H.L. Bakels e.a., *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2013, p. 223.

Main players are the Social and Economic Council of the Netherlands (SER) and the Labour Foundation. While the Social and Economic Council has a public law basis, the Labour Foundation is a private law organisation.

The Social and Economic Council of the Netherlands (SER) was founded shortly after World War II, when attention needed to be paid to economic growth, employment and social policy. This task couldn't be done by the government themselves, the business needed to be involved. The council consists of employees, employers and independent experts who are appointed by the government (Tripartite). The council has an advisory function on social and economical matters.[3] The advisory function is for the government and parliament on the outlines of social-economic policy. Furthermore, the council has an administrative and supervisory task on (the establishment of) works councils.

The Labour Foundation is a consultation platform of employers and employees organisations (Bipartite). It facilitates consultation between the parties and gives information and advise. They share their opinions with the government, and give advise on subjects of collective bargaining, wages and on general binding. The consultation of the Labour Foundation does not lead to firm commitments for the members and the advise is not legally binding.

1.2 CLA's conducted for sectors, or for particular enterprises

Collective agreements (CLA's) can be made with employers organisations for (a part of) a particular industry, or with an individual employer. The personal scope of the industry CLA's are much wider than the scope of the company CLA's.[4] The company CLA's are applicable to an individual company, while the industry CLA's are applicable to more enterprises in the concerning industry. The factual involvement of the employer is decisive whether or not the CLA is applicable. This will be further explained in chapter 4.

In 2011, there were 700 CLA's in the Netherlands, which were applicable to 6 million employees. Approximately 500 CLA's for enterprises, and 200 were industry CLA's.

[3] H.L. Bakels e.a., *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2013, p. 227.
[4] H.L. Bakels e.a., *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2013, p. 243

74 percent of the employees are covered by an industry CLA, and 9 per cent by company CLA's.

1.3 Unionization rate

In 2012 20 percent of the employees was member of a union. This corresponds to 1.85 million employees. This number has been decreasing through the years. The employers organisations can count on a larger unionization rate. Figures vary from 50 to 80 percent. They differ in size of the enterprises and sector.[5]

1.4 Percentage of employees covered by collective bargaining

Employees who are member of a union that is part to the CLA are covered by the CLA. Besides that, the Netherlands has a system of binding. Employers who are member an employer's organization party to the CLA has to apply the CLA to all the employees employed by him.[6] The binding of the CLA can be extended by a decision of the Minister of Social Affairs on request of the parties. The CLA has to be applied to all employers and employees falling within the personal scope of the CLA.[7]

The percentage of employees who are covered by collective bargaining is approximately 80 percent of the employees, this corresponds to 6.1 million employees. Of this percentage over 5.6 million employees are covered by industry CLA's, 88 percent direct and 12 percent due to binding generally decision.[8] Legal binding applies to employees (that are no member of an union) whereof the employer is participant in a CLA. On basis of article 14 Dutch law on CLA's (hereinafter: ACLA), the employer is obliged to apply the CLA also on the unorganized employees.

1.5 The relation between unions and works councils

In legislation there is no distribution of tasks between the unions and the works councils. But according to provisions of the Works Councils Act priority is granted to trade unions. If conditions are already fully regulated in a CLA, it is out of the hands of the works councils.[9] Moreover, if works council has made agreements with the

[5] SER, draagvlak cao afspraken, p. 12.
[6] Article 14 ACLA.
[7] Article 2 Act on Declaring Provisions of a Collective Agreement Generally Binding.
[8] Ministerie van SZW (2011) Voorjaarsrapportage cao-afspraken 2011, p. 69 e.v.
[9] H.L. Bakels e.a., *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2013, p. 335.

employer, binding effect on the employees is lacking. The works council has no competence to conclude CLA's that are binding for the individual employer.[10] [11] More on the subject of works councils is found in chapter 5.

[10] Unless an 'incorporation clause' has been inserted in the individual employment contract.
[11] H.L. Bakels e.a., *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2013, p. 336.

2. Short synopsis of the legal system

2.1 Formal definition

Article 1 ACLA contains a formal definition of a CLA. It qualifies a CLA as an agreement between one or more employers and one or more unions of employees. In the CLA are mainly or solely working conditions composed that need to be taken into account in employment. Neither the negotiations, nor the competence of the practice to bargain is regulated by legislation. Instead it is subject to jurisprudence.

2.2 Parties that can participate in the bargaining process

In principle, to participate in the bargaining process, the organization that wishes to participate needs to have legal personality according to article 1 ACLA. When this is the case, according to article 2 ACLA, organizations can enter into consultation of an CLA, if this competence of concluding CLA's is in their articles of association.

The Dutch Constitution contains the general right of association. This right is also acknowledged in article 5 of the Social Charter[12] and in the ILO conventions. [13]
However, there is no specific regulation that allows unions to participate in the bargaining process. Therefore, Dutch private law applies. In article 2:30 of the Dutch Civil Code and article 2 ACLA power to negotiate is obtained by incorporating the articles of association in a notarial authentic document. Further restrictions do not apply.

2.3 Conditions on the possible contents of CLA's

The system of collective bargaining has a civil law basis, the principle of freedom of contract is important. Parties have, in terms of the law, power to bind themselves.[14] There is no duty to take part in the process of collective bargaining nor to contract.[15] The statutory provisions that are contrary to the legal system are null.[16] This means that provisions like minimum wage, binding (minimum) statutory provisions and void

[12] Article 8 Dutch Constitution.
[13] ILO Conventions 87, 98, 149.
[14] H.L. Bakels e.a., *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2013, p. 244.
[15] SUPREME COURT 11 december 1992, JAR 1993/14, SUPREME COURT 18 june 1983/732.
[16] Article 3:40 Dutch Civil Code.

need to be taken in account. Also null are collective bargaining provisions that are discriminating.[17]

Denying a union access to collective bargaining can be unlawful. This can particularly be the case when a smaller union is allowed to participate instead of a union that is mere representative. If the union wishes to participate it has to argue why it wants to do so, and there has to be a chance to come to an agreement.[18] This will be further explained in chapter 3.

2.4 Proceedings that need to be followed in adopting a CLA and to allow that this agreement is generally binding

In order for a CLA to be valid, the agreement needs to be in writing.[19] All members of the parties that have adopted the agreement need to be given the opportunity to obtain the text of the CLA as soon as possible.[20] The employer is required to inform the employee which CLA is applicable.[21] Notice has to be given to the Ministry of social affairs.[22] The notice is required for qualifying the agreement as a CLA.[23]

Generally binding for both unorganized and organized employers and employees, can be obtained. This can be requested from the Minister of social affairs.[24] This is possible for a certain area or the whole country. Condition is that the CLA is applicable to an important majority of the employees. General binding is not retroactive, nor has it any aftereffects for employees who are not members of the unions. Management is often not included. More on the subject of the binding effect is found in chapter 4.

[17] Article 1 (3) ACLA. (Also discriminating in accordance to general provisions on discrimination in national and international law.)
[18] Mantel, 'Recht op toelating tot cao-onderhandelingen', SMA 2008, p.74 e.v.
De Laat, 'De categorale bond en de toelating tot cao-onderhandelingen.' TRA 2011/2.15.
[19] Article 3 ACLA.
[20] Article 4 ACLA.
[21] Article 7:655 (1) (1) Dutch Civil Code.
[22] Article 4 Wages Act.
[23] SUPREME COURT 30 november 2001, JAR 2002/16.
[24] Article 2 Act on Declaring Provisions of a Collective Agreement Generally Binding.

3. Do legal criteria exist for qualifying as a bargaining party (in the sense of being able to conclude collective agreements), if so, what are they?

3.1 Association rights

The Dutch Constitution (hereinafter: Constitution) does not entail specific legal standards to qualify labour unions. The Constitution recognizes the freedom of association in its 8th article: "*The right of association shall be recognized. This right may be restricted by Act of Parliament in the interest of public order."* There are no specific constitutional provisions that govern the association of workers or employers. The founding and organization of a labour union is governed by the general rules of the right of association. It results from the Civil Code that one is free to found an association.[25]An association is described as a *legal entity with members, which is focused on a certain goal*.[26] An association can be registered in a Trade Register

3.2 The ability to conclude collective agreements

Labour unions are not directly qualified to conclude collective agreements. For them to be able to do so they must have (1) *legal personality* and (2) they must be *empowered by their constitution to enter into collective agreements*. These 2 requirements follow from the articles 1 and 2 of the Act of Collective Agreements. A qualified trade union does not however gain a place at negotiations for collective agreements. Whether or not a trade union will bargain for a collective agreement is ruled by the general principles of private law and more specific the freedom to contract.

3.3 Legal personality

An association found by notarial act shall gain legal personality. The notarial act must include the association's constitution. These constitution comprise the name of the association, the registered office, the association's goal, their commitments to their members, how to call for a general meeting, the appointment and removal of directors and the procedures after dissolution.

[25] Civil Code Book 2, titel 2.
[26] Article 2:26 Civil code.

3.4 Empowered to enter into collective agreements

As mentioned above, the organization of associations entails the freedom of associations. The law does not provide any specific rules on how to organize the associations. However, associations must have a constitutional aim to conclude collective agreements to qualify as bargaining party. This will emphasize that membership of a bargaining party shall lead to commitment to collective agreements concluded by that party.

3.5 Bargaining criteria

By meeting the previous two standards a trade union can legally conclude collective agreements. As mentioned before, this does not mean that they will be automatically bargaining for the conclusion of such agreements. Parties are free to decide whether or not they want to bargain and/or conclude a collective agreement. The case law gives some rules on being able to demand a place at negotiations and the ability to refuse trade unions as bargaining parties. These rules follow from the representativeness of trade unions.

3.6 Representativeness

A requirement of representativeness is not derived from any law. According to the Explanatory Memorandum of the Law on Collective Agreements the legislature has intended to ensure that labour unions will only enter in collective bargaining for those employees whose interests it, according to its constitution, belongs to represent.[27] The Dutch Economic and Social Council has drafted guidelines with regard to representativeness. These guidelines can be used in determining the representativeness of a labour union, but are not decisive.[28]

A trade union's representativeness follows from its constitution. The requirement of being empowered to enter into collective agreement entails a requirement of representativeness in the sense that it specifies which employee's interest's the trade union wishes to represent. This is called the requirement of 'fictional representation' of the labour union. It can be easy for trade unions to bypass this requirement by given a spacious definition to the concept of 'employee whose interests it represents'

[27] idem
[28] A.T.M Jacobs *Mon. Sociaal Recht,* 'Collectief arbeidsrecht', p.37

in its constitution.[29] However, there have been in the past negotiations with labour unions without a constitution. They were not labour unions in the sense of the Act on the Collective Agreements. These unions do not, and cannot, conclude the CLA but they can influence the negotiations.
But still, constitutional representativeness does not give a trade union any right to negotiations. To claim a place at the negotiations one can take the path towards the court. There is no right to enter into bargaining for concluding collective agreements; it can be enforced by the wrongful act.

In some cases trade unions tried to claim their place at negotiations by arguing that they represent specific interest's that are not sufficiently represented by the other bargaining parties, claiming this was a wrongful act of those bargaining parties.[30] In this scenario it is relevant as well whether or not the bargaining party has been party to the previous collective agreements as well. If not, they must come up with arguments on the importance of entering into bargaining for this particular collective agreement.[31] In these cases the Courts applied a test of evident representativeness.

In one important recent case the Court decided that a trade union was not representative enough to conclude a collective agreement for all the employees of a warehouse. The main consideration was that in the trade union's constitution it was stated that they represent the interests of the higher personnel of warehouses. The concluded agreement contained provisions for the 'other personnel' and so the Court considered the trade union not able to legally conclude that collective agreement.[32]

But even when a trade union is representing specific interests, a place at negotiations is not always certain. In 2007 the Supreme Court refused to admit a trade union to claim place at negotiations. It considered that, in general, a trade union representing a majority of employees should have entry to negotiations based on their (evident) representativeness. But from the freedom to contract it follows that entry can be refused if the bargaining parties have the legitimate expectation that entry of that

[29] S.F. Sagel, 'Representativiteit van vakbonden en gebondenheid van werknemers aan cao's', *ArbeidsRecht* 2006, 44.
[30] Court Utrecht 8 april 1997, *JAR* 1997, 115.
[31] Court Utrecht 10 januari 2007, *JAR* 2007, 104.
[32] ECLI:NL:RBAMS:2005:AU8865.

particular trade union will lead to the impossibility to conclude a collective agreement, due to fundamental lack of understanding. The Court goes on considering that the interests of all parties must be weighed; the claim can be refused for reasons of justice and equity. The argument of being evident representativeness is insufficient to successfully claim a place at negatiations.[33]

3.7 Yellow unions

Yellow unions, trade unions that are directly founded in connection with a company can lack independence of the employer. There are only few examples in Dutch employment law history. Those examples are cases were an employer asked for dispensation of the generally binding effect of a collective agreement by act of the minister of Social Affaires, which will be further explained in Chapter 4. It follows from case law that yellow unions cannot be exempted from the generally binding effect if they are not 'really' independent.[34] In this regard questions as to the freedom to associate, free elections, financial resources and the right to strike play an important role. However, legal criteria are not given.[35]

[33] T. Jaspers, 'Toegang tot het cao-overleg', *TAP* 2010/2.
[34] Ktg. Utrecht 3 november 1994, *JAR* 1995/39.
[35] Manuscript ICAR 2011/2012.

4. What is the binding effect of collective agreements in your country?

4.1 Requirements for binding effect

The law requires that a collective agreement is conducted in writing.[36] The parties closing the agreement must have full legal personality (see above).

A second requirement follows from the *Act on Setting Wages*. This Act contains the exceptional possibility for the government to interfere in the concluding of collective agreements in the area of wage setting; therefore article 4 paragraph 3 requires that collective agreements are notified with the Ministry of Social affaires.[37] The Court has ruled that this requirement is a constitutive requirement for a legally binding collective agreement. [38]

4.2 Who is bound and who is not bound by a collective agreement

Collective agreements are concluded between bargaining parties. In line with general contract law the collective agreements are binding between those parties.[39] The scope of collective agreement is larger than that; the nature of the provision is decisive for the question who is bound to it. Article 9 paragraph 2 creates an obligation for all parties and members of parties to apply the CLA.

Bargaining parties are bound to each other on terms of their agreement, The bargaining parties are directly bound to all compulsory provision that link one directly to the other, this can be an obligation bargain after the collective agreement expired. They can enforce one another to comply with the provisions of that contract. If one fails to do so, the other party will have the possibility to claim compensation for damages next to the possibility to claim the application of the CLA.[40] The Act on Collective Agreements gives another way to enforce compliance in article 15. It opens the possibility for a bargaining party to ask for compensation of damages when the other party does not comply with the provisions of the collective agreement. The

[36] Article 3 ACLA.
[37] Article 4 Wages law.
[38] SUPREME COURT 13 april 2001, *JAR* 2001/82.
[39] Article 6:248 Civil Code.
[40] Article 6:74 Civil Code.

compensation will be determined with the rules of equity; the damages suffered can also be of an immaterial nature, like loss of respect and credibility. [41]

The members of those bargaining parties have transferred their own freedom to contract to the bargaining parties. The Act on Collective agreements has strengthened the binding effect of the collective agreement, in particular by the articles 9, 12 and 13.

According to article 9, para 1 all members are obliged to apply the collective agreement.[42] This horizontal obligation is binding between individual employers and employees, being members of the union party to the collective agreement. These obligations have a normative character. They fulfil the provisions of the employment contracts. The collective agreement transfuses its provisions in all individual employment contracts by declaring all contrary provisions null and replacing them automatically by the provisions of the collective agreement.[43] The binding of all 'normative' provisions is complemented by article 13 WCAO; the collective agreement has direct effect in the relationship between employer and employee when there's a lack of comparable provisions.

In the Netherlands most of the employees aren't trade union members.[44] When their employer is member of an employer's organisation, he is obliged to apply the collective agreement on all his employees, even those who are not a member of a trade union.[45] The employers have to offer an employment contract that is in line with the collective agreement. They can do so by submitting an incorporation clause stating that a collective agreement is applicable to the contract. In general it is sufficient to mention the sector bound collective agreement. The incorporation clause is dynamic, meaning that each time a new collective agreement is concluded, it will be applied to the employment contract. The incorporation clause makes the CLA binding for all employees, bound and not bound. Another way for the employer to apply the collective agreement is by integrating all of the provisions of the collective agreement in the employment contract.

[41] Article 16 ACLA.
[42] Article 9 par. 1 ACLA.
[43] Article 12 ACLA.
[44] In 2011 only 20% of all employees aged 15 – 64 with a work minimum of 12hours a week was member of a trade union.
[45] Article 14 ACLA.

It's important to bear in mind that the employer and not bound employee are still free to legitimately conclude an employment contract that differs from the collective agreement. The employer will risk that the trade union brings actions to him, based on article 14 and 15 Act on CA, claiming application and damages.

When a collective agreement is conducted in a certain area, all employers bound by this collective agreement must apply it. Provisions of a collective agreement can be of standard, minimum or maximum character. All provisions contrary to the collective agreement are null and void, when the collective agreement is of standard character. However, it is possible to deviate from a provision with a minimum character but only in a way that is more favourable for the employee.

The collective agreement will have binding effect until its expiration date, if that date is specifically mentioned in the collective agreement. The collective agreement can contain a renewal clause, renewing the duration of the collective agreement for the period mentioned in it.[46] In principle all collective agreement are concluded for a limited period of time, either mentioned in the collective agreement or, in absence of that for a period of a year. When there's no expiration date mentioned in the collective agreement, the agreement will automatically be renewed for the same period it was concluded. In general bargaining parties shall insert an expiration date, allowing the collective agreement to expire.[47]

An employer can decide to cease his membership to the employers' organisation.[48] He will rest bound to the collective agreement until the expiration of the collective agreement, or when parties decide to change the collective agreement. Renewal of the collective agreement does not bind the employer who ceased his membership.[49]

The expiration of a collective agreement, without renewal, does not entail the expiration of the binding effect of that collective agreement. It follows from case law that the provisions of the collective agreement will maintain their binding effect; this

[46] Article 19 ACLA.
[47] Grapperhaus, TC Arbeidsrecht, artikel 19 ACLA.
[48] Article 10 ACLA.
[49] Grapperhaus TC Arbeidsrecht, artikel 10 ACLA, aant. 2.

is called the 'aftereffect'.[50] The aftereffect continues until a new collective agreement is concluded. The aftereffect only works for the normative provisions. During this period the employer and employee can agree to differ from the provisions in the collective agreement. Their freedom to contract will only be for a limited period of time, until a new collective agreement is concluded. If they do not use their freedom to contract, the collective agreement will have its aftereffect.[51]

4.3 Extension of the binding effect

According to a specific act (the Act on Declaring Provisions of a Collective Agreement Generally Binding) the minister of Social Affaires can extend the binding effect of a collective agreement. He only can do so on request of the bargaining parties.[52] The request will be publicised in the *Staatscourant*. After publication of the request interested parties can express their concerns. If concerns are submitted the minister will ask the *Stichting van de Arbeid* for its advice. This advice does not need to be followed by the minister; he holds the competence to decide irrespective of the advice. The power of extending the effect is further regulated in a Ministerial decree (it is called *Framework for assessing the request for generally binding decision*). It contains procedural as well as substantive rules.

Extending the binding effect will happen in order to prevent that not bound employers are taking advantage of being not bound and offering employment conditions worse that those in the CLA (unfair competition). The aim is to avoid abuse of employment conditions in a certain industry. After the decision of extension all companies (in a certain industry) covered by the scope of the collective agreement are bound by the collective agreement. By a request an employer can ask for an exemption of being bound by that decision to extension. Employers can only ask for exemption on good grounds, like when they apply a company specific collective agreement.[53] For granting dispensation the minister will verify the independence of the labour union with whom the collective agreement is closed.[54] A decision to refuse the exemption is subject to appeal before the administrative court. [55]

[50] Hoge raad 9 juni 1987, *NJ* 1988, 70.
[51] Prof. Jaspers. – cao recht.
[52] Article 1 WACLA.
[53] Article 2 par. 1 WACLA.
[54] Court14 december 1988, *KG* 1989, 31.
[55] Art 1:2 jo 3:1 AWB.

A requirement for extending the effect is that agreement is already applied on at least half of the employees covered by the scope of that agreement working in that sector. It is, once again, within the competence of the minister to determine the decisive percentage. Guidelines on the assessment of the extension provide that a percentage of 60% will lead to extension. A percentage of less than 55% will not qualify for extension, unless there are special circumstances. For the calculation of this percentage all employees bound by the collective agreement count, even the unbound employees.

The extension of the binding effect of the collective agreement is binding for all employers in that industry within the scope of the agreement, except for those who have received dispensation. The minister can decide to declare only specific provisions of the collective agreement generally binding.[56]
The extension does not work retroactively[57], nor will it be binding after the expiration date: a so-called *aftereffect* does not exist for these generally bound provisions. However rights granted during the period of extension will not expire after extension has ended.[58]

Extension of the binding effect will only be given for a limited period of time. This period of time will be equal to the (remaining) period of the collective agreement but no longer than 2 years.[59]
During this period of time, the collective agreement will have the same force as without the extension. This means that all conditions and provisions different or contrary to the collective agreement are null and replaced by the provisions of the collective agreement for all employers in the sector of the collective agreement.[60]

4.4 Deviation from collective agreements detrimental to workers

Employers cannot deviate from provisions of collective agreements with a standard or minimum character. In general the collective agreements have mixed provisions with standard and minimum characters. Provisions have a minimum character if they allow

[56] J. Van de Hel, *'De spanning tussen algemeen verbindend verklaarde cao-bepalingen en de cao',* Arbeidsrecht 2001, 20.
[57] Article 2 par. 3 WACLA.
[58] SUPREME COURT 28 januari 1994, *NJ* 1994, 420 r.o. 3.1-3.2; Prof. dr. A.T.J.M. Jacobs, *Collectief arbeidsrecht,* p. 193 – 194.
[59] Article 2 p.ar 2 WACLA.
[60] Article 3 WACLA.

deviation in favour of the employee. Provisions with a standard character do not allow any kind of deviation. This will not be different if the works council or the employees themselves agree on the deviation. The possibility for the employer to conclude agreements with the work council on employment conditions is explained in Chapter 5.

4.5 Invoking compliance

As mentioned before the provisions of the collective agreement have direct effect in the relation between employer and employee. Provisions that are contrary to the collective agreement are null and replaced, by law; there is no action by any of the parties needed. The employee can invoke all those provisions in civil court, without interference of a trade union. He can do so, even after his employment contract has ended.

Besides the employee, trade unions can invoke compliance of the collective agreement's provisions for an employee, based on article 9 para. 2 Act on CA, even after an employment contract has ended. In that case the claim is not launched for one specific employee but on behalf of all employees victim to the employer's contract agreements. It is not necessary that the employees have opposed to their employment conditions. Trade unions can claim compensation for damages as well when an employer is in breach of his 'normative' obligations on grounds of article 15 and 16 Act on CA.

5. Do works councils have any formal role in the collective bargaining?

5.1 Introduction

Trade unions are the key and most important negotiation partners regarding primary employment conditions in collective agreements. This follows from The Works Councils Act.[61] As such, the thought is that works councils do not have any role with respect to drafting or amending primary employment conditions. Having said this, it is up to the discretion of the employer[62] and works councils to deviate from this principle. Such agreements however only have effect in case the employer does not wish to bargain with a trade union, there is no active trade union in the particular company to bargain with, or the trade unions have not regulated the particular subject with the employer, leaving maneuvering room for the works council.[63]

In practice, collective agreements more and more often contain decentralization clauses. In such clauses, the regular bargaining parties (trade unions) have decided that certain subjects are to be delegated to the power of the works council. This can hence include primary employment conditions. There is a dispute in case law and literature in which manner these (primary) employment conditions, agreed on with the employer, have effect in individual employment contracts on which the collective agreement is applicable.[64]

Apart from the formal bargaining position through decentralization clauses, works councils have a formal role with respect to specific regulations. These regulations specifically do not regard primary employment conditions, but are regulations separate from collective agreements. These regulations are limitative and specified in The Works Councils Act. If an entrepreneur whishes to implement such a regulation, the works council must explicitly approve the regulation.

[61] The Works Councils Act (WCA).
[62] Entrepreneur in the sense of the WCA, Article 1 sub d WCA.
[63] F.G Laagland, Decentralisatiebepalingen in cao's. De gedelegeerde rol van de ondernemingsraad bij primaire arbeidsvoorwaarden, Tijdschrift Arbeidsrechtpraktijk 2014(5).
[64] F.G. Laagland, Arbeidsovereenkomst, artikel 613 Boek 7 Dutch Civil Code, aant. 3.2.2.

5.2 Are works councils legally allowed to bargain with the employer and conclude agreements on employment conditions or other issues related to the interests of the employees?

The Works Councils Act

As briefly stipulated in the introduction, it follows from The Works Councils Act that works councils are not allowed to institute or amend primary employment conditions. The unions are the legal bargaining partners for primary employment conditions. This clear distinction is the fundamental principle which governs the relationship between works councils and trade unions. Works councils however have to give their consent for specific regulations which are directly related to the interests of the employees.[65] Art. 27 of The Works Councils Act includes a limitative list of regulations for which works councils must explicitly give their approval. These regulations are supplementary to the collective agreements and do not regard primary employment conditions. Section F of this chapter indicates the types of regulations for which works council approval is required. If the employer fails to acquire the consent of the works council, the particular decision by the employer can be nullified by the works council.[66]

Apart for the consent right, works councils have the right to advise the entrepreneur with respect to specific important resolutions.[67] This article, equipping the works councils with the right to advise also contains a limitative list of specific decisions. If an entrepreneur proposes a resolution (the resolution has thus not been made yet) which is stated in the list, the entrepreneur must ask the advice of the works council.

In addition works councils in the Netherlands have specific rights which are delegated to them in The Works Councils Act to bargain with the employer and conclude agreements issues related to the employees . Works councils are not obliged to use these rights.

[65] Article 27 WCA.
[66] Article 27 sub 5 WCA.
[67] Article 25 WCA.

Decentralization clauses in collective agreements

In practice, collective agreements can contain decentralization clauses. In such clauses, the regular bargaining parties (trade unions) have decided that certain subjects are to be delegated to the power of the works council. In other words: the trade unions and entrepreneur have deviated from the principle that works councils only have the advice and consent right provided by the law. Such clauses in practice can be divided into two categories: in the first category the rights of the works council provided by The Works Councils Act are extended and elaborated. This can entail that the works council is delegated the right to make agreements concerning primary employment conditions. The second category gives the works councils and entrepreneur the right to deviate from the collective agreement if they agree on certain regulations.[68] In this manner works councils can be granted the right to bargain with the employer and conclude agreements on employment conditions through decentralization clauses.

5.3 Legal effect of agreements by the works councils

The Works Councils Act

As stated, works councils have to be asked for their consent for certain regulations which the entrepreneur whishes to institute. If the works council approves the regulation, this regulation does not *ipso facto* legally bind the individual employees. The works council hence does not legally bind the employees. As such, works council agreements do not bind the employees in the sense that a collective agreement does. Having said this, employees are bound to the regulation if they explicitly opt in, or they silently agree.[69] Individual employment contracts often have a clause which states that individual employees agree with the regulations for which the works council has been consented to. In that case, the employees are generally bound to the works council regulations.

[68] F.G Laagland, Decentralisatiebepalingen in cao's. De gedelegeerde rol van de ondernemingsraad bij primaire arbeidsvoorwaarden, Tijdschrift Arbeidsrechtpraktijk 2014(5).
[69] L. Sprengers, T&C Arbeidsrecht, commentaar op artikel 27 WOR.

Decentralization clauses in collective agreements

There is a discussion as to the legal qualification of agreements which are made by the works council through delegated powers from a decentralization clause. Although such agreements are struck between the employer and the works councils, the agreements have a different legal effect than agreements based on The Works Councils Act. Agreements through decentralization clauses legally bind the employees. In case law and literature there is however a discussion whether this legally binding effect occurs directly on the basis of the collective agreement, or due to 7:613 Dutch Civil Code. This article entails that an employer is only allowed to amend an employment condition in case he has a overriding public interest.

In a recent judgment the Amsterdam Court of Appeal held that in case of a decentralization clause the employees are directly legally bound to the agreement.[70] The court hence did not explain the legal effect by using 7:613 Dutch Civil Code as was previously considered the legal tendency. The court held that agreements based on decentralization clauses are directly binding for employees and employers, as the trade unions have specifically delegated certain collective agreement rights to the works councils.

5.4 What is the relationship between works councils and trade unions in the context of collective bargaining?

Trade unions are the legal bargaining partners for primary employment conditions. This principle governs the relationship between works councils and trade unions. Both the unions and works councils thus have their own particular role with respect to collective bargaining. In theory this principle is clear and distinct. In practice however disputes can occur whether a works council has a say. For example when is a topic considered as a primary employment condition, and when is it considered a regulation for which the works council has to give its consent.

A study with respect to the relationship between the unions and works councils described the relation between unions and works councils as going 'from conflict to

[70] Hof Amsterdam 4 maart 2014, JAR 2014/119 (Grafimedia).

cooperation'.[71] Works councils and unions thus have moved from a power struggle to a mutual understanding to achieve the best possible employment conditions.

5.5 Can works councils agreements be invoked or challenged by individual employees?

As stated above, individual workers are by no means legally bound by agreements based on The Works Councils Act unless they opt in or implicitly agree. Employees can for example silently agree when the employer enacts the regulation and receives no complaints. In case employees do not wish to be bound to certain regulations, they can explicitly state this. This can be the case if the previous regulation on the subject was more beneficial for the individual employee. In such a case, the works council agreement can be successfully challenged by individual employees, that is, that the new regulations do not bind them.

It is quite a hassle for an employer to both consult the works council and let each employee opt in to certain regulations. Hence individual employment contracts often have a clause which states that individual employees agree with the regulations for which the works council has been consulted and agreed with.

5.6 Can works councils agreements deviate from collective agreements?

The Works Councils Act

Regulations made between the employer and the works councils cannot deviate from collective agreements. In article 27 WCA, which sets out the consent right, it is stated that in case certain employment conditions are regulated by the collective agreement, the works council is cannot give its consent.[72]

Decentralization clauses in collective agreements

In case collective agreements delegate power to works councils the works council is enabled to make regulations with the employer regarding primary employment conditions. In case the employer and works council decide to use such a delegated power, they can deviate from the primary employment conditions which are set out in

[71] M. van der Aalst, J. van der Veen, M. van Ewijk, Monitor medezeggenschap, trendrapport 2000-2003, eindrapport, Leiden, 2004 p. 37.
[72] Article 27 sub 3 WCA.

the collective agreement.[73] When the employer and works councils do so, the decentralized agreements are likely to be set out in a legal contract between the employer and the works council.[74] In this specific case, works councils are thus able to deviate from collective agreements.

5.7 Are there examples of issues that have been addressed by works councils agreements (if possible at all)?

The Works Councils Act

Art. 27 of The Works Councils Act includes a limitative list of regulations as to which the employer must ask consent of the works council to institute, amend, or withdraw such a regulation. The list includes the following subjects:

a) Any regulation relating to a pension insurance scheme, a profit-sharing scheme or a savings scheme;
b) Regulations relating to working hours or holidays;
c) Pay or job-grading systems;
d) Regulations relating to working conditions, sick leave or reintegration;
e) Regulations relating to policy on appointments, dismissals or promotion;
f) Regulations relating to staff training;
g) Regulations relating to staff appraisals;
h) Regulations relating to industrial social work;
i) Regulations relating to job coordination meetings;
j) Regulations relating to complaints procedures;
k) Regulations relating to the handling and protection of personal information of persons working in the enterprise;
l) Regulations relating to measures aimed at or suitable for monitoring or checking the attendance, behaviour or performance of persons working in the enterprise;

[73] F.G Laagland, Decentralisatiebepalingen in cao's. De gedelegeerde rol van de ondernemingsraad bij primaire arbeidsvoorwaarden, Tijdschrift Arbeidsrechtpraktijk 2014(5).
[74] F.G Laagland, Decentralisatiebepalingen in cao's. De gedelegeerde rol van de ondernemingsraad bij primaire arbeidsvoorwaarden, Tijdschrift Arbeidsrechtpraktijk 2014(5).

6. Concurrence of collective labour agreements in collective labour law

6.1 Introduction: the possibilities of Concurrence

The question to be answered in this paper is whether two (or more) collective labour agreements (on sector or company level) can be applied simultaneously in the same company? This question can be answered in the affirmative. It is possible that two (or more) collective labour agreements (hereinafter CLA) apply simultaneously in the same company.[75] When this occurs in legal terms one speaks of ´concurrence of CLAs´. Concurrence brings a number of complications for the employer and employees. First of all the employer has to be aware of the possibility of applying different CLAs on his employees. Secondly, he has a duty to apply their application on the relevant employee(s) at stake. There are a number of possible situations in which concurrence of CLAs may occur and to which the employer has to pay attention. While there are three major situations in which concurrence may appear, we add one other situation.[76] Also where possible solutions for concurrence will be provided and the applicable hierarchy between the CLAs will be discussed.

Concurrence may appear in the following four situations: 1. Concurrence due to the scope of CLAs (chapter 6.1); 2. Concurrence between a sector CLA and a enterprise CLA (chapter 6.2); 3. Concurrence between a sector CLA and decentralised agreements (chapter 6.3); 4. Concurrence after a transfer of undertaking (chapter 6.4). In the conclusion a recapitulation of the possible situations of concurrence will be given (chapter 6.5).

6.2 Concurrence due to the scope of CLA ´s

In a CLA a description is provided of the corporate activities being undertaken in the company and at times the CLA also mentions to which sector a CLA applies. This is referred to as the scope of the CLA. Concurrence based on the scope of a CLA, occurs when two different CLAs overlap each other as to their scope.[77] An example is the CLA for the 'Metaal industrie' (*Metal industry*) and the 'Metaal nijverheid' (*Metal activity*).[78] Some undertakings when reviewing their activities may fall under

[75] W.J.P.M. Fase & J. van Dongelen, *CAO-recht,* Deventer: Kluwer 2004, p. 104.
[76] Taking on the approach addressed in: E.N. Franx-Schaap et. al. , *De toekomst van het cao-recht*, Deventer, Kluwer 2011, p. 151-172.
[77] E.N. Franx-Schaap et. al., *De toekomst van het cao-recht*, Deventer, Kluwer 2011, p. 152.
[78] The difference between them is the scale of their activities. Employers belonging to the Metaal industry are the big firms whereas the others mostly are small enterprises.

the scope of the Metal industry CLA and they also may fall under the scope of the Metal activity.
In such situations the employer is confronted by two applicable CLAs, as mentioned before, because the scope of these two agreements overlap each other.

Another application of two or more CLAs is when an undertaking is composed of a plurality of individual units which fall within the scope of different CLAs, e.g. a warehouse that sells clothes, provides catering services and also has an indoor travel agency. The scope of each activity is different and falls within a different CLA, yet they are all situated in the same warehouse indicating that the employer has to apply three different CLAs.[79] After all although the warehouse is a unit, it provides a combination of different businesses. In the case *Iselmar*[80] the court ruled that it is not the sector in which the activities are being undertaken that is decisive for which CLA applies, but it is rather the scope of the CLA that determines under which CLA an employee falls. In this case Iselmar Recreation BV was in the context of the social security classified in the sector 'Klein Metaal' (falling under the CLA of Metal activity). On employee Derksen, who performed janitorial activities over the entire company, Iselmar applied the CLA of the Metal activity The Supreme Court decided, unlike the judges in earlier instances, that the CLA of the industry of 'Horeca (*the CLA for Hospitability branch)* had to be applied. The ground for that was that Horeca-CLA has been declared generally binding, and given the fact that Iselmar conducted activities which resorted under the scope of the Horeca-CLA, this CLA had to be applied and not the Metal activity CLA.

Solving concurrence

The above two situations bring some difficulties for the employer. In regard to the first example where two CLAs illustrate a certain overlap as to their scope, it could be difficult for the employer to determine which CLA should be applied. This existing legal uncertainty is hard to solve since there are no regulations and guidelines, ruling which CLA prevails.

Possible solutions for this kind of concurrence can be arranged in the CLA. A few examples can be given. The first one is that the CLA itself states that the CLA

[79] Unless the warehouse has concluded a Cla for the whole company, covering all activities of that company.
[80] SUPREME COURT 6 januari 1995, *NJ* 1995, 549.

will not be applied in case the other CLA is applicable. Still the most commonly used provision in most CLAs is that of exemption. It is an option in the CLA which allows an employer to request for exemption from the application of the CLA.[81]

It is also possible that a CLA is declared generally binding. In that case there are certain rules making sure to avoid concurrence.[82] These rules stipulate that CLAs which may overlap with one and other cannot be declared generally binding. Also in case the CLA was declared generally binding and in this period (there is always a fixed period for a CLA to be generally binding) there is overlap with a different CLA, then the law will make sure that this CLA will not be declared generally binding until the problem of overlap is resolved.

As to the second situation it does not as such impose difficulties for the employer. The employer in principle has to apply the CLA concerning the activities which the employee is conducting in that undertaking and which are within the scope of that particular CLA. The only issue is that the employer has to review carefully under which CLA the activities involved fall.

6.3 Concurrence between a sector CLA and an enterprise CLA

It is possible that in an undertaking besides the sector CLA also a enterprise CLA applies. Here the question may arise which of the two CLAs should be applied. In other words which CLA prevails. In this regard the commonly used principle is that the sector CLA prevails. The underlying thought is that the sector CLA aims at preventing competition on labour conditions and that may not be frustrated by an enterprise CLA.[83] In case the enterprise CLA has better labour conditions it is permitted to deviate in favour of the enterprise CLA only if the sector CLA has a minimum character. The court has stated in the case of *Boonen/Quicken* that it is not permitted to compare the two CLAs as a total package. All different parts have to be judged separately to review whether the enterprise CLA or the sector CLA is more favourable.[84] This is different in case the sector CLA has a standard character. In that case it always prevails even if the enterprise CLA is more favourable. The underlying

[81] M.M. Olbers, 'De toepasselijke cao in de samengestelde en geparallelliseerde onderneming', SMA 1985, p. 653/654.
[82] Toetsingskader ACLA 1 januari 2010, par. 6.2, under 1.
[83] J. Helmer & T. Jaspers, 'Decentralisatie en proliferatie: de cao artikel onder druk', *TRA* 2015, p. 7.
[84] SUPREME COURT 14 januari 2000/43 (Boonen/Quicken); SUPREME COURT 24 april 2009, NJ 2009, 105 (Teunissen/Welter Scheepvaart).

reason for this practise is the more importance that is given to the organizing function of the CLA than other goals of a CLA, such as the protection of the employees.[85]

Solving concurrence

As easy as it may be to prevail the sector CLA above the enterprise CLA it may be at odds with the freedom of contract and also with the principle of 'lex specialis derogate lex generalis'.[86] At times it is also necessary to negotiate an enterprise CLA based on the needs of the company, in other words instead of an 'one fits all' approach adapting measures based on the need of the undertaking. This is mostly important in case of an undertaking with different activities where it is more suitable that the union in the company represents the employees. Considering these concerns the employer may as a solution always give up his membership of the sector CLA. This way there will be no issue of concurrence anymore and the employer has to abide the provision enshrined in the enterprise CLA. If the employer would rather not give up his membership to the sector CLA, he may seek for possibilities to enter into dialogue with the unions, parties to the CLA and try to seek for arrangements that benefit both parties. The unions, parties to the sector CLA, can use the delegation provisions within the framework of the sector CLA or they can request for dispensation.

Determining Hierarchy

It is possible that a company- and a sector CLA conflict one and other. In such a case some scholars assert that the sector CLA should entail an explicit option to deviate –at the undertaking level - from the sector CLA.[87] In the absence of any guidelines and regulations for concurrence of CLAs, this falls within the freedom of the contracting parties to agree on such terms in order to make the decision for the applicable CLA easier and battle concurrence.

A different situation is when the sector CLA is declared generally binding by the Minister of Social Affairs. In that case the employer is not bound to the sector CLA through his membership of the employer's organisation, but because the CLA

[85] E.N. Franx-Schaap et. al., *De toekomst van het cao-recht*, Deventer, Kluwer 2011, p. 156.
[86] E.N. Franx-Schaap et. al., *De toekomst van het cao-recht*, Deventer, Kluwer 2011, p. 156.
[87] Helmer & T. Jaspers, 'Decentralisatie en proliferatie: de cao artikel onder druk', *TRA* 2015, p. 8.

has been declared generally binding. In case of conflict between the two CLAs dispensation can be requested from the Minister of Social Affairs.

6.4 Concurrence between a sector CLA and decentralised agreements

It is possible that a sector CLA entails provisions which delegate the competence to negotiate to a lower level, mostly to an undertaking level. The problem that arises here is that decentralised arrangements may be contrary to the provisions from the sector CLA. Consequently there is concurrence between the decentralised arrangements and the sector CLA.

Solving concurrence through case law

There are a few cases in which the Court has solved the issue of concurrence between a sector CLA and decentralised arrangements on enterprise level with a works council. The first case concerned a claim by the union that believed that the established arrangements with the works council did not meet the conditions of the CLA and therefore the CLA had to be applied. This is a form of concurrence because the decentralised arrangement is inconsistent with the requirements of the sector CLA and therefore the latter should be applied. The requirement of a minimum equivalent arrangement does not mean that every element of the arrangement should be equivalent, but that the arrangement itself at least must be equivalent. The Court has assessed the decentralized arrangement on the basis of norms in the CLA. Other matters the Court has given a dictum on is whether arrangements can be made with the so called 'Personeelsvertegenwoordiging' (*Staff Representation*).[88] In that regard the Court stated that the CLA only refers to a works council. Therefore a decentralised arrangement made with the staff representation is not valid. [89] Also in case an undertaking without a present works council has applied a decentralised arrangements on enterprise level. This arrangement has to deviate for the sector CLA.[90]After all deviation from the sector CLA is only possible on an enterprise level if this enterprise has works council.

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[88] In companies that does not meet the threshold of 50 workers employed, a Staff Representation will be established.
[89] Court of law Arnhem 23 december 2003, *JAR* 2004,30.
[90] Cantonal judge Utrecht 13 februari 2008, *JAR* 2008, 83.

6.5 Concurrence after a transfer of undertaking

The rights and obligations from the CLA to which the transferred employee is bound at the time of the transfer of the undertaking pass automatically to his new employer. Consequently the employer is possibly confronted by applying a different CLA on this transferred employee(s) than on his own employee(s), this leads to concurrence between the two CLAs and may also lead to major differences in employment conditions.

Based on Directive 2001/23/EC[91] the company that takes over the undertaking (transferee) has to maintain the employment conditions enshrined in the CLA towards the transferred employees it has taken over. In Dutch law this obligation to *maintain* the employment conditions of the CLA of the transferred employees is enshrined in article 14a ACLA and article 2a of the 'AVV-recht' (*Act on Declaring Provisions of a Collective Agreement Generally Binding*).

Based on article 14a of the ACLA all the rights and obligations from the CLA to which the transferred employee is bound will be automatically passed over to the transferee. However, the transferred employee is no more bound to these rights and obligations in the following situations.

i)when the receiver of the undertaking is being bound to a new CLA, after the transfer of undertaking, established CLA;

ii)when the new employer is being obliged to apply a CLA because it is declared generally binding;

iii)at the time that the duration of the CLA, to which the transferred employee is bound, has elapsed.

It is interesting to state that according to the decision of the Court of Justice of the EU[92] the transferee is not bound to the CLA of the transferee based on article 9 ACLA, but on the basis that the employer has to maintain the rights and duties from the CLA of the transferred employee(s). The duty to maintenance sees to the rights and duties as they were on the day of the transfer of the undertaking and not to later changes in the CA.

Solving concurrence

[91] Article 3 s.3 of Directive 2001/23/EC of 21 of March 2001.
[92] ECJ maart 2006, JAR 2006,83 (Werhof/Freeway).

The duty to apply the CLA of the transferred employee(s) comes to an end in case of one of the three situations above mentioned occurs. This does not mean that after that moment no duties and rights can be derived from the CLA of the transferred employee(s). There will be the 'nawerking' (*after-effect*) of the CLA. Due to the after-effect of that CLA terms in the CLA even after a transfer of undertaking keep their effect. The after-effect is the result of the consensus achieved between the employer and the employee to make the CLA conditions part of the labour contract. This applies to the parties bound by the CLA. In case of employees not being bound, there is no need for an explicitly present consensus in order to apply certain CLA conditions on them. In most cases certain CLA conditions apply because of an incorporation clause in the labour contract, through which the old CLA conditions become part of the labour contract and remain their application. This aftereffect comes to an end in case the new employer and the transferred employee agree on other labour terms. The after-effect also does not apply if the CLA of the new employer is declared generally binding. Declaring a CLA generally binding is the task of the government. When it sees the need to declare a CLA generally binding this will be done for a well determined limited period of time. [93]

Determining hierarchy

Article 14 a ACLA provides also the principle of favourability. In principle Dutch CLAs have a minimum character. As such it is possible for the employer to derogate from the CLA, but only in favour of the employee.[94] Court rulings have previously decided on this matter and have stated that when two CLAs apply, the most favourable provisions from both CLAs must apply. [95] The derogation must be unequivocally favourable for the employee. The Court has ruled that when derogation is primarily unfavourable but the consequences of derogating are significantly favourable for the employee, the favourability principle permits derogation. [96] However, each provision must be revised separately. This decision of the Supreme Court[97] may imply that the CLA is not considered to be a 'package-deal'. Provisions derogating from the CLA that are favourable for the employee, cannot justify other

[93] Article 2 Act on Declaring Provisions of a Collective Agreement Generally Binding .
[94] Prof. dr. A.T.J.M. Jacobs, *Collectief arbeidsrecht,* p. 114.
[95] Court 's-Gravenhage 31 januari 1996, *JAR* 1996/60.
[96] Court Utrecht 15 september 1994, *JAR* 1994/198.
[97] Supreme Court 14 januari 2000, *JAR* 2000/43 (Boonen/Quicken)

derogating provisions that are unfavourable for the employee. Eventually, the employee benefits from the favourable provision in his individual employment agreement as well as the favourable provision from CLA.

6.6 Conclusion

It is possible that two (or more) CLAs apply simultaneously. This is a difficult situation for the employer. Especially since there is no uniform solution for the situations in which concurrence occurs.

There are four situations in which concurrence may occur:

- Two or more CLA are applicable simultaneously;
- Concurrence of a sector CLA and an enterprise CLA;
- Transfer of undertaking;
- Concurrence of a sector CLA and decentralised arrangement on the level of the enterprise.

Concurrence based on the material scope of a CLA, occurs in two situations. Different CLAs overlap each other as to their material scope. Another situation is when an undertaking is composed of a plurality of individual units which fall within the scope of different CLAs. As to the first situation this is to solve by arranging this kind of concurrence in the CLA. If the CA is enounced generally binding than there are certain rules making sure to avoid concurrence. As for the second situation the employer has to view the activities of his employees carefully and assess under the scope of which CLA these activities belong and as a result apply that CLA.

Some undertakings have besides the sector CLA also an enterprise CLA. In principle the sector CLA prevails over the enterprise CLA. Although if the CLA has better labour conditions it is permitted to deviate in favour of the enterprise CLA if only the sector CLA has a minimum character. If the sector CLA has a standard character, it always prevails even if the enterprise CLA is more favourable. Solving this concurrence is possible by terminating the membership of the employer to the sector CLA. Another option is to seek for possibilities to enter into dialogue with the unions party to the CLA and try to seek for custom arrangements.

In some sector CLA there is a provisions which delegate the competence to negotiate to a lower level, mostly to an undertaking level. The problem that arises here is that decentralised arrangements may be contrary to the provisions from the sector CLA. In such a case there is concurrence between the sector CLA and the

decentralised arrangements. The Court has provided for a number of dictums through which concurrence can be solved.

In case of a transfer of the undertaking the rights and obligations from the CLA to which the transfer-employee is bound at the time of the transfer passes automatically to his new employer. This leads to concurrence between the two CLAs, that of the employer and the transfer-employee. The employer has to abide to the CLA of the transfer-employee(s) until the maintenance duty comes to an end. Yet, the favourability principle will always give the transfer-employee(s) the right to prevail the more favourable terms from their CLA – as a result of after-effect- over the CLA of the new employer.

7. Changes in the collective bargaining system and decentralization trends

7.1 Introduction

As stipulated in this paper, collective agreements are of importance for nearly all employees whether they are members of bargaining parties or not. The scope of collective agreements (i.e. the number of employees bound by it) is very large. This large scope is very beneficial. Having said this Jaspers and Helmer have identified two trends which pose a possible threat to this scope.[98] First of all the bargaining process itself is decentralized. Second, the results of these processes are also decentralized. Jaspers refers to this as 'proliferation'.

7.2 Decentralization

Several authors have mentioned the phenomena of decentralization.[99] These reports show that decentralization has three main aspects.[100] The first of which is a shift in bargaining power. Since 1985 the power of employers has increased. This has been caused by an increase of international competition leading to cuts in costs including salaries and other employment conditions. These events have had an influence on the position of the bargaining parties. Companies need to be more flexible in order adapt to this change in market circumstances. Also employees themselves were expected to be more flexible. On a more decentralized level it is much easier to be flexible as a company and hence be able to adapt. This shift has subsequently resulted in a shift in power to local bargaining parties.[101]

A second important aspect identified by Katz with respect to decentralization is the increased importance of organization of topics and subjects related to "work floor". 'Restructuring of the workplace' is influenced by both technological and economic innovation. Local management is most able to deal with these changes of market circumstances. Subsequently, local employee organizations are more able to deal with measures imposed by the local management. Streeck coined this as "co-managing of

[98] T. Jaspers and J. Helmer, Decentralisatie en proliferatie: de cao onder druk?, Tijdschrift Recht en Arbeid, 2015, p. 1.

[99] H. Katz, 'The Decentralization of Collective Bargaining: A Literature Review end Comparative Analysis', in *Industrial and Labor Law Review*, 1993/47, No. 1 (1993). Among others: C. Schnabel, *Collective Bargaining under Stress: Decentralisation and Opening Clauses in Germany*, Paper workshop Rome 1999, (www.researchgate.net); and U. Zachert, '60 Jahre Tarifvertragsgesetz – Eine rechtspolitische Bilanz', *WSI Mitteilungen* 2009/4, p. 179-184.

[100] See Katz and the authors named by him in (note 16). For the Netherlands a.o. T. Jaspers, 'Decentralisation and Proliferation of Social Dialogue: a Crisis or a Challenge?, (note 1), p. 175.

[101] T. Jaspers and J. Helmer, Decentralisatie en proliferatie: de cao onder druk?, Tijdschrift Recht en Arbeid, 2015, p. 4.

the internal labor market".[102] Jaspers argues that local management can react better to external changes. New types of organization play an important role, for example: teamwork, compensation by employee performance, education and training on the job.[103]

A third aspect which has been identified as influencing the decentralization trend is the diversification in the structure of companies. So called 'business units' have gained an individual position within the company structure. Such units are accountable for their own performance. This could entail that interests of (groups of) employees become more diverse and that certain collective interests disappear to the background.[104] Due to a change and proliferation of interests, employees require custom tailored employment conditions that see on their specific condition and not only on for example working hours. This puts pressure on the traditional collective agreement and adds to the decentralization trend.

One important instrument through which the decentralization trend is realized is by means of a decentralization clause as discussed in chapter 5. Another instrument identified by Jaspers is by granting dispensation to companies of sector collective agreements. This means that companies can be granted the option in the collective agreement to request dispensation of the collective agreement. In such a manner companies can deal more adequately with external factors. This is hence considered as an instrument to decentralize. Studies have shown that the majority of sector agreements have such a dispensation clause.[105] These are often very broad, stating that the dispensation has effect with respect to entire agreement. In exceptional cases, the dispensation only see's on a specific part of the sector agreement.

7.3 Proliferation

Apart from decentralization another trend can be identified namely that of proliferation. More and more parties enter the bargaining processes. These parties

[102] W. Streeck, 'Neo-Corporatist Industrial Relations and the Economic Crisis in West Germany', in John H. Goldthorpe (ed.), *Order and Conflict in Contemporary Capitalism*, Oxford: Oxford University Press 1984, p. 291-314.
[103] T. Jaspers and J. Helmer, Decentralisatie en proliferatie: de cao onder druk?, Tijdschrift Recht en Arbeid, p.
[104] Katz, a.w., p. 17.
[105] T. Jaspers and J. Helmer, Decentralisatie en proliferatie: de cao onder druk?, Tijdschrift Recht en Arbeid, 2015, p. 9.

often have different interests among each other. Jaspers addressed the question whether the collective agreement is prone to pressure in case several bargaining parties conclude separate agreements with the employer.[106] Jaspers argues that due to this, the solidarity of these separate groups is turned inward. This can pose a threat to the essence of collective agreements. Having said this, the current situation in the Netherlands shows that proliferation of bargaining parties has been relatively limited.[107]

7.4 Closing Remarks

Decentralization of bargaining with respect to collective agreements is a development which cannot be stopped.[108] Decentralization is the answer to the increasing need of companies be more flexible, adapt to market circumstances and be able to customize employment conditions. Having said this, the bargaining structure itself is also prone to change: employers have to bargain with more parties which among themselves have different interests.[109] This increase in bargaining parties affects the solidarity amongst employees. Jaspers stated that although these developments are taking place, they have not yet resulted in a negative effect on employments conditions.[110]

[106] T. Jaspers and J. Helmer, Decentralisatie en proliferatie: de cao onder druk?, Tijdschrift Recht en Arbeid, 2015, p. 10.
[107] T. Jaspers and J. Helmer, Decentralisatie en proliferatie: de cao onder druk?, Tijdschrift Recht en Arbeid, 2015, p. 14.
[108] T. Jaspers and J. Helmer, Decentralisatie en proliferatie: de cao onder druk?, Tijdschrift Recht en Arbeid, 2015, p. 14.
[109] T. Jaspers and J. Helmer, Decentralisatie en proliferatie: de cao onder druk?, Tijdschrift Recht en Arbeid, 2015, p. 15.
[110] T. Jaspers and J. Helmer, Decentralisatie en proliferatie: de cao onder druk?, Tijdschrift Recht en Arbeid, 2015, p. 15.