INVISIBLE CLAUSES IN COLLECTIVE AGREEMENTS

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I. INTRODUCTION

Purpose of This Article

The subject matter of this article is concerned with part of the general area of Scandinavian Labour Law relating to the effects of various terms connected with the *employment relationship* (the legal relationship between the employer and the employee). The terms of the employment relationship (*employment terms*) are derived from three principal sources: (1) an employment contract concluded between the individual employer and employee, (2) a collective agreement generally concluded between an industry-wide employers' association and an industry-wide trade union, and (3) the legislative enactments and rules of law governing labour relations. A peculiar feature of Scandinavian law is that the effects of an employment term depend upon which of the three sources mentioned above the term is derived from, as well as upon its literal meaning. Identical clauses may differ with respect to their effect on the employment relationship, depending upon whether the clause has as its source a collective agreement or the employment contract.

It is, however, often asserted that there are terms of employment relationships which have the same effects as collective agreement clauses even though they have not been explicitly inserted in the applicable collective agreement. Such terms might be called "invisible clauses" of collective agreements.

The System of Employment Terms

Before beginning to discuss "invisible clauses", it is necessary to present an outline of the structure of the Scandinavian system

of employment terms.[1] Here, it might be helpful to draw parallels between an employment relationship and an ordinary contractual relationship, for example, one based on a contract of sale or lease.

The rights and duties of the parties to an ordinary contract are normally determined by the terms of the actual contract as agreed to by the individual parties themselves. The terms of the contract are supplemented by legal rules, which may be either statutory or customary (judge-made), and which are usually optional but may sometimes be mandatory. With regard to an employment relationship, however, there is, as discussed above, a third source of rights and duties: the collective agreement, which in Scandinavia is most often executed on an industry-wide basis between federations of employers and employees.[2] The employment contract is usually the least significant source of employment terms. Such matters as hours of work, paid vacations, and sometimes even wages are regulated by extensive modern labour legislation containing predominantly mandatory provisions. Moreover, matters not settled by legislation are usually determined more or less extensively by collective agreements, which are as a rule mandatory with regard to individual employers and employees. Indeed, sometimes the only matter that the prospective parties to an employment relationship are left to decide by themselves is whether to conclude an employment contract or not. Even where the regulation by legislation and collective agreement is not so extensive, the freedom of the employer and the employee to mould their relationship usually comprises matters of minor importance only. Thus, the terms of a typical employment relationship are derived from

[1] On the structure of the system of employment terms, see especially Folke Schmidt, *Tjänsteavtalet,* Stockholm 1959, pp. 20 ff.; Jorma Vuorio, "Om kollektivavtalets reglerande verkan i nordisk rätt", *T.f.R.* 1957, pp. 45 ff.; Vuorio, *Työsuhteen ehtojen määrääminen,* Helsinki 1955, pp. 382 ff. On the legal framework of labour relations in Scandinavia in general, see, e.g., Walter Galenson, *The Danish System of Labor Relations,* Cambridge, Mass., 1952, Chapters X and XI; Galenson, *Labor in Norway,* Cambridge, Mass., 1949, Chapters V and X; T. L. Johnston, *Collective Bargaining in Sweden,* London 1962, Part II; Carl Erik Knoellinger, *Labor in Finland,* Cambridge, Mass., 1960, Chapter 9; Schmidt, *The Law of Labour Relations in Sweden,* Stockholm 1962, Chapters II, V, VIII and IX.

[2] In addition to rules of law and clauses of collective agreements and employment contracts, there is a fourth source of employment terms: the employers' shop rules. The shop rules are nowadays fairly insignificant. Moreover, their significance varies between the Scandinavian countries, depending in part on whether this institution is regulated by legislation—as in Finland and Norway—or not—as in Denmark and Sweden. In this paper the shop rules are disregarded. Cf. also Axel Adlercreutz, "The Rise and Development of the Collective Agreement", *Scandinavian Studies in Law,* vol. 2, Stockholm 1958, pp. 16 ff.; Schmidt, *Tjänsteavtalet,* pp. 29 ff., 76 ff.; Vuorio, *T.f.R.* 1957, p. 45 note 19.

more sources than are the terms of an ordinary contract, and the terms agreed upon by the parties to the contract themselves have less significance in the former case than in the latter.

In addition to these quantitative differences there is, however, a qualitative one, which involves the relationship between the source of the term and its effect. In an ordinary contractual relationship, this distinction does not exist. If the terms of an ordinary contract are not fulfilled, the question whether the disregarded duties are expressly mentioned in the contract or are derived from the legal rules governing it generally has no significance. In both cases, a legal action grounded on the breach of the contract is instituted in the same court, which grants the same relief. Although in employment relationships all terms derived from the various sources must be complied with by the parties to the relationship, there are special effects connected with breach of the employment relationship which depend upon the particular derivative source, as may be seen from the following descriptions:

(1) *Labour legislation* is officially enforced. The observance of the various statutes is supervised by factory inspectors, and violators are prosecuted by the Public Attorney.

(2) *Collective agreement* observance is supervised by trade unions and employers' associations. Disputes concerning collective agreements are tried in each of the Scandinavian countries by a special court—the Labour Court (in Denmark called the Permanent Court of Arbitration). Suits in this court are as a rule conducted by and against parties to collective agreements; this is true even where rights and duties of individual employers and employees are concerned. The relief given by the Labour Court differs in many cases from the relief that would be given by an ordinary court of law: in Sweden and Norway, damages may be mitigated according to special rules, and in Denmark and Finland damages are generally replaced by a compensatory fine, not closely dependent upon the actual loss, which must be paid by the violator to the wronged party. Finally, collective agreement relationships entail a labour peace obligation even in the absence of an express no-strike-no-lockout clause in the agreement. The meaning of this peace obligation is that strikes, lockouts, and other offensive actions constitute violations of the agreement, but only in so far as they are directed against the agreement.[3]

[3] As one of the specific effects of collective agreement clauses, their *automatic and mandatory effect* is sometimes mentioned. This effect means that the employment terms set out in the collective agreement shall be applied in

(3) In contrast to statutory rules and clauses of collective agreements, clauses in *employment contracts* are enforced like ordinary contract clauses. The wronged party brings an action against the other party in an ordinary court of law, and the relief given is usually damages prescribed according to general principles of the law of contracts.

Consequently, "invisible clauses" of a collective agreement are those employment terms which cannot be found in the express text of the agreement, but which nevertheless have the specific effects of collective agreement clauses. For example, a suit concerning the existence or construction of an "invisible clause" would be tried by the Labour Court; an employer or employee violating an "invisible clause" would (in Finland) be subject to a compensatory fine; and if offensive actions were used to secure employment conditions which conflict with an "invisible clause", the peace obligation would be infringed.

the employment relationships covered by the agreement irrespective of any contrary stipulations in the employment contracts in question. In some countries, this effect indeed seems to be peculiar to collective agreement clauses, as legislative provisions do not have similar effects. If a contract contains stipulations which are contrary to mandatory provisions in legislation, the result in these countries is that the contract is void, not that the mandatory provisions should be applied instead of the contract clauses. (See André Rouast, "Rapport général des pays de langue latine", in *Actes du deuxième congrès international de droit du travail,* Genève 1961, pp. 19, 510.) But in Scandinavia, it is not unusual that mandatory rules of law replace any contrary clauses in contracts, which remain effective in other respects. This is especially true in such fields as, e.g. labour legislation, where the main purpose of mandatory provisions is to protect one of the contracting parties. (See Henry Ussing, *Aftaler paa Formuerettens Omraade,* 3rd ed. Copenhagen 1950, pp. 188 f.; Carl Jacob Arnholm, *Privatrett,* vol. 2, Oslo 1964, pp. 219 f., 250; Lennart Vahlén, *Avtal och tolkning,* Stockholm 1960, pp. 234 f.) There is accordingly no reason to list the automatic and mandatory effect in the sense just described among the specific effects of collective agreement clauses. (Cf. further Alfred Hueck and Hans Carl Nipperdey, *Lehrbuch des Arbeitsrechts,* vol. 2, 6th ed. Berlin 1957, pp. 278 f., 389 ff.; Gerhard Schnorr, *Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung,* Munich 1960, p. 140 note 58; Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts,* vol. 2, Berlin 1965, pp. 576 f.) Yet one of the aspects of the automatic and mandatory effect is even here specific to collective agreements. The constitutional principles concerning *ex post facto* laws restrict the applicability of newly enacted legislation upon existing contractual relationships. The applicability of collective agreement clauses is not restricted by any such principles. Accordingly, the clauses of a new collective agreement shall be immediately applied in the existing employment relationships in question, any contrary terms in the employment contracts notwithstanding. (See Vuorio, *Työsuhteen ehtojen määrääminen,* p. 312 f.) It seems to me, however, that this aspect of the automatic and mandatory effect is without relevance for the purposes of this article.

Sources of "Invisible Clauses"

It is possible to think of several different ways in which "invisible clauses" may arise. In fact, the definition I gave for such clauses is so broad that it could be fulfilled by employment terms arising in any manner except by expressly inserting them in a collective agreement. However, a mere definition does not guarantee that "invisible clauses" really do exist; it is the object of this study to determine whether such clauses are involved in the employment relationship. In the search for "invisible clauses", the following kinds of employment terms should be examined:

(1) *Rules of Law.* Provisions of labour legislation are not enforced solely by means of inspections and prosecutions. Many such provisions contain a private-law core.[4] For example, if an employer does not pay an employee the overtime compensation prescribed by the Finnish Hours of Work Act, he may be prosecuted; but the employee is also entitled to sue the employer to recover the amount due to him according to the act. Moreover, some statutes dispense altogether with any official enforcement. For instance, the Swedish Paid Vacations Act contains no provisions on penalties or official supervision. The only legal sanctions to ensure the observance of the act are that the employee has an actionable right to the benefits granted to him by the act and that agreements to diminish these benefits are in most cases void. In this way, an employee may have rights against his employer not explicitly embodied in any agreement governing the employment relationship. Rules of law which become contract terms in this manner are commonly called *naturalia negotii* (in the singular, *naturale negotii*). This phrase is especially used about optional rules of law. However, for the purposes of this article there would seem to be no reason to treat optional and mandatory rules of law separately. Nor is the distinction between statutory and customary (or judge-made) law material in this context.[4a]

(2) *Implied Terms of Collective Agreements.* In determining the rights and duties of the parties to a contract, importance is sometimes attached to the intentions of the parties, even though

[4] Cf. Franz Gamillscheg, *Internationales Arbeitsrecht,* Berlin 1959, pp. 7 f.; Schmidt, *Tjänsteavtalet,* pp. 21 ff., 221 f.; Vuorio, *Työsuhteen ehtojen määrääminen,* pp. 189 ff.

[4a] In spite of the vast amount of labour legislation, customary law is still fairly important in labour law. This holds true in other Scandinavian countries more than in Finland, where the statute book contains an Employment Contracts Act.

these intentions have not been embodied in the express clauses of the contract. In such a case, we may speak of *implied terms* or *underlying assumptions* of the contract. Intentions giving rise to implied terms need not be those which the parties to the particular contract in question have actually had. We must distinguish between *actual* and *presumed* underlying assumptions. Parties to all contracts of a certain type are sometimes presumed to have concluded the contracts under certain assumptions. Such assumptions imputed to the parties are often based on what the court (or writer) in question thinks just and fair.[5] Presumed underlying assumptions are not very different from customary *naturalia negotii*. The main—if not the only—difference seems to be that the customary rules called *naturalia negotii* are already well established, whereas the presumed underlying assumptions of a contract are still emerging rules of law. Actual underlying assumptions, on the other hand, are based on actual intentions of the parties to the particular contract in question; the existence of such intentions may be inferred from the course of negotiations for the contract or from other circumstances connected with that contract or the parties to it. The actual underlying assumptions are further from *naturalia negotii* and closer to the express clauses of the contract. With regard to collective agreements in Finland, Norway and Sweden, even the actual underlying assumptions must, however, be clearly distinguished from express agreement clauses, as in these countries all collective agreements must be in writing and, consequently, only stipulations incorporated in the contract text can be regarded as express clauses of the agreement.

(3) *Clauses and Implied Terms of Employment Contracts.* Clauses of individual employment contracts might perhaps sometimes have the specific effects of collective agreement clauses. The problems connected with this possibility are, however, rather different from problems met in the search for "invisible clauses" among rules of law and implied terms of collective agreements. For this reason, clauses of employment contracts are left outside the scope of this article. In addition to express clauses, employment contracts, too, may contain implied terms, based on the actual or presumed intentions of the parties. It is natural that implied terms based on circumstances connected with the particular employment contract in question should be excluded from consideration here, together with the express clauses of the contract. However, there is no reason to exclude implied terms based

[5] See Knut E. Henriksen, *Tariffavtale og fredsplikt,* Oslo 1956, p. 137.

on the presumed intentions of parties to all employment contracts (or certain categories of employment contracts), as such implied terms are here akin to the *naturalia negotii* of employment contracts.

Approach and Arrangement

My approach to the problem of "invisible clauses" is different with regard to Danish and Norwegian law from what it is with regard to Finnish and Swedish law. In Denmark and Norway, principles concerning "invisible clauses" are already well established. Consequently, my approach to Danish and Norwegian law is purely descriptive. On the other hand, in Finland and Sweden there are still unclear points about the "invisible clauses". Therefore, I hope to be able to make some contribution towards a better understanding and more consistent application of Finnish and Swedish law in these matters. The descriptive treatment of Danish and Norwegian law is intended to serve not only as a source of information for the readers but also as comparative material which is useful in the analysis of Finnish and Swedish law.

The order in which the treatment of the subject matter of this article is arranged depends on still other considerations. The fact that a certain employment term has some of the specific effects of collective agreement clauses does not necessarily mean that it has all other such effects as well. In particular it seems possible to detach the protection of employment terms through the peace obligation from the other specific effects of collective agreement clauses. Therefore, I begin by disregarding the peace obligation and searching for employment terms which would have other specific effects of collective agreement clauses. Afterwards, I will continue with a search for employment terms protected by the peace obligation.

II. "INVISIBLE CLAUSES" WITHOUT REGARD TO THE PEACE OBLIGATION

"Invisible Clauses" Supplementing Express Clauses

A distinct category of "invisible clauses" seems to consist of rules supplementing or construing express clauses of collective agree-

ments. Describing the practice of the Swedish Labour Court, Professor Folke Schmidt speaks of "*naturalia negotii* of collective agreements". He refers to two decisions concerning questions of this kind. One of the cases was about a collective agreement which quoted minimum wages for work by the hour, but allowed individual employers and employees to agree freely about piecework rates. In spite of the wording of the agreement, the Labour Court regarded it as a *naturale negotii* of the agreement that the employers and employees were not free to agree on piecework rates which clearly could not even give the employees the quoted minimum wages for work by the hour. The other case also concerned piecework rates. The rates were given by the collective agreement in question, but the agreement contained no express clause about the effect of changed circumstances. According to the opinion of the Labour Court, however, the agreement had been concluded under the assumption that if the methods of work, raw materials, etc., were essentially changed, either party to the agreement was entitled to terminate it with regard to the piecework rates.[6]

In my opinion, it is quite natural that rules concerning the construction or application of express clauses in collective agreements should share the specific effects of these clauses. It is immaterial whether these rules of construction and application arise out of statutory or customary law or out of the underlying assumptions of the collective agreement. Another distinction is similarly immaterial. The first case mentioned by Professor Schmidt concerned the construction of such an express clause as can occur in collective agreements only, not in employment contracts. It is, however, easy to find clauses occurring in employment contracts as well as in collective agreements. Let us take one example. Sec. 6 of the Finnish Employment Contracts Act provides that if, according to the wording of their contract, the employer and the employee should observe different periods of notice, the shorter of the agreed periods shall prevail. Here we have a mandatory provision prescribing that a contract clause shall be given a construction diverging from the literal contents of the clause. Suppose that the collective agreement contains no clause concerning the termination of employment relationship,

[6] See *Swedish Farm Workers' Association* v. *Swedish Gardening Employers' Association,* 1936 A.D. no. 29; *Road Board in Jösse District* v. *Truck Owners' Association in Western Värmland,* 1938 A.D. no. 57; Schmidt, *Tjänsteavtalet,* pp. 349, 356.

and the employer and the employee are accordingly free to arrange this question by themselves. If they make a contract granting a two months' period of notice to the employer and a three months' period to the employee, the rule of sec. 6 becomes operative. In case of disagreement, the rule shall be applied by an ordinary court of law in a suit between the employer and the employee. But suppose that the clause granting two months' notice to the employer and three months' notice to the employee was inserted in the collective agreement itself. Sec. 6 of the Employment Contracts Act would be operative in this case too, but it would now be applied in interpreting a clause in a collective agreement. Accordingly, any differences would now be decided by the Labour Court in a lawsuit between the parties to the collective agreement. Thus, sec. 6 would now be an "invisible clause" of the collective agreement rather than the employment contract.

"Invisible Clauses" Depending upon the Existence of a Collective Agreement

Another category of "invisible clauses" consists of rules which are applied only in employment relationships governed by a collective agreement, even though they are neither mentioned in the collective agreement nor concerned with the construction or application of any of its express clauses. As early as in the 1930s, the Swedish Labour Court recognized the right of association as an implied term of every collective agreement. If an employer bound by a collective agreement dismissed an employee because of his membership of or activity in a trade union bound by the same agreement, he was deemed to have violated the agreement even when the right of association was not provided for expressly. This implied right of association was considered to be derived solely from the collective agreement, and an employee whose employment relationship was not covered by a collective agreement was not protected against dismissal because of union activities. Therefore, cases concerning the right of association were quite properly considered to be within the jurisdiction of the Labour Court, which has jurisdiction to hear and try all cases concerning collective agreements.[7]

[7] See Schmidt, *The Law of Labour Relations in Sweden*, p. 127; Lennart Geijer and Folke Schmidt, *Arbetsgivare och fackföreningsledare i domarsäte*, Lund 1958, pp. 35 ff., 363 f., 375 (German summary, pp. 393 f.).

These cases concerning the right of association have been superseded by new legislation.[8] However, there still remain other employment terms which depend upon the existence of collective agreements. For instance, according to the Swedish Labour Court it is an underlying assumption of every collective agreement that no employment contract governed by the agreement may include clauses which would prevent the employee from participating in offensive actions ordered by his union (and not violating the collective agreement in question).[9]

In Finland, no such underlying assumptions of collective agreements are known. This may partly be due to the existence of the Employment Contracts Act, where many matters are regulated otherwise than subject to underlying assumptions. There is another reason for the notion current in Finland. The power of employers' and employees' organizations to conclude agreements which are binding on persons who are not personally parties to the agreement is considered an exception to the general principle of privity of contracts. For this reason, this power should only be extended to cases clearly recognized by legislation; and as all collective agreements must be in writing, the parties to the agreement could not bind others by means of any assumptions having no connection with the text of the agreement.[1]

"Invisible Clauses" Introduced by Legislation

It is of course perfectly possible to enact legislative provisions furnishing certain employment terms with some specific effects of collective agreement clauses. In this way, the Swedish Paid Vacations Act provides that differences arising out of the act in those situations in which the employer and the employee in question are bound by a collective agreement must be tried by the Labour Court, but in other situations by an ordinary court of

[8] See the Swedish Act on the Rights of Association and Negotiation, 1936; Schmidt, *The Law of Labour Relations in Sweden*, pp. 127 ff.

[9] See *Swedish Wood Industry Workers' Association* v. *Employers' Association of the Swedish Wood Products Industry*, 1944 A.D. no. 82; Svante Bergström, *Arbetsrättsliga spörsmål*, vol. 1, Stockholm 1950, pp. 57 f.; Geijer and Schmidt, *op. cit.*, p. 272.

[1] See Arvo Sipilä, "Tertiuksen velvoittaminen työehtosopimuksella", *Lakimies* 1951, pp. 498, 501 f.; Sipilä, "Om några divergenser mellan Finlands och Sveriges lagar om kollektivavtal", *F.J.F.T.* 1962, pp. 279, 281 f.; Urho Kopponen, *Työehtosopimus työsuhteen perussäännöksenä*, Helsinki 1954, pp. 109 ff.; Vuorio, *Työsuhteen ehtojen määrääminen*, pp. 302 ff.

first instance. The same distinction applies to differences arising out of some other acts of lesser importance.[2] Accordingly we have here instances where the employment terms in question exist without regard to collective agreements, but where the existence of a collective agreement provides these terms with some of the specific effects of collective agreement clauses.

The jurisdiction of the Swedish Labour Court has been enlarged in other respects also. For example, the Labour Court hears and decides most actions concerning the application of the Act on the Rights of Association and Negotiation.[3] However, the competence of the Labour Court in such cases does not depend on whether the relationship between the litigants is governed by a collective agreement or not. Therefore, the extended jurisdiction of the Labour Court in these cases cannot properly be said to give rise to "invisible clauses" of any collective agreements.

No similar extensions of the jurisdiction of the Labour Court exist in Finland.

Transfer of Employment Terms from the Employment Contract Sphere to the Collective Agreement Sphere

The main problem to be treated before beginning to discuss the peace obligation is whether there are employment terms which exist independently of collective agreements but which have effects upon employment relationships governed by collective agreements which are different from the effects upon other employment relationships. We might say that such employment terms are transferred from the *employment contract sphere* to the *collective agreement sphere* by virtue of the existence of the collective agreement. This concept of "transferring" employment terms from one sphere to another is, of course, a shorthand way of describing a variety of possibilities. The concept is intended to describe how some employment terms which before the conclusion of the collective agreement had the specific effects of employment contract clauses have with the conclusion of the collective agreement achieved at least some of the specific effects of collective agreement clauses. It does not imply that these terms would necessarily acquire *all* the specific effects of collective agreement

[2] See Schmidt, *The Law of Labour Relations in Sweden*, p. 53.
[3] See Schmidt, *op. cit.*, p. 52.

clauses, nor that they would necessarily lose all the specific effects of employment contract clauses. It might well be possible for some employment terms to acquire some—or all—of the specific effects of collective agreement clauses while retaining some—or perhaps all—of the specific effects of employment contract clauses, thereby being in force in both spheres simultaneously. We have already seen that provisions of the Swedish Paid Vacations Act and some other Swedish statutes are transferred from the employment contract sphere to the collective agreement sphere. This result follows, however, from express provisions in these statutes. The central problem is whether there are any employment terms which are similarly transferred without express authority in legislation.

Professors Folke Schmidt and Svante Bergström seem to answer this question in the affirmative. Professor Bergström is more pronounced in his answer. He even endeavours to present principles for drawing the line between those employment terms which are transferred to the collective agreement sphere and those which remain in the employment contract sphere. The fact that some terms remain in the employment contract sphere is undisputed.

Among those terms which remain in the employment contract sphere the rule of so-called reasonable wages is the most prominent. This rule provides that if no express contract provision about the amount of wages exists, the employee shall be paid reasonable remuneration for work performed. Even where the employment relationship is governed by a collective agreement (but wages are determined neither in the collective agreement nor in the employment contract), the rule about reasonable wages is administered by ordinary courts of law and not by the Labour Court.[4]

Suits concerning the rule of reasonable wages are not, however, the only cases when the Swedish Labour Court refuses to exercise jurisdiction. We might cite a case where an action was brought at the Labour Court against an employer because of the contents of the testimonial given to an employee. As the collective agreement in question contained no clauses about testimonials, the action was dismissed (although, under general principles of law, the employer was undoubtedly responsible for testimonials given by him).[5] This decision is commented upon by Professor Schmidt in the following manner: "Consequently, the duty to deliver testi-

[4] See Schmidt, *The law of labour relations in Sweden*, p. 185; Schmidt, *Tjänsteavtalet*, pp. 319 ff.; Bergström, *op. cit.*, vol. 1, p. 49.

[5] See *Isaksson* v. *Tuolluvaara Mine Co.*, 1947 A.D. no. 38.

monials does not belong to those rules concerning the employment contract which have been considered to be included among the *naturalia negotii* of the collective agreement."[6] Other decisions show, *inter alia,* that the Labour Court does not admit employers' claims for damages because of the negligence of employees, unless the duty to be careful is expressly imposed upon the employees in the collective agreement.[7] On the other hand, I have not found any decision in the opposite direction, i.e. admitting claims based on employment terms connected with neither the existence nor the contents of the collective agreement in question.

The fact that no such decisions can be found does not, of course, prove that transfers of employment terms from the employment contract sphere to the collective agreement sphere would always be impossible. First, it might be possible to disagree with the Labour Court and maintain that the court should have exercised jurisdiction over some of the dismissed actions. Secondly, without disagreeing with the decisions rendered by the Labour Court, it is possible to argue that the court would be required to try other actions which have not yet been brought before it.

Professor Bergström has adopted the first standpoint to a certain degree. He points out, that according to the practice of the Labour Court, trivial circumstances decide whether a given employment term belongs to the collective agreement sphere or the employment contract sphere. If the collective agreement happens to contain a clause stating that the employees shall be careful in their work, damages for negligence are awarded by the Labour Court according to the special provisions of the Collective Agreements Act; but if the agreement is silent on this point, a suit for damages has to be brought before an ordinary court of law and decided according to the general principles of the law of contracts. Yet, the primary duty of the employee to be careful is identical in both situations, as the collective agreement clause does not add anything to the duties of the employee according to the customary *naturalia negotii* of employment contracts. Professor Bergström argues that violations of these identical duties should have the same consequences and that differences concerning these conse-

[6] See Schmidt, *Tjänsteavtalet,* p. 269.

[7] See Bergström, *op. cit.,* vol. 1, pp. 59 ff.; Schmidt, *The Law of Labour Relations in Sweden,* pp. 48 f. See also, e.g., *Local no. 7* v. *Cab Owners' Association in Stockholm,* 1946 A.D. no. 67, not admitting a suit for damages because of alleged violations of the Hours of Work Act.

quences should also be decided by the same instance, the Labour Court.[8]

In addition to these criticisms of the practice of the Labour Court, Professor Bergström infers from certain *dicta* of the Labour Court and from some of its decisions in matters concerning the peace obligation that the court would assume jurisdiction in suits concerning some kinds of employment terms not connected with the existence or contents of collective agreements. Professor Schmidt seems to be of the same opinion with regard to at least some of these inferences.[9] Before I can comment upon these inferences I must, however, discuss the "invisible clauses" with regard to the peace obligation. My final views on the problem whether the mere existence of a Swedish collective agreement does transfer some employment terms from the employment contract sphere to the collective agreement sphere are therefore left until the close of this article.

The question whether a Finnish collective agreement may bring about similar transfers is commonly answered in the negative.[1] This result can be explained by the Finnish views, already mentioned, that the provisions concerning the effects of collective agreements shall be construed narrowly.[2] Moreover, mere references in a collective agreement to legislative provisions are not taken by the Finnish Labour Court to incorporate these provisions in the collective agreement. If, e.g., the collective agreement provides that "overtime compensation shall be paid according to law", the Finnish Labour Court, unlike the Swedish court, does not admit suits concerning interpretation or violations of the provisions referred to.[3] The criticisms presented by Professor Bergström against the Swedish Labour Court could thus not be levelled in all respects against its Finnish counterpart.

[8] See Bergström, *op. cit.*, vol. 1, pp. 48 ff., 59 ff. Cf. also Schmidt, *The Law of Labour Relations in Sweden*, pp. 49 f., 221 ff.

[9] See Bergström, *op. cit.*, vol. 1, pp. 54 ff.; Schmidt, *The Law of Labour Relations in Sweden*, pp. 48, 184 f.; Schmidt, *Tjänsteavtalet*, pp. 269, 319.

[1] See Vuorio, *Työsuhteen ehtojen määrääminen*, pp. 260 ff.

[2] See p. 188 *supra*, at note 1.

[3] See *Finnish Paper Industry Employees' Association* v. *Finnish Wood Processing Employers' Association*, 1951 T.T. no. 1; *Ships' Officers' Association* v. *Employers' Association in Coastal and Inland Navigation*, 1953 T.T. no. 7.

If the legislative provision referred to would not be applicable except for the reference in the collective agreement, the situation is naturally different. See *Ships' Officers' Association* v. *Employers' Association in Overseas Navigation*, 1957 T.T. no. 9.

Danish and Norwegian Law

In Denmark, there appears to be a greater inclination to insert "invisible clauses" in collective agreements by implication. According to the Danish standpoint, collective agreements are based on the general assumption that the relations between the organizations have been settled by the agreement. Hence, differences regarding questions not expressly mentioned in the collective agreement are to be solved by supplementing the agreement with arbitration or litigation. However, wages constitute an exception; if the agreement does not stipulate wages for a certain kind of work, a wage clause cannot generally be supplemented without the consent of both parties. Even with this important exception, the general rule would seem to leave ample possibilities for supplementing collective agreements with "invisible clauses". However, most of the decisions cited by Danish writers in this context are similar to the Swedish cases mentioned earlier. The largest group is formed by decisions which interpret or supplement specific clauses in collective agreements. The right of association is also dealt with. This right is drawn with wider limits than in the Swedish cases. It is an implied term of every collective agreement that not only is the employer forbidden to dismiss employees because of union activities but also he must not systematically avoid union members when hiring new employees.

Yet we do find instances in which Danish collective agreements are supplemented with rules which are not connected with any specific clauses in the agreements in question. Thus, the principles embodied in the General Agreement between the Danish Employers' Association and the Federation of the Danish Trade Unions are used for supplementing collective agreements concluded by non-members of the Employers' Association or of the Federation. In this way, the employer's prerogative of directing and distributing work, mentioned in the General Agreement, is considered to constitute an underlying assumption of all collective agreements. Here, the mere existence of a collective agreement seems to transfer an employment term from the employment contract sphere to the collective agreement sphere; for undoubtedly the employer's prerogative also exists in employment relationships not covered by collective agreements, and in such relationships the prerogative must have the specific effects of employment contract clauses.

One of the reasons why it is easy to operate with underlying

assumptions of collective agreements in Denmark seems to me to be the fact, already referred to, that in Denmark the collective agreements need not be in writing, as they must be in the other Scandinavian countries, in order to be valid. The underlying assumptions applied in Danish cases seem to consist mainly of principles developed in the practice of the labour market. Provisions of labour legislation do not seem to have been introduced into the collective agreements as "invisible clauses" with the effect that violations of them would be regarded as infringements of the agreements.[4]

The Norwegian Labour Court has also used the conception, which we already know from Denmark, that every collective agreement is assumed to regulate thoroughly those employment relationships which are governed by it, and consequently any incompletenesses in the agreement must be rectified by supplementing the agreement judicially.[5] It seems, however, difficult to find decisions in which this principle has been relied upon in another manner than to interpret and supplement specific clauses in collective agreements.[6] The right of association as an underlying assumption of every collective agreement is nevertheless recognized in Norway, too.[7]

III. "INVISIBLE CLAUSES" WITH REGARD TO THE PEACE OBLIGATION

The Peace Obligation

In the Introduction I have already mentioned the peace obligation connected with every Scandinavian collective agreement. In Finland and Sweden, the peace obligation is statutory, regulated in the Collective Agreements Acts of these countries. The extent

[4] See Knud Illum, *Den kollektive Arbejdsret*, 3rd ed. Copenhagen 1963, pp. 110 ff., 181 ff.; Allan Rise and Jens Degerbøl, *Grundregler i dansk arbejdsret*, 2nd ed. Copenhagen 1961, pp. 76 f.; Galenson, *The Danish System of Labor Relations*, p. 234.

[5] See Kristen Andersen, *Arbeidsretten og organisasjonene*, 2nd ed. Oslo 1956, p. 153.

[6] See Andersen, *op. cit.*, pp. 130 ff.

[7] See Paal Berg, *Arbeidsrett*, Oslo 1930, p. 198. In Berg's opinion, the right of association is an aspect of the peace obligation. See also Henriksen, *op. cit.*, pp. 82 ff.

of the peace obligation is defined in the Finnish act by stating that such offensive actions (i.e. strikes, lockouts, boycotts, obstruction of work, etc.) as are directed against the existing collective agreement as a whole or against any of its provisions are prohibited (sec. 8). The Swedish act (sec. 4, subsec. 1) goes further into detail and forbids offensive actions which arise as a result of:

(1) a dispute respecting the validity, existence or correct interpretation of the agreement, or on account of a dispute as to whether a particular action constitutes an infringement of the agreement or the provisions of the Collective Agreements Act;

(2) an attempt to bring about an alteration in the agreement;

(3) an attempt to enforce a provision which is to come into operation on the expiration of the agreement; or

(4) a design to assist others in cases where those others are not allowed themselves to commit offensive actions.

In Sweden, the peace obligation falls upon all those persons who are bound by the collective agreement, i.e. the parties who have concluded the agreement, and all associations, employers and employees that, directly or through one or more intermediate associations, are members of the associations which are parties to the agreement. In Finland, the coverage of the peace obligation is the same but with one rather important exception, namely that it does not fall upon individual employees. In both countries, all associations bound by the agreement are also obliged to work actively against recourse to offensive actions by their members (associations, employers and employees). Associations which are not themselves bound by the collective agreement but which have members bound by it also have some duties connected with the peace obligation. Moreover, actions and omissions of association officers, such as union-elected shop stewards, are imputed to the associations. In this way, the fact that Finnish employees are not personally responsible for violations of industrial peace does not make the peace obligation illusory in this country.

The statutory peace obligation of Finland and Sweden is mandatory and provides a legal minimum; a clause in a collective agreement purporting to abolish or restrict it is null and void. In Sweden it is possible to enlarge the peace obligation by agreement. Such agreements are effective in Finland also, in so far as the parties to the agreement may take upon themselves extended duties; but branch associations and employers upon whom the peace obligation falls because of their membership cannot be made responsible for violations of such extended duties, nor can any

responsibility for violations of industrial peace be extended to individual employees.[8]

The Norwegian Labour Disputes Act also contains a provision (sec. 6, subsec. 1) which resembles the provisions about the peace obligation in the Finnish and Swedish Collective Agreements Acts and which forbids strikes and lockouts because of differences concerning existing collective agreements. However, this is regarded as being a public-law provision, constituting a duty towards the State; violation of the provision was earlier an indictable offence. (No similar provisions exist in the other Scandinavian countries and, even in Norway, offenders against the provision were seldom prosecuted.) However, a peace obligation falls upon a party to the collective agreement by virtue of the agreement. If not expressly stipulated it is implied as an underlying assumption. This contractual peace obligation does not coincide with the statutory no-strike-no-lockout provision. Yet even the contractual peace obligation is but relative. Only offensive actions instituted because of circumstances regulated through the collective agreement are enjoined.[9]

The peace obligation is based on customary rules in Denmark also. There, as in the other Scandinavian countries, the peace obligation is relative. Work stoppages are forbidden in so far as they are aimed at an overthrow or alteration of the existing collec-

[8] See Schmidt, *The Law of Labour Relations in Sweden*, pp. 162 ff.; Sipilä, *Suomen työoikeus*, vol. 1, Porvoo 1947, pp. 176 f.; Sipilä, *Lakimies* 1951, pp. 499 ff.; Sipilä, *F.J.F.T.* 1962, pp. 281 f., 286 f., 292; Kopponen, *op. cit.*, pp. 199 ff.; Vuorio, *Työsuhteen ehtojen määrääminen*, pp. 335 ff.; Vuorio, "Työrauhanvelvollisuudesta", *Juhlajulkaisu Toivo Mikael Kivimäki*, Vammala 1956, pp. 451 ff. An opinion has been presented that it would be possible to enlarge the peace obligation of branch associations and member employers and to extend the obligation to member employees. See Allan Viranko, "Työehtosopimuksen sitovuus", *Lakimies* 1951, pp. 471 ff.; Tapani Virkkunen, "Työehtosopimuksen sisällyksen oikeudellisista rajoista", *Lakimies* 1951, pp. 494 f.; cf. also T. M. Kivimäki, *Työlakko yksityisoikeudellisilta vaikutuksiltaan*, Porvoo 1927, pp. 82, 163 ff., 174 f. The reasons given by Sipilä *et al.* against this opinion seem to me, however, conclusive. Nevertheless, it might be possible to impose a certain peace obligation on member employees by inserting in the collective agreement a clause defining the employees' duty to perform work. See Vuorio, *Juhlajulkaisu Toivo Mikael Kivimäki*, p. 471. Cf. also *Finnish Association of Building Contractors* v. *Finnish Building Workers' Association*, 1961 T.T. no. 17.

[9] See Berg, *op. cit.*, pp. 199, 204 f., 235 ff.; Paal Berg and Toralf Evje, *Arbeidstvistloven, Lov om offentlige tjenestetvister, Lønnsnemndloven*, 6th ed. Oslo 1959, pp. 62 ff.; Andersen, *op. cit.*, pp. 40 f., 194 f., 225 f.; Henriksen, *op. cit.*, pp. 33 ff., 44, 131 f. The penalty provision was repealed in 1956. Notwithstanding the repeal, the notion of the public-law character of the no-strike-no-lockout provision still prevails. See Berg and Evje, *loc. cit.*

tive agreement, or at the regulation of labour relations after the expiration of the existing agreement; but it is in principle lawful to institute stoppages in order to back claims which are new in the sense that they have not been solved through the existing agreement.[1]

"Invisible Clauses" in Norway and Denmark

The question whether a collective agreement can contain "invisible clauses" with regard to the peace obligation has aroused wide interest in Scandinavia. In Denmark and Norway, the law seems to be fairly settled on this point. As mentioned previously, the peace obligation forbids offensive actions instituted because of circumstances regulated by the existing collective agreement. But a question need not be expressly mentioned in the agreement in order to be regarded as regulated by it. The collective agreement may be said to regulate various items by implication. As early as 1918, the Norwegian Labour Court stated that if a party has not succeeded in putting through a claim during the negotiations for a collective agreement, the same claim must not be advanced by undertaking offensive actions during the lifetime of the agreement. Some years later, it was held that if a question was regulated by statutory law, the existence of a collective agreement precluded resort to offensive actions in order to obtain more favourable terms than those granted by the statute, even though the question was not mentioned in the agreement at all. And a decision of 1922 stated that even in other cases where a party would have had a reasonable occasion to present a claim during the negotiations for a collective agreement but had failed to do so, that party could not advance the claim by resorting to offensive actions during the agreement period.[2]

The situation in Denmark is in this respect very similar to that in Norway. And it is no wonder that the general underlying assumption of Danish collective agreements that the relations between the organizations have been settled by the agreement is also taken to imply that work shall go on undisturbed during the agreement period. In a way, we can trace the origins of this idea back to the great conflict of 1899. An arbitral award of that

[1] See Illum, *op. cit.*, pp. 244 f.; Galenson, *The Danish System of Labor Relations*, p. 244.

[2] See Berg, *op. cit.*, pp. 196 ff.; Andersen, *op. cit.*, pp. 195 ff.; Henriksen, *op. cit.*, pp. 43 f., 64 f., 77, 97 ff.

year declared that even though the lockout did not violate any duties expressly mentioned in the agreements in question, the lockout was in conflict with the underlying assumptions of those agreements. It is true that those assumptions were not concerned with the employment relationships between single employers and their employees, but with the relationships between the parties to the agreements in question. But perhaps the award may nevertheless be regarded as a forerunner to the present case law, which forbids offensive measures designed to alter employment terms not expressly regulated in the existing collective agreement.

We saw earlier that the general underlying assumption of Danish collective agreements that such an agreement regulates thoroughly the terms of all employment relationships covered by it does not extend to situations where wages for certain kinds of work are not stipulated in the agreement. Similarly, the peace obligation does not extend to such cases, and both sides are free to use offensive actions to determine wages for the work in question.[3]

The Problem in Sweden and Finland

In Sweden and Finland the question whether "invisible clauses" can be regarded as being inserted into collective agreements in that sense that they are covered by the peace obligation is much more disputed than in Norway and Denmark. Strange as it may seem, this situation is apparently due, partly at least, to the fact that the extent of the peace obligation is regulated in Sweden and Finland by statute, but in Norway and Denmark by customary law.[4] Yet it would be perhaps more important to know the answer to the question in Sweden and Finland than in Norway and Denmark. Danish and Norwegian collective agreement parties may evade the question by defining the peace obligation more precisely

[3] See Illum, *op. cit.*, pp. 11, 244 ff.; Rise and Degerbøl, *op. cit.*, pp. 62 ff.; Galenson, *The Danish System of Labor Relations*, p. 244; Hjalmar V. Elmquist, "Fredspligten ifølge den kollektive arbejdsoverenskomst med særligt hensyn til sympatiaktioner", *T.f.R.* 1937, pp. 265 f., 271 f.

[4] Another reason for the difference might be that, even in the general law of contracts, the doctrine of underlying assumptions has been more influential in Norway and Denmark than in Sweden and much more influential than in Finland, where this doctrine has been met with great suspicion. See Knut Rodhe, "Adjustment of Contracts on account of Changed Conditions", *Scandinavian Studies in Law*, 1959, p. 166; Berndt Godenhielm, *Om säljarens bundenhet under ändrade förhållanden*, Helsinki 1954, especially pp. 78 ff.

in the agreement, but the Swedish and Finnish provisions on the peace obligation are partially mandatory.

The questions to be answered can be stated more accurately in the light of the Finnish and Swedish statutory provisions concerning the peace obligation. In Finland, we should examine whether an offensive action concerning a question not expressly mentioned in a collective agreement could nevertheless be considered to be directed "against the agreement as a whole or against any of its provisions". In Sweden, it would be determined whether an offensive action concerning such a question could be contrary to some of the provisions of subsec. 1 of sec. 4 of the Collective Agreements Act. Several of the details of the subsection could be considered. For example, if it was sought to solve by offensive action a dispute concerning the existence, validity or correct interpretation of employment terms not mentioned in the existing collective agreement, the action might violate point 1 of subsec. 1; and if offensive actions were used to settle employment terms in a respect not mentioned in the agreement, point 2 might have been violated.

Materials Concerning Swedish Law

On occasion, the Swedish Labour Court has had to deal with the question of "invisible clauses". Attention is usually drawn especially to a case from 1933. A trade union had ordered a boycott against an employer in order to force him to re-engage certain workers who had been dismissed. The collective agreement in force contained no express stipulation concerning the employer's right to dismiss workers, nor could any specific clause of the agreement be construed to refer to that right. Nevertheless, the Labour Court stated that general principles of law allow both parties to an employment contract to terminate the contract after a reasonable period of notice, unless the right to terminate the contract has been expressly restricted, and that therefore the boycott was intended to deprive the employer of a right he possessed. Thus, the boycott was held to violate point 2, which forbids the use of offensive actions in order to bring about an alteration in a collective agreement.[5]

This decision of the Labour Court is well in line with the *travaux préparatoires* of the Collective Agreements Act. From the

[5] See *Swedish Metal Trades Employers' Association* v. *Swedish Metal Industry Workers' Association,* 1933 A.D. no. 159.

report of the commission which prepared the Swedish Collective Agreements Bill, the following passage, written in support of the commission's proposals concerning the peace obligation, may be quoted: "The circumstance that a certain question is not mentioned in the agreement is not conclusive proof that the question is not regulated by the agreement."[6] In the Minister's statement on the purposes of the bill the reasoning of the commission is carried further. The Minister mentions the question—which we know already from the situation existing in Denmark and Norway—about claims presented but not carried through during the negotiations for a collective agreement. Then he continues by stating that in certain cases it is not necessary that the claim be presented during the negotiations. Such is the case if offensive actions are employed to deprive one of the parties of a right that he possesses, or to furnish him with a right that he does not possess, according to the nature of the matter, if the agreement does not contain any express opposite stipulation.[7] Expressions similar to these passages from the *travaux préparatoires* are still used today by litigants before the Labour Court as well as by the court itself in its decisions.[8]

Professor Schmidt, however, does not seem to be quite happy with this situation. He compares the 1933 case with another decision, *Swedish Metal Industry Workers' Association* v. *Plumbing Employers' Association*.[9] This case is about a collective agreement which stipulated different wages for different groups of localities. When the agreement was to be applied in a locality not listed in any of the groups, negotiations were to be undertaken in order to arrange the grouping of the locality. The Labour Court held that the collective agreement contained no rule as to which group the new locality was to be ranged with and that it was accordingly permissible to resort to offensive action to solve this question. Professor Schmidt points out, however, that the court could have had recourse to general rules of law in this case, too. We remember the rule of reasonable wages, which provides that if no express contract about the amount of wages exists the employee shall receive reasonable remuneration for work performed. Why did

[6] See *Utkast till lagar om kollektivavtal och om arbetsdomstolar,* Stockholm 1927, p. 21.

[7] See Bill no. 39 of the Parliamentary Session of 1928, p. 95.

[8] See, e.g., *Swedish Industrial Salaried Employees' Association* v. *Swedish Metal Trades Employers' Association,* 1964 A.D. no. 5.

[9] 1947 A.D. no. 51.

the Labour Court not insert this principle into the collective agreement, as it did with the employer's prerogative to hire and fire? In fact, as mentioned by Professor Schmidt, the legislative history of the Collective Agreements Act shows well enough that it was not meant to be the business of the Labour Court to fix wages in the event of their being left unregulated in a collective agreement. The court's interpretation allowing it to decide upon the employer's prerogative if this was left unregulated "is not entirely beyond discussion", Professor Schmidt states, adding, however, that he will not pursue the criticism further.[1]

But the criticism is pursued further, in a much sharper tone, by the Finnish scholar Jorma Vuorio. He points out that if some "general principles" are inserted into the collective agreement and others are not, the parties can never know exactly the real contents of their agreement, and this is inimical to legal safety. Moreover, the erroneousness of the Swedish Labour Court can also be shown, without any value judgments, by the use of legal analysis. The starting point of Vuorio's analysis is the same as the starting point of this article. Employment terms are set in various ways: by collective agreements, employment contracts, provisions of statutes, and rules of so-called unwritten (customary) law. Terms of all categories should be complied with by the parties to the employment relationship; but various specific effects are connected with the terms of different categories. Thus, the provisions of the Scandinavian Collective Agreements Acts concerning offensive actions are only connected with norms of collective agreements, not with other norms. Rules of customary law are not norms of collective agreements, even though they are also binding on employers and employees. In the case under discussion, the right to terminate employment relationships was not mentioned in the collective agreement, but it was based upon customary law. Therefore, Vuorio concludes, this right was among the terms to be observed by the individual employers and employees, but the peace obligation, being a peculiar effect of the norms of collective agreements, could not be connected with this rule of customary law.[2]

On the other hand, Professor Bergström maintains that there is a relevant difference between the two decisions referred to. Questions not relating to wages should be regarded as protected by the

[1] See Schmidt, *The Law of Labour Relations in Sweden*, pp. 184 f. Cf. also Geijer and Schmidt, *op. cit.*, pp. 127 f., 375.

[2] See Vuorio, *T.f.R.* 1957 pp. 44 ff.; Vuorio, *Juhlajulkaisu Toivo Mikael Kivimäki*, pp. 462 ff.

peace obligation even when there are no references to them in the collective agreement. But why questions concerning wages should be treated differently is not explained by Professor Bergström.[3]

Materials from Finland

A fairly recent case from the Finnish Labour Court holds that if a collective agreement does not prescribe wages for certain kinds of work, but refers this question to be negotiated and regulated by the individual employers and employees concerned, it is permissible to use offensive actions in order to exert influence on these negotiations.[4] As regards questions not relating to wages, we have no cases bearing directly on the point. However, a case from 1956 gives us a fairly good indication of the standpoint of the Finnish Labour Court on this question. After an apothecary, Miss X, had given notice to one of her pharmaceutists, the Pharmaceutists' Association declared a boycott against Miss X in order to compel her to withdraw the notice. The employer's right to discharge employees at will on notice was not expressly confirmed in the collective agreement. There was, however, a clause to the effect that the period of notice should be one month, and another clause saying that notice should not be given to an employee during a period when he is drawing sickness pay or is on vacation. The Labour Court inferred from these clauses the prescription that, except in the cases specifically excluded, employers and employees were entitled to terminate their employment relationships by giving notice. Thus, the boycott was directed against this prescription and accordingly violated the peace obligation. One of the members of the court dissented, stating that the agreement contained no stipulations on the question whether the employers and employees were entitled to terminate their employment relationships by giving notice and that the boycott was therefore directed neither against the agreement as a whole nor against any of its provisions. Had the Labour Court been of the opinion that the peace obligation also covers offensive actions against employment terms not expressly mentioned in the collective agreement,

[3] See Bergström, *op. cit.*, vol. 1, pp. 41, 54 ff.; Bergström, review of Folke Schmidt's book *Kollektiv arbetsrätt*, *Sv.J.T.* 1951, pp. 618 f. Cf. Erland Conradi, review of Svante Bergström's book *Arbetsrättsliga spörsmål*, vol. 1, *Sv.J.T.* 1951, p. 359; Geijer and Schmidt, *op. cit.*, p. 375 note 29.

[4] See *Finnish Association of Building Contractors* v. *Finnish Building Workers' Association*, 1962 T.T. no. 15.

it would not have needed recourse to the somewhat strained construction of the clauses concerning time of notice, etc.; nor would the dissenting member have been able to reject the claim on the grounds mentioned by him.[5]

The problem of "invisible clauses" in collective agreements with regard to the peace obligation aroused interest in Finland even before the case mentioned above was tried. The first writer to treat the problem seems to have been Sakari T. Lehto. As his point of departure, he chose Norwegian and Danish law as expounded by Chief Justice Paal Berg and Professor Knud Illum. We have seen that in the countries in question the existence of a collective agreement precludes the use of offensive actions in order to enforce claims which were ineffectively presented during the agreement negotiations or which were not presented then in spite of a reasonable opportunity to do so. Lehto is very critical of this use of the doctrine of underlying assumptions. A collective agreement must be in writing, and this means that if no support whatsoever can be found in the express text of the agreement for the belief that the parties intended to regulate a question, it is not a matter for the Labour Court to add any regulation of this question to the agreement with the effect that such a regulation were protected by the peace obligation.[6]

The next scholar to write about the question was Professor Arvo Sipilä. He supports the position taken by Danish and Nor-

[5] See *Commercial Employers' Association* v. *Finnish Pharmaceutists' Association*, 1956 T.T. no. 6. According to Vuorio, who was on the bench deciding the case, the unanimous opinion of the Labour Court was that the case had to be decided according to what the collective agreement, construed literally, could be established to include. Whether the employer otherwise did or did not possess a right to terminate employment contracts could have no influence upon the outcome of the case. See Vuorio, *T.f.R.* 1957, p. 46.

The reason why I consider the construction used by the Labour Court to be strained is that the existence of the employer's right to discharge employees at will on notice cannot at all be dependent on the clauses in the agreement, as this right is based on mandatory provisions of the Employment Contracts Act (secs. 3–6, 27).

Cf. also *Finnish Association of Building Contractors* v. *Finnish Building Workers' Association*, 1961 T.T. no. 6. This case was about a strike which was begun to compel the employers to show the pay rolls to the shop stewards. This claim was based on a collective agreement clause stating that it was the duty of the shop stewards to check that the agreement was not violated. In the opinion of the Labour Court, however, the employees' claim could be based neither on this nor on any other clause in the collective agreement. Nevertheless, it was held by the court that the strike was directed against the clause just mentioned and that, accordingly, the peace obligation was infringed.

[6] See Lehto, "Työehtosopimuslaissa kielletyistä työtaistelutoimenpiteistä", *Lakimies* 1953, pp. 725 ff.

wegian law with regard to claims that were unsuccessfully presented during the agreement negotiations or were not presented then in spite of the reasonable opportunity. The reason given by Sipilä for this standpoint is that even if an offensive action is not directly aimed at a collective agreement, it cannot be considered permissible if the result of it would be that the purpose of the peace obligation provisions of the Collective Agreements Act would not be achieved.[7] More recently, Professor Sipilä has described the peace obligation by stating that an offensive action is forbidden if it aims at augmenting a collective agreement with a stipulation which earlier was not there.[8]

Lehto has, however, been followed by some other members of the younger generation. Vuorio's criticism against the interpolation of rules of statutory or customary law into collective agreements has already been mentioned. In recognition of Professor Sipilä's opinion Vuorio, however, distinguishes the underlying assumptions of collective agreements from mere *naturalia negotii* of employment contracts. The realization of the aims of collective agreements would require that offensive actions could not be used to support claims which were unsuccessfully presented during the negotiations for the existing agreement; and so far it would be reasonable to rely upon a doctrine of underlying assumptions. On the other hand, collective agreements should not have "invisible contents". Vuorio suggests a compromise between these two lines of reasoning. Parties to a collective agreement would be bound by the underlying assumptions, as they knew them; but the branch associations and employer members could only be responsible for offensive actions directed against the specific visible contents of the agreement.[9]

Criticism of Vuorio's Analysis

Vuorio's reasoning is in the form of a chain which holds only if all links are sound. It seems to me that there is one link the

[7] See Sipilä, "Milloin työtaistelutoimenpide kohdistuu työehtosopimukseen tai sen yksityiseen määräykseen", *Teollisuuden työsuhdejuristien neuvottelupäivät Helsingissä huhtikuun 12 ja 13 päivinä 1955* (mimeographed), Helsinki pp. 5 f.

[8] See Sipilä, *F.J.F.T.* 1962, p. 289. See also Sipilä's dissenting opinion in the case *Finnish Association of Building Contractors* v. *Finnish Building Workers' Association*, 1964 T.T. no. 21.

[9] See Vuorio, *Juhlajulkaisu Toivo Mikael Kivimäki*, p. 464. Vuorio's opinions have been adhered to by Erkki Wuori. See Wuori, "Eräistä työtaistelutoimenpiteistä työrauhavelvollisuuden kannalta", *Pykälä ry:n 25-vuotisjuhlajulkaisu*, Vammala 1960, pp. 111 f.

soundness of which can be doubted, namely the proposition that the provisions of the Scandinavian Collective Agreements Acts concerning offensive actions are only connected with norms of collective agreements. This proposition can be used as a sound link in Vuorio's chain only if the phrase "norms of collective agreements" is taken to mean only such employment terms as are expressly mentioned in the collective agreement. It must be conceded that the only Finnish case *nearly* in point does correspond to a narrow definition. However, a comparison with the law of the other Scandinavian countries argues for another solution. For decades the peace obligation of Danish and Norwegian law has been given a much broader coverage. Nor does a narrow definition correspond to the legislative history of the Swedish Collective Agreements Act or to the repeatedly stated opinion of the Swedish Labour Court. Finally, the provision concerning offensive actions in the Finnish Collective Agreements Act is by no means so clearly written as to make it inevitable to choose a narrow definition. For these reasons, the soundness of this link cannot in my opinion be proved by means of legal analysis alone, but must also depend on considerations of other kinds.

A Possible Solution

The solution might be found along a line suggested by Professor Bergström. I have mentioned before his opinion that all questions not relating to wages are protected by the peace obligation even when they are not mentioned in the collective agreement. According to Professor Bergström, this protection does not, however, necessarily transfer them from the employment contract sphere to the collective agreement sphere in other respects.[1] I think we can find an analogous feature in the practice of the Finnish Labour Court. I have already mentioned that if a collective agreement contains references to legislative provisions, the Finnish Labour Court does not admit suits concerning interpretation or violations of the provisions referred to.[2] But if offensive actions are resorted to in order to extract more favourable terms than those granted by the legislative provisions referred to in the collective agreement,

[1] See Bergström, *op. cit.*, vol. 1, p. 41. Cf. also Henriksen, *op. cit.*, pp. 100 f.
[2] See p. 192 at note 3, *supra*.

the peace obligation is deemed to have been violated.[3] How can it be explained that certain employment terms—the legislative provisions referred to in collective agreements—are protected by the peace obligation, but suits concerning interpretation or violations of the same terms are not admitted by the Labour Court? The only theoretical explanation I can give is that the legislative provisions referred to do not become collective agreement clauses by reference, but the reference is taken to mean only that the questions referred to shall remain outside the collective regulation for the agreement period. An attempt to extract more favourable terms by resorting to offensive actions would be tantamount to an attempt to regulate again the same questions collectively, which would be against the agreement.[4]

Another analogous feature is found in minimum-wage clauses. The practical effect of such clauses is undisputed. An employer may agree with any of his employees to pay higher wages than those listed in the collective agreement. A single employee who is not content with his wages may give notice, or continue to work only on condition that his wages be raised. But employees may not resort to concerted actions in order to get an increase.[5] In Sweden, this could be theoretically explained by construing the minimum-wage clause as a contractual enlargement of the statutory peace obligation. But in Finland this construction is not possible. As the reader may recall, the peace obligation which falls upon branch associations and employers because of their membership cannot be enlarged. The only possible explanation seems to be the same as with regard to references to legislation. The question of

[3] See *Finnish Brewery and Soft Drink Industry Employers' Association* v. *Finnish Food Industry Workers' Association*, 1949 T.T. no. 14; *Helsinki Dairy Co.* v. *Finnish Food Industry Workers' Association*, 1950 T.T. no. 2; *Commercial Employers' Association* v. *Finnish Food Industry Workers' Association*, 1950 T.T. nos. 4 and 5.

[4] Another explanation is supplied by Vuorio (who apparently has not thought of the possibility of an explanation along the lines now suggested). According to him, mere reminders of, or vague references to, provisions of legislation do not mean that such provisions are incorporated in the collective agreement; but more explicit references may result in such incorporation. Thus it would be a mere chance that explicit references have occurred in suits concerning offensive actions, reminders or vague references in suits of other kinds. (But I do not see any systematic difference in the explicitness or vagueness of the references in the two groups of cases.) See Vuorio, *Juhlajulkaisu Toivo Mikael Kivimäki*, p. 462. See also Vuorio, *Työsuhteen ehtojen määrääminen*, p. 260; Sipilä's review of that book, *Lakimies* 1956, p. 282.

[5] See Bergström, *op. cit.*, vol. I, p. 41; Schmidt, *Tjänsteavtalet*, p. 308; Andersen, *op. cit.*, pp. 204 ff.; Henriksen, *op. cit.*, p. 70; Illum, *op. cit.*, pp. 157 ff.

wages higher than the minimum granted by the collective agreement is by virtue of the minimum wage clause left outside the collective regulation; and an offensive action to extract higher wages is an attempt at a collective regulation in defiance of the agreement.[6]

Could not the "invisible clauses" be explained in a similar manner? For that purpose it would not be necessary to regard the term as such a *naturale negotii* or an implied term of the collective agreement. On the contrary, it would be either a *naturale negotii* or an implied part of the agreement that certain questions shall remain outside the collective regulation and thereby outside the field for permissible collective offensive actions, too.

The Suggested Solution and the Form of Collective Agreements

The solution suggested above may seem to be incompatible with the requirement that all collective agreements must be in writing. In this respect, there is a difference between the suggested solution, on the one hand, and the collective agreement clauses referring to legislative provisions or prescribing minimum wages, on the other. With regard to such clauses, the requirement of the written form is fulfilled. In these instances, there are specific clauses in the collective agreement that can be construed as leaving certain questions outside the collective regulation. But with regard to the suggested solution, it would not be the presence but the absence of clauses concerning certain questions that would be construed in such a manner.

Here, the difference between *naturalia negotii* and implied terms (underlying assumptions) might seem to be relevant. Even when a contract must be in writing, the rights and duties arising from the contract need not all be explicitly enumerated in the contract text. It is precisely the function of the *naturalia negotii*

[6] In Germany, this problem is solved in accordance with similar principles. However, the German solution is also connected with the theory that the use of offensive actions is not permissible unless the action is socially adequate. Actions concerning questions which are not *kollektivrechtlich* lack this quality. Therefore, they are wrongful even if no collective agreement is in force between the parties. To Scandinavian thinking, this theory appears strange. Cf., e.g., Alfred Hueck and Hans Carl Nipperdey, *Lehrbuch des Arbeitsrechts*, vol. 2, 6th ed. Berlin 1957, pp. 194 f., 642, 646 f.; Arthur Nikisch, *Arbeitsrecht*, vol. 2, 2nd ed. Tübingen 1959, pp. 120 f., 130 f., 291 f., 331 f.; Alexander Karakatsanis, *Die kollektivrechtliche Gestaltung des Arbeitsverhältnisses und ihre Grenzen*, Heidelberg 1963, pp. 34 ff., 104 ff.

of a contract to supplement it in matters not explicitly covered. The requirement of the written form means in this context that any deviations from the *naturalia negotii* must also be in writing –deviations agreed orally are not recognized. Thus we might say that the contents of a contract are determined not only by what is stated in the contract text but also by what is not stated there.[7] We can see that if the suggested solution can be regarded as a rule of customary law, it is not incompatible with the requirement of the written form.

But what is the situation if the suggested solution is not regarded as a customary *naturale negotii* but as an underlying assumption of collective agreements? Such an underlying assumption could be given the formulation that if the collective agreement contains nothing on such questions as, e.g., hours of work, overtime pay, paid vacations, etc., the intent of the parties is that the provisions of labour legislation shall be applied during the whole agreement period, and not merely until one of the parties thinks itself strong enough to impose more favourable terms upon the other. If we recall the distinction between actual and presumed underlying assumptions,[8] we can see that the assumption formulated above would be a typical presumed assumption. It would be based neither on the course of the negotiations for the particular collective agreement in question nor on other specific circumstances connected with that particular agreement or the parties to it. Instead, it would be an assumption attributed to all parties to collective agreements, or even to all persons concerned with collective agreements, negotiators and common members alike. As underlying assumptions of this kind are functionally very close to *naturalia negotii,* in my opinion the suggested solution, even if regarded as an underlying assumption of collective agreements, would not in itself be incompatible with the form requirement of collective agreements.

Are Customary Rules Concerning Collective Agreements Possible?

Although the suggested solution is not incompatible with the required written form of collective agreements, we must still ask

[7] Cf. also Hueck and Nipperdey, *op. cit.,* vol. 2, p. 240; Nikisch, *op. cit.,* vol. 2, p. 334.

[8] See p. 184 at note 5, *supra.* Cf. also Bergström, *op. cit.,* vol. 1, p. 37 note 9.

whether the statutory regulation of collective agreements admits of supplementation by means of customary *naturalia negotii* or presumed underlying assumptions. Is it not the purpose of the Collective Agreements Acts to regulate this field thoroughly, leaving no room for judge-made rules?

In Sweden, we have found other instances of customary *naturalia negotii* or presumed underlying assumptions of collective agreements. The reader may recall how the right of association was introduced among the terms of collective agreements by the Labour Court without any support in statutory law.[9] The construction recognizing the right of association as an "invisible clause" of every collective agreement seems to me not less far-reaching, especially when the legislative history of the Collective Agreements Act is taken into account, than the construction which makes it an "invisible clause" that questions not expressly mentioned in a collective agreement remain outside the collective regulation. Structurally, both "invisible clauses" are of the same character. The existence of the "invisible clause" depends in both cases on the existence of a collective agreement.

In Finland, the question is more difficult. We have adhered more strictly to the principle that a collective agreement can impose duties on others than the parties who have concluded the agreement only by virtue of express provisions in statutory law. However, we have not succeeded in getting along without any exceptions from that principle. According to the peace obligation provision of the Finnish Collective Agreements Act, offensive actions are prohibited if they are directed against the (existing) collective agreement as a whole or against any of its provisions. The Finnish act contains no express provision corresponding to the rule under point 3 in sec. 4 of the Swedish Collective Agreements Act enjoining offensive actions undertaken in order to support claims concerning employment terms after the expiration of the existing collective agreement. Nevertheless, the Swedish rule is unanimously taken to represent the standpoint of Finnish law, too.[1] Professor Sipilä's reasons for this conclusion are that the collective agreement would lose its significance as a peace treaty

[9] See p. 187 at note 7, *supra*.

[1] See *General Group of Finnish Employers* v. *Finnish Metal Workers' Association*, 1963 T.T. no. 6; Sipilä, *Teollisuuden työsuhdejuristien neuvottelupäivät*, pp. 5 f.; Sipilä, *F.J.F.T.* 1962, p. 289; Vuorio, *Juhlajulkaisu Toivo Mikael Kivimäki*, pp. 463 f.; Wuori, *Pykälä ry:n 25-vuotisjuhlajulkaisu*, pp. 112 f. See also, with regard to German law, Hueck and Nipperdey, *op. cit.*, vol. 2, p. 239; Nikisch, *op. cit.*, vol. 2, p. 331.

between employers and employees, if the existence of a collective agreement would not bar offensive actions concerning a future agreement.[2] Here we accordingly have an instance where the legal peace obligation of the Finnish Collective Agreements Act is extended to cases not expressly mentioned in the statute. In my opinion, this departure from the text of the Collective Agreements Act is more far-reaching—albeit also more urgently necessary—than the construction which would make it an "invisible clause" of collective agreements that certain questions be left outside the collective regulation for the agreement period.

The Suggested Solution and the Relativity of the Peace Obligation

How can the suggested solution be reconciled with the commonly accepted proposition that the legal peace obligation is but relative, i.e. only those offensive actions that are directed against the collective agreement infringe the peace obligation? According to the suggested solution, the fact that some question is not mentioned in the collective agreement would mean that it was left outside the collective regulation, with the effect that no collective action could be resorted to on that question. We may thus ask whether during the life of a collective agreement the suggested solution would leave over any possibilities for lawful offensive actions—

[2] Vuorio offers another argument in support of the rule. If offensive actions concerning future employment terms were not forbidden, it would be fairly easy to evade the peace obligation. This argument does not, however, explain why an offensive action concerning a future agreement is forbidden even if it is quite evident that the action is in no way concerned with the employment terms to be applied before the expiration of the existing agreement. It seems to me that Vuorio's argumentation is in the nature of a rationalization. He has felt it necessary to prohibit offensive actions concerning employment terms after the expiration of the existing agreement. At the same time, he does not want to know anything about any unwritten underlying assumptions of collective agreements. Thus he has had to explain how an offensive action concerning future employment terms is nevertheless directed against the existing collective agreement.

A third explanation is given by the Labour Court in the decision referred to in the preceding note. A local union had begun a strike with the purpose of compelling the employers to speed up the negotiations for a new collective agreement. The essence of the argumentation of the Labour Court, in considering that the union had encroached upon the peace obligation, was that because the peace obligation was effective during the whole agreement period, the strike was directed against the collective agreement clause defining the agreement period. To me this argumentation seems extremely artificial.

disregarding sympathetic actions, etc.—or whether it would in reality make the peace obligation absolute.

The suggested solution is ultimately based on the proposition that the presumed intent of the parties in concluding a collective agreement is that the agreement shall regulate the relations of the contracting parties thoroughly and that work shall go on undisturbed during the agreement period. This presumption is not valid with regard to all collective agreements. The aim of some agreements is to regulate some limited questions only, e.g., the position of shop stewards in relation to the employers. There are indeed agreements to regulate the modes of industrial action. It is plain that such agreements do not purport to regulate questions not mentioned therein, nor is it the intention of the parties to banish offensive actions in matters not regulated by the agreement. We might thus distinguish two groups of collective agreements: those which aim at a complete regulation of the employment relationships covered by them, and those which do not have this aim. If all matters concerning certain employment relationships have been regulated by a collective agreement, offensive actions to influence any of the terms of these employment relationships are directed against the agreement. In this sense, a complete regulation of employment terms by a collective agreement makes the peace obligation absolute.

Essentially, the point of the suggested solution is only that a collective agreement might involve complete regulation without stating it explicitly. Whether an agreement implies complete regulation or only partial regulation must, then, be determined by interpreting the agreement.[3] A point of importance here is whether wages have been regulated by the agreement or not. I have mentioned Professor Bergström's opinion that the peace obligation protects even such employment terms as are not mentioned in the collective agreement, but that questions about wages constitute an exception from this rule. It seems to me more pertinent to say that generally a collective agreement which regulates wages thoroughly aims at a complete regulation of the employment terms, whereas an agreement with no comprehensive stipulations

[3] Here, I would like to quote once more the *travaux préparatoires* of the Swedish Collective Agreements Act: "It is often difficult to answer the question whether a claim aims at an amendment of the agreement. To find the answer, the agreement in question must in each case be interpreted. Special weight must then be given to the question about the matters which can be considered to come within the natural framework of the agreement." See *Utkast till lagar om kollektivavtal och om arbetsdomstolar,* p. 21.

about wages is usually a partial agreement; if wages for certain employees or certain kinds of work are missing, the agreement is partial with regard to those employees or those kinds of work. The reason for this proposition is that the question of wages is the most essential one for both employers and employees. In addition, the Scandinavian labour legislation contains no minimum or normal wage lists. Thus, if wages are not explicitly regulated in a collective agreement, the silence cannot be taken to mean that the parties to the agreement intended that the rule of reasonable wages shall apply; nor can their intention be presumed to be that wage matters be left outside the collective agreement sphere and regulated exclusively by employment contracts.

These interpretations, of course, are not universally valid. Thus, the Norwegian Labour Court has held in some cases that when certain employees were expressly excluded from the collective agreement, the intent of the agreement parties was to leave the employment terms of these employees outside the collective regulation. Accordingly, their wages and other employment terms could be regulated by individual employment contracts, but no collective actions could be used to support any wage or other claims.[4]

On the other hand, even a collective agreement that seemingly aims at complete regulation may in reality have left some question open without intending to leave it outside the collective regulation. As an example, a well-known practice of construction workers might be cited. If a contractor goes bankrupt and cannot meet his wage obligations, the building is boycotted, and no work is performed until the wages in arrear have been paid. In law, of course, neither the owner of the building nor the new contractor is responsible for the wages left unpaid by the former contractor, nor is any such liability imposed by the collective agreements of the building industry. Nevertheless, the boycott against the new contractor would seem not to constitute any breach of the peace obligation.

Similarly, Finnish shipowners know well enough that the members of the Seamen's Union never work aboard a ship employing non-union seamen. Thus, even though the seamen's collective agreement contains no closed-shop clause, the silence of the agreement does not imply that the union would have relinquished the closed-shop requirement for the agreement period. Consequently, an action of the union to remove all members from a ship employing unorganized seamen does not constitute a breach of

[4] See Henriksen, *op. cit.*, pp. 98 ff.

its peace obligation. (But if the aim of the action were to secure a formal undertaking from the shipowners to respect the closed shop, it would be against the peace obligation.)[5]

Especially in the instance mentioned last, we approach actual —as distinguished from presumed—underlying assumptions of the collective agreement. Consequently we also approach the domain of the requirement that all collective agreements be in writing. This requirement could perhaps be thought to be avoidable by resorting to a well-established rule concerning the interpretation of collective agreements. This rule provides that the collective agreement parties have a certain monopoly to interpret the agreement. If it can be shown what they have intended by a clause in the agreement, that interpretation prevails even if the language of the clause gives another impression.[6] Could this rule not be taken as also providing that the silence of the collective agreement shall be interpreted according to the common intent of the parties? Taken literally, such a rule would dispense with the requirement of the written form. But a cautious use of this rule in ascertaining the degree of the "completeness" of a collective agreement could well be defended. Once customary *naturalia negotii* or presumed implied terms of collective agreements are admitted, I think it is impossible to apply them inflexibly, totally without regard to the actual assumptions of the persons concerned. By a "cautious" use of the rule I mean, *inter alia,* that actual assumptions can be taken into account the more easily the commoner they are. Opinions held by the negotiators alone have much less weight than do beliefs common to all or nearly all employers and employees within the branch of industry in question.

IV. CONCLUSION

Conclusions with Regard to the Peace Obligation

The "suggested solution" elaborated above implies in brief a theoretically consistent explanation of the standpoint of the

[5] Cf. also *Swedish Industrial Salaried Employees' Association* v. *Swedish Metal Trades Employers' Association,* p. 200, note 8, *supra.*

[6] This may be too bold a statement with regard to Finland, where the question concerning the interpretation of collective agreements is still largely unexplored. Cf. *Finnish Food Industry Workers' Association* v. *Mensa Co.,* 1955 T.T. no. 11; Kopponen, *op. cit.,* pp. 215 ff. See further, e.g., Schmidt, *The Law of Labour Relations in Sweden,* pp. 105 f.; Illum, *op. cit.,* pp. 105 f.; Andersen, *op. cit.,* p. 132.

Swedish Labour Court that the employment terms not expressly mentioned in the collective agreement may be, but are not always, protected by the peace obligation. With regard to Finland, I would suggest that the existence of implicitly complete collective agreements be recognized in this country also. I submit that even Finnish collective agreement parties can generally be presumed to have intended that work shall go on peacefully for the whole agreement period and not only until the point when one of the parties feels itself strong enough to try to extract better terms in questions not expressly regulated by the agreement.[6a]

Final Consideration of Problems not Concerning the Peace Obligation

With regard to problems not concerning the peace obligation, the implication of the "suggested solution" is that the employment terms not mentioned in the collective agreement, or some of them, can be protected by the peace obligation, without presupposing that those employment terms also have the other specific effects of express clauses in collective agreements. Thus the outcome of the decisions of the Swedish Labour Court concerning the peace obligation does not have any direct bearing upon the question of the other effects of employment terms. It is true that some *dicta* of the Labour Court may give the impression that the opinion of the court was that when a collective agreement is concluded some employment terms not mentioned in the agreement will nevertheless become terms of the collective agreement.[7] It seems to me, however, that it would not be necessary to understand these *dicta* as implying that the employment terms in question would have the standing of collective agreement clauses in determining, for example, the jurisdiction of the Labour Court.

It is also true that if certain employment terms not mentioned in the collective agreement were to have all the specific effects of collective agreement clauses, a larger number of disputes concerning employment terms would receive the expert treatment of the Labour Court, which would also apply the same rules of

[6a] Does not the outcome of the Finnish cases cited above indicate that this presumption is shared to some extent, at least, even by the Finnish Labour Court, the contrary wordings in the court's decisions notwithstanding?

[7] See, e.g., *Carlsson* v. *Locals nos. 103 and 170*, 1930 A.D. no. 52; *Swedish Metal Trades Employers' Association* v. *Swedish Metal Industry Workers' Association*, p. 199, note 5, *supra*.

substantive law to these cases without regard to whether the employment terms in question were expressly mentioned in the collective agreement or not. On the other hand, it is unanimously agreed that all employment terms would not receive the specific effects of collective agreement clauses. There would accordingly in any case remain many instances in which the substantive and procedural law to be applied would depend on whether the employment terms in question were expressly included in the collective agreement or not. Moreover, it would be necessary to know how to draw the line between those employment terms which are transferred to the collective agreement sphere and those which are not. It seems to me that Vuorio's proposition that there are no reliable bases for drawing this line[8] is true here. Finally, in my opinion the express framing of the relevant provisions of the Collective Agreements Act and the Labour Court Act corresponds best to the standpoint that employment terms have the specific effects of collective agreement clauses only if their existence or contents depend on the existence or contents of the collective agreement.[9] For these reasons, my conclusion would be that employment terms neither mentioned in the collective agreement nor dependent on the existence of the agreement do not have the specific effects of collective agreement clauses except for the limited effect of being in certain instances protected by the peace obligation.

[8] See Vuorio, *Juhlajulkaisu Toivo Mikael Kivimäki*, p. 463; Vuorio, *T.f.R.* 1957, p. 45.

[9] See the Swedish Collective Agreements Act, sec. 8; the Swedish Labour Court Act, secs. 11 and 13. See also the corresponding Finnish acts: the Collective Agreements Act, sec. 7, and the Labour Court Act, secs. 1 and 11.