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Larry S. Bush

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Romanian Regulation of Trade Unions and Collective Bargaining

Larry S. Bush*

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The author generally has relied on his own translations for the foreign language materials cited in the Article, many of which are not available in English. Translations of selected Romanian legal materials (in English and other languages) are published by *Monitorul Oficial*, Romania’s official national gazette. Copies of hard-to-access Romanian source materials and notes from the personal interviews and meetings cited in the Article are on file with the author.

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Introduction

Trade unions have been important players in Romanian economic, political and social life since the overthrow of the Ceaușescu regime in December 1989.¹ When communist control disappeared, Romanian workers enthusiastically created new trade unions and restructured the pre-existing ones.² As a result, union density has remained relatively high.³ Even though much of the developing private sector is non-union, organized labor will continue to exert a powerful influence over both politics and the economy. Labor unions play an important role as one of the “social partners” under

1. See generally Larry S. Bush, *Collective Labor Disputes in Post-Ceaușescu Romania*, 26 CORNELL INT’L L.J. 373 (1993) (discussing trade union activity in Romania from December 1989-1992).

2. See *id.* at 386-87.

3. No reliable figures exist on trade union density. Trade union leaders notoriously inflate their membership numbers. A recent leading treatise on Romanian labor law has adopted the trade unions’ claims, concluding (albeit somewhat skeptically) that Romanian trade union membership numbers approximately seven million workers (including five million dues payers), out of a workforce of about 10 million. See SANDA GHIMPU & ALEXANDRU ȚICLEA, *DREPTUL MUNCII* 87 (Casa de Editură și Presă “ȘANSA” S.R.L. 3d ed. 1997). An edited English translation of an earlier version of this text can be found in Sanda Ghimpu & Alexandru Țiclea, *Romania*, in INT’L ENCYCL. FOR LAB. L. & INDUST. REL. 178 (Roger Blanpain ed., 1996 supp.).

Romanian legislation,⁴ and they also dominate the state sector (including state-owned enterprises, or their privatized successors), a key component of the Romanian economy.

Given the ongoing power of organized labor, developing a workable industrial relations system is crucial to Romania's future. An effective system requires a fair, coherent legal structure for the exercise of collective labor rights that commands the respect and adherence of both employers and workers. In addition, given Romania's ambitious plans to join the European Union,⁵ the system must comply with the international labor standards prevailing in Europe. Romania has already adopted many of these standards.⁶

The Romanian model of labor relations that has evolved since 1989 is a study in contradictions. While the current model fosters grass-roots organization and accommodates trade union pluralism at all levels, it also retains powerful influences from the communist system of centralized labor relations, especially vis à vis collective labor contracts. Even the most recent collective bargaining legislation presumes a centralized, hierarchical structure of legally-binding contracts, beginning at the national level and extending through the industrial sectors (or "branches") to the enterprises.

This Article provides an overview and critique of two fundamental areas of current Romanian labor law – trade union organization and collective bargaining.⁷ This Article recommends several approaches to harmonizing Romanian law with prevailing international standards, using the model of labor relations that the Romanians have chosen.

4. In addition to their role in collective bargaining under the statutes that are the subject of this article, "social partners" (i.e., workers' and employers' representative organizations) act as central players in salary indexing, establishing the national minimum wage, advising on proposed labor legislation, and mediating large-scale industrial disputes. See, e.g., *Lege privind Organizarea și Funcționarea Consiliului Economic și Social*, No. 109, July 2, 1997, *Monitorul Oficial al României* [hereinafter M.O.], Part I, No. 141, July 1997 (statute establishing an Economic and Social Council, composed of representatives of the leading trade union confederations and employer associations) [hereinafter Law 109/1997].

5. Cf. *Agenda 2000: Commission opinion on Romania's application for membership of the European Union*, BULL. OF THE EUROPEAN UNION, Supp. 8/97.

6. Romania has ratified many of the treaties prepared under the auspices of the Council of Europe, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, together with its 11 protocols. As of October 1998, it had signed, but not ratified, the Revised European Social Charter, which contains many worker rights articles. Romania is a member of the International Labor Organization and has ratified 37 ILO conventions, including: Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) [hereinafter ILO Convention No. 87]; Right to Organize and Collective Bargaining Convention, 1949 (No. 98) [hereinafter ILO Convention No. 98]; Workers' Representatives Convention, 1971 (No. 135); Tripartite Consultation (International Labor Standards) Convention, 1976 (No. 144); and, Collective Bargaining Convention, 1981 (No. 154).

7. The regulation of collective labor disputes is beyond the scope of this article. The author addressed this subject several years ago; see generally Bush, *supra* note 1, at 373. At the time of this writing, Romania's parliament is considering a proposal that would make fundamental revisions to its collective labor disputes law.

I. Romanian Labor Law – Background, Current Structure and Conflicts with International Standards

Romania's contemporary labor relations practices, and the laws that implement them, were first hammered out in the chaotic months following Nicolae Ceaușescu's overthrow in December 1989. In the turbulent period from 1990-92, trade unions arose as major political players, often opposing the government and at times even threatening the regime's existence.⁸ The laws adopted to regulate this burgeoning labor movement combined communist-era and pre-communist Romanian legal concepts with new theories influenced by Western European (especially French) labor models.

Romania's post-communist legal framework for labor relations was put in place in 1991. The framework was based on the new Constitution,⁹ together with three statutes – Law 13/1991 (Law on the Collective Labor Contract);¹⁰ Law 15/1991 (Law on the Settlement of Collective Trade Disputes);¹¹ and Law 54/1991 (Law on Trade Unions).¹² In 1996, a more sophisticated collective negotiations statute replaced Law 13/1991;¹³ it was subsequently amended in 1997.¹⁴ Also in 1996, Romania established a tripartite Economic and Social Council, which was given consultative responsibility regarding the nation's labor laws, as well as mediation duties in collective labor disputes at industry and national levels.¹⁵

Notwithstanding the creation of extensive new labor relations legislation, the communist-era Labor Code of 1972¹⁶ has neither been repealed

8. See *id.* at 387-400. Cf. VLADIMIR PASTI, THE CHALLENGES OF TRANSITION: ROMANIA IN TRANSITION 262-85 (1997) (arguing that the enterprise technocracy is the effective power in Romania and that this group had succeeded in eliminating the trade unions as serious competitors for power by 1992).

9. CONSTITUȚIA DIN 1991 [hereinafter 1991 CONST.]. An English version of the Constitution may be found in Gisbert H. Flanz, *Romania*, in CONSTITUTIONS OF COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

10. Lege privind contractul colectiv de muncă, No. 13, Feb. 8, 1991, M.O., Part I, No. 32, Feb. 9, 1991 [hereinafter Law 13/1991]. The Romanian text, together with English and French translations, of this and other cited labor statutes promulgated prior to 1993 are available in 7 PARLIAMENT OF ROMANIA, ROMANIAN LEGISLATION: LABOUR AND SOCIAL PROTECTION (M.O., 1993).

11. Lege pentru soluționarea conflictelor colective de muncă, No. 15, Feb. 11, 1991, M.O., Part I, No. 33, Feb. 11, 1991 [hereinafter Law 15/1991].

12. Lege cu privire la sindicate, No. 54, Aug. 1, 1991, M.O., Part I, No. 164, Aug. 7, 1991 [hereinafter Law 54/1991].

13. Lege privind contractul colectiv de muncă, No. 130, Oct. 1996, M.O., Part I, No. 259, Oct. 24, 1996 [hereinafter Law 130/1996].

14. Lege pentru modificarea și completarea Legii nr. 130/1996 privind contractul colectiv de muncă, No. 143, July 24, 1997, M.O., Part I, No. 172, July 1997 [hereinafter Law 130/1996 (1997)]. Law 130/1996, as amended, was republished in M.O., Part I, No. 184, May 19, 1998. Discussion and citations in this article regarding Law 130/1996 will be to the amended version, as republished, unless otherwise noted.

15. See Law 109/1997, *supra* note 4. At the time of this writing, Parliament has before it a draft law, "Lege privind soluționarea conflictelor de muncă," intended to replace Law 15/1991, *supra* note 11, and to establish a new framework for regulating collective labor disputes.

16. Codul Muncii al României, Law No. 10, Nov. 23, 1972, Buletinul Oficial, Part I, No. 140, Dec. 1, 1972. For an annotated version of the Code, in Romanian, containing

nor comprehensively revised,¹⁷ except to the extent that it has been superseded by specific provisions of subsequent labor and employment statutes or by the 1991 Constitution. Consequently, the regulation of individual employment contracts still remains based in large part on the 1972 Labor Code.¹⁸

A. The Romanian Constitution of 1991

Any assessment of contemporary Romanian labor relations law begins with the 1991 Constitution. It established a social democratic republic¹⁹ wherein the state "is obliged to take measures for economic development and social protection which will ensure that citizens will have a decent standard of living."²⁰ Romanians' constitutional rights include free state education,²¹ health care,²² and "the social protection of labor" (*i.e.*, safety and health, minimum wage, time off, paid vacations, special provisions for work under difficult conditions, an eight hour day, equal pay for women and men for the same work),²³ as well as special protection for families,²⁴ children,²⁵ and the disabled.²⁶

Although the Constitution establishes Romania as "a market economy"²⁷ and protects the right to private property,²⁸ the state retains a central role in overseeing the national economy.²⁹ Moreover, the Constitution

commentary and modifications through early 1994, see UNIUNEA JURISTILOR DIN ROMÂNIA, CODUL MUNCII (Șerban Beligrădeanu annot. 1994).

17. The current government hopes to revise the labor code at some point within the next few years. See Interview by Larry S. Bush with Alexandru Athanasiu, Minister of Labor and Social Protection, Ministry of Labor and Social Protection, Strada Demetriu I. Dobrescu, No. 2, Bucharest, Romania (Mar. 13, 1997).

18. Cf. UNIUNEA JURISTILOR DIN ROMÂNIA, *supra* note 16, at V-IX.

19. 1991 CONST., *supra* note 9, art. 1.2-1.3 ("1.2. The form of government of the Romanian state is the republic. 1.3. Romania is a social and democratic state of law in which human dignity, the rights and liberties of citizens, the free development of the human personality, justice, and political pluralism represent supreme values and are guaranteed.").

20. *Id.* art. 43.1.

21. See *id.* art. 32.

22. See *id.* art. 33.

23. See *id.* art. 38.2.

24. See *id.* art. 44.

25. See *id.* art. 45.

26. See *id.* art. 46.

27. *Id.* art. 134.1.

28. See *id.* art. 41.

29. The state is expected to ensure:

- a) free trade, protection for loyal competition, the creation of a favorable framework for the utilization of all production factors;
- b) the protection of national interests in economic, financial, and currency activity;
- c) the stimulation of national scientific research;
- d) the exploitation of natural resources in accordance with the national interest;
- e) the restoration and protection of the environment, as well as the preservation of ecological balance;
- f) the creation of the necessary conditions for improving the quality of life.

mandates state control over a wide array of productive assets.³⁰

The 1991 Constitution gives trade unions an important place in Romania's social democracy. Article 37 ["The Right to Associate"] confers on Romanians an express constitutional right to form trade unions,³¹ and Article 9 ["Trade Unions"] defines their function.³² The Constitution also expressly protects Romanians' right to bargain collectively and to strike. Article 38.5 ["Labor and the Social Protection of Labor"] states that "[t]he right to collective bargaining and the binding nature of collective agreements are guaranteed."³³ Article 40 ["The Right to Strike"] confers the right to strike, albeit with vague statutory limitations unspecified in the Constitution.³⁴

Several constitutional articles that address the relationship between Romania's treaty obligations and its municipal law could affect the interpretation and validity of Romania's labor laws. According to Article 11.1 ["International Law and Domestic Law"], "[t]he Romanian state pledges to fulfill, to the letter and in good faith, its commitments under the treaties to which it is a party."³⁵ Article 11.2 then provides that "[t]he treaties ratified by Parliament, according to the law, are part of domestic law,"³⁶ thereby

See *id.* art. 134.

30. For example, Article 135.4 provides:

Underground resources of any type, lines of communication, air space, water resources that can produce power or can be used in the public interest, beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, as well as other assets as defined by law, are exclusively state property.

Id. art. 135.4. These public properties "are nontransferable." *Id.* art. 135.5. Even before approval of the 1991 Constitution, Romanian statutes had identified "other assets" that were to be "exclusively state property." For example, in Law 15/1990, "State-owned Enterprise Restructuring," state enterprises were divided into "autonomous companies" ("regie autonome") and "commercial companies" ("societatea comerciala"). The autonomous companies were to be "organized and operate within the economy's strategic branches (e.g., the armament industry, the power industry, mining and natural gas exploitation, the mail system, and railway transports) as well as in other fields of activity established by the Government." Law 15/1990, M.O., Aug. 8, 1990, art. 2. The autonomous companies were also to stay in government hands; only the commercial societies were to be privatized. See Law 58/1991, "The Commercial Companies Privatization Law," M.O., Aug. 16, 1991.

31. 1991 CONST., *supra* note 9, art. 37.1 ("Citizens may freely associate in political parties, trade unions, and other forms of association.").

32. *Id.* art. 9. Specifically, Article 9 states "[t]rade unions are set up and carry out their activity under the conditions of the law. They contribute to the protection of the rights and the promotion of the professional, economic, and social interests of employees."

33. *Id.* art. 38.5.

34. "1. Employees have a right to strike to protect their professional, economic, and social interests. 2. The law sets the conditions and limits for the exercise of this right as well as the guarantees required for providing essential public services." *Id.* art. 40.

The "law" that implements Article 40.2 is Law 15/1991, *supra* note 11, which was promulgated almost a year prior to adoption of the Constitution. For an extended discussion of Romania's regulation of collective labor disputes and strikes under Law 15/1991 through 1992, see Bush, *supra* note 1, at 402-19.

35. 1991 CONST., *supra* note 9, art. 11.1.

36. *Id.* art. 11.2.

transforming Romania's international obligations into municipal law.³⁷

Human rights treaties, as part of municipal law, are accorded superior status vis-à-vis other, purely Romanian, municipal law. Article 20 ["International Human Rights Treaties"] states:

1. Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and with other treaties and pacts to which Romania is a party.
2. If there is disagreement between the pacts and treaties on fundamental human rights to which Romania is a party and domestic laws, then international regulations will have priority.³⁸

Given that Article 20.2 allows international human rights law to preempt domestic law and that Romania has agreed to uphold trade union and collective activity rights in several treaties,³⁹ this Article – together with Articles 11 and 20.1 – is potentially relevant to the future development of Romanian labor law. Romania's constitutional obligation to enforce these "human rights" as a form of "higher law" within its municipal legal system suggests that Romanian courts could arguably reject domestic law in favor of conflicting treaty-based standards such as those found in the European Convention for the Protection of Human Rights and Fundamental Freedoms or Romania's ILO treaty obligations.⁴⁰

B. The Major Labor Relations Statutes

1. Regulation of Trade Union Organization and Operation

a. Trade Union Law up to the Communist Era

Trade unions in the modern sense arrived in Romania toward the end of the nineteenth century.⁴¹ Collective bargaining came to Romania later than it did to Western Europe, in large part because Romania was an overwhelmingly agricultural nation. Interest in trade unions grew quickly, however, as the socialist movement attracted adherents: by 1920 there

37. For a general discussion of the relationship between international and municipal law, in Western European states and elsewhere, see OPPENHEIM'S INTERNATIONAL LAW §§ 18-21 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

38. 1991 CONST., *supra* note 9, art. 20.

39. See, e.g., treaties listed *supra* note 6.

40. According to one Romanian commentator, Romanian law below the level of the Constitution that conflicts with human rights treaties to which Romania is a party can be declared inapplicable, but not abrogated, by public authorities, including the courts (except the Constitutional Court). Such decisions by the courts would be effective *inter partes litigantes* but not *erga omnes*, i.e., *stare decisis* is not consistent with Romania's civil law legal theory. Moreover, "politico-legal" international documents other than treaties (see, e.g., U.N. Resolutions, ILO Declarations) could be used to interpret internal Romanian law, but not to declare it inapplicable. Finally, customary international law and decisions of the European Court of Human Rights should be treated the same as human rights treaties. See Corneliu-Liviu Popescu, *L'application des Normes de Droit International Relatives aux Droits de l'Homme en Droit Roumain*, 8 REVUE EUROPEENNE DE DROIT PUBLIC 351 (1996).

41. The first workers' organization was the Asociației Generale a tuturor lucrătorilor din România, founded in 1872. See GHIMPU & ȚICLEA, *supra* note 3, at 83.

were 146 trade unions with over 90,000 members.⁴²

While statutes protecting minors and women had been in place as early as 1885,⁴³ and attempts to formulate a comprehensive legislative social policy began as early as 1909, modern industrial relations law first appeared after World War I.⁴⁴ The first comprehensive regulatory framework for trade unions was the "Law About Professional Trade Unions,"⁴⁵ promulgated in 1921 during a relatively democratic period in pre-World War II Romania.⁴⁶ This was a progressive statute, granting to all "people . . . who practice the same professions, [or] similar or connected professions, the right to constitute themselves in a free fashion into professional trade unions, without needing any prior authorization,"⁴⁷ albeit with mandatory court-supervised registration.⁴⁸

Unfortunately, the rights guaranteed by the 1921 Trade Unions Law were progressively eroded in the following decade. By the 1930s, Romania was caught up in the fascist convulsions then sweeping central Europe. The country lapsed into a royal dictatorship in 1938, prompting the repeal of the 1921 Trade Unions law and its replacement by a much more restrictive royal decree.⁴⁹ The short-lived royal dictatorship was followed by the authoritarian regime of Marshal Antonescu, who eliminated trade unions entirely.⁵⁰

Trade unions subsequently reappeared following the 1944 overthrow of Antonescu.⁵¹ In January 1945, while still independent of Moscow,⁵² the Romanian government passed a new "Law About Professional Trade Unions — Law 52/1945."⁵³ In most respects it reinstated the principles,

42. *See id.*

43. *See id.* at 17.

44. *See id.*

45. *Lege Asupra Sindecatoror Profesionale*, Decree No. 2.207, April 24, 1921, M.O., No. 41, May 26, 1921 [hereinafter 1921 Trade Unions Law].

46. *See* STEPHEN FISCHER-GALATI, *TWENTIETH CENTURY ROMANIA* 36 (1970). Ironically, this law was promulgated during the regime of General Alexandru Averescu, a conservative war hero with a reputation for hostility toward organized labor. *See id.* at 35-38.

47. 1921 Trade Unions Law, *supra* note 45, art. 2.

48. *See id.* arts. 5-16. This Article does not extensively discuss the 1921 statute; much of it was re-enacted in a 1945 law that in turn was the basis for much of the 1991 statute currently in force. *See infra* notes 54-82 and accompanying text.

49. *See* George G. Crisan, *Trade Union Movement in Romania* 9 (October 1955) (unpublished manuscript, on file with the author).

50. *See id.* at 12. Antonescu kept Romania allied with the Axis powers for most of world War II. *See, e.g.,* FISCHER-GALATI, *supra* note 46, at 63; VLAD GEORGESCU, *THE ROMANIANS: A HISTORY* 210-22 (1991) (originally published in Romanian as *ISTORIA ROMANILOR: DE LA ORIGINI PINA LA LILELE NOASTRE* (1984)).

51. For an overview of this period, *see* GEORGESCU, *supra* note 50, at 207-32. On August 23, 1944, the young king, Mihai, led a coup d'etat overthrowing the Antonescu regime. Romania then joined the Allies in a fruitless effort to avoid Soviet occupation. Essentially abandoned by the Western powers, Romania sank quickly into the Soviet sphere of influence.

52. The Soviets installed a puppet government in Bucharest in March 1945, allowing the communist party to progressively achieve a complete takeover. *See id.*

53. *Legea Nr. 52 Asupra Sindicatelor Profesionale*, Decree No. 150, Jan. 20, 1945, M.O., No. 17, Jan. 21, 1945 [hereinafter Law 52/1945].

and often the exact language, of its 1921 predecessor. Its structure and contents also inspired much of the current Law 54/1991 and thus merit further examination.

Law 52/1945 authorized free association into trade unions with relatively few restrictions.⁵⁴ In order to acquire legal personality, trade unions were required to (1) be composed of at least fifteen members;⁵⁵ (2) complete the registration process before the designated court where the trade union was headquartered;⁵⁶ and (3) formulate bylaws ("statutul") that conformed to statutory requirements.⁵⁷ They also were required to have a leadership committee composed of five to twenty-five members,⁵⁸ the majority of whom had to be Romanian citizens. All leaders had to possess full civil rights and had to have been "practicing the profession in a real fashion for at least one year prior to the time of their election."⁵⁹ Finally, none of the leaders could have been convicted of certain specified crimes.⁶⁰

A trade union acquired "legal personality" on the date that the court registered it.⁶¹ Unregistered organizations did not exist in the eyes of the law and possessed no statutory privileges.⁶² Trade union leaders who functioned on behalf of such "nonexistent" entities were subject to severe criminal penalties, namely fines and imprisonment of six months to two years.⁶³

A trade union with legal personality could represent its interests, or those of its members, in legal proceedings where the rights in question "result[ed] from laws, regulations, [or] collective or other contracts that are consistent with the exercise of the profession and with the collective inter-

54. Like its 1921 predecessor, the law provided as follows:

There is recognized for all natural persons who work in the same professions, similar or connected professions the right to constitute themselves in a free fashion into professional trade unions, without needing any prior authorization . . . No one can be forced to take part, not take part or stop taking part in a professional trade union against his will.

Id. art. 2. The statute allowed government employees and minors with professional qualifications to unionize without prior authorization. *See id.* arts. 3, 4. It also contained stiff penalties for persons proven to have interfered with the rights of free association through violence, threats, refusals to hire or dismissals, gifts or promises. Punishment could include fines and imprisonment from six months to two years. *See id.* art. 43.

55. *See id.* art. 1.

56. *See id.* arts. 5-16. The court was expected to take into account the opinion of the Ministry of Labor regarding whether it approved the trade union's acquisition of legal personality. *See id.* arts. 7-8.

57. *See id.* art. 18. One of the legal requirements was that "[t]he rights of every member to political and religious freedom cannot be in any way affected by the provisions of the bylaws." *Id.* art. 18.d.

58. *See id.* art. 20.

59. *Id.* art. 21.

60. These crimes included: abuse of trust, embezzlement of public funds, extortion, fraud, larceny, concealing stolen goods, bribe-taking or counterfeiting. *See id.*

61. *See id.* art. 13.

62. *See id.* art. 31.

63. *See id.* art. 44.

ests of the members or for the interests of the profession.”⁶⁴ In addition, a trade union could acquire property, start businesses, establish mutual aid societies and pensions, and publish materials “for the cultural or technical development of its members or for the defense of professional interests, without the need of any prior authorization.”⁶⁵ Finally, the statute granted trade unions “the right to designate delegates chosen from their members to all institutions and organs” that discuss, resolve, or guide “questions of professional, economic or cultural interest for employees, in which their professional and economic interests must be represented.”⁶⁶

The foregoing rights applied to all “professional trade unions” that acquired legal personality, a category that included organizations of artisans and other self-employed persons. Its provisions, therefore, were not intended solely to benefit the wage-earning “employees” of modern industrial or commercial enterprises. The statute conferred additional rights on wage earners, however, when they created “professional trade unions of workers and of employees in private offices.”⁶⁷ These organizations were expressly empowered to negotiate collective labor contracts “either with isolated employers, or with associations of employers”⁶⁸ They also had the right to designate delegates to conciliation and arbitration commissions established under an earlier law⁶⁹ to resolve collective labor conflicts.⁷⁰ Together with representatives of employers’ organizations and the government, these trade unions were also allowed to participate in work site inspections under labor protection laws and regulations, in administering the laws regarding vocational schools and technical training, and in the operation of public placement services. These private sector “employee” trade unions were further empowered to administer social assurance programs (when accredited by the Ministry of Labor), to establish labor exchanges for their members, and (at the enterprises where their members worked) to take “within the limits of the law, any kind of action for defending and guaranteeing the professional interests of its members.”⁷¹

Law 52/1945 provided that the union’s bylaws would govern the relationship between the trade union and its members.⁷² Members could withdraw from the union without giving a reason, but the trade union could claim any dues owed.⁷³ If approved by the leadership committee of the

64. *Id.* art. 25.

65. *Id.* arts. 26, 27, and 29.

66. *Id.* art. 30.

67. *Id.* arts. 32, 33.

68. *Id.* art. 32.

69. *Lege pentru regulamentul conflictelor colective de muncă*, Decree No. 8.703, Sept. 4, 1920, M.O., No. 122, Sept. 5, 1920.

70. *See* Law 52/1945, *supra* note 53, art. 32. The trade union delegates did not have to be employees of the enterprise in the conflict. The trade union could name such delegates as long as one third of the employees interested in the conflict belonged to the trade union, provided that a majority of all of the employees interested in the conflict accepted those delegates. *See id.*

71. *Id.* art. 33 d-f.

72. *See id.* art. 34.

73. *See id.* art. 35.

trade union, resigning members could keep all of the economic or "mutual aid" rights they had possessed in trade union enterprises to which the member had contributed through dues or otherwise.⁷⁴ Members could be dismissed from the trade union by the leadership committee, with a right of appeal to its general assembly.⁷⁵ Finally, the statute expressly provided that a "member of a professional trade union, who accepts working conditions inferior to those stipulated in the collective contract, can be excluded from the trade union."⁷⁶

Trade unions ("sindicali"), which were local in character under Law 52/1945, could join together to form unions ("uniuni," the equivalent of modern federations) as long as they were in the same professional category; in turn, two or more "unions" could form a confederation.⁷⁷ These higher level bodies could obtain legal personality as long as the constituting organizations at the next lower level had complied with the law's provisions governing the creation of local trade unions.⁷⁸

All of the provisions in Law 52/1945 directed toward trade unions also applied to these "unions" and confederations.⁷⁹ Having obtained legal personality, such higher-level organizations could "designate persons empowered to negotiate in the name of the affiliated trade unions with employers or with employers' associations, or on conciliation and arbitration commissions, to resolve collective labor disputes, to conclude collective labor contracts and to represent the affiliated trade unions or 'unions' on all occasions."⁸⁰

Even though much of Law 52/1945 was substantially identical to its 1921 predecessor, it deviated sharply from the older law in one notable respect: Article 28 of the new law authorized the creation of factory (or enterprise) committees, which represented "the professional interests of all the employees" before enterprise management.⁸¹ The committees were to be composed of three to thirteen members elected by a majority vote of the assembly of all the employees in the enterprise; the vote could be secret if one-fifth of the employees present so demanded.⁸²

74. *See id.* The requirement that the trade union leadership approve of the retention of these benefits was added in 1945 to an article that was, in all other respects, a direct carryover from its predecessor. *See* 1921 Trade Unions Law, *supra* note 45, art. 32.

75. *See* Law 52/1945, *supra* note 53, art. 36. As with member resignations, the 1945 statute gave broader decision-making power to the leadership committee than did the 1921 version. *See id.* art. 35. In the earlier statute, dismissals were effected by the general assembly of the trade union, with a right of appeal to the "tribunal" (essentially an appellate court). *See* 1921 Trade Unions Law, *supra* note 45, art. 37.

76. Law 52/1945, *supra* note 53, art. 37.

77. *See id.* art. 46.

78. That is, they had to convene general assemblies, conform to the provisions of Law 52/1945 that regulated the contents of ordinary trade union bylaws (arts. 17-19), and obtain legal personality from the court, which would enter the higher-level trade union organization into the official register. *See id.* art. 47.

79. *See id.* art. 49.

80. *Id.* art. 48.

81. *Id.* art. 28. These "professional interests" included working conditions, salary, morale, and cultural interests.

82. *See id.*

b. Trade Unions During the Communist Era

The communists quickly seized the factory committees as a major instrument of their control. The secret vote safeguard provided for in Law 52/1945 was frequently ignored, allowing the communists to dominate committee membership. According to one observer of the period, beginning in September 1945:

Under the [Frontul Unic Muncitoresc – United Workers Front] auspices a network of the workshop committees (factory committees) was created in plants and factories, which became the main instrument of propaganda, channel of control of the industrial production, and center of the organization of new trade unions under the communist control. They enjoyed the confidence of the Soviet occupation forces. Everybody who opposed their aims, political parties, government and rival social and labor organizations came under the attack of the communist press, meetings and mass demonstrations The activity of the factory committees was manifold. They immediately attacked the management. Owners and managers were threatened with denouncement to the Soviet occupation forces as truce saboteurs. Whosoever dared to say anything against the factory committee was doomed to be attacked by all means including physical coercion and beating.⁸³

Law 52/1945 remained in force, albeit in modified form, throughout the communist era; it was repealed only in 1991, following the enactment of Law 54/1991.⁸⁴ Factory or enterprise committees, and later “workers’ councils,” along with trade unions, remained an integral part of the structure of labor relations and Party control throughout this period.⁸⁵

The role of trade unions was modified significantly under the communist regime, which viewed them as institutions intended to further the policies of the state rather than the interests of their members.⁸⁶ The regime expected trade unions to cooperate with central and communal institutions, workers’ councils, and the managers of the enterprises.⁸⁷ Through their activities, trade unions were directed by law to “contribute to the

83. Crisan, *supra* note 49, at 16-17. According to Ghimpu and Țiclea, these factory committees existed as early as September 1944 before passage of Law 52/1945, when the communists established the Central Commission of the United Unions Movement, which in turn promoted the creation of factory committees. See GHIMPU & ȚICLEA, *supra* note 3, at 84.

84. “Law No. 52/1945 on professional trade unions with its subsequent modifications as well as any other contrary provisions shall be abrogated.” Law 54/1991, *supra* note 12, art. 51.

85. See MICHAEL SHAFIR, ROMANIA: POLITICS, ECONOMICS AND SOCIETY; POLITICAL STAGNATION AND SIMULATED CHANGE 58 (1985).

86. For example, according to the 1972 Labor Code:

The trade unions mobilize the masses for accomplishing the program of the Romanian Communist Party of building a new society, developing sustained activities to raise labor productivity and the superior quality of production, promoting technical progress, raising the level of training of working people, rigorously respecting discipline in production, and fulfilling the duties that are incumbent upon every employed person.

SANDA GHIMPU ET AL., DREPTUL LA MUNCĂ: CODUL MUNCII COMENTAT ȘI ADNOTAT 620 (1988), art. 165(1).

87. See *id.* arts. 167, 168, and 170.

development of the socialist consciousness of those who work, in the spirit of the materialist outlook on the world and society, to the cultivation of moral features corresponding to ethical principles and socialist and communist equities" and "to concern themselves with the good organization and judicious use of the free time of working people, collaborating closely with other communal organizations and with specialized bodies."⁸⁸

There was no trade union pluralism under the communists. Rather, there was a strict hierarchy of trade union organizations beginning at the top with the central General Union of Romanian Trade Unions (UGSR), followed by branch organizations, groups of enterprises organizations and enterprise trade unions.⁸⁹ The entire structure was subjugated to the political control of those in power.⁹⁰

c. Law 54/1991

Romanian workers and the new trade unions they created after December 1989 generally were committed to trade union pluralism and independence from the state. They were also opposed to institutionalizing anything that resembled factory committees or worker's councils.⁹¹ The provisions authorizing such entities were therefore omitted in the 1991 law; trade unions alone represented workers in the new system.⁹² From 1991 to 1996, however, Law 13/1991 required many workplaces to elect ad hoc employee delegates for collective negotiations and thus muddied this picture considerably.⁹³

88. *Id.* art. 166.

89. *See id.* art. 164 ("Trade unions are professional organizations which are constituted on the basis of the right of association provided by the Constitution and function on the basis of the statutes of the General Union of Romanian Trade Unions, of branch trade unions and of enterprise trade union organizations."). *See also* GHIMPU & ȚICLEA, *supra* note 3, at 85.

90. *See* GHIMPU & ȚICLEA, *supra* note 3, at 86; *see also* SHAFIR, *supra* note 85, at 101-02.

91. *See* Bush, *supra* note 1, at 383 n.45. *See also* Peter Siani-Davies, *Popular Mobilisation During the Romanian Revolution: The Case of the National Salvation Front Local and Enterprise Councils 10-15* (unpublished paper presented at the Third International Congress on Romanian Studies, Cluj, July 1-6, 1997; on file with the author) (arguing that many of the enterprise councils formed in December 1989 and January 1990 "were a radical grass roots manifestation of the revolution" that was eclipsed largely as a result of official disfavor).

92. This contrasts with the practice in Western Europe, where works councils or their equivalent are very common. *See* M. Biagi, *Forms of Employee Representational Participation*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 315-51 (R. Blainpain & C. Engels eds., 1993). It also differs from several of Romania's Central European neighbors, notably Hungary. *See* L. Nagy, *Transformation of Labour Law and Industrial Relations in Hungary*, in *LABOUR LAW AND INDUSTRIAL RELATIONS IN CENTRAL AND EASTERN EUROPE: FROM PLANNED TO A MARKET ECONOMY* 67, 79-81 (R. Blainpain & L. Nagy eds., 1996); Csilla Kollonay Lehoczky & Mária Ladó, *Hungary*, in *NEW PATTERNS OF COLLECTIVE LABOUR LAW IN CENTRAL EUROPE: CZECH AND SLOVAK REPUBLICS, HUNGARY, POLAND* 101, 128-31 (Umberto Carabelli & Silvana Sciarra eds., 1996) [hereinafter *NEW PATTERNS OF COLLECTIVE LABOUR LAW*].

93. *See infra* notes 180-84 and accompanying text.

Law 54/1991 currently regulates the creation and operation of Romanian trade unions. Under it, trade unions may be formed when at least fifteen “[p]ersons having the status of employee,”⁹⁴ or fifteen “[p]ersons who are lawfully and individually exercising a trade or profession, or who are associated in co-operatives as well as in other professional classes,”⁹⁵ wish to create one – a standard directly adopted from Law 52/1945. No one can be compelled to join or refrain from joining a trade union,⁹⁶ but a person can be a member of only one trade union at a time.⁹⁷ The right to unionize is denied only to those “holding management functions or functions involving the exercise of State authority” in specified state and local governmental bodies, and to public prosecutors, judges, and military personnel.⁹⁸

Trade unions can be organized on an enterprise, industry, profession, or territory basis.⁹⁹ Enterprise-based unions form the dominant model. Two or more trade unions in the same industry or profession may join to form a federation.¹⁰⁰ In turn, two or more federations from different branches can form a confederation, which is intended to operate at the “national” level.¹⁰¹

By law, trade union organizations must be “apolitical,” existing “for the purpose of protecting and promoting the professional, economic, social, cultural and sporting interests of their members, and their rights, provided in the legal texts on labour matters and in the collective labour contracts.”¹⁰² They are to be independent of the State, political parties and “any other organizations.”¹⁰³ Trade unions have the right to establish their own regulations, organize their activities, and elect their representatives, without intervention by “[p]ublic and administrative authorities.”¹⁰⁴

Trade union leaders may be elected only from among “Romanian citizens who are members of the trade union with full rights, working in the

94. Law 54/1991, *supra* note 12, art. 2(1), (2).

95. *Id.* art. 4. Ghimpu and Țiclea point out an apparent discrepancy between Article 9 of the 1991 Constitution, which speaks only of “employees” in describing the role of trade unions, and Article 4 of Law 54/1991, which extends the right to unionize to people practicing a craft or profession as self-employed individuals or as members of a cooperative. Noting that, among others, peasants, writers and lawyers had all formed trade unions by 1993, they concluded that the Constitution spoke in general terms and did not intend to restrict the right to form trade unions to “employees.” Thus, they saw no need either to amend the Constitution or to declare Article 4 of Law 54/1991 unconstitutional. See GHIMPU & ȚICLEA, *supra* note 3, at 91-92.

96. See Law 54/1991, *supra* note 12, art. 2(3).

97. See *id.* art. 2(4).

98. See *id.* art. 5.

99. See *id.* art. 42(1).

100. See *id.* art. 42(2).

101. See *id.* art. 42(3).

102. *Id.* art. 1(1). The requirement that trade unions be “apolitical” has been controversial, given that state ownership of much of the economy means that what might otherwise be purely economic issues are inevitably political to a greater or lesser extent. Cf. GHIMPU & ȚICLEA, *supra* note 3, at 99.

103. Law 54/1991, *supra* note 12, art. 1(2).

104. *Id.* art. 8(1),(2).

enterprise,” and who are not subject to certain criminal penalties¹⁰⁵ — another direct borrowing from Law 52/1945. Pensioners and persons from outside the enterprise may be hired as trade union employees, but only to perform “specialized functions which require a superior qualification.”¹⁰⁶

The law protects trade union leaders from constraints upon the exercise of their duties.¹⁰⁷ Leaders’ individual employment contracts with their enterprise receive limited protection for up to one year after leaving office,¹⁰⁸ as do their rights to retain their position and seniority.¹⁰⁹ Leaders are entitled to up to five days release time per month from their enterprise duties in order to handle trade union matters.¹¹⁰

Law 54/1991 expressly authorizes trade unions to engage in bargaining, mediation, conciliation, petitioning, protests, demonstrations, and strikes “under conditions specified by law.”¹¹¹ The unions may use the courts and administrative bodies to defend their members’ rights arising from labor laws and collective agreements.¹¹² In addition, Law 54/1991 specifies that trade unions may acquire property, support their members’ exercise of their profession, establish mutual insurance funds, print publications, set up cultural, teaching and research bodies, establish commercial enterprises and banks, and borrow money.¹¹³

Trade unions, by law, have consultation and information rights. Enterprise boards of directors are required to invite trade union representatives to their board meetings “in order to discuss matters of professional, economic, social, or cultural interest.”¹¹⁴ The trade unions have a right to obtain information, presumably from the enterprises whose workers they represent, “necessary for negotiating the collective labor contract as well as for the formation and utilization of funds designed for improving working conditions, for labor protection and social uses, [and for] social insurance and protection.”¹¹⁵

Trade union federations and confederations may assist their affiliated

105. *Id.* art. 9.

106. *Id.* art. 34(2).

107. *See id.* art. 10.

108. *See id.* art. 11.

109. *See id.* art. 12.

110. *See id.* art. 35.

111. *Id.* art. 27(1). In 1993, the author participated in appellate arguments concerning a subway strike in Bucharest. Cf. *Conflictul de muncă de la Metrou este sau nu este legal?*, ROMÂNIA LIBERA, June 26, 1993. In reply to the author’s arguments supporting the legality of the Metro Workers’s strike, the Metro enterprise’s lawyer cited the provisions of Article 27(1), claiming these required trade unions to invoke the enumerated procedures in strict order. According to this interpretation, a strike would be illegal if the trade union had not first attempted to bargain, then to mediate or conciliate, then to petition, and finally to protest and demonstrate prior to initiating a walkout. The court did not adopt this reading of the statute, although it did rule the strike illegal on other grounds.

112. *See* Law 54/1991, *supra* note 12, art. 28.

113. *See id.* arts. 23-25.

114. *Id.* art. 29(1).

115. *Id.* art. 29(2).

trade unions in dealings with enterprise management.¹¹⁶ In addition, confederations “at the national level shall be consulted . . . at the drawing up of the drafts of normative acts regarding labor relations, collective labor contracts, [and] social protection as well as of any other regulations referring to the right of association and to trade union activity.”¹¹⁷

To establish a lawful trade union and acquire legal personality, the founders must draw up a “statute” that satisfies the criteria set out in Law 54/1991.¹¹⁸ In addition, they must file a registration application “with the court of first instance in whose jurisdiction the headquarters of the trade union lie.”¹¹⁹ The court will examine the application to confirm that the necessary documents have been provided and that the trade union’s formation and statute conform to the law.¹²⁰ The court will then issue a reasoned decision accepting or rejecting the application.¹²¹ A rejection decision can be appealed.¹²² The court of first instance is required to keep a special register containing basic information about the trade unions registered in its jurisdiction.¹²³ Subsequent modifications to the trade union’s statute, as well as changes in its leadership body, must be communicated to the registering court.¹²⁴ A trade union acquires legal personality on the date the registering court’s decision to approve the application becomes final.¹²⁵

d. Disparities Between Law 54/1991 and International Labor Standards

i. “House” Trade Unions

Article 2 of ILO Convention No. 98, to which Romania is a party, guarantees trade unions protection from employer domination or control:

1. Workers’ . . . organizations shall enjoy adequate protection against any acts of interference by [employers’ organizations] in their establishment, functioning, or administration.
2. In particular, acts which are designed to promote the establishment of workers’ organizations under the domination of employers or employers organizations, or to support workers’ organizations by financial or other means, with the object of placing such organizations under the control of employers or employers’ organizations, shall be deemed to constitute acts of interference within the meaning of this Article.¹²⁶

116. *See id.* art. 31.

117. *Id.* art. 27(2).

118. *See id.* arts. 6-8.

119. *Id.* art. 15. Romania is divided, for administrative purposes, into 40 “judets” (counties) and the city of Bucharest. Each of these administrative units has at least one court of first instance, known as a “judicătoria.”

120. *See id.* art. 16(1).

121. *See id.* art. 16(3).

122. *See id.* art. 17.

123. *See id.* art. 18.

124. *See id.* art. 21.

125. *See id.* art. 19.

126. ILO Convention No. 98, *supra* note 6, art. 2. Compare National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2)(1994) (“It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .”).

Romanian law does not specifically regulate employer-dominated trade unions, which, in Romanian vernacular, are called “house” or “yellow” trade unions. Article 1(2) of Law 54/1991 does state, however, that “[t]rade unions shall be independent of State bodies, political parties and of any other organizations.”¹²⁷

According to Romanian trade union leaders, employer-dominated trade unions are a widespread problem.¹²⁸ Enterprise managers allegedly create or dominate “house” trade unions both to complicate the collective bargaining process and to make it easier to obtain favorable agreements. Given the prevalence of trade union pluralism in Romanian enterprises,¹²⁹ bargaining at that level would include both independent trade unions and any existing “house” trade unions.¹³⁰

127. Law 54/1991, *supra* note 12, art. 1(2) (emphasis added). Since 1992, the national-level collective labor contracts have contained a clause that obliquely addresses the problem of employer-dominated unions. The clause provides that “the employer will adopt a neutral and impartial position towards the trade unions and the representatives of the employees in the enterprises and institutes.” 1992 National Level Collective Labor Contract, negotiated by Frăția, CNSLR and Cartel Alfa, art. 98(2).

128. See Larry S. Bush, Report: Worker Rights and Labor Law Seminar, Free Trade Union Institute, Saturn, Romania, 12-19 August 1995 ¶¶ 3, 4 (unpublished report on seminar for Blocul Național Sindical (BNS), a national confederation, on file with the author). The report had this to say about pluralism and “house” trade unions:

3. Romanian collective bargaining and trade union organization laws permit representation of the same unit of workers by multiple unions and also permit the creation of employer-dominated company unions The trade union leaders at the seminar accepted the principle of multi-unionism (doubtless a practical stance, given that BNS must fight for its existence against other confederations, some of which seem to have more influence with the Government and the ruling parties). The experience with collective bargaining in a multi-union context is mixed. On the one hand, in the metal industry, where there are six BNS federations and five other federations affiliated with either CNSLR-Frăția or Cartel Alfa, there is a history of successful cooperation in jointly negotiating collective bargaining agreements. On the other hand, in Romtelecom, where there is a BNS affiliate and one from CNSLR-Frăția, the two sides have had great trouble cooperating and the BNS federation’s president said that his rivals were very close to management and tried to undermine his federation.

4. The trade union leaders were very concerned about the company unions, however. Romanian law does not prohibit company-dominated unions The union leaders did not seem particularly interested in considering amendments to the law to outlaw them. Again, this appears to be a concession to reality; since most trade unions are dependent upon the enterprise for financial and other support, many of the labor organizations that are actually independent would feel threatened if there were such a law. Rather, the trade union leaders focus on that portion of Law 54/1991 that permits the creation of a trade union with only 15 members. They believe that by increasing this minimum number to some (unspecified) higher figure many of the problems with company unions would be solved.

Id.

129. See GHIMPU & ȚICLEA, *supra* note 3, at 103.

130. After Law 130/1996 took effect, “house” unions wishing to participate in collective negotiations would have to meet the new standard for “representativity” (i.e., represent at least one-third of the workers, or be affiliated with a representative federation or confederation). See *infra* notes 224-27 and accompanying text.

Employer domination of trade unions formed the basis for a 1991 complaint brought against the Romanian Government before the ILO Governing Body's Committee on Freedom of Association. The final decision in the case contained a recommendation – the sternest sanction available – that the Romanian government modify its new Law 54/1991 to prohibit such domination.¹³¹ Despite this ruling, Law 54/1991 was not revised.

The number of “house” trade unions in Romania is difficult to gauge due, in large part, to the lack of objective information on the problem. Trade union officials inflate the estimates by failing to distinguish between employer domination and trade union competition, sometimes castigating rival organizations as “house” unions, whether or not they are actually controlled by the employer.

Interestingly, even leaders of genuinely independent trade unions show little interest in amending Romanian law to implement the ILO standard and to expressly outlaw employer-dominated trade unions. This lack of interest probably derives from the reliance of most enterprise-level trade unions (including those that are, for all practical purposes, “independent”) on the enterprise for varying degrees of financial (and other) support.¹³² Presumably, some leaders fear that the explicit incorporation of the ILO standard into Romanian law might place their independent organizations at risk of dissolution.¹³³

ii. Requirement that Trade Union Members and Officers be Enterprise “Employees”

Under Law 54/1991, only “[p]ersons having the status of employee shall enjoy the right to organize themselves into trade unions”¹³⁴ Eligibility

131. See Complaint against the Government of Romania presented by the International Union of Food and Allied Workers' Associations (IUF), Report Nos. 278 (interim) and 279 of the Committee on Freedom of Association, ILO Official Bulletin Vol. LXXIV, 1991, Series B, Nos. 2 and 3 (Case No. 1571). In the second of these reports, issued after the promulgation of Law 54/1991, and taking into account its provisions, the ILO Governing Body approved the Committee's reiterated “recommendation on the necessity to ensure adequate protection against acts of interference by employers in workers' organizations and requests [to] the Government to adopt legislative provisions to that effect.” Paragraph 422(e), Report No. 279.

132. See Bush, *supra* note 128, at 2. Employer financial and material support for trade unions has been institutionalized at the highest level. The national-level collective labor contract in effect through May 1998 specified that:

(1) Enterprises will ensure on their property, free for the activity of the trade unions, space and necessary furniture, as well as access to enterprise office equipment (fax, copiers and other things of an administrative nature); the conditions of access to these will be established by collective labor contracts.

(2) Cultural-sporting facilities, owned by the enterprise or by the trade unions within the enterprise, respectively, can be used, without payment, for actions organized by the trade unions or the employer, under conditions provided by the collective labor contract.

Art. 89, Contractul Colectiv de Muncă Unic la Nivel Național, M.O., Part V, No. 2, Feb. 20, 1998.

133. See *supra* note 128.

134. Law 54/1991, *supra* note 12, art. 2(1). This statement must be qualified, however, insofar as the law also permits “persons . . . associated in cooperatives as well as in other professional classes” to form trade unions. See *id.* art. 4.

for election to trade union leadership is limited, in turn, to "Romanian citizens who are members of the trade union" and who are "working in the [enterprise]."¹³⁵ Romanian trade unionists believe that enterprise managers use this "employee status" requirement to deny trade unions the right to speak for unemployed or retired persons affiliated with or employed by the enterprise.¹³⁶ More problematically, managers have also exploited the requirement by refusing to recognize trade union leaders as the representatives of their organization following the discharge of the employees by the enterprise.¹³⁷

In either of the above cases, the "employee status" requirement arguably conflicts with ILO standards on freedom of association. Article 2 of Convention No. 87 expressly states that "[w]orkers . . . without distinction whatsoever, shall have the right to establish and . . . to join organizations of their own choosing without previous authorization."¹³⁸ This has been interpreted, by the ILO Governing Body's Committee on Freedom of Association, as meaning that national law cannot restrict trade union membership to the employees of a single employer.¹³⁹ It remains unclear, however, whether the ILO standards would also prohibit domestic law from excluding people not currently employed (i.e., retirees and the unemployed) from trade union membership.

Regarding trade union office holding, Article 3 of Convention No. 87 provides that "[w]orkers' . . . organizations shall have the right to . . . elect their representatives in full freedom."¹⁴⁰ The ILO's Committee on Freedom of Association has frequently considered state limitations of eligibility for trade union office to persons currently employed at the enterprise. The ILO's position on this question is clear:

The requirement that employees must belong to the establishment in question for election to trade union office is contrary to Article 3 of Convention No. 87. It is necessary to admit as candidates for trade union office persons who have previously been employed in the occupation concerned and to exempt from the occupational requirement a reasonable proportion of the

135. *Id.* art. 9.

136. Ghimpu and Țiclea confirm that trade union membership rights are denied to persons not currently employed: "Taking into account the provisions of Law 54/1991, [since] the unemployed, pensioners (who have ceased work permanently), [and] high school and university students may not join trade unions, [they] therefore do not possess trade union freedom." GHIMPU & ȚICLEA, *supra* note 3, at 92. Notwithstanding this limitation, organizations calling themselves trade unions exist specifically for the unemployed and some university students. *See id.*

137. Regarding restrictions on holding trade union office, see Bush, *supra* note 128, at 5 ("[T]rade union leaders who are discharged by their enterprise lose their right to be recognized as leaders by that enterprise."). *See also infra* notes 141-42 and accompanying text.

138. ILO Convention No. 87, *supra* note 6, art. 2.

139. *See* INTERNATIONAL LABOUR OFFICE, FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO 53 (4th ed. 1996) ("The requirement for the establishment of a trade union that workers need to be employees of only one employer is a violation of the principles of freedom of association.").

140. ILO Convention No. 87, *supra* note 6, art. 3.

officers of an organization.¹⁴¹

In 1995, the ILO Committee on Freedom of Association addressed Romania's standard in a case brought against the Romanian government and its national railroad company (SNCFR) by the National Trade Union Bloc (BNS) and its affiliate, the Engine Drivers' Federation. The case arose in part from SNCFR's refusal to recognize discharged trade union leaders as authorized representatives due to their non-employee status.¹⁴² Acting upon the Committee's recommendation, which found numerous violations of ILO standards, the ILO Governing Body requested the Romanian Government amend portions of its labor legislation, including "the requirements to belong to the respective occupations to be eligible as trade union leader."¹⁴³ Nonetheless, to date the Romanian Government has not complied with the ILO's request.

2. Regulation of Collective Bargaining

a. Collective Bargaining Prior to Law 13/1991

i. The Labor Contract Law of 1929

The first Romanian statute devoted to collective bargaining was passed in 1929,¹⁴⁴ and was apparently inspired by both French and Italian legislation.¹⁴⁵ It established the collective labor agreement as one of the recognized forms of labor contracts, along with apprenticeship contracts, individual employment contracts and "team" contracts.¹⁴⁶ The statute defined "collective labor contract" as "the written agreement concerning the conditions of work and payment, concluded on the one hand by one or more entrepreneurs, or by groups or associations of them and, on the other hand, by professional associations or groups of employees (wage-earners)."¹⁴⁷

The 1929 Labor Contracts Law contrasts starkly with the communist and post-communist era labor statutes in one major aspect. Whereas the more recent statutes stress the power of representative bodies to bind unconsenting workers and employers, the 1929 law was firmly grounded in nineteenth century liberal notions of freedom of contract. No person or entity was legally obligated to comply with a collective contract absent

141. INTERNATIONAL LABOUR OFFICE, *supra* note 139, at 80.

142. See Complaint against the Government of Romania presented by the National Trade Union Bloc (BNS) and the Free and Independent Trade Union Federation of Train Drivers of Romania (FSLIMLR), ILO Official Bulletin vol. LXXVIII, 1995, Series B, No. 297 (Case No. 1788) [hereinafter BNS/FSLIMLR Complaint].

143. *Id.* ¶ 366(a).

144. Lege asupra contractelor de muncă, April 5, 1929, M.O., No. 74, April 5, 1929 [hereinafter 1929 Labor Contracts Law]. See also GH. BĂDICĂ & A. POPESCU, CONTRACTUL COLECTIV DE MUNCĂ: SALARIZAREA ȘI IMPOZITAREA 35 (1991). An earlier law on the organization of professional trade unions, passed in 1921, had envisioned the right of workers to enter agreements with owners. See *id.*

145. See BĂDICĂ & POPESCU, *supra* note 144, at 35.

146. See 1929 Labor Contracts Law, *supra* note 144. The provisions regarding collective labor contracts were contained in Title IV of the statute.

147. *Id.* art. 101.

some word or deed that could be said to constitute a manifestation of assent. The only persons or entities that could be bound by a collective labor contract were: (a) organizations that represented employers or workers, if those organizations committed themselves to comply either at the time the contract was created or by later adhesion; (b) individual workers and employers who actually signed the contract, "as well as those who g[a]ve [an] individual written mandate to negotiate in their name and for them;" (c) workers and employers who did not resign from groups in category (a) within eight days of learning of the creation of the collective labor contract; (d) employers who formally adhered to the contract subsequent to its creation; and (e) workers or employees who joined groups in category (a).¹⁴⁸

This relentless commitment to individual freedom of contract ran throughout the 1929 Labor Contracts Law. There were no express provisions for branch- or industry-level contracts as such, nor any mention of national-level contracts. Multi-employer contracts could be applied only to those employers who had manifested assent in one of the ways specified above. Had a national-level contract been contemplated, compliance with this requirement would have made universal coverage extremely unlikely.

ii. Collective Bargaining Under the 1972 Labor Code

In contrast to the 1929 Labor Contracts Law's liberal freedom of contract approach to collective bargaining,¹⁴⁹ the communist-era labor code treated collective labor contracts as simply one aspect of the "transmission belt" role of trade unions — a means to ensure that the workers fulfilled the economic plans established by the regime. The express purpose of enterprise-level collective contracts, set out in Article 76(1) of the 1972 Labor Code, was "to contribute to superior organization of work, to reinforce[] discipline and mobiliz[e] . . . all efforts for fulfillment of the plan, [and] to improv[e] conditions of work and life in the enterprises."¹⁵⁰ The workers and the enterprise management were expected to commit themselves, through the collective contract, "to improving the capacity of production, raising labor productivity, reducing specific expenditures and reducing the cost price, as well as to obtaining economies and benefits above the planned level, improving the quality of production, and raising the efficiency of economic activity."¹⁵¹ In addition, collective contracts were intended to provide the forms of worker remuneration and methods of operating social investments (i.e., housing, creches, health unit dispensaries, canteens and similar activities), as well as to promote cultural and

148. *Id.* art. 108. This article dealt specifically with contracts for an indefinite term. The emphasis on individual assent was reinforced in another provision which delineated who would be bound for the entire period of a definite term or "life of the job contract." *Id.* art. 109. It was necessary to address these different types of contracts separately because any party could denounce a contract of indefinite duration on 20 days' notice. See *id.* arts. 115, 116.

149. The 1929 Labor Contracts Law, *supra* note 144, was repealed in 1950.

150. GHIMPU ET AL., *supra* note 86, art. 76(1).

151. *Id.* art. 76(2).

sports activities.¹⁵²

The 1972 Labor Code required collective labor contracts between the enterprise and the "collective of workers" to be executed annually by the leader of the enterprise and the president of the trade union committee.¹⁵³ While the law required all labor contracts be "debated and approved by the general assembly of workers,"¹⁵⁴ prior to its entry into force, this process was unlikely to reflect individual worker assent. Once a contract entered into force, its provisions applied to all persons employed at the enterprise.¹⁵⁵

At the branch, or industry-wide level, ministries (as well as "other central organs or economic centers") could enter into collective contracts with trade union federations; such contracts would then apply to all of the enterprises and workers in that industry.¹⁵⁶ These contracts, which could be effective for as long as five years, were intended "to [implement] the provisions of the plan [and] the application of labor law; [to improve] conditions of labor and life in the enterprises of the respective sectors, [and to implement] necessary measures with a view to achieving the collective contracts of the enterprises."¹⁵⁷

Law 13/1991 superceded Articles 76-80 of the 1972 Labor Code.¹⁵⁸ The drafters of Law 13/1991 did not revert to pre-communist legislation as their model for collective labor contracts, however, as they had previously done when drafting Law 54/1991.¹⁵⁹ Rather, they rejected the freedom of contract approach embodied in the 1929 Labor Contracts Law, opting instead for a system similar to the 1972 Labor Code, i.e., striving for universal coverage.

b. Law 13/1991

Faced with major labor unrest in the early 1990s, the Romanian government sought to draft trade union laws that would promote industrial stability. By 1991, the threat posed by collective labor disputes (which had a particularly political edge to them at that time) was the principal labor relations concern of the ruling party. The major units of production were state enterprises (private sector production was negligible), so economic demands were inextricable from politics. Law 15/1991, which was created to regulate collective labor disputes and strikes, was therefore designed to confer the right to strike in principle only; it hedged the privilege with so many substantive limitations and procedural hurdles that strikes (particu-

152. *See id.* art. 77(1).

153. *See id.* arts. 76(1), 77(2) and 78(1). The president of the trade union committee acted as the representative of the workers' collective (i.e., all employees, without regard to actual assent or voluntary membership in the trade union). *See id.*

154. *Id.* arts. 78(1) and 77(2).

155. *See id.* art. 78(1).

156. *See id.* art. 78(2).

157. *Id.* art. 78(2).

158. Law 13/1991, *supra* note 10, art. 21.

159. *See, e.g., supra* note 91 and accompanying text.

larly political strikes) could be declared illegal or suspended.¹⁶⁰

In turn, Law 13/1991 (companion legislation to the strike law) was designed to assure that centralized national and industry-level collective bargaining dominated the labor relations framework. It established a system that could be controlled by those in political power at the center, at least on the employers' side, but potentially even on the trade union side if (as appeared possible in early 1990s) a single confederation established its hegemony.¹⁶¹ Whether or not such a motive underlay the creation of this "top-down" bargaining system, the hierarchical approach came naturally to those charged with drafting Law 13/1991. After almost fifty years of centralized state planning, most Romanians had grown accustomed to the idea that meaningful political and economic action had to begin at the top.¹⁶²

Law 13/1991 proved to be a crudely crafted piece of legislation, fraught with conceptual defects and incapable of regulating the vigorous trade union pluralism that quickly developed in Romania.¹⁶³ This led to a crisis of legitimacy in regard to the status of collective labor contracts as reliable sources of rights and obligations. One contributing factor to the crisis was the fact that trade unions were barred, at least in theory, from serving as the employees' representatives in most enterprises. The crisis was also fueled by several other factors, including: uncertainty about the status of the duty to bargain (i.e., was there a legally duty); the unsatisfactory method of selecting employer and trade union representatives for higher level bargaining; and the reality that competing collective labor contracts could exist simultaneously at branch and national levels. The existence of multiple, conflicting labor contracts posed serious questions about whether any contracts at these levels could be legally binding. These issues, as well as problems that trade unions experienced in enforcing enterprise contracts, ultimately led to the passage of reform legislation – Law 130/1996.

c. Law 13/1991's Problem Areas

i. Trade Union Pluralism and Employee Representation at the Enterprise Level

Under Law 13/1991, collective labor contracts could be entered into at four levels – enterprise,¹⁶⁴ groups of enterprises, branches of activity (i.e.,

160. See Bush, *supra* note 1, at 387-419 (assessing the background and import of Law 15/1991).

161. See *id.* at 383-87. The National Confederation of Free Trade Unions of Romania (CNSLR), a successor to the old communist General Trade Union Confederation in Romania (UGSR), was closely allied with the National Salvation Front, which controlled the government both before and after the 1990 elections. See *id.* at 385.

162. The author once discussed with Dumitru Costin, the president of the National Trade Union Bloc (BNS), the advisability of putting a mandatory membership dues deduction clause into enterprise-level collective contracts. Mr. Costin insisted that such a clause would only be accepted if it was first put into the national level collective bargaining agreement.

163. See Bush, *supra* note 1, at 383-87.

164. The Romanian word used in Law 13/1991 and other Romanian labor legislation to refer to both business and government entities is "unitate," which means "[t]he small-

industry level) and national.¹⁶⁵ A contract at any of these levels was “a convention between employers and employees.”¹⁶⁶ The “parties” to the collective contract were said to “be equal and free in [its] negotiation,”¹⁶⁷ with the power to extend,¹⁶⁸ modify,¹⁶⁹ suspend,¹⁷⁰ or terminate¹⁷¹ the contract. Carrying out the terms of the collective contract was “compulsory for the parties”¹⁷² and failure to comply with the contractual obligations would “involve the responsibility of those found guilty of it.”¹⁷³

One fundamental question that arose under Law 13/1991 concerned the identity of these “parties.” At the enterprise level, where the law envisioned the creation of a single contract, rather than separate contracts for each group of separately-represented workers,¹⁷⁴ Article 7(1) reiterated that “the collective labor contract shall be concluded between the employer

est formation, economic, administrative, military, medical, etc., organization which forms a whole and acts under a general plan.” ACADEMIA ROMÂNĂ, INSTITUTUL DE LINGVISTICĂ “IORGA IORDAN”, DEX: DICȚIONARUL EXPLICATIV AL LIMBII ROMÂNE 1136 (2d ed. 1996) [hereinafter DEX]. The word most accurately translates into English as “unit.” ANDREI BANTAȘ, DICȚIONAR ROMÂN-ENGLEZ 425 (3d ed. 1995). This Article adopts an alternate translation — “enterprise” — because it conforms to more generally accepted terminology used in Western economies.

Another Romanian word, “întreprindere,” means an “[e]conomic unit of production, service or commerce.” DEX, *supra*, at 540. It is translated as “industrial unit” or “shop.” BANTAȘ, *supra*, at 228. “Întreprindere” is not used in contemporary Romanian legislation. A friend of the author, an experienced translator, suggested that the reason for this might be that the word is associated with communist usage.

It would appear that neither “unitate” nor “întreprindere” correspond precisely with the Romanian terms for privately-organized business entities — “societate comercială” or “societate pe acțiune.” It is therefore difficult to pinpoint whether the bargaining that must occur at “enterprise (‘unitate’) level” refers to single site locations (roughly akin to “bargaining units” in U.S. parlance), or is to be company-wide. In the public sector, the Romanian national railroad, SNCFR, (a single legal entity prior to 1998), entered into one nationwide collective contract with the trade union federations that represented its employees throughout Romania. See BNS/FSLIMLR Complaint, *supra* note 142, ¶ 319. SNCFR was at one and the same time an enterprise and a “branch,” it seems. Cf. ISABELLE DESBARATS, L’ENTREPRISE À ÉTABLISSEMENTS MULTIPLES EN DROIT DU TRAVAIL (1996) (discussing extensively the treatment of the concept of “enterprise” in French labor law).

165. Law 13/1991, *supra* note 10, art. 6.

166. *Id.* art. 1 (“The collective labor contract shall be a convention between employers and employees, stipulating clauses with regard to the working conditions, remuneration, and other rights and obligations proceeding from labor relations, within the limits provided by the law.”).

167. *Id.* art. 3. In negotiating the collective labor contract, however, the parties had to “include clauses by which the mutual rights and obligations of the parties shall be established, as regards the promotion of equitable labor relations of a nature to ensure the social protection of the employees, the diminution or elimination of collective trade disputes, or the calling of strikes.” *Id.* art. 10.

168. *Id.* art. 9(2).

169. *Id.* art. 14(1).

170. *Id.* art. 13.

171. *Id.* art. 16.

172. *Id.* art. 13(1).

173. *Id.* art. 13(2).

174. This result was implicit in the statute, which mandated that once an enterprise collective labor contract had been executed, its provisions bound all enterprise employees, “regardless of the date of their hiring or whether they were or were not affiliated to a trade union organization in the enterprise.” *Id.* art. 4.

and the employees,"¹⁷⁵ i.e., the "parties" identified in the basic definition of the collective agreement set out in Article 1.

Law 13/1991 defined "employer" as "self-managed public companies, trading companies, and the other legal or natural persons having employees."¹⁷⁶ The statute thus envisioned that virtually all private enterprises and most public ones would be "employers" within the meaning of this law.¹⁷⁷ With one exception,¹⁷⁸ the statute did not specify which officials or individuals from management or the ownership of the enterprise were authorized to negotiate on its behalf; presumably, however, this was merely a question of determining who had such authority under Romanian company law.

Determining who held authority to speak for the employees was frequently a more complicated matter. In theory, workers were to be represented by a single trade union during enterprise-level bargaining, as long as all workers belonged to that trade union.¹⁷⁹ However, most Romanian enterprises of any size had multiple trade unions, so that it would be unusual for every employee to be affiliated with the same trade union. Some unions at a particular enterprise could be either independent or affiliated to competing federations, with each purporting to speak on behalf of their members.

Ubiquitous trade union pluralism, combined with the statutory right not to join a trade union,¹⁸⁰ conflicted with the model envisioned by Law 13/1991 — a single collective bargaining agreement per enterprise. According to Dr. Șerban Beligrădeanu, one of the most prolific commenta-

175. *Id.* art. 7(1).

176. *Id.* art. 19.

177. Under Romanian law in 1991, state enterprises were divided into "commercial societies" and "autonomous regimes." "Commercial societies" are state-owned businesses engaged in commercial and other activities that in the U.S. would be performed by private companies. These commercial societies were subsequently to be privatized. "Autonomous regimes" involve activities intended to remain under state control, even though many of their activities — mining, railroads, etc. — are in the private sector in western nations. Following the 1996 elections, some of the autonomous regimes, such as the telephone company, were also slated for privatization.

Law 13/1991 permitted "budgetary institutions" or "departments which co-ordinate such institutions" (i.e., government ministries and other purely governmental organizations) to enter into collective labor contracts, "if the law provides that some rights of the employees from these units shall be established by collective negotiations." *Id.* art. 20(1).

178. In the case of "budgetary institutions" or the departments that coordinate them, the statute specified that "the managing bodies of the budgetary institutions, or of the departments, as the case may be, shall represent the employers at the conclusion of the collective labor contracts." *Id.* art. 20(2).

179. At the conclusion of the collective labor contract, the employees shall be represented by trade unions. In the enterprises in which trade unions have not been organized, or in which, although organized, not all employees are members of a trade union, or of the same trade union, the representatives of the employees shall be elected by these ones, by secret ballot, on lists.

Law 13/1991, art. 7(2).

180. See Law 54/1991, *supra* note 12, art. 2(3) ("No one can be compelled to belong or not belong to . . . a trade union.") .

tors on contemporary Romanian labor law,¹⁸¹ if Law 13/1991 had been strictly applied, ad hoc elections to elect worker delegates would have been required in virtually every work place.¹⁸² The result thus would have resembled the "works council" institutions common elsewhere in Europe, but rejected by Romania.¹⁸³

This is not what occurred in practice, however. Many trade union leaders noted that the trade unions in the enterprise generally continued to speak for their members at bargaining sessions and ad hoc elections were only held to select representatives for non-union employees. Thus, the actual collective negotiations were conducted between the enterprise managers and an amalgam of trade union and ad hoc representatives. This process often involved acrimonious disagreements about how many representatives were allowed to participate and vote from the various employee constituencies, as well as what level of agreement was necessary among the parties for the collective labor contract to go into effect.¹⁸⁴

ii. Absence of a Duty to Negotiate

Even though the constitution purports to protect the right to organize and bargain collectively,¹⁸⁵ Law 13/1991 contained no specific statutory requirement that any enterprise recognize a trade union as a representative of its workers, negotiate with it, or enter a collective agreement. Article 6 merely stated that "collective labor contracts *can be* ('se pot') concluded at the level of enterprises, groups of enterprises, [or] branches of activity [industry level] as well as at national level."¹⁸⁶ The use of permissive rather than mandatory language was a strong indication that parties unwilling to negotiate, much less agree upon, the terms of collective agreements were not subject to legal sanction. The labor relations statutes nowhere else recognized any express requirement that enterprises recognize and bargain with trade unions, although it perhaps could be argued that this expectation was implicit in the overall structure of the post-1989 laws.

Romanian jurists were divided concerning the duty of employers to recognize and negotiate with trade unions under Law 13/1991. Ghimpu

181. Beligrădeanu has authored numerous articles on labor law, both before and after the fall of the communists. In the early 1990s, he compiled two authoritative annotations of labor law: *UNIUNEA JURIȘTILOR DIN ROMÂNIA, CODUL MUNCII*, *supra* note 16 (an annotated Labor Code); and *LEGISLAȚIA MUNCII 1990-1991* vols. I and II (1991, 1992) (an annotated collection of labor statutes and decrees promulgated after December 1989).

182. See Șerban Beligrădeanu, *În Legătură cu Problema Efectelor Contractelor Colective de Muncă Încheiate la Nivel Național, de Ramură sau al Grupurilor de Unități*, *DREPTUL*, No. 5/1992, 33, 34.

183. See *supra* note 92 and accompanying text. Dr. Beligrădeanu argued that trade union members selected in such ad hoc elections would not be representing employees in their trade union status, but solely as individually-elected delegates. See Beligrădeanu, *supra* note 182, at 35.

184. See Interviews with representatives of trade union federations affiliated with Blocul Național Sindical, in Saturn, Romania (Aug. 12-17, 1995).

185. See 1991 CONST., *supra* note 9, art. 38.5.

186. Law 13/1991, *supra* note 10, art. 6 (emphasis added).

and Țiclea's leading labor law treatise, *Dreptul Muncii*,¹⁸⁷ adopted the view that no obligation to negotiate was imposed upon "the social partners" (employers and employees) at any level of the economy, characterizing this situation as a "legislative lacuna" that had to be eliminated.¹⁸⁸

On the other hand, Dr. Gheorghe Brehoi, a frequent commentator on labor law and a high-ranking official of the Ministry of Labor and Social Protection, concluded that while negotiations and actual entry into a collective labor contract were mandatory at the enterprise level, they might not be at the higher branch or national levels.¹⁸⁹ Brehoi noted that several statutes require certain enterprise labor standards to be established by collective negotiations,¹⁹⁰ reasoning that because "the mechanism for establishing and granting important personal rights cannot function in the absence of a labor contract at the level of the enterprise, doubtless its conclusion is obligatory and neither of the parties — employers [or] employees — can refuse to negotiate collectively for establishing its contents."¹⁹¹

Ghimpu and Țiclea rejected Dr. Brehoi's conclusions, in part because Article 6 of Law 13/1991 contained no distinction between the various levels at which negotiation could take place. Thus, they argued, the statute's internal structure did not permit the conclusion that reaching agreement is obligatory only at the enterprise level. In addition, they urged that because the law contained no express obligation to negotiate at all, *a fortiori* it could not be construed to require actual agreement on a contract.¹⁹²

Notwithstanding the theoretical confusion, in practice state enterprises generally did negotiate with the trade unions represented among their work forces. The situation in the emerging private sector was, however, more complicated. Some businesses accepted collective bargaining, but others, especially some with foreign partners, are said to have expressly conditioned their willingness to invest in Romania upon being

187. SANDA GHIMPU & ALEXANDRU ȚICLEA, *DREPTUL MUNCII* (1994).

188. *See id.* at 114.

189. *See* Gheorghe Brehoi, *Contractele Colective de Muncă La Nivel Național Pentru Anul 1992*, *DREPTUL*, No. 4/1992, 3, 5.

190. In Article 3(2) of Law 31/1991 ["Establishment of the Duration of Working Time Under Eight Hours a Day for Employees Working Under Particular — Harmful, Difficult, or Dangerous — Conditions"], the length of work time reduction and the identification of employees to benefit from it "shall be established by negotiations between employers and trade unions, or the employees' representatives, as the case may be." *Lege privind stabilirea duratei timpului de muncă sub 8 ore pe zi pentru salariații care lucrează în condiții deosebite — vătămătoare, grele sau periculoase*, art. 3(2), No. 31, Mar. 22, 1991, M.O., Part I, No. 64, Mar. 27, 1991. Similarly, in Article 5(1) of Law 6/1992 ["Employees' Paid Holidays and Other Holidays"], rules concerning taking of paid holidays "shall be established in the collective labor contract." *Lege privind concediul de odihnă și alte concedii ale salariaților*, art. 5(1), No. 6, Feb. 5, 1992, M.O., Part I, No. 16, Feb. 10, 1992.

191. Brehoi, *supra* note 189, at 5.

192. *See* GHIMPU & ȚICLEA, *supra* note 187, at 114. Their survey of other nations also led them to conclude that the majority of states with a tradition of collective bargaining did not elevate the obligation to negotiate to a legal duty. *See id.*

able to operate union-free.¹⁹³ As the private sector grew, it became even more crucial to resolve the issue of whether there was a duty to negotiate.

iii. Unenforceability of Collective Labor Contracts at Enterprise Level

There were many problems associated with trade unions' efforts to enforce collective labor contracts under Law 13/1991. This was an especially glaring problem when national and industry-level contracts were ignored by enterprises. Although the law could be read to make such contracts binding on enterprises within the relevant industry,¹⁹⁴ Romanian labor law experts reasoned that it could not have this effect, either in theory or practice.¹⁹⁵ Because Article 4 mandated that the provisions of any contract negotiated at the enterprise level had to apply to all enterprise employees,¹⁹⁶ as a matter of law there could only be one collective bargaining contract for the workers within a single enterprise.¹⁹⁷ At the same time, an enterprise quite often would have employees who belonged to rival trade unions, each of which were affiliated to different federations and/or confederations, which, in turn, might have negotiated rival industry and/or national level agreements. The statute, by its silence, incongruously permitted two or more contracts to exist simultaneously in any given branch of industry and even at the national level.¹⁹⁸ Thus, an enterprise could be placed in the impossible position of simultaneously being subject to two or more industry or national contracts – each allegedly binding and potentially conflicting. For this reason, one commentator has concluded that collective labor contracts above the enterprise level could not be seen as a “source of law,” but only as a “source of inspiration.”¹⁹⁹

On the other hand, Law 13/1991 mandated that enterprise-level contracts were legally binding and enforceable in the courts.²⁰⁰ Nevertheless,

193. See Interview with leaders of “Electron” Federation, in Bucharest, Romania (June 23, 1993).

194. The statute impliedly rather than expressly bound enterprises to these “higher level” contracts: it allowed for industry and national-level contracts; it made contract compliance “compulsory for the parties;” and it specified that litigation concerning contract compliance fell within the jurisdiction of the court of first instance. See Law 13/1991, *supra* note 10, arts. 13, 17. The latter two provisions, as written, appeared to apply to contracts at all levels, without distinction.

195. See GHIMPU & ȚICLEA, *supra* note 187, at 122-23; Beligrădeanu, *supra* note 182, at 35-37.

196. Law 13/1991, *supra* note 10, art. 4 (“The provisions of the collective labor contract shall produce effects for all the employees in the enterprise, regardless of the date of their hiring, or whether they were or were not affiliated to a trade union organization in the enterprise.”).

197. See Beligrădeanu, *supra* note 182, at 34.

198. For example, there were three competing national level contracts in 1992. See *id.* at 35.

199. [C]ollective labor contracts entered into at the national and branch level, etc., would not have the legal effect of other contracts – that of constituting a *vinculum juris* [legal bond or tie] – but would represent, in essence, *only a simple optional source of inspiration* for negotiation of collective labor contracts entered into at the level of every enterprise, the only one which, *legally, obligates* the parties who entered it (employers and the employees of the enterprises) *Id.* at 37 (emphasis in original).

200. Law 13/1991, *supra* note 10, arts. 13, 17; see *supra* note 190.

Romanian trade union leaders claimed that managers frequently breached their enterprise collective contracts and that the trade unions could not, as a practical matter, respond by invoking judicial remedies.²⁰¹ They gave several reasons for this. First, the trade unionists simply did not trust the quality of justice available in the courts; important cases would regularly be decided in the way “the Power” wanted them to come out. Second, it was very expensive to litigate; trade unions could not afford to sue for contract breaches, especially given their claim that breaches occurred frequently. Third, there was tremendous delay in the litigation process, and trade union leaders often could not suffer the consequences of waiting for a decision – particularly when the dispute was an urgent one.²⁰² As a result, leaders risked losing their members’ support by going to court; the members would perceive the leaders to be failures when, as was often the case, no positive results were obtained after long delays and great expense.²⁰³

iv. Legitimacy Questions Regarding National and Industry-Level Collective Labor Contracts – the Problem of Freedom of Contract

Law 13/1991 established an extremely vague process for negotiating national and industry-level agreements. All lawfully established trade union federations (at the industry level) and confederations (at the national level) were automatically entitled to participate in negotiations at their respective levels, regardless of the size of their membership.²⁰⁴ The statute did not provide any mechanisms for assuring that any of the competing federations or confederations actually represented a significant proportion of the employees within any given segment of the economy, nor did it require coordinated bargaining or the production of a single contract at industry or national level.

In 1992, competing confederations negotiated three separate national-level contracts with the employer representatives.²⁰⁵ Thereafter, the confederations cooperated in national-level negotiations, reaching agreement on a single contract in 1993 and 1995 (no contract was agreed to in

201. See Bush, *supra* note 128, at 1.

202. See *id.* at 1-2. In 1995, the “Metal 93” federation attempted to convince the Ministry of Justice to establish a fast-track for handling labor litigation (hearing within 24 hours of filing), but no ministry action was ever taken; the proposal was taken for “study” and disappeared. See *id.* at 2.

203. See *id.*

204. At the conclusion of the contracts . . . the employees shall be represented by federation type trade union organizations, in cases in which the contracts shall be concluded at the level of groups of enterprises or branches, or by confederation type trade union organizations, in cases in which the collective labor contracts shall be concluded at national level.

Law 13/1991, *supra* note 10, art. 8(2).

A federation can be formed by two or more trade unions from the same branch; a confederation can be created by two or more federations from different branches. There is no requirement for a minimum number of members. See Law 54/1991, *supra* note 12, art. 42(2),(3).

205. See *supra* text accompanying note 198.

1994).²⁰⁶ The same practice was followed in 1996, but one of the most powerful confederations, Cartel Alfa, refused to sign the final document that year.²⁰⁷ However, their refusal to sign was not seen at the time as preventing the contract from coming into force.²⁰⁸

At the industry level, competing trade union federations reached a *modus vivendi* in some instances. For example, in 1995 the metal trades industry was represented by eleven federations, six of which were affiliated with the National Union Bloc (BNS), and five of which were affiliated with either CNSLR-Frăția or Cartel Alfa. These federations coordinated their collective bargaining efforts at the level of the industry agreement.²⁰⁹ On the other hand, some industries experienced fractious inter-union relations. The telecommunications industry (Romtelecom, a state autonomous regime) had two competing federations that reportedly had great difficulty cooperating; charges of bad faith and collusion with company officials abounded.²¹⁰

The situation was even worse on the employers' side in industry and national negotiations. Under Law 13/1991, the employers' representatives were persons named by the Romanian Chamber of Commerce and Industry.²¹¹ Although the practice evolved into designating employer representatives from the developing employer associations, massive confusion and controversy over who should rightfully speak for management or the owners of the state enterprises nevertheless persisted.

As discussed above,²¹² the weight of authority suggested that the higher level collective contracts were not legally enforceable against the enterprises. Moreover, it would have been perfectly logical for enterprise management to refuse to honor agreements purportedly entered by their representatives on the grounds that the enterprise authorities never authorized such representation and that the actual enterprise managers never agreed to be bound by the resulting contracts.²¹³ The owners of private enterprises were even more likely to adopt this kind of position, especially if they were not members of the employer associations named by the Romanian Chamber of Industry and Commerce.

206. See GHIMPU & ȚICLEA, *supra* note 3, at 121-22 n.32.

207. See Confederația Națională Sindicatilor Libere din România, Contract Colectiv de Muncă Unic la Nivel Național 36-37 (1996) (presenting a copy of the 1996 national-level contract; pages 36 and 37 contain photocopies of the signature pages for the contract, on which the signature lines for Cartel Alfa representatives were blank).

208. See Ghimpu & Țiclea, *supra* note 3, at 121-22 n.32 (listing Cartel Alfa as one of the five confederations party to the 1996 national contract).

209. See Bush, *supra* note 128, at 2.

210. See *id.*

211. Law 13/1991, *supra* note 10, art. 8(3).

212. See *supra* notes 194-99 and accompanying text.

213. In informal conversations the author had with Romanian trade union leaders during the years 1993-1995, the latter occasionally mentioned that such positions were sometimes taken by enterprise management.

d. Law 130/1996

In response to its perceived inadequacies (though not necessarily those identified in this article), Law 13/1991 was repealed on October 16, 1996, and replaced by a new statute, Law 130/1996 (Law Concerning the Collective Labor Contract).²¹⁴ This statute was the culmination of several years of negotiations begun in 1994 by the major trade union confederations, which had sought modifications in all of the labor relations statutes.²¹⁵ The structure of the new law retained the basic elements of Law 13/1991, but refined them to rationalize and legitimize those aspects that were unworkable or incoherent in the earlier statute. It also reflected the perspective of the largest trade union confederations, which favored a system of national and branch-level contracts, but which sought to limit the trade union organizations that would be authorized to negotiate to those that were representative (i.e., themselves). In fact, the final statute contained a great deal of the original agreement reached by the trade unions in tripartite negotiations with the Government and employer representatives, albeit with a number of controversial changes that were vigorously protested by some labor organizations.²¹⁶

President Iliescu and his party, who had been responsible for the original round of labor legislation in 1991,²¹⁷ approved Law 130/1996 during their final days in power. However, the opposition leaders who came to power following the November 1996 elections also supported Law 130/1996.²¹⁸ The new political leaders sought to make only minor statutory modifications once taking office. In that spirit, the new government passed Law 143/1997 (Law for Modifying and Completing Law 130/1996 Concerning the Collective Labor Contract).²¹⁹

The following discussion will, for the most part, address Law 130/1996 as modified in 1997. Law 130/1996 remains the official designation, notwithstanding its subsequent amendment and republication.²²⁰ Because the new law is in many respects designed as a more sophisticated version of its predecessor, Law 13/1991, and because it retains much of the latter's underlying vision concerning the central role of the social partners, the same order of topics and problems discussed in connection with Law 13/1991 will be taken up here.

214. See *supra* note 13 and accompanying text.

215. In addition to reform of Law 13/1991, the major confederations were interested in reforming Laws 15/1991, *supra* note 11, and 54/1991, *supra* note 12, as well as in creating an Economic and Social Council and passing legislation to establish credible employer associations.

216. See Letter from Department Juridic BNS (the legal office of the National Trade Union Bloc), to the author (May 10, 1996) (on file with the author) (listing BNS's objections to the version of Law 130/1996 passed by the Romanian Senate).

217. See Bush, *supra* note 1, 387-400 (describing the political setting in 1991 at the time Law 13/1991 was promulgated).

218. For example, Alexandru Athanasiu, who was instrumental in the passage of Law 130/1996, was appointed Minister of Labor and Social Protection in the new government formed after the 1996 elections. See *infra* note 243.

219. Law 130/1996 (1997), *supra* note 14.

220. See *id.*

i. Trade Union Pluralism and Employee Representation at Enterprise Level

As amended, Law 130/1996 – like Law 13/1991 – allows contracts to be formed at four different levels – national, industry, groups of enterprises, and the enterprise.²²¹ As in the old law, the parties remain the employers (or employers' organizations) and the employees, although the statute now specifies that the latter are to be "represented by the trade union or in another way provided by law."²²²

Probably the most important innovation of Law 130/1996 is that it restricts the right of participation in collective negotiations to organizations that are "representative," as defined by the statute. At the enterprise level, a trade union is deemed representative in either of two ways – if at least one-third of the employees in the enterprise are its members,²²³ or if it is affiliated with a representative federation or confederation.²²⁴ Ad hoc employee delegates are elected only if there is no representative trade union present in an enterprise.²²⁵ Law 130/1996 thus indisputably installs representative trade unions, not elected employee delegates, as the preferred employee representatives, eliminating the theoretical and practical problems experienced under Law 13/1991 in this regard.

Law 130/1996 also preserves a regulated and restricted form of the enterprise-level trade union pluralism that had arisen under the imprecise provisions of Law 13/1991. Notwithstanding the potential difficulties and uncertainties associated with trade union pluralism, it is a well-established practice in Romania and one which the trade unions fought to preserve in the new law. They almost lost it; Law 130/1996, as originally promulgated, required majority support ("at least 50%") in order for an enterprise trade union to be representative and did not include the provision for representativity based on affiliation.²²⁶ Any trade union possessing majority support ipso facto would have obtained an exclusive right to negotiate. A majority support requirement could have effectively eliminated trade union pluralism at the enterprise level by barring non-majority organizations from the collective negotiations process (although arguably they could still have represented their members before the enterprise).

In recognizing trade union representativity based on either a one-third support standard or by affiliation, the 1997 amendments to Law 130/1996 represent a victory for proponents of trade union pluralism. The amended qualifications will enable many more enterprise trade unions to participate

221. See *id.* art. 10(1), (2).

222. *Id.* art. 1(1).

223. See *id.* art. 17(1)(c).

224. See *id.* art. 18(3). For a discussion of what constitutes a representative trade union organization and employer association at higher levels, see *infra* notes 258-68 and accompanying text.

225. See *id.* art. 20.

226. See Law 130/1996, *supra* note 13, art. 17. The ability to obtain representative status by affiliation was not extended beyond the federations at the industry and groups of enterprises levels. See *id.* art. 18.

in collective negotiations and thus remain viable organizations with an influential presence in the enterprise.

Law 130/1996 expressly mandates that there can be only one collective labor contract within an enterprise.²²⁷ Given that two or more representative trade union organizations often will be participating in collective bargaining as a result of the 1997 amendments, coordinating the negotiations and achieving agreement on contract terms will continue to be problematic. The law specifies little about how such multi-party negotiations are to take place.²²⁸

Even more troubling, under Law 130/1996, it appears that a single unhappy participant can keep a contract from entering into force, notwithstanding the fact that the other parties agreed on its contents. This would be possible because no collective labor contract (at any of the four possible levels) can take effect until the date of its registration in the appropriate office of the Ministry of Labor and Social Protection.²²⁹ Contracts cannot be registered if "they are not signed by all of the representatives of the parties to the negotiations."²³⁰ There are only two exceptions to this unsigned contract rule: (1) where the non-signatory representatives, although

227. Law 130/1996 (1997), *supra* note 14, art. 11(1)(a), 11(2) (collective labor contract clauses "produce effects . . . for all employees within the enterprise, in the case of collective labor contracts entered into at this level" and "[a]t every one of the levels . . . a single collective labor contract is entered into.").

228. When enterprise negotiations are mandatory, they must take place annually. *See id.* art. 3(2). The employer is expected to initiate negotiations, *see id.* art. 3(5), convene a negotiation session within 15 days of receiving the trade union demands, *see id.* art. 4(1), and provide specified information to the trade unions that "must permit a comparative analysis of the situation of the work place, of the classification of professions and trades, of the level of salaries, of the length of work time and of the organizations of the work program." *Id.* art. 4(2)(a).

Romania's neighbors have also wrestled with the collective negotiations problems arising from trade union pluralism at the enterprise level. In Hungary, which like Romania mandates a single collective labor contract with every employer, there are complex rules for determining which trade unions are authorized to negotiate: if there is a single trade union, it may negotiate an agreement so long as its nominees received more than half of all the votes in the works council election [hereinafter "the election"]; if there are two or more trade unions, they all may join together to negotiate an agreement, as long as their nominees collectively received more than half of the votes in the election; if all of the trade unions cannot cooperate toward this end, those that are representative (i.e., their nominees received at least 10% of the election votes) may do so collectively, so long as their nominees have more than 50% of the election votes; if the representative trade unions, acting together, cannot reach agreement with the enterprise on a contract, the one among them (if any) whose nominees received more than 65% of the election votes is authorized to contract alone; when there are one or more trade unions present, but their nominees collectively did not receive more than half of the works council votes, they are entitled to negotiate a contract, but it is then subject to approval in an employee referendum before it can enter into effect. *See Act No. XXII, 1992, §§ 29(2), 33, reprinted in NEW PATTERNS OF COLLECTIVE LABOR LAW, supra* note 92, at 305, 316-17.

In Poland, it is equally cumbersome. *See Act to Amend the Labour Code and Other Acts in Respect of Collective Bargaining, Sept. 29, 1994, DZIENNIK USTAW, Oct. 26, 1994, No. 113, Text No. 547 § 241-25, reprinted in NEW PATTERNS OF COLLECTIVE LABOR LAW, supra* note 92, at 481, 489-90 [hereinafter DZIENNIK USTAW].

229. *See* Law 130/1996 (1997), *supra* note 14, art. 25(3).

230. *Id.* art. 26(1)c).

invited, had not been present at the negotiations; or (2) where the non-signatory representatives had participated in the negotiations and agreed to the negotiated clauses, but then refused to sign the contract.²³¹ If a contract was not signed by all of the representatives of the parties because one of the participating representatives refused to accept it, it could not be registered.²³² The absence of any provisions that could circumvent a single party's ability to effectively "veto" a majority-approved contract could prove to be a major flaw in the statutory system. There is rich potential for frustrating successful collective bargaining, not only by trade unions (or employer associations) willing to play "dog in the manger" for their own purposes, but also through collusion between enterprise managers and house trade unions (i.e., when the employers do not wish to enter a contract but must negotiate with all of the trade unions present).²³³ Furthermore, this problem is not confined to enterprise-level bargaining but rather could occur at any of the four levels for which bargaining is authorized.²³⁴

ii. A Limited Duty to Negotiate

Whereas Law 13/1991 did not address the issue of the duty to negotiate, Law 130/1996 created a limited duty. The duty to negotiate does not exist above enterprise level and applies only to the larger entities – those with twenty-one or more employees.²³⁵ Even then, negotiations are mandatory only when there is a representative trade union present or, if none are present, when at least half of the employees have voted in an election to select ad hoc bargaining delegates.²³⁶

231. See *id.* art. 26(2).

232. This happened in 1996 when a major confederation refused to sign. See *supra* note 207 and accompanying text.

233. Even if the employer is under a duty to negotiate in good faith, see *infra* notes 242-44 and accompanying text, it is not clear that such a duty would be implied against a trade union. By way of comparison, Hungary's laws have explicitly extended the duty to the trade unions: "Every trade union, represented with the employer, may participate in the negotiations aimed at concluding the collective agreement and *has to cooperate with a view to the success of the negotiations.*" Act No. XXII, 1992, § 33(8), as amended by Act No. XIII, 1993, reprinted in *NEW PATTERNS OF COLLECTIVE LABOR LAW*, *supra* note 92, at 317 (emphasis added).

234. It is also not unique to Romania. In Poland, where a comparable "signature requirement" exists, one commentator has noted: "The law further requires that both plant and supra-plant collective agreements must be signed by all unions who negotiated the same. Its [sic] enough that a single union involved in the negotiations refuses to accede to the agreement reached to prohibit conclusion of the same." M. Sewerynsky, *The Main Features of the 1994 Act*, in *NEW PATTERNS OF COLLECTIVE LABOUR LAW*, *supra* note 92, at 493.

235. See Law 130/1996 (1997), *supra* note 14, art. 3(1). This was the number in the original act passed in October 1996, *supra* note 13. The trade unions pushed for a lower limit equal to the smallest number of employees necessary to form a trade union under Law 54/1991, i.e., 15. "Legea Contractului Colectiv de Muncă-Lege Antisindicală," Memorandum from Dumitru Costin, President, Blocul Național Sindical (BNS) to the International Confederation of Free Trade Unions, Oct. 17, 1996 (on file with author). The new Government, on the other hand, proposed to increase the minimum number to 50 employees, but this was rejected by Parliament. See *Propuneri de Modificare și Completare a Legii Nr. 130/1996 Privind Contractul Colectiv de Muncă* (undated chart prepared by BNS in early 1997) (on file with author).

236. See Law 130/1996 (1997), *supra* note 14, arts. 17(1)c), 18(3) and 20.

Romania borrowed this "duty to negotiate" standard from France.²³⁷ In doing so, however, it did not follow the French lead in extending it to industry-wide negotiations.²³⁸ Although the law does not mandate negotiations at the higher levels, it obviously anticipates that such negotiations will continue to take place, given its extensive regulation of upper-level negotiations and the power accorded to the social partners to insert clauses into the national and industry collective contracts that define and bind the lower levels of negotiations.²³⁹

The fate of smaller enterprises, i.e., those with less than twenty-one employees, remains unclear. On one hand, the statute excludes them from the bargaining sphere, absent voluntary participation by the employer.²⁴⁰ On the other hand, there are still certain labor standards that Romanian law presupposes will be established through collective negotiation.²⁴¹

Even where negotiations are mandatory, Law 130/1996 does not impose a legal obligation to actually agree to the terms of a collective labor contract;²⁴² nor does it expressly require the parties to negotiate in good faith. Nevertheless, Alexandru Athanasiu has argued that a duty to negotiate in good faith would in fact exist by operation of general civil law principles.²⁴³ He has written that "the obligation to negotiate represents an obligation of ['means'], of which adequate fulfillment is evaluated exclusively from the perspective of the diligence put forth by the employer in achieving a collective labor accord, not in the least in relation to the fact of entering into a labor contract."²⁴⁴

237. See Alexandru Athanasiu, *Legea Nr. 130/1996 Privind Contractul Colectiv de Muncă*, DREPTUL, No. 3/1997, 1, 6 (specifically referencing articles 132-27, 132-28 and 132-29 of the 1989 Code du Travail).

238. See *id.* Athanasiu, who had a major influence on the content of Law 130/1996 and even more on the 1997 modifications thereto, see *supra* note 218, *infra* note 243, wrote that limiting the duty to bargain to the enterprise level was done because "in the future, the role of collective negotiations at the enterprise level must be of first importance in fashioning the legal status of employees, to the prejudice of national or industry collective negotiations." *Id.* at 7.

239. See *infra* notes 258-61 and accompanying text.

240. A trade union could be formed in an enterprise with as few as 15 members. See Law 54/1991, *supra* note 12, art. 2(2). No express legal provision would preclude such a trade union, or even unorganized employees, from pressuring an employer to recognize and bargain with them. See Law 15/1991, *supra* note 11, art. 2(1) and 24(1) (collective labor disputes and strikes may be initiated to protect employees' professional, economic, or social interests).

241. See *supra* note 187.

242. Failure to agree on a contract is clearly anticipated. The duty to bargain annually arises, among other times, "at least 12 months from the date of the preceding negotiations which did not result in the conclusion of a collective labor contract . . ." Law 130/1996 (1997), *supra* note 14, art. 3(2)a). See also Athanasiu, *supra* note 237, at 7.

243. Athanasiu served as the President of the Chamber of Deputies' Committee of Labor and Social Protection when Law 130/1996 originally was passed. Later, while serving as Minister of Labor and Social Protection, he was also involved in passing modifications to the law. See also *supra* note 218.

244. Athanasiu, *supra* note 237, at 6 (citation omitted). By way of comparison, Poland has legislated unequivocally on this subject:

Each party shall be obligated to bargain in good faith and with respect of the legitimate interests of the other party. This means, in particular:

Although the statute penalizes employers who either fail or refuse to initiate negotiations or to convene the parties following the trade union's formulation of demands,²⁴⁵ the penalties are too small to function as an effective deterrent. The offense is punishable by a fine of approximately \$200-\$400 – a negligible amount for an enterprise of any size.²⁴⁶ Beyond this, the law provides no remedies for any party – enterprise or trade union – unable to obtain meaningful bargaining from its “social partner.”²⁴⁷

iii. Enforceability of Collective Labor Contracts at the Enterprise Level

Under the amended statute, enterprises will now be bound by the provisions of a national-level agreement, as well as any industry-level agreement in their branch. They will no longer be potentially subject to multiple, competing higher-level collective contracts, as under Law 13/1991. The new law expressly states that there can be only one collective labor contract at all levels of bargaining²⁴⁸ and that those contracts will “produce effects . . . for all employees employed at enterprises” of the branch, in the case of branch contracts, or in the entire country, in the case of national level contracts.²⁴⁹ It also prohibits creation of collective labor contract “clauses that establish rights at a level below those established by collective labor contracts entered into at a higher level”²⁵⁰ or individual labor contract clauses with rights inferior to those contained in any of the relevant

(i) to make allowances for demands of a trade union organization justified by the economic situation of workers;

(ii) to restrain from making demands which obviously exceed the financial possibilities of the employer;

(iii) to respect interests of workers not covered by the agreement.

DZIENNIK USTAW, *supra* note 228, §§ 241- 43(1).

245. See Athanasiu, *supra* note 237, at 8 (citing U.S. law on good faith bargaining). Penalties also might be extended to refusals to negotiate in good faith or to provide information to the trade unions.

246. See Law 130/1996 (1997), *supra* note 14, art. 5 (“Nonfulfillment . . . of the[s]e obligations is . . . punishable by fines of 3,000,000-6,000,000 lei.”). The value of the leu has declined steadily since 1989. In 1999, one dollar was worth about 15,000 lei.

247. The statute envisions a private right of action only over matters that follow creation of a collective labor contract, i.e., execution, modification, suspension, or termination. See *id.* art. 34.

248. See *id.* art. 11(2) (“At every one of the levels provided by art. 10 [i.e., enterprise, groups of enterprises, branch and national] a single collective labor contract is entered into.”).

249. The clauses of the collective labor contracts produce effects

a) for all employees within the enterprise, in the case of collective labor contracts entered into at this level;

b) for all employees employed at enterprises that are part of the group of enterprises for which the collective labor contract has been entered into at this level;

c) for all employees that are employed at all enterprises of the branch of activity for which the collective labor contract is entered into;

d) for all employees that are employed at all enterprises in the country in the case of the collective labor contracts at the national level.

Id. art. 11(1).

250. *Id.* art. 8(2).

collective labor contracts.²⁵¹

As in Law 13/1991, Law 130/1996 imposes a legal duty of contract compliance on the parties – which presumably include those employees and enterprises brought within a contract's reach by operation of law, rather than agreement.²⁵² Law 130/1996 also retains the same dispute resolution system, with jurisdiction falling to the courts of first instance.²⁵³ Thus, the practical problems of contract enforcement experienced by trade unionists under Law 13/1991²⁵⁴ have not been addressed in the new law.

The Romanian Government has recently proposed the creation of labor courts having jurisdiction to resolve conflicts concerning collective labor contracts. Under the draft statute, specialized sections to adjudicate labor conflicts would be established within the existing court structure.²⁵⁵ Three-person panels – a professional judge and two assistant judges, one representing employer associations and one representing trade unions – would hear cases in the first instance.²⁵⁶

iv. Legitimacy Questions Regarding National and Industry-Level Contracts – “Representatives” versus “Freedom of Contract”

The top-down system of labor relations characteristic of the communist era remains more widespread in Romania than some Western observers might wish. For example, the trade union confederations premised their reform on such a system. Moreover, Mr. Athanasiu argued for retaining a modified system of centralized labor relations in Law 130/1996, in part because it would allow “the social partners” to create national and industry labor standards equivalent to those that legislators might incorporate in a modern labor code.²⁵⁷

Law 130/1996 has significantly strengthened the legal status of national- and industry-level collective negotiations by articulating concrete, quantifiable criteria that employer associations and trade union federations and confederations must meet in order to qualify as representative organizations. The statute further strengthens the status of negotiations by

251. See *id.* art. 8(3). In addition, it is specified that “[a]t the entry into the collective labor contract, legal provisions have a minimal character for the contracting parties.” *Id.* art. 8(4).

252. See *id.* art. 30.

253. See *id.* art. 34.

254. See *supra* notes 200-03 and accompanying text.

255. See Draft, *Lege privind unele măsuri pentru organizarea instanțelor judecătorești competente să soluționeze conflictele de muncă* [“Law concerning measures for organizing the jurisdiction of courts competent to resolve labor conflicts”] arts. 1, 2 (on file with author).

256. See *id.* art. 5.

257. See interview with Alexandru Athanasiu, Labor Law Professor and opposition deputy, Romanian Chamber of Deputies (Civic Alliance Party), Faculty of Law, Bulvardul M. Kogălniceanu no. 36-46, Bucharest, Romania (Nov. 2, 1995); interview with Alexandru Athanasiu, *supra* note 17. Romania's communist-era Labor Code has not yet been revised. At the latter interview, in March 1997, Mr. Athanasiu, by then the Minister of Labor and Social Protection, said that he hoped to undertake a full-scale revision of the Labor Code, but that it could not be done for several years. See *id.* He appointed a committee in 1999 to begin drafting a new code.

expressly granting to representative organizations the power to negotiate binding industry- or nation-wide collective labor contracts that automatically cover all workers²⁵⁸ (and by implication at least, all employers) at those levels.

The top-down paradigm²⁵⁹ that underlies Law 130/1996 (and that was implicit in its predecessor, Law 13/1991) is relatively simple: the largest trade union confederations and employer associations (representing both private and public enterprises) negotiate a contract containing basic labor standards for the entire national economy, to the extent that such standards are not already specified by law. As a part of that contract, they define and establish the structure in which the next level of collective negotiations – the branch, or industry, level – will take place: “[t]hrough the collective labor contract entered into at the national level, the parties establish the branches of activity of the national economy, and the criteria according to which the enterprises take part in these branches on the basis of the consultative advice of the National Commission of Statistics.”²⁶⁰

At the next level, the largest federations and employer associations in each of the respective branches of the industry negotiate a single industry-wide contract. The contract standards must be at least as stringent as those of the national contract and must cover industry-specific issues not addressed in the national contract. The contracting parties also must identify which enterprises fall within the contract’s provisions.²⁶¹ Finally, the enterprises (either individually or as a group) negotiate their contracts with the local representative trade unions or ad hoc employee delegates, again

258. See *supra* note 249. The trade unions did not want automatic coverage of all employees at a given level. Under Law 13/1991, the trade unions had ensured that the benefits of collective labor contracts would not accrue to employees unless they were members of signatory trade unions or adhered to the contract and paid a fee to the trade unions. See Athanasiu, *supra* note 237, at 9. See also Contractul Colectiv de Muncă unic la Nivel National art. 11 (1995) (on file with author)

At the entry into individual labor contracts of an employee who was not represented at the negotiation of the present national level collective labor contract, he can adhere to its application if, in this sense, he makes a declaration according to annex number 2 which is deposited with the trade unions affiliated with the signatory confederations.

The “declaration” referred to in article 11 required the employee to agree to a monthly deduction of fees from his salary, payable to the trade union. See *id.* Annex No. 2.

259. See, e.g., Athanasiu, *supra* note 237, at 15. Mr. Athanasiu speaks of “encourag[ing] . . . the pyramidal structuring of trade unions and employer associations.”

260. Law 130/1996 (1997), *supra* note 14, art. 21.

261. See *id.* art. 13.

(1) The parties are obligated to specify, in every collective labor contract entered into at the level of group of enterprises and branch of activity, the enterprises included to which the negotiated clauses are applied.

(2) In the case of collective labor contracts entered into at the level of branches of activity, their component enterprises are established and specified by the parties that negotiated the collective labor contract, with due regard to the requirements of the present law.

Id. art. 13.

using all the higher-level contracts in their hierarchy as the base upon which to build the enterprise contract.

Eligibility to participate in the higher-level contract negotiations is restricted to representative organizations, a feature not found in Law 13/1991. To qualify as representative at the national level, an employers' association must include employers whose enterprises, when taken together, (1) operate in at least half of Romania's local government units ("judets"); (2) are active in at least twenty-five percent of the existing branches of industry; and (3) employ at least seven percent of the country's workers.²⁶² There are comparable requirements for a trade union confederation to be representative at that national level: it must include trade union organizations that, when taken together, operate in at least half of Romania's judets, are active in at least twenty-five percent of the existing branches of activity, and have a membership at least equal to five percent of the national work force.²⁶³

To be representative at the branch level, an employers' association must either (1) represent employers whose enterprises include at least ten percent of the number of employees in that branch,²⁶⁴ or (2) be affiliated with an employers' association that has established itself as representative at the national level.²⁶⁵ The standards for a trade union federation to be representative at this level are again comparable to those for employers' associations: the membership of the component trade union organizations must equal at least seven percent of the work force in the branch,²⁶⁶ and the federation must be affiliated with a confederation that is representative

262. See *id.* art. 15(1)a). Three employer organizations qualified as representative under Law 130/1996 and signed the national level contract in December 1997: Confederația Patronală din Industria României (CONPIROM – Employer Confederation of Romanian Industry); Confederația Națională a Patronatului Român (C.N.P.R. – National Confederation of the Romanian Employer); and, Consiliul Național al Întreprinderilor Private Mici și Mijlocii din România (C.N.Î.P.M.M.R. – National Council of Small and Medium-sized Private Enterprises of Romania). Convenție privind modificarea și completarea contractului colectiv de muncă unic la nivel național, prelungit până la data de 31 mai 1998 conform art. 23(2) din Legea nr. 130/1996, modificată și completată prin Legea nr. 143/1997, M.O., Part V, No. 2, at 17, Feb. 20, 1998 (agreement attached to Contractul Colectiv de Muncă Unic la Nivel Național, *supra* note 132, signed by the parties Dec. 12, 1997, to be effective until May 31, 1998) [hereinafter *Convenție*].

263. See Law 130/1996 (1997), *supra* note 14, art. 17(1)(a). Six confederations qualified as representative and signed the 1997 national level collective contract: Confederația Națională a Sindicatelor Libere din România-Frăția (C.N.S.L.R.-Frăția – National Confederation of Free Trade Unions of Romania – Brotherhood); Confederația Națională Sindicală "Cartel Alfa" (National Trade Union Confederation "Cartel Alfa"); Blocul Național Sindical (B.N.S. – National Trade Union Bloc); Confederația Sindicatelor Democratice din România (C.S.D.R. – Confederation of Democratic Trade Unions of Romania); Convenția Confederațiilor Sindicatelor Nealiniate (C.C.S.N. – Convention of Confederations of Unaffiliated Trade Unions); and, Confederația Sindicală "Meridian" (Trade Union Confederation "Meridian"). See *Convenție*, *supra* note 262, at 17.

264. See Law 130/1996 (1997), *supra* note 14, art. 15(1)(b).

265. See *id.* art. 16 ("Representative employers' associations at the national level are also representative at the level of the branches and of the groups of enterprises through the agency of component federative type organizations.").

266. See *id.* art. 17(1)(b).

at the national level. In the latter case, the confederation itself, rather than the member federation, would technically be representative at this level.²⁶⁷

The implications of this system of representative organizations are sweeping. Employer associations and trade union confederations that are representative at the national level will be able to set mandatory labor standards for all Romanian employers, including those that are not affiliated with any of the nationally representative employer associations and whose employees are not members of any trade unions affiliated with the nationally representative confederations. The mandatory contract coverage would include small businesses with no legal duty to negotiate at the enterprise level and presumably would also apply to government employees insofar as the law permits them to engage in collective bargaining.²⁶⁸

The implications of Law 130/1996's impact on unaffiliated employers are nowhere more clear than in the 1998 national level collective contract's provisions regarding the "collective negotiations fund." Article 99(2) of the contract stipulates that "[e]nterprises that are not affiliated with employer organizations signatory to the present collective labor contract will transfer, in an obligatory manner, a contribution equivalent to 2,000 lei/employee per year into the account of one of the representative employers' confederations."²⁶⁹

At the industry level, the effect is much the same as at the national level. The representative organizations are the only entities authorized to negotiate an industry-level contract. Once they have done so, every employer identified as a member of that industry is automatically bound by the contract, regardless of its actual affiliation to the negotiating parties. The employees of "member" employers are likewise bound by industry-level contracts.

267. See *id.* art. 18(1).

268. Law 130/1996 does not distinguish between state-owned commercial societies and private ones. In regard to pure governmental entities ("budgetary institutions" in Romanian terminology), the statute provides: "Collective labor contracts can also be entered into for employees of budgetary institutions. Clauses cannot be negotiated through these contracts concerning rights as to which the granting and the amount are established through legal provisions." *Id.* art. 12(1).

269. Romanian national collective labor contracts are very comprehensive documents. The 1996 contract (an extension of a contract negotiated under Law 13/1991, then modified and renewed under Law 130/1996 through May 31, 1998) established standards regarding the following topics: time of work; working conditions and safety; indexation and other factors affecting salary and benefits; holidays and leave time; contents of individual labor contracts; regulation of professional qualifications; participation of trade union representatives in enterprise administrative councils and access to enterprise operating information; offices, furniture and other support enterprises to made available to trade unions; automatic withholding and deposit of employee membership dues in trade union accounts (with employee consent); prohibition of replacement workers during collective labor conflicts; mandatory contents of enterprise contracts, including certain health-related travel expenses, child care and employee cafeterias; and, mandatory employer contributions to a fund established to support collective negotiations. See *Contractul Colectiv de Muncă Unic la Nivel Național* art. 10, M.O., Part V, No. 2, Feb. 20, 1998, *supra* note 132. *Id.* at 10.

Such a system dramatically stretches the concept of "contract," perhaps to the breaking point. It differs significantly from Romania's pre-communist collective labor contract law, which scrupulously adhered to freedom of contract principles.²⁷⁰ Even more importantly, it goes further than any other contemporary European labor relations system, and probably further than international labor standards will permit, in depriving non-consenting employers and workers of their rights to contract.

The concept of representative trade union organizations is common in European systems of collective bargaining,²⁷¹ as is the practice of "extending" branch-level contracts, i.e., making them applicable to enterprises that were not parties to the original contracts.²⁷² Perhaps the leading example for present purposes is France, whose legal system has been, and remains, the most important model for Romanian lawmakers.²⁷³ The French Code du Travail directly influenced much of Law 130/1996,²⁷⁴ and

270. In contrast, the 1929 law required actual assent to create a legally-binding obligation:

The following are bound by the collective labor contract:

- a) professional associations [i.e., trade unions] or groups of entrepreneurs or wage earners who have committed themselves, either at the moment of concluding the contract, or later through adhesion, notifying the Chambers of Labor where the contract is registered;
- b) wage earners and entrepreneurs signatory to the contract as well as those who give individual written mandate to negotiate in their name and for them;
- c) wage earners or entrepreneurs who have not resigned from the association or group to which they belong within 8 days from the date when notice was given of the conclusion of the collective labor contract;
- d) entrepreneurs who have adhered to the contract and have communicated this adhesion to the Chamber of Labor which is in charge of the registration;
- e) wage earners or entrepreneurs who join groups or professional associations bound by the collective agreement.

1929 Labor Contracts Law, *supra* note 144, art. 108.

271. The practice is not limited to countries like France, whose laws speak explicitly of this concept. See *infra* notes 277-79 and accompanying text. Representative trade union organizations exist in Germany, although the term does not appear in German legislation. See Franz Gamillscheg, *Trade Union Representativity in German Law*, in *LABOUR LAW AT THE CROSSROADS: CHANGING EMPLOYMENT RELATIONSHIPS* 75, 75 (J.R. Bellace & M.G. Rood eds., 1997). The practice has also been adopted by other Central European nations, such as Hungary, since 1989. *But see infra* note 296.

272. See Reinhold Fahlbeck, *Collective Agreements: A Crossroad Between Public Law and Private Law*, *COMP. LAB. L.J.* 268 (1987). The author has not been able to identify any European state that permits groups purporting to represent "the social partners," acting alone, to negotiate agreements that bind all branches, enterprises and employees in the state. To the extent that national level agreements exist, they tend to be tripartite arrangements in which the government is a significant participant, thus giving them a governmental regulatory nature. See generally Roger Blanpain, *Belgium*, in *INT'L ENCYCL. FOR LAB. L. AND IND. REL.* (Roger Blanpain ed. 1985).

273. For example, the 1991 Romanian Constitution, *supra* note 9, was modeled on the French one, establishing political, and some judicial, institutions that very closely resemble their French counterparts.

274. For example, the language of Law 130/1996 art. 4, concerning the employer's obligation to convene a bargaining session within 15 days of the date of the trade union's formulation of its demands, as well as the information the employer is obligated to furnish at that meeting, is taken almost verbatim from its French counterpart, *CODE DU TRAVAIL* art. L.132-28 (Daloz 1997).

was the primary inspiration for its "representativity" provisions.²⁷⁵

In France, a trade union is deemed representative²⁷⁶ on the national level if it satisfies standards, not specified in the Code du Travail, regarding size, independence, dues, experience, and length of existence, as well as its "patriotic attitude during the occupation."²⁷⁷ At lower levels (e.g., a region or an industry), a trade union is representative (and therefore capable, *inter alia*, of concluding a collective contract which can be extended) if it is affiliated with one of the nationally representative organizations, or if it has "proven [its] representativity in the field of application of the contract or agreement."²⁷⁸ Thus, the French and Romanian laws for establishing representative trade union status are much the same, except that Romania has included precisely quantified criteria in its statute.

French and Romanian labor practices differ most notably in the application of branch-level contracts²⁷⁹ to enterprises or workers that have not agreed to be bound, either individually or through the agency of an employers' association or a trade union to which they belong. In Romania there is only one step, the branch-level negotiations among the qualifying representative parties on both sides. The resulting contract is then automatically applicable to all enterprises and workers identified as being within that branch, without further administrative implementation or an opportunity to be heard by interested parties. In contrast, in France, social partners that negotiate the original contract bind only the enterprises that actually agree to be bound, either by individual act or by membership in a signatory employers' association.²⁸⁰ In order for such a contract to become legally binding upon an unconsenting employer, it first must qualify for "extension."

To qualify for "extension," (1) both the employer organizations, as well as the trade unions, must be "representative"; (2) the negotiations must take place under the auspices of a joint commission convened by the Ministry of Labor and presided over by its representative; (3) the contract must cover a branch or a defined inter-industrial segment of the economy, or a

275. Athanasiu, *supra* note 238, at 10 n.26.

276. Strictly speaking, the term used is "most representative," but it seems to mean the same thing in practice. See MICHEL DESPAX & JACQUES ROJOT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN FRANCE* 159, 179-80 (1987).

277. C.TRAV. art. L.133-2. The last factor has been dropped from the analysis in practice. See DESPAX & ROJOT, *supra* note 276, at 160.

278. C.TRAV. art. L.132-2.

279. France does not have national-level contracts applicable to the entire economy; the closest approximation to such contracts are the national inter-occupational agreements.

280. A French industry-level collective labor contract (which has not been extended) would bind: "the [trade] unions, employers' organizations, individual employers and employer members of the organizations which signed it," any of those groups that subsequently adhered to it; employers who affiliated with an organization bound by it; to some extent, employers who have resigned from organizations bound by it; and "all the employees of an employer bound by [it], whether unionised or not, and whether or not their [trade] union has signed [it]." DESPAX & ROJOT, *supra* note 277, at 254. Cf. C.TRAV. art. L.132-9 (non-signatory employer associations or individual employers can adhere to existing collective labor contracts).

subcomponent thereof (the territorial scope can be national, regional or local); and (4) the contract must contain contractual provisions regarding topics specified in the Labor Code (e.g., free exercise of trade union rights and employee freedom of opinion).²⁸¹ Qualifying contracts do not automatically cover all enterprises within their occupational and territorial scope, however. In order for this to occur, they first must have been officially "extended."²⁸²

"Extension" is a completely separate process from the original contract negotiation and conclusion. Whereas the latter is an affair solely between consenting "social partners," the former is an official act of the French Government, taken only after completing defined procedural steps, including a right of notice and opportunity to be heard for those potentially affected.²⁸³

There is a vast difference between the French system of "extension," in which only official acts of the government (with recourse to judicial review)²⁸⁴ can subject unconsenting employers to legal obligations, and Romania's system, which grants such power directly to non-government parties, affording no due process rights to the unconsenting employer or trade union organizations and the workers they represent. The distinction between the two countries' systems is of fundamental importance. In simple terms, the French two-step approach — private contract plus administrative extension — is consistent with international labor standards, while the Romanian one-step approach — private contract binding nonconsenting third parties — is not.

International standards for collective labor contracts are grounded on the concept of "voluntary negotiations."²⁸⁵ Furthermore, ILO Convention

281. See DESPAX & ROJOT, *supra* note 276, at 265-68.

282. C.TRAV. arts. L.133-8 to 133-17.

283. The minister in charge, acting either on his own initiative or at the request of a representative party, can initiate procedures whereby the provisions of a branch contract or a professional or interprofessional agreement . . . can be rendered obligatory for all the employees and employers included in the field of application of the said contract or the said agreement, by order of the Minister, after the reasoned opinion from the National Commission for Collective Negotiation provided in article L. 136-1.

C.TRAV. art. L.133-8. Under the "extension" procedures, the Minister must not only take into account the opinion of the National Commission for Collective Negotiation (a body composed of several ministers, the President of the Social Section of the Conseil d'Etat, plus an equal number of representatives from trade union organizations and employer associations that are "the most representative at the national level," *id.* art. L. 136-1, but must also precede his order with the official publication "of an opinion relative to the extension or to the enlargement envisaged, inviting the interested organizations and persons to make their observations." *Id.* art. L. 133-14.

284. The act of the Minister of Labor is subject to appeal in the French administrative courts. See DESPAX & ROJOT, *supra* note 276, at 270.

285. See ILO Convention No. 98, *supra* note 6, art. 4 ("Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.") (emphasis added).

No. 154 clearly states that “[t]he measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining.”²⁸⁶ It could scarcely be considered “voluntary negotiations” or “freedom of collective bargaining” to bind an employer or a group of workers to contracts negotiated by other private persons or entities not authorized to speak for them. At the same time, international labor standards do allow, and indeed encourage, “extension” of collective labor contracts by act of government, implicitly recognizing that there would be employers and workers who were not automatically covered by the original privately-negotiated contract.²⁸⁷

Although it is generally recognized that collective labor contracts can have both contractual and legislative aspects,²⁸⁸ established international standards demand some act by responsible government officials before the private water is converted into public wine. Romania’s delegation of law-making authority to trade unions and employer associations therefore might render this aspect of Law 130/1996 subject to successful objection in one of several forums. A complaint could be brought before the ILO,²⁸⁹ or perhaps even in the municipal courts of Romania under the provisions of Articles 11 and 20 of the 1991 Constitution that incorporate international treaties into municipal law.²⁹⁰ It is perhaps only a matter of time before a private business enterprise or a trade union which cannot qualify as representative incurs enough prejudice from one of these contracts to make such a challenge.

286. ILO Collective Bargaining Convention, 1981 (No. 154), *supra* note 6, art. 8.

287. The relevant ILO Recommendation provides:

(1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

(2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions:

(a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative;

(b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;

(c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

ILO Collective Agreements Recommendation, 1951 (No. 91), art. 5.

288. See, e.g., Fahlbeck, *supra* note 272.

289. Such complaints could be brought before the ILO Governing Body’s Committee on Freedom of Association. See *Procedures of the Fact-Finding and Conciliation Commission and the Committee on Freedom of Association for the Examination of Complaints Alleging Violations of Freedom of Association*, in INTERNATIONAL LABOUR OFFICE, FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO ann. I (4th ed. 1996). Romania has already come under the scrutiny of this body in cases filed since 1989. See *supra* notes 127, 140 and accompanying text.

290. See *supra* notes 35-40 and accompanying text.

II. Recommended Modifications of Laws 54/1991 and 130/1996

At the beginning of this article, I suggested that Romania's legal framework for labor relations should be coherent, fair and consistent with international labor standards prevailing in Europe. In light of this, and the foregoing discussion, my recommendations for modifications to the present law are both obvious and brief.

A. Law 54/1991

With regard to Law 54/1991 and the regulation of trade unions as organizations, the two areas that need attention are: (a) the absence of prohibitions against employer-dominated "house" trade unions; and (b) the restriction of eligibility for trade union membership and office to "employees." In both cases, relatively simple modifications to Law 54/1991 would bring the statute into line with ILO standards. With regard to "house" trade unions, the language of Article 2 of ILO Convention 98 could be incorporated into Article 1(2) which already mandates that, "trade unions shall be independent of . . . any other organizations,"²⁹¹ or into Article 48, which establishes sanctions for, "interference with the exercise of the right to free trade union organization or association."²⁹² Thus amended, the language of Law 54/1991 might read as follows:

[a]cts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations, shall be deemed an offense [punishable under Article 48].²⁹³

Injecting the ILO standard into the law should not jeopardize most of the enterprise support currently provided to Romanian trade unions, as long as it is given without discrimination.²⁹⁴ The ILO Committee on Freedom of Association has noted:

It is fairly common for legislation or practice to contribute to the financing of trade unions or to afford them certain advantages, such as premises or facilities, which could involve the risk of interference or favouritism. In the view of the Committee, while there is no objection in principle to an employer expressing its recognition of a trade union as a social partner in this manner, this should not have the effect of allowing the employer control

291. Law 54/1991, *supra* note 12, art. 1(2) ("Trade unions shall be independent of State bodies, political parties, and of any other organizations.").

292. *Id.* art. 48(a). Such acts are deemed "offenses" ("infracțiuni"), punishable by a fine of 5,000-25,000 lei (a minuscule sum at present) or imprisonment from six months to two years (certainly not an insignificant sanction). *See id.*

293. The bracketed words would be used if the modification were made in Article 1(2).

294. *See supra* note 132 (describing 1998 national level collective labor contract provisions regarding employer obligation to make space and equipment available for trade union use) and note 127 (recognizing that in 1992 and subsequent years, collective labor contract clauses required employer impartiality in dealing with trade unions in an enterprise).

over a trade union, or favouring one trade union over another.²⁹⁵

Nor would having an anti-domination standard in Romanian law threaten the existence of any given trade union. Romanian law does not permit the State to dissolve a duly-registered trade union, even one that might be dominated by an employer.²⁹⁶ The only meaningful sanction under Article 48 of Law 54/1991 (imprisonment) would be directed against individuals, not organizations.

The other problem with Law 54/1991, i.e., denying membership or the right to hold office to non-employees, involves two separate elements. In regard to limitations on membership, Romania should be encouraged to adopt a model of legal regulation that gives due respect for the role trade unions should be expected to play in representing the interests of "working people." One such example can be found in Polish law:

- (1) Regardless of the nature of their employment contract, all workers, members of agricultural production cooperatives, and those working under a management contract, provided that they are not employers, have the right to establish and join trade unions.
- (2) Homeworkers have the right to join any trade union that functions in the establishment with which they concluded the homework contract.
- (3) Those persons referred to in subsections (1) and (2) do not lose the right to belong to and join a trade union when they retire or receive a disability pension.
- (4) The unemployed, within the meaning of legal provisions on employment, retain their right to belong to a trade union, and if they are not trade union members, they have the right to join a trade union in compliance with the by-laws of the trade union.²⁹⁷

If Romania could be persuaded to adopt a version of the Polish model for trade union membership, then all that would be necessary to create an internationally acceptable requirement for holding trade union office would be a modest revision of Law 54/1991 – namely, removing the phrase "working in the enterprise" from Article 9.²⁹⁸ This would certainly eliminate the most pernicious use of the current restriction – discharging a trade union officer and then using his non-employment as a grounds for refusing to recognize his capacity to speak for his trade union.

295. ILO Freedom of Association and Collective Bargaining: Protection against Acts of Interference ¶ 229, 1994, Report III, Part 4B, 81st Session, International Labor Conference.

296. See Law 54/1991, *supra* note 12, art. 40 ("Trade union organizations cannot be dissolved and their activity cannot be suspended on the basis of orders issued by the State administration bodies.").

297. Act of May 23, 1991, On Trade Unions, Sec. 2(1)-(4), *DZIENNIK USTAW*, *supra* note 228, June 26, 1991, No. 55, pp. 725-730, Text No. 234.

298. The article would thus read, "In the leadership bodies can be elected Romanian citizens who are members of the trade union possessing full exercise capability and not serving one of the complementary penalties provided by the criminal law." Law 54/1991, *supra* note 12, art. 9. This would still leave open the question of whether Article 9's requirements that officials be Romanian citizens and not be subject to certain criminal penalties are fully in compliance with international standards, a subject that is not addressed herein.

B. Law 130/1996

Law 130/1996 is, for the most part, well within the norms of Western European industrial practice. However, the sweeping authority of representative trade unions and employer associations to automatically bind an entire industry (or even the entire nation) by virtue of agreeing to an industry- or national-level contract should be curtailed.²⁹⁹ Romania should be encouraged to implement the French model, in which trade union organizations and employer associations may bind only their members to the contracts they enter, and in which any "extension" of contract terms would require a second step, administered by the government and open to participation by interested parties. Romania's neighbors — Hungary,³⁰⁰ Poland,³⁰¹ and the Czech Republic³⁰² — have all adopted this model. If Romania would do so, non-consenting parties would no longer be deprived

299. The duty to bargain should also be expanded, both down to enterprises with 15 employees (the minimum number required to form a trade union under Law 54/1991), as well as to the industry level, as is done in France. Additionally, it would be a good idea to create a more meaningful standard of penalties for violation of the duty to bargain, such as indexing the size of fines in some way that takes inflation into account.

300. § 34. (1) In response to a joint request of the contracting parties, the Minister of Labor may extend the effectiveness of the collective agreement to the entire sector (sub-sector), provided that the organizations entering into such a contract shall be deemed representative in the sector.

(2)-(5)(criteria to establish "representativeness")

(6) The Minister of Labour shall publish his resolution about the extension in his official newspaper. Unless otherwise specified in the collective agreement, such publishing shall be regarded as the announcement.

§ 35. Any trade union, representative organization of employers or employer, governed by the collective agreement, may petition the extension of the collective agreement by the Minister of Labor.

§ 36. (1) If there is no extension (§ 34), the collective agreement shall be effective for employers which

- (a) concluded the collective agreement, or
- (b) was (sic) members of the employers' representative organization at the time the collective agreement was made, or
- (c) joined the same later.

(2) When joining the organization as specified under Section (1)(c) above, the trade union represented at the employer shall consent to extending the effectiveness of such collective agreement to the employer.

(3) The collective agreement should specify which category of employers, listed in Section (1)(b) above, is governed by it.

(4) The collective agreement shall be applied to the employees of the employers governed by it, even though they may not be members of the trade union that has entered into the collective agreement.

Act No. XXII of 1992, *supra* note 228, §§ 34-36.

301. See *DZIENNIK USTAW*, *supra* note 228, § 241-18. The section reads:

(1) Upon the request of a supra-enterprise trade union organization or an employers' organization, the Minister of Labor and Social Policy may, after consulting the organization which is entitled to conclude a supra-enterprise agreement with the requesting organization, extend by order the scope of application of a supra-enterprise agreement, or parts of it, to workers who are not covered by any agreement, in the event that this is dictated by an important social interest. The extension of the scope of application of a supra-enterprise agreement shall be effective only until these workers are covered by another supra-enterprise agreement.

of their freedom of contract rights, and individual representative parties could not paralyze entire industries by refusing to agree to a contract the other parties wish to enter.³⁰³

Conclusion

Romania's collective labor relations law is a work in progress. Romania is beginning to bring its trade union practice more in line with internationally-recognized standards by eliminating inefficient and outdated norms and procedures. The suggestions for change noted in this article are respectfully intended to further the same end. While significant, these proposed changes would not deflect Romania from its chosen course. Rather, if adopted they would help to ensure that the "social partners" – trade unions, employers and employer associations – could carry out their roles in an even more meaningful, acceptable, and ultimately more enforceable manner.

(2) In the event that a request to desist from extending the application of an agreement is submitted, the first sentence of subsection (1), shall apply *mutatis mutandis*

Id.

302. See Act N. 2/1991 O.G., Dec. 4, 1990, on Collective Bargaining art. 7, reprinted in NEW PATTERNS OF COLLECTIVE LABOR LAW, *supra* note 92, at 229, 231. This section, promulgated before the Czech Republic and Slovakia separated, read in full:

(1) The Ministry of Labour and Welfare of the Republic may stipulate, by legal provision, that the collective agreement of a higher degree shall be binding also for employers who are not members of the employers organization concluding the agreement.

(2) The binding effect of the collective agreement of a higher degree may be extended, under the preceding article, only to cover employers pursuing similar activities under similar economic and social conditions, based on the territory of the respective republic and not bound by the collective agreement of a higher degree.

Id.

303. Admittedly, this "paralysis" would still exist at the enterprise level, but perhaps this is the price that must be paid in order to maintain the version of trade union pluralism that Romania has adopted.