CHAPTER 4

COLLECTIVE BARGAINING

ABRIDGED CONTENTS

A Introduction

The purpose of this chapter is to examine the origins, historical development and functions of trade unions and collective bargaining. A comparative study will be undertaken in order to demonstrate the different systems of collective bargaining that have developed. Explanations for these differences will be put forward. The reasons for the phenomenal growth of trade unions in the era of Fordism will also be examined.[1]

One of the major functions of trade unions is that of procuring better working conditions and wages and salaries for its members.[2] This is achieved through the process of collective bargaining. The most important instrument of serving the interests of the members of trade unions is by collective bargaining. As seen in the previous chapter the LRA strongly supports collective bargaining, especially at sectoral level as the most important mechanism of setting conditions of service.[3]

The primary role played by collective bargaining in South African labour law in terms of the LRA is extended to non-distributive or production-related issues. This is apparent in the provisions regarding workplace forums.[4] The collective

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1 See par B *infra.*

2 Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 354-355, Grogan *Workplace Law* (2003) 275; Basson *et al Essential Labour Law* (2002) vol 2 36.

3 See "Explanatory Memorandum" 1995 *ILJ* 279 at 293 where the Ministerial Task Team, in explaining the Draft Bill of the LRA 66 of 1995, stated: "While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing for a series of organisational rights for unions and by fully protecting the right to strike…" See also ch 3 *supra.*

4 S 84(1) of the LRA provides: "Unless the matters for consultation are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to be consulted by the employer about proposals relating to any of the following matters -
(a) restructuring the workplace, including the introduction of new technology and new work methods;
(b) changes in the organisation of work;
(c) partial or total plant closures;

bargaining forums for sectoral level collective bargaining (bargaining and statutory councils) are also accorded primacy with reference to the settlement of disputes arising within their jurisdiction.[5] This system is in accordance with the traditional view of the function of labour law as espoused by Kahn-Freund[6], where the individual contract of employment plays a subordinate role and collective agreements are the primary vehicle for the determination of terms and conditions of employment.[7] Terms of collective agreements take precedence over those in

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(d) mergers and transfers of ownership in so far as they have an impact on the employees;
(e) the dismissal of employees based on operational requirements;
(f) exemptions from any collective agreement or any law;
(g) job grading;
(h) criteria for merit increases or the payment of discretionary bonuses;
(i) education and training;
(j) product development plans; and
(k) export promotion."

S 86(1) of the LRA provides: "Unless the matters for joint decision-making are regulated by a collective agreement with the representative trade union, an employer must consult and reach consensus with a workplace forum before implementing any proposal concerning-
(a) disciplinary codes and procedures;
(b) rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees;
(c) measures designed to protect and advance persons disadvantaged by unfair discrimination; and
(d) changes by the employer or by employer-appointed representatives on trusts or boards of employer-controlled schemes, to the rules regulating social benefit schemes.

5 S 51 of LRA; the bargaining councils enjoy primacy in the sense that if there is a bargaining council under whose scope the parties to the dispute fall, the bargaining council and not the Commission for Conciliation Mediation and Arbitration (CCMA) must settle the dispute.

6 See ch 2 *supra.*

7 Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 8-9, wrote: "The law has important functions in labour relations but they are secondary if compared with the impact of the labour market and with the spontaneous creation of social power on the workers' side to balance that of management. The law does, of course, provide its own sanctions, administrative, penal and civil and their impact should not be underestimated but in labour relations legal norms cannot often be effective unless they are backed up by social sanctions as well, that is by the countervailing power of trade unions and of organised workers asserted through consultation and negotiation with the employer and ultimately, if this fails, through withholding their labour." See also Olivier "The Regulation of Labour Flexibility and the Employment Relationship: Paradigm Shifts on the Horizon" 1998 *TSAR* 536 where he stated: "Apart from the subordinate role played by the individual contract

individual contracts of employment and rights acquired through collective agreements cannot be contacted out of or waived.[8] Where the agreement was entered into by a majority union at plant level even non-members are bound.[9] As seen in the previous chapter collective agreements reached at sectoral level can be extended to non-parties.

Given the primacy accorded to collective agreements by the South African labour legislation and the fact that collective bargaining is traditionally the main function of trade unions, the concept of collective bargaining, its functions, historical foundations, the coverage and content of collective agreements, the different levels of collective bargaining, the types of bargaining forums and units, and so on will be discussed hereunder.

B Development and Historical Background of Trade Unions

1 Development of Trade Unions

The origins of trade unions in different states and the type and levels of collective bargaining that emanated at the different times serves to demonstrate that the system(s) of collective bargaining were the result of national and international socio-economic phenomena.[10]

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of employment in this regard, collective agreements have been the primary vehicle for determining in particular terms and conditions of employment and regulating the employment relationship and labour flexibility generally. In fact, the statutory framework existing in South Africa has undoubtedly reinforced and supported the pre-eminent position enjoyed by collective bargaining as far as these matters are concerned."

8 S 23(3) states: "Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement."

9 S 23 (1) specifies: "A collective agreement binds employees who are not members of the registered trade union or trade unions party to the agreement if-
(i) the employees are identified in the agreement;
(ii) the agreement expressly binds the employees; and
(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace."

10 See Huiskamp "Collective Bargaining in Transition" in Ruysseveldt *et al Comparative Industrial and Employment Relations* (1995) 137-138.

Trade unions and hence collective bargaining began to emerge in the early stages of industrialization. As mentioned earlier[11], different states experienced industrialization at different times, and indeed some countries have yet to become industrialised. The industrial revolution created a new breed of employer and employee which revolved around mass employment and mass production. The result was a market polarisation between employees and the owners of production. The result was a potential for conflict.[12] Collective bargaining was a means of institutionalising and containing such conflict. In the earlier stages of the industrial revolution when workplaces were smaller it was easier to contain the conflict. Consequently in these early stages of industrialisation trade unions were not recognised by employers or the state.[13] They were repressed and outlawed, with unionists often being arrested or even killed. In fact well into the 19th century unions were considered illegal in England, the United States and most common law countries.[14]

However, as factories became bigger and employed more people trade unions gained more power. Collective bargaining was a system of institutionalising conflict that "suited the sociological features of manufacturing industries which concentrated sizeable groups of wage earners doing similar tasks into workplaces that were relatively large".[15] Before this most firms were small and family run and it was seldom tenable for combinations of employees to coerce the employer to providing higher wages and better working conditions.[16]

During the era of "Fordism" with its mass production systems fuelled by mass consumption trade unions gained impressive power vis-à-vis the employer.[17] Large

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11 Ch 2 *supra.*

12 Davidson and Rees-Mogg *The Sovereign Individual* (1997) 148

13 See Bendix *Industrial Relation in the New South Africa* (1998) 166.

14 See Adams "Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences" 1993 14 *Comparative LLJ* 272, 282 ("Regulating Unions").

15 Blanpain *et al Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (2001) ch 21 p 3.

16 Davidson and Rees-Mogg *op cit* 148.

17 *Idem.*

factories, typical of this era were softer targets for unions to exploit than the smaller firms that have now replaced the giant manufacturing plants.[18] It is ironic that smaller firms were characteristic of the early stages of industrialisation, and as seen above, trade unions were consequently relatively weak.

2 Reasons for Increase in Trade Union Power

As the scale of enterprise rose in the era of Fordism unions became more powerful for the following reasons:[19]

(i) Organisations were tied down to specific locations due to the high natural resource content of most industrial products. Factories that were placed where they could gain easy access to raw materials experienced considerable cost advantages. This made it easier for unions to coerce employers to pay higher wages;

(ii) large economies of scale with expensive machinery and capital equipment necessary for production lines rendered it impossible for the bulk of the population to compete in leading industries as the capital required to enter such markets was beyond most people's reach. This meant that large segments of the population were employed by fewer firms. This concentration of industries combined with the ability of nation-states before globalisation to protect national industries by the imposition of trade tariffs enabled employers to charge monopoly prices for their products. Since this was possible, the expense of paying wages above market related wages could be passed on to the consumer. The payment of wages higher than market value was rendered even easier in an environment of very low unemployment rates that fostered mass consumption. Trade unions could demand higher wages since employers could afford to pay them. Globalisation and international competition has rendered this less tenable;

(iii) the concentration of industries and large firms resulted in a depersonalisation of the company or enterprise. Usually shares in a company were owned by hundreds or even thousands of individuals, who

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18 *Ibid* 146-157.

19 Davidson and Rees-Mogg *op cit* 148.

relied on company directors to protect their property. This depersonalisation of ownership weakened resistance to union extortion and it was easier for employees to ignore owner's property rights;

(iv) the vast numbers of employees also engendered feelings of solidarity amongst employees[20] and unions were a convenient vehicle for expressing such solidarity;

(v) the small number of competitors in leading industries as a result of the huge capital outlays necessary to enter the market, made these organisations easy targets. It is easier to coerce five or ten firms than it is to coerce one thousand firms;

(vi) due to the huge capital requirements of setting up a firm; plant closures would result in massive losses. Inevitably it would make more economic sense to give in to demands for higher wages than risk closure;

(vii) assembly line economies rendered factories vulnerable to strikes since a partial stoppage in just one section of the assembly line would result in retardation and even stoppages of subsequent sections, bringing the whole production process to a standstill. The assembly line production process meant that any production standstill, no matter how brief would result in massive losses to the enterprise.

In short therefore, the economies of scale of large factories with their assembly line production processes rendered these enterprises soft targets for coercion in the form of industrial action (strikes) by unions.

3 Historical Background of Trade Unionism in South Africa

3.1 Introduction

Three different policies towards trade unions have been identified: [21]These policies can be applied to the development of trade unions in South Africa:

(i) deterrence is a policy that deters or, prevents or limits union activity;

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20 Blanpain *et al loc cit*.

21 Raday "The Decline of Union Power:" in Conaghan, Fischl and Klare *Labour Law in the Era of Globalization* (2002) 358.

(ii) neutral policy is a policy of non-intervention; and

(iii) supportive intervention is a policy whereby incentives for union development and collective bargaining are provided by the political and legal systems. The general perception is that government policy towards trade unions in industrialised states developed in a linear fashion through these three approaches.[22]

This brief overview of the history of trade unionism in South Africa that follows serves to demonstrate that the successive South African governments' policies towards trade unions have generally followed the sequence of policies which has just been indicated above.

3.2 Period 1900- 1930's

Repression of trade unions was the order of the day in the nineteenth and early twentieth centuries.[23] At the beginning of the twentieth century (the early years of industrialisation in South Africa) industrial action was prohibited and trade unions were not recognised until 1924 with the enactment of the Industrial Conciliation Act.[24] However trade unions representing blacks were not recognised in terms of this Act. Only in 1979 were all employees given equal rights in terms of labour legislation. Thereafter the government took a non-interventionist stance until 1988 and labour relations were left to run their own natural course.[25] The trade union movement grew significantly during the 70's and 80's.[26] In 1994 the first democratically elected government espoused a policy of supportive intervention.[27] It appears therefore that this linear progression from repression to support of trade unions is also reflected in the South African experience, which is discussed hereunder.

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22 *Idem.*
23 *Idem* and Davidson and Rees-Mogg *The Sovereign Individual* (1997) 148.
24 11 of 1924.
25 Finnemore and Van Rensburg *Contemporary Labour Relations* (2000) 35-42.
26 *Idem.*
27 See ch 3 *supra.*

At the beginning of the 20th century strike action in South Africa was on the increase.[28] It culminated with large scale strikes by white mine workers in 1913 followed by strikes by black mine workers in the same year. These were followed by strikes at the railways and power stations. In 1914 there was a general strike by white employees. The government reacted by enacting the Act of Indemnity and the Riotous Assemblies Act, which prohibited certain industrial actions.[29]

As secondary industries began to flourish the establishment of numerous unions ensued. The proliferation of unions on the mines and in the manufacturing sector resulted in the creation of federations.[30] There was a brief period of industrial peace following the First World War and the Chamber of Mines recognised unions representing white miners. In 1919 a national conference of employers and employees was held where it was resolved that industrial conflict would be alleviated by the recognition of unions. However the downturn in prosperity in the early twenties and the drop in the gold price contributed to industrial unrest. The infamous Rand Rebellion of 1922, when 25 000 white miners went on strike, was crushed by the army. Of these, 153 miners were killed and 500 were wounded. Another 500 were arrested and four of them were hanged for treason.[31]

Having realised the strength of the workers, the government gave urgent attention to labour relations. After appointing a commission to investigate the labour situation the government enacted the Industrial Conciliation Act.[32] Its main purpose was the containment of industrial unrest by means of institutionalisation. Machinery for collective bargaining and conciliation in the event of a dispute was provided for in this Act. Employees could only strike if the dispute resolution procedure provided for in the Act had been exhausted.[33] The structures for collective

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28 Finnemore and Van Rensburg *Contemporary Labour Relations* (2000) 28-33.

29 See Jones and Griffiths *Labour Legislation in South Africa* (1980) 3-15 and Thompson and Benjamin *South African Labour Law* (1997) A1-22.

30 Finnemore and Van Rensburg *op cit* 32.

31 See Oberholzer *Die Randse Staking van 1922* (1980) (Unpublished thesis University of Pretoria).

32 See Du Toit *et al Labour Relations Law (*2003) 4th ed 6.

33 *Idem.*

bargaining created in terms of this Act made for a centralised system of collective bargaining with trade unions bargaining with employers' organisations.[34] This trend of centralised collective bargaining was to continue for the next 50 years.[35] However, Blacks were excluded from this system since no unions representing Black males could register under this Act.[36] The result was the unions representing Black employees could not take part in the official collective bargaining process at the industrial councils, could not instigate the creation of a conciliation board to settle a dispute, and its members could therefore not embark on a legal strike.[37] However the Wage Act of 1925[38] provided for minimum wage rates for all employees irrespective of race, where collective bargaining structures were not in place.

3.3 Period 1930's and 1940's

Trade union membership grew considerably after the depression years of the thirties and the collective bargaining system as well as the conciliation procedure provided for in terms of the Industrial Conciliation Act was extensively used.[39] Nevertheless, unions representing Blacks were not recognised and in the twenties legislation was introduced which was used against Black unionists.[40]

The Pact Government followed a labour policy that privileged White employees. Discrimination against Blacks with reference to job opportunities and wages was provided for by legislation.[41] The notorious job reservation laws were first implemented in the so-called White areas in the mining industry and were extended to all industries despite the opposition of many employers. This policy

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34 *Idem.*
35 *Ibid* 7.
36 Finnemore and Van Rensburg *op cit* 31.
37 *Idem.*
38 27 of 1925.
39 See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 326.
40 The Native Administration Act of 1927 made it an offence to promote 'hostility' between the races.
41 See Du Toit *et al op cit* 10.

was called the 'Civilized Labour Policy' and it entailed the promotion of the use of white, especially Afrikaans employees at higher wages.[42]

The Industrial Conciliation Act[43] resulted in the polarisation of Black unions.[44] Growth in the manufacturing and service industries in the thirties and forties led to the creation of many unions and the fact that unions representing black employees were not allowed to partake in the official collective bargaining process did not deter their creation.[45]

3.4 Period Late 1940's – 1960's

In 1948 the National Party appointed the Botha Commission to investigate labour legislation since South Africa was experiencing great industrial expansion as well as heightened labour unrest.[46] The Commission recommended that Black trade unions be recognised, albeit subject to stringent conditions and without the right to strike. The government however, did not wish to adopt a policy or legislation that might encourage trade unions and rejected the recommendation to recognise Black trade unions.[47] In order to contain labour unrest, the National Party passed the Black Labour Relations Regulation Act[48], which made provision for the establishment of worker's committees for Black employees. The object was to avert trade unionism among Black employees.[49] These committees did not prove to be very effective as very few Black employees supported these committees and most lacked the expertise to represent their grievances effectively. By 1973 only 24 such committees had been registered in terms of the Act.[50] Effective representation by means of these committees was not possible since only one committee consisting of a maximum of five members was allowed per plant. This committee system was the only legitimate system of representation for Black

42 S 77 of the Industrial Conciliation Act 28 of 1956.
43 11 of 1924.
44 Finnemore and Van Rensburg *op cit* 34-35.
45 *Idem.*
46 See Van Jaarsveld, Fourie and Olivier *op cit* par 327.
47 Bendix *Industrial Relation in the New South Africa* (1998) 86.
48 48 of 1953.
49 Van Jaarsveld, Fourie and Olivier *loc cit*.
50 *Idem.*

employees until 1979. It is clear therefore that government policy with reference to the bulk of the labour force (i.e. Black employees) was one of deterrence of trade unions.

Other legislation such as the Industrial Conciliation Act (also known as the Labour Relations Act) of 1956 [51]also polarised the Black on White trade union movement. It prohibited the registration of mixed unions, except with ministerial permission and excluded all Blacks from the ambit of the legislation. This and other legislation entrenched racial division in the conduct of employment relations.[52] The period 1950-1970 was characterised by relative labour peace and a marked polarisation between employees of different races.

3.5 Period 1970's – 1980's

In the 1970's, with the economy still growing black people became more aware of their rights. As they constituted a majority of the population and the workforce it began to become clear to everyone, including government that Black trade unions, despite a lack of formal recognition wielded immense power. This awareness was reflected in the advent of recognition agreements between employers and trade unions at the workplace and the subsequent collective bargaining that resulted. By 1976 the registered trade union movement had grown to approximately 650 000.[53]

From 1974 onwards the government began banning individuals who were involved in the organisation and promotion of Black trade unions. Government policy and the recession following the 1976 riots resulted in a loss of momentum for the trade union movement. Numerous strikes occurred in 1970's.[54] The government reacted by enacting the Black Labour Relations Regulation Act[55], which provided for the establishment of Black liaison committees at plant level. This system was introduced to replace the collective bargaining system (i.e. at central level) and

51 28 of 1956.
52 Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2003) 4th ed 9-11.
53 Van Jaarsveld, Fourie and Olivier *loc cit*.
54 *Idem.*
55 70 of 1973.

thereby curtail power of Black trade unions. Employers responded enthusiastically to this system and many liaison committees were established, mostly on the initiative of the employer.[56] This Act also gave Black employees a limited right to strike once certain procedural and dispute settlement requirements had been adhered to.[57] However, only a few unions representative of Black employees made use of these procedures.[58]The liaison committees designed to improve communications between employer and Black trade unions did not succeed in curtailing militancy amongst Black employees.[59]

The Wiehahn Commission was therefore appointed in 1977 to investigate labour legislation. In 1979 the first Report of the Commission recommended inter alia the following:[60]

(i) trade union rights should be granted to Black workers;
(ii) stringent requirements were needed for trade union registration;
(iii) job reservation should be abolished;
(iv) a new industrial court should be established;
(v) a national manpower commission should be appointed;
(vi) provision should be made for legislation concerning fair labour practices
(vii) separate facilities in factories, shops and offices should be abolished and
(viii) the name of the Department of Labour should be changed to Department of Manpower.

Various legislative amendments arising from the 1979 Wiehahn recommendations were adopted. In 1980 and 1981 Parts 2 to 4 and 6 of the Wiehahn Report were published. Part 5 was released in September 1981. Included in this part, were the following recommendations:[61]

56 Bendix *op cit* 94.
57 Bendix *op cit* 93.
58 *Ibid* 94.
59 *Ibid* 93.
60 Van Jaarsveld, Fourie and Olivier *op cit* par 329.
61 See Van Jaarsveld, Fourie and Olivier *op cit* par 330.

(a) "labour laws and practices should correspond with international conventions and codes;
(b) statutory requirements and procedures for registration of trade unions should be revised;
(c) urgent attention should be given to specific defects of the industrial court;
(d) bargaining rights of workers; councils should be laid down by statute;
(e) the position of closed shop agreements should be clarified;
(f) basic labour rights should be extended to the public sector;
(g) specific legislation should be adopted regarding unfair labour practices;
(h) the Wage Act should be retained but amended; and
(i) conditions of employment and working circumstances of female employees should be revised in various aspects."

Government reacted positively to most of these recommendations by giving effect to them in subsequent legislation. [62]

The Black trade unions did not react positively to their inclusion in the existing official centralised system of collective bargaining. Instead they continued to bargain collectively at plant level in terms of recognition agreements entered into with the relevant employer. Initially employers were reluctant to recognise these unions at plant level. The result was increased strike activities culminating in a strike wave on the East Rand in early 1982. Gradually employers began to sign more and more recognition agreements to the extent that even today it is a practice that is entrenched in our labour relations system. The trade union movement grew significantly in the 1980's.[63]

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62 *Idem.*

63 According to the Department of Manpower *Report* for 1990 there was a total registered membership of 2 458 712. This excluded membership of non-registered unions. This amounted to an increase of members of registered unions by one and a half million since 1980.

Strike frequency increased from 101 strikes in 1979 to 1 148 in 1987 and 1 025 in 1988[64]. Since Blacks were denied franchise rights unions played a major political function, fighting for both economic and political rights of the working class.[65] Even though the collective bargaining system espoused by legislation had always been a system of centralised collective bargaining, a two-tier system with Black unions bargaining mainly at plant level emerged during the 1980's.[66]

3.6 Period 1980-1990

During the 1980's the government took a neutral stance toward labour relations and left the parties to themselves. The Director General of the Department of Manpower (now the Department of Labour) repeatedly stated that government policy was that employees and employers should regulate their own employment relationship and that self-governance should prevail.[67] This policy persisted until 1988 when government gave in to employer pressure to make legislative amendments to oppose union growth.[68] These amendments[69] were strongly resisted by the union movement and mass protests ensued until the government repealed them in 1991.[70]

3.7 Period 1990 - 2004

In the 1990's the previously banned political organisations were unbanned, Nelson Mandela was released, government was under international pressure and sanctions adopted a more corporate stance towards labour relations.[71] In April 1994 the first democratically elected government, the ANC, came to power. The ANC was supported extensively by The Confederation of South African Trade Unions (COSATU) and as a result of this COSATU and its members had great

64 Bendix *Industrial Relation in the New South Africa* (1998) 98.
65 *Ibid* 99.
66 Cameron, Cheadle and Thompson *The New Labour Relations Act* (1989) 4.
67 *Ibid* 98-103.
68 *Idem.*
69 Labour Relations Amendment Act 83 of 1988. See Cameron, Cheadle and Thompson *op cit* for a comprehensive analysis of this Act.
70 Labour Relations Amendment Act 9 of 1991.
71 See Finnemore and Van Rensburg *Contemporary Labour Relations* (2000) 43 for a summary of the major milestones of political change from 1990 to 1994.

expectations with reference to what the ANC would deliver in terms of a new labour dispensation.[72] It appears that "COSATU, by opting for centralised bargaining and closed shop agreements is attempting to entrench itself in a central position, although this could eventually lead to its demise".[73] Government's policy since 1994 has been one of promoting trade unions.[74] The recent amendments[75] continue with this policy and attempt to entrench the power of large trade unions and centralised collective bargaining even further.[76]

This short summary of the history of trade unionism in South Africa serves to demonstrate that South African governments have followed the linear progression mentioned by Raday[77] (*supra*) where government policy towards trade unions progresses from repression through to neutrality and finally support.

C Objectives and the Right to Collective Bargaining

1 Meaning of the Concept

Grogan gives meaning to this concept of collective bargaining by stating as follows: "Collective bargaining is the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation. The dynamic of collective bargaining is demand and concession; its objective is agreement. Unlike mere consultation, therefore, collective bargaining assumes willingness on each side not only to listen and to consider the representations of the other but also to abandon fixed positions where possible in order to find common ground."[78] [79]

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72 Du Toit *et al Labour Relations Law* (2003) 4th ed 17.

73 Bendix *op cit* 103.

74 See the following chapter for a discussion of the South African legislature's response to trade union decline.

75 Labour Relations Amendment Act 12 of 2002.

76 See for example s 33A where the effective enforcement of compliance with bargaining council collective agreements is enhanced by various mechanisms to ensure compliance; see also s 189A where *inter alia*, trade unions are given an unprecedented election to strike over a dispute of right, namely dismissal on the basis of operational requirements.

77 "The Decline of Union Power" in Conaghan, Fischl and Klare *op cit* 358.

78 Grogan *Workplace Law* (2003) 304.

2 Objectives of Collective Bargaining

The objectives of collective bargaining may be described as the following:[80]

(i) The setting of working conditions and other matters of mutual interest between employer and employees in a structured, institutionalised environment;

(ii) conformity and predictability through the creation of common substantive conditions and procedural rules;

(iii) the promotion of workplace democracy and employee participation in managerial decision-making;

(iv) the resolution of disputes in a controlled and institutionalised manner.

The main function of collective bargaining is the reaching of a collective agreement that regulates terms and conditions of employment.[81] What renders the bargaining 'collective' is the presence of a trade union(s) that represents the interests of employees as a collective. The other party to collective bargaining is usually an employer. However it could be a number of employers or an employer's organisation. Representatives of government may form a third party to the

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79 Basson *et al op cit* vol 2 56 state: "The collective bargaining process can broadly be defined as a process whereby employers (or employer's organisations) bargain with employee representatives (trade unions) about terms and conditions of employment and other matters of mutual interest."; The Wiehahn Commission Part V par 2.6.2 defined collective bargaining as follows: "Collective bargaining is a process of decision -making between employers and trade unions with the purpose of aiming at an agreed set of rules governing the substantive and procedural terms of the relationship between them and all aspects of and issues arising out of the employment situation."; See also Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 533 where various definitions of collective bargaining are quoted. In the end the authors conclude: "From these definitions the following definition may be extrapolated: collective bargaining is a voluntary process by means of which employees in an organised relationship negotiate with their employers or employers in an organised relationship, with regard to employment conditions or disputes arising therefrom with the object of reaching an agreement on these matters."

80 Finnemore and Van Rensburg *op cit* 276.

81 Bamber and Sheldon "Collective Bargaining" in Blanpain *et al Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (2002) 1.

collective bargaining process so that a form of corporatism or tripartite collective bargaining can be instituted.[82] Sometimes the state could be the employer party.[83]

Both broad and narrow conceptions of collective bargaining exist.[84] In the broad sense collective bargaining is perceived as different types of bipartite and sometimes tripartite discussions concerning employment and industrial relations that have an impact on a group of employees.[85] The narrow sense of the word is limited to bipartite discussions.[86] The terms 'collective bargaining' on the one hand and 'consultation' on the other have been accorded different meanings. With consultation the prerogative remains the employer. However the employer is obliged to share relevant information with the trade union or employee representative and in good faith consider their proposals. Collective bargaining on the other hand implies an attempt by both parties to reach consensus usually by means of compromise.[87] Consultation therefore "is a less competitive and more integrative process whereby the parties will exchange views but not necessarily reach a formal agreement."[88]

3 Right to Collective Bargaining

This applies to the right of employees to negotiate the terms and conditions of employment with their employer, through a trade union.[89] Although the ultimate objective is that agreement should be reached the right to collective bargaining does not entail a *ius contrahendi*, but merely entails a *ius negotiandi*.[90] In South

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82 According to Bendix, *Industrial Relation in the New South Africa* (1998) 241, "Karl von Holdt describes corporatism as an 'institutional framework which incorporates the labour movement in the economic and social decision-making of society…generally corporatism tends to introduce a more cooperative relation between the three parties (capital, labour and the state) as well as the capacity to negotiate common goals.'"

83 This is the case in the civil service.

84 Bamber and Sheldon *op cit* 642.

85 *Idem.*

86 *Idem.*

87 See Grogan *op cit* 293 and 304.

88 Bamber and Sheldon *loc cit*.

89 Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 537.

90 *Idem.*

Africa the right to collective bargaining is recognised in terms of the Constitution[91] and also in terms of the Labour Relations Act.[92]This right, however, was recognised in South Africa before the enactment of the Interim and final constitutions as well as the Labour Relations Act. The old industrial court in giving content to unfair labour practices held that the right to bargain collectively existed in South African labour law.[93]Whether or not this right entails a corresponding duty to bargain is discussed in chapter 5 hereunder.[94]

D Levels and Requirements for Collective Bargaining

1 Introduction

There are four possible levels of collective bargaining:

(i) Multinational collective bargaining constitutes bargaining between trade unions or trade union federations and employers organisations on an international level;[95]

(ii) national level collective bargaining refers to collective bargaining between trade unions and employers and employers' organisations at national level;[96]

(iii) sectoral or centralised collective bargaining refers to bargaining between one or more unions and a group of employers from a particular industry or occupation;[97]

(iv) plant-level or organisational collective bargaining refers to bargaining between one or more unions and individual employers.[98]

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91 S 23(5) of Act 108 of 1996 states that every trade union, employer's organisation and employer has the right to engage in collective bargaining.

92 See ch 3 *infra* where the legislative framework regarding collective bargaining is discussed.

93 *UAMAWU v Fodens (SA) (Pty) Ltd* 1983 *ILJ* 212 (IC); *East Rand Gold and Uranium Co Ltd v NUM* 1989 *ILJ* 683 (LAC); *NUM v East Rand Gold and Uranium Co Ltd* 1991 *ILJ* 221 (A).

94 In section D, sub –heading 9.

95 Summers "Comparison of Collective Bargaining Systems: The A Shaping of Plant Relationships and National Economic Policy 1995 *Comparative Labour Law Journal* 467.

96 See ss 37 and 38 of LRA.

97 See ss 27 and 28 of LRA.

2 The Position in South Africa

In South Africa collective bargaining takes place at national level at NEDLAC,[99] sectoral or centralised level[100]and at plant level.[101]Since collective bargaining takes place at different levels the question as to at which level an employer should bargain has arisen. In *Besaans Du Plessis (Pty) Ltd v NUSAW*[102]the employer was active in the metal industry and was represented on the national industrial council for that particular industry. . The union, which represented the majority of the employees of the employer, was not a member of the industrial council. The employer refused to bargain collectively with the union. On appeal the Labour Appeal Court held that in the absence of manifest unfairness, the choice of bargaining forum should be left to be determined by the respective power of the parties.[103] This advantages and disadvantages of plant level and sectoral level bargaining are discussed in chapter 5 hereunder.[104]

3 Levels of Bargaining in Foreign Countries

Differences in the collective bargaining systems of various countries have generally been determined by historical experience especially flowing from the effects of industrialisation.[105] In Western Europe, England, Australia and New Zealand employers joined in the negotiation process in order to counteract the force of unions that had organised on a national and industrial level in the metal industries.[106] In USA and Japan however since companies that emerged early on in the industrial era were relatively large, these companies were able to counteract union power at plant or enterprise level.[107] Consequently systems of multi-

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98 See ch V of LRA; for a comparative survey of plant level collective bargaining with the European Union, see Weiss "Workers' Participation: Its Development in the European Union" 2000 *ILJ* 737.

99 National Economic Development and Labour Council.

100 See ch 3 sub-heading C 4 *infra.*

101 See ch 3 sub-heading C 4 and Ch 5 sub-heading C *infra*.

102 *Besaans Du Plessis (Pty) Ltd v NUSAW* 1990 *ILJ* 690 (LAC).

103 See Davis “Voluntarism and South African Labour Law- Are the Queensbury Rules an Anachronism?” 1990 *AJ* 45 for a discussion of the philosophy of voluntarism underlying South African labour law.

104 Sub-heading C.

105 *Ibid* 12.

106 Bamber and Sheldon *op cit* ch 21 5.

107 *Ibid* 6.

employer bargaining at industrial or sectoral level developed in Western Europe and Australasia, while the collective bargaining in the USA, Canada and Japan typically took place at plant organisational level.[108]

Until the 1980 national level collective bargaining was the dominant system in the Scandinavian countries and in Austria.[109] However some countries that have centralised systems of collective bargaining taking place at industrial level have a dual system with plant level collective bargaining serving a complementary role. Germany is an example reflecting such dualistic system.[110]

It has been suggested[111] that where different levels of bargaining coexist in the same country this is a direct result of the different industries emerging at different stages of the industrial era. The older industries consisting of smaller firms tend to organise at industrial level with employers' organisations consisting of a number of employers negotiating with the union(s) representing the employees within a particular industry.[112] Examples of such industries are the engineering and printing industries. The large enterprises operating at the height of the industrial era often occupied monopoly or quasi-monopoly positions in the product market. The huge quantities of capital required to enter the market rendered it unnecessary for these organisations to co-operate with competitors in order to take wages out of competition.[113] These larger organisations could counter union power at

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108 *Idem.*

109 *Idem.*

110 See Summers "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *CLLJ* 467 at 475 where the author says: "The German system of labour relations is a dual system with both adversarial and cooperative components. The negotiation of collective agreements between unions and employers' associations at the industry level have marked adversarial qualities. Conversely, relations at the plant and enterprise level between the statutorily mandated works councils and individual employers have a marked cooperative quality."

111 Huiskamp "Collective Bargaining in Transition" in Ruysseveldt *et al Comparative Industrial and Employment Relations* (1995) 137-138.

112 *Idem.*

113 Bamber and Sheldon *op cit* state: "When, in earlier stages of industrial development, these markets were essentially local, multi-employer bargaining was one way to regulate competition. the greater scale and industrial concentration of

organisational or plant level, hence bargaining was localised. Examples of such newer industries include the chemical and oil refining industries.[114]

As industrialisation progressed further and the service and computer industries developed, bargaining tended to become individualised at the expense of collective bargaining.[115]

4 Requirements for Collective Bargaining

4.1 Introduction

Statutory mechanisms for the institutionalization of conflict through the medium of collective bargaining were introduced into South African labour law in 1924.[116] Despite the provision of a legislative framework for collective bargaining, there still was an underlying philosophy of voluntarism underpinning the legislation.[117]The voluntarism took the form of the employer and employee parties being able to freely regulate their relationship. The role of the state was to encourage collective bargaining by providing the framework for it.[118] This philosophy endured. In 1979 the Wiehahn Commission Report stated that the role of the state is limited to "setting the broad framework within which the employer and employee should have the maximum degree of freedom to regulate their various relationships."[119] The Labour Relations Act[120] continues with this voluntarist philosophy in that the procedures or mechanisms and outcomes of the collective bargaining process are voluntary.[121]Like its predecessors the Act provides a framework for collective

later industries worked against multi-employer bargaining by undermining the possibility of product market competition within single economies."

114 *Idem.*

115 The "individualisation of employment relations" will be discussed ch 6 *infra.*

116 See Industrial Conciliation Act 11 of 1924.

117 Davis "Voluntarism and South African Labour Law" 1990 *AJ* 45, 50.

118 Davis *op cit* describes it thus: "…voluntarism in this context being something of a hybrid system in which the State provided the boxing ring and a copy of the Queensbury rules and then withdrew to allow the parties to fight it out in a manner whereby the party with the greater collective power becomes the victor."

119 Wiehahn Commission Report Part V par 4.11.5.

120 66 of 1995.

121 Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) par 791.

bargaining.[122]Although there is no specific provision in the Act requiring the parties to bargain collectively, provision for extensive organisational rights is made.[123] Furthermore the Act provides that where the dispute concerns a refusal to bargain in different forms, after an advisory award has been made, the employees may strike.[124] The Constitution[125] provides "the right to engage in collective bargaining."[126]Whether or not the right to engage in collective bargaining entails within it a corresponding duty to bargain[127] which is legally enforceable is a question that remains unsettled.[128]

4.2 Requirement of Representativeness

Where there is more than one trade union that wishes to bargain collectively with an employer, the question arises as to which trade union the employer should bargain with. The following approaches to this dilemma have been identified: [129]

(i) Majoritarian approach: The employer bargains only with a trade union that represents a majority (more than 50%) of the employees.

(ii) Pluralist approach: The employer bargains with all trade unions that represent a substantial percentage (usually 30% or more) of the employees.[130]

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122 See ch 3 *infra.*

123 See ch 3 *infra.*

124 S 64(2).

125 Act 108 of 1996.

126 S 23(5).

127 If it is accepted that such a duty exists, it is not an absolute duty. For example in *SASBO v Standard Bank of SA Ltd* 1988 *ILJ* 223 (SCA) it was held that the duty to bargain collectively was not absolute and where managers were directly involved in collective bargaining on behalf of the employer, they should be excluded from the process in order to avoid a conflict of interest. Consequently, the court refused to order the bank to bargain collectively with the applicant union representing the respondent's managerial employees on the ground that an unacceptable conflict of interest would be unavoidable in respect of some of the managers if they formed part of the collective bargaining unit.

128 The different views are discussed in ch 5, subsection D.

129 See Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) par 797.

130 In *Mutual & Federal Insurance Co Ltd v Banking Insurance Finance & Assurance Workers Union* 1996 *ILJ* 241 (AD) it was held that the union must be "sufficiently representative" of the employees in the appropriate bargaining unit before the duty to bargain arises.

(iii) All comers approach: The employer bargains with all trade unions irrespective of their representivity.

4.3 Conduct of Parties During Collective Bargaining

As discussed[131] the legislation displays a preference for collective bargaining as the main means for settling disputes and dealing with conflict. In order for collective bargaining to be effective the parties must bargain in good faith. It is impossible to draw up a *numerus clausus* of what constitutes good faith or bad faith bargaining. Good faith bargaining has been described as negotiating "with an honest intention of reaching an agreement, if this is possible."[132] Having recourse to court decisions Van Jaarsveld has drawn up a comprehensive list of both employer and employee conduct which the courts have considered to constitute negotiating in bad faith.[133] Such conduct includes *inter alia*:

(i) making unrealistic, absurd, unfair or unlawful demands, insulting and offensive behaviour;

(ii) refusing to supply information which is relevant to the negotiations;

(iii) implementing unfair delaying tactics, *et cetera.*

4.4 Aspects of Collective Agreements

4.4.1 Requirements for a Valid Collective Agreement

The Labour Relations Act[134]defines a collective agreement as "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and on the other hand-

(a) one or more employers;

(b) one or more registered employers' organisations; or

131 See ch 3.

132 *East Rand Gold & Uranium Co Ltd V National Union of Mineworkers* 1989 *ILJ* 683 (LAC) 697F.

133 Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) par 802-804.

134 66 of 1995.

(c) one or more employers and one or more registered employers' organisations"[135]

It follows from this definition that in order for a collective agreement to be valid it must be in writing, the trade union concerned must be registered and the agreement must concern itself with conditions of employment or any other matter of mutual interest between the parties.[136] A matter of mutual interest includes "any matter that fairly and reasonably could be regarded as affecting the common interests of the parties concerned, or otherwise be directly or indirectly related thereto."[137] It is also generally accepted that all the usual common law requirements for a valid contract must be present.[138]

4.4.2 Legal Consequences of Collective Agreements

The parties to the collective agreement, their members, the members of the registered trade unions and employers' organisations that are parties to the agreement are all bound to the collective agreement. Furthermore the agreement is also binding on employees who are not members of the registered trade union if: the trade union represents the majority of the employees employed by the employer at the workplace and these employees are identified and specifically bound to the agreement in terms of the agreement.[139] All trade union members are bound to the collective agreement irrespective of when they became members.[140]A collective agreement takes precedence over the individual contract of employment and any provisions in the individual contract of employment which are contrary to the collective agreement will be amended.[141] Where the individual contract of employment purports to amend an applicable collective agreement these provisions are invalid.[142] No provision in an individual contract of employment may

135 S 213.
136 See Basson *et al Essential Labour Law* (2002) vol 2 59.
137 Van Jaarsveld and Van Eck *op cit* par 808; see
138 *Ibid* par 809.
139 S 23(1) (d); see also Basson *op cit* 60-63.
140 S 23(2).
141 S 23(3); see Basson *op cit* 67-68 in this regard.
142 S 199(2).

permit an employee to be paid less remuneration than agreed to in terms of an applicable collective agreement.[143] No provision in an individual contract of employment may permit an employee to be treated less favourably or receive a benefit that is less favourable than that provided in terms of the applicable collective agreement.[144]An employee may not waive any rights contained in an applicable collective agreement in terms of an individual contract of employment.[145] A collective agreement remains in force for the whole period of the agreement,[146]and if it is concluded for an indefinite period it termination may be effected by either party giving the other party reasonable notice, unless the agreement contains a provision prohibiting this.[147]

As industrialisation progressed further and the service and computer industries developed, bargaining tended to become individualised at the expense of collective bargaining.[148]

E Comparative Survey

1 Sweden[149]

The Swedish collective bargaining system has always been highly centralised.[150] Historically the bargaining partners have been nationally represented trade union federations on the one hand and national employers' associations on the other hand. The Social Democrats came to power in the 1930's and began a tradition of co-operative bargaining between the parties where the impact of the collective agreements on the economy, foreign trade and income distribution was of primary importance.[151]

143 S 199(1) (a).
144 S 199(1) (b).
145 S 199(1) (c).
146 S 23(2).
147 S 23(4); Basson *op cit* 64-65.
148 The "individualisation of employment relations" will be discussed ch 6 *infra.*
149 Regarding the Swedish system in general, see Summers *op cit* 482-486.
150 Austria, the Netherlands and Switzerland also have centralized systems of collective bargaining.
151 Summers *op cit* 482-483.

The Swedish Trade Union Federation (hereinafter LO) wields central control over other trade unions.[152] Where a national union intends calling a strike, which would involve more than three per cent of its members, LO, approval is required. Since LO controls major strike funds it controls the ability of national unions to strike. This control enables LO to influence bargaining policy and the content of settlements.[153] After World War II the LO agreed to pay freezes. This later caused discontent as there were severe inequalities in wages. The result was a decision by LO to decentralise bargaining in 1951 and consequently national unions demanded higher wages for sectors that had lagged behind and had not enjoyed the higher wages given to other sectors.[154]

During the 1950's an informal centralised bargaining system was adopted by the parties.[155] The bargaining parties were the Swedish Employer's Confederation (SAF) and LO. SAF was founded early in the twentieth century and has always been highly centralised, controlling a large fund to aid employees during strikes. The SAF had power to call national lock-outs and influence bargaining policies.[156] This informal process involved the leaders of the two central federations meeting informally with government officials in order to reach consensus on wages so that the national economy would not be adversely affected. The effect of the wages on the rate of inflation, economic growth and exports were major issues for consideration by the parties. Another aspect that was factored in was the intentional narrowing of differences between high and low wages. This was known as the 'solidarity policy' of the LO. In other words the lower income employees received higher increases than the higher income employees. This system was formalised in the 1960's. The negotiations always included consultations with government so that the projected effect of the increased wages on the economy could be considered. The LO would agree to limit wage increases in exchange for

152 *Ibid* 482.
153 *Idem.*
154 *Ibid* 483.
155 *Idem.*
156 *Ibid* 482.

government undertakings to increase spending on social security such as housing, medical care, pensions or alternatively changes in personal income taxes.[157]

The Social Democrats remained in power until 1980. The Liberal Government's policy was that it should not interfere in the negotiation process and that collective bargaining was a matter between trade unions and employers.[158] Without the usual government assurances the unions were not prepared to limit wage demands. The result was strikes beginning in the public sector and spreading in the form of sympathy strikes and eventually bringing the Swedish economy to a virtual standstill for ten days. Eventually government had to intervene and mediate a settlement.[159]

The LO's 'solidarity policy' which narrowed the wage differential between skilled and unskilled workers, may have contributed to the shortage of skilled workers in Sweden.[160] Consequently during the last fifteen odd years there have been moves by trade unions and employers alike to a more decentralized system. In 1984 unions negotiated independently. However by 1985 there was a return to co-ordinated and uniform, centrally negotiated agreements.[161] Employer attempts to decentralise the system in the last few years have been thwarted by the unions. Nevertheless the system is still highly centralised and in 1998 85% of employees were covered by centrally negotiated agreements.[162]

This highly centralised negotiation system managed to maintain a growth rate in the economy of 3,8 per cent from 1950 to 1973. The growth rate has subsequently declined to 1,5 per cent.[163] During the latter part of the 1980's Sweden

157 *Ibid* 483.
158 *Idem.*
159 *Ibid* 484.
160 *Idem.*
161 *Idem.*
162 *Idem.*
163 Terblanche "A Comparison of the Social Security Systems of Sweden, Germany and the United States: Possible Lessons for South Africa" Paper read at a seminar presented by the Goethe-Institute on "Social Transformation Processes" Johannesburg 4 November 1998 12.

experienced higher levels of unemployment. Until 1986 Sweden was able to keep unemployment below 3 per cent.[164] The Swedish government was able to contain unemployment by the reason of jobs in the public sector in the newly created service industry. However by the early 1990's the rate of unemployment in Sweden was almost 10 per cent.[165] The centralised collective bargaining system in the new era of technology and globalisation has been unable to deliver both efficiency and welfare. During the 1980s and the 1990s "the strongly centralized bargaining system, which has given stability but also counteracted flexibility, has gradually disappeared."[166]

2 Germany

Germany has a dualistic system of collective bargaining with negotiations taking place both at plant level as well as at industrial or sectoral level.[167] The bargaining style for industrial level collective bargaining is adversarial and the topics for negotiation are distributive issues. Collective bargaining at plant or organisational (enterprise) level on the other hand concerns productive issues and consequently is co-operative in nature.[168] The bargaining at plant or organisational level is conducted by works councils and individual employers,[169] whereas the industrial or central level collective bargaining is conducted by trade unions and employers' organisations.[170]

Industrial level collective bargaining in the German system differs from the Swedish system in that the government is not involved in the negotiation

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164 *Idem*

165 *Ibid* 3.

166 Nystrom in Blanpain *Labour Law and Industrial Relations at the Turn of the Century* (1998) 368. The author concludes that "There is a tendency in Sweden today towards more individual protection."

167 Fuerstenberg "Employment Relations in Germany" in Bamber and Lansbury *International and Comparative Employment Relations; A Study of industrialised Market Economies* (1998) 98.

168 Bamber and Sheldon *op cit* 8.

169 These works councils are "in some way, the extended arm of the union on the shop floor, despite the fact that they are elected by all workers of the plant, whether unionised or not," according to Daubler "Trends in German Labour Law" in Wedderburn *et al Labour Law in the Post-Industrial Era* (1994) 109.

170 *Idem.*

process.[171] The parties do not take responsibility for the possible repercussions of the final settlement or agreements on the national economy.[172] Since central level collective bargaining is antagonistic and adversarial in nature each party attempts to gain at the other's expense irrespective of the possibly adverse effects on the national economy. The national economy is the government's problem not that of the negotiating parties.[173]

The German Trade Union Federation does not exercise control over the national unions that make up the Federation. However the national unions are highly centralised and co-ordinated with local branches being controlled by the national unions. National unions however, do not exercise control over works councils.[174]

After the Second World War unions exercised wage restraint as a matter of policy. Subsequently under Social Democratic Governments wage restraint on the part of unions was achieved by government undertakings to support price stability by fiscal and budgetary means. However, in the late 1960's strikes broke out as a result of lack of confidence in the unions. The strikes were resolved by work councils negotiating for better wages despite their lack of authority to do so.[175]

Attempts at wage restraint are usually ineffective since works councils frequently negotiate improved benefits above those negotiated by the industrial level collective agreements.[176] These industrial level collective agreements can be extended to non-unionised work places in terms of legislation.[177] The main purpose of extensions of collective agreements to employers who were not party to the agreement was to eliminate competition from non-unionised employers. This

171 Summers "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *CLLJ* 475.
172 *Idem.*
173 *Ibid* 485
174 *Idem.*
175 *Idem.*
176 Du Toit "Workplace Forums from a Comparative Perspective" 1995 *ILJ* 1544 1548.
177 Australia, Austria, Belgium, Denmark, France, Italy, Japan, South Africa, South Korea, Spain and Switzerland all have procedures for the extension of collective agreements to non-members within a particular sector.

objective however, can no longer be attained because globalisation and the resultant free markets have rendered the isolation of national markets impossible. Nevertheless the practice of extending agreements to non-parties is still very prevalent in France.[178]

3 United States of America

There exists no legal framework for central level collective bargaining with all collective bargaining taking place at plant or organisational level. The negotiating style for collective bargaining in the USA is adversarial.[179] This style of negotiation means that a gain for one side necessarily entails a loss for the other side, unlike co-operative negotiating where the parties share a common interest in the prosperity of the enterprise. In the USA therefore, the only concern of unions is to achieve the best possible benefits for their members. The employers' financial circumstances are of no concern to the union. The traditional union stance is that all employers must pay the standard rate and an employer who cannot afford to should go out of business.[180] On the other hand, employer stance has historically been that since profits are the fruit of employers' risk they are none of the union's business.[181]

Despite the fact that the National Labour Relations Act of 1935 declared the national policy to be the promotion of collective bargaining, it appears that the state and the courts have done very little to prevent breaches of this Act and employer ploys to defeat trade unions.[182] An increase in cases of discriminatory practices against union members for partaking in union activities from 1965 to the 1990's has been recorded. The ratio between the number of employees

178 Bamber and Sheldon *op cit* 25
179 *Ibid* 6.
180 Summers *op cit* 468.
181 *Idem.*
182 *Ibid* 469 and Adams "Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences" 1993 14 *CLLJ* 272, 280. See also Davis "Voluntarism and South African Labour Law – Are the Queensbury Rules an Anachronism?" 1990 *AJ* 45, 46-47.

discriminated against and the number of union members was 1 in 72 in 1965, 1 in 35 in 1975, 1 in 6 in 1985 and 1 in 7 in 1990.[183]

The adversarial nature of collective bargaining in the USA has been entrenched by the following legal rules:[184]

(i) The principle of majoratarianism means that an employer need not negotiate with a trade union until it has proof that that trade union represents the majority of its employees. The election campaigns often result in unions promising prospective members large pay rises which if elected they are compelled to demand. Usually the employer has no choice but to reject unrealistic demands that would put the organisation in jeopardy. The resulting deadlock usually leads to antagonism and distrust.[185]

(ii) The underlying belief in an antagonistic system where employee and employer interests can never coincide has led to the rule that management staff are not entitled to join trade unions and bargain collectively since they are the employer's representatives. The philosophy that labour and management cannot be on the same side has also been supported by US court decisions.[186]

(iii) Another rule that entrenches this adversarial nature of collective bargaining is that unions are not entitled to information concerning the financial affairs of the enterprise unless the employer claims an inability to pay.[187] The underlying premise supporting this rule is that the prosperity of the

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183 Adams *Industrial Relations under Liberal Democracy* (1995) 469.

184 *Idem.*

185 *Ibid* 470.

186 See *NLRB v Yeshiva University*, 444 US 672, 684 (1980) where it was held that since university professors exercised managerial functions in determining curricula, class schedules, teaching methods, grading policies, and admission and graduation policies, the university was not obliged to bargain with the union representing the professors. Similarly in *NLRB v Health Care & Retirement Corp* 114 S.Ct 1778 (1994) the court held that nurses who were put in charge of other nurses and who could make proposals with reference to promotions and dismissals were not entitled to union representation.

187 Summers *op cit* 471.

enterprise is no concern of the union and that profitability of the enterprise is the sole responsibility of management.

(iv) The concept of the employer's duty to bargain was accorded very limited scope by the US courts which have emphasised the concept of managerial prerogative.[188]

Despite these rules and premises upon which an adversarial relationship is inevitably grounded, some employers and unions in the USA have developed co-operative relationships based on the recognition of a common interest.[189] Nevertheless the heritage of hostility was in place since the outset of industrialisation and the advent of the American labour unions[190] and consequently is deeply embedded in the American consciousness.[191]

4 Japan

Like USA collective bargaining does not take place at central level but rather at enterprise or plant level.[192] However, unlike USA collective bargaining is co-operative in nature with the fundamental recognition that employer and trade unions have a common interest in the survival and prosperity of the enterprise.[193] This was not always the case and prior to the Second World War, trade unions

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188 See *First Nat'l Maintenance Corp v NLRB* 452 (1981)US 666 where it was held that an employer has no duty to inform or negotiate with the union about the matters concerning the day to day running of the enterprise such as the introduction of new products, or new production methods, or the restructuring or partial closing of the enterprise. In *Fibreboard Paper Prod. Corp. v NLRB* (1964) 379 US 203, 223 the court held that unions can be excluded from "managerial decisions which lie at the core of managerial control."

189 Summers *op cit* 469-470.

190 Gregory *Labour and the Law* (1946) 15.

191 This traditionally adversarial system of collective bargaining has not been able to withstand the changes brought about by globalisation and the rapid advances of technology since the early 1980s. Arthurs, in Blanpain *Labour Law and Industrial Relations at the Turn of the Century (*1998) 152, stated: "For one thing, the American system of collective bargaining is in decline. This decline began long before the shape of the so-called 'new economy' became visible in the 1980s, but it has certainly been exacerbated by stresses attributable to globalization, technological change and the ascendancy of anti-state ideologies."

192 Bamber and Sheldon *op cit* 5-6.

193 Summers *op cit* 474.

were strongly opposed by employers and government alike. However by the 1950's the potential for destruction and unproductivity resulting from adversarial relationships swayed employers to embark on a more co-operative stance and the labour relations system was transformed to a system of co-operation between employer and trade unions.[194]

Summers has identified the following principles and policies that form the basis of the Japanese system: [195]

(i) Unlike the American system where employees are perceived as mere suppliers of labour, employees in Japan are considered to be part of the enterprise. Employers have strong social and moral obligations not to dismiss employees despite economic downturns.[196] The practice of life-long employment has been the norm since the 1950's and sixties.[197] Even small employers will make every effort not to dismiss employees. This practice however has recently become less popular with the younger generation who sometimes prefer to negotiate better wages in exchange for less job security.[198]

(ii) Employees are entitled to full information since decisions concerning the enterprise must be made jointly by management and unions.

(iii) Not only do employees share the responsibility of the viability of the enterprise but they also share in the profits.[199] Up to one third of employees' remuneration takes the form of a bonus that will vary according to the enterprise's profitability. Where company profits drop, management are the first to accept a cut in salary.

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194 Summers "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *Comparative LLJ* 473.

195 *Ibid* 473-475.

196 See Summers *op cit* 474-475.

197 Nakakubu "Individualisation of Employment Relations in Japan: A Legal Analysis" in Deery and Mitchell *Employment Relations Individualisation and Union Exclusion* (1999) 172.

198 This aspect is discussed in the next chapter where the worldwide trend towards the individualisation of the contract of employment is discussed.

199 Nakata "Trends and Developments in Japanese Employment Relations in the 1980s and 1990s" in Deery and Mitchell *op cit* 188.

(iv) Differences in wages, treatment, status and so on between management, staff and other employees is minimal.

(v) Unlike the USA there is no separation between union and management.[200]

In summary therefore, employees and employers are 'partners' in the enterprise. In exchange for security in the form of life long employment employees and trade unions co-operate with employers with one of their objectives being the maintenance of the viability of the enterprise.[201] Joint responsibility is taken for the survival and prosperity of the company and profits are also shared. Since joint responsibility for the viability of the company is taken, employees and trade unions are essential parties to the decision making process. For this decision making process to be viable full disclosure of information by the employer is necessary. The sharing of information, joint responsibility for the fortune of the enterprise, joint decision making, life long employment and the sharing of profits all serve to contribute to a culture of employees being part of the organisation and having an interest in its long term survival.[202] Co-operative relationships are a necessary consequence of such principles.

200 Adams "Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences" 1993 14 *CLLJ* 272.

201 Yamakawa "The Role of the Employment Contract in Japan" in Betten et *al The Employment Contract in Transforming Labour Relations* (1995) 106.

202 Summers *op cit* 474.

5 England

The labour relations system in England has often been referred to as voluntaristic.[203] The reason for such categorisation is that the Sate has not played a major role with regard to labour legislation.[204] For instance there is no law that compels an employer to bargain collectively with a trade union; even if such collective bargaining takes place and the parties reach agreement, such agreement is not legally binding; the law does not regulate the right to strike, there are no provisions governing the coverage of collective agreements, and so on.[205] The State therefore has not played a direct role in the creation of the labour relations system. Nevertheless state policy toward collective bargaining has been far from neutral.[206] Until 1979 when Margaret Thatcher came to power, British

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203 See Kahn-Freund "Legal Framework" in Flanders and Clegg *The System of Industrial Relations in Great Britain* (1954) 44 where he stated: "British industrial relations have, in the main, developed by way of industrial autonomy. This notion of autonomy is fundamental and it is…reflected in legislation and in administrative practice. It means that employers and employees have formulated their own codes of conduct and devised their own machinery for enforcing them…within the sphere of autonomy, obligations and agreements, rights and duties are, generally speaking, not of legal character." Oliver "Trade Union Recognition: Fairness at Work" 1998 *Comparative Labor Law and Policy Journal* 33 states: Traditionally, U.K. labour law has been based on the theory of legal abstentionism - the idea that employers and employees should be left to bargain with each other freely over contractual terms and conditions without interference by legal regulation. This led to England being one of the first jurisdictions with a well-developed although largely unregulated system of collective bargaining, and as a result less statutory protection of workplace rights than comparable jurisdictions".

204 Kahn-Freund *op cit* 44 stated: "there is perhaps no major country in the world in which the law has played a less significant role in the shaping of (industrial) relations than in Great Britain and in which today the legal profession have less to do with labour relations."

205 Penceval "The Appropriate Design of Collective Bargaining Systems: Learning from the Experience of Britain, Australia and New Zealand" 1999 *Comparative Labor Law and Policy Journal* 447, 461.

206 As pointed out by Adams "Regulating Unions" 272, 295: "Despite the absence of extensive legislation, the policy of British governments in the 20th century has not been neutral, as the policy of voluntarism is sometimes interpreted to imply. In fact British policy has been to encourage collective bargaining. It has done so by notifying all public servants that collective bargaining is the preferred means of establishing conditions of work, by requiring government suppliers to recognize the freedom of their workers to join unions and engage in collective bargaining and by directly intervening in many disputes in order to pressure intransigent employers to recognize unions and to negotiate with them. These 'policies' were de-emphasized

national policy towards trade unions and collective bargaining was one of encouragement and the State contributed in an indirect manner to the growth of trade unions:[207]

(i) Non-union firms with government contracts were required to pay union-negotiated wages.[208]

(ii) Minimum wage regulations for specific industries were predominant in industries that employed mainly unskilled workers, until they were removed in the early 1990's.[209]

(iii) The introduction by many governments of 'income policies' aimed at reducing wage and price inflation were usually accompanied by favours granted to unions in order to induce union co-operation.[210]

(iv) Since approximately a century ago until 1979, British governments have consistently discouraged competition in product markets. Prior to the second world war it was believed that monopolies or quasi monopolies in product markets could compete more effectively on the international level. After the second world war major industries such as coal, gas, electricity, urban transport, the railways, airlines, telecommunications and steel were state owned monopolies. Such nationalisation was supported by the union movement.[211]

Things changed from 1979 when Margaret Thatcher took over.[212] The Thatcher administration privatised a number of industries, eliminated minimum wage floors

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by British labour experts fixated on the romance of 'voluntarism' until Margaret Thatcher changed them in the 1980s".

207 Penceval *op cit* 462-464.

208 As Penceval points out, *op cit* 463: "Given the extensive role of government expenditures in the economy, these rules affected a number of employers."

209 *Idem.*

210 *Ibid* 463.

211 Penceval *op cit* 465.

212 Oliver *op cit* says at 33: " …during the 1980's, the then conservative government systematically eroded the power and influence of trade unions at a time away from large manufacturing plants and heavy industry, coupled with an increase in service industries, an increase in the number of non-unionised part-time and female workers, and high unemployment. This led to the present position whereby no employer is compelled to recognize trade unions in the workplace, and collective consultation with employees is rarely compulsory except where required by

in specific industries and eliminated the practice of extending union negotiated wages to non-union employers.[213]

In 1998 however, proposals were made concerning legislation which would provide for the statutory recognition of unions.[214]These proposals resulted in the Employment Relations Act 1999 (ERA). The policy consideration behind the legislation is the achievement of an effective partnership between the employer and the workforce and is encapsulated in the White Paper *Fairness at Work*

European legislation such as that relating to collective redundancies, transfers of undertakings, and health and safety." This erosion of union power by the Conservative Governments since 1979 took the form of new rules and regulations. In the words of Pencavel *op cit* 465: "Foremost among these new regulations were rules concerning strikes. The Trade Disputes Act of 1906 established that a union could not be sued by an employer for damages resulting from a strike. Thatcher's administrations qualified this legal immunity from damages: A union became liable for damages if striking against a secondary employer; an employer could sue a union if the strike was not over industrial relations issues that the employer could address, but over, say, political issues or inter-union feuds that the employer had no control over; and a union would lose its immunity if the strike had proceeded without first secretly balloting its members and obtaining the support of the majority for the strike action. In those circumstances where the union lost its immunity its financial liabilities for damages were proscribed by law. In instances where the union undertook strike action without first balloting its members and ignored court injunctions to desist, the union's funds could be sequestered. The number and importance of strikes in Britain over the past thirteen years has fallen considerably, and it is tempting to attribute this decline in strike incidence to these legal changes. However there are many competing explanations for this change - strike activity has fallen in many countries - and it is difficult to determine the particular contribution of the law. [See ch 5 *infra* where the reasons for the worldwide trend of a decline in union power are discussed.] The Conservative Governments since 1979 also changed the law to make closed shops more difficult to maintain, in particular the 1988 Employment Act prohibited firms from dismissing non-union workers at the behest of the unions while the 1990 Employment Act made it illegal a non-union worker access to employment. In addition laws were introduced strengthening the rights of rank- and- file union members in dealing with their own organization. It was stipulated that direct, secret elections of union officials must occur every five years, while every ten years elections must be held to approve any political expenditures the union makes. Union members were given the rights to examine their union's accounting records. "See also in this regard Gould "Recognition Laws: The US Experience and its Relevance to the UK" 1999 *Comparative Labor Law and Policy Journal* 11.

213 Penceval “The Appropriate Design of Collective Bargaining Systems: Learning from the Experience of Britain, Australia and New Zealand” *Comparative Labor Law and Policy Journal* (1999) 465.

214 United Kingdom White Paper *Fairness at Work* (1998) and The Employment Relations Bill 1998.

(FAW).[215] This legislation in no way encourages centralised forms of collective bargaining or the extension of centrally bargained collective agreements. It is concerned with recognition of trade unions for the purpose of plant level collective bargaining. Aside from the fact that the legislation does not concern itself with centralised or industrial level collective bargaining, it also does not perceive trade unions as the only or necessarily the preferred vehicle or body for the representation of the workforce. In fact "the authors (of the legislation) make no secret of the fact that they regard the role of statutory recognition as a very marginal one, a mechanism of last resort, rather than as a way of developing a general paradigm. At one level, that represents no more than a preference for voluntarily agreed trade union recognition over recognition imposed by statutory machinery, a preference with which it is hard to quarrel. At another level, it is part of a persistent emphasis on the fact that representation of the workforce by trade unions, even if it is voluntary rather than statutory, is only one of the alternative methods of workforce representation, and by no means necessarily the preferred method…."[216]The policy considerations which prompted this legislation is the notion that in order for companies to prosper and consequently boost the economy there needs to be an "effective partnership between the business and its workforce, permitting the most efficient and flexible harnessing and development of the skills and talents of the workforce. The partnership may be mediated through trade unions, but it is envisaged as underlying a partnership with the individual workers themselves."[217]

The new legislation perceives statutory recognition as only one means ,and a relatively unimportant one at that, of achieving this effective partnership for the

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215 Freedland "Modern Companies and Modern Manors-Placing Statutory Trade Union Recognition in Context" *Comparative Labor Law and Policy Journal* 1998 3, 6.

216 *Ibid* 6. The White Paper *Fairness at Work* par 4.10 states: "The Government accepts the importance of voluntary choices, and believes that mutually agreed agreements for representation whether involving trade unions or not, are the best ways of employers and employees to move forward."

217 Freedland *op cit* 6-7. See ch 6 *infra* where the worldwide trend of individualisation of the employment relationship is discussed.

achievement of a stronger economy. More important in the achievement of this partnership is the promotion of "family friendly" policies.[218]

The result of the changes affected by the Thatcher administration and consequent Conservative Governments was the creation of more competitive product and labour markets.[219] Consequently there has been a decrease in coverage of multi-employer agreements and an increase in coverage of agreements reached at plant level.[220] This was recognised and encouraged even by Labour Governments as seen by the recent labour legislation discussed above. The central features of this legislation (ERA) which followed from the White Paper *Fairness at Work* were identified as being a culture of support for the family for the mutual benefit of the employee of the business, a culture of partnership between employer and employees, and equal and fair treatment for all in the workplace.[221] These objectives are to be attained through representation of the workforce. Schedule 1 of the ERA provides that where a majority of the workforce wants recognition or where more than 50% of the workforce are members of the union seeking recognition automatic statutory recognition will kick in. As a minimum collective bargaining must take place over the issues of pay, hours of work and holidays.[222] These agreements become legally binding contracts enforceable by a court of law. However, specific performance is the only remedy available for breach of such a collective agreement.[223] This is problematic because specific performance is generally difficult to obtain.[224]

6 Belgium

218 Freedland *op cit* 7. See ch 5 of FAW and clauses 8-10 of the ERA which deal with leave for family and domestic reasons.

219 Penceval *op cit* 466 states: "There is wide agreement that, since 1979, the arbitrary power of unions in Britain has fallen, and part of the increased growth in productivity over the past eighteen years or so has been attributed to a decline in the obstructionist power of unions."

220 *Idem.* This issue is discussed in ch 5 *infra.*

221 According to the Secretary of State for Trade and Industry when presenting the Bill to the House of Commons. See also Clause 5.5 of White Paper *Fairness at Work*.

222 S 5 of ERA.

223 Schedule 1 clause 30 (6) ERA.

224 Oliver *op cit* 42.

The Belgian collective bargaining system is highly formalised.[225] In Belgium collective agreements can be negotiated at the following levels:[226]

(i) National level (National Labour Council- for all industries in the whole country).[227] This forum negotiates the provisions governing working conditions and social security, and, advises the government on labour affairs and on disputes among Joint Management Labour Councils.[228]

(ii) Regional (sector) and industrial level (National Joint Committee-for one sector of industry throughout the country);[229] where wage rates, job classifications, general conditions of employment and training programs are negotiated.[230]

(iii) Enterprise level (Works councils, Trade Union Delegation and the Health and Safety Committee) - for the particular employer and its employees.[231] All three of these bodies have overlapping functions and at times overlapping personnel.[232] The scope of collective bargaining issues differs from company to company and can include virtually all issues.[233]

The National Labour Council was created shortly after the Second World War.[234] However it roots go as far back as 1886, when a large wave of industrial unrest led to the creation of the High Labour Council (Hogere Arbeidsraad) in 1892.[235] The idea was that it was preferable to contain conflict by involving employer organisations and employees in the management of the national economy.[236] Agreements reached at national and regional level can be declared to be of

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225 Murg and Fox *Labour Relations Law (Canada, Mexico and Western Europe)* (1978) 943.
226 Potgieter "Die Reg op Kollektiewe Bedinging" 1993 *TSAR* 175,178.
227 Gower *Employment Law in Europe* (1995) 2nd ed 67.
228 Murg and Fox *op cit* 390.
229 Potgieter *op cit* 177.
230 Murg and Fox *op cit* 391.
231 Gower *op cit* 67.
232 Murg and Fox *op cit* 391.
233 *Idem.*
234 Jacobs "From the Belgian National Labour Council to the European Social Dialogue" in Blanpain *Labour Law and Industrial Relations at the Turn of the Century* (1998) 306.
235 *Idem.*
236 Jacobs *op cit* 106.

general application or extended to the parties throughout the country.[237] The National Labour council has an equal number of representatives from trade union and employer organisations.[238] These agreements take precedence over all other collective agreements as well as individual contracts of employment, customs and so forth, unless the latter are more favourable to the employee.[239] These collective agreements can be enforced by the civil courts and by penalties in terms of the criminal law.[240]

There are three bodies that bargain collectively with the employer at enterprise level: The trade union delegation, the works council and the Health and Safety Committee.[241] All companies employing more than 150 employees are obliged to have a works council.[242] The main function of the works council is to promote co-operation between management and employees on working conditions, the organisation of work and the application of labour legislation.[243] Each council consists of employee representatives and the head of the enterprise and employer representatives which may be appointed by the employer. However, there may not be more employer representatives than employee representatives.[244] Trade union delegations are the bodies where most of the enterprise level collective bargaining takes place.[245] Trade union delegations can be established by collective agreement either at enterprise level or at industrial level.[246] A union delegation can only be establishes at the request of one or more representative trade unions, and the employer is obliged to comply with this request.[247] These union delegations enjoy certain rights "which in other jurisdictions are typically extended to works councils -

237 Potgieter *op cit* 181.
238 *Idem.*
239 Jacobs *op cit* 309.
240 *Idem.*
241 Murg and Fox *loc cit*.
242 *Idem.*
243 Potgieter *op cit* 178.
244 Du Toit *et al Labour Relations Law* (2003) 4th ed 393.
245 Du Toit "Collective Bargaining and Worker Participation" 1996 *ILJ* 1545, 1551.
246 Du Toit *et al op cit* 392.
247 Du Toit *op cit* 1551.

- the supervision of the application of labour standards, labour laws, collective agreements and work rules;
- right to advance information on matters which could affect working conditions or remuneration methods;
- joint decision-making rights concerning measures to deal with increased workload, such as overtime and the use of temporary workers from an agency;
- in the absence of a Committee for Prevention (of accidents) and Protection at work, carrying out the duties normally assigned to such committee."[248]

Clearly union delegates are the key figures in enterprise level collective bargaining and it is accepted practice for employers to recognize and deal with union delegations.[249] As such employers are obliged to inform union delegations of proposed changes to wages and working conditions.[250] Union delegations are present in most enterprises and they enjoy the exclusive right to nominate the employee representatives for the works council.[251] In this way strong union presence and influence at enterprise level can be attained.

Since 1952 all enterprises employing fifty or more employees are obliged to have a Health and Safety Committee which is composed of worker representatives nominated by the three most representative trade unions in the workplace.[252]

F Conclusion

Trade unions emerged as a social response to the advent of industrialisation.[253] Individual employees had to combine and consolidate their bargaining in order to

248 Du Toit *loc cit*.
249 Murg and Fox *op cit* 392.
250 *Idem.*
251 Du Toit *op cit* 1559.
252 Du Toit et *al op cit* 393.
253 The ability of trade unions to properly fulfil this function in the post-industrial era began to be questioned as the twentieth century was coming to an end. As pointed in Wedderburn *et al Labour Law in the Post-Industrial Era* (1994) 87: "In my view,

influence employers and bargain for better wages and working conditions. Trade unions were the vessel for such collective power and its main function has always been to bargain with employers in order to attain better working conditions for their members. As Adams states: "Indeed collective bargaining is generally considered to be the major contemporary function of trade unions. The two institutions are so intimately linked that many writers speak of them as if they were a single interwoven phenomenon." [254]

Collective bargaining can take place at various levels and in different forms. It was suggested that the systems of collective bargaining that have been adopted in different countries are a result of the historical and political influences present at the time that particular country became industrialised.[255] Where unions organised along occupational or industrial lines employers were forced to counter union power by joining forces. Multi employer bargaining thus became the norm in Western Europe, Britain, Australia and New Zealand.[256] However, where larger organisations emerged very soon these organisations were able to counter union powers at plant level without having to join forces with other employers. This was

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the 20th century saw the rise and now sees the fall of the concept of collectivism. In the first decades of this century collectivities, unions, turned out to be a possibility to compensate for at least a great part of the inequality between employer and worker. Unions managed to bargain with employers and their organizations, and were able to reach more favourable working conditions than the worker could on his own. The blooming period of the unions lasted some decades during which workers themselves were very poorly trained, educated and skilled. In the meantime, however, the changing type of worker we meet now has less confidence in collectivities to defend his rights. A characteristic of the present time is the waning belief in the collective promotion of interests. The concept of collectivism is rapidly losing ground to that of individualism. The new type of worker thinks he can look after his own interests. He refrains from joining a union…."

254 "Regulating Unions" 272.

255 Bamber and Sheldon *op cit* 5.

256 Bamber and Sheldon *op cit* 5-6 state: "In western Europe including Britain, and Australasia, multi-employer bargaining emerged as the predominant pattern largely because employers in the metal working industries were confronted with the challenge of national unions organized along occupational or industrial lines. In contrast, single employer bargaining emerged in the USA and Japan because the relatively large employers that had emerged at quite an early stage in both countries were able to exert pressure on unions to bargain at enterprise level."

the case in USA, Japan and Canada. Consequently these countries have never had centralised systems of collective bargaining.[257]

Collective bargaining can also be conducted at different levels in the same country. It has been suggested that the level at which collective bargaining occurs is determined by the stage of industrial development within which the particular industry emerged.[258] At the earlier stages of industrial development organisations tended to be smaller and consequently older industries such as printing and engineering developed centralized collective bargaining systems. This was done in order to remove competition within product markets. As the industrial era progressed larger industries such as the chemical and oil refining emerged. [259] These huge firms were sufficiently powerful to counter union power at plant level without having to embark in multi employer collective bargaining. Secondly, it was not necessary for these huge firms to co-operate with other firms in order to reduce competition within product markets.[260]

Finally, the newer industries such as the service industries typically make use of individually bargained employment contracts.[261] Collective bargaining systems do not only differ with reference to the levels at which bargaining takes place, but also differ with regard to whether the bargaining is co-operative or adversarial in nature.[262] As seen above in England and the United States, bargaining tends to be adversarial, while in Japan and Sweden it is more co-operative with unions sharing responsibility for the prosperity of the enterprise. Germany has a dual system with adversarial bargaining taking place at central level, and co-operative style bargaining taking place at plant level. In Belgium bargaining takes place at national level, sectoral, regional and industrial level, as well as at plant level.

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257 *Idem.*

258 Huiskamp "Collective Bargaining in Transition" in Ruysseveldt *et al Comparative Industrial and Employment Relations* (1995) 137-138

259 Bamber and Sheldon *op cit* 6.

260 *Idem.*

261 This phenomenon is discussed in the next chapter.

262 See Du Toit *op cit* 1544, 1553.