GRIEVANCE SETTLEMENT PROCEDURES IN SWEDISH LABOUR RELATIONS

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1. INTRODUCTION. THE SCOPE OF THIS PAPER

A common feature of collective agreements between employers and unions containing rules of employment is that they generate grievances. It is also a common feature of such agreements that the parties have developed more or less institutionalized procedures in order to deal with the grievances as smoothly and as quickly as possible. It is of great importance that grievances can be taken care of in this way. The parties to the agreement have a strong mutual interest in maintaining good working relations. They live in a lasting association not easily dissolved—a marriage with no recourse to divorce. They cannot afford to have their association put under a considerable strain each time trouble in the form of a grievance arises. By providing for firm and mutually accepted procedures for handling grievances, the parties work towards creating and maintaining good working relations. In so doing, however, they also create and maintain a system of private contract administration and adjudication—they establish a private contract enforcement machinery.

This paper will deal with the procedures under Swedish law and Swedish collective agreements for settling grievances under collective agreements and with the grievance procedure as a means of settling legally relevant disputes in general. The grievance procedure will be scrutinized from a strictly legal point of view. Such an approach may surprise the reader. After all, the strictly legal aspects of the grievance procedure do not stand out as the most important ones when a grievance system is assessed in its entirety. There are, however, many justifications for the legal approach. First, as a system for handling legal disputes the grievance procedure is very important from a quantitative point of view as well as from a qualitative one. The number of grievances processed annually through the system runs into hundreds of thousands even in such a small country as Sweden. Quite a number of these disputes are of great importance, either to the whole—or fractions of the whole—employee community covered by the contract, or to individuals. Furthermore, unions are increasingly being vested with new responsibilities giving them important roles as co-administrators of the plant.[1]

[1] A radically different approach was chosen by Dr. Sten E:son Edlund in his study on grievance negotiation, *Tvisteförhandlingar på arbetsmarknaden. En rättslig studie av två riksavtal i*

Only the grievance procedure will be discussed here. The judicial stage following an unsuccessful handling of a dispute in the grievance procedure falls mainly outside the framework of this paper. Rules relating to the judicial stage—i.e. litigation before the Labour Court or by means of arbitration—will be taken into consideration where they have a direct impact on the grievance procedure. Such rules, however, are numerous. The most obvious example is the statutory rule barring the Labour Court from trying a case until the parties have observed the agreed grievance procedure or the statutory obligation to negotiate in case of a dispute.

Traditional legal vocabulary is used when discussing the grievance procedure. In doing so, the author is not implying that the grievance procedure is "legal" in any specific degree. But the grievance procedure is a system set up for the handling of legally recognizable disputes and it has adopted many rules similar to those followed by society for the handling of disputes in the courts. To give only a few examples, most grievances are to be processed in successive steps, time limits are set for the initial presentation higher up in the grievance machinery—in both cases failure to conform entails the risk of losing the possibility of raising the claim again—and rules are given as to how a grievance shall be presented. These and many other rules fulfil functions similar to those fulfilled by rules in connection with court litigation. Consequently, terms related to court procedure can satifactorily be used to denote corresponding out-of-court dispute settlement rules. The use of legal procedural terms is aimed not at equating grievance procedure provisions with court litigation rules but at pointing out the basic similarity in aims and objectives.

This paper focuses upon the handling of grievances, i.e. claims based on the collective agreement. Such claims are generally referred to as disputes of rights. However, in most cases the grievance procedures are also open to disputes of interest.[2] Consequently, what is said about the handling of

tillämpning, Stockholm 1967. Cf. Dr Edlund's article "Settlement through negotiations of disputes on the application of collective agreements", 12 *Sc.St.L.,* pp. 9–47 (1968).

[2] The distinction commonly used in Sweden between disputes of "rights" and disputes of "interest" corresponds to the distinction made by the US Supreme Court in *Elgin, Joliet & Eastern Ry Co.* v. *Burley,* 325 US 711, 723 (1944). Disputes on rights arise out of a difference of opinions "respecting the validity, existence or correct interpretation of the (collective) agreement, or on account of a dispute as to whether a particular action constitutes an infringement of the agreement or the provisions of this Act"; sec. (4) (1) of the Act Respecting Collective Agreements. (The Act is printed in Folke Schmidt, *The Law of Labour Relations in Sweden,* Harvard University Press, 1962. Appendix 1. Cf. note 4, p. 78.) Alleged infringements of other acts also constitute disputes of rights. Disputes of interest form a disparate category characterized by the common denominator that they are related to the creation of new "rights" by means of altering or supplementing an existing collective agreement or by means of concluding a new agreement. Various aspects on the distinction between disputes of rights and those of interest are discussed by K. W. Wedderburn, "Conflicts of 'Rights' and Conflicts of 'Interests' in Labor Disputes" in *Dispute Settlement Procedures in Five Western European*

disputes of rights will very often apply to disputes of interest as well. Problems with regard to the process of collective bargaining for a new contract will not be discussed in this paper.

After some introductory remarks on collective bargaining and collective agreements in Sweden, as well as a survey of existing grievance procedures, this paper will present a largely descriptive outline of the content of the grievance procedure provisions. In section 5 some questions chosen more or less at random will be singled out for more extensive discussion. They demonstrate the occasional complexity of what was intended to be—and in most cases is—a simple way of settling day-to-day disputes.

What is the role of the grievance procedure in the tripartite relationship between the employer, the union and the employees? Mr Justice Douglas, writing for the US Supreme Court on the subject, has expressed his view in the following opinion:

> But the grievance machinery under a collective bargaining agreement is at the very heart of the system of selfgovernment. --- The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.[3]

Similar assessments are frequently found in works by scholars in the USA.[4] Professor David E. Feller,[5] a former union lawyer, goes so far as to say that "[t]he [collective] agreement's most significant function is to provide a system for the adjudication ... of complaints that management ... has not complied with the rules jointly agreed to".

Would similar statements be accurate where Sweden is concerned? Statements as strongly worded as the ones referred to would probably strike many Swedish labour lawyers as exaggerated, but only slightly so. The difference between the USA and Sweden in this respect is due to the fact that collective bargaining agreements in the United States contain many more substantial rules of importance to individual employees than do collective agreements in Sweden. Thus, employees have more "rights" under American collective agreements. Consequently, the machinery to enforce the agreement plays a more important role. The Swedish picture

Countries, ed. by B. Aaron, Institute of Industrial Relations, University of California, Los Angeles 1969.

[3] *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 US 574, 581 (1960).

[4] Cf. quotations from Archibald Cox and Harry Shulman in the case referred to in note 3. See also, for example, Harry Shulman, Conference on Training of Law Students in Labor Relations. Vol. III, Transcript of Proceedings 669 (1947) and Slichter, Healy and Livernash, *The Impact of Collective Bargaining on Management*, p. 692.

[5] David E. Feller, "A General Theory of the Collective Bargaining Agreement", 61 *California Law Review*, 663, 743 (1973).

is, however, changing rapidly, owing to the continuous process of "democratization" of labour relations, which must have an impact on the grievance procedures too.

2. SOME REMARKS ON COLLECTIVE BARGAINING AND COLLECTIVE AGREEMENTS IN SWEDEN[6]

In Sweden, employers and employees are obliged by statute to bargain collectively with each other "respecting the adjustment of conditions of employment and respecting the relations between employers and employees in general".[7] A pattern of bargaining on a national level has long existed in Sweden. Industry-wide bargaining is conducted by national federations of employers and national unions. By far the majority of employees work for employers who are members of employers' federations. Collective agreements resulting from industry-wide bargaining in the various branches of the economy thus cover the vast majority of employers and employees. This is true with regard to both manufacturing and non-manufacturing branches of the economy and to the public sectors as well.

Matters not closely related to the individual employees—such as industrial democracy, grievance procedures, industrial safety, modernization and automation—are often embodied in master agreements.

The master agreements are adopted by employers' federations and national unions in the different branches of the economy. This means that such agreements will cover vast areas of the labour market. Excellent examples of master agreements are provided by the master agreements on grievance settlement procedures.[8]

A collective agreement is binding not only upon the parties to the agreement but also upon the members of the parties, i.e. the employers who are members of an employers' association—where the agreement has been signed by an employers' association—and the individual employees who are members of the union. However, it is within the power of the parties to the contract to decide that a clause in the agreement shall be applicable exclusively to the parties. Such clauses—the contractual

[6] Cf. Schmidt, *op. cit.* note 2, chaps I, V and VII. A brief comprehensive survey is given by the same author in "The Settlement of Employment Grievances in Sweden" in *Labour Courts and Grievance Settlement in Western Europe,* ed. by B. Aaron, University of California Press, 1971.

[7] Sec. 4 of the Act on the Right to Organize and to Bargain Collectively, 1936. The Act is reproduced in Schmidt, *op. cit.* note 2, Appendix 3. Cf. note 4, p. 78.

[8] Cf. section 4.

clauses—differ from the normative clauses which are binding on individual employees as well. Most clauses in collective agreements are normative, but there are many important exceptions.[9]

Non-union employees or employees belonging to a union other than the union that is party to the contract are not *ipso facto* affected by the agreement. There is no equivalent in Swedish law to the majority rule under US law or to the extension rules of some other countries. On closer scrutiny, however, it becomes clear that the collective agreement is of great importance even to outsiders. This result is brought about in various ways, one being that the provisions of the collective agreement in the field of business concerned are read into the individual employment contracts as implied terms.

3. SURVEY OF GRIEVANCE PROCEDURE PROVISIONS IN SWEDISH COLLECTIVE AGREEMENTS

Virtually all Swedish collective agreements contain grievance procedure provisions and have done so ever since collective bargaining became an established pattern. This means that grievance procedural provisions form a constant element in the contractual relationship between management and organized labour. By far the greater part of the Swedish labour market—including both the private and the public sector—is covered by master agreements on grievance handling. There are in all 20 grievance procedure master agreements in force at the present time. The most important of these is the agreement between the Swedish Employers' Confederation (SAF) and the Confederation of Swedish Trade Unions (LO). This instrument, known as the Saltsjöbaden Agreement, was concluded in 1938 but has been amended on various occasions.[1]

The Saltsjöbaden Agreement has been adopted by most national unions of manual workers and is part of their nation-wide agreements. It has also served as a model for most of the remaining master agreements. Some important workers' unions—e.g. in the building and transport industries—have decided not to adopt the Saltsjöbaden Agreement, mainly because of the far-reaching peace obligation written into it. Unionized white-collar employees and professional categories are virtually all covered by master contracts.

[9] Cf. 5.6.4 and 5.6.5.

[1] The agreement, generally known as the Basic Agreement, is reproduced in Schmidt, *op. cit.* note 2 above, Appendix 5. Chap. III of the original agreement, as reproduced in its amended form by Schmidt, is no longer in force.

The public sectors are completely covered by master agreements. The most important agreement covers state employees. The remaining three agreements cover the various municipalities. The agreements in the public sector have basic trends in common with the Saltsjöbaden Basic Agreement.

In collective agreements not covered by master agreements, a great variety of grievance procedural provisions can be found. Broadly speaking, however, there is a large measure of consistency not only between the various master agreements but also among the agreements outside the coverage of the master agreements. One does not find radically different approaches to the problem of handling grievances.

There is a close contractual, historical and ideological relationship between the grievance provisions and the contractual peace obligation. Under Swedish law the collective agreement has long carried with it an extensive obligation not to resort to industrial action during the life of the agreement.[2] However, this rule was not made statutory law until 1928. In addition, the statutory peace obligation offers no security that disputes will be discussed in an orderly fashion before recourse is had to some industrial action. The statutory peace obligation is supplemented by contractual peace clauses with the purpose of ensuring that the parties shall bargain before resorting to industrial action. Thus, the contractual peace clauses are interwoven with the grievance bargaining provisions.

In their basic and most simple form, the grievance clause and the peace clause are embodied in a single section. A joint clause was common in collective agreements before the era of master agreement began in 1938. Today such clauses are rare but they are still to be found. A clause of this kind would state:

> Disputes between the parties concerning this agreement or any other subject matter must not give cause to any action disrupting the work, be it by means of a strike, a blockade, a boycott, a lockout or any other similar action, until collective bargaining has taken place, in the first place between the disputing parties and, if they fail ro reach an agreement, between their organizations.

Today, most agreements spell out the peace obligation in one or more separate clauses, but its basic connection with the collective bargaining provisions remains the same. When the contractual relationship is covered by a master agreement, the peace clauses are without exception part of the grievance procedure in the master agreement.

Failing an agreement within the framework of the grievance procedure,

[2] Cf. Schmidt, *op. cit.* note 2 above, Chap. VIII.

the grievance can be appealed to the judicial stage of the industrial procedural system. In most cases this means that the grievance is submitted to the Labour Court. Arbitration as a final settlement device is permitted under chap. 1 (3) of the newly (1974) adopted Act on Litigation in Labour Grievances. Historically, arbitration has been the normal way of achieving a binding settlement; after all, the Labour Court started functioning only in 1929. Today, however, arbitration is the exception rather than the rule. Arbitration is resorted to mainly in certain specific cases, such as piece-rate disputes and disputes over the interpretation and implementation of master agreements. Until recently disputes over lay-offs, dismissals and reinstatements were often referred to arbitration, but since the adoption in 1974 of the Act on Security in Employment, arbitration has become much less common in this field. Arbitration still has a strong position in the building and construction industries as well as in the newspaper trade.

4. BRIEF OUTLINE OF THE CONTENT OF GRIEVANCE PROCEDURE PROVISIONS[3]

4.1. *The Goals of the Grievance Procedural System*

Various goals are pursued in the systematic processing of grievances. Of these goals three can reasonably be classified as primary goals, viz. the aim to facilitate conciliation between the parties, the aim to further peaceful settlements and the aim to provide the parties with an opportunity to assess the merits of their own position before resorting to litigation in the Labour Court.

There are also some goals of lower priority. One is to get disputes settled quickly once they are raised. Closely related to this goal are rules stipulating that disputes should be raised or decisions appealed against within short time limits on pain of their being barred from any further handling in or out of court. Another goal is to make sure that solutions are based on a careful investigation into the factual and contractual aspects involved in the dispute. A third is to screen grievances that might otherwise have gone to court. Finally, rules of *res judicata* aim at forcing the parties to handle each dispute once and for all and to free the parties from their seemingly unlimited statutory obligation to enter into negotiations time and again over the same dispute.

[3] An extensive treatment of the law of grievance handling is given in Reinhold Fahlbeck, *Om arbetsprocessrätt. Studier i det fackliga tvisteförhandlandets juridik. With a Summary in English*, Stockholm 1974.

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This goal structure is not without inconsistencies. The wish to reach a quick settlement may clash with the wish to base the settlement on a thorough investigation of the merits of the dispute. Rules on *res judicata* can come into conflict with the self-healing aspect of the grievance procedure.

4.2. *The Scope of the Grievance Procedure*

According to the Act on the Right to Organize and to Bargain Collectively, 1936,[4] the parties are under a duty to negotiate on terms and conditions of employment and on other questions concerning the relationship between employers and employees. The grievance provisions generally use similar expressions. All grievance procedures contained in master agreements cover disputes over rights as well as disputes over interests, though many exclude procedures for bargaining over new contracts. Under grievance provisions outside the area covered by master agreements, the grievance procedure is in most cases open to all disputes, but several agreements limit the scope of the grievance procedure to disputes over rights.

When deciding the question whether the grievance procedure covers a specific subject matter, the Labour Court looks for guidance in the collective agreement itself. Sometimes the court has also relied upon the implicit goals of the grievance procedure. However, the court cannot refer to the scope of the statutory obligation to negotiate, as disputes in specific cases over the implementation of the statute can be brought to the court only by using a lengthy procedural detour which in fact is never used. This means that conflicts between the statutory and the contractual obligation to negotiate are rarely tried. If the contractual obligation is more limited in scope than the statutory obligation—this seems to have been a common feature, especially within the field of managerial prerogatives—the contractual obligation normally sets the limits of the day-to-day negotiation activities. This is so despite the fact that contracting out from the statutory obligation by agreement between the parties is not possible. But the agreed grievance procedure is open only to subject matters covered by the grievance procedure provisions. On the other hand, negotiations in accordance with the rules laid down in the statute very rarely take place between parties to a collective agreement.

[4] This act will be replaced in 1977 by the Act on Joint Decision-making in Labour Relations, enacted in 1976. The new act also replaces the 1928 Act Respecting Collective Agreements—cf. note 2, p. 72—as well as the 1920 Mediation Act. The new act—which aims at establishing a system of industrial democracy—will have an enormous effect on labour relations in Sweden. However, its impact on matters discussed in this paper will be rather limited.

4.3. *The Parties to Grievance Bargaining*

A grievance procedure under a collective agreement is open only to the parties who have established the master agreement—if any—on which the procedural agreement is based, and to the organizations which have adopted the procedural agreement and to their members. The most interesting question is the role of the individual employee. Questions relating to the individual will be examined in 5.6.

The statutory right to negotiate with the employer is vested in unions only. It is conferred upon each union regardless of the number of its members at the plant, and regardless of whether the union has been acknowledged as a party to a collective agreement with the employer.

4.4. *What Does the Duty to Negotiate Signify?*

The obligation to negotiate does not compel the parties to reach an agreement. If an oral agreement has been reached, there is no obligation to have the agreement embodied in a written contract, collective or other.[5]

What, then, are the parties obliged to do? In the case AD 1940: 77,[6] the Labour Court stated that the parties have a mutual obligation to "contribute towards carrying the negotiations forward" by entering into "negotiations on the merits of the dispute". This obligation is fulfilled, however, when one party has stated its position and its reasons in a clear way and has given the other party the opportunity to do so as well. The contractual obligation of one party to negotiate is fulfilled even when the other party has not made use of the opportunity offered it. Also, the obligation is fulfilled even where either party had no intention of reaching an agreement.

The obligation to enter into "negotiations on the merits of the dispute" does not contain an obligation to enter into negotiations of "desirable completeness from an objective point of view". However, the Labour Court has found it within its discretionary powers to direct the parties to undertake further negotiations if it considers that negotiations have been insufficient, though it has used its powers sparingly.

Must there be a formal "dispute", or can any question be raised in the grievance procedure? The grievance provisions all without exception

[5] The ruling by the Labour Court in AD 1972: 5 that there is no obligation to sign a collective agreement even though oral agreement has been reached on all substantial issues has been examined by the European Court of Human Rights. It was claimed that this ruling—though perhaps conforming to Swedish law—is contrary to the European Convention on Human Rights, section I, art. 11 in conjunction with art. 14. The Court found no violation of the Convention. The Swedish Engine Drivers' Union case. February 6, 1976.

[6] AD, *Arbetsdomstolens domar*, i.e. Rulings by the Labour Court.

speak of "disputes" or "differences of opinion" as the subject matter of the grievance procedure. This has been held by the Labour Court—first in AD 1948: 78—to imply that something must be "unsettled or otherwise not resolved", the purpose of the negotiation being to reach a settlement or solution. This requirement is not met when the aim is to check how the other party applies the collective agreement. Nor is it met when the purpose is to confirm an obligation that the other party does not deny but has failed to honour. It is met, on the other hand, in a case where, even though one party asserts that the claim is not founded upon the collective agreement, the other party in good faith asserts that it is. It is also met if one party claims that his position is obviously right.

4.5. *Exemptions from the Duty to Negotiate*

There are some occasions when either party is relieved from his duty to negotiate. This occurs when the other party fails to fulfil his obligation to negotiate. To some extent, it also occurs when the other party has resorted to industrial action in order to enforce his claim.

If one party, though summoned in due order to the negotiation table, fails to appear, the other party is relieved of its duty to negotiate or is deemed to have fulfilled that duty. Consequently the latter party is entitled to proceed to the next step in the grievance procedure (or to take action in court if the failure has occurred at the last step in the grievance procedure). This effect also occurs when the other party is present but fails to fulfil its obligation to enter into "negotiations on the merits" of the dispute. The failure in this respect must be a serious one, however. The exemption is in force only so long as the other party is in default. The party not in breach has to proceed to the next grievance step or to take action in court while still confronted with a refusal to negotiate. Otherwise its obligation to negotiate is revived.

The reason for not negotiating "on the merits of the claim" is irrelevant. Damages can be reduced if the party acted in good faith on the presumption that it was not obliged to negotiate.

When either party resorts to industrial action—e.g. strike, lock-out or boycott—the machinery has been disrupted. This gives rise to an issue which has been widely discussed in Sweden, and which on close scrutiny reveals many aspects, some of which are extremely complicated. Can the whole machinery, in fact, be set aside?

This question must be considered from two angles. First, there is the question whether industrial action puts an end to the other party's duty to negotiate about the underlying dispute; secondly, it has to be considered

whether there is an obligation to negotiate about the character and consequences of the industrial action in itself before bringing that issue to the court. The author submits that there is a duty to negotiate about the underlying dispute before and after the period during which the action took place. While the action is in force the duty is suspended, provided that the injured party in good faith believes that the action is unlawful.

Regarding the obligation, if any, to negotiate about the nature and consequences of the industrial action, the author has arrived at the following conclusions. The Act on Litigation in Labour Grievances, 1974, expressly exempts the injured party from any obligation to negotiate while the action is proceeding. This exemption is also valid when the action is over. In both cases the injured party can resort to litigation immediately; it must, however, act in good faith when asserting that the industrial action is unlawful.

Another much-debated question in Sweden is whether the mediator can or should intervene under the Mediation Act when an unlawful industrial action is in progress. Some leading mediators have declared that they will refuse to do so unless called upon by both parties. The author submits that the present statute entitles the mediator to intervene at his own discretion. Whether he should intervene in any particular dispute is another matter. In any case the mediator should not intervene if the intervention might create an impression that society does not repudiate the unlawful action.

4.6. *Grievance Meetings and Negotiating Procedure*

There are few forms prescribed for starting the grievance procedure. Strictly speaking, there is only one, i.e. that grievance negotiations must be initiated by means of an express request. Informal discussions do not necessarily constitute grievance negotiations. In fact, informal discussions can go on for a very long time and still not be regarded as grievance negotiations in the legal sense. There are no forms prescribed as to what the request should at the very least contain in order to compel the other party to attend the meeting, but it must be made clear to the other party that the procedure is to apply. Any shortcomings in these respects will redound to the disadvantage of the applicant party.

The grievance provisions generally provide rules for closing negotiations. A party has always the power to terminate negotiations unilaterally. As the exact date of termination is relevant for contractual time limits, a party must be precise.

It is not uncommon for collective agreements to spell out an obligation

for the employer to submit his files and records for union investigation on specific matters or to furnish the union with all material relevant to the matter. Failure to observe such clauses constitutes a breach of the contract but has nothing to do with the obligation to negotiate on grievances.

The grievance provisions, on the other hand, contain virtually no rules about material and data of interest as evidence. Is there a right for one party to require the other party to produce documents under threat of a penalty? At present there is little possibility of doing so. This leaves the union in a difficult position, since most of the evidence is under management control. However, as a part of the obligation to "negotiate on the merits" of a dispute a party is obliged to state what evidence he has, though he is not obliged to present it. Nor is he obliged to submit the evidence to the other party for scrutiny.[7]

Most grievance provisions stipulate that minutes shall be kept, but they rarely specify what the minutes should include. In many cases the parties agree not to keep minutes. This practice should be viewed in the light of the whole purpose of keeping minutes. The main purpose is to produce evidentiary material for later use at higher stages in the grievance procedure or in court proceedings.

4.7. *Steps in the Grievance Procedure*

The vast majority of grievance provisions provide for a two-step procedure, i.e. "local" and "central" (or "national") negotiations. Local negotiations are conducted between the plant management and the union "club" at the plant where the grievance originated; central negotiations are conducted between the national association of employers and the national union which are parties to the agreement. Companies often set up internal multi-step procedures, but little knowledge of these procedures is available.

The Labour Court has deemed it within its powers to send a dispute back to the parties for further negotiations. The Court may do so when it thinks that in this way the parties may be able to agree on certain points of evidence or possibly even reach a settlement.

If the parties fail to reach an agreement at the local or the national level, either party can appeal the case to the next step, i.e. the national level or the Labour Court, respectively. In cases where an agreement is reached

[7] Under the new Act on Joint Decision-making in Labour Relations—cf. note 4, p. 78—the employer will have a far-reaching duty to provide the union with information on all matters of interest to the union.

but a party on second thoughts regrets having entered into it, there is no appeal. Grievance procedure agreements are binding upon those who have entered into them.

4.8. *Sanctions for Breach of Duty to Negotiate*

Failure to observe the contractual duty to negotiate constitutes a breach of the collective agreement. The party in breach is liable to pay damages for both economic and non-economic loss. The injured party is free from his obligation to negotiate when the other party is in breach of his duty to negotiate. The injured party can carry the dispute to the next grievance step, thereby depriving the other party of the possibility of further negotiations at the same level. This is a kind of "procedural sanction".

4.9. *Grievance Representatives and Grievance Costs*

The parties can choose their grievance representatives freely. There are no rules on the qualifications of a grievance representative. The appointment of the employee representatives is in the hands of the union.

The power of the union officer as representative of the union is primarily judged in accordance with general rules on agency in Swedish private law.[8] It is of particular interest to establish whether there are any specific rules concerning the power of the agent in grievances. Many arguments can be put forward in favour of conferring a wider power upon agents in grievance procedure than is conferred upon contract bargaining representatives. Some Labour Court rulings indicate that this is exactly what the court has done. These holdings—AD 1936: 62 and AD 1937: 106—indicate a rule with only limited exceptions to the effect that it is a part of the duty to bargain that a party shall be represented by an agent who is competent to negotiate a settlement of the dispute. This rule applies to negotiations at the local as well as at the national level.

The union representative faces the possibility of retaliatory actions from management. What protection does he enjoy? By the 1936 Act on the Right to Organize and to Bargain Collectively[9] he is protected against any retaliatory actions taken by management. Up to 1974, however, the injured representative had to go to court to challenge management actions. There he had to make it appear probable that the action taken by management was caused by his grievance performance or was taken as a

[8] The statutory power conferred upon union representatives to represent individual members will be discussed in 5.6.2.

[9] Cf. note 7, p. 74.

preventive measure. In the future these rules will apply primarily to officers belonging to a union that has no collective agreement. With regard to the majority of representatives, i.e. officers of the union holding the collective agreement, new statutory rules were adopted in 1974 in the Act on Union Representatives. These rules considerably increase the protection given to union representatives. No alteration in a union officer's conditions of work can be made without prior notice to the union. If the proposed alteration is contested by the union, it cannot be put into effect until it has been approved by the Labour Court (or through an arbitration procedure).

Privileges have increasingly been accorded by management to union representatives within the plant. In 1970 a master agreement on the role of blue-collar shop stewards was concluded between SAF and LO, the top employer and employee associations in the private sector. The agreement was followed by some seven other similar agreements covering the private as well as the public sector. The adoption in 1974 of the Act on Union Representatives changed the picture considerably. The agreements have largely become obsolete. The statute—covering the whole labour market—private as well as public, blue-collar workers as well as white-collar workers and professional categories—also represents a turning point with regard to the attitude taken by society to union activities. Previously such activities were considered mainly a private matter for one pressure group among others. The 1974 statute has turned them into a matter of public interest. Unions are not only a pressure group "but co-builders of society as well".[2] In line with this attitude, union representatives are granted far-reaching privileges.

4.10. *Time Limits*

Virtually all grievance provisions contain time limits. First, time limits are laid down for the initial presentation of a claim. Generally there is a dual limit: a maximum time limit, ordinarily of two years, operates from the time the disputed action took place; a shorter time limit, ordinarily of four months, operates from the time the union was made aware of the claim.

Secondly, the grievance provisions prescribe a time limit, ordinarily of two months, within which an appeal has to be lodged at the national level against a local decision, and a time limit, ordinarily of three months, for appeal against the national decision to the Labour Court.

The time-limit rules are drawn up as rules regarding standing to bargain

[2] Cf. Prop. 88/1974, p. 147.

and to litigate. The rules serve a twofold purpose. They are time-limit rules and they also determine the standing to bargain (the *locus standi*).

Some questions with regard to the time-limit rules will be discussed in 5.5.

5. A SPECTRUM OF PROBLEMS RELATED TO THE GRIEVANCE PROCEDURE

5.1. *Negotiations Prior to Action*

Is the employer obliged to negotiate before acting on a decision taken by himself? Is the employer obliged to negotiate at an even earlier stage of the decision-making process, i.e. when he is considering whether or not to take a certain action?

From an historical standpoint, the point of departure is that the management decides and takes action unilaterally without prior notification. The role of unions is to challenge the management's actions, if deemed necessary.

The committee that prepared the present statute on the duty to negotiate[3] touched on the subject of bargaining before acting but did not really discuss it. The right to primary negotiations—as the issue is generally termed in Sweden—was brushed aside without serious consideration.

Grievance procedures have altered very little in this regard. Management has strongly defended its "right" to take unilateral action even in cases where important employee interests are at stake, such as, for instance, sub-contracting, automation, relocation or closing of plants, and discipline. However, some important exceptions were obtained by the unions concerning lay-offs and dismissals. First introduced in the Basic Agreement between SAF and LO, they were adopted in many other master agreements. The rules did not deprive the employer of the right to decide unilaterally in the last instance. Nor did they include specific rules for "just cause", seniority or similar rules limiting the freedom of action of management. Given this, it follows that the duty to negotiate before taking action was of another character than in ordinary grievance bargaining. This state of affairs explains why such negotiation was termed "consultation" rather than bargaining (or negotiation).

The 1974 Act on Security in Employment has changed the picture considerably in the field covered by it. Far-reaching obligations have been imposed on the employer to notify the union—and in some instances the

[3] Report by the Committee on the Right to Organize and to Bargain Collectively, 1935: 59.

employee concerned—of contemplated decisions regarding job security. The union has a right to discuss the matter with the employer before he acts. Detailed rules are laid down concerning just cause for dismissal, seniority, reinstatement, etc. The statute permits national unions to enter into collective agreements in order to contract out of provisions that otherwise are mandatory. Such agreements have generally been negotiated, giving unions considerable power at the local level to conclude agreements with the employer on lay-offs, dismissals and reinstatement.

To some extent the 1974 Act on Security in Employment has also empowered unions to prevent a managerial decision from becoming effective until the Labour Court has ruled on the matter.

These statutory regulations have changed the duty of primary negotiations considerably. The balance of power has become more evenly distributed between management and unions. Proposed managerial actions can be matched in advance against specific statutory and contractual obligations. Binding collective agreements can be concluded.

Under the new Act on Joint Decision-making in Labour Relations,[4] the duty to negotiate prior to action has been extended to all decisions of major importance to employees. Thus, as from the beginning of 1977 a general obligation to enter into serious negotiation before taking action will prevail in Sweden on most issues in the field of labour relations.

An interesting aspect of the question of negotiating prior to action is what remedy can be used against the employer if it turns out that the contested action taken by him is in violation of a statute or the collective agreement. Can the employer face the risk of having to restore the *status quo ante,* i.e. to undo whatever action he has taken? It is obvious that if the employer runs the risk of such a remedial order he will have a strong incentive to bargain before taking action. The risk of losing a dispute over the contested action may overcome hesitations on his part to bargain despite the fact that he may not be under a duty to bargain. By bargaining with the union, the employer can ensure that the action he takes will be of a nature acceptable to the union. This will eliminate the risk that the action will subsequently be contested. Thus, the arsenal of remedies available to the other party will have an impact on the employer's conduct.[5] In fact, it seems reasonable to believe that primary negotiations can be obtained

[4] Cf. note 4, p. 78, above.

[5] Cf. in this context the American case *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 US 203 (1964). In this case the employer had unilaterally decided to subcontract certain jobs. It signed contracts with other firms to have the job performed by them. As a result of this the Fibreboard Company no longer had work for all its workers, so some employees were dismissed. The Court found that the company had violated its duty to bargain and sustained an order by the NLRB that the employer should terminate his subcontracting agreements and reinstate the dismissed employees with full back pay.

indirectly by providing for suitable remedies. It may be assumed that the indirect method has at least one distinctive advantage over a bare stipulation that employers should negotiate prior to action. This advantage is that negotiations are likely to be conducted with much more openness and willingness to reach an agreement if the consequence facing the employer is that of restoring the *status quo ante* rather than that of paying damages.

Until recently the sole remedy in Sweden for breach of collective agreements was damages. To some extent the 1974 Act on Security in Employment has enlarged the arsenal of remedies. In certain instances the employer can be ordered to undo what he has done. However, damages still constitute the principal remedy, though the intention is that the level of damages shall be elevated. The 1976 Act on Joint Decision-making in Labour Relations contains similar rules.

5.2. *The Significance of the Duty to Negotiate*

It might be argued that the duty to negotiate must contain some element of pressure on the parties as to how they shall behave at the negotiation table. Failing this, the duty might conceivably be fulfilled when the parties have met and exchanged their points of view even if there was no desire to reach an agreement or even to consider the position of the other party. If one party is unwilling to allow the other party to exercise any influence, the negotiation session would turn into "monologues of the deaf". Thus, the legislator might be forced to put some kind of pressure on the parties to enter into "real" negotiations. The alternative to legal stipulation would be the relative strength of the parties. Force would be a determining factor in the conduct of the parties at the bargaining table.

In the USA the difficult task of making sure that real negotiations take place has been met by imposing upon the parties a duty to bargain in "good faith". Briefly, this duty means that the parties have to negotiate with an openness of mind to the position of the other party in order to ensure that the parties reach a common ground. Furthermore, the parties must have a sincere desire to reach an agreement. However, good-faith bargaining does not compel either party to make concessions or to negotiate in a way that might be classified as "reasonable" by some standard established by a court of justice (or some other body). Nor does good-faith bargaining compel parties to reach an agreement. A breach of the duty to bargain occurs when a party has demonstrated "a desire not to reach an agreement".[6]

[6] *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (1st Circuit 1953), certiorari denied, 346 US 887 (1953).

What is the state of law with respect to the contents of the duty to bargain in Sweden? In section 4.4 above a brief outline of Swedish law on this matter was given. As the account reveals, there is simply no statutory pressure on the parties to enter into "real" negotiations. Each party has fulfilled his duty when he has stated his position and the reasons for his position and has given the other party the opportunity to do so as well. There is no statutory obligation to consider the position of the other party. Nor is there an obligation to state one's own position with regard to the position of the other party. Still less is there an obligation to negotiate with a desire to reach an agreement. Clearly, the content of the obligation to negotiate is very modest indeed.

All this looks very confusing. How can collective bargaining—be it contract bargaining or grievance negotiations—function when the law has left it to the parties to decide what is to happen at the negotiation table?

The 1935–36 legislators were aware of this problem. They forced the employer to come to the negotiation table but left it to the parties to decide how to behave behind the doors of the conference room. The main reason for this attitude was a wish not to interfere with the freedom of contract of the parties. The legislators had great confidence that, once the parties met, real negotiations would take place. Has this hope come true?

On the whole, the answer is yes. There seems to be only one major exception. This is the case where the employer is faced with two unions both wishing to obtain an agreement to cover more or less the same kind of work. In most instances one of the two competing unions is an independent union, not affiliated to any federation of unions. The employer signs an agreement with the affiliated union covering its members but is asked to enter into an agreement with the independent unions as well to cover its members. In these instances the employer often resorts to purely artificial collective bargaining.[7]

The reasons why "real" collective bargaining largely takes place despite the lack of any legally enforceable obligation to that effect can be given only tentatively. One reason seems to be that Sweden is a country where laws, once enacted, are accepted and followed to a large extent.[8] More important is that unions on the whole are accepted as an integral part of the labour-market scene, which means that the establishment of good relations with the union is not only a necessity but also something desirable

[7] Cf. 4.4 at note 5. The events at the origin of the case mentioned in note 5 are an example of the situation outlined in the text.

[8] Cf. the remark by Professor Folke Schmidt that "[i]n Sweden advocates of reforms are fortunate in that once a law reform is adopted the matter is in most quarters considered as settled". Cf. *op. cit.* note 6, p. 74, above, at p. 223.

in itself. However, it seems reasonable to believe that the most important factor is that unions are strong and dispose of an impressive armoury of coercive methods to ensure that real collective bargaining takes place.

Especially when grievance negotiations are discussed, still another reason can be traced. This reason is purely legal. To understand it, one has to consider the negotiation process. When the union asks for a meeting to discuss a grievance, the employer must attend. He must listen to what the union has to say and he must state his own position, though admittedly he is not initially obliged to discuss the union's arguments. But if the union, having heard the employer's statement, poses questions to the employer with regard to his view on the disputed issue, there is good reason to presume that the employer is under a duty to state his position on the questions put forward. The employer's answer to the question may constitute a subject matter of bargaining of its own. If this is so—and some rulings by the Labour Court seem to indicate that the Court will take this view[9]—then the legal duty to negotiate will have more substance than would at first sight appear. The law puts little pressure upon either party to be active on its own initiative. The duty to negotiate acquires real substance gradually, in accordance with the negotiating techniques of the parties. What initially looks like a series of "monologues of the deaf" turns into a "dialogue of conversationalists".

5.3. *Procedural Accuracy at the Bargaining Table*

In this section, some questions regarding negotiating tactics and procedural accuracy will be discussed. One starting point is the assumption that grievance negotiations are not a collective search for the truth. Rather it must be reckoned with that the parties are inclined to pursue negotiating tactics aimed at gaining as much as possible, even in grievance handling. This can have important effects on the way the parties behave at the negotiating table. Another starting point is that grievance handlers are not professional trial lawyers. This means that they are likely to make accidental mistakes and omissions when they present their cases at the negotiating session.

A grievance session comes about only when either party has a grievance. The aggrieved party will as a matter of course open the session by giving some sort of presentation of what he wants to obtain—his claim—and his reasons—i.e. the ultimate and evidentiary facts in support of the relief he seeks. What is not a matter of course, however, is how accurate and precise

[9] AD 1959: 18 and AD 1968: 13.

the aggrieved party has to be. Can he just mention his grounds—the ultimate facts—or is he obliged to invoke them in some precise and clear way? Is he obliged to mention all his reasons at once, or for that matter to state all that he wants to obtain? And how about the other party with respect to the same questions? Furthermore, is the other party under a duty to discuss claims or reasons not referred to in a precise way or not introduced at the first bargaining session?

Questions regarding procedural accuracy in presenting claims and reasons for claims are of great importance in civil and criminal procedure. Are they worth mentioning where the grievance procedure is concerned? In fact, they are. But this is true not so much because procedural accuracy is of importance in itself but rather because the answers to the questions which we now have in mind will be decisive for four other, closely related issues.

First, they have a bearing on whether the duty to negotiate has been fulfilled. Can shortcomings in procedural accuracy—voluntary or involuntary—constitute a breach of the duty to negotiate on the merits of the dispute? *Secondly,* one has to know whether the introduction at a higher stage in the grievance procedure or at the Labour Court of an ultimate fact not mentioned at a previous stage will constitute a bar to further discussions at that stage. Shall the grievance be referred back to the first stage in order to ensure that all ultimate facts are considered at all grievance stages? *Thirdly,* what obligation—if any—is there to discuss alterations with regard to previous claims and reasons when the grievance has been discussed at some level of the grievance procedure but the time limit[1] for appeal to a higher stage or to the Labour Court has elapsed? In other words, do grievance procedure decisions carry with them some *res judicata* effect and, if so, what is the scope of that effect, if any? *Fourthly,* procedural accuracy is of importance when discussing how claims are protected from being barred by the contractual provisions of time limitations.

Let us consider just one example to illustrate these problems. By statute and under the applicable collective agreement, employees can be dismissed with notice where there is just cause. Dismissal without notice can be resorted to if there has been a grave breach of the employment contract. In our example, an employee has neglected his work for some period of time. Furthermore, on two occasions he has failed to show up for work, without notifying the employer. This has taken place during the time the employee neglected work. Absence from work without prior notification is unlawful in itself but it also implies that the employee neglects his work. Both the

[1] Cf. 4.10.

employer and the union are aware of the unlawful absence from work and they are both of the opinion that such conduct constitutes a grave breach of contract, making the employee liable to dismissal without notice if the employer has drawn attention to it. But the employer is eager to establish that the employee's neglect of work is also a sufficient cause for dismissal without notice, so he dismisses him without notice solely on the grounds of neglect of work and without mentioning the unlawful absences from work. Negotiations at the local level take place. The parties fail to reach agreement on whether the employee's neglect of work constitutes a grave breach of contract. The grievance is appealed to the central (national) level. The employer still asserts that the neglect of work is a sufficient reason for dismissal without notice, but he now introduces the unlawful absences as an alternative ground for the dismissal.

The introduction into the case of the unlawful absences gives rise to several questions. Is the employer entitled to base his case on the absences as an alternative ground, or is this ultimate fact precluded because it was not referred to earlier? Has the employer failed in his duty to negotiate on the merits of the case at the local bargaining sessions? Should the grievance be referred back for renewed bargaining at the local sessions?

If we change our example slightly, other complicated questions arise. Let us assume that the grievance was not appealed to the national level within the prescribed time limit. Let us further assume that the union's opposition to dismissal without notice for neglect of work induced the employer to revoke the dismissal. This decision is recorded in the minutes. The question now arises whether the employer can dismiss the employee with or without notice on grounds of unlawful absences, or whether this ultimate fact is precluded because of an effect similar to *res judicata*. The question further arises whether the employer can change his previous decision and dismiss the employee *with notice* on grounds of neglect of work.

We shall now try to answer the many questions just raised. Grievance procedure provisions are silent on procedural accuracy, but the Labour Court has had to deal with questions of this kind in a few cases: AD 1959: 18, AD 1963: 29 and AD 1972: 18. The Court's rulings reflect a fairly strict view on what the parties have to do. Both parties must invoke—not just mention—all ultimate facts in support of their claim in the case. All ultimate facts or any modification that—if undertaken—would not transform the dispute into a new case must be invoked.

It must be pointed out, however, that it cannot be stated for certain to what extent the Court's rulings reflect actual practices in the grievance procedure. There seems to be good reason to believe that the distinction

between mentioning and invoking ultimate facts is to a great extent just a matter of rhetoric. Its purpose is probably rather to give the Labour Court some freedom of action to decide on the issues related to the problem of procedural accuracy.[2]

Before discussing the four related issues, another observation must be made. In AD 1959: 18 and AD 1972: 18 the Labour Court has clearly accepted that the parties can introduce new claims or ultimate facts after the first negotiating session or at a higher stage in the grievance procedure, though the Court has not elaborated on the extent to which this is possible. Given the serious consequences of barring new material—claims or facts—to the case, it must be taken for granted that barring is prohibited unless explicitly provided for in the applicable collective agreement. Only one contractual barring rule can be found in Swedish collective agreements, i.e. time-limit rules.[3] Consequently the employer in our example can introduce the unlawful absences into his case at the national bargaining level (or in the Labour Court if he did not refer to the absences at the national level either).

Now, what about the closely related issues previously outlined and the ensuing questions? We first focus our attention on the question whether failure to observe procedural accuracy in accordance with the court-fashioned law constitutes a breach of the obligation to negotiate on the merits of the grievance. The Labour Court has yet not been faced with this problem. As has just been stressed, tactical negotiating practices by means of alteration of the material for the grievance case—new claims or facts—are permissive. But such alterations should constitute a breach of the duty to negotiate on the merits of the dispute whenever it can be said that the negotiating tactics used are deliberately misleading or negligent with respect to the real position of the party in breach. To take our hypothetical case, the employer should be held to be in breach of his duty to negotiate on the merits of the dispute because of his deliberate failure to mention the unlawful absences.

Shall the grievance be referred back from the Labour Court (or the national level) to renewed bargaining at the local level when a failure to observe procedural exactitude has occurred? (Under the new Act on Joint Decision-making in Labour Relations negotiations must have taken place at the national level before an action can be brought in the Labour Court.) Under the 1974 Act on Litigation in Labour Grievances—and its predecessor of 1928—the parties must have negotiated on the merits of the dispute before resorting to the Labour Court. This provision will have the conse-

[2] Cf. above.

[3] Cf. 4.10 above and 5.5 below.

quence that any procedural shortcomings in previous negotiations amounting to a breach of the duty to bargain on the merits of the dispute will bar litigation in the Labour Court. Upon request the action must be dismissed.[4] Alternatively, the Court can refer it back for renewed negotiations. Will the same effects occur when the procedural lapse is revealed already at the national bargaining level? This question has yet to be answered by the Labour Court. In conformity with the provision just referred to in the Act on Litigation in Labour Grievances, the same results should follow. In our hypothetical situation the grievance should upon request be referred back for further bargaining at the local level.

Closely related to procedural exactitude in grievance negotiations is the existence, if any, of something similar to *res judicata* in grievance settlements. Questions related to this problem will be discussed in 5.4. below. To anticipate that discussion, it may be noted, however, that grievance settlements—whether joint or unilateral—do carry an effect of *res judicata*. This effect extends to all facts—ultimate as well as evidentiary—mentioned or invoked and to all facts that could have been mentioned or invoked without transforming the dispute into a new case. Such facts must be invoked at the risk of preclusion when the agreed time limit for appeal has elapsed. The *res judicata* effect also extends to all claims based upon the facts now mentioned. Thus, in the modified version of our example the unlawful absences have been precluded. Subsequently, the employer can no longer invoke them as a separate ground for dismissal of the employee. Nor can he dismiss the employee *with notice* on the ground of neglect of work.

5.4. *Res Judicata*

Do grievance settlements carry with them binding force in terms of *res judicata?*

Swedish law distinguishes between "negative" (or "procedural") effects and "substantial" (or "prejudicial" or "positive") effects.[5] The negative effect means that a judgment is a bar to further litigation on the same claim, whereas the substantial effect "denotes its binding force in a subsequent action in which the claim is not the same".[6] The "substantial effects relate exclusively to the definite status of a prior judgement order" but not to "findings made by the court in arriving at its ultimate conclusion".[7] The

[4] AD 1959: 18 and AD 1974: 4. Cf. AD 1974: 47.

[5] Cf. Ginsburg & Bruzelius, *Civil Procedure in Sweden*. Columbia University School of Law. Martinus Nijhoff, The Hague 1965, pp. 306 ff.

[6] *Ibid.*, p. 308.

[7] *Ibid.*, p. 309.

question is whether any effects similar to the *res judicata* binding force are to be attached to grievance decisions.

At first, one might be inclined to say that there can be no *res judicata* effect attached to grievance decisions, because these decisions are private, whereas the *res judicata* doctrine refers to decisions made by public authorities. This answer does not go far enough, however. The crucial point is whether legal effects similar to—or identical with—those attached to court decisions are attached to grievance decisions regardless of what these effects are called. What is of primary interest is to ascertain the legally binding consequences of grievance decisions; naming these consequences is of secondary importance. Thus, our question still remains to be answered.

The applicable statute does not deal with the question. At first sight, grievance procedure provisions do not deal with it either. Before looking more closely at the contractual provisions, some additional remarks will be made.

First, let us consider the *raison d'être* of the *res judicata* effect. Why is a judgment a bar to further litigation on the same claim? It is patent knowledge that the *res judicata* effect is intended to obviate repeated litigation on the same claim and to force the parties to a court case to give the closest possible attention to their case. Also, the *res judicata* effect makes it possible for the parties to a lawsuit to foresee their future relations in the disputed area. This in turn ensures better conditions for planning future activity. Lastly, personal security is promoted by not permitting lawsuits to take place time after time on the same chain of events. Do these aims of *res judicata* apply to grievance decisions as well? Obviously they do. Consequently, it would seem that there is a need for something similar to the *res judicata* effect.

However, grievance settlements are private agreements and there is much justification for looking upon them as ordinary contracts. Could not the contract doctrine of *pacta sunt servanda* do the job of making certain that grievance settlements are binding and final? Is it necessary to resort to the troublesome doctrine of *res judicata* when the less troublesome doctrine of *pacta sunt servanda* is available? Let us consider the effects of each doctrine and the needs of the industrial community.

Let us return to the hypothetical case outlined in 5.3 above. Grievance negotiations at the local level have been terminated by the decision of the employer to revoke his previous decision to dismiss the employee without notice for neglect of work. The union is in accord with this decision. An agreement has been reached. Can the employer dismiss the employee *with notice* for neglect of work or can he dismiss the employee *with or without*

notice for unlawful absences—not discussed by the parties at the time of the negotiations but known to them—during the same period as the neglect of work took place? Under the doctrine of *pacta sunt servanda* there is little reason for not allowing the employer to take any of the suggested actions. The grievance agreement is concerned only with the neglect of work as a possible ground for dismissal without notice. But is it reasonable to believe that the parties intended to let the issue of dismissal of the employee for whatever he did during the period considered by the parties—and known to the parties—remain open? No, it most certainly is not. Neither the parties nor the employee would be well served by grievance procedure decisions if they did not have a wider coverage. There is a need to settle once and for all the issue of dismissal for neglect of work for the time under consideration. Consequently the binding effect should—generally speaking—embrace the whole chain of events that forms the basis for the disputed decision by the employer. Thus, the binding effect should include the various claims (or decisions) that these events may give rise to and the ultimate and evidentiary facts, whether referred to by the employer or not.

A binding effect of this extent would normally be of most benefit to the employer. The union will be barred from bringing a new grievance in many instances such as the discovery of some new evidence. In disciplinary cases, however, the union and the employee will benefit most.

It was said above that neither the applicable statute nor the agreements deal with the question of the binding force of grievance decisions. Why is this so? Some tentative answers can be put forward. One fairly plausible reason is the complexity of questions related to the *res judicata* doctrine. Another possible reason is that strict application of rules of the binding force of grievance decisions can be detrimental to a good bargaining relationship between employer and union. Such rules tend to formalize the bargaining process. They also introduce into the bargaining process an element of judicial precision that may jeopardize basic values of openness and flexibility in that process.

However, collective agreements do treat some aspects of the binding force of grievance decisions. On closer investigation, it becomes clear that the time-limit rules generally to be found in grievance provisions must be construed to include an effect of *res judicata* type. This is so for the following reason. If a grievance is not appealed to the national level or to the Labour Court within the agreed time limit, the aggrieved party loses his standing to negotiate or to litigate. This effect is expressly stated in the time-limit provisions. But it must necessarily mean that the grievance decision is binding in the sense that neither party can demand that the

grievance shall be discussed once more at the local level. Otherwise the time-limit rule would be sidestepped and would lose its meaning. Thus, grievance negotiation decisions have at least *some* negative *res judicata* effect. The grievance negotiation provisions offer no possibility of uncovering the precise content and extension of the binding force. However, rulings by the Labour Court permit some fairly precise conclusions.[8] These conclusions can be summarized as follows:

Binding force is attached to grievance decisions. The binding force arises when three conditions are met. First, grievance negotiations must have been held; secondly, they must have been closed in due form; and, thirdly, the time limit for appeal must be over. Whether the negotiations have ended in a joint agreement or by unilateral decision by either party is irrelevant. However, the binding force can on most occasions be set aside by mutual agreement between the parties.

The binding force has primarily a negative effect. The duty to enter into further negotiations expires once the binding force comes about. The negative effect covers the same dispute (claim) that was previously submitted to negotiations but not disputes over the interpretation or application of the decision reached at previous negotiations. The author is of the opinion that, within specific limits, the negative binding effect can be extended to disputes over the interpretation of the collective agreement as well. The binding force also includes the substantial effect.

It was stated that the negative effects cover the same claim as was previously treated in the grievance procedure. Now, what exactly are the dimensions of the claim? This is an extremely complicated matter. It has not been dealt with by the Labour Court. When the Court is faced with the matter it is likely that it will on the whole consider it with the Swedish Code of Judicial Procedure as a model.[9]

5.5. *Time Limits and Barring by Limitations*

Time-limit rules are closely related to the problems discussed in 5.3 and 5.4 above. Some other questions with reference to time-limit rules will be dealt with briefly here.

In 4.10 the frequency and content of time-limit rules were outlined. Why are time-limit rules so common and what purposes do they serve? On the whole, time-limit rules in collective agreements serve the same purpose as all other time-limit rules. The passing of time is in itself a factor of legal

[8] AD 1963: 29 and AD 1972: 18.

[9] On the dimensions of the claim from the point of view of the Swedish Code of Judicial Procedure, see Ginsberg & Bruzelius, *op. cit.*, pp. 305 ff.

importance; the law deals with current legal relations. Time-limit rules ensure this; they ensure, too, a certain security as well as a certain amount of foresight in legal affairs. They also serve the purpose of reducing the difficulties of proving contested issues.

All this is of importance in grievance negotiations as well, but it does not explain why time-limit rules are so common. Who has an interest in time-limit rules, the employer or the union and the employees? Generally speaking, time-limit rules are of greater interest to debtors than to creditors. In most cases the aggrieved party is to be found within the employee community and the aggrieved party is always in a creditor's position. Thus, the time-limit rules are of greatest interest to the employer, the debtor. It is true that the employee is also interested in quick settlements of grievances. But the employee does not need time-limit rules to start a grievance procedure or to appeal grievance decisions. He would be well served by rules specifying time limits for the handling of grievances at the various stages, but such rules are very rare in Sweden. So how is it that unions have largely accepted binding time-limit rules? No adequate answer can be given. It seems most likely that unions have had to accept short time-limit rules as part of the price for getting an orderly grievance procedure. Also, the employee community has the greatest benefit from time-limit rules in disciplinary matters and all other matters where the employer rather than the employee is in a creditor's position.

What claims are subject to the time-limit rules? On the whole, the rules look only at disputed claims to rights accrued in the past. This generally means that both parties have performed before time-limit rules can be applied. But what if either party—in most cases the employer—announces a decision regarding his future application of the collective agreement on some specified issue? Should time-limit rules be applied as from the date the announcement is made or from the later date when the announced application is first put into effect? In view of certain Labour Court rulings,[1] it can be said for certain that only the date of putting into effect the announced interpretation is of interest.

What actions can be taken to preserve a claim? The grievance provisions often prescribe that the act necessary for preserving a claim is the request for negotiations. This means that the request for negotiations is of decisive importance in this connection. In order to preserve his claim, the claimant must also press for negotiations to start. What is the scope of preservation of the request? Obviously, the broader the request the larger the scope of preservation. The dimensions of the binding force of grievance settle-

[1] AD 1967: 20 and AD 1971: 12.

ments mark the minimum boundaries of the scope of preservation of the request. But it seems possible to go beyond these dimensions in certain situations. This is true especially when the dispute concerns the day-to-day application of the collective agreement on a particular issue but only a few out of many specific cases are cited in the request.

Very often, grievances refer to the day-to-day application of the collective agreement by the employer. This generally means that new claims arise all the time. How are time limits to be applied? Various possibilities are available. One possibility is to look upon the continuous application as a unity to which time-limit rules should be applied simultaneously regardless of when any particular act took place. In this case, time-limit rules can either be applied at the start of the contested application of the agreement or at the end of it. The first alternative must be ruled out; it will have the totally unacceptable consequence that acts in accordance with the contested interpretation will be barred from any legal actions when the time limits have been passed. Nor can the second alternative be accepted. It would permit claims based on acts both in the distant and the recent past to be raised so long as they are raised within the time limit of the last act taken in accordance with the disputed interpretation. Thus, simultaneous barring by time limits must be completely ruled out in favour of successive barring. Each individual action should be considered separately.

Can the right to assert that a claim has been barred by time limits be lost or waived? It is a matter of course that it can be expressly waived. In fact, even the non-assertion of barring by time limits is a waiver. The most common way of losing the contractual right to assert barring by time limits is by entering into negotiations on the merits of a claim. However, the present author is of the opinion that either party should be entitled to preserve his right to assert barring by time limits when he enters into such negotiations, provided that he expressly makes an exception to that effect.[2]

What are the legal consequences of barring by time limits? It has already been made clear that the primary consequence is that the aggrieved party can no longer summon the other party to negotiations or take him to the Labour Court. The claim is "dead". But is the claim completely "dead"? Yes, with only very limited exceptions, which cannot be discussed here. Thus the claim cannot be used for the purpose of set-off.

5.6. *The Role of the Individual*

5.6.1. *Introduction*

The role of the individual employee—and to some extent the individual employer—in grievance bargaining is difficult to ascertain. A number of

[2] This seems to be the case in the USA. See Elkouri & Elkouri, *How Arbitration Works*, 3rd ed. BNA, Washington D.C. 1974, p. 150.

questions arise when the relationship between union and member is closely examined. The starting point is simple enough. The union concludes the collective agreement. The agreement is binding upon the member. Grievance provisions form part of the agreement. Under virtually all grievance procedures, the individual member has no standing to negotiate in the grievance procedure.

Until now, the position of individual employees and the relation between the union and its members have not been matters of great concern to labour lawyers and grievance negotiators. This is in vivid contrast to the USA, where these matters have been intensively and even hotly debated. Nevertheless, the Labour Court has been faced with disputes in this area quite a number of times.[3] In fact it is warrantable to say that the area has been neglected. Although the Labour Court's rulings in this field have had less impact on collective bargaining than has been the case in the USA,[4] important rules have been established. Many reasons can be put forward to explain why the position of the individual employee has not drawn the same attention as in some other countries, notably the USA. The union movement is highly united. Jurisdictional disputes are comparatively rare. The rate of union membership is high. Unions represent only their members in grievance bargaining. Internal conflicts within the unions have been comparatively rare; harmony rather than discord is the hallmark of Swedish unions. Corruption and tendencies to "government by bosses" are seldom found. Unions have traditionally been responsible to their members.

For many reasons it seems likely that these matters will attract more attention in the future. Unions are invested with considerable influence and power by various statutes, whose provisions are often to be exercised with discretion. Individual employees are vested with far more rights; if this state of affairs reduces management's rights and its discretionary power, it also enlarges the area where individual employees can come into conflict not only with the employer but with other employees and the union as well.

All this means that the manifold problems related to the position of the individual employee vis-à-vis his employer and the union merit serious consideration.

[3] Whereas suits by individual employees amounted to roughly 1 % of all cases adjudicated by the Labour Court in the five-year period 1929–34, they amounted to nearly 10 % in the period 1967–71. Nevertheless they are still rare. Of 171 cases adjudicated by the Labour Court in the years 1967–71, 16 individual employees figure as plaintiff.

[4] Many of the leading rulings on collective bargaining law in the USA have involved individual employees. Among several cases, reference can be made to *Humphrey* v. *Moore*, 375 US 335 (1964), *Republic Steel* v. *Maddox*, 379 US 650 (1965), and *Vaca* v. *Sipes*, 386 US 171 (1967).

5.6.2. *The right of unions to represent their members*

The first question with regard to the relationship between unions and their members deals with the right of unions to represent their members in the grievance procedure and before the Labour Court. The crucial question is to determine the extent of power conferred upon unions to settle members' grievances or—in other words—to establish who owns the grievance.[5] In the United States this problem is resolved by the doctrine of the duty of fair representation. Under this doctrine the union is obliged to represent its members in "good faith and honesty of purpose"[6] and to avoid any acts that are "arbitrary, discriminatory, or in bad faith".[7] This confers upon unions "a wide range of reasonableness ... subject always to complete good faith and honesty in the exercise of its discretion".[8]

In Sweden the discretionary power of unions to settle grievances is far more limited. This state of affairs reflects the statutory regulation that individual employees are personally and directly bound by the collective agreement. Consequently, with regard to individual rights vested in the past there is no power at all for the union to dispose of the claim without the consent of the employee-member. On the other hand, by force of statute and collective agreements the union always has a standing to negotiate and litigate such claims, but this procedural power must be kept strictly apart from the issue as to whether there is any power to dispose on the merits of the claim. This state of affairs is confusing and ought to be clarified by a statutory provision.

The picture becomes still more confusing when one considers that the union, jointly with the employer as the other party to the agreement, has the exclusive right to interpret the agreement. Joint interpretations by the parties to the agreement are binding upon the members. Now, is it possible to draw a distinct and unambiguous line between the interpretations of the agreement and the disposals of rights accrued? On close scrutiny it becomes clear that this is not the case. Some guiding principles are necessary to establish the borderline. However, it is a very difficult task to establish guiding principles of a precise nature. An interpretation must be unambiguous and applicable to similar situations. Furthermore, if a settlement has to rely heavily upon a subjective assessment of factors of a predominantly individual and/or casual nature it cannot be accepted as an interpretation of the agreement. But how can one determine when a

[5] Professor Folke Schmidt, *op. cit.*, note 6, p. 74, *supra*, at pp. 188 ff., discusses the problem under the heading "Who owns the grievance?".

[6] *Ford Motor Co.* v. *Huffman*, 345 US 330, 338 (1953).

[7] *Vaca* v. *Sipes*, 386 US 171, 190 (1967).

[8] Case cited above in note 6, p. 338.

settlement is based—wholly or predominantly—upon an assessment of such non-quantitative factors and when it is not?

Until recently unions have had little say in the administration of the collective agreement. Starting in 1974, with the enactment of the Act of Security in Employment, the picture is changing rapidly and radically. Unions will have a far-reaching right to act as a co-administrator and they will have a not inconsiderable discretionary power. This will create problems in the relationship between unions and their members.

So far, the legislator has disregarded the problem completely and the courts have not yet been faced with it. Soon enough the courts will have to fashion rules for the situation. In the present author's opinion something similar to the duty of fair representation under United States law will have to be developed.

5.6.3. *The duty of unions to represent their members*

What duty do unions have to take claims by members to the grievance procedure and to the Labour Court? How are they to behave in terms of negotiating with the employer and in terms of putting pressure upon the employer when they have taken a claim to the grievance procedure?

These are questions of considerable importance, since individual members are reluctant or unwilling to act on their own without the support of their union. Amazingly, the courts have not been faced with disputes in this field.[9] Professor Folke Schmidt[1] has held that an employee is entitled to damages from his union only if "the association (i.e. the union) has *obviously*[2] neglected the interests of the member in negotiations with the employer". The present author takes a somewhat less liberal view with regard to the extent of union power. Should members be entitled only to services that are not *obviously* negligent? It is here submitted that unions must have a wide range of discretion when deciding whether and in what way to process a grievance. But this discretion is more limited at the local level. Unions should have a considerable duty to represent members at the local level, though the union should be entitled to take a rather passive stand when it believes that the claim is unwarranted.[3] The same should

[9] The almost complete absence of disputes in this area indicates that unions have behaved responsibly towards members; cf. 5.6.1. There is in fact one case in this field, but the dispute was settled out of court after the judgment of the trial court. The dispute involved a woman who sued her union for breach of its duty to represent her in the grievance procedure. An earlier case involving the same woman, closely related to the trial court case, is described by Folke Schmidt, *op. cit.* note 6, p. 74, *supra*, at pp. 190 ff.

[1] *Op. cit.* note 1 section 1, p. 80.

[2] My italics.

[3] If the union in good faith feels that the grievance is frivolous there is no duty of representation at all.

apply to situations where members have conflicting interests. Under such a rule the individual employee should have the benefit of union assistance to start a grievance settlement procedure. His unwillingness or reluctance to continue on his own must be considerably less important once the procedure has started.

Thus, a member-orientated principle should apply at the local level. The union should be under a general duty to represent its members. Exemption from doing so should be granted only if "clearly justified". At the national level, however, a collective-orientated principle should apply. The union should have a less extensive duty to represent its members. Exemption from the duty should be allowed unless "clearly unjustified".

Undoubtedly, the union has no duty whatsoever to take members' claims to litigation or arbitration.

5.6.4. *Procedural options for the individual employee*

Individual members have no standing to use the grievance procedure. Of course, informal discussions can take place between management and employees. In a very limited number of collective agreements, such informal discussions have been classified as negotiations in the contractual sense. If the union refuses to represent the member in the grievance procedure, no negotiations will take place before litigation.

The rules relating to the right to use the grievance machinery are of a contractual character.[4]

Unions have a statutory right to represent their members before the Labour Court. If the union declines to go to litigation over a member's grievance, the member can go to the Labour Court himself. But what if the collective agreement has arranged for arbitration instead of litigation? First, it should be noted that members are bound by the arbitration clause. Members cannot prevent their union from calling for arbitration even though they may prefer their claims to be tried by the Labour Court and members are bound by the arbitration award.

Do members have a standing to litigate before the arbitration board when their union declines to represent them? If the agreement entitles them to do so, members are bound to take their claim to arbitration, though the arbitration clause may have to be modified to protect the individual. For various reasons, litigation before the Labour Court is to the advantage of the individual. Obscure contract clauses should be interpreted with this in mind.

[4] Cf. section 2 *supra*.

5.6.5. *Time-limit rules and individual employees*

Though the individual employee has no standing to use the grievance procedure, contractual time-limit rules are binding upon him. In other words, these rules are of a normative character.[5]

However, a number of questions arise when these rules are applied to members. The reason for this is that the time-limit rules have been written to suit the needs of management and unions. They must be adapted in order to ensure that individual members are given a fair chance to assert their claims when the union does not choose to represent them. In a number of cases the Labour Court has ruled on the matter.

5.6.6. *The position of employees not covered by the collective agreement*

The position of non-unionized employees as well as employees organized in a union other than that which holds the contract has to be dealt with separately in Sweden. This is so because Swedish law does not confer upon any union the right to represent all employees. Nor does Swedish law recognize an extension of the collective agreement.[6] Consequently, those employees are not legally bound by the collective agreement.

The most important question with regard to these employees is to establish to what time-limit rules their claims are subjected. The author is of the opinion that the time-limit rules of the collective agreement must be applicable. The great importance of the time-limit rules makes it quite unlikely that the employer would have accepted any other rules than the ones contained in the collective agreement if the matter had been raised when the employee was hired.

[5] Cf. section 2 *supra*.
[6] Cf. section 2 *supra*.