The Changes and Development of Collective Bargaining in Taiwan

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I. Introduction

It has been almost five years since Taiwan referred to the legislative examples of Japan and United States to establish the arbitration mechanism for unfair labor practices in May 2011. This arbitration mechanism, which protects labor's right to organize or participate in labor union activities, the right to do collective bargaining with their employer and the right to apply for arbitration of unfair labor practices, plays a crucial role in the collective labor-management relations.

The regulations correlated with the arbitration mechanism are: In Article 35 of Labor Union Act, it sheds lights on the unfair labor practices which may hamper the development of labor unions; In Article 6, Paragraph 1 of Collective Agreement Act, it expresses: "Both the labor and the management shall proceed in good faith when bargaining for a collective agreement; any party without justifiable reasons cannot reject the collective bargaining proposed by the other party." In order to deal with unfair labor practices handle unfair labor practices rapidly and to protect the infringed labor rights, the government amended the Act for Settlement of Labor-Management Disputes, added a new chapter — Decision, which is from Article 39 to 52, to regulate the decision-making system in labor-management dispute. The purpose of the newly amended law, which is identical to the illustration in its draft, is to protect the collective bargaining right and the right to organize or attend labor union, rapidly eliminate unfair labor practice and return labor-management relations to normal. To achieve this purpose, the authority concerned will organize a Board for Decision on the Unfair Labor Practices, recruiting experts and scholars who are familiar with labor-management relations as committee members, to judge and to remedy unfair labor practices.

The biggest change in the collective labor-management relations after the establishment of arbitration mechanism of unfair labor practices is the introduction of "good faith bargaining." According to Article 6, Paragraph 1 in Collective Agreement Act, it is stipulated that both the labor and the management has the duty to respond to the bargaining request from another party, and it shall proceed in good faith. Also, according to Article 32, Paragraph 1 of the same Act "Any party in violation of Paragraph 1 to Article 6 of the Act, after it is decided through related procedures contained in the Settlement of Labor-Management Dispute Act, it shall be punished by an administrative fine of not less than N.T.$100,000 but not exceeding N.T.$500,000." And in Article 51, Paragraph 1 of Act for Settlement of Labor-Management Disputes, it regulates that the punishment shall include ordering the parties to take or not to take certain action. Thus, in Article 32, Paragraph 2 of Collective Agreement Act, it further regulates that "any party that has not undertaken any action or inaction within the period as prescribed in the decision rendered in accordance with preceding paragraph shall be punished again by an administrative fine of not less than N.T.$100,000

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but not exceeding N.T.$500,000, and may also order to correct within a given period; if the party fails to take corrective action within a given period, the fine may be imposed consecutively." In the following paragraphs, we are going to illustrate the changes in Taiwan's labor-management collective bargaining, and the meaning of it.

II. The changes in the norm of collective bargaining

Collective bargaining agreements derive from the motivation to maintain and ameliorate current labor conditions, as well as the purpose of assuring and elevating the social status of labor. Theoretically speaking, collective bargaining agreements come from the fact that labor usually has the lower hands facing dispute with employers individually. Through the power of unity, labor has more chances to bargain with their employers. Collective bargaining has existed in many countries for a long while. However, due to the differences in the influence of labor unions as well as the labor-management relations, the design of the agreements from every country differs. We can bisect the current collective bargaining agreements into the laissez-faire style and the assistance style.[1] The laissez-faire agreements mode, which Germany adopts, protects labor's right to organize or participate in labor unions and the right to dispute with employers, giving special efficacy to collective bargaining agreements. The agreements only regulate things within the limitations of dispute settlement during the collective bargaining. The assistance agreements mode, which Japan and the United States adopt, is an obligation levies on employer that urges them to bargain collectively with employees.

Taiwan's Collective Agreement Act, which was enacted in 1930, focuses on the restrictions (chapter 2), the effects (chapter 3) and the duration (chapter 4) of the collective agreements. The only regulation related to collective bargaining is in Article 4 of Collective Agreement Act, the rest of the relative regulations are in Notice of the Conclusion of Collective Agreement. This is because the Taiwanese governments in early times presumed that the working conditions are collectively formed by labor-management autonomy. Therefore, we can say that Taiwanese government adopted the laissez-faire agreements mode back in the time.[2] And because of that, the method and the necessity of conducting a collective bargaining depend on the interplay between labor union and employer. However, due to many restrictions on labor unions and many requirements for executing labor's right to strike and take collective action, labor unions could not form and grow freely. The condition of collective bargaining and the little amount of concluded agreements was therefore being criticized for long.

Due to the malfunctions of the previous act, the new labor acts (Collective Agreement Act, Labor Union Act, and Act for Settlement of Labor-Management Disputes) amended the previous law substantially. Mainly targeted on the formation of labor unions, collective bargaining and the dispute generated from the uneven labor-management relations, the new laws also introduced the unfair labor practices, which has taken effects in Japan and United States for years. To carry out the collective bargaining protections, the new Article 6, Paragraph of Collective Agreement Act stipulates that "both the labor and the management shall proceed in good faith when bargaining for a collective agreement; any party without justifiable reasons cannot reject the collective bargaining proposed by the other party."

III. Collective bargaining negotiation obligations and good faith bargaining

The negotiation obligations that the new Article 6 of Collective Agreement Act stipulates have had many criticisms in the past. Professor Tong-Shuan Yang criticizes that the previous law has the inclination to infringe the right to organize or participate in labor unions from his "collective bargaining autonomy" point of view. He also points out "The government involves too much and violates the administrative

1 Kazuo Sugeno, Labor Law 832-835 (2016) ; Seigo Mori, Labor Law: Introduction and Relations Law 278 (2000).
2 Yue-Qin Huang, New Reviews of the Labor Law 91-92 (2012).

neutrality when applying administrative sanctions to carry out the negotiation requisition right."[3] Professor Ling-Hwei Kuo also points out "Forcing one party to proceed with the negotiation seems to intervene too much into private autonomy, however, it is the choice of last resort to establish a collective bargaining mechanism under the existing laws."[4] These opinions mainly come from the notion of laissez-faire agreements mode. But if we view it from assistance agreements mode's side, in fact, it also makes sense. Article 6 of Collective Agreement Act's main purpose is to assist labor and management to carry out negotiation, without interfering with the content of the negotiation.

According to Article 6, Paragraph 1 of Collective Agreement Act, without justifiable reasons, both the labor and the management cannot reject the request of collective bargaining proposed by the other party. That is to say, both labor and management have the duty to proceed with collective bargaining, and have the remedies from the Board for Decision on the Unfair Labor Practices as an additional protection. The purpose of levying this obligation on both parties is as what in the legislation reason of Article 32 of the same Act mentions "Employer groups do not want to negotiate with labor unions, and this is the key factor which results in the poor performance in promoting collective bargaining system in the past. Considering the fact that domestic labor unions still cannot rely on its own power to ensure the right of negotiation, on the basis of good faith bargaining, it stipulates clearly in Paragraph 1 that both the labor and the management cannot reject the requisition of collective bargaining proposed by another party without justifiable reasons. Any violation identified by Act for Settlement of Labor-Management Disputes, is punishable by fines." This part of the regulations is mainly refered to the regulations of United States, Japan and Korea.

Under this condition, this kind of protection to collective bargaining right should be defined as an amendment on the way that labor union and employers conduct collective bargaining freely (The laissez-faire agreements mode).[5] Furthermore, this obligation doesn't mean that both the labor and the management have to fully accept the requisition from another party or to fully concede. Take the employer's side as an example; the willingness to accept the labor union's request and the degree of concession the employer is giving away should be determined by the employer itself by the result of negotiation. Although the negotiation might not reach a consensus, we could not deem employer as a violator to the obligation of collective bargaining base on this result.

Moreover, the obligation of collective bargaining is not only the response to the requisition of collective bargaining; it also encapsulates the obligation to negotiate in good faith. Which is the "Good Faith Bargaining." Article 6, Paragraph 1 of Collective Agreement Act states that "both the labor and the management shall proceed in good faith when bargaining for a collective agreement." This is the protection of collective bargaining right. The actual meaning of collective bargaining only makes sense when labor and management carry out the collective bargaining with sincerity and honesty. If the negotiation is conducted without honesty, the guarantee of collective bargaining right is in vain.

Therefore, under the current situation that labor unions are still fostering, and the fact that the condition of collective bargaining and the number of concluded agreements has been criticized for long, we expect the amendment of Article 6 of Collective Agreement Act to protect collective bargaining right and to improve the function and the harmony of labor-management relations in Taiwan.

IV. The characteristics of the new regulations

As described above, the making of the new Article 6 of Collective Agreement Act has referred to

3 Tong-Shuan Yang, Collective Labor Act: Theory and Practices 143-144, 195 (2012).

4 Ling-Hwei Kuo, *Collective Agreement and Collective Bargaining*, in Taiwan Law Society (Ed.), New Lessons in Taiwan Law (Vol. 4) 98-99 (2006).

5 There are the same discussions in Japan. See Tetsunari Doko, Good Faith and Fairness in Labor-Management Relations Act 89-90 (2006).

Japanese and American legislations. Although the references are from Japan and the States, it does carry some characteristics that feature in Taiwan's laws. First of all, on the collective agreement obligations that protected against unfair labor practices, unlike Japan's way of levying this duty only on the management, Taiwan levies this duty on both the labor and the management, the same as the way that United States adopts. The United States of America enacted the National Labor Relations Act of 1935 (NLRA, also known as Wagner Act) in order to define unfair labor practices. Under the assurance of labor's right of organizing and participating in labor union activities, the Act prohibits any unfair labor action taken from employers. The States also established National Labor Relations Board (NLRB) to handle unfair labor practices. The system was amended in 1947 and 1959. Aside from prohibiting employers from taking unfair labor practices, it also added some regulations, which prohibits labor unions from taking unfair labor practices. After the Second World War, due to the effect of NLRA, Japan prohibited employers from any kind of infringement to the labor and labor union by the legislation of Article 7 of Labor Union Act in Japan. The infringement actions include disadvantage treatments, yellow-dog contract, the rejection of collective bargaining and the intervention of labor union's autonomy. These actions above are the unfair labor practices prohibited by law. Japan also regulated that the authority concerned for the remedies of unfair labor practices is the Council of Labor Affairs in Article 27 of the same Act.

Secondly, the negotiation parties that Article 6 of Collective Agreement Act protects, only limits the side that is qualified to do the collective bargaining (in Paragraph 2 and 3 of the Act). It is different to the system United States and Japan adopt. United States adopts the Exclusive Representative System for the collective bargaining. In NRLA Sec.9 (a), "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions of employment." This is the base of "Exclusive Representative System." Under this system, the labor union selected to be the representative has the limit of authority to represent all the employees in the unit, including the employees who do not support the labor union selected.[6] Since its enactment in 1935, it has become an important symbol of collective bargaining in the United States of America. The labor union, which is selected to be the exclusive representative, carries out collective bargaining with employers. It also develops into the fact that the representative has not only the limit of authority to collective bargaining; it also has the obligation of justice.[7]

Article 28 of the Constitution of Japan regulates "The right of workers to organize and to bargain and act collectively is guaranteed." Under this frame, the current legal system adopts the Plural Unionism. Therefore, there will be many labor unions coexisting in one enterprise. However, although some labor unions have lesser people, their rights are still under the protection of Article 28 of the Constitution and the arbitration mechanism of unfair labor practices. Hence, when they have more than one labor union existing in an enterprise, employer must not only do collective bargaining with each of them, but also respect their right to organize and participate in labor unions. Employer cannot treat them differently by the size or the orientation of different labor unions.[8]

According to the new Article 9 of Labor Union Act, the number of corporate union in an organization shall be no more than one. However, according to the regulations in Article 6, Paragraph 1 of Labor Union Act, corporate union is a labor union organized by employees of the same factory or workplace, of the same business entity, of enterprises with controlling and subordinate relationship between each other in accordance with the Company Act, or of a financial holding company and its subsidiaries in accordance

6 See Hiroya Nakakubo, American Labor Law 37-38, 102-121 (2010).
7 See Mich C. Harper & Samuel Estreicher, Labor Law: Cases, Materials, and Problems 1057-1102 (2011).
8 See Kazuo Sugeno, *supra* note 1, at 840-843,857-858; Seigo Mori, *supra* note 1, at 282.

with the Financial Holding Company Act. So there might be more than two labor unions coexisting in one enterprise in Taiwan as well. Moreover, the employees hired by the enterprise might not participate in the corporate union, but the industrial union or the professional union. Thus, employers might face the condition that corporate union, industrial union and professional union all demand to have a collective bargaining simultaneously. Hence, the authority concerned amended Article 6, Paragraph 3 of Collective Agreement Act to standardize the labor side with bargaining qualification. It also amended Paragraph 4 of the same Article to regulate the legal way of doing collective bargaining with more than one union. "When more than two labor unions on the labor side, or more than two employers or employer organizations on the management side, propose to bargain, the other party may request them to select bargaining representatives; if they cannot select bargaining representatives, the representatives can be selected in accordance with its percentage in total membership."

V. Conclusion

According to the developments mentioned above, we could understand that Taiwan's collective bargaining system has had a drastic change after 2011. The change of the system was after the Global Financial Crisis in 2008, but it had very little to do with the fluctuant world economy. The main reason of the change was the fact that labor unions had a weak actual power for long, the achievement of collective bargaining are little; which inspired the authority concerned to start to amend the Acts. According to the statistics from the Ministry of Labor, after the amendment of the Acts, there are 30 application cases of unfair labor practices in 2011, 72 in 2012, 62 in 2013, 53 in 2014, and 61 in 2015.[9] Also, according to the statistics from the Board for Decision on the Unfair Labor Practices, until January 2017, 22 cases out of all the decisions mentioned above are involved with Article 6, Paragraph 1 of Collective Agreement Act.[10] Moreover, according to the statistics from the Ministry of Labor, the number of the conclusion of collective agreement has risen from 43 conclusions in 2010 to 664 conclusions in 2015.[11] From these statistics, we could perceive that unfair labor practice disputes in collective bargaining are growing as well as the number of the conclusion of collective agreements. Thus, we could say that the reformation has its preliminary effect already. However, there still exist many challenges and problems that are in desperate need of discussion. This is a part that we should keep on observing and taking care of in the future.

9 The Annual Statistic can be found in the Introduction of Unfair Labor Practices on the website of Ministry of Labor, *available at* http://www.mol.gov.tw/topic/3073/19167/19185/ (last visited Jan. 15, 2017).

10 The Statistic can be found in the Introduction of Unfair Labor Practices on the website of Ministry of Labor, *available at* http://uflb.mol.gov.tw/UFLBWeb/wfCaseData.aspx (last visited Jan. 15, 2017).

11 The Labor Statistic Yearbook (2015) can be found on the website of Ministry of Labor, *available at* http://statdb.mol.gov.tw/html/year/year04/33070.htm (last visited Jan. 15, 2017).