

Collective Labour Agreements

1. Introduction

Terms and conditions of employment in the Netherlands are primarily the result of mutual agreement between employer and employee. However, this apparent freedom of employer and employee to determine terms and conditions of employment is bound by important restrictions. These restrictions exist in part because the position of an employee is usually much weaker than the position of an employer. Thus a complete freedom to negotiate terms and conditions of employment inevitably results in the employer having the upper hand and being able to unilaterally dictate terms and conditions of employment. In the Netherlands it is a generally accepted principle that the employee in his/her capacity of the weaker party should enjoy some degree of statutory protection.

The principal restriction as to the freedom to negotiate terms and conditions of employment is statutory law. Dutch employment law contains numerous statutory regulations, which are of a mandatory, semi mandatory or three quarter mandatory nature. This means that deviations are either not possible at all, possible by collective labour agreement (CLA) only, or possible in writing (agreement between parties).

2. Collective Labour Agreement (CLA)

Another restriction in contractual freedom can be the existence of an applicable CLA. A CLA is an agreement concluded between one or more companies (i.e. employers) or employers associations on the one hand and one or more (employee) trade unions on the other hand, which exclusively or primarily concerns employment conditions that need to be observed in respect of employment contracts. Examples of such employment conditions are salaries, working hours, paid holidays and overtime pay. In addition it is not uncommon for a CLA to contain regulations in respect of concluding and terminating employment contracts, schooling, redundancy or negotiations with trade unions in the event of a (collective) dismissal. Currently, approximately 85% of the Dutch workforce falls under the scope of a CLA.

In order for a CLA to be considered a valid CLA (as opposed to 'merely' an agreement between the contracting parties), the Minister of Social Affairs and Employment needs to be notified of the CLA and provided with the final text. Failure to notify results in the CLA lacking CLA status. Unless stipulated otherwise in the CLA, it is valid for one year. The term of validity is usually contained in the CLA and will normally amount to one or two years.

3. Types of CLA

In principle there are two types of CLA, a company CLA or an industry wide CLA. A company CLA is concluded between an (employee) trade union and a company directly and will as a rule only be

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applicable to employees employed by the company. An industry wide CLA is concluded between one or more employers associations on the one hand and one or more (employee) trade unions on the other hand and is applicable to all companies active within that the branch or industry. Industry wide CLA's are common in the more traditional sectors (metal, agriculture, construction, hospitals etc.), whereas company CLA's are common for large companies or new economy companies. In addition a CLA can be declared generally applicable (see below).

4. Contents of a CLA

As mentioned, statutory law defines a CLA as containing provisions, which exclusively or primarily concern employment conditions that need to be observed in respect of employment contracts. The phrase 'exclusively or primarily' indicates that other provisions may also be included. In principle a CLA may contain three types of provisions: normative or prescriptive provisions, obligatory or compulsory provisions and diagonal provisions.

Normative or prescriptive provisions are provisions which prescribe the contents of the employment contracts which fall under the scope of the CLA. Example of such provisions are those regarding salaries, working hours, overtime work holidays, etc. Due to their nature (they regulate the employment relationship between employer and employee) these provisions are also referred to as horizontal provisions. It is principally this type of provision which is eligible for general applicability (see below).

Obligatory provisions are provisions which regulate the relationship between the CLA parties themselves, i.e. the employers association(s) or the company on the one hand and the trade union(s) on the other hand. Such provisions may include topics such as dispute resolution or so-called 'truce provisions' (on the basis of which contracting parties resolve not to take collective action in order to bring about changes to the current terms and conditions of a CLA).

Diagonal provisions are provisions which are aimed at a particular party to the individual employment contract, usually the employer. Such provisions may for example concern conditions in the workplace, hiring, recruitment and co-determination.

5. General applicability of a CLA

A CLA has a limited scope. As will become evident below, in general a CLA can only bind an employer insofar as it is a member of an employers association which is a contracting party to the CLA. Consequently, employers which are not a member cannot be bound by such a CLA. Likewise, employees who are employed by such an employer cannot derive any rights from the CLA.

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In order to prevent unfair competition due to this possible distinction between member and non-member employers as regards the applicability of rules and regulations (read: the treatment of employees) and thus realise similar (decentralised) employment conditions on a branch or industry wide level, the Minister of Employment and Social Affairs has the authority to declare a CLA generally applicable. In the event that such a Decree is issued by the Minister every employer is bound by the regulations contained in the CLA, regardless of whether or not the employer is a member of an employers association which is a contracting party to the CLA. In other words: the generally applicable CLA acquires the legal force of mandatory law, and can thus be directly invoked in all of the relevant employment relationships.¹

The legal effect of the general applicability of a CLA is that provisions in the employment contract between employers and employees, which do not conform to the CLA, are null and void and are automatically replaced by those laid down in the CLA. However, deviations in favour of employees are permissible, provided that the CLA is a so-called "minimum-CLA ". In a so-called "standard-CLA" no deviations whatsoever are allowed.

Currently approximately 250 CLA's have been declared generally applicable. This amounts to some 70% of all industry wide CLA's and is an indication of the importance of generally applicable CLA's on employment relationships in the Netherlands.

6. Who is bound by a CLA?

The question as to who is bound by a CLA depends primarily on (i) on the type of CLA and (ii) the scope of the CLA.

Ad (i): the type of CLA

Applicability of a CLA varies, depending on the type of CLA in question and can be indicated by the following charts:

Company CLA	
Employer = contracting party to CLA	
Employee = member of trade union which is a party to the CLA	Employee ≠ member of trade union which is a party to the CLA
Applicable	Applicable

¹ For employers who apply their own company CLA this may create problems. The contents of the generally applicable CLA may conflict with the contents of the company CLA. However, it has become common policy for the Minister to exclude those employers from the general applicability, provided a timely (i.e. when the request for generally applicability has been made, but the Decree by the Minister has not yet been issued) request to that effect has been made by the employer.

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Normally, one would assume that an employee who is not a member of a trade union which is a contracting party to the CLA cannot be bound by it. However, statutory law prescribes that in that event a company CLA as well as an industry wide CLA is applicable. The underlying reason for this is that the Government was afraid that, if employees who are not members of a trade union would not be bound by the CLA, employees who are members of a trade union would thereby be undercut. As employers would not be bound by the rules and regulations contained in the CLA vis-à-vis non-member employees, it would be very beneficial and thereby more preferable to employ these employees than to employ member employees. Hence the applicability to all employees, whether they are members of a trade union or not.

Industry wide CLA			
Employer = member of employers association which is a party to the CLA		Employer ≠ member of employers association which is a party to the CLA	
Employee = member of trade union which is a party to the CLA	Employee ≠ member of trade union which is a party to the CLA	Employee = member of trade union which is a party to the CLA	Employee ≠ member of trade union which is a party to the CLA
Applicable	Applicable	Not applicable	Not applicable

As mentioned above, applicability of a CLA can also be the result of it being declared generally applicable. As the term suggests a generally applicable CLA applies to all employers and employees, regardless of the fact whether or not they are a member of an employers association or a trade union which is a contracting party to the CLA.

Generally applicable CLA ²			
Employer = member of employers association which is a party to the CLA		Employer ≠ member of employers association which is a party to the CLA	
Employee = member of trade union which is a party to the CLA	Employee ≠ member of trade union which is a party to the CLA	Employee = member of trade union which is a party to the CLA	Employee ≠ member of trade union which is a party to the CLA
Applicable	Applicable	Applicable	Applicable

Finally, applicability of a CLA can also be the result of a transfer of an undertaking (the sale and transfer of assets), a voluntary willingness on the part of the employer to observe the contents of a CLA (despite the fact that neither a generally applicable CLA exists nor that the employer is a member of an employers association which is a contracting party to a CLA) or through custom or usage.

Ad (ii): the scope of the CLA

In order to be bound by the rules and regulations of a CLA it is not sufficient to be bound as a result of the type of CLA in question as mentioned above, let alone for the CLA to have been declared

Alternatively, many CLA's contain the option for an employer to ask the contracting parties (or a body set up for this specific purpose) for dispensation.

² See also above.

generally applicable. Both employer and employee can only be bound by the CLA insofar as they fall within its scope. The scope of the CLA is usually contained in the wording of the CLA itself. It will contain definitions of what is considered an employer and an employee within the meaning of the CLA. However, the wording of the definitions is not always entirely clear, in which case one will need to interpret the wording of definitions in order to deduce whether or not the CLA is indeed applicable.

It is not uncommon for CLA's to exclude certain categories of employees, such as management staff, highly paid staff, holiday workers or trainees. In the event of a generally applicable CLA one needs to examine the Minister's Decree in order to determine whether one falls under its scope. More often than not the Decree will mirror the scope definitions in the CLA itself, but occasionally the Minister may decide to exclude certain (categories of) companies. In the event of an industry wide CLA one must verify whether the entire branch or industry falls within its scope. As with a generally applicable CLA, sometimes certain companies are excluded.

Then there is the issue of convergence. It is possible that a dispute arises as to which CLA is applicable in respect of a specific employee. This may occur if the scope definitions in the CLA are not clear. Imagine, for example, an employee who performs duties for a hotel as a cleaner. Does the employee in question fall under the scope of the CLA for the Hotel and Catering Industry or the CLA for the Cleaning Industry? This can be difficult to determine. The Supreme Court has ruled that, if and when the employee's duties which fall within the scope of a certain CLA are performed merely on a sporadic basis, such a CLA will not apply if the employer for which the employee works does not fall within the scope of that CLA. It is not so much the nature of duties which are performed by the employee but the nature of the company where the duties are performed which constitutes the decisive determining factor here. In the example this implies that the cleaner falls under the scope of the CLA for the Hotel and Catering Industry and not the CLA for the Cleaning Industry.

7. Collective Labour Agreements applicable to foreign employees?

In general the applicability of a CLA is limited to (companies operating in) the Netherlands. Such companies need to apply the regulations of the CLA to its employees working in the Netherlands³. Employees who are working outside the Netherlands on a temporary basis (secondments) are also likely to fall under the scope of the CLA.

What is the situation if an employee is employed by a foreign (read: Japanese) company and is working in the Netherlands? Is a Japanese company bound by the CLA or not?

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In the event that the employee is employed by the Japanese parent company but seconded to a Dutch branch office (as opposed to a legal entity, a subsidiary), the CLA will not apply, unless the CLA in question has been declared generally applicable. In the event that the Japanese parent company has a legal entity (a subsidiary) in the Netherlands, applicability will depend on the type of CLA in question. With a company CLA applicability is evident, as the subsidiary will be the contracting party. With an industry wide CLA this will depend on whether the subsidiary is a member of an employers association, which is a contracting party to the CLA. If the subsidiary is not a member, then it will not be bound by the CLA, unless the CLA has been declared generally applicable.

Would the situation be any different as regards the generally applicable CLA in the event that the employment relationship between the Japanese parent company and the Japanese employee is subject to Japanese law? For example a Japanese employee is employed by the parent company in Japan on the basis of an employment contract subject to Japanese law, but seconded to work in the Netherlands for either a branch office or a subsidiary.

Under Dutch law an employee who is seconded to work in the Netherlands on a temporary basis and based on an employment contract subject to foreign law, will still be entitled to certain statutory minimum employment conditions (holidays, equal treatment etc). With regard to a generally applicable CLA, statutory law contains a similar provision. Generally applicable CLA regulations regarding working hours, holidays, minimum wage, overtime pay, health & safety at the workplace and equal treatment also apply to the seconded Japanese employee, irrespective of the fact that his employment contract is subject to Japanese law. Until recently this regulation in respect of generally applicable CLA's was limited to the construction industry only. However, in 2005 a Bill has been introduced into Parliament which aims at extending aforementioned statutory regulations to all sectors as opposed to merely the construction industry. This Bill was adopted by Parliament and became law in December 2005.

8. Conclusion

CLA's are an important source of obligations in the Netherlands for companies to take account of. Despite the fact that a company may not even be a member of an employers association, it can still be subject to provisions of a CLA which has been declared generally applicable. This also applies to employees, who are employed by a Japanese parent company and seconded to the Netherlands, even if the employment contract is subject to Japanese law.

³ Provided of course that such companies as well as their employees fall under the scope (definitions) of the CLA, see also above.