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The Promotion of Collective Bargaining: Different Models

LLM THESIS

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TABLE OF CONTENTS:

	Page
<hr/>	
CHAPTER 1: INTRODUCTION.....	1
CHAPTER 2: THE FUNCTIONS AND INHERENT FEATURES OF COLLECTIVE BARGAINING.....	3
2.1 The Functions of Collective Bargaining	3
2.2 The Inherent Features of Collective Bargaining	4
CHAPTER 3: THE DIFFERENT MODELS OF COLLECTIVE BARGAINING.....	6
3.1 Introduction	6
3.2 The Purely Voluntary Model	7
3.3 The Voluntary Model Requiring Machinery to Promote Collective Bargaining	8
3.4 The Voluntary Model with Compulsory Conciliation	9
3.5 The Compulsory Model	10
3.6 The Essential Elements Required By All Models of Collective Bargaining	10
CHAPTER 4: COLLECTIVE BARGAINING AND THE ILO.....	13
4.1 The Collective Bargaining Framework of the ILO	14

CHAPTER 5: THE DUTY TO BARGAIN..... 17

5.1	Introduction	17
5.2	What the Duty Entails	17
5.2.1	Determination of the Bargaining Parties	19
5.2.2	Bargaining Unit Determination	19
5.2.3	Bargaining Subject Matter	20
5.2.4	Bargaining Conduct	20
5.3	The Purpose of Imposing a Duty to Bargain	21
5.4	Difficulties Incurred by Imposing Good Faith	25
5.4.1	Determining ‘Good Faith’	26
5.4.2	Tough Bargaining and Bad Faith Bargaining	26
5.4.3	Remedies	26

CHAPTER 6: COUNTRIES ADHERING TO THE COMPULSORY MODEL OF COLLECTIVE BARGAINING.....27

6.1	Introduction	27
6.2	The United States of America	28
6.2.1	The Historical Development of the Duty to Bargain	28
6.2.2	Current Framework in Support of Collective Bargaining	29
6.2.3	Effectiveness of the Duty to Bargain in the American System of Collective Bargaining	30
6.2.4	Difficulties Incurred by Imposing a Duty to Bargain	31
6.2.4.1	Establishing Good Faith	31
6.2.4.1.1	Expressed Declaration	32
6.2.4.1.2	Inferred from Conduct	32
6.2.4.2	Tough Bargaining and Bad Faith Bargaining	35

6.2.4.3	Remedies	36
6.2.5	Problems with the American Collective Bargaining System	37
6.2.6	Compliance with the ILO	39
6.2.7	Final Thoughts on the American System	40
6.2.8	Employee Free Choice Act (H.R. 800)	41
6.3	Canada	42
6.3.1	Historical Development of the ‘Duty to Bargain’	42
6.3.2	Current Framework in Support of Collective Bargaining	43
6.3.3	Effectiveness of the Duty to Bargain in the Canadian System of Collective Bargaining	45
6.3.4	Difficulties Incurred by Imposing a Duty to Bargain	48
6.3.4.1	Determining Good Faith	49
6.3.4.1.1	Conduct Considered to Weaken the Bargaining Process	49
6.3.4.2	Tough Bargaining and Bad Faith Bargaining	51
6.3.4.3	Remedies	53
6.3.5	Problems with the Canadian Collective Bargaining System	53
6.3.6	Compliance with the ILO	54

CHAPTER 7: COUNTRIES ADHERING TO THE VOLUNTARY

	MODELS OF COLLECTIVE BARGAINING.....	57
7.1	Germany	57
7.1.1	The German Collective Bargaining System	57
7.1.2	The Historical Development of the German Collective Bargaining System	59

7.1.3	The German Collective Bargaining System	
7.1.4	Effectiveness of the German System	60
7.2	Austria	61
7.2.1	The Austrian Collective Bargaining System	61
7.2.2	Effectiveness of the Austrian System	63
7.2.3	Compliance with the ILO	65
7.3	South Africa	66
7.3.1	Introduction	66
7.3.2	The Historical Development of the South African Collective Bargaining System	66
7.3.3	The Current South African Collective Bargaining Framework	68
7.3.4	Features of the South African Voluntary System	73
7.3.4.1	Compulsory Conciliation	74
7.3.4.2	Machinery to Promote Bargaining	74
CHAPTER 8: CONCLUSION.....		75
BIBLIOGRAPHY.....		76
CASES.....		79
LEGISLATION.....		80

CHAPTER 1: INTRODUCTION

The process of collective bargaining emerged as a consequence of the Industrial Revolution. It was developed as way in which workers could act together in order to attain greater bargaining power and protect their interests and job security more effectively. The process was initially very unpopular as it was seen as a threat to an employer's ability to make profit and as a process which contravened basic contractual principles. However, over time perceptions started to change and collective bargaining became more acceptable. Its popularity gradually grew and collective bargaining eventually became a standard feature of industrial relations systems in many industrialised market economies across the world. In fact its recognition, implementation and promotion have become so widespread in modern times that the bargaining process can be accurately described as a global phenomenon.

Two important factors that have contributed significantly to the almost universal acceptance of the bargaining process as a means of determining terms and conditions of employment. The first relates to the array of different functions served by collective bargaining and the second to the inherent features of the process, namely flexibility and adaptability. These factors have ensured that collective bargaining is actively pursued as a regulatory tool in industrial relations and that states implement measures and legislative frameworks which encourage and promote its use although in different forms and to different extents. This has given rise to various models of collective bargaining.

This paper sets out to examine in greater detail four of the more popular bargaining models that have emerged as mechanisms to regulate and promote bargaining collectively. This will be done with reference to five specific countries implementing either one or a combination of these models. The five countries that will be looked at are: The United States of America, Canada, Germany, Austria and South Africa. These bargaining regimes will be examined and comparatively analysed which will provide useful insight into the operation of

the different approaches, their advantages and disadvantages, the policy choices behind their implementation and how they are designed to address specific economic, political and social factors

The methodology of this paper will be to firstly set out the features that have made the process of collective bargaining what it is today. Secondly, the four different bargaining models dealt with by this paper will be briefly set out and discussed. Thirdly, collective bargaining in terms of the International Labour Organisation will be looked at. Fourthly, the duty to bargain as found in the compulsory model of collective bargaining will be explained which will be followed by an exploration of the bargaining regimes of two countries adhering to this approach. Finally the different voluntary models will be dealt with.

CHAPTER 2: THE FUNCTIONS AND INHERENT FEATURES OF COLLECTIVE BARGAINING

2.1 The Functions of Collective Bargaining

Collective bargaining has become one of the most important components of industrial relations systems globally. This can to a considerable extent be attributed to the fact that it serves a wide range of important functions which have resulted in its promotion internationally. The first and most important of these is the fact that it serves as a primary rule making device in collective labour relations. It affords both employers and workers the opportunity to decide upon terms and conditions of employment. This function is valuable as it allows workers the opportunity to actively participate in the determination of the rules that will govern their employment and this not only ensures greater protection to their interests but also affords more stability to the employment relationship as it is given more legitimacy and stability through the joined participation of employees and employers.

The reliance on collective bargaining as a means to regulate the employment relationship is also in many instances to be preferred over some of the other alternatives available. For example, collective bargaining is normally preferred over having employment terms unilaterally imposed, because unilateral implementation can result in the interest of workers being disregarded. It is also to be preferred over individual workers bargaining with employers as in this situation the power balance is distorted which can result in unfair or detrimental terms and conditions of employment being imposed. Lastly, it is also a preferable means of regulation than the imposition of legislation as legislation can be rigid and less capable of taking into account current business and economic trends.

Collective bargaining further serves as a means to regulate the conflict that occurs naturally in the industrial arena by providing rules designed to regulate and diffuse conflict

situations. This is important as ‘there must be rules designed to promote negotiation, to promote agreement, and to promote its observance, and there must be rules designed to regulate the use of such social pressure as must be available to both sides as weapons in the conflict.’¹ Collective bargaining does this by bringing the bargaining parties together in order to enable them to discuss their issues openly and resolve their dispute amicably and rationally through the establishment and reliance on certain procedures designed to aid dispute resolution. It is also utilised to provide parties with forums in which to voice their opinions and concerns and in certain circumstances introduces the presence of neutral third parties or arbitrators who are tasked with helping the parties break dead-locks in order to move closer to reaching a compromise.

Another important function of collective bargaining is to promote democracy in the workplace by allowing workers to participate in the decision-making processes. This helps create stability as it helps to obtain ‘the consent of those who have to live under the terms of the agreement which emerges from the bargaining process.’² This function is valuable for a healthy employment relationship as it ‘helps to substitute freely given consent for grudging or blind obedience.’³

The last function of collective bargaining that will be listed for the purposes of this paper is that of social protection. Collective bargaining functions as a tool through which workers can improve their social conditions and standard of living as in capitalist economies bargaining collectively is probably the ‘most potent anti-poverty program available.’⁴

2.2 The Inherent Features of Collective Bargaining

The functions and inherent features of collective bargaining have ensured the position of the

¹ Davies & Freedland *Kahn-Freund's Labour and the Law* at 28.

² Windmuller *Collective Bargaining in Industrialized Market Economies: A Reappraisal* 9.

³ Ibid.

⁴ The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United

process as ‘a key element of nearly all industrial relations systems of industrialised market economies, albeit with different styles, patterns and traditions in different contexts.’⁵ Two features are principally responsible for the variations of the bargaining process and hence the different models, namely the features of adaptability and flexibility, which have allowed countries, or different industries within countries, the option to customise the bargaining process to their own individual and unique needs. This is illustrated by the following statement:

Not only does collective bargaining allow for substantial inter-country variations, which indicate that it can adapt to a broad range of economic and political systems, but within a given national context it has shown itself able to adjust to the exacting requirements of many different industrial and occupational sectors, to the private as well as the public sector, to the single-plant units as well as to an entire industry, and to the skill of manual operatives or service employees as well as to the expectations of the most highly skilled professionals.⁶

These features have been instrumental in expanding the popularity of collective bargaining as it has allowed specific and unique needs of different states to be taken into account when adopting collective bargaining as a means of regulating the employment relationship through the adoption of different models. Models can vary on a number of different bargaining aspects depending on the needs of a particular country and can be seen as moving from the completely voluntary side of the collective bargaining spectrum right across to the completely compulsory side.

States - Issue Brief AFL-CIO September 2005 at 14.<<http://www.americanrightsatwork.org>

⁵ Bamber & Sheldon ‘Collective Bargaining: Toward Decentralization’ in Blanpain & Engel *Comparative Labour Law & Industrial Relations in Industrialized Market Economies* 513.

⁶ Windmuller (note 2) at 8.

CHAPTER 3: THE DIFFERENT MODELS OF COLLECTIVE BARGAINING

3.1 Introduction

This chapter explores four different bargaining models. As already mentioned, various types of bargaining systems have emerged over the years as countries have been able to adapt the bargaining process to best address their economic, political and social needs. These needs may range from requiring a system relying on state intervention in the regulation of the bargaining process to providing the bargaining parties with varying degrees of autonomy to regulate the bargaining process. A state can therefore assess its bargaining needs and implement a bargaining model best suited to address those needs as is indicated by the following statement:

Every democratic country faces this challenge of fashioning a system to minimize the undesirable aspects of unionism and to maximize unionism's potential as a constructive element in society. The designs of any system involves drawing the line between those issues regulated by law and those issues regulated by the market. Then, within the class of those issues regulated by law, it has to be determined whether the role of the law is to 'hold the ring' in which bargaining takes place or to specify closely the terms of the employment relationship and the mechanism of bargaining.⁷

Bargaining systems are usually categorised as being either compulsory or voluntary. However, this categorisation is too simple, because not only are there different degrees of voluntariness, but there are also different mechanisms available to regulate and facilitate bargaining. These possibilities make it possible to differentiate further between a number of voluntary approaches. This paper will look specifically at the compulsory model and three different voluntary approaches, which will be classified as follows: First, the purely voluntary model. Second, the voluntary model with machinery to promote collective bargaining. Third, the voluntary model with compulsory conciliation.

⁷ Pencavel 'The Appropriate Design of Collective Bargaining Systems: Learning From the Experience of Britain, Australian and New Zealand' *Comparative Labour Law and Policy*

3.2 The Purely Voluntary Model

This model incorporates all those collective bargaining regimes that have emerged through the efforts made by the bargaining parties themselves. It is referred to by this paper as the purely voluntary model as this is how the process of collective bargaining originally originated. It also remains the most voluntary bargaining model available to states as it operates free from state interference in the bargaining process. The following statement explains this approach:

The labour union movement, the collective bargaining arrangements, and the internal management of unions have developed with little statutory regulation. There is no law obliging private employers to bargain with unions, not anything that makes collective bargaining agreements enforceable in a court. There is no statement in law giving workers the right to strike.... The general position taken by the law on these issues is that they are best determined by the parties concerned, and that there is little need for regulation by the state.⁸

This does not mean that a state adhering to this model incurs no obligations or responsibilities in relation to the institution of collective bargaining. The state is under a duty to actively promote bargaining and to provide sufficient space within which it can occur. This is done by providing for a legislative framework which conducive to collective bargaining and supports its utilisation. Essential to this framework is the protection and guarantee of the right to freedom of association which provides the basic requirements needed for collective bargaining and the promotion thereof in a purely voluntary system by protecting the right to form and join trade unions, by protecting unions from unlawful interference from the state as well as employers and other non-state parties and by protecting lawful associational activities. These are crucial elements that must be guaranteed and protected as without them collective bargaining would not be possible. Without them employers and the state would be able to rely

Journal 1998-1999 (20) 447 at 470.

⁸ Pencavel (note 7) at 461.

on the law of contract and tort to dismiss workers or institute legal proceedings against them for participating in union activities and union members would not be able to build up sufficient numbers to constitute worthy bargaining opponents.

The most essential elements of this model are the right to freedom of association together with the right to strike. They are responsible for its effective operation and ensure that the parties are able to form and join unions for collective bargaining purposes and that they are able to embark on legal and protected industrial action without having to fear unlawful interference or victimisation. The protection of these two rights ensure the proper functioning of systems implementing this purely voluntary model. However, it is submitted by this paper that these elements are the driving force behind all the different bargaining models, whether they are compulsory or voluntary, and despite any mechanisms or procedures designed to regulate and facilitate bargaining.

3.3 The Voluntary Model Requiring Machinery to Promote Collective Bargaining

This model as with the original voluntary model, also relies on the protection of the right to freedom of association and the right to strike as essential elements required for the success of the establishment of bargaining relationships. However, unlike the previous model systems following this approach provide by means of national legislation machinery aimed at supporting and promoting collective bargaining. This is done by either establishing permanent, ad hoc or specialised bodies ‘whose purpose is to help promote collective bargaining by studying general problems, drawing up codes of good conduct and giving advice to the parties to help them solve particular problems they may encounter.’⁹ The machinery is designed to facilitate negotiation and also at resolving any disputes that may occur.

⁹ 1994 Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Report III (4B) at para 245.

Different types of machinery have been implemented by countries as the ‘development of machinery for collective bargaining and the characteristics of that machinery are the outcome of the particular needs and circumstances existing at country, industry and enterprise levels....’¹⁰ These include the establishment of joint bodies, forums, committees and councils which are responsible for providing a platform on which the parties can voice their opinions and bargain according to pre-established rules of conduct and procedures or in other cases in accordance with procedures which are to be determined by the parties, but which always leaves the outcome of the process up to the parties involved.

3.4 The Voluntary Model with Compulsory Conciliation

This model is also classified as voluntary as the state does not regulate or intervene in the bargaining process and the parties are permitted to establish bargaining relationships on their own accord. It protects the right to freedom of association and the right to strike and to this extent is the same as the previous two model. However, there is a substantial difference between this model and the previous two as it imposes compulsory conciliation as a pre-condition to a protected strike in circumstances where negotiations have failed.

Compulsory conciliation is a mechanism relied upon to minimise the need for industrial action. It compels the parties to the negotiating table after an impasse has been reached in an attempt to resolve the dispute through communication and in the presence of a neutral third. To this extent this model imposes a requirement which is very similar to a duty to bargain as found in the compulsory models, which is discussed below. However, unlike a duty to bargain, which compels a bargaining relationship as soon as a union has met the necessary threshold requirements, the bargaining parties in this model are only compelled to negotiate once they have established a bargaining relationship themselves and provided an impasse has been reached. Conciliation is also focused on the process of finding a compromise or on breaking a dead-lock whereas the a duty to bargaining is focused on the respective rights of

¹⁰ Windmuller (note 2) at 52.

the parties.

3.5 The Compulsory Model

The compulsory model adheres to a completely different set of principles than those followed by the voluntary models. Where the supporters of the voluntary models view state interference in the bargaining arena as undesired, the supporters of the compulsory model view it as beneficial, desirable and as a means of promoting the bargaining process. Therefore, this model compels the establishment of bargaining relationships through legislation by imposing a duty to bargain which is judicially enforced. Its characteristic feature is a high degree of state involvement in the regulation of the bargaining process. Both the legislature and judiciary are more actively involved in the bargaining arena than what is found under voluntary regimes. They regulate issues concerning the recognition of trade unions who allege sufficient representation, the establishment of a bargaining relationships, the appropriate unit for bargaining, the level at which bargaining occurs and many other aspects of bargaining collectively.

3.6 The Essential Elements Required By All Models of Collective Bargaining

Is important to note that despite the classification of different bargaining models, all the models essentially rely on three common features which are fundamental to any bargaining model. These three features constitute the core of the bargaining process as without them the collective bargaining process would not be possible.

The first essential element consists of the right to freedom of association together with its ancillary rights including the right to organise. This right can be seen as constituting the first step in the bargaining process. It creates the space in which bargaining is to occur by ensuring that employees and their unions have the means to organise and recruit members, by protecting certain associational activities which are required for the bargaining process and by protecting union members from being dismissed for participation in union activities or being victimised.

The second essential element consists of ‘the *freedom* to bargain collectively’ which can be described as ‘the negative right to collective bargaining.’¹¹ This freedom means that the state may not interfere with bargaining by way of laws, but it is a right which may also be enforced against other parties as ‘it is a right that may be enforceable against employers’ organisations and trade unions that, by collective agreement or by the exercise of economic power, prevent employers or and workers from engaging in collective bargaining.’¹²

The third essential feature relates the use of economic weapons in bargaining process. The use of economic power and the ability to bargain effectively have gone hand in hand since the advent of the bargaining process. Without the threat of economic reprisal there would be nothing to induce the bargaining parties to compromise with each another in order to conclude an agreement. Therefore, this element is crucial to any bargaining system in the private sector of labour relations¹³ and its importance, at least to some extent, is recognised by all collective bargaining models. This element can be seen as one of the final steps in the bargaining process, as it is only relied on where negotiations and other means of obtaining agreements have failed.

It can therefore be seen that all bargaining models are very similar in respect of the three abovementioned essential elements. Different systems may give effect to these elements in lesser or greater extents, but they must be given effect to if the bargaining model is to function as they form the core of the bargaining process.

However, the models obviously have distinguishing features that make it possible to speak of different collective bargaining models. These distinguishing features are to be found

¹¹ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* 388.

¹² Ibid.

¹³ The right to resort to industrial action, though being an essential component in bargaining models occurring within the private sector, is not an essential element of models found in the public sector dealing with essential

somewhere in between the second essential element and the third as it is the provision of different mechanisms aimed at facilitating, promoting and regulating bargaining that gives each individual model its characteristic features. They are aimed at compelling bargaining relationships to ensue or at making it easier for parties to meet at the bargaining table if they so choose by providing them with a forum in which they can discuss their issues. All these additional features are aimed at avoiding unnecessary unrest where this is possible. However, where the mechanisms and procedures fail to do this the ultimate way of settling disputes is still dependent on the ability of the parties to flex their industrial muscle.

services, as here industrial action could be hazardous to the lives and well being of people.

CHAPTER 4: COLLECTIVE BARGAINING AND THE ILO

Before the different models and their promotion of the bargaining process can be considered in greater detail it is imperative to understand the collective bargaining standards developed by the International Labour Organisation (ILO) and the implications of this on its Member States. It is also important to point out that the Organisation's perspective on collective bargaining is particularly important for the purposes of this paper, as each of the countries forming part of this comparative analysis are members of the ILO and they are therefore obliged to comply with ILO standards. These obligations will be set out below and will also be discussed in more details when considering the bargaining systems adhered to by each of the individual countries.

The ILO has recognised the importance of collective bargaining for many years and 'one of its chief tasks has been to advance collective bargaining throughout the world.'¹⁴ It has set out a specific framework within which it believes collective bargaining should occur in order for the process to be successful and Member States are under a duty to comply with the basics of this framework. This duty arises for Member States in one of two ways. The first relates to the ratification of ILO Conventions concerning collective bargaining. Conventions create international obligations and establish international labour standards. As soon as a state ratifies a Convention, which is done by signing it, the state is under a duty to comply with the requirements as set out in that Convention. In terms of collective bargaining, the two most important Conventions are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and The Right to Organise and Collective Bargaining Convention, 1948 (No. 98).

¹⁴ Gernigon, Otero & Guido 'ILO Principles Concerning Collective Bargaining' *International Labour Review* (2000) vol 139(1) 33 at 34.

The second way in which a Member State incurs a duty to promote collective bargaining in accordance with ILO principles, arises from the ILO's Declaration on Fundamental Principles and Rights at Work.¹⁵ It was adopted in 1998 and its importance lies in the fact that it imposes obligations on Member States, to observe the principles enshrined in the fundamental ILO Conventions, irrespective of whether or not they have ratified those fundamental Conventions. It provides that 'all Members, have an obligation, arising from the very fact of membership in the Organisation, to respect, to promote and realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights....'¹⁶ It is also important as it gives effect to the 1919 ILO Constitution as well as to principles contained in 1944 Declaration of Philadelphia. The Declaration 'codifies the ILO's long understanding of the fundamental human rights contained in its Constitution and standards, as comprising freedom of association and the right to bargain collectively; freedom from forced labour; freedom from child labour; and freedom from discrimination'.¹⁷ As can be seen, both the right to freedom of association and the right to bargain collectively, as provided for by Conventions No. 87 and No. 98, are such fundamental human rights and are therefore provided for by the Declaration. This means that the universal reach of the Declaration, has important consequences for the bargaining regimes of all ILO Member States, as they are under an obligation to 'respect, to promote and realise, in good faith' the fundamental rights concerning 'freedom of association' and the 'right to collective bargaining' even though they might not have ratified *Convention No. 98* or *87*.

4.1 The Collective Bargaining Framework of the ILO

As mentioned, the ILO sets out a specific framework within which it believes collective bargaining should occur if it is to be successful. This framework can be described as follows:

This framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of the independence and

¹⁵ ILO Declaration on Fundamental Principles and Rights at Work 86th Session, Geneva, June 1998.

¹⁶ Section 2 (note 15).

¹⁷ Swepston 'International Labour Law' in Blanpain Comparative Labour Law and Industrial Relations in Industrialized Market Economies at 45.

autonomy of the parties and the free and voluntary nature of the negotiations; it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organisations and workers' as the parties to the bargaining.¹⁸

There are three important elements that make up this framework. The first element comprises of the right to freedom of association and is provided for and protected by *Convention No. 87*. This Convention provides workers and employers with the right to establish and 'join organisations of their own choosing without previous authorisation.'¹⁹ It provides these organisations with the right to 'draw up their own constitutions and rules, to elect their representatives in full freedom...' and prevents public authorities from restricting or impeding this right or its lawful exercise.²⁰ It also obliges 'workers and employers and their respective organisations' to respect the law of the land while at the same time requiring the law of the land not to impair, nor be applied so as to impair the guarantees provided for by the Convention.²¹ In dealing with the protection of the right to organise, the Convention requires that all 'necessary and appropriate' measures be taken to ensure the right to organise is exercised freely.²² The right to freedom of association in terms of the ILO has a wide meaning and encompasses the right to organise and the right to bargain collectively as well. It constitutes a crucial element of the collective bargaining framework, without which collective bargaining could not exist properly.

The second element of the ILO's framework requires states to implement machinery to promote voluntary collective bargaining. This is provided for by Article 4 of Convention, No. 98, which states that '[m]easures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employer or employers' organisation and workers'

¹⁸ Gernigon, Otero & Guido 'ILO Principles Concerning Collective Bargaining' *International Labour Review* (2000) vol 139(1) 33 at 34.

¹⁹ Article 2 The Right to Organise and Bargain Collectively Convention, 1948 (No. 98).

²⁰ Article 3 (note 19).

²¹ Article 8 *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87)

organisation, with a view to the regulation of terms and conditions of employment by means of collective agreement.’²³ Article 4 clearly indicates the ILO’s preference for a voluntary approach to collective bargaining. This however, according to the Digest, does not mean that the compulsory model violates the principles or Conventions as set out by the Organisation, as it states that the fact that Article 4 does not ‘entail recourse to measures of compulsion’ does ‘not mean that governments should abstain from any measure whatsoever aiming to establish a collective bargaining mechanism.’²⁴ Measures of compulsion or degrees of voluntariness within a collective bargaining system are therefore left up to the state’s discretion, provided the parties are ultimately left free to conclude their own collective agreements and the terms thereof.

The third and final element involves the right to strike. This right according to the Digest is ‘one of the essential means through which workers and their organizations may promote and defend their economic and social interests’ and an ‘intrinsic corollary to the right to organise protected by Convention No. 87.’²⁵ It is a necessary part of the institution of collective bargaining and should therefore be given effect to by ILO Member States.

²² Article 11 Ibid.

²³ Article 4 (note 19).

²⁴ Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (2006) at 185.

CHAPTER 5: THE DUTY TO BARGAIN

5.1 Introduction

Before the bargaining regimes of the five different countries are discussed it is important to explore the most noticeable feature of the compulsory model of collective bargaining in greater detail. This feature is the duty to bargain and it is this model's primary means of regulating and promoting the bargaining process. It is very important to understand the origins and purpose of this model as it was designed with specific goals in mind. It first appeared in the labour legislation of the United States of America and relies heavily on legislative procedures and regulations to promote and regulate bargaining. Unlike the voluntary models, bargaining relationships are automatically imposed by statute once all necessary legislative requirements have been met making it unnecessary to rely on bargaining strength for the establishment of bargaining relationships.

This chapter looks at how the duty operates, how effective it is as a method of inducing meaningful negotiations and how successful it is at reducing industrial unrest in the collective bargaining arena. However, in order to evaluate the success or failure of the 'duty to bargain' approach effectively, it becomes necessary to compare the compulsory model with the voluntary models of bargaining. In order to establish whether a particular approach can be said to be superior at promoting collective bargaining.

5.2 What the Duty Entails

The 'duty to bargain' entails the imposition of a legal duty on an employer to bargain in good faith, with a trade union recognised as the bargaining agent, over bargaining subjects, for the appropriate bargaining unit. The obligation to negotiate arises once a union has attained the majority of support from the workers in a bargaining unit. Where a recalcitrant employer refuses to bargain, the remedy available to the union is a judicial one, constituted

²⁵ Ibid at 109.

by an order compelling the employer to bargain with the union.

One of the most striking implications of imposing a statutorily imposed duty to bargain is to involve the state more vigorously in the bargaining process. The state ensures the establishment of bargaining relationships by placing a legal duty on employers to recognise and bargain in good faith with unions who have attained bargaining status by meeting the necessary legislative requirements. The scope for permissible state intervention is limited to the establishment of relationships and the regulation of the bargaining process itself. It does not extend to the content and conclusion of collective agreements, as these are matters to be determined by the bargaining parties themselves.

The state's regulation is there to assist the parties to reach an agreement and to facilitate the process. However, if the parties are still unable to conclude a collective agreement after exhausting the statutory requirements, they may have to rely industrial action in an attempt to have their demands met. In this regard the compulsory model imposing a legally enforced duty to bargain is no different to the voluntary models. Both approaches rely on industrial action as the ultimate arbiter of bargaining disputes, as it is always relied in where other dispute preventing or dispute resolving mechanisms have failed.

The duty to bargain also has further important implications, as it involves more than simply compelling parties to the bargaining table. It signifies 'a policy regime that involves fundamental choices as to the form and level of collective bargaining and the nature of its regulation' and 'commits society to a collective-bargaining regime centered on the workplace rather than on the industry.'²⁶ It requires the state or its designated administrative agency to regulate the following fundamental bargaining aspects: First, they have to determine who the bargaining parties are and what threshold requirements must be met in

²⁶ Cheadle (note 11) at 390.

order for unions to obtain bargaining rights. Second, they are responsible for establishing the appropriate bargaining unit. Third, they regulate the subjects that may be bargained over. Fourthly, they are responsible for regulating the way in which bargaining is conducted by enforcing a duty to bargain in good faith. These issues are discussed in greater detail below.

5.2.1 Determination of the Bargaining Parties

The ‘duty to bargain’ arises once a trade union has acquired bargaining status. Therefore, the attainment of bargaining status is a crucial requirement that must be complied with before any bargaining can ensue. A union usually becomes entitled to recognition once it has reached the required level of representativeness, which means that it has sufficient level of support from the employees at the workplace or bargaining unit.

Recognition or bargaining status can be granted in various ways. It essentially depends on the law of a particular country. Provision is usually made for voluntary as well as mandatory recognition. Voluntary recognition involves an employer acknowledging a union who has met the bargaining threshold, without being compelled to do so. However, because employers are often reluctant to do so, provision is also made for mandatory recognition procedures. Mandatory recognition involves a statutory procedure which results in the certification of the union as a bargaining agent. It requires compliance with certain formalities, for example an election, and is therefore a more onerous process.

5.2.2 Bargaining Unit Determination

The bargaining unit is ‘that part of a workforce or workplace in which a union claims recognition and from which the members on whose behalf it negotiates are drawn.’²⁷ Its definition provides the boundaries separating those employees who are represented by the union and those that are not. These boundaries may be defined according to various factors such as trade, occupation, geographical proximity, industry or skill. The determination of

²⁷ Grogan *Workplace Law* at 363.

this unit is an important part the compulsory model of bargaining as ‘issues of representivity can be resolved only by reference to a bargaining unit.’²⁸ In most countries following the compulsory approach this determination is left up to the state and its specially appointed administrative agencies, who decide on these issues by referring to specific criteria that has been established to aid this determination.

5.2.3 Bargaining Subject Matter

The subject-matter that may be bargained over is also a matter capable of regulation by the state in the compulsory model of collective bargaining. Therefore, the range of permissible bargaining topics may differ from country to country as it is ‘influenced by various forces including the relative power of the parties, custom and practice, basic agreements and law.’²⁹ In the voluntary models of collective bargaining, it is mostly the bargaining parties themselves who decide on the range of negotiable issues and whether they wish to exclude certain topics from the bargaining table. In the compulsory model, the curtailment of permissible bargaining subjects are regulated by the state through the passing legislation. This affords the state the opportunity to play a greater role in the regulation and control of the bargaining process, if it so chooses.

5.2.4 Bargaining Conduct

The compulsory model of collective bargaining normally regulates bargaining conduct by imposing a duty to bargain in good faith. It also does so by prohibiting conduct amounting to unfair labour practices, which is a specific type of action taken by either a union or employer which countering effective collective bargaining.

In relation to the duty to bargain, the subjective standard of good faith requires the parties to ‘approach the bargaining table with a sincere desire to reach agreement on the

²⁸ Du Toit and others *Labour Relations Law: A Comprehensive Guide* (4ed) at 232.

²⁹ Bamber & Sheldon (note 5) at 535.

issues in dispute and to make a reasonable effort towards that end.’³⁰ It strives towards creating ideal bargaining conditions by prescribing to the parties how they should conduct themselves and what their attitude should be towards the bargaining process. It prohibits certain objective conduct which is considered to evidence bad faith. It also regulates bargaining conduct to the extent that it requires the disclosure of certain information and prohibits employers from bargaining with individual employees.

5.3 The Purpose of Imposing a Duty to Bargain

As mention earlier, the compulsory model of bargaining originated in the United States and was specifically developed and implemented by the government of the time, as it provided the means by which the state could regulate and facilitate the bargaining process, in a very particular manner and to a much greater extent than would have been possible by following a voluntary approach. Therefore, the purposes of imposing a duty to bargain must be discussed with reference to the American context in which it was developed.

The development of bargaining collectively in the United States did not follow the same path as it did in most other countries. In other industrialized market economies, the process of collective bargaining developed voluntarily and through the efforts made by trade unions, with little, if any assistance being provided by law. Where the law did offer assistance, it was usually in the form of legalising unions, permitting union activities and allowing union members and employers to resort to industrial action. However, the American approach departed significantly from this, as the process of bargaining was specifically adopted by the state as a national policy.

The Unites States enacted the National Labour Relations Act (NLRA)³¹ in 1935. Section 1 of the Act makes it clear that the principal reason for adopting this policy was to

³⁰ Feinsinger ‘The National Labor Relations Act and Collective Bargaining (1959) *57 Michigan Law Review* 807 at 811.

³¹ National Labour Relations Act 49 Stat. 449 (1935).

protect trade. Every paragraph under this section makes reference to either the protection of commerce, the promotion of commerce or eliminating causes which affects the free flow of commerce. The main threat posed to trade was the high incidence of industrial action, which made Congress decide to impose a collective bargaining regime which would enable the state to intervene in the bargaining process in order to ensure that its principal objective of protecting commerce was achieved.

Workers also benefited under this new policy even though their interests were only an indirect concern to Congress as it was found that ‘inequality of bargaining power...substantially burdens and effects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners....’³² Therefore, their interest had to be protected in so far as it would provide the labour force with greater purchasing power. The regulation and endorsement of collective bargaining could therefore be utilized to ‘eliminate certain sources of industrial unrest, to remedy the inequality of bargaining power between employers and individual employees, to increase mass purchasing power through increased wage levels, and to eliminate competitive advantages based on differentials in wage rates and working conditions within and between industries.’³³

To attain this, Section 8(5) was inserted into the NLRA. This section placed the employer under a duty to recognise a union as a bargaining agent once it has attained majority status and made it an unfair labour practice for an employer to ‘refuse to bargain collectively with the representatives of his employees....’ This rather simple provision was intended to serve several useful purposes according to Professor Cox, who said that by ‘reading the testimony, the debate, and the history of the times with a large measure of hindsight’ it is possible for one to discern four purposes which section 8(5) hoped to

³² Section 1 National Labour Relations Act 49 Stat. 449 (1935), as amended; 29 U.S.C. §§ 151-69 (1988).

³³ Feinsinger (note 30) at 810.

achieve.³⁴ The first purpose it would serve would be to decrease the number of strikes occurring for union recognition, by legally requiring an employer to recognise a union who has attained majority status. This would mean that a union with majority support would no longer have to strike in order to force an employer to recognise it as a bargaining partner as the employer would be legally obliged to afford the union its due recognition. Secondly, it would create a more equal balance of power between the parties through mandatory recognition, as this would prevent certain anti-union tactics designed to weaken the union, such as ‘the devastating psychological blow to have the employer shut the office door in the union’s face.’³⁵ Thirdly, it would ensure that the basic policy of the NLRA was given effect to by promoting collective bargaining as opposed to individual bargaining. Finally, it would involve a ‘rational process of persuasion’ which ‘enables employers and employees to dig behind their prejudices and exchange their views with the result that agreement is reached on many points while on others it is discovered that the area of disagreement is so narrow that compromise is cheaper than battle.’³⁶

Originally when the NLRA was enacted, no reference was made to good faith. This was because it intended for the duty to bargain to inquire into what happens between the employer and the union behind closed doors. It was simply intended as an obligation on an employer to recognise the duly appointed union and to bargain with it. However, this stance was soon believed to be inadequate as many employers resorted to surface bargaining. They went through the motions of bargaining by listening to the representations made by the union and then merely rejecting them. This mindset did not help the parties reach agreement and it also did not decrease the numbers strikes taking place. As a result, it assumed that it ‘was not enough for the law to compel the parties to meet and treat without passing judgment upon the quality of the negotiations. The bargaining status of a union can be destroyed by going through the motions of negotiation almost as easily as by bluntly

³⁴ Cox ‘The Duty to Bargain in Good Faith’ (1958) 71 *Harvard Law Review* 1401 at 1407.

³⁵ *Ibid* at 1408.

withholding recognition.’³⁷

To solve this problem Congress had to intrude further into the bargaining arena. This was done by amending the NLRA in 1947, by enacting the Taft-Hartley Act. Section 8(5) became section 8(a)(5), and section 8(d) was inserted which defined the meaning and extent of the ‘duty to bargain’ to include the requirement of ‘good faith.’ Section 8(d) also required the parties ‘to meet at reasonable times and confer in good faith’ and made it expressly clear that ‘such obligation does not compel either party to agree to a proposal or require the making of a concession....’ The purpose of this section was to promote meaningful negotiation and to prevent surface bargaining. It was aimed at bringing ‘to the bargaining table parties willing to present their proposals and articulate supporting reasons, to listen to and weigh the proposals and reasons of the other party, and to search for some common ground which can serve as the basis for a written bilateral agreement.’³⁸ This was required in an attempt to minimise strikes as it was believed that fruitful negotiations would enable the parties to resolve their differences amicably thereby reducing the need for industrial action. Economic power would still ultimately play a principal role in determining bargaining disputes, but it would only be relied on as a last resort as it assumed that the imposition of a duty to bargain in good faith would ensure that these instances were kept to a minimum by fostering friendly, rational and informed discussions and prohibiting conduct which would undermine a bargaining relationship. The following statement illustrates this position clearly:

Collective bargaining is not merely an economic exercise, being just as much an exercise in human relations. This latter aspect of collective bargaining cannot be carried on successfully if the parties are left free to resort to tactics inherently destructive of the bargaining relationship. The presence of a duty to bargain in good faith serves to control such tactics while still leaving the parties free to resort to

³⁶ Ibid.

³⁷ Ibid at 1412.

³⁸ Gorman & Finkin *Basic Text on Labor Law Unionization and Collective Bargaining* at 532.

legitimate economic sanctions.³⁹

The requirement of good faith meant that the parties had to ‘approach the bargaining table with a sincere desire to reach agreement on the issues in dispute and to make a reasonable effort toward that end.’⁴⁰ It works towards creating ideal bargaining conditions by prescribing to the parties how they should conduct themselves and what their attitude should be towards the bargaining process. It requires an open mind and a sincere desire to reach an agreement with the other, which makes a party’s state of mind important and in need of determination, through relying on a subjective test. However, the requirement of good faith, despite its aim of promoting industrial peace and facilitating bargaining, brought with it a range of new difficulties.

5.4 Difficulties Incurred by Imposing Good Faith

The imposition of a ‘duty to bargain in good faith’ causes many difficulties in practice. It requires a party to approach to bargaining table with a particular type of attitude which conforms to the generally accepted good faith standard. It requires a genuine desire to reach settlement and a willingness to listen to the other side with an open mind.

Essentially, good faith presents three challenging problems in practice which have to be dealt with by systems relying on this model of collective bargaining. The first problem relates to the way in which compliance with the good faith requirement is determined. The second deals with the delicate distinction that must be made between ‘tough bargaining’ and ‘bad faith bargaining’. The third problem relates to what constitutes an appropriate remedy for the breach of a duty to bargain in good faith. These problems will be briefly examined by this section. A more detailed analysis of how each country approaches these difficulties will be made when dealing with the bargaining regimes in place in each of the individual

³⁹ Arthurs, Carter, Fudge, Glasbeek & Trudeau ‘Canada’ in Blanpain *International Encyclopaedia of Labour Law and Industrial Relations* (1996), Kluwer Law International 259.

⁴⁰ Feinsinger (note 30) at 811.

countries forming part of the comparative analysis.

5.4.1 Determining ‘Good Faith’

This psychological standard is ‘extremely difficult to understand, articulate, or implement.’⁴¹ Ascertaining whether or not there has been compliance is difficult as this standard is ‘seldom capable of patent demonstration.’⁴² This difficulty leads to the risk of a party pretending to bargain in good faith as a skilled negotiator can simply mask their actual bad faith intention, by going through the motions of bargaining without having any real desire to reach an agreement with the other side.

5.4.2 Tough Bargaining and Bad Faith Bargaining

Another interesting problem that arises where a duty to bargain in good faith is imposed involves making a distinction between ‘tough bargaining’ and ‘bad faith bargaining’ as the duty to bargain in good faith specifically allows a party to be adamant regarding their bargaining position. However, in some cases a refusal to make concession or put forward proposal can be an indication that a party lacks good faith. Drawing the dividing line between permissible hard bargaining and being guilty of bargaining in bad faith can therefore be very difficult, if not impossible, to do accurately.

5.4.3 Remedies

Providing an appropriate remedy for the breach of the duty to bargain in good faith is another difficulty that arises. The compulsory models do not permit the state to determine the outcomes of collective bargaining. Therefore, it is not appropriate for a remedy to come to the aid of the innocent party by deciding the issues in their favour. Remedies must allow the parties the opportunity to determine the outcome themselves while at the same time also trying to put to an end bad faith bargaining.

⁴¹ Duvin ‘The Duty to Bargain: Law in Search of Policy’ *Columbia Law Review* (1964) vol 64 248 at 256.

CHAPTER 6: COUNTRIES ADHERING TO THE COMPULSORY MODEL OF COLLECTIVE BARGAINING

6.1 Introduction

This chapter looks at the collective bargaining regimes of the United States of America and Canada, which adhere to the compulsory model of collective bargaining. These states have implemented this particular model as it is perceived to offer certain specific advantages. These advantages include the fact that it offers the government more power to regulate and control the bargaining process as well as the fact that it compels the bargaining parties to the negotiating table as soon as certain mandatory requirements have been met, which helps to ensure that negotiation and the possible conclusion of collective agreements occur much sooner than would be possible in systems where unions have to first go on strike for bargaining status and the establishment of bargaining relationships. This also reduces the need for strike activity. However, it must be kept in mind that what is advantageous to the state may not always be advantageous to the bargaining parties. For instance, the fact that this model allows a much higher degree of state intervention can be disadvantageous to the bargaining parties, as it removes their power to decide on aspects of the bargaining relationships which in voluntary systems are normally left up to their autonomy. It can also have the effect of making the process more rigid as compliance with legislation and formalities become essential.

Therefore, this chapter looks at some of the potential advantages and disadvantages of the compulsory model by examining the bargaining systems of the above two countries. The approach will be to firstly, examine the historical development of the bargaining process as understanding the historical events that led up to the implementation of the compulsory model is crucial to understanding current attitudes towards the process. It also provides insight into

⁴² *Globe Cotton Mills v NLRB* 103 F.2d 91, 94.

the level of success the process has attained in each country, or alternatively, the reasons why the process has failed to achieve its objectives. The historical element is especially important with regards to the compulsory models as it is imposed by the state because of prevailing circumstances. Therefore, it is important to take note of the political, social and economic circumstances that were present at the time when the models were first implemented. The historical development will be followed by looking at the operation and effectiveness of the current framework and particular difficulties that arise in relation to the current framework. Finally, where the bargaining system of these countries do not comply with their obligations in terms of the ILO it will be pointed out and briefly discussed.

Another issue that will be addressed is whether or not the potential advantages offered by the compulsory approach can only be attained through imposing a duty to bargain or whether there are other less invasive means in which the same objectives can be achieved. As will be pointed out, there are other less invasive means of attaining these objectives, for example such the process of conciliation, which is required by some voluntary models and essentially serves a very similar function to that of a duty to bargain.

6.2 The United States of America

6.2.1 The Historical Development of the Duty to Bargain

Labour relations in America have since the start been characterised by severe hostility towards the process of collective bargaining. Employers have ‘from the beginning of the labour movement in the nineteenth century, used every means available to prevent unions from organizing, to defeat their efforts, and to destroy them were they became established.’⁴³ As a result of this adversarial attitude, collective bargaining initially played a very minor role in industrial relations. However, this situation became unsustainable during the Great

⁴³ Summers ‘Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy *Comparative Labour Law Journal* (16) 1994-1995 467 at 469.

Depression in the 1930's, when the country was experiencing a severe economic crisis. Congress realised that something had to be done to alleviate the problems caused by the economic depression that the state was faced with. It implemented federal legislation which adopted the process of collective bargaining as a national policy. The National Labour Relations Act of 1935⁴⁴ provided workers with many rights including the right to self-organisation, the right to form and join trade unions, the right to bargain collectively and the right to participate in 'other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'⁴⁵ It also outlawed certain behaviour, which had the effect of damaging the bargaining relationship, by prohibiting such behaviour as unfair labour practices.

Under the new system unions were able to flourish and many social and economic victories were won for workers. However, this prosperous time for collective labour relations was short-lived as during the 1940's and 1950's a perception started to develop that under the dispensation of the Act, unions were becoming too strong. This perception could largely be attributed to the significant increase in strike activity. As a result the NLRA was amended. The first amended took place in 1947 by the passing of the Taft-Hartley Act. The second occurred in 1959 by enacting the Landrum-Griffin Act. These amendments were mostly aimed at curbing union power. It had the effect of ensuring that union strength and the prominence of collective bargaining, as a method of determining terms and conditions on employment in the United States, began a long and steady decline that still continues today.

6.2.2 Current Framework in Support of Collective Bargaining

The law regulating collective bargaining in the United States of America has not changed much over the years since the implementation of the NLRA and its amendments. This Act remains the core piece of federal legislation responsible for the facilitation and supervision

⁴⁴ *National Labour Relations Act* 49 Stat. 449 (1935), as amended; 29 U.S.C. §§ 151-69 (1988).

⁴⁵ *Ibid* Section 7.

of collective labour relations. Bargaining still occurs at plant level, between the employer and trade union elected by the majority of employees. The trade union acquires the exclusive right to bargain on behalf of its members and non-members in the appropriate bargaining unit after it has satisfied the necessary procedural requirements. Once all the requirements are met, a duty to bargain in good faith is imposed on both parties. However, the duty to bargain does not take away the necessity of resorting to economic weapons as this is still ‘expected whenever the power of persuasion, including the threatened consequences of resort to economic warfare, fails to adjust the parties’ differences.’⁴⁶

6.2.3 Effectiveness of the Duty to Bargain in the American System of Collective Bargaining

Within the American system of collective bargaining, the imposition of a duty to bargain has not been as effective as was hoped for. This situation is as a result of many different factors all of which have caused a serious decline in the union density and success of American collective bargaining. In many cases the problems are attributable to the ‘legal and administrative policies concerning the enforcement of unfair labour practices or the certification of unions as bargaining agents.’⁴⁷ In other the problems relate to inadequate protection of bargaining rights such as the right to freedom of association, the right to organise and even the right to strike, which make it difficult for workers to organise successfully, join unions and exercise collective bargaining rights. Another very important factor contributing to the weak position of American collective bargaining is the fact that the NLRA does not promote collective bargaining adequately as its position towards the process is quite neutral. One of the primary concerns of the Act is the regulation of the collective bargaining process through laws and procedures without any focus on its promotion as required by the ILO. This is evidenced by the certification process which simply allows

⁴⁶ Goldman ‘*United States of America*’ in *Blanpain International Encyclopaedia of Labour Law and Industrial Relations* at para 564.

⁴⁷ Atleson ‘*Law and Union Power: Thoughts on the United States and Canada*’ in *Godowsky & Wilthagen Reflexive Labour Law* at 145.

employers to resist the certification of a union as a bargaining agent.

6.2.4 Difficulties incurred by imposing a duty to bargain

The imposition of a judicially enforced duty to bargain gives rise to many difficulties in practice. It also has a tendency to complicate the bargaining process as well as the relationships between the bargaining parties. These inherent difficulties have been the subject of discussion for many years as labour law practitioners and academics debate whether or not legislation should even impose this duty and attempt to generate the psychological standard of good faith. However, despite these recognised problems, the duty to bargain in good faith has remained an important part of the American collective bargaining framework for over fifty years.

This section deals with some of the primary difficulties incurred by imposing this duty. It will look at the problems incurred when trying to establish whether or not a party has complied with the requirement of good faith, drawing distinctions between bad faith bargaining and tough bargaining and providing for appropriate remedies where a party has been found to be in breach their duty.

6.2.4.1 Establishing Good Faith

The duty to bargain not only requires the bargaining parties to bargain with each other, but also requires them to bargain in good faith. Bargaining in good faith entails approaching the negotiating table with a particular subjective intention. However, a subjective state of mind is hard to detect accurately and therefore it requires compliance with a standard which is 'extremely difficult to understand, articulate, or implement.'⁴⁸ This inherent difficulty provides employers with the opportunity to breach the provisions of the NLRA by bargaining in bad faith because the likelihood of them being found out is slim as they can mask their actual subjective intentions, which is easy as bad faith can only be inferred from external evidence.

⁴⁸ Duvin 'The Duty to Bargain: Law in Search of Policy' *Columbia Law Review* (1964) vol 64 248 at 256.

In the United States, the courts and labour boards can infer bad faith either from the expressed declaration of a party or they can infer it from a party's conduct. These are discussed more fully below.

6.2.4.1.1 Expressed Declaration

The NLRB and courts can accept a lack of good faith if a party expressly declares that he lacks the necessary intention to bargain in good faith. This express statement is taken to reveal a person's actual state of mind. However, this is a situation that rarely occurs in practice and more often than not, the courts or Board will have to infer that a person has not complied with the subjective standard of good faith by looking at other external evidence.

6.2.4.1.2 Inferred from Conduct

Generally bargaining parties will not admit to the fact that they have contravened the law by declaring their lack of good faith during the negotiating process. On the contrary, they will attempt to conceal bad faith intentions and bargain 'with a view toward making the strongest record for NLRB scrutiny.'⁴⁹ Therefore, it becomes necessary for the courts and Board to establish whether or not a party has in fact bargaining in good faith by looking at the available external evidence.

There are three forms of external evidence that can be relied on in order to draw an inference of bad faith. The first is provided by a party's cumulative conduct. The second, by relying on a single act and the third, by examining the contents of a party's bargaining proposals. The courts or the Board may look at an employer's cumulative conduct and bargaining tactics to help it determine 'whether the employer acted like a man with a mind closed against agreement with the union.'⁵⁰ To determine whether the employer acted in this manner or not, one must ask another important question which is 'whether a normal

⁴⁹ Cox (note 34) at 1440.

employer, willing to agree with a labour union, would have followed the same course of action.’⁵¹ The process involves trying to deduce a person’s subjective intention by examining the totality of their actions. This determination is extremely difficult to make accurately. It is also risky as a party’s cumulative conduct may evidence bad faith while the person is actually bargaining in good faith and a person assumed to be bargaining in good faith might actually be bargaining in bad faith.

Another possible way to infer a lack of good faith by examining external conduct is through utilising the ‘per se’ doctrine. This doctrine differs from that of determining a lack of good faith through the evaluation of cumulative conduct as here a single act committed by one of the parties is automatically used to make a finding of bad faith. Acts constituting per se violations include the refusal to meet with the other side, refusing to sign a written contract which embodies the terms agreed to during the negotiations and refusing to provide the union with necessary and requested information. These acts are evidence bad faith immediately as they are ‘in the preponderance of cases likely to disrupt or frustrate negotiations and not likely to be justified by substantial business reasons.’⁵² However, the per se doctrine, although useful is not completely reliable either, as once again, it is possible that employer who has committed a per se violation has a valid justification for their conduct and therefore has not lacked a good faith.

The third way in which bad faith can be inferred through external evidence is by examining the contents of bargaining proposals. This method is however very problematic as the contents of bargaining proposals are matters to be left free from government interference and scrutiny. This position is clearly depicted in the NLRA which requires government intervention in order to facilitate and regulate bargaining, but makes it clear that the duty to bargain only requires the parties to meet and confer without being under any

⁵⁰ Ibid at 1418.

⁵¹ Ibid at 1418.

⁵² Gorman & Finkin *Basic Text on Labor Law Unionization and Collective Bargaining* at 532.

obligation to reach an agreement. This is because the whole idea behind the duty is to get the parties to the negotiating table and to regulate the procedures getting them there, but while at the same time allowing them the freedom to agree to their own terms without any state interference. In order to ensure this, Section 8(d) of the Act, states that a party is under no obligation to make proposals or concession. Therefore, the contents of an agreement should not be scrutinised by the state, as it is left up to the autonomy of the parties to decide to the exclusion of all others.

However, the problem with establishing good faith, requires the contents of bargaining proposals to be looked at in certain circumstances. This is necessary where the contents or proposals might evidence bad faith and obviously this is problematic as brings the Board and Court ‘dangerously close to substantive regulation of the terms of collective agreements.’⁵³ However, this power to do this is essential as ‘its absence might render collective bargaining a meaningless matter of form.’⁵⁴ Therefore, the contents of bargaining proposals must be taken into account if necessary, despite the risk of unwarranted government interference. This was recognised by the court in *Reed & Prince Mfg. Co.*⁵⁵ This case referred to an earlier decision which stated that it is not permissible for the NLRB ‘to sit in judgment upon the substantive terms of collective bargaining agreements.’⁵⁶ The court in *Reed & Prince Mfg. Co.* agreed, but held that even though the statement is true, it is nonetheless necessary for the Board to look at the content of proposal because ‘if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations.’⁵⁷ The court also made it clear that ‘while the Board cannot force an employer to make a “concession” on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his

⁵³ Duvin (note 48) at 250.

⁵⁴ Ibid at 250.

⁵⁵ *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953).

⁵⁶ *NLRB v. American National Insurance Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952).

differences with the union, if § 8(5)(a) is to be read as imposing any substantial obligation at all.⁵⁸

6.2.4.2 Tough Bargaining and Bad Faith Bargaining

Drawing a distinction between tough bargaining and bad faith bargaining is another difficulty that arises where a judicially enforced duty to bargain is imposed. This is especially so in those compulsory systems where there is no obligation to make proposals or concession. Under these systems, of which America is one, a party has a right to be adamant about their bargaining position and to protect it as vigorously as they possibly can. This position was affirmed by the court in *NLRB v Herman Sausage Company*.⁵⁹ The court held that ‘if the insistence is genuinely and sincerely held, if it is not a mere window dressing, it may be maintained forever though it produce a stalemate.’⁶⁰

However, problem here is that stubbornness can also be held to evidence bad faith, provided it is accompanied by other evidence indicating a lack of good faith. This as was pointed out by the court in *Chevron Oil Company v NLRB*.⁶¹ It held that the NLRA clearly states that a party is not obliged to make any concessions and this means that ‘adamant insistence on a bargaining position, then, is not in itself a refusal to bargain in good faith.’⁶² Therefore, it is up to the Board or the courts to determine whether a party is being legally adamant or whether their stubbornness constitutes bad faith. Various factors can be relied on to make this determination, but the ‘prevailing view appears to be that good faith bargaining must be assessed by looking at the totality of the parties’ conduct and that while rigidity is not itself a violation of the duty to bargain in good faith, it is evidence that the party has not come to the bargaining table with the requisite willingness to reach

⁵⁷ *NLRB v. Reed & Prince Mfg. Co.*, (note 55) at 134.

⁵⁸ *Ibid.*

⁵⁹ *NLRB v. Herman Sausage Co.* 275 F.2d 229 (5th Cir.1960).

⁶⁰ *Ibid* at 231.

⁶¹ *Chevron Oil Company, Standard Oil Company of Texas Division v. NLRB* 442 F.2d 1067 (5th Cir. 1971).

⁶² *Chevron Oil Company, Standard Oil Company of Texas Division v. NLRB* 442 F.2d 1067 (5th Cir. 1971)

agreement.’⁶³ Therefore, where an employer is stubborn with regards to their bargaining position, and adopts a take-it-or-leave-it position to the point that it seems that their mind has already made up regarding the negotiations and they are not willing to be persuaded, bad faith will probably be inferred. This is because it amounts to conduct on the part of the employers which ‘pre-empts the unions role as a partner in establishing the terms of the labour contract.’⁶⁴ However, a take-it-or-leave-it approach is not always considered an indicator of bad faith. Where a party sincerely puts forward its best as well as final offer, after which no further negotiations are possible, bad faith will not necessarily be inferred. In this regard, the circumstances of each case plays an important role in the determination.

From the above, it can be seen that drawing a distinction between hard bargaining and bad faith bargaining is a very difficult determination to make. It requires the courts and the Board to resolve complicated issues and this may involve the examination of the contents of bargaining proposals. The process therefore, requires these institutions to exercise restraint when making these determinations, so as to not over step the line in the bargaining relationship. These difficulties do not arise in systems where there is no duty to bargain as these systems do not rely on state intervention as they leave the regulation of collective bargaining matters up to the parties themselves.

6.2.4.3 Remedies

The remedies provided in circumstances where an employer has been found guilty of bad faith bargaining constitutes another problem area in the compulsory model of bargaining. The most popular remedy in countries following this model is the bargaining order. This remedy requires that a party who has been found guilty of bargaining in bad faith, cease and desist from such behaviour and immediately start bargaining in good faith. Unfortunately, it is a weak remedy as there are no sanctions for parties who do not comply with it. Therefore,

at 1072.

⁶³ Goldman (note 46) at para 561.

⁶⁴ Gorman & Finkin (note 52) at 649.

employers after being ordered to bargaining in good faith, simply continue to bargain in bad faith as bargaining orders allows the cycle of bargaining in bad faith to repeat itself. This is obviously detrimental to the bargaining process, especially in the American context, where unions are too weak to enforce their demands through strike action.

6.2.5 Problems with the American Collective Bargaining System

America has one of the weakest and most ineffective collective bargaining systems in the world. As a result, the plight of workers has worsened over the years and not much has been done to alleviate the position in which the country's collective bargaining regime finds itself. This grim situation can partly be attributed to the way in which the NLRA is administered, interpreted and enforced, which has the effect of placing employees and their unions in a precarious position in which their rights to participate in collective bargaining, especially those relating to the right to freedom of association and the right to strike are compromised and restricted. It can also be attributed to the fact that America does not comply with its international obligations as the NLRA fails to promote the process of collective bargaining .

Many problems arise as a consequence of the way in which the provisions of the NLRA are applied and interpreted. This statute, which was 'supposed to uphold and defend the right to form unions, has become a Catch-22 of ineffective enforcement and interminable delay.'⁶⁵ Both administrative and procedural delays are responsible for the suppression of workers rights and they undermine the bargaining process as unions might have to wait for years before the final determination of a dispute. These disputes can be in relation to a number of things ranging from an allegation of a refusal to bargain or an allegation of an unfair labour practice. The law and administrative policies do nothing to alleviate difficulties caused by the long delays. These delays are further contributed to by the fact that the NLRA does not provide the Board with sufficient powers to regulate these matters by itself. Therefore Board decisions are usually always subject to review.

⁶⁵ The Silent War (note 4) at 1.

The enforcement of the NLRA also creates difficulties as its provisions are not properly enforced. Therefore, employers are always violating the law as they know that most violations go undetected. In fact, even where there is a real possibility of being caught, the penalties are so minuscule that employers will often take the risk. For these reasons, violations of the NLRA are extreme and abundant. They go beyond firing workers for participating in union activities as employers often participate in other unlawful activities such as ‘surveillance, interrogation, unscheduled pay increases and threats of dismissal - without fear of facing ULP...charges.’⁶⁶ These are all prohibited activities that should be prevented in order to protect the institution of collective bargaining because they undermine its successful operation by intimidating workers and preventing them from unionising.

There have also been judgments handed down by the Supreme Court of the United States, which have interpreted certain provisions of the NLRA in a manner which is restrictive and oppressive to collective bargaining such as the decision which has made it more difficult for unions to get recognition as a bargaining agent by diverting from the previously held position that signed authorisation cards constituted sufficient proof of majority status, which has now has been made subject to the employers approval.⁶⁷ The employer will obviously prefer the union to go through the more difficult and time-consuming board election procedure as this affords them the opportunity to resort to tactics which will make the success of the union less likely.

Election procedures in terms of the NLRB are also detrimental to collective bargaining in the United States. The procedures make it extremely difficult for unions to succeed in meeting the requirement for certification. The situation is so bad that the election procedure has been described as a ‘deathtrap for workers’ aspirations, a parody of democracy and little more than a platform for employer coercion.’⁶⁸ It is a process characterised by extreme

⁶⁶ Ibid at 11.

⁶⁷ *NLRB v. Gissel Packing Corp.*, 396 U. S. 575 (1969)

⁶⁸ *The Silent War* (note 4) at 12.

delays before the election outcome is given, intimidation of workers so that they will be reluctant to vote for the union, coercion and the provision of incorrect information when a union request certain data from the employer.

The right to strike in another problematical area of collective labour relations in the United States. In principal the right is protected under section 7 of the NLRA which basically states ‘that employees have a right to engage in concerted activity for collective bargaining and other mutual aid and protection and section 8(a)(1) of the NLRA makes it an unfair labour practice for an employer to interfere with an employee’s exercise of a right protected under section 7.’⁶⁹ However, under the American systems it is permissible to replace striking workers with either permanent or non-permanent replacement labour according to a decision by the Supreme Court which found that an employer has the right to maintain the operation of his business during a strike and is therefore entitled to replace striking workers.⁷⁰ This situation obviously has a negative impact on the bargaining regime in the United States as in order for the bargaining process to operate successfully it must ensure the adequate protection of workers embarking on legal strike action.

6.2.6 Compliance with the ILO

The United States of America has not ratified the two main ILO Conventions concerning collective bargaining.⁷¹ However, as an ILO Member State it is nevertheless obliged to promote the principles enshrined in these Conventions, as they are contained in the ILO Declaration on Fundamental Principles and Rights at Work. This means that, despite not having ratified Convention No. 87, the right to freedom of association, which includes the right to organise and the right to bargain collectively, should be respected and protected. One of the most significant problems is the fact that the right to freedom of association, the

⁶⁹ Goldman *Labor and Employment Law in the United States* at 327.

⁷⁰ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S 333 (1938).

⁷¹ Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and The Right to Organise and Collective Bargaining Convention, 1948 (No. 98).

right to organise and the right to strike are not adequately protected.

In principle, the right to organise is protected and recognised by the NLRA ‘but when America’s workers seek to exercise this right today, they nearly always run into a buzz saw of employer threats, intimidation, coercion and outright warfare.’⁷² The violation of the right to organise is especially evidenced during election campaigns when employers are able to rely on many tactics to suppress workers’ rights. Some of these tactics are legal even though they have the effect of intimidating workers. Others are unlawful but the penalties imposed for taking part in such activities are so petty that it makes it ‘extremely cheap for an employer to illegally suppress the right to organize by firing union supporters.’⁷³ In fact, a ‘worker is fired or discriminated against every 23 minutes...for exercising their freedom of association’⁷⁴ and ‘one out of every four employers illegally fires workers for union activity during organization campaigns.’⁷⁵ The following observation has been made by Human Rights Watch regarding the American collective bargaining situation:

Our findings are disturbing, to say the least. Loophole-ridden laws, paralyzing delays, and feeble enforcement have led to a culture of impunity in many areas of U.S. labour and practice. Legal obstacles tilt the playing field so steeply against workers’ freedom of association that the United States is in violation of international human rights standards for workers.⁷⁶

6.2.7 Final Thoughts on the American System

America does not promote collective bargaining sufficiently in terms of its ILO commitments. It also does not afford adequate protection to some of the fundamental bargaining rights. These are the factors which have contributed to the steady decline of collective bargaining as a viable institution on the United States. This situation has cause American unions to place too much hope and emphasis on the ‘duty to bargain in seeking to

⁷² The Silent War (note 4) at 1.

⁷³ Ibid at 6

⁷⁴ Ibid at 3.

⁷⁵ Ibid at 6.

⁷⁶ Roth ‘Workers’ Rights in the United States’ Industrial Relations Research Association 2001,

establish bargaining relationships, despite their lack of economic strength to stand up to employers and to back up their demands. These unions have no alternative but to put all their aspirations into this rather weak legislative duty, which is easily side-stepped by skilled negotiators pretending to comply with its requirements. Employers also have no incentive for taking these unions seriously as there is no serious threat of economic reprisals that can harm their business. Therefore, employers simply fake compliance with the NLRA by going through the motions of bargaining.

It is submitted that if unions were strong enough to exert sufficient economic pressure on employers, they would be less likely to bargain in bad faith. It seems therefore, that the problem with imposing a duty to bargain, where it is unaccompanied by a strong trade union movement, results in wasted time because employers have no incentive for taking unions seriously, which are too weak to pose a severe economic threat. Meaningful negotiations require the participation of two opponents worthy of each other. It cannot occur where one party's power completely exceeds that of the other. The protection and promotion of the right to freedom of association, the right to organise, right to bargain collectively and the right to strike are therefore essential components in any system wishing to operate successfully and this is where the American systems lacks compliance. The situation can also be improved if collective bargaining in America more actively promoted. This can be done by simplifying the certification procedure, providing for first-agreement arbitration and making the use of replacement labour impermissible, which are issues contained in the Employee Free Choice Act discussed below.

6.2.8 Employee Free Choice Act (H.R. 800)⁷⁷

This Employee Free Choice Act is a bill that has been introduced to the House of Representatives and the Senate in the Unites States. The bill proposes to deal with some of

Perspectives at Work Vol 5 no 1 at 19-20 as quoted *The Silent War* (note 4) at 3.

⁷⁷ <<http://www.americanrightsatwork.org>

the problems that arise in the American collective bargaining system as a result the poor enforcement of, and inadequate remedies and penalties provided for, by the NLRA. The core objectives that the bill aims to achieve are the following: Firstly, making the certification of a union possible by showing signed authorization card as opposed to requiring the union to go through the more difficult NLRB election procedures. Secondly, providing first-agreement arbitration and mediation where bargaining parties to a newly formed bargaining relationship are unable to reach agreement on their first contract. Thirdly, by providing more powerful penalties where there is interference with the rights of employees to organise.

This bill will greatly assist collective bargaining in the United States if enacted, but it remains to be seen if this will ever happen. On 1 March 2007, the bill was passed by the House of Representatives. Its for the Senate and the President now to make their decision regarding the fate of America's workforce.

6.3 Canada

6.3.1 Historical Development of the 'Duty to Bargain'

Collective bargaining received no support from the Canadian federal government prior to 1944. The government took a non-interventionist approach and it was left up to workers themselves to establish bargaining relationships, without being provided with any of the basic bargaining rights such as the right to freedom of association and the right to organise.

However, all this changed in 1944 when a need to move from this non-interventionist stance arose as a result of the Second World War. The war provided the perfect opportunity for trade unions to grow in strength as 'the labour shortage and general economic recovery proved conducive to trade union organisation.'⁷⁸ However, this period of growth became problematic as unions became stronger and their demands to be included in the decision

⁷⁸ Arthurs, Carter, Fudge, Glasbeek and Trudeau 'Canada' in in Blanpain *International Encyclopaedia of Labour Law and Industrial Relations* at 45.

making processes became more serious while employers remained reluctant to participate in. This situation gave rise to high levels of industrial unrest, which could not be ignored by the government.

The Canadian government intervened promptly to diffuse the situation. This intervention came in the form of the federal government relying on its wartime emergency powers, permitting it to legislate on matters usually reserved for regulation by the individual provinces. P.C. 1003 was enacted which contained regulations dealing with collective bargaining. Most of these regulations were adopted from the American system as the American regulations provided a way in which government could promote, regulate and facilitate collective bargaining, through involving the state more actively in the bargaining process, while at the same time still providing the parties with the opportunity of concluding their own collective agreements. It seems therefore, that both Canada and the United States implemented the compulsory model of collective bargaining as their preferred method of regulation, in the belief that a more interventionist role by the government, in the regulation and protection of collective bargaining, would ultimately lead to a reduction in industrial unrest.

After the war P.C. 1003 was repealed and each province was once again entitled to implement their own legislation regulating labour matters. They all did, but the legislation adopted by each province was rooted in the war time regulations. As a result, the provisions of P.C. 1003 lived on, ensuring many similarities between the different provincial statutes adopted and giving Canadian labour law a distinctly American characteristic.

6.3.2 Current Framework in Support of Collective Bargaining

The institution of collective bargaining in Canada consists of eleven different bargaining systems. This number comprises the jurisdictions of the ten provinces as well as that of the federal sphere. However, despite the different systems, the general collective bargaining

approach is relatively the same, especially with the regards to the imposition of a duty to bargain. This makes it possible to deal with collective bargaining in Canadian generally and without having to refer to the positions under each of the different systems.

As already mentioned, the Canadian system of collective bargaining is very similar to its American counterpart as many features have been adopted from the United States. Thus, bargaining is mostly conducted at plant level and the principles of majoritarianism and exclusivity are adhered to. Legislation imposes a duty to bargain in good faith on an employer, once the union has met all the necessary requirements. These requirements usually relate to the union being able to show that it has attained the support of the majority of the employees in the appropriate bargaining unit. The purpose of the duty is the promotion of rational and informed discussion, which helps bargaining parties to resolve their differences, thereby preventing unnecessary industrial action.

The establishment of labour boards is another important feature of the Canadian system. These boards are responsible for implementing and regulating the collective bargaining legislation. They also deal with the certification of unions, the investigation of unfair labour practices and the provision of appropriate remedies where a party has been found guilty of violating the legislation.

The right to strike is another an essential component of the collective bargaining regime in Canada. However, this right is limited where there is a collective agreement in force and also for a limited time period after a collective agreement has ended.

The above American features and influences have however, been intertwined with distinctly Canadian features. One of these is the fact that Canadian legislation makes submission to conciliation a precondition to legal strike. This requirement only arises where the parties have reached a stalemate, having been unable to agree on terms satisfactory to

both sides. Conciliation can be seen as an instrument aimed at providing the parties with a final opportunity to resolve their dispute, before the need to resort to industrial action arises. Unlike the negotiations preceding conciliation, conciliation involves the introduction of a neutral third-party to help facilitate bargaining. This small addition has proved to be very useful in the bargaining dynamic as more than ‘half of all collective agreements are achieved with some third-party intervention.’⁷⁹

First-agreement arbitration is another feature imposed by several jurisdictions in Canada.⁸⁰ It is imposed where parties to a newly established bargaining relationship are unable to agree to an initial collective agreement. After providing the parties with the opportunity to present their case, an arbitrator is entitled to impose their first collective agreement on them. The possibility of having the terms imposed by an arbitrator provides a strong incentive for reaching an agreement. It also has a strong ‘deterrent effect upon other employers who might be tempted to adopt anti-union tactics when bargaining.’⁸¹ Both of these features provide numerous advantages for unions.

6.3.3 Effectiveness of the Duty to Bargain in the Canadian System of Collective Bargaining

Canada’s collective bargaining system is relatively strong and much more successful than its American counterpart. This being so despite both systems following a more or less similar approach. This fact provides proof that is not the imposition of a duty to bargain that has led to the failure of the American collective bargaining regime, but that its failure is in fact attributed to a range of other factors. The factors responsible for the failure of the American system were mentioned above and will not be mentioned again, except where necessary to point out how Canada’s different approach to these factors have resulted in a much more

⁷⁹ Thompson & Taras ‘Canadian Industrial Relations’ in Blanpain *Labour Relations in the Asia Pacific Countries* at 20.

⁸⁰ Canada, s 80; Manitoba, s 87; Newfoundland, ss 80.1 – 80.3; Ontario, s 41, Quebec, 93.1 – 93.9 as stated in Arthurs, Carter, Fudge, Glasbeek and Trudeau (note 76) footnote 1 at 254.

successful bargaining regime.

The recognition of collective bargaining, as an important element in labour relations, has allowed the Canadian trade union movement to grow steadily in strength and numbers while in the United States union density rates are amongst the lowest in the world. This gives rise to an interesting situation as '[o]rganisational levels in Canada and the United States were approximately equal in 1955.'⁸² The greater success of collective bargaining in Canada can in part be attributed to the fact that Canadian legislation is much more supportive of unions and this is evidenced in the manner in which labour provisions are implemented and regulated. Certification is easier, unfair labour practices are more strictly regulated and penalised, the right to organise is better respected and protected and some jurisdictions provide for first-agreement arbitration. Employers are also much less hostile to trade unions and their activities.

The Canadian labour boards and courts are also much more vigilant when it comes to protecting the right to organise and protecting employees from unfair labour practices. Both the 'federal and provincial statutes are more sympathetic in encouraging union organization and provide more effective remedies, especially since unions are often certified without the need for an election.'⁸³ In most of the provinces, unions get certified simply by showing that their employees make up the majority in the bargaining unit. A vote is not required and this makes certification easier and faster. It also decreases the likelihood of interference by the employer during elections. Trade unions are also normally shown greater support when only membership evidence is relied on as compared to when an election vote has to take place. This position can probably be attributed to the more informal and less threatening atmosphere of only requiring the show membership evidence. Only two provinces always require a vote, but their election procedures are faster and more shielded from unfair labour

⁸¹ Arthurs, Carter, Fudge, Glasbeek and Trudeau (note 76) at 254.

⁸² Atleson 'Law and Union Power: Thoughts on the United States and Canada' in Godowsky & Wilthagen *Reflexive Labour Law* at 139.

practices than is the case in the United States.

Canadian labour boards are also given greater powers to investigate allegations of unfair labour practices and to provide effective sanctions where they are found to have occurred. In many jurisdictions where an employer is found guilty of interfering with election campaigns, to the extent that the true wishes of the employees can no longer be established, the union will get certified even though it might not have majority support. This is an extremely powerful remedy for undue interference by employers and provides a strong incentive for them to not interfere with union campaigns.

Conciliation is another feature of Canadian collective bargaining that makes the process more successful. The duty to bargain gets the parties to the negotiating table so that they can take part in rational discussion, but they are left to their own devices and the statutory requirement of ‘good faith’ is seldom of any value in compelling the parties to deal with each other in a manner that will result in an agreement. The resort to economic weapons is therefore still very much relied on. But in Canada, before the parties may embark upon lawful industrial action, they need to refer their dispute to conciliation. This process involves the parties discussing their issues with each other once again, but this time it occurs in the presence of a neutral third-party who is there to facilitate the negotiation. This rather small change has proved to be very successful as experience “shows that the mere intervention of a neutral, independent third party, in which the parties have confidence, is often enough to break a stalemate which the parties would be unable to resolve themselves.”⁸⁴

Another important feature making collective bargaining more effective in Canada is the fact that many jurisdictions require first-agreement arbitration where a newly certified trade union is unable to conclude a collective agreement with the employer. As both parties

⁸³ Atleson *ibid* at 155.

⁸⁴ 1994 Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on

are normally reluctant to have an agreement imposed on them, they will usually make a greater effort to reach an agreement.

Overall, collective bargaining in Canada operates in a much more effective, supportive and favourable framework and ‘effectuates the Wagner Act design more consistently than does the American counterpart.’⁸⁵ The ‘duty to bargain in good faith’ has also attracted much less attention and litigation than received in the United States. It is submitted that the reason for this has to do with the fact that Canadian unions do not put all their hopes and aspirations in the enforcement of this duty as do the American unions. American unions are too weak to go on strike, so the use of economic power to attain their demands is not really an option. Their only hope is at the bargaining table, where their efforts are more often than not unsuccessful. Where an employer is found to have bargained in bad faith the NLRB simply orders the employer to start bargaining in good faith. However, there is nothing to prevent bad faith bargaining from continuing and the cycle repeats itself. At no point are the unions capable of breaking off negotiations and resorting to economic weapons to stop the cycle as they are simply too weak. This is not the case in Canada, as unions are sufficiently strong to constitute a worthy bargaining opponent capable of exerting pressure to enforce their demands.

6.3.4 Difficulties Incurred by Imposing a Duty to Bargain

Canadian collective labour relations are in a fairly good position, but this is not to say that it is without problems. Many of the problems experienced relate to the imposition of a duty to bargain in good faith. These problems will be discussed below and it will also be shown that the Canadian approach to dealing with some of these difficulties differs to the approach taken by its American counterpart. Overall, it will be seen that that the Canadian approach is much more simple and straightforward.

the Application of Conventions and Recommendations, Report III (4B) at para 247.

⁸⁵ Kettler & Warran ‘American and Canadian Labour Regimes and the Reflexive Law Approach’ in Godowsky & Wilthagen *Reflexive Labour Law* 104.

6.3.4.1 Determining Good Faith

There has been much opposition and debate regarding the imposition of a duty to bargain in good faith in Canadian labour law. The requirement of ‘good faith’ has been described as ‘not a part of the bargaining process and, indeed, seems impossible of attainment under the conditions of the existing economic system.’⁸⁶ However, despite these recognised difficulties, all eleven Canadian jurisdictions impose a duty to bargain in good faith.

The approach followed by the Canadian labour boards and courts, in determining whether the duty to bargain in good faith has been complied with, revolves around evaluating the employer’s objective conduct. No attempt is made at establishing their actual subjective state of mind. The focus is on the manner in which employers conduct themselves during negotiations. The labour boards look for objective conduct considered to weaken the bargaining process as indications of bad faith. Conduct which is considered to weaken the bargaining process is generally conduct which prevents rational informed discussion from taking place. It includes a refusal to meet, certain types of actions taken away from the bargaining table, unsuspected changes in bargaining positions, not substantiating bargaining proposals, failure to supply information, misrepresentation of information and ‘surface bargaining’.

The content of a proposal is seldom relied on in order to make a finding of bad faith. This will only be required if there is an allegation of ‘surface bargaining’. For this reason, problems arising in relation to surface bargaining will be considered separately from those concerning general conduct considered to weaken the bargaining process.

6.3.4.1.1 Conduct Considered to Weaken the Bargaining Process

An outright refusal to meet or placing unreasonable conditions that must be met before a

⁸⁶ Palmer ‘The Myth of “Good Faith” in Collective Bargaining (1966) 4 *Alberta Law Review* 409 at 417.

meeting will be agreed to, is obviously conduct which weakens the bargaining process as it prevents rational discussion from taking place. Where a party is guilty of such conduct, the boards will infer bad faith.

Premature and illegal strikes threats have been held to be conduct which weakens the bargaining process as it indicates a lack of desire to participate in rational discussion. The same has been held for circumvention of the bargaining agent and unilateral changes to terms and conditions of employment, where no valid justifications are provided.

Unforeseen changes in bargaining positions also undermine the bargaining process, as valuable participation in negotiation requires bargaining parties to be open about all the issues that need to be discussed and that these issues be placed on the bargaining table during the early stages of the negotiation. Where a party suddenly introduces new issues at a late stage of the negotiations one must be suspicious of their motives as such a tactics 'effectively destroys the decision-making framework.'⁸⁷

Reneging on a previous commitment is also considered conduct which weakens the bargaining process and unless there is a valid reason for reneging, a ruling of bad faith will be made as '[r]ational discussion requires that parties share the intention of narrowing whatever gap exists between them with a view to closing it completely. Once steps have been taken to narrow the gap, the onus should be on the party that backs away and retrenches to demonstrate that it did so with some legitimate purpose in mind....'⁸⁸

Canadian law requires bargaining proposals to be substantiated fully as this duty 'is crucial to the notion of collective bargaining as a rational process of persuasion and this is

⁸⁷ *Graphics Arts International Union v Graphic Centre (Ontario) Inc* [1976] OLRB Rep. 221 at 230.

⁸⁸ Bendel 'A Rational Process of Persuasion: Good Faith Bargaining in Ontario' (1980) 30 *University of Toronto LJ* 1 at 20.

for at least three reasons.’⁸⁹ These reasons are provided by Bendel as the following: Firstly, meaningful negotiation is only possible ‘if the premises, perspectives and factual elements that lie behind a position are articulated.’⁹⁰ Secondly, ‘the requirement to substantiate a proposal makes it somewhat less likely that frivolous or untenable proposals will be made.’⁹¹ The requirement that proposals must be substantiated also helps put a party in a better position to understand the other stance by requiring proposals to be explained. This helps to make the bargaining process more credible. Thirdly, it ensures that bargaining parties are ‘not only entitled to know the outcome of negotiations, but, if an impasse is reached, they are also entitled to know why there has been a failure to agree, something which could only be revealed if the perspectives of each sides’ position have been fully explained.’⁹² The reasons given, for this requirement to be sufficiently met, must be honest and rational. It does not however, have to be reasonable.

Employers will also be found guilty of bargaining in bad faith where they refuse to supply the union with information that is relevant to and necessary for rational and informed discussion.

Lastly, a finding of bad faith will be made where an employer who is under a duty to supply a union with information, supplies the union with false information.

6.3.4.2 Tough Bargaining and Bad Faith Bargaining

The main difficulty regarding the imposition if a duty to bargain in good faith arises when determining whether or not a party is guilty of surface bargaining. This occurs where a person has already made up their mind that they have no intention to work towards reaching an agreement and then simply go through the motions of bargaining in order to avoid a

⁸⁹ Ibid at 23.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid at 24.

finding that they have acted in bad faith. However, as already mentioned, according to Canadian as well as American law, parties are permitted to be adamant when it comes to maintaining their bargaining positions which does not amount to bad faith. This situation causes the problem of having to draw a distinction between ‘hard bargaining’ and ‘surface bargaining’. This distinction has attracted serious criticism against imposing a duty to bargain in good faith because not only is it extremely difficult to make this determination accurately, but it also involves the labour boards having to look at the content of bargaining proposals. However, the content of a proposal is not by itself sufficient to draw an inference of bad faith according to the *Toronto Typographical Union v The Daily Times*. This case held that surface bargaining can only be inferred after a party’s cumulative conduct has been looked at and that this examination would include looking at, but is not restricted to, the ‘adoption of an inflexible position on issues central to the negotiations.’⁹³ The court also held that it ‘is only when the conduct of the parties on the whole demonstrates that the one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of “surface bargaining” can be made.’⁹⁴

This above approach is clearly problematic as it makes it possible for a party with a clearly unacceptable bargaining proposal, to be found to be bargaining in good faith, as long as there are no other indications pointing in the direction of an unwillingness to reach agreement. This also enables a skilled negotiator, who has absolutely no intention of concluding an agreement, to pass the good faith test by going through the motions of bargaining.

It has been suggested, that in order to overcome this difficulty, the labour boards ‘should be prepared to hold that an employer whose contract proposals it considers unreasonable by reference to a particular objective standard is prima facie guilty of failing to

⁹³ *Toronto Typographical Union v The Daily Times* [1978] OLRB Rep. 604 at 610.

bargain in good faith' and that a 'similar inference should be drawn if the employer insists upon a proposal the possible consequence of which would lead to a deterioration in employees' terms and conditions of employment.'⁹⁵ Once this prima facie case is established, it will be the employer's responsibility to show that his conduct is not in breach of his duty to bargain in good faith.

6.3.4.3 Remedies

Canadian labour boards have much wider powers to provide remedies where a breach of the duty to bargain in good faith has occurred. As a result a wide range of remedies are capable of being used as long as it does not amount to the imposition of a collective agreement on the parties. This wider discretion allows the boards to provide more suitable remedies where employers are guilty of bargaining in good faith.

The situation in Canada also differs to that of America as first-agreement arbitration does provide a very effective remedy. It imposes a collective agreement on parties to a newly established bargaining relationship where they are unable to reach agreement themselves which provides a very strong incentive for concluding a collective agreement

However, one of the most popular remedies relied on, as in the United States, has been an order compelling a party to bargain in good faith if they have been found guilty of bad faith bargaining. Despite its popularity, this remedy is actually quite useless against an employer determined to undermine the bargaining process.

6.3.5 Problems with the Canadian Collective Bargaining System

In general the Canadian collective bargaining system functions quite well and promotes collective bargaining quite effectively. The only substantial problems seem to be those

⁹⁴ Ibid.

⁹⁵ Bendel 'A Rational Process of Persuasion: Good Faith Bargaining in Ontario' (1980) 30 *University of Toronto LJ* 1 at 24.

incurred by imposing a duty to bargain in good faith and those resulting from the fact that Canadian law does not fully comply with some of its obligations in terms of the ILO. This section will only deal with Canada's compliance with its ILO obligations as the difficulties incurred by imposing a duty to bargain in good faith have already been discussed above.

6.3.6 Compliance with the ILO

Canada is an ILO Member State and is therefore obligated to give effect to the fundamental principles enshrined in the ILO Declaration.⁹⁶ It has also ratified Convention No. 87 and has signed but not yet ratified Convention No.98. However, Canada has failed to comply with its international obligations in two respects. The first relates to the right to freedom of association as provided for by the Canadian Charter of Rights and Freedoms⁹⁷ which was contrary to the ILO standards up to 2007, and the second, relates to the exclusion of certain agricultural workers from participation in collective bargaining.

The right to freedom of association under Canadian law did not always correspond to the right to freedom of association according to the ILO. Unlike the ILO, which interprets this right to embrace the right to bargain collectively as well as the right to strike, the Canadian right was prior to 2007 interpreted narrowly by the Supreme Court of Canada and 'in the labour context included nothing more than the right to join a trade union.'⁹⁸ This position was affirmed by three Supreme Court decisions which have become known as the Labour Trilogy.⁹⁹ These three decisions by the court essentially defined the right to collective bargaining and the right to strike as 'modern and legislative and not fundamental.'¹⁰⁰

⁹⁶ ILO Declaration on Fundamental Principles and Rights at Work 86th Session, Geneva, June 1998.

⁹⁷ Canadian Charter of Rights and Freedom, Part 1 of the Constitution Act, 1982.

⁹⁸ Fudge 'Labour is Not a Commodity: The Supreme Court of Canada and the Freedom of Association' 67 *Saskatchewan Law Review* 2004 425 at 428.

⁹⁹ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424, 38 D.L.R (4th) 269; *Retail, Wholesale and Department Store Union v. Saskatchewan*, [198] 1 S.C.R. 460, 38 D.L.R. (4th) 277.

¹⁰⁰ Fudge (note96) at426.

However, the Supreme Court shifted from its position in the case of *Dunmore v. Ontario (Attorney General)*.¹⁰¹ The Court's decision signified a move towards an approach closer to that of the ILO's as it found that some union activities were inherent in the right to freedom of association. This position was shifted even further in June 2007 when the Canadian Supreme Court handed down its judgment in *Health Services & Support – Facilities Subsector Bargaining Assn. v. British Columbia*.¹⁰² The court held that the right to freedom of association as provided for by the Canadian Charter 'protects the capacity of members of labour unions to engage in collective bargaining on workplace issues.'¹⁰³ The stated the following in this regard:

Our conclusion that s. 2(d) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(d) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of **freedom of association** does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to **freedom of association**. Third, collective bargaining is an integral component of **freedom of association** in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.¹⁰⁴

The second way in which Canada does not comply with its ILO obligations is with respect to the exclusion of certain workers from collective bargaining and this contravention of ILO standards is still applicable. In certain provinces, farm workers are excluded from bargaining and this has formed the basis from numerous complaints being lodged against Canada as in the 'last twenty-two years, there have been some sixty-five complaints from

¹⁰¹ *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193.

¹⁰² *Health Services & Support – Facilities Subsector Bargaining Assn. v. British Columbia* 2007 SCC 27.

¹⁰³ *Ibid* at 30.

¹⁰⁴ *Ibid* at 40.

Canadian unions referred to the Committee on Freedom of Association.’¹⁰⁵

¹⁰⁵ Norman ‘A Colloquy on Employment and Labour Law and Policy for the New Millennium: Promise and Paradox 67 *Saskatchewan Law Review* 2004 591 at 605.

CHAPTER 7: COUNTRIES ADHERING TO THE VOLUNTARY MODELS OF COLLECTIVE BARGAINING

This chapter looks at three countries which adhere to the voluntary models of collective bargaining and how they utilize a specific voluntary model or a combination of voluntary models to suit their particular needs.

7.1 Germany

7.1.1 The German Collective Bargaining System

The German collective bargaining system follows the purely voluntary approach to collective bargaining. Bargaining occurs predominantly at sectoral level and there are no laws regulating the process, except for the *Tarifvertragsgesetz*, which only deals with collective agreements. This means that the law and the courts do very little to assist unions in the bargaining process. There is no ‘duty to bargain’ and the whole collective bargaining process as well as its outcomes are left up to the autonomy of the parties.

However, adherence to the purely voluntary model does require the state to create sufficient room in which bargaining can be effectively pursued. Germany does this by constitutionally protecting the right to freedom of association, which has become the primary legal source for collective bargaining.¹⁰⁶ Unlike the Canadian right to freedom of association, which has in the past been narrowly construed, the German right must be understood in the widest sense. It protects the right to organise, to bargain and to strike. In this sense, freedom of association as provided for by the German Constitution corresponds to the meaning of the right under the ILO Conventions. Where this right relates to ‘collective industrial organizations’ it may not be limited by the state or any other person or body, but in order to enjoy this protection, unions must meet certain requirements and these include having sufficient power and sufficient members. Unions are not however, required to be elected

¹⁰⁶ Article 9, subsection 3 Grundgesetz [Constitution] (F.R.G)

before they are entitled to operate and participate in the bargaining process.

The ability to exert economic pressure is a crucial part of the German system as ‘the requirement to possess the power to exert pressure on the respective counterpart is based on the assumption that the proper functioning of the autonomous system of collective bargaining would be undermined if powerless associations were able to participate in collective bargaining.’¹⁰⁷ The right to resort to industrial action is seen as a corollary of collective bargaining and is therefore also protected by the right to freedom of association contained in the Constitution. It has also been made clear by the German courts that ‘only industrial action, and not judicial proceedings, can force an employer or an employer’s association to bargain collectively with a union.’¹⁰⁸

7.1.2 The Historical Development of the German Collective Bargaining System

The voluntary approach to collective bargaining in Germany emerged in the same manner as it emerged in other countries adhering to the original voluntary model. It emerged through the efforts made by German workers, without any assistance being offered by the state. Workers did this as they were eager to protect their interests and curb the ability of employer’s to unilaterally change terms and conditions of employment. This effective emergence of the process took many years and involved many struggles. For many years it was seen as an illegal activity and the formation of unions and participation in their activities were prohibited. However, this position started to change when the ‘Industrial Code of 1869 theoretically removed all bans on the formation of trade unions....’¹⁰⁹ Unfortunately for unions, this victory did not mark the end of their struggles as they were once again banned by the Anti-Socialist Act of 1878. This Act remained in force for twelve years. Only after it was repealed did unions begin their long and steady journey of growth and development.

¹⁰⁷ Buschmann ‘Workers Participation and Collective Bargaining in Germany’ *Comparative Labour Law Journal* 15 (1993 - 1994) 26.

¹⁰⁸ Ibid.

¹⁰⁹ Halbach, Paland, Schwedes & Wlotzke *Labour Law in Germany: An Overview* at 301.

7.1.3 The German Collective Bargaining System

Adherence to the purely voluntary model requires that state interference in the bargaining process be kept to a minimum as the principles of voluntary negotiation and the autonomy of the bargaining parties are highly regarded. As such, the imposition of a legally enforced duty to bargain is a concept which is completely unheard of in German industrial relations, because the establishment of bargaining relationships are left up to the power of the parties themselves.

Bargaining occurs at sectoral level between trade unions and employers' associations. These associations work independently 'from governmental influences, but still operate within the framework of the constitution and current legislation.'¹¹⁰ They conclude collective agreements for the whole industry which has the advantage of creating uniform terms and conditions of employment.

The state is responsible for protecting the bare essentials that make collective bargaining possible and this includes providing for sufficient legal space in which the process can be utilised. Germany does this through Article 9 subsection 3¹¹¹ of the German Basic Law, which has become the primary legal source for collective bargaining and constitutionally protects the right to freedom of association.

However, in order to enjoy the protection afforded by Article 9 subsection 3, associations must first meet certain preconditions. These preconditions are aimed at ensuring that the process of collective bargaining functions properly by only affording protection to those associations who are strong enough to participate in the process meaningfully. Unlike its American counterpart, the German collective bargaining regime does not come to the aid

¹¹⁰ Thüsing 'Recent Developments in German Labor Law: Freedom of Association, Industrial Action, and Collective Bargaining' *International & Comparative Labour Review* 9(2) 1998 - 1999 47.

¹¹¹ Grundgesetz [Constitution] (Federal Republic of Germany)

of unions which are too weak to exert some kind of pressure on employers in order to persuade them to take part in the collective bargaining process because the German position is that unions, which are incapable of backing up their assertions successfully are not entitled to be protected in the bargaining process. This is because ‘the requirement to possess the power to exert pressure on the respective counterpart is based on the assumption that the proper functioning of the autonomous system of collective bargaining would be undermined if powerless associations were able to participate in collective bargaining.’¹¹²

From the above, it also becomes clear that the right to resort to industrial action is another crucial element of the German system. It is seen as a corollary of collective bargaining and to this extent it has been emphasised by the German courts that ‘only industrial action, and not judicial proceedings, can force an employer or an employer’s association to bargain collectively with a union.’¹¹³

7.1.4 Effectiveness of the German System

Despite the fact that unions are not assisted by the courts or legislation, German unions have been able to ‘maintain their dominant role as a force in German industrial relations.’¹¹⁴ It is however true that over the past few years there has been a steady decline in union membership, but even so, many employees remain unionised and a majority of employers still belong to employers associations.

The effectiveness of the system can be attributed to the strong protection of the right to freedom of association and the other rights embraced by this. Germany also vigorously promotes collective bargaining. This has proved to be sufficient at ensuring the emergence of a strong and competent union movement. It has also ensured the viability of the collective bargaining process. The provision of these basic rights have made it possible for employees

¹¹² Buschmann (note 105) at 26.

¹¹³ Ibid.

¹¹⁴ Ibid at 28.

to join unions, participate in union activities and to protect their rights and interest by being guaranteed the right to resort to protected industrial action where it is required. These are all the essential elements that any collective bargaining systems requires for it to be successful.

Another important element that contributes to the success of the bargaining process in Germany is the fact that the majority of employers belong to employer's organisation. This factor contributes very strongly to the endorsement of the bargaining process as a way in which to determine terms and conditions of employment. Employer's organisations afford employers the opportunity to work together, share financial burdens and offer one another support when it comes to the negotiating process. This position differs significantly from that in the United States, where the concept of an employers organisation is a very uncommon feature. In the American context, employers act alone and therefore tend to feel more threatened by unions, which is not the case in countries where there is support for employer's organisation. Here employers tend to be more conducive to participating in the bargaining process as it allows them the opportunity to work together with the other in the same industry and allows them set industry wide wage level, which very often can work to their advantage.

7.2 Austria

7.2.1 The Austrian Collective Bargaining System

This section briefly examines the Austrian collective bargaining regime. This bargaining regime is especially interesting, as despite being categorised as falling under the purely model of collective bargaining, it has certain features that create a very unique bargaining system.

Austrian collective labour law is divided into the 'law of trades representation and the law of works representation.'¹¹⁵ Trades representation consists of standards that help to regulate the employment relationship, rules that govern aspects relating to collective

¹¹⁵ Strasser 'Austria' in Blanpain *International Encyclopaedia of Labour Law and Industrial Relations* at 30.

agreements and laws that regulate industrial disputes. This area of collective labour law arises only at national level as it concerns the conclusion of collective agreements, which in Austria is only occurs at this level. Works representation concerns employees' interest at the enterprise level, which are dealt with by works councils. It does not deal with collective agreements, but 'creates organisational possibilities for the personnel in an establishment, giving them rights to participate in, its administration and thereby restricting the owner's freedom of decision.'¹¹⁶

As mentioned above, bargaining occurs at sectoral level which 'is differentiated according to employee status (blue-collar workers and white-collar workers) and also, in the area of the production of goods, according to manufacturing industry... and small-scale craft production....'¹¹⁷ There are basically two associations that represent the interest of employees. The first is the Trade Union Federation (Österreichischer Gewerkschaftsbund) and membership is based on voluntary association. The second is the Labour Chambers (Arbeiterkammern) and membership is compulsory. The Trade Union Federation (TUF) enjoys a monopoly position when it comes to representing workers and concluding collective agreements. The interests of employers are represented by one statutorily created employers' association called the Chamber of Commerce (Bundeskammer der Gewerblichen Wirtschaft). Membership to this association is compulsory and 'on acquiring the right to run a business, every employer automatically becomes a member of the organisation.'¹¹⁸

Austria's voluntary approach to bargaining means that there is not much law regulating the bargaining process. As with other voluntary approaches, the rights and protection of workers to participate in the bargaining process is ensured by the protection of the right to freedom of association. In this respect Austria also ensures freedom of assembly and the

¹¹⁶ Ibid at 31.

¹¹⁷ EIRO Comparative Study on Changes in the National Bargaining Systems Since 1990 - Case of Austria
<http://www.eurofound.eu/eiro/2005/word>

¹¹⁸ Strasser (note 133) at 123.

freedom to join and form affiliations, which is guaranteed by various constitutional provisions. As in German law, Austrian associations must meet certain preconditions before they are entitled to constitutional protection and associations are only considered to be affiliations for labour law 'if their aim is to influence the employment conditions of the participants and, if need be, to regulate them, as well as to look after and protect the interest of the participating employers and employees in connection with employment matters.'¹¹⁹

Another interesting aspect of the Austrian system is that it 'recognises no subjective right of either employees or employers to take industrial action'.¹²⁰ However, 'neither special penal provisions nor provisions in private law forbid strikes, lock-outs or boycotts.'¹²¹ Strikes are therefore neither prohibited nor protected, which means that when a particular strike occurs, its lawfulness must be determined 'according to the totality of law.'¹²² Thus, it can be seen that the Austrian system more or less complies with the general features of collective bargaining systems.

7.2.2 Effectiveness of the Austrian System

Austria enjoys the highest rate of collective bargaining coverage in the world which is somewhere in range of 98 per cent and 99 per cent.¹²³ This high coverage rate would suggest that the overall effectiveness of the Austrian bargaining system is good, but this could be a bit deceiving as the high rate can be attributed to various factors, not all of which have to do with a bargaining system that operates well. Some of these factors include the following: Firstly, the fact that collective agreements are binding on both union and non-union members of a sector and the fact that they may even be extended to cover employers not falling under its scope of the agreements application. Secondly, membership to the Chamber of Commerce is compulsory and therefore most employers are members of this association. Thirdly, the TUF

¹¹⁹ Ibid.

¹²⁰ Strasser [note 39] at 190.

¹²¹ Ibid.

¹²² Ibid at 192.

enjoys a monopoly of power in the bargaining process and most private sectors employees are members. This means that the TUF concludes agreements for a majority of workers in the workforce. As can be seen from this, the high coverage rate has a lot to do with the fact that collective bargaining agreements are extended to non-unionised members and the fact that all employers belong to the employers' organisation.

Another factor contributing to the successfulness of the Austrian system is the overlap between leadership in the TUF and the national government. This means that trade unions leaders are always in a position to have their concerns heard and are also able to exercise some influence with parliamentary leadership, which makes it easier to represent the interests of union members and to have these interests protected and enforced through law. In fact, the TUF is provided with two different ways in which to realise its aims. It can either impose its aims by statute, in the Nationalrat (National Council) through the Federal Minister of Social Administration, a position which has since 1945 been occupied high-ranking official in the TUF, or it can impose its aims through implementing collective agreements.

Membership of works councils and trade unions also overlap creating even stronger ties between all the parties in the bargaining system. The overlap between the TUF and Nationalrat ensures that the process of implementing terms and conditions of employment and the regulation of other matter occurs much faster and more efficiently. However, it also means that there is a much greater risk of government pursuing its own objectives and relying on this overlap in membership to legitimise it. On the other hand, the overlap between trade union members and works council members ensure communication between the national and enterprise level and this 'integration of personnel extensively prevents differences of opinion....'¹²⁴ These factors ensure that the Austrian system of collective bargaining is characterised strong bonds and coherence making the system effective and preventing the

¹²³ EIRO [note 40].

¹²⁴ Strasser (note 113) at 24.

occurrence of industrial actions.

7.2.3 Compliance with the ILO

Austria has ratified both Convention No. 87 and Convention No. 98 and it is therefore under a duty to comply with the requirements as set out by the Conventions. The main issue that arises in respect of Austria's compliance with its ILO obligations is in terms of Convention No. 87. This is due to the fact that despite the right to freedom of association being guaranteed by the Austrian Constitution, under the Austrian collective bargaining regime there is only one association responsible for concluding agreements on behalf of employees. Despite this situation, it has been stated that Austrian law is on line with Convention No. 87 and it is submitted that in principal this position is absolutely correct. However, the reality of the Austrian situation makes it very difficult to exercise the right to freedom of association fully, as explained below.

The TUF is the only union federation in Austria and most unions fall under its umbrella. It most certainly occupies a monopoly position as close to '60 per cent of all Austrian employees are organised as members of the ÖGB, and of the employees organised into unions, the ÖGB embraces over 98 per cent!'¹²⁵ This is as a result of the fact that it is the only organisation which is capable of representing the interests of workers and which is capable of concluding collective agreements on their behalf. However, this situation is not imposed by Austrian law, but has developed naturally since 1945. Employees are in essence, guaranteed the right to freedom of association as provided by the Austrian Constitution. They are permitted to establish or join associations of their choosing, but as can be seen from the above, this is not really possible as the TUF enjoys a dominant position in the bargaining arena and is the only association capable of concluding collective agreements. The conclusion of collective agreements are the ultimate aim of the bargaining process. Therefore, what use is the freedom to form a union or even to join, without the ability to conclude these agreements.

¹²⁵ Strasser (note 113) at 132.

7.3 South Africa

7.3.1 Introduction

South Africa's collective bargaining regime follows a voluntary approach. However, its approach is interesting and unique as it combines features of two different voluntary models. It provides for machinery to facilitate and promote bargaining and it also requires compulsory conciliation as a precondition to legal industrial action.

7.3.2 The Historical Development of the South African Collective Bargaining System

South Africa's current labour law regime is relatively new. The previous Labour Relations Act¹²⁶ was repealed and replaced with a new one just over twelve years ago. This was done to signify the move away from apartheid policies and to bring the country's labour regime in line with the new era of democracy. Therefore, in order to acquire a proper understanding of the current LRA's treatment of collective bargaining, and the specific issues which it seeks to address, it is necessary to be familiar with the previous regime's regulation of labour and the social and political circumstances under which it operated.

As with the new Act, the previous Act also favoured voluntarism. It contained no express duty to bargain and the regulation of the bargaining process was left primarily up to the parties to decide. However, the Act operated during a period in which South Africa was characterized by segregation, inequality and unrest and a dual system of labour relations operated during this period, which was 'primarily brought about by the exclusion of pass-bearing African workers from the statute's definition of "employee", and therefore from membership of registered trade unions, from direct representation on industrial councils and

¹²⁶ Labour Relations Act 28 of 1956.

from using conciliation boards.¹²⁷

By the late 1970's the government set up the Wiehahn Commission of Inquiry in order to deal with the above situation as it was being unbearable due to industrial unrest. The Commission's task was to make recommendations which could be implemented as soon as possible in order to deal with the problems causing the conflict in the labour force. One important recommendation that was made and accepted was that African workers be permitted to become members of registered trade unions as well as being allowed representation on industrial councils. This recommendation was accepted which resulted in the demise of the dual system of labour relations. These changes signified a radical departure from previous policies, but did not end the plight of African workers and their unions as many 'employers were reluctant to recognise them as legitimate representatives of their workforces; they were seen as unwelcome interlopers.'¹²⁸ Many employers simply refused to bargain with these newly formed unions and this resulted in even higher levels of industrial strife.

It is in the above context that the Industrial Court felt the need to step into the bargaining arena, despite the Act's preference for the principle of voluntarism. The court recognised the need to reduce the turmoil present in the country's labour relations regime and it also saw the social benefits which could be provided by orderly collective bargaining. Fortunately for the Industrial Court it also had the means to intervene. This was provided by the court's very wide unfair labour practice jurisdiction, as the 'definition of unfair labour practice, focusing as it did on practices which had the effect, *inter alia*, of creating or promoting labour unrest or detrimentally affecting the relationship between employer and employee, was broad enough to include within its scope a deliberate spurning by an employer of the overtures of a representative union.'¹²⁹ The court clearly believed that it was necessary to use this power in order to minimise labour unrest and also to assist the trade unions who were in much weaker

¹²⁷ Du Toit (note 28) at 7.

¹²⁸ Grogan *Workplace Law* at 355.

position than the employers to compel a bargaining relationship. This was the only way in which the extreme power imbalances between employees and employers could be levelled out while at the same time reducing the need for employees to embark on strike action in order to enforce their demands.

7.3.3 The Current South African Collective Bargaining Framework

The new LRA clearly favours a voluntary process in that it ‘seeks to secure only the means of collective bargaining, without prescribing, or empowering the courts, to prescribe, how these means should be exercised.’¹³⁰ However, unlike the 1956 Act, the courts no longer have the capacity to intervene in bargaining disputes. This is as a result of the definition of an ‘unfair labour practice’ being severely restricted by the new Act to include only certain specified conduct ‘arising between an employer and employee.’¹³¹ However, this change does not mean that the new Act is any less enthusiastic about collective bargaining. On the contrary, it creates a strong framework in support of it, which makes the need for a duty to bargain redundant. It provides organizational rights, the guarantee of freedom of association, the protection of the right to strike and the provision of machinery to promote collective bargaining.

However, despite this, many claims have been made that new LRA is unconstitutional as it does not provide for a duty to bargain. These claims arise from the fact that the South African Constitution in Section 23 provides for a ‘right to engage in collective bargaining’¹³² and this has been held to envisage the imposition of a duty to bargain. However, as was pointed out by the Supreme Court of Appeal in *SANDU v Minister of Defence*,¹³³ section 23 only requires statutory support for collective bargaining and a duty on the State not to take any action which prohibits it. Therefore, cannot be relied on to impose a duty to bargain on an employer. The

¹²⁹ Ibid.

¹³⁰ Ibid at 321.

¹³¹ Section 186 *The Labour Relations Act* 66 of 1995.

¹³² Section 23 of the Constitution of the Republic of South Africa Act 108 of 1996.

Court, per Justice Nugent, made it clear that a ‘right to engage in collective bargaining is of little account without an effective means of inducing an opposing party to bargain.’¹³⁴

However, the court held that in South Africa the means by which the Constitution protects bargaining and the means to induce it ‘is by entrenching the right to strike, thereby excluding a simultaneous right to judicial intervention to regulate the bargaining process.’¹³⁵

The LRA’s voluntaristic approach means that it is still left up to the power of the relevant parties and their right to resort to either a strike or a lockout to determine what happens in respect of a struggle relating to collective bargaining. However, the new Act made a very significant improvement in respect of the ongoing power struggle between employers and employees. It took into account the fact that employees were in a more vulnerable position than their employers, and for this reason it implemented measures to ensure that the position of employees and their trade unions were strengthened. The position created by the current Act is therefore, at the same time both similar and different to that which was put in place by its predecessor. This is indicated by the following statement:

It is quite evident that the Act vigorously pursues a policy of abstentionism in relation to the bargaining process and its outcome. To that extent, its underlying philosophy is no different from that of its predecessor. However, the premises upon which the new Act’s abstentionist stance is founded differ fundamentally from those which informed the 1956 Act. Whereas the latter regulated the bargaining process without regard for the disparities which exist in the rights and sanctions of management and organised labour, the new Act sets out to establish greater balance of power between the parties in order to ensure a more effective bargaining process, greater stability and more balanced outcomes.’¹³⁶

The above statement is important as it indicates one of the reasons why the absence of a duty to bargain from the LRA is not conspicuous. The motivation behind this absence is that the new LRA attempts to establish a more even balance of power between trade unions and

¹³³ *SA National Defence Union v Minister of Defence & Others* (2006) SCA 90 (RSA).

¹³⁴ *Ibid* at 3.

¹³⁵ *Ibid*.

¹³⁶ Jordan ‘Collective Bargaining under the New Labour Relations Act: The Resurrection of Freedom

employers by guaranteeing unions organisational rights in order to assist them to compel bargaining relationships with employers rather than imposing a duty to bargain. These rights ‘make it possible for a trade union to build up, consolidate and maintain a power-base of sufficient strength among the employers’ employees’¹³⁷ and this is crucial since collective bargaining under the Act still depends largely on the strength of the parties. It ‘is only once the union has attained sufficient strength’ with the assistance of these organisational rights that ‘it can exercise sufficient economic power on the employer to bargain on wages and other terms and conditions of employment.’¹³⁸ All that is required from trade unions before they are guaranteed these rights are that they have reached the required level of representivity and that they are registered.¹³⁹ It is therefore no longer necessary for unions to strike in order to obtain these rights as was the position under the 1956 Act. This change in position was referred to by the Labour Court in *FEDCRAW v Edgars Consolidated Stores Ltd*. The court held that in the past when a trade union desired organisational rights it was ‘preceded and often obtained by industrial action’ but as our ‘system of labour relations matured, the social partners agreed to remove this cause of conflict and to focus on the exercise of these rights rather than on their attainment.’¹⁴⁰ The Constitutional Court also dealt with these rights in *NUMSA v Bader Bop (Pty) Ltd* where it held that the LRA confers these rights upon representative unions and that the ‘effect of this is that representative unions are entitled as of right to these organisational rights - they need not bargain for them.’¹⁴¹

The South African approach ensures a voluntary process while at the same time providing employees and their unions with much needed assistance in order to level the playing field when it comes to collective bargaining. It avoids the necessity of a statutory duty to bargain which if relied on would once again mean that collective bargaining develops in ‘a context of

of Contract’ *Law, Democracy & Development* 1997 (1) 1 at 1.

¹³⁷ Mischke ‘Getting a Foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA’ *Contemporary Labour Law* (2004) Vol 13 51 at 52.

¹³⁸ Ibid.

¹³⁹ Sections 11 to 16 (note 129).

¹⁴⁰ *FEDCRAW v Edgars Consolidated Stores Ltd* [2002] 11 BLLR 1066 (LC).

legalism at the expense of voluntarism, innovation and industry level organisation.¹⁴² That is the situation the new Act seeks to avoid, as it results in ‘a confused jurisprudence in which neither party is certain of its rights and in which economic outcomes are imposed on parties which often bear little, if any, relation to the needs of the parties or the power they are capable of exerting.’¹⁴³ The absence of a statutory duty to bargain also provides more flexibility in the labour market as the ‘fundamental danger in the imposition of a legally enforced duty to bargain and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment.’¹⁴⁴ These organisational rights are therefore, a vital component of the framework created by the new Act in support of collective bargaining. Without them, unions would be in a very precarious position in trying to enforce a bargaining relationship with employers who do not wish to bargain, as there would be absolutely nothing besides industrial action, to assist them in attaining the power that they need in order to successfully represent their members interests. These rights are a ‘necessary corollary to the LRA’s voluntarist approach, and provide trade unions with the essential instruments for not only securing an organisational foothold in the employer’s business, but also laying the foundations for a future collective bargaining relationship with the employer.’¹⁴⁵

The right to strike is another very important feature of the new LRA’s framework in support of collective bargaining. It is seen as ‘a union’s most appropriate response to an employer’s refusal to bargain with it.’¹⁴⁶ As the courts no longer have the capacity to influence bargaining outcomes, the parties must rely on their own power to influence outcomes and

¹⁴¹ *NUMSA v Bader Bop (Pty) Ltd & Another* [2003] 2 BLLR 103 (CC) at 126.

¹⁴² Du Toit (note 28) at 229.

¹⁴³ Explanatory Memorandum to Draft Labour Relations Bill (GN 97 of 10 February 1995) 122 as quoted in Du Toit and others *Labour Relations Law: A Comprehensive Guide* (4ed) 229.

¹⁴⁴ GN 97, “Draft Negotiating Document in the Form of a Labour Relations Bill”, in Government Gazette 16259 of 10 February 1995 at 122 (as quoted in Cheadle et al *South African Constitutional Law: The Bill of Rights* at 391).

¹⁴⁵ Mischke (note 129) at 60.

‘that power is underpinned by the organizational rights conferred by part A of chapter III of the Act, and the right to collective action conferred by chapter V.’¹⁴⁷ The right to strike obviously plays a pivotal part in the framework of the Act and therefore, the Act ‘has extended and bolstered the right’ thereby ensuring that employees finding it necessary to resort to this right in order to ‘back up their demands’ are sufficiently protected.¹⁴⁸ This protection afforded to employees was referred to by the Labour Appeal Court in *SA Chemical Workers Union v Afrox Ltd*. The court held that ‘section 5(1) of the LRA prohibits discrimination against an employee for exercising any right conferred by the LRA. Section 67(4) states that an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike.’¹⁴⁹ However, employees participating in a protected strike may be dismissed for misconduct or operational requirements in terms of section 67(5). In order for this protection to apply section 64(1) of the LRA has to be complied with. It requires that the ‘issue in dispute first be referred to a council or to the Commission’ for conciliation and that written notice of a proposed strike be given ‘as the use of power should be a last resort.’¹⁵⁰ The Labour Court in *Picardi Hotels Ltd v Food & General Workers Union* held that another implication of a protected strike is that ‘no civil or legal proceedings arising out of the strike or conduct in contemplation or in furtherance of the strike, may be instituted unless they are in respect of conduct which constitutes a criminal offence.’¹⁵¹

In the case of a refusal to bargain dispute there is an extra requirement that must be met. A refusal to bargain dispute includes a refusal to either recognise a union as a collective bargaining agent or a refusal to establish a bargaining council, withdrawing recognition, the resignation of a party from a bargaining council or a dispute about appropriate bargaining

¹⁴⁶ Ibid at 52.

¹⁴⁷ *National Police Services Union & others v National Negotiating Forum & others* (1999) 20 ILJ 1081 (LC) at 1095.

¹⁴⁸ Du Toit (note 28) at 159.

¹⁴⁹ *SA Chemical Workers Union & Others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at para 24.

¹⁵⁰ Du Toit (note 28) at 230.

levels, units or subjects.¹⁵² Before notice is given in such a dispute in terms of subsection (1) (b) or (c), it is necessary that an advisory award must have been prepared in terms of section 135(3)(c) of the LRA. This award is not binding, however, non-compliance could have ‘the effect of legitimising or stigmatising any industrial action that might follow, depending on the terms of the award.’¹⁵³

7.3.4 Features of the South African Voluntary System

7.3.4.1 Compulsory Conciliation

Section 64(1) imposes the compulsory conciliation requirement. The parties are expected to discuss their issues at conciliation in the hope that they will be able to resolve their differences. The process makes use of a neutral third-party whose task it is to facilitate the meeting. Essentially conciliation serves the same purpose as ‘the duty to bargain’ as the parties are compelled to come together at the bargaining table before they may move on to the next step being industrial action. However, this approach offers more advantages than the ‘duty to bargain’ does as the parties are not left to their own devices. The presence of a facilitator greatly assists meaningful negotiations. Parties are also not required by statute to bargain in good faith. If they take part in the conciliation process in bad faith and no agreement is reached, the next step is simply to go on strike. This saves time as there is no need for an order compelling the party in breach to commence bargaining in good faith.

7.3.4.2 Machinery to Promote Bargaining

The South African framework in support of collective bargaining also adheres to the voluntary approach requiring the provision of machinery that facilitates and promotes collective bargaining. The LRA ‘sets up an integrated framework in which organized labour

¹⁵¹ Picardi Hotels Ltd v Food & General Workers Union (1999) 20 ILJ 1915 (LC) at para 26.

¹⁵² Section 64(2) [note 135].

¹⁵³ Du Toit (note 28) at 237.

and management may engage one another over the full range of industrial issues.’¹⁵⁴ The framework of the Act basically provides for bargaining to occur in the following forums: Firstly, NEDLAC (the National Economic Development and Labour Council). This is considered to be the top bargaining forum. It is ‘quadripartite in nature, drawing in representatives of the state, business, labour and civil society.’¹⁵⁵ Secondly, the act makes provision for bargaining councils. These statutory bodies can be created by registered trade unions and employers’ association for a specific sector. They provide parties with a forum in which to conclude collective agreements. They also allow for the establishment procedures aimed at helping the parties to settle disputes. Thirdly, a union who has at least thirty percent support within a particular sector can apply for the establishment statutory council. However, these councils do not partake in the collective bargaining process.

¹⁵⁴ Thompson & Benjamin *South African Labour Law* at AA1-8.

¹⁵⁵ *Ibid.*

CONCLUSION

This paper examined four different models of collective bargaining with reference to the bargaining regimes of five specific countries. It was pointed out that the inherent features of the bargaining process, namely that of adaptability and flexibility, combined with the fact that it serves a variety of advantageous functions have ensured that the process has expanded in acceptance and popularity to the point where it is a common feature of many industrialised market economies, albeit in different styles and forms. These different styles and forms have resulted in the emergence of different bargaining models which have their own ways of regulating and promoting the bargaining process. After examining these four different models and their characteristic features it was illustrated that all the models have three common features that are essential to their effective operation. The three features were identified as the protection of the right to freedom of association, the freedom to bargain collectively and the right to strike.

In conclusion, it is submitted that all bargaining models, irrespective of whether they adhere to the compulsory or voluntary approach to collective bargaining must give adequate protection to the above essential elements if they are to regulate and promote collective bargaining effectively. When an element is inadequately protected, the result is a defective collective bargaining regime incapable of serving those functions it was designed to serve. It is for these reason that the ILO has emphasised the importance of the elements by entrenching them in the various ILO Conventions as well as the ILO Declaration. However, as was indicated by this paper, not all countries comply with their commitments in terms of the ILO and many states, whether they adhere to the compulsory or voluntary model of bargaining, continue to regulate and promote the collective bargaining process in a manner that fails to meet ILO standards.

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