The right to undertake industrial actions against an employer already bound by a collective agreement

- *An analysis in the light of the conflict in the port of Gothenburg*

Är kollektivavtalet i hamn?

- *En analys av rätten att vidta stridsåtgärder gentemot arbetsgivare som redan är bunden av kollektivavtal*

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Abstract

The aim of the thesis is to analyse the right to undertake industrial actions and freedom of association, especially in the case where a collective agreement already is in place. The thesis applies mainly three perspectives: a national, an international and lastly one with the concrete use of the ongoing conflict in the port of Gothenburg. To achieve the aim a legal dogmatic method is applied.

The conflict in Gothenburg concerns the complex situation where the employer is bound by a collective agreement with Transport, but the third party, Hamnfyran, undertakes actions to attain a collective agreement of their own. Using the report from the mediators, the underlying problems and discussed solutions to the conflict are described. As result, the thesis lays down that the case law from the Labour Court consistently rule equivalent actions as lawful and thus that the legal positon is unproblematic. It is also established that the occurrence of industrial actions against employers already bound by another collective agreement not are a commonality. Further, the thesis describes the unusual occasions the government historically has interfered in the social partners' otherwise sacred autonomy to undertake industrial actions.

Additionally, an international perspective is described. The section scrutinizes the rights within EU, ECHR and ILO. It is concluded that the right to strike is one of the most essential ways to secure freedom of association, but not the only one. Every country has a wide margin to ensure the regulations within the conventions. A union must however have the possibility to be recognized. Further on, these international obligations are applied in a reasoning of *de lega ferenda* when discussing a potential future restriction of the right to undertake industrial actions. In this reasoning, a principle of proportionality, a rule of representation and a restriction of third party's right to take action are discussed with consideration of all three perspectives. The thesis also concludes that there in fact are a fair number of potential solutions to the conflict in Gothenburg within today's legislation, and thus it is questioned whether a restriction is necessary at all.

Keywords: Collective agreement, ECHR, EU, Freedom of association, Hamnfyran, ILO, Industrial action, Industrial peace, LO, Port of Gothenburg, the right to strike, The Swedish model & Transport.

Sammanfattning

Syftet med föreliggande masteruppsats är att redogöra för och analysera rätten att vidta stridsåtgärder samt föreningsfrihet, i synnerhet i situationer då arbetsgivaren redan är bunden av kollektivavtal. I huvudsak kommer tre perspektiv att tillämpas; ett internationellt, ett nationellt samt ett med användande av den pågående konflikten i Göteborgs hamn. För att uppnå syftet har en rättsdogmatisk metod tillämpats.

Konflikten i Göteborgs Hamn utgörs av en situation där arbetsgivaren är bunden av kollektivavtal med Transport, medan tredje part, Hamnfyran, vidtar stridsåtgärder för att få till stånd ett eget kollektivavtal. Med hjälp av medlarnas rapport beskrivs den bakomliggande problematiken i konflikten samt de lösningar som diskuterades under medlingen. Som resultat fastställs att stridsåtgärder från tredje part mot redan kollektivavtalsbunden arbetsgivare är fullt tillåtna i gällande rättsläge. Vidare kartläggs även att förekomsten av sådana stridsåtgärder utgör en ytterst liten andel av den totala mängden stridsåtgärder på den svenska arbetsmarknaden. I uppsatsen presenteras vidare de sällsynta fall då staten historiskt har ingripit mot arbetsmarknadens parters autonomi genom att tillfälligtvis begränsa rätten att vidta stridsåtgärder.

Efter redogörelsen av svensk rätt beskrivs Sveriges internationella åtaganden i form av EU, ECHR och ILO. Detta resulterar i fastställandet av stridsåtgärder som ett av de mest avgörande tillvägagångssätten för att säkerställa föreningsfrihet, men att det inte är det enda. Det framgår även att varje land har stor frihet att garantera konventionernas innehåll. Oavsett måste en fackförening ha något medel att tillgå för att utöva sin föreningsrätt. De internationella åtagandena inkluderas sedan i en diskussion om hur en potentiell lagstiftning skulle kunna formas för att behålla konformitet internationellt, gå i linje med den svenska modellen samt lösa den faktiska konflikten. Det undersöks hur införandet av en proportionalitetsprincip eller ett representationskrav skulle fungera utifrån dessa perspektiv. Utöver detta presenteras ett flertal lösningar till Hamnkonflikten som är tillgängliga inom dagens lagstiftning och således ifrågasätts huruvida en lagstiftad restriktion är nödvändig över huvud taget?

Nyckelord: ECHR, EU, Fredsplikt, Föreningsfrihet, Göteborgs Hamn, Hamnfyran, Hamnkonflikten, ILO, Kollektivavtal, Stridsåtgärder, Strejk, MBL, Svenska modellen & Transport.

Preface

As this thesis comes to an end I want to thank my supervisor Federico Fusco for always being understanding with deadlines, answering my emails and for meeting me. You have challenged and motivated me by addressing problems and adding new perspectives. I would also like to thank Andreas Inghammar who supervised my Bachelor's thesis and now also contributed with his encouragement and insight to my Master's.

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Axel Stigmar
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Abbreviations

AD	Arbetsdomstolen (The Swedish Labour Court)
AML	Arbetsmiljölagen (Work environment act)
APMT	AMP Terminals
Art.	Article
Byggnads	Svenska Byggnadsarbetareförbundet (Swedish Building Workers' Union)
CEACR	Committee of experts
CFA	Committee of Freedom of Association
CFREU	Charter of Fundamental Rights of the European Union
Dir.	Direktiv (Directive)
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
FML	Lag (1974:358) om företroendemans ställning på arbetsplatsen (Worker's representative Act)
GP	Göteborgsposten (The newspaper of Gothenburg)
Hamnfyran	Hamnarbeterna Avdelning 4 (SHF section 4)
ICJ	International Court of Justice
ILO	International Labour Organisation
KAL	Lag (1928:253) om kollektivavtal (Collective agreement Act)
Kap.	Kapitel (Chapter)
LAS	Lag (1982:80) om anställningsskydd (Employment Protection Act)
LO	Landsorganisationen (Swedish Trade Union Confederation)
LRA	Lag (1974:371) om rättegång i arbetstvist (The Labour Disputes (Juridical procedure) Act)
LSR	Lag (1987:1245) om styrelse (Board Representation Act)
MBL	Medbestämmandelagen (Co-determination in the Workplace Act)
Metall	Industrifacket Metall (Swedish Metal and Industry Workers' Union)
MI	Medlingsinstitutet (Swedish Mediation Office)
No.	Number

Nr.	Nummer (Number)
Pappers	Svenska Pappersindustriarbetarförbundet (Swedish Paper Workers' Union)
Para.	Paragraph
Prop.	Proposition (Preparatory work)
RF	Regeringsformen (Instrument of Government)
SAC	Sveriges Arbetares Centralorganisation (Central Organisation of the Workers of Sweden)
SACO	Sveriges Akademikers Centralorganistion (Swedish Confederation of Professional Associations)
SAF	Sveriges Arbetsgivareförening, numera Svenskt Näringsliv (Confederation of Swedish Enterprise)
SEF	Svenska Elektrikerförbundet (Swedish Electricians' Union)
SFS	Svenskförfattningssamling (Swedish Code of Statues)
SHF	Svenska Hamnarbetarförbundet (Swedish Port Workers' Union)
SOU	Statens offentliga utredningar (State Public Reports)
SVT	Sveriges Television AB (Sweden's Television)
TCO	Tjänstemännens Centralorganisation (Swedish Confederation of Professional Employees)
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
Transport	Svenska Transportarbetareförbundet (Swedish Transport Workers' Union)
UN	United Nations

1. Introduction

1.1 Background

One of the primary incitements for a Swedish employer to enter a collective agreement is to achieve industrial peace. The industrial peace is in fact the main reason the collective agreements arose in the early 20th century.[1] On the other hand one might say that the right to take industrial action is the employees' only option to improve or affect their working conditions. The concept of industrial peace may roughly be described as when the employer and union are bound by a collective agreement, industrial peace is acquired. This however, is only the legal principle and the exception is the root to a conflict in the port of Gothenburg that has divided Swedish labour law experts and politicians in a question concerning the foundation of the Swedish model.[2]

In Swedish labour law an employer is free to enter a collective agreement with whoever he wants. It is very unusual that an employer enters a collective agreement with a minority union. One of the reasons being that minority unions rarely can initiate industrial actions of magnitude to trouble the employers notably.[3] At the same time, all unions not bound by collective agreements are more or less free to take industrial action. Consequently, in a situation where there are more than one union claiming the right to a collective agreement, there might occur a status quo where one union is obligated to maintain industrial peace while another is free to take industrial action. There are numerous dimensions and aspect to consider but regardless, the employer is trapped between two unions. This juridical dilemma, which is perfectly illustrated in the conflict in the port of Gothenburg, will be the foundation of this thesis.

The conflict in the port of Gothenburg is a complex one, consisting mainly of the three parties; APMT (employer), Transportarbetarförbundet (union with collective agreement) and lastly Svenska hamnarbetarförbundet avdelning 4, further on Hamnfyran or SHF (union who requests collective agreement). The reason that this specific situation has caused a national debate is that the employer has chosen to enter a collective agreement with the well-established LO union Transport, which in this case, uniquely, does not represent the majority of the employees. In

[1] Nyström (1998). *Kollektivavtalet – en säregen avtalstyp*, s. 236.
[2] https://www.lag-avtal.se/arbetsratt/tung-facklig-kritik-mot-s-uttalande-om-strejkratt-6892889#conversion-310803801
[3] Roos, Fahlbeck & Adlercreutz (red.) (1983). *Perspektiv på arbetsrätten: vänbok till Axel Adlercreutz*, p. 9-10.

fact, Hamnfyran's members count to circa 250 employees, which equals a representation of 85 percent of the concerned port.[4] The decision to enter a collective agreement with Transport has put APMT in an intricate situation. Industrial peace is obtained between APMT and Transport, meanwhile Hamnfyran keeps their right to strike. Given that Hamnfyran represents the majority of the employees the industrial peace becomes more or less worthless for APMT.[5]

Emerging from this conflict of some hundred workers in the port of Gothenburg the debate has become a national concern in many aspects. This infected situation has become an ideological, juridical and political question in all corners of society. The labour ministry has appointed a committee to review the right to strike and what solutions might be possible. The committee's results should be presented last of May at the latest.[6] Recent statements from the Swedish minister of the labour market, Ylva Johansson, in which she entertained the thought of restricting the right to strike to solve the problem in the port, have caused the debate to accelerate even more.[7] Following the minister's statement various reputable political leaders, teachers in law from Swedish universities and union representatives have raised their concern from different points of views. Some raise the concern of an unbalanced labour market while some takes Sweden's international obligation into account.[8] Regardless the point of view, the conflict has engaged and impacted especially the Swedish labour law but also the Swedish society in general. Not least because of the fact that the port handles, or at least used to handle, about 60 percent of Sweden's total export and import.[9]

In addition to the complexity of the juridical dilemma within the Swedish labour law, Sweden has various international obligations they are bound to comply. Internationally, the right to take industrial action is perhaps even more connected to the freedom of association, which is a deeply rooted right in many international organisations. In fact, the freedom of association is one of the main reasons why the UN organ ILO was founded in the first place. In excess of ILO, Swedish law must keep conformity with both ECHR and of course the EU. When investigating the possibilities to restrict the right to take industrial actions, one must take

[4] http://www.gp.se/ekonomi/den-bittra-kampen-om-g%C3%B6teborgs-hamn-1.4262579

[5] https://www.svt.se/special/speletomhamnen/

[6] Dir 2017:70, *Översyn av rätten att vidta stridsåtgärder på arbetsmarknaden.*

[7] https://www.lag-avtal.se/arbetsratt/tung-facklig-kritik-mot-s-uttalande-om-strejkratt-6892889#conversion-310803801

[8] https://www.lag-avtal.se/arbetsratt/foreslagna-namnden-kan-stoppa-strejker-6882899#conversion-310803801

[9] http://www.gp.se/ekonomi/den-bittra-kampen-om-g%C3%B6teborgs-hamn-1.4262579

Sweden's international obligations into account. Having Sweden's history with Lex Britannia and Lex Laval in mind, one must take a number of perspectives into account when finding a suitable restriction that solves the conflict in the port, is aligned with the Swedish model and still keeps Sweden's internationally conformity.

1.1.1 The course of events in the port of Gothenburg

One might say that the conflict has its origin from a break-up in 1972. The break-up consisted on one side of the LO union Transport and on the other a disappointed part of Transport who became independent and created Hamnarbetarförbundet.[10] Ever since then Hamnarbetarförbundet has been an outsider who cannot privilege from a membership in LO. Hamnarbetarna has applied for membership but LO is denying their application due to their statutes.[11] Hamnfyran's statutes dedicates all power and decisions to the members, while LO is heavily centralised and indirect control the ability to undertake industrial actions of its members.[12] Additionally, Transport is infamous within LO for being especially dependent and centrally managed.[13] There are many reasons why the conflict in the port of Gothenburg has occurred, but one of the most crucial ones is the union not being a part of LO. In their so called *Organisationsplan* LO states, amongst many other things, that any conflict between two LO unions should be solved internally by the organisation. In that way, a conflict concerning which union has the right to collective agreement does not affect the employer but is instead solved within the organisation.[14] That is why, given a scenario where Hamnarbetarförbundet had a membership in LO the conflict would have been taken care of internally between LO, Transportarbetarförbundet and Hamnarbetarförbundet. LO's coordinating role is of great value for the employer, who is in that sense, normally guaranteed industrial peace when entering a collective agreement with an LO union.

[10] SOU 1988:49, *Arbetsmarknadsstriden III*, p. 26-27.
[11] http://hamn.nu/article/2430/Fragor--svar-om-situationen-pa-APM-Terminals.html
[12] Källström (1979). *Lokala kollektivavtal,* p. 7.
[13] Källström (1979). *Lokala kollektivavtal,* p. 22.
[14] LO:s organisationsplan, p. 37 ff. See: http://www.lo.se/home/lo/p3/resources.nsf/vRes/kongress_2012_lo_organisationsplan_2012_pdf/$File/LO_organisationsplan_2012.pdf. Compare with 5 § TCO stadgar. In which equivalent regulations concerning the main organisations responsibility to solve internal conflicts is to find. See: https://www.tco.se/globalassets/k2011_stadgar_w.pdf. In addition, sometimes there are agreements between for instance LO and TCO stating that conflicts between unions of the two organisations should be solved by a joint committee, see: Medlingsinstitutets rapport (2017). *Förekomsten av konflikter på arbetsmarknaden i situationer där arbetsgivaren är bunden av kollektivavtal,* p. 13.

The ongoing conflict in the port of Gothenburg started during the spring of 2016 when Hamnfyran ordered their members to go on a two-day strike. Hamnfyran was frustrated with the new management, which was assigned 2015. Earlier Hamnfyran had some union rights such as appointing a work environment representative, which is a right that should pertain the local employee's organisation, as stated in AML[15]. Furthermore, the union also upheld a tradition that more or less allowed them to negotiate in an equivalent position as Transport.[16] In excess of to the deprived rights, Hamnfyran also had an extensive list of unsolved problems and legal matters concerning the union. After yet another strike both parties requested help from the Swedish national mediation office, *Medlingsinstitutet*. The mediators presented a solution that did not meet Hamfyrans demands, why Hamnfyran negated their proposal and instead went on strike. On January 24th Hamnfyran went on strike once again and this was in fact their only strike in 2017. As Hamnfyran's actions failed to improve their conditions, they implied that the meditators were partial due to their background in LO and therefore wanted them exchanged.[17]

The conflict could have had a natural solution when the national collective agreement with Transport expired. Hamnfyran proposed a three-party solution, which Transport refused and instead APMT entered a new three-year agreement with Transport. The spring of 2017 was characterized by blockades against overtime, recruiting and hired staff on the one side, and by notice of redundancy on the other. May 10 APMT escalated the conflict when announcing six-week total shutdown during weekends and evenings. In the announcement APMT declared that their purpose for doing so was to get an end to the strikes. The lockout was of course expensive for both parties, but APMT being supported by Svenskt Näringsliv were confident they had a better buffer than the vulnerable Hamnfyran with no support from LO. Four weeks later APMT announced that 160 employees would be made redundant, of which a majority were members of Hamnfyran. These redundancies were one of the last incidents that happened in the conflict, although the conflict is not over. The conflict has awoken national interest and forced politicians and experts to review the Swedish model and to consider the possibility to restrict the right to strike.[18] The conflict is still very infected and as for today, the parties have five simultaneous legal disputes being processed in the Swedish Labour Court.[19]

[15] Arbetsmiljölagen (1977:1160) kap. 6:2.
[16] http://www.gp.se/ekonomi/den-bittra-kampen-om-g%C3%B6teborgs-hamn-1.4262579
[17] https://www.svt.se/special/speletomhamnen/
[18] https://www.svt.se/special/speletomhamnen/
[19] https://www.lag-avtal.se/arbetsdomstolen/parterna-i-hamnkonflikten-gor-upp-i-ad-6893283?source=carma&utm_custom[cm]=302764246,33270&utm_campaign=mail2

To summarize, the conflict concerns the particular situation where APMT have entered a collective agreement with the established union Transport instead of the most represented one, namely Hamnfyran. Thus, the employer has industrial peace with only a minority of the workers and Hamnfyran does everything in their power to make themselves recognized. The conflict came into national spotlight when Ylva Johansson announced that there might be required to legislate a restriction of the right to take industrial action. In addition, the conflict is causing massive economic consequences for Swedish export.

1.2 Aim

The aim of the thesis is to analyse the right to undertake industrial actions and freedom of association, especially in the case where a collective agreement already is in place. When is a party bound by industrial peace and when is it lawful to undertake industrial actions? With the respective legal position as starting point the thesis will further analyse and clarify the relation and collaboration between the two legal principles. Is it lawful to take industrial action against a party already bound by a collective agreement and how common are such actions? Another objective with the thesis is to examine the freedom of association. The freedom of association will primarily be accounted for in its relation to the right to take industrial actions. To cover an adequate scope of the freedom of association, both national and international legislation will be presented and further on analysed. The purpose of including international obligation is to problematize the Swedish legal system in another context. Furthermore, the international obligations are essential to take into account when discussing a potential restriction of industrial actions in Swedish law.

Using the situation in the port of Gothenburg the thesis aims to highlight the close relation between the right to take industrial actions and the freedom of association. The thesis will in that way identify areas in which the two principles might *de facto* and *de jure* be incompatible. With this concrete example, the thesis aims to pinpoint what could be argued as a deficiency in the Swedish model.

Further, the thesis aims to address what potential obstacles a modified legislation of the right to take industrial actions would face both nationally and internationally. This will be analysed in the light of the conflict in the port of Gothenburg, the Swedish model and of course with a perspective from Sweden's international obligations.

1.3 Research questions

To achieve the aim of the thesis the following research questions will be used:

- When is it lawful to undertake industrial actions against a party already bound by a collective agreement in Swedish labour law?

- In what ways do the conflict in the port of Gothenburg reveal a deficiency concerning industrial actions against an employer already bound by collective agreement in the Swedish model?

- How is a restriction of the right to take industrial actions within the Swedish model compatible with retaining freedom of association?

1.4 Method and material

To achieve the aim of the thesis a legal dogmatic method has been used. A legal dogmatic method has the main purpose to clarify the law, *de lege lata*. To achieve this according to a legal dogmatic method, it is necessary to describe and systematize the applicable law. Relevant law should in this case be interpreted extensive and thereby include for instance EU law and European law. Furthermore, this method includes various sources of law, such as: preparatory work, case law, doctrine and the law.[20] Applying a legal dogmatic method one should use concrete research questions.[21] It is of great importance that these research questions touch upon the very problem that needs to be examined. Keeping this in mind, the research questions in this thesis have been modified and adapted over time.[22] Moreover, these research questions should be answered partly abstract and partly concrete. Firstly, the researcher should define an adequate legal principle or legal position and further on explain it and its relevance. Subsequently, this rule of law is applied in the concrete situation that interests the researcher.[23] With this set up in mind, this thesis starts in a judicial problem which needs to be defined and examined before being applied in the concrete example in the port of Gothenburg.

[20] Sandgren (2015). *Rättsvetenskap för uppsatsförfattare*, p. 43.
[21] Korling & Zamboni (2001). *Juridisk metodlära*, p. 23.
[22] Korling & Zamboni (2001). *Juridisk metodlära*, p. 30.
[23] Korling & Zamboni (2001). *Juridisk metodlära*, p. 29.

In this thesis, all above mentioned sources of law have been used. Regarding Swedish law, all different sources of law have been covered. Given that MBL is perhaps the most important law in Swedish labour law, numerous authors have written about the law and its legal consequences. Thus, there has been a wide selection of doctrine to include. This wide selection came to use not the least when describing the history and development of today's legislation. A significant amount of not recently published doctrine has been used to describe the historical development as accurate as possible.

Regarding case law, various courts from different legal systems have been included in the thesis. When including national case law, the Swedish Labour Court has been primarily used, considering it is the highest instance and thus the court of record.[24] As for international courts, the same principle has been the aim. Given that the main object of the thesis is to examine Swedish law, the international courts' case law is not exhaustive but rather clarifying and exemplifying what previously have been described.

The thesis is somewhat comparative and it is therefore necessary to decide in what ways the international content should be used.[25] In this thesis, the Swedish labour law is the main topic. International law is however applied to problematize and add a dimension to the Swedish system. Given that Sweden is bound by conventions regulating Freedom of association, it is of great value to include these conventions when discussing potential deficiencies in *de lege lata* and what to take into consideration when discussing *de lege ferenda*. The international segments do, as previously declared, only aim to illustrate the basic principles and are not the main topic of the thesis.

Given that the conflict in the port of Gothenburg is still active, articles from judicial papers as well as ordinary newspapers have been used to ensure the most current updates. When using these articles and non-sources of law they have strictly been given the sole purpose to describe a situation or a course of event. Moreover, some cases articles have been used to refer to a statement or opinion which is of use to widen the points of view and perspectives. To clarify, Lag & Avtal has for instance not been used to any analysing but only to describe events. Further, the newspaper of Gothenburg has been chosen because of its geographic convenience. It

[24] Lehrberg (2016). *Praktisk juridisk metod*, p. 172.
[25] Sandgren (2015). *Rättsvetenskap för uppsatsförfattare*, p. 54.

appears reasonable that the newspaper in the city where the conflict takes place has the best conditions to describe the conflict in some ways. Moreover, GP writes significantly more about the conflict than other newspapers. Additionally, SVT's article concerning their own reportage in Uppdrag Granskning has been used to add yet another perspective and thereby excavate potential underlying opinions. Unlike these regular newspapers, Juridisk Tidskrift is written by legal scholars and therefore have been used in a somewhat wider meaning.[26] The database that have been used when searching for scientific articles is Lubsearch. A non-exhaustive exemplification of the search words that have been used in different combinations is: Collective agreement, European Union, European Convention of Human Rights, Freedom of association, ILO, industrial actions, industrial peace and the right to strike.

Further, when using the website of Hamnfyran, the purpose has been to achieve authenticity while being transparent. With transparency, their website can very well add an insight to their mind-set and perspective. This was for instance of great value when presenting Hamnfyran's demands and solutions. However, it of utmost importance that the reader is well-aware when reading extracts from the unions official website.

As far as applicable the *Glossary for the Courts of Sweden* has been used to achieve a consequent and suitable language. This glossary is published by the Courts of Sweden and is therefore of great value when translating specific juridical terms. However, the glossary is not specified to labour law and therefore a lot of specific labour law terms and concepts were not included.

1.5 Delimitation

The thesis has been delimited in various ways due to different circumstances. The time restraint has of course restricted the scope of the thesis, mainly meaning it has affected the aim and the research questions. Even though there has not been any limitation of the number of pages the time limit has amounted to an indirect delimitation in this way.

Even though the thesis aims to underline the importance of the collective agreement in Swedish labour law, the concept is only briefly introduced to the reader. The legal consequences of the collective agreement as well as the adjacent legislation are such broad topics that they could

[26] Samuelsson & Melander (2003), *Tolkning och tillämpning*, p. 50.

compose a thesis themselves. That is why, they are only described in a way that their importance is stressed rather than examined.

Moreover, the thesis does not take the public sector into consideration. The public sector has a special set of rules regarding the right to take industrial action, which does not apply on the chosen conflict nor on the majority of the labour market. Even though the thesis does not include the public sector, the sector is mentioned a few times. These unusual appearances aim to either contrast or further explain the concerned legal position. Also, in some cases an analogical interpretation of case law is used to clarify or emphasise a legal position. However, the thesis does not in any way aim to examine or explain the legal position of the public sector.

Although the thesis aims to take Sweden's international obligations into account, all of them have not been included in the scope. For instance, the thesis does not cover the European Social Charter. This selection of which international obligations to include has been made due to different reasons. First, to include EU law was natural because of its legal sovereignty to Sweden. ECHR being incorporated into Swedish law made the Convention an obvious part of the thesis as well. In addition, both EU law and ECHR bring along valuable case law which may deepen the possibility to analyse and discuss the matters of the thesis. The ECHR also include the so called negative freedom of association, not being a part of Swedish labour law, and thus supplement the discussion with another dimension. Lastly, ILO is a part of the international perspective of the thesis. ILO adds a perspective from an organisation which originated due to the freedom of association. Furthermore, ILO brings along significant case law and the perspective from active surveillance organs. Additionally, all from a perspective from outside of Europe. Moreover, the Swedish Labour court referred to both ILO and ECHR in one of its recent rulings in a case concerning the port of Gothenburg, accentuating the legal value of the conventions in Swedish law and thus this thesis.

Lastly, the thesis describes and analyses the legal position as of when the thesis was written. Since the conflict still is ongoing there will certainly appear new circumstances and legal facts that could have been of use. This could for instance be case law from the Labour court ruled in the second half of 2018 or the result of the appointed labour market committee that inquired the possibility to modify the legislation. Consequently, this has not been included in the thesis, which was finalized in May 2018.

1.6 Disposition

In the second chapter the Swedish model is introduced with its characteristics. Chapter two will portray the principles of the Swedish model and the collective agreement's position in Swedish labour law. Knowledge about the construction of the Swedish labour law is of importance to be able to understand in-depth descriptions and reasoning further on in the thesis. With an introduction, these in-depth descriptions and analyses will also be contextualised and thereby generate an additional value. An overall understanding of the Swedish model in general and the collective agreement in particular is a premise to follow the analyse of the conflict in the port of Gothenburg.

Following the brief introduction, the two concepts of the right to take industrial actions and the industrial peace will be examined. The two legal concepts will be described somewhat historically but foremost from today's legal position. In this way, the chapter will allow exploration of legislative history as well as the labour court's interpretation and application. Neighbouring principles and legislation will be touched upon. Questions concerning industrial actions when an employer already is bound by a collective agreement will be accounted for. With an understanding of the two principles the reader will have a foundation for further discussion and analysis.

In the fourth chapter, the freedom of association will be described. Freedom of association is expressed in various situations, but this chapter aims to explore it primarily in the light of the right to take industrial actions. The freedom of association is in many ways the backbone of both international and Swedish labour law, why it contributes with a necessary and meaningful perspective. Internationally, the right to take industrial action is even more connected to the freedom of association and thus this chapter will spotlight namely the international perspective. The chapter will mainly focus on ILO, EU and ECHR. The chapter will in that way investigate what rights (For example the right to strike and the right to collective bargaining) that are included in the international scope of freedom of association.

In the fifth chapter, the thesis will centre on the conflict in the port of Gothenburg. In this chapter, the parties' different opinions and solutions will be scrutinized. Naturally, the chapter has a starting point in the various standing points and proposals from APMT, Hamnfyran and the Swedish Mediation Office. As for the Mediation Office, their official report from their mission will be thoroughly described and accounted for. Given that the course of events already

is described somewhat in the background, this will only be presented in a brief matter. To deepen the illustration of the multifaceted conflict, a summary of various legal disputes and miscellaneously facts will be presented.

In the sixth chapter, a reasoning will be made about the legal position of the right to take industrial action and the industrial peace. The reasoning will touch upon the importance of the two principles and their place in the Swedish model. The right to take industrial actions will also be discussed from an international perspective. Further the thesis will discuss what is explored in the previous chapters about the Gothenburg port and its problems. Why is there a conflict and what solutions might there be? Lastly, a discussion regarding how potential modifications and restrictions to the right to strike might be contrary to Sweden's international obligations will be held. The international perspective will penetrate the discussed solutions and restrictions in the light of ILO, EU and ECHR.

In the last chapter, the conclusion of the thesis will be provided. This part aims to summarize and compile what is presented and discussed in the previous parts of the thesis.

2. Introduction to the Swedish model and collective labour law in Sweden

The Swedish model is nationally and internationally famous for being both well-adjusted and well-functioning. A precise and established definition of the Swedish model is however not to be found. The model is characterized by the autonomy of the labour market. The autonomy of the labour market in this sense, refers to the absence of the legislator in favour of collective agreements between the parties. With this system, the decisions are closer to the work place and the parties may adapt their collective agreements to their respective branch and interests. In addition to this, the collective agreement also has several legal consequences that are unique.[27] Regardless of the definition, it is for certain that the collective agreement plays a central part. In fact, the collective agreement has an even more important role in Swedish labour law than in other countries.[28]

In Sweden, the collective agreement has a very distinguished position both in the legislation and in the labour market. In fact, 90% of the Swedish employees are covered by a collective agreement. The high coverage is not due to the membership in unions, which roughly measures 70%, but is caused by the employers' membership in employer associations. Even though there has been a drop in the union membership since the 21th century Sweden still has one of the highest ratings in the world. The neighbouring countries Finland and Denmark submit equivalent numbers. Worth mentioning is that these countries are still linking the unemployment insurance fund to membership in a union. To contrast the Swedish union membership at 70% are the German at 18%, French at 8% and USA at 11%.[29]

2.1 History and evolution

The concept of collective agreement has been of major importance in the Swedish labour law for a long time and has its origins from the middle of the 19th century. One of the earliest documents found is an agreement from 1869 concerning payment of salary to plasterers who were striking.[30] This document however, was not labelled as a collective agreement and the specific term established itself in the early 20th century.[31] Two of the single most important

[27] Ahlström (2013). *Kollektivavtal: formalia, giltighet och tolkning,* p. 31.
[28] Nyström (1998). *Kollektivavtalet – en säregen avtalstyp,* p. 234.
[29] Medlingsinstitutets årsrapport (2017). *Avtalsrörelsen och lönebildningen 2016,* p. 216-224.
[30] Adlercreutz (1954). *Kollektivavtalet,* p. 169.
[31] Adlercreutz (2005). *Kolletivavtalet som avtalsform och avtalstyp,* p. 13.

organisation in Swedish labour law was founded as a result of the incipient workers' movement, LO (1989) and SAF (1902). Unions on the other hand had been a part of Swedish labour market since the typographers started their union in 1886, which usually is said to be Sweden's first union.[32] The workers' movement in general is however said to be started after the Plasterers' strike in 1869, which was followed later that year by strikes from the tailors, carpenters and painters.[33] The employers waited longer to organise themselves, but in 1893 the pressure from the workers resulted in the foundation of the employers' association for building contractors in Gothenburg.[34] Although there were no unions, industrial actions have appeared on the Swedish labour market at least since the 18th century. Most of these early actions did not generate in any success and were organised by miners or other industrial workers.[35] Sweden was however, not earlier developed than other European countries and glanced at their systems for inspiration. That is why there is a notable resemblance with especially Danish labour law today.[36] Further, United Kingdom is said to be the cradle of the workers' movement.[37] The root of collective agreements was the transition from an agricultural to an industrial society, which caused employees to be frustrated over their lack of influence.[38] The employees created unions to raise their voice and together achieve endurable working conditions. The employer on the other hand was interested in the industrial peace.[39]

A milestone in Swedish labour law is the year 1906, the year of the December compromice, *Decemberkompromissen*. The compromise between LO and SAF included the recognition of the freedom of association on the one hand and the so called *arbetsgivarprerogativet,* the employer's right to lead and manage the work, on the other. Although the collective agreement was frequently used on the labour market it was not until 1928 it got legislated. The most important legal effect that was regulated in the legislation of 1928 was the industrial peace.[40] In excess of the legislation, the Labour Court early linked the collective agreement as an important factor in the Swedish labour law. The collective agreement also earned a distinctive position in what cases the labour court should judge.[41] The LRA defines which cases should be

[32] Karlbom (1969). *Arbetarnas fackföreningar*, p. 17. There is a fairly exhaustive register of the first unions in Sweden and when they were founded. The register covers the years 1886-1899.
[33] Adlercreutz (1954). *Kollektivavtalet,* p. 172 and 182-183.
[34] Adlercreutz (1954). *Kollektivavtalet,* p. 202.
[35] Göransson (1988). *Kollektivavtalet som fredspliktsinstrument,* p. 41.
[36] Adlercreutz (2005). *Kollektivavtalet som avtalsform och avtalstyp,* p. 16.
[37] Karlbom (1969). *Arbetarnas fackföreningar*, p. 9
[38] Källström, Malmberg & Öman (2016). *Den kollektiva arbetsrätten,* p. 15-17.
[39] Nyström (1998). *Kollektivavtalet – en säregen avtalstyp,* p. 236.
[40] Schmidt (1997). *Facklig arbetsrätt*, p. 23-24.
[41] Nyström (1998). *Kollektivavtalet – en säregen avtalstyp,* p. 248.

judged by the labour court and it states that cases concerning collective agreements, MBL or a legal dispute at a work place that has or at least usually has collective agreement should be ruled by the labour court.[42] According to the same law all other legal disputes concerning the work place should be judged by the District Court, Tingsrätten.[43]

Another essential year in the history of Swedish labour law is 1938, when *Saltsjöbadsavtalet* was entered between SAF and LO. *Saltsjöbadsavtalet* is known for its famous spirit, a spirit characterized by the cooperation of the parties on the labour market. In addition to the spirit the parties also commonly decided to restrict the right to strike by regulating strikes causing damage to third parties and the society.[44] During the first half of the 1930's there were about 700 strikes a year in Sweden, which of course were one of the reason why the parties felt the need to solve the situation.[45] Another great incitement for the parties was to protect the labour market from further legislation.[46] The social partners managed to keep the legislator away until the 1970's, when an explosion of legislation occurred. The sudden need for legislation did not have only one answer but was probably influenced by for instance a more international perspective, Swedish miners going on wild strike 1969-1970 and the socialistic regime.[47] A lot of the legislation that is found today was introduced during this era. The new legislation extended the job security with LAS, improved the union's position with FML and LRA and regulated codetermination, freedom of association and negotiating by introducing MBL.[48]

2.2 The collective agreement and its legal consequences

As described above the collective agreement is of major importance in Swedish labour law. But what is a collective agreement? In 23 § MBL it is stated which three requisites that needs to be fulfilled for an agreement to be a collective agreement. For a collective agreement to occur the agreement must be 1) in writing, 2) the parties must consist of employer or employer association and a trade union and 3) the agreement should regulate employment conditions or other matters concerning the relation between employee and employer. If all the three above are fulfilled it is a collective agreement. The most common set up is that an employer has one collective

[42] 2 kap. 1 § Lag (1974:371) om rättegång i arbetstvister.
[43] 2 kap 2 § Lag (1974:371) om rättegång i arbetstvister.
[44] Ahlström (2013). *Kollektivavtal: formalia, giltighet och tolkning*, p. 32.
[45] Eklund, Sigeman & Carlson (2008). *Swedish labour and employment law: cases and materials*, p. 19.
[46] Schmidt (1997). *Facklig arbetsrätt*, p. 24-25.
[47] Schmidt (1997). *Facklig arbetsrätt*, p. 25-26.
[48] Andersson, Edström & Zandering, *Arbetsrätt*, p. 12-13.

agreement concerning the white collars and one concerning blue collars, historically this typically means one agreement with LO and one with TCO.[49]

Moreover, a collective agreement may consist of somewhat various parties and is subsequently categorized as different types of collective agreements. For instance, there are *huvudavtal*, *riksavtal* and *lokalavtal*. Lokalavtal are local agreements entered on plant level by the specific employer and the local union while riksavtal are entered centrally by the union and the employers' association. When LO, SAF or TCO enter agreements these are called huvudavtal. Unlike riksavtal and lokalavtal, huvudavtal do not bind the members but only the parties. However, the associations recommend the unions to accept the agreements and thereby make it binding for the members in the respective unions.[50]

Other than the unique forms prescribed by law, the collective agreement also has various legal consequences that impact many aspects of the labour law. The most notables being the binding and normative effect. The binding effect is unique for the collective agreement because it binds not only its parts, but also members in the union. The members in the union becomes personally bound by the agreement and therefore also the rights and obligations that follow. In effect, this means employees are bound by for example the industrial peace the organisation offers. Even in the case that a member secedes from the union the employee is bound by the collective agreement.[51] Contiguously to the binding effect is the compulsory effect, *tvingande verkan*. The compulsory effect means that both the employer and the employee is obligated to follow the regulations in the collective agreement. This effect has mainly two objects, the first is to secure the collective agreement from being undermined by individual agreements, the second is to protect the single employee from worse conditions than those stipulated in the collective agreement.[52] The compulsory effect is aligned with the thought that the employer should not be able to profit from using non-organised employees by giving them worse conditions than stipulated in the collective agreement.[53] The binding effect is found in the 27 § MBL, where it is stated that all agreements an employee and employer enter that conflict with the collective agreement are invalid.

[49] SOU 1988:49, *Arbetsmarknadsstriden III*, p. 89.
[50] Fahlbeck (1989). *Praktisk arbetsrätt,* p. 85-86.
[51] Ahlström (2013). *Kollektivavtal – formalia, giltighet och tolkning,* p. 78-79.
[52] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 223-224.
[53] Fahlbeck (1983). *Om diskriminering av utanförstående arbetstagare,* p. 69.

The normative effect on the other hand does not only effect members of the union but also the unorganised employees within the collective agreement's area of application. The normative effect is not to be found in any legislation, but has instead been established in the case law of the labour court.[54] The effect means that the collective agreement must be applied on every employee within the area of application, even to those who are not bound by it. This follows with a special feature, namely that the employer is only obligated to follow the collective agreement in relation to the union.[55] Thus, the employer is "free" to enter an individual employment contract that conflicts with the collective agreement[56], but of course the union may sue the employer for violating their agreement.[57] Since there is no agreement with an unorganised employee a potential summoning from the employee must refer to the individual employment contract and not the collective agreement.[58] Furthermore, a contract violating the normative effect is not invalid according to the 27 § MBL.

In addition to the normative and binding effect the collective agreement present even more legal consequences that proves the agreements value in Swedish labour law. As earlier mentioned Swedish labour law is partly composed on semi-dispositive legislation[59], giving the parties the possibility to deviate from the legislation with collective agreements.[60] Further, the union with collective agreement is attributed with various authorization. Firstly, the union earns extended rights to negotiating. In fact, the employer becomes obligated to negotiate with the union upholding collective agreement in many cases.[61] Besides, the union is also privileged with right to information (19 § MBL), codetermination agreements (32 § MBL), interpretative prerogative (33-35 §§ MBL) and veto (38-40 §§ MBL). Moreover, the union earns additional rights in legislation other than MBL. One example is AML that regulates the union's right to assign a work environment representative[62] and another is the right to assign a representative to achieve exceeded influence and insight on the board.[63] Lastly, the union with collective agreement has various rights according to FML, with the purpose of empowering the union's position and its

[54] See for example AD 1977 nr 49 and 1978 nr 163.
[55] Ahlström (2013). *Kollektivavtal – formalia, giltighet och tolkning,* p. 80.
[56] See for example AD 1983 nr 184, AD 1977 nr 49.
[57] Prop. 2009/10:48, p. 50.
[58] Prop. 2009/10:48, p. 50.
[59] See for example 2 § LAS och 4 § MBL.
[60] Ahlström (2013). *Kollektivavtal – formalia, giltighet och tolkning,* p. 44-45.
[61] 11-13 §§ MBL.
[62] Kap. 6 § 2 AML.
[63] 6 § LSA.

influence.[64] Given the opportunity to agree on specific regulations but also the belonging legal consequences the collective agreement most certainly becomes very desirable for the union.[65]

[64] Källström, Malmberg & Öman (2016). *Den kollektiva arbetsrätten*, p. 20.

3. Industrial actions and industrial peace

3.1 Industrial actions

The right to industrial actions is stated in various legislation, not the least in the Swedish constitution.[66] The Swedish constitution provides employer associations, unions and individual employers the right to utilise industrial actions. Thus, not providing a right for individual employees, but only the parties that by law have the possibility to entre a collective agreement.[67] Furthermore, individuals taking lawful industrial actions are protected by the freedom of association and not to be punished with reprisals from the opposing party. Important to underline is that this protection includes only lawful actions, not all actions organised by a union.[68] For someone to not be allowed to practice their right to industrial actions must an agreement or law express why, otherwise the right is according to the legal principle free.[69] There is for instance no principle of proportionality required.[70] An underlying principle is that industrial actions are forbidden in legal disputes[71], *rättstvister,* and can therefore only be taken in disputes of interest, *intressetvister*. A legal dispute is roughly defined as a dispute that can be solved in court, which is also the reason why industrial actions are not allowed.[72] Furthermore, the single most important factor concerning the right for industrial action is whether or not there is an existing collective agreement between the parties.[73] As legal principle, a party bound by a collective agreement is also obligated to maintain industrial peace according to 41 § MBL, further described below.[74] Due to the extensive regulation by collective agreement in Swedish labour law the importance of the possibility to affect its regulations and conditions, taking industrial action, becomes even more essential. In an international perspective, the Swedish right to industrial action is considered generous.[75] Another difference from an international perspective is that in other countries the right to take industrial action varies depending on whether an employer or employee is undertaking it. Meanwhile in Sweden,

[66] 2 kap. 14 § RF. According to Waas (2014) most countires have a constituted right to strike, p. 6.
[67] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 291.
[68] Flodgren (1978). *Fackföreningen och rätten,* p. 168-169. Although, the employer may dismiss an employee during an ongoing industrial action. In that case, the dismissal may be the employer's way of upholding its economic interests, p. 171.
[69] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 291.
[70] Fahlbeck (2008). *Employee participation in Sweden: union paradise and employer hell or-?,* p. 48.
[71] However, see: AD 2006 nr 58.
[72] Bergqvist & Lunning (1997). *Medbestämmande i arbetslivet: kommentar till den nya lagstiftningen*, p. 412.
[73] Schmidt (1997). *Facklig arbetsrätt*, p. 221-222.
[74] Bergqvist & Lunning (1997). *Medbestämmande i arbetslivet: kommentar till den nya lagstiftningen*, p. 418.
[75] Schmidt (1997). *Facklig arbetsrätt*, p. 223.

the right is basically identical.[76] Moreover, an unorganised employee has the same rights to participate in a lawful strike as any other employee.[77]

A general principal is the neutrality and absence of the government. Even though there always, as a last resort, is the possibility for the government to intervene.[78] This balance maintains, hereunto, due to the labour market fulfilling its responsibility to solve the conflicts internally. Both parties are well-aware of the damage they can cause one another, nevertheless they also know the importance of maintaining a good relationship.[79] In this sense, Saltsjöbadsavtalet with its restrictions of industrial actions and famous spirit is to thank. The restrictions included prohibition against religious and political actions as well as industrial actions out of vengeance against part in an already solved conflict. Further, industrial action may not be taken to affect someone who is testifying or representing a government agency. Nor is industrial action against family businesses or action to force self-employed to abstain business opportunities accepted. Saltsjöbadsavtalet also protects third parties from suffering.[80] In addition to this there are a few restrictions found outside of MBL. For example, according to 48 § *Sjömanslagen* sailors cannot strike out on the ocean, but only when docked to a port. Another restriction is found in Lag (1936:320) om skydd mot vräkning vid arbetskonflikter, which restricts the employer from evicting an employee from a resident attached to the employment.[81]

3.1.1 Different kinds of industrial actions

There is no explicit or exact definition of what an industrial action is in Swedish law. In 41 § MBL there is an exemplification, although this recital is neither exhaustive nor descriptive. The section states that lockout, strike, blockade, boycott or other equivalent action is violating the industrial peace. There might be an inherent restriction in a definition or enumeration, that indirect limit the right to strike by excluding all other versions.[82] In doctrine and various legislative history, there is however a well-established definition of what is to be defined as an industrial action. Whether it is an industrial action is based on 1) the measure taken, 2) the purpose behind it and 3) if its collectively taken.[83] The purpose has over time, not at least due

[76] Schmidt (1997). *Facklig arbetsrätt*, p. 224.
[77] AD 1980 nr 15.
[78] Bergqvist & Lunning (1997). *Medbestämmande i arbetslivet: kommentar till den nya lagstiftningen*, p. 413.
[79] Fahlbeck (2008). *Employee participation in Sweden: union paradise and employer hell or-?*, p. 50.
[80] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar*, p. 292.
[81] Schmidt (1997). *Facklig arbetsrätt*, p. 231.
[82] Waas (2014). *The right to strike: a comparative view*, p. 3.
[83] SOU 1975:1, p. 351.

to the ruling of the labour court, proven to be more important than the measure itself.[84] The labour court has for example ruled that a notice of industrial action may be considered an industrial action itself. The court reasoned that the purpose of giving notice sometimes is to raise concerns at the opposite side and the notice may also cause economical damage. With this reasoning, the court ruled that a notice fulfils the requisites for being an industrial action itself.[85] Given that the party taking industrial action must give notice according MBL, a notice is of course not considered an industrial action if the sole purpose is to comply with the law.[86] The requisite of being collectively taken does not require the measure to include employees in plural, but can instead be announced by a union and therefore earn its collective label. Thus, an industrial action can *de facto* include only one employee.[87]

The historically most important industrial actions are strike and lockout, which together can be defined as stoppage of work. Stoppage of work initiated by the employees being strike and on the other side described as a lockout. Closely related to strike is for instance the partial stoppage of work. Such industrial actions often express themselves by employees refusing to work overtime or performing specific work tasks. After the different types of stoppage or refuse, blockade is the most common industrial action. A blockade is normally used as a recruitment blockade, preventing the employer from hiring new employees.[88] In addition to the traditional industrial actions there are of course many more and most probably even more than we know of yet. To name one, the labour court has ruled an organised slowdown to be an industrial action.[89] Sympathy actions will be described further down in the thesis under the segment about the four prohibitions.

3.2 Industrial peace

The main principle in Swedish labour law is that all industrial actions except for those mentioned in the 41 § MBL are legal. 41 § MBL regulates the most extensive and primary restrictions of industrial actions, namely the industrial peace when bound by a collective agreement. Although, the parties do not need to be *de facto* bound by a collective agreement. If a party in good faith claims that there is a collective agreement and thereby industrial peace is

[84] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 299.
[85] AD 1986 nr 4.
[86] AD 1985 nr 47.
[87] Adlercreutz & Mulder (2013). *Svensk arbetsrätt*, p. 173.
[88] SOU 1984:18, p. 165.
[89] AD 1993 nr 3. See Fahlbeck (1989). *Praktisk arbetsrätt,* p. 112 ff for further examples of industrial actions.

in effect that makes it a legal dispute in accordance with 41 § 1 st. 1p.. Therefore, the other party must await the court's decision before taking industrial action.[90] Such a claim is of course inofficiously if the party should have realised its lack of legal ground.[91] An obviously invalid objection that delays the industrial action can furthermore be imposed with damage. The labour court does so called interimistic rulings to judge whether the intended action is lawful.[92]

The section describes in which situations industrial actions are not valid, *e contrario* all other are legal.[93] The section is often referred to as the four prohibitions and enshrines that an employer or employee bound by a collective agreement may not take part in action;

> 1. to exert pressure in a dispute over the validity of a collective bargaining agreement, its existence, or its correct interpretation, or in a dispute as to whether a particular action is contrary to the agreement or to this Act;
> 2. to bring about an amendment to the agreement,
> 3. to effect a provision that is intended to enter into force upon termination of the agreement; or
> 4. to aid someone else who is not permitted to implement an industrial action. Industrial actions that have been taken contrary to the first paragraph are unlawful.[94]

All prohibitions cover various aspects and will be described in chronological order in the following section. The first prohibition restricts the parts from implementing industrial actions in legal disputes, these disputes should instead be ruled by the court. Roughly the prohibition could be described as forbidding disputes concerning the between the parties binding collective agreement and MBL.[95] Regarding disputes with legal basis in other legislation than MBL it is unclear whether industrial actions are violating the industrial peace. The question is not legislated and neither has it been a case for the labour court. In a case were a union would implement industrial actions against for example a dismissal it is almost certain that the labour court would rule the action as unlawful, nevertheless it could be interesting to see its reasoning.[96] Further does the first prohibition also make reactions to unlawful industrial actions

[90] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 308-309.
[91] AD 1989 nr 143.
[92] Sigeman & Sjödin (2017). *Arbetsrätten,* p. 96.
[93] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar*, p. 298.
[94] 41 § MBL.
[95] Adlercreutz & Mulder (2013). *Svensk arbetsrätt*, p. 176.
[96] Schmidt (1997). *Facklig arbetsrätt*, p. 254.

unlawful. The labour court has for instance ruled that a recommendation to not hire unlawful strikers was an unlawful action itself.[97] For the responding action to be unlawful must the purpose of the action of course fulfil what is required of an industrial action in the first place.[98]

The second prohibition states that parties bound by a collective agreement not may take industrial action to achieve a change in the same agreement. When interpreting the subject of the collective agreement normal civil interpretation of contract is applied. The subject of the contract should in that way be what the parts commonly intended when entering it.[99] This includes so called invisible clauses that have merged into the collective agreements.[100]

Further, the third prohibition makes it unlawful to take industrial actions which aim to achieve change in a future collective agreement. In other words, an industrial action concerning a future agreement cannot be lawful if there already is a collective agreement in force. In the legal history, it is explained that this goes in line with the general principle of having industrial peace during periods of collective agreement.[101] There is however an exception to this regulation, which states that a blockade to collect due salary is legal.[102]

Lastly is 41 § 4p. MBL, in which it stated that that an employee may take so called sympathy actions in a situation where the primary action is unlawful. This prohibition is formulated as everything is allowed but what is mentioned, *e contrario* stating that all but the mentioned are lawful. Thus, for a sympathy action to be lawful must the primary action be lawful in the first place. The sympathy action is nevertheless invalid if it is contrary to some of the other prohibitions. Additionally, the sympathy action must be time limited, this is a regulation to protect the employer's managerial prerogative. Sympathy actions may be taken simultaneously as the primary actions and a union might take sympathy actions to support the same union at another workplace.[103] Moreover, the Labour court has even reasoned that in a case where the primary action lacks efficiency there is perhaps an even bigger interest to implement sympathy

[97] AD 1976 nr 130.
[98] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 304.
[99] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 197.
[100] Nyström (1998). *Kollektivavtalet – en säregen avtalstyp,* p. 254-256.
[101] SOU 1975:1, p. 348.
[102] Prop. 1975/76:105, p. 499.
[103] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 306-307.

actions, a reasoning emphasizing the well-established legal position of sympathy actions in Swedish labour law.[104]

The prohibitions are applicable on the majority of the labour market at any given time, even when the parties temporarily not are bound by a collective agreement regarding salaries and general conditions. This is due to the *huvudavtal* between organisations such as LO and Svenskt Näringsliv that continues until further notice. *Huvudavtal* does not make the industrial action unlawful but requires it to be authorized in proper order.[105] Furthermore, the social parties on the labour market are burdened with a responsibility for maintaining the industrial peace. Due to the binding effect are the members of the organisation bound by the industrial peace. Therefore, it is the organisation's responsibility that its members do not implement unlawful industrial action and in the case the members do the organisation is obligated to act and react.[106]

3.3 Restrictions other than the industrial peace

As previously mentioned, the single most important aspect of the right to take industrial action is whether there is a collective agreement and thereby industrial peace. The most common type of industrial actions is those taken during periods when no collective agreement exists. Other than the industrial peace there are however an additional set of rules that always are applicable. For an industrial action to be legal in the first place it must be properly authorised. To achieve a proper order of authorisation does the industrial action need to follow the rules stipulated in the organisation's statue. Normally this means being authorised by the board of the union.[107]

The party taking industrial action must according to 45§ MBL leave notice to the opposite party and the Swedish mediation office at least seven days before. The notice should include why and how the industrial action will be express taken. This rule gives the mediation office time to intervene but also the other party to prepare necessary means. Yet another purpose with the rule is that the party leaving notice about industrial action gets seven days to reflect whether the decision is right.[108] Notice should not only be left when initiating an industrial action, but also when extending or escalating one. Individual employees are never obligated to notice the

[104] AD 1972 nr 19.
[105] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar*, p. 298.
[106] Nyström (1998). *Kollektivavtalet – en säregen avtalstyp*, p. 247.
[107] Adlercreutz & Mulder (2013). *Svensk arbetsrätt*, p. 174.
[108] Schmidt (1997). *Facklig arbetsrätt*, p. 229.

opposing party, that is between the organisations on the respective side. The obligation to leave notice is however not of legal effect but only economic. This means an industrial action is not considered invalid due to the negligence even though the party may be imposed with damage.[109]

Additionally, it is not legal to take actions that violate any other law by for instance using physical abuse.[110] This principle is actually to be found in the labour court's case law in a case regarding the port of Gothenburg and Hamnfyran in the 1980's.[111]

Other than these quite non-controversial regulations of formalities, the constituted right is that industrial actions on the labour market, *stridsåtgärder på arbetsmarknaden*, are lawful. This right can however be restricted by law and agreements, the most important one being 41 § MBL.[112] Nothing obstructs the parties to agree on a further going industrial peace than what is regulated in the law. In this matter are the agreements between SAF and LO the most important ones. [113] In AD 2003 nr 46 did the labour court clarify that the constituted right normally cannot be restricted by the court itself without support from legislation.

3.4 An intervening government

Contrary to the other Nordic countries, government intervention in specific situations rarely happens in Sweden.[114] Nevertheless, it occurs from time to time and one example is when the government proposed a national industrial peace regarding salaries, due to a requested freeze of all salaries. The background to the legislation was the uncontrolled cost and wage situation on the labour market in general. The suggested legislation included all employees, even those who were not covered by collective agreements. Further, the proposition stated a special damage for those violating the law.[115] The proposed legislation was however met by criticism, mainly focusing on that the legislation handled the symptom rather than the underlying problem. Furthermore, the legislation would also have been hard to monitor.[116]

[109] Schmidt (1997). *Facklig arbetsrätt*, p. 230.
[110] Sigeman & Sjödin (2017). *Arbetsrätten,* p. 95.
[111] AD 1982 nr 157.
[112] Sigeman & Sjödin (2017). *Arbetsrätten,* p. 96.
[113] Adlercreutz & Mulder (2013). *Svensk arbetsrätt*, p. 184.
[114] Bergqvist & Lunning (1997). *Medbestämmande i arbetslivet: kommentar till den nya lagstiftningen,* p. 413.
[115] Prop. 1989/90:95.
[116] Arbetsmarknadsutskottets betänkande 1989/90:AU24, *Allmänt lönestopp.*

Another time of interference was when the government in 1971 proposed a legislation which would allow the government to during a period of six weeks to freeze all industrial actions that threatened the critical interest of the society. The proposition stated the government's right to extend the period of the former collective agreement with six weeks, with the purpose of easing the negotiation. The reason for the legislation was the many industrial actions that had been taken during the early part of 1971, mainly in the public sector. One of the many notices included over 3000 employees in various parts of the public sector, such as government agencies, the judicial system and the Swedish enforcement agency. Only a few days later the government countered by putting about 28.000 SACO-members in lockout, mostly teachers. The committee presenting the proposition emphasised that the suggested legislation was an exception and had a time limit.[117]

A few other times the government has intervened are 1947's police conflict, 1951's nurse conflict and 1955's naval commander conflict. To prevent too many policemen from going on strike and jeopardising the safety in society over their working conditions the law was implemented, but never needed to be used. Concerning the nurses in 1951 the reasoning for legislation was similar. The proposition proposed upholding some necessary parts of the health care with the use of a compulsory arbitration. However, the conflict solved itself before the parliament had to vote. Lastly, the conflict regarding the naval commanders also solved itself before the government intervening. Although, the proposition suggested a compulsory arbitration due to the severe damage the conflict would have on the Swedish economic.[118] In all of above mentioned legislation and propositions the legislator is very strictly highlighting the fact that the measures taken are not more than what is necessary.

Even though the government rarely intervenes, the Swedish Mediation Office is a government agency that undeniably in some ways intervene. Actually, in addition to enable a functioning salary formation the purpose is to mediate in disputes.[119] The Mediation Office as we know it today was introduced in 2000.[120] Mediation has been a part of Swedish labour law for quite a while and the first legislation concerning mediation entered into force in as early as 1907.[121] MI has limited remedies and cannot intervene beyond its authority. Its authority includes for

[117] Prop. 1971:50.
[118] Prop. 1971:50, p. 6-7.
[119] Prop. 1999/2000:32, *Lönebildning för full sysselsättning*, p. 1.
[120] Prop. 1999/2000:32, *Lönebildning för full sysselsättning*, p. 41.
[121] Nyström (1990). *Medling i arbetstvister*, p. 65.

instance delaying an announced industrial action by 14 days and to impose a fine to a party that does not take part in a summoned mediation.[122]

3.5 Industrial actions against an employer bound by collective agreement

It is never allowed to take industrial action to supersede an already existing collective agreement.[123] Nevertheless, the legal principal is that it is lawful to take industrial actions against an employer already bound by a collective agreement with another party.[124] The labour court has persistent established the legal position as uncomplicated in this matter. The court has ruled that there is no problem if the conditions contradict one another, there is only a problem if the purpose is to remove, change or undermine the existing collective agreement.[125] Given the persistent ruling, one could however wonder when an industrial action has the purpose to replace or remove the existing collective agreement. According to the Labour court it seems that the union undertaking action must demand that the new agreement will be applied on all employees, not only the union's own members, for the action to be unlawful. Thus, offering a generous possibility to take industrial actions against an already bound employer.[126]

The second entered collective agreement has however not as powerful legal consequences, because the employer is bound to follow the first one.[127] This principle is well established and was laid down by the Labour Court in AD 1939 nr 24. Regarding employment conditions, the first entered agreement is the only applicable one. While, as for other working conditions the second entered collective agreement is applied at areas the first one does not cover.[128] The second collective agreement is of course not worthless, but supplies the union with for example rights according to FML and some rights within MBL.[129] However, there is a controversial asymmetry when calculating which collective agreement is the oldest. Suppose an employer is bound by a collective agreement, CA1. CA1 is valid for another year. The employer chose to enter yet another agreement, CA2. CA2 is valid for a traditional three-year period. After one year, when CA1 runs out the parties have the ambition of extending the agreement. However,

[122] 49 och 52 §§ MBL.
[123] Prop. 2016/17:107 Nya utstationeringsregler, p. 39.
[124] Medlingsinstitutets rapport (2017). *Förekomsten av konflikter på arbetsmarknaden i situationer där arbetsgivaren är bunden av kollektivavtal,* p. 9.
[125] https://www.lag-avtal.se/arbetsdomstolen/ad-tillater-stridsatgarder-mot-arbetsgivare-som-har-avtal-6877529
[126] Weihe (2010). *Vänbok till Ronnie Eklund,* p. 622.
[127] Nyström (1998). *Kollektivavtalet – en säregen avtalstyp,* p. 241-242.
[128] Hansson (2010). *Kollektivavtalsrätten: en rättsvetenskaplig berättelse,* p. 342.
[129] Schmidt (1997). *Facklig arbetsrätt,* p. 232.

after a short interruption due to bargaining CA1 is renewed but becomes the second entered agreement and thereby lost many of the legal advantages of being the first agreement. To conclude, the calculation solely takes consideration to when the existing agreement was entered and not when the parties first entered an agreement in a coherent chain.[130]

In the legal history of MBL did the government appointed labour law committee discuss whether a restriction to the right to take industrial actions was necessary and suitable. The committee discussed two different alternatives, the first one being that the Labour court should be able to judge if the action was permitted due to the purpose of it. The other suggestion was that there would be a certain requirement of representation for the union taking the action. None of the discussed restrictions did however seem to fit in the Swedish model nor clarify or ease the legal position. Instead, the committee reasoned that the parties on the labour market, in accordance with the Swedish model, should keep the responsibility to solve potential conflict of this matter.[131]

Since Lex Britannia, there has been five rulings in the Labour court regarding industrial actions against an employer already bound by a collective agreement.[132] The first case, AD 1993 nr 15, actually concerns Hamnfyran and the conflict was based on the fact that the ship crew performed some of the job tasks assigned to the employees in the port. Hamnfyran gave notice that they would blockade the two concerned ships. The employer was bound by a collective agreement with the ship crew, but not with Hamnfyran. The employer argued that the actions aimed to restrict the employer's prerogative and furthermore that they were not even able to fulfil the demands. In addition, the employer claimed that Saltsjöbadsavtalet should be considered as a legal principal applicable to the entire Swedish labour market. The employer summoned Hamnfyran to the Labour court, which interimistic judged that even if Saltsjöbadsavtalet was considered applicable the court could not see any reason why the actions would be unlawful.[133]

The second case of this matter was AD 2004 nr 96, also a case involving Hamnfyran. There was no collective agreement between the parties, although the employer was bound by one with

[130] Hansson (2010). *Kollektivavtalsrätten: en rättsvetenskaplig berättelse,* p. 345-347.
[131] SOU 1975:1, *Demokrati på arbetsplatsen,* p. 414-419.
[132] Medlingsinstitutets rapport (2017). *Förekomsten av konflikter på arbetsmarknaden i situationer där arbetsgivaren är bunden av kollektivavtal,* p. 14.
[133] AD 1993 nr 15.

Transport. The local agreement regulating night shift was modified so that the compensation became lower. Transport and the employer agreed on the new terms meanwhile SHF and Hamnfyran gave notice of blockade until they found a pleasurable solution for their employees. The employer claimed that SHF tried to supersede or change the existing agreement whilst SHF argued that they were not bound by industrial peace and just wanted a pleasurable solution for their employees. The Labour court ruled interimistic that the action was not unlawful and therefore could be continued.[134]

Another ruling regards a somewhat internal and external dispute between Swedish Paper Workers' Union (Pappers), IF Metall (Metall) and the employer. After a re-organisation, an arbitrator decided that the collective agreement with Metall was applicable on the organisation. The employer offered Pappers an identical substitute agreement. Pappers did not settle and tried to get an own collective agreement by giving notice of industrial actions. The employer argued that the suggested collective agreement from Pappers aimed to change, or even replace, the existing agreement with Metall. Pappers on their side, argued that they only wanted to regulate the conditions of their members. AD did once again rule in favour of the union and declared the actions as lawful.[135]

A similar case from the Labour Court is AD 2012 nr 13. The case take place on the public sector but the principles are still analogical applicable to the private sector. The public employer already was in a collective agreement, but the Swedish Building Workers' Union (Byggnads) claimed that they wanted an agreement as well. The employer argued that the agreement had the purpose of replacing the existing agreement. The employer also claimed that the proposed agreement violated 41 § p. 2 MBL because it aimed to, or at least inevitably would, amend the existing collective agreement. In this sense, the employer meant that the second prohibition was applicable even if Byggnads was not a party in the existing agreement. In accordance with the court's case law did AD rule the actions as lawful. The Labour court further added that the fact that the employer was bound by *Huvudavtalet*[136], stating which parties the employer was permitted to enter collective agreements with, did not affect the court's reasoning.[137]

[134] AD 2004 nr 96.
[135] AD 2005 nr 110.
[136] A central collective agreement between The Swedish Agency for Government Employers and various unions. See: https://www.arbetsgivarverket.se/globalassets/avtal-skrifter/centralaavtal/huvudavtal/huvudavtal-130327.pdf
[137] AD 2012 nr 13.

Last year AD ruled in yet another case concerning industrial actions against an employer bound by a collective agreement with another party. In the case, the employer had a collective agreement with the Swedish Electricians' Union (SEF) but when the employer changed employer association to Almega they also changed to a new collective agreement with Unionen instead. Unionen being a white-collar union and SEF being a blue-collar union, meaning all employees switched collars. SEF went on strike and claimed first of all that there was no existing agreement for the concerned workers and secondly that even if so, the case law from AD was clear that such industrial actions still were lawful. The employer on the other hand, argued that the demand to include all workers in SEFs new agreement meant replacing the existing one. AD reasoned that there were no facts pointing towards SEF trying to replace or amend the existing white-collar agreement, but only to improve the conditions of their own members.[138]

3.5.1 Statistics of industrial actions against an employer bound by collective agreement

The Swedish Mediation Office has overviewed the number of times they have had to intervene in conflicts since their origin in the year 2000. During the first years of the 21th century the MI estimated that about 80 cases were managed every year. In comparison, this number is approximately half of the equivalent numbers from the 1990's. Furthermore, there were about 300 cases a year after the introduction of MBL. Thus, there has been a successive decrement for a long time. During their entire existence[139] MI has managed around 1160 cases. Of these cases 420 are reported to concern an employer already bound by a collective agreement.[140] There is an uncertainty about 150 of these cases due to the fact that MI did not mediate themselves in the actual matters, nevertheless the cases are included in the statistics.[141] Moreover, this statistic shows all the cases were notice about industrial action has been laid, meaning that actions have not been taken in all situations.

The established unions, the ones usually entering collective agreements, stands for about 45 of the actions against already bound employers. Further, SAC, Central Organisation of the

[138] AD 2017 nr 32.
[139] Until August 2017.
[140] Medlingsinstitutets rapport (2017). *Förekomsten av konflikter på arbetsmarknaden i situationer där arbetsgivaren är bunden av kollektivavtal,* p. 21.
[141] Medlingsinstitutets rapport (2017). *Förekomsten av konflikter på arbetsmarknaden i situationer där arbetsgivaren är bunden av kollektivavtal,* p. 32.

Workers of Sweden, compose the absolute majority with 330 of the matters while SHF is represented in about 35 of the matters. All the matters where SHF is represented appears to be against an employer bound by a collective agreement according to the statistics. The Mediation Office finds it hard to estimate how many working days that have been lost due to actions against already bound employers. It is only for certain that strike has occurred in 60 of the cases and that it did not occur in 80.[142] That MI has not been involved makes it impossible to with certainty know *if* actions were taken and in that case *what* actions were taken. However, they estimate that these 60 matters have generated a loss of 4800 working days spread over 17 years.[143] Although, the Mediation office point on a probable supposed number of unknown cases these 4800 lost working days accumulated over 17 years should be put in comparison to the estimated 50.000 working days that yearly are lost due to all strikes and lockouts on the labour market.[144]

[142] Medlingsinstitutets rapport (2017). *Förekomsten av konflikter på arbetsmarknaden i situationer där arbetsgivaren är bunden av kollektivavtal,* p. 32.
[143] Medlingsinstitutets rapport (2017). *Förekomsten av konflikter på arbetsmarknaden i situationer där arbetsgivaren är bunden av kollektivavtal,* p. 33.
[144] Medlingsinstitutets rapport (2017). *Förekomsten av konflikter på arbetsmarknaden i situationer där arbetsgivaren är bunden av kollektivavtal,* p. 38.

4. Freedom of association

4.1 Freedom of association in Swedish law

Freedom of association is stated as a freedom and right in in the Swedish constitution.[145] This constituted freedom is however only against *det allmänna,* meaning the state and public sector. The regulations in 7-9 §§ MBL secures employers and employees freedom of association against the opposite. The legislation found in MBL secures the right to membership and utilisation of the membership without pressure or intervening from the other part of the employment contract. This freedom of association has its origins from the December compromise, *Decemberkompromissen,* in 1906 where LO and SAF agreed that both parties' respective freedom of association would not be violated.[146] Before the compromise it was not unusual for the employer to force the employees to agree on not being a part of a union and for those being union representatives there was always the risk of being dismissed or relocated to particularly repellent work.[147]

Only a few years after the courts introduction did the Labour court rule the freedom of association to be considered a natural part of the collective agreement.[148] The ruling did however only secure the right between the by collective agreement bound parties, thus not regulating the freedom of association for non-members in that particular union.[149] The freedom of association for all employees and employers got legislated first in 1936 and later on complemented in 1940.[150] This legislation is juridical equivalent with today's regulations found in MBL, which is peremptory. The legislation does not protect job seekers or the organisations themselves, nor does it protect the so called negative freedom of association. The negative freedom is instead protected in the European convention of Human Rights, further on ECHR, which will be described below.[151]

In a report from a government authorised labour law committee it is problematized that employers in some specific situations also might violate a job seeker's freedom of association,

[145] 2 kap. 1 § 5 p. RF.
[146] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 73-74.
[147] Schmidt (1997). *Facklig arbetsrätt,* p. 106.
[148] AD 1933 nr 94.
[149] Schmidt (1997). *Facklig arbetsrätt,* p. 107.
[150] Lag (1936:506) om förenings- och förhandlingsrätt.
[151] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 74.

even if that should not be considered the legal principle.[152] In the legal history of LAS there is stated that the freedom of association should protect employees claiming re-employment.[153] Regardless of what is stated in the legal history has the labour court applied the reasoning restrictive.[154]

In 8 § MBL its legislated that the freedom of association is violated when the opposite party;

> "takes action that is detrimental to the other party as a consequence of such party's exercise of its/her/his right of association or where an employer or employee, or the representative of either, takes action directed at other party for the purpose of inducing that party not to exercise its/her/his right of association. Such infringement shall also be deemed to have occurred notwithstanding that the action was taken for the purpose of fulfilling an obligation towards a third party."[155]

From the section, mainly two requisites can be found. The first one being that measure has been taken and the second one being the purpose behind that specific measure. Thus, to be a violation there must have been an action with either the purpose of obstructing someone from making use of the freedom of association or reacting to the use of it. The measure varies from case to case, but to be able to prove the violation it is important that the measure is concrete. The most common measure is for an employee to be dismissed, relocated or withdrawn benefits. The measure does not need to be reactive in this sense, but can also be an employer offering a higher salary with the condition that employee do not join a union. The labour court has an immense case law on the topic of freedom of association and the requisite measure has been extensively applied.[156] For example, the court has found that threat of disciplinary actions[157] or information and notice about dismissal[158] be enough for a measure to be considered as taken. Further the court has ruled both a work testimonial saying that the employee was very loyal to the union[159] and reoccurring negligence to offer overtime[160] as measures according to 8 § MBL. Nevertheless, the labour court has been clear that general statements concerning critic and

[152] SOU 1975:1, p. 226.
[153] Prop. 1973:129, p. 166.
[154] AD 1982 nr 16.
[155] 8 § MBL.
[156] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar*, p. 76-77.
[157] AD 1983 nr 85.
[158] AD 2002 nr 6.
[159] AD 1986 nr 25.
[160] AD 1948 nr 52.

dissatisfaction against the union or its representatives, is not sufficient to be a measure in accordance with the legislation.[161]

As stated above a measure is not enough for a violation of the freedom of association to occur, there also needs to be a purpose behind the action. The measure might be reactive, one might define it as vengeance, for someone making use of its right. The other case is when a measure aims to obstruct someone from in the future making use of the freedom of association. The later one being somewhat more diffuse, due to the fact that these measures not always have a concrete damage to the victim but might also be privileges if seceding a union.[162]

4.2 International legislation

The freedom of association is enshrined in numerous international obligations. Sweden does however apply a dualistic perspective, meaning that international and international law are two different legal systems. The practical implication of this system is that even when Sweden ratify conventions, they do not automatically become applicable law. Instead the convention can be *incorporated*, making the convention coming into legal force.[163] One example of an incorporated law is the Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna, by which the European convention of Human Rights was fully incorporated in the Swedish legal system.[164] Another way of giving an international obligation legal effect is by *transformation*, making Swedish law compliant with the obligation. The legislator might also regard the Swedish legislation as sufficient and therefore do nothing, which first was the case with the European convention of Human Rights. Regardless of how the convention is implemented, Sweden is obligated to have conformity with its international obligations when introducing new legislation.[165]

4.2.1 International Labour Organisation

The ILO was founded 1919 with the purpose of regulating the freedom of association to eliminate deficient work conditions. ILO consist of three organs representing employers,

[161] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 76-78.
[162] Holke och Olauson (2014). *Medbestämmandelagen – En kommentar,* p. 79-80.
[163] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet,* p. 36-37.
[164] Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.
[165] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet,* p. 37-39.

employees and states. The highest instance being the International Labour Conference, which amongst other ensure compliance from the ratified states and discuss the enacting of conventions.[166] Only a few years after the organisations founding did it enact the Convention No. 11 concerning the freedom of association for agricultures. From that point, the organisation started their work on enacting a universal convention protecting all employees. It took until 1948 for the freedom of association to finally be enacted through the Convention No. 87. With Convention No. 87 finally being enacted it took only one year for Convention No. 98, protecting mainly the right to collective bargaining, to be introduced.[167] These conventions are adjacent to one another and sometimes even overlapping.[168]

Every member state is obligated to report its implementation of its obligations. A state might also be requested to report on areas which the state has not ratified. These reports are both continuous but also initiated due to complaint. In addition to this reporting, there are two organs of surveillance. The first and most influential one being the Committee of Experts on the Application of Conventions and Recommendations, CEACR. CEACR's main object is to ensure that case law and legislation is conform with the states ratified conventions. To achieve conformity, the organ imposes requests to specific countries. CEACR presents their observations in a yearly report.[169]

The second surveillance organ is the Committee of Freedom of Association, CFA. CFA analyses specific cases and are not to find general principles, although CEACR often uses the reasoning of CFA to interpret the Convention. The reasoning of CFA is not legally binding, but is said to have a "persuasive moral value".[170] In addition to these organs, might employee and employer organisations leave so called representations when they believe that a state does not fulfil its ratified obligations. The states themselves may also complain on other countries, given that both countries have ratified the concerning Convention. When complaints have taken place shall ILO publicise a report of recommendations, which the concerned countries might accept or oppose. The International Court of Justice, ICJ, in Haag might confirm, change or overrule the report. The CFA has scrutinised approximately 2000 cases concerning Convention No. 87 and 98, out of which the ICJ has ruled in only one case. Thus, the possibility for the ICJ to rule

[166] SOU 2005:89, *Bevakning av kollektivavtals efterlevnad,* p. 31.
[167] Alcock (1971). *History of the International labour organisation*, p. 258.
[168] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 174-175.
[169] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 66-67.
[170] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 67-69.

a reasoning from CFA to become legally binding is of no practically importance.[171] When describing the supervisory organs of ILO, it is important to mention their preventing and dissuasive effect, namely that the public pressure is perhaps its most powerful weapon in the absence of sanctions.[172]

4.2.1.1 ILO Convention No. 87

Art. 1 in the Convention states that all members of the organisation is obliged to apply all of the conventions articles:

> "Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions."[173]

All states ratifying the Convention must of course apply its legal effect. The question is however, if members of the ILO in general are obligated to follow the Convention even though they have not ratified it. All members must accept the fundamental principles of the Constitution and the Declaration of Philadelphia, which includes the freedom of association. Thus, all members are bound to follow at least the principle of freedom of association. Practically this means that if a state gets accused for not fulfilling sufficient conditions, a state that has not ratified Convention No. 87 instead may be investigated through the principles of the ILO's constitution, within which the Philadelphia declaration is found.[174]

Convention No. 87 consists of 21 articles that together protect the freedom of association. The most fundamental one being Art. 2, stating that:

> "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."[175]

The Convention is consistently using the word worker instead of employee, this is to include everyone who is working but not in fact a part in an employment contract.[176] Furthermore, the

[171] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 68-70.
[172] Von Potobsky (1998). *Freedom of association: The impact of convention No. 87 and ILO action,* p. 221.
[173] ILO Convention No. 87 Art.1.
[174] ILO (2006). *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, para. 115.
[175] ILO Convention No. 87 Art 2.
[176] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 136.

articles regulate for example what organisations the workers and employers are free to choose[177], that public authorities should not interfere or restrict the right[178] and that the organisations may not be violating the national law.[179] The organisations included in the Convention No. 87 are more specific any organisation of workers or of employers for furthering and defending the interests of workers or of employers. An important distinction being that all organisations with this particular purpose is included, not only the established or accepted ones. These organisation of course have the possibility to in their statues regulate what members are accepted into the organisation, consequently not giving everybody right to be a part of any organisation. The Convention also holds a prohibition against discrimination, this is established in the legal history as well as the case law of the Committee of Experts on Application of Conventions and Recommendations.[180] The right to not join an organisation, so called negative freedom of association, is however not regulated in Convention No. 87.[181]

4.2.1.2 Rivaling organisations

The Convention protects the right to exceed an organisation or to be a member of numerous organisations. The national legislation may not direct or indirect restrict the possibility for numerous organisations to act on the same workplace. So called organisation monopoly, legislation giving one organisation the right to a specific workplace is in violation with the Convention, even in the case were the workers are free to not join that specific organisation. Such legislation, regardless of it being direct or indirect, restricts the free choice to join an organisation although it allows the worker not to be a member. Furthermore, due to the same principle all workers should also be free to establish an entirely new organisation. Regulations stating that organisation must have at least 50 percent of the employees at the given workplace are also in violation with the constitution since the regulation only allows one organisation to exist at the same time.[182]

Neither is the state allowed to discriminate certain organisations or in any way affect the choice for the workers. By for example putting an organisation in a more or less favorable situation might the state influence the choice. Such interfering from the state could express itself by

[177] ILO Convention No. 87 Art 10.
[178] ILO Convention No. 87 Art 3.
[179] ILO Convention No. 87 Art 8.
[180] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 133-138.
[181] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 141.
[182] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 138-139.

unequal economical support, official statements from authorities or ministers or negligence to recognize the organisation's legitimacy. Even if a worker would prefer a specific organisation it is somewhat likely that it is more pragmatic to choose another organisation if that one has a notably better position. Consequently, the legal principle is that the state should not affect the choice of organisation.[183]

The Convention's purpose is however not to enforce diversity of organisations, but solely to make it possible. In many situations, it is in an employee's interest for an organisation to not have many rivaling organisations. National systems giving the most represented organisation privileges is not in violation with Convention No. 87, in the case where the organisation itself has earned its position. Another premise is that other organisations have the possibility to conquer the same privileges. Nations that have ratified the Convention cannot restrict the number of organisations without violating its obligations. Neither might a legal system deny a minority organisation to exercise its right. The Swedish system has been a subject for the CEACR. The committee meant that the impression of the system might be that it is unfair, but with all organisations given the same opportunity to earn the by collective agreement achieved privileges it was conform with the Convention.[184]

4.2.1.3 The right to undertake industrial actions in Convention No. 87

The right to take industrial action is not explicitly mentioned in Convention No. 87, but is instead protected by the statements and reports of the ILO Committees.[185] Nevertheless, is the right to industrial action considered as an essential measure to ensure the members interests. In fact, the right was defined an essential right as early as 1952, although the CEACR waited until 1959 to recognize that a restriction of industrial action is also a restriction to the freedom of association.[186] The expert committee declared that a general prohibition may violate the Convention, but that for instance the public sector might have to restrict it to protect some essential services it provides. Regardless of sector, all restriction should be compensated for. As for today, the right to industrial action is well-established and accepted. The right is derived from Art. 3,8 and 10. The two surveillance organs are not quite agreed on whether the right is individual and collective or just collective, but at the least the right is collective. The right of

[183] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 142.
[184] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 141-145.
[185] Iossa (2017). *Collective Autonomy in the European Union*, p. 113.
[186] Bellace (2014). *The ILO and the right to strike*, p. 47-49.

industrial actions has grown stronger by the years and today a state must provide a genuine protection.[187] Moreover, it is argued that the right to collective bargaining would become meaningless if the right to strike was not protected by the same Convention. To underline the problem, it is said that without the right to strike it is more *collective begging* than bargaining.[188]

The definition of industrial actions according to ILO is quite generous. Industrial actions are considered unlawful first when they are no longer conducted in a peaceful manner.[189] From an ILO point of view the purpose behind the strike, the employee's interests, are of utter most importance. Thus, the action itself nor the concerned questions are the single most important factor but instead that there is a purpose linked to the interest of the employees. The right to industrial action is not limited to disputes that can be solved by collective agreement but includes for instance actions to enforce payment of salary or protest against someone being dismissed due to participating in an unlawful action.[190] Moreover, ILO has declared that a general prohibition against sympathy actions is in contrary to the Convention, but that a premise stating that the primary action must be lawful is reasonable.[191] The right to take sympathy actions is derived from Art. 4 and 10 in the Convention, and is by CEACR argued to include even actions taken to support non-members of one's union.[192]

A state restricting the right to take industrial action must have reasonable intentions. A restriction may not be more than necessary or amount to a total restriction. Restricting the right in so called *legal disputes* is however not seen as a contradictory.[193] Regulations making industrial actions the last option are not *per se* contrary to the Convention. For instance, an authority might apply a cool-down period of 40 days after the notice of industrial actions. The CFA has also accepted requirement of giving notice at least 20 days before the action is reasonable, 60 days was ruled to be overly restrictive. Further, legislation requiring an absolute majority in voting or 2/3 of the members to vote are considered unreasonable.[194] Nevertheless, there are some exceptional situations when the right might be restricted during a required time. This could be the case during acute national emergencies such as insurrection, natural

[187] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 149-151.
[188] Vogt (2016). *The right to strike and the International Labour Organisation*, p. 112.
[189] Gernigo, Odero and Guido (1998). *ILO principles concerning the right to strike*, p. 444.
[190] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 154-155.
[191] Gernigo, Odero and Guido (1998). *ILO principles concerning the right to strike*, p. 444.
[192] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 154-155.
[193] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 151-153.
[194] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 155-157.

catastrophes or severe riots. The applicability of these exceptions is of course restrictively interpreted.[195] Furthermore, it is the only scenario where a general prohibition against industrial actions are lawful according to the Convention.[196]

4.2.1.4 ILO Convention No. 98

The second ILO convention highlighted in this thesis is Convention No. 98, within which the right to organise and the right to collective bargaining are regulated. The first article regulates the protection against anti-union discrimination and reads as follows:

> 1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
>
> 2. Such protection shall apply more particularly in respect of acts calculated to--
>
> (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
>
> (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.[197]

Both CFA and CEACR are clear that no one should be discriminated in effect of their membership or position in a union. Convention No. 98 protects all employees in the same extent that Convention No. 87 Art. 2 does. Consequently, the union does not have to be recognized to a discrimination to have taken place. The protection found in Convention No. 98 covers only the right against employers.[198] Art. 1 does however state that the employment should not depend on membership in a union, giving the protection a coverage of jobseekers as well as current employees. The protection of jobseekers does not include a protection against so called organisation clauses[199] or collective agreements stating a fee of the salary should accrue the

[195] Gernigo, Odero and Guido (1998). *ILO principles concerning the right to strike*, p. 453.
[196] ILO (2006). *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, para. 570.
[197] ILO Convention No. 98 Art. 1.
[198] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 177-178.
[199] Schmidt (1997). *Facklig arbetsrätt*, p. 114, Flodgren (1978). *Fackföreningen och rätten*, p. 181 ff. Nyström, Edström & Malmberg (red.) (2012). *Nedslag i den nya arbetsrätten*, p. 21. A concept which was established in some parts of the Swedish labour market but was prohibited by Svenskt Näringsliv. Thus, only employers outside of Svenskt Näringsliv, primary in the building sector, used the concept of organisation clauses. The clause allowed the employer to employ workers only from the by the clause stated union. Such clauses are nowadays unlawful according to the ECtHR, https://www.lag-avtal.se/nyhetsarkiv/europadomstolen-stoppar-organisationsklausuler-6555002.

union. Further, the Art.[200] declare that the employment should not be terminated or in other way disfavored by for instance relocating, take disciplinary measures, force retirement or receive an inadequate salary due to membership in a union.[201]

CFA has reasoned that every nation's method may vary, the importance is that the method effectively secures anti-union discrimination. Meanwhile, CEACR has more or less demanded that all states implement regulations protecting anti-union discrimination. Furthermore, the regulation must be complemented with efficient legal remedies. A dismissal due to union activities or membership may not be handled in the same way as an ordinary dismissal. Consequently, the process must be characterized by urgency, cost effectivity, nonpartisan justice.[202]

4.2.1.5 The right to collective bargaining according to ILO

Collective bargaining is mainly regulated in Art. 4 of the Convention. The article states that appropriate measures should be taken in each country to encourage and facilitate negotiation between the parts. Moreover, according to the Philadelphia declaration, which ILO is obligated to follow, must collective bargaining be recognised all over the world. This is considered fundamental to achieve decent working conditions. Art. 4 shows in many ways the close interplay between Convention No. 87 and 98. This is because collective bargaining is considered perhaps the most critical right to achieve the interest of the employees. The two surveillance organisms have developed a concrete case law protecting for instance the labour markets parts autonomy.[203] The right to industrial action is also closely linked to collective bargaining, even though the right is not explicitly pronounced in Convention No. 98 but rather enshrined in Convention No. 87.[204]

Both CFA and CEACR have faced questions concerning who got the right to collective bargaining. CFA declared that the principle is that negotiating with the union should be promoted and encouraged according to Art. 4. Further, CEACR has reasoned that the right for unorganised workers probably not is protected by neither Convention No. 87 nor 98. Nevertheless, the two organs are very clear that the member states must recognise all qualified

[200] ILO Convention No. 98 Art. 1:2:b.
[201] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 179-180.
[202] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 181-182.
[203] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 186.
[204] ILO Convetion No. 87 Art. 3 & 10.

unions otherwise flagrantly violating the Article and Convention. With the legal principle being that all unions have the right to collective bargaining the ILO has made an exception. The exception being that the most representative union may attain an exclusive position. To earn this exclusive position must the union be decided via objective and fair methods. Consequently, CFA has accepted union earning exclusivity when the position is based on criteria regarding representing a majority and being independence. ILO reasons that to be the most representative union must the majority of the employees in the work place take a vote, such a vote should however not require an absolute majority.[205]

4.2.2 European Convention of Human Rights

Another area of legislation that embodies the freedom of association is the ECHR. As a consequence of World War II the interest for human rights increased. Hence, the Council of Europe was founded in 1949. Shortly after its foundation the council composed the European Convention of Human Rights.[206] The Convention is incorporated in Swedish law[207] but is not a part of the constitution. When incorporating ECHR in 1993, the legislator made the Convention equal with Swedish law, but to protect it from losing its magnitude through *lex posterior* and *lex specialis* a special regulation in the constitution[208] was implemented. The effect being that ECHR is equal to Swedish law, but with the addition that no future legislation may violate Sweden's international obligations from the ECHR.[209] Furthermore, already existing and obviously contrary Swedish law was modified to correspond with the new Convention.[210] Every state bound by the Convention is obligated to guarantee all individuals in their jurisdiction the stated rights. To ensure the rights is the European Court of Human Rights, further ECtHR. An individual citizen's possibility to take legal action against a state, which is afterwards bound by the courts ruling is a unique concept.[211]

The freedom of association is regulated in Art. 11:1 and the allowed restrictions in 11:2.

[205] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 188-190.
[206] SOU 2005:89, *Bevakning av kollektivavtals efterlevnad*, p. 49.
[207] Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.
[208] RF 2:23.
[209] Danelius (2015). *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*, p. 43-44.
[210] Proposition 1993/94:117, p. 36.
[211] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 74.

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.[212]

A restriction of Art. 11:1 is only possible if the restriction goes in line with what is stated in 11:2. The presented possibilities of restriction are exhaustive and for a restriction to not violate the Convention it must 1) be prescribed by law, 2) serve a legitimate aim and 3) be necessary in a democratic society. The state has the burden of proof and must justify that the restriction is necessary, and furthermore that it does not violate the principle of proportionality. Thus, the state must prove that the restriction is the minimum level of interference necessary to attain the purpose. This systematic procedure ensures the Convention from being undermined from national legislation and historically most countries have failed the principle of proportionality.[213]

The state is also obligated to secure the individuals freedom of association in relation to companies. The main purpose of Art. 11 is however to protect individuals from an intervening state.[214]

4.2.2.1 A right to enter collective agreement?

Within the right to collective bargaining there can be different scopes. One being the right to negotiate and another one being the right to entre a collective agreement, amongst other. The most interesting scope for this thesis is the right to entre collective agreement. There is some case law concerning the state being accused for favoring a particular union and thus violated

[212] ECHR Art. 11.
[213] Golubovic (2013). *Freedom of association in the case law of the European Court of Human Rights,* p. 764-765
[214] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet,* p. 302.

the freedom of association. One of the most famous rulings is Lokmannaförbundet v Sweden[215], and another one being Trade Union X. v Belgium[216].

In the case, The Swedish engine drivers', *Lokmannaförbundet*, had gone five years without a collective agreement. The Swedish engine drivers' claimed that the absence of collective agreement had caused several disadvantages for the union. These disadvantages being for instance having no right to appoint safety inspectors and official trade union representatives.[217] The commission reasoned that neither the union's right to engage collective bargaining nor the capacity of entering a collective agreement was violated.[218] Instead, the main question of the case was whether the state of Sweden could be obligated to enter "any given collective agreement with a trade union representing certain of its employees whenever the parties are in accord on the substantive issues negotiated upon".[219] The court ruled against the union and further explained that Art. 11 secures the right for a union to protect and strive for its members interest, which could be the case without an absolute right to a collective agreement. The state is free to ensure that the right is fulfilled in a way of their choosing.[220] A collective agreement is one way to secure the right. The court's ruling has been confirmed later on.[221]

The first case concerning collective bargaining since *Lokmannaförbundet* was Wilson & Palmer v United Kingdom in 2002.[222] In the United Kingdom, it was legislated that the unions had to be accepted as a union by the employer to earn the right to collective bargaining.[223] Some Unions which did not earn acceptance took legal action to ensure the right. The ECtHR did however, referring to statements from their own case law once again confirm that Art. 11 does not secure any especial protection but instead leaves every state to ensure that the right is fulfilled.[224] The court reasoned that even if collective bargaining is one way, it is not necessarily the only way. Further, the court reasoned that a state ensuring the right to take industrial actions is one of the most essential ways to fulfill the Articles protection of the union members interests.[225] In *obiter dictum* the court added that in a legal system where the employer is free

[215] Swedish Engine Drivers' v Sweden, 6 February 1976.
[216] Application No. 7361/76 Trade Union X. v. Belgium.
[217] Swedish Engine Drivers' v Sweden, 6 February 1976, p. 32.
[218] Swedish Engine Drivers' v Sweden, 6 February 1976, p. 38.
[219] Swedish Engine Drivers' v Sweden, 6 February 1976, p. 39.
[220] Swedish Engine Drivers' v Sweden, 6 February 1976, p. 39-40.
[221] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 310.
[222] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 312.
[223] Wilson & Palmer v. United Kingdom, 2 July 2002, p. 26.
[224] Wilson & Palmer v. United Kingdom, 2 July 2002, p. 40.
[225] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 313.

to enter collective bargaining with whoever it chooses, the other unions must be able to be recognized in other ways, for instance by organizing industrial actions.[226]

A neighboring case from recent years is Demir & Baykara v Turkey. The case was ruled in 2008 and concerned a trade union in the public sector that had a collective agreement with the employer. The union brought proceedings against the employer in The Turkish Civil Court when it believed that the employer did not fulfill its obligations from the agreement. The court reasoned that because there was no law recognizing the right to form trade unions, the trade union had never existed and thus never had the right to collective bargaining. The ECtHR ruled that the Convention did include the right to form a trade union and the right to collective bargaining. Moreover, the court laid down that Turkey did not restrict the Convention in a way that was necessary for a democratic society and therefore had violated its obligations.[227]

4.2.2.2 Industrial actions in ECHR

As legal principle, the ECtHR has declared the right to industrial action as one of the most important aspects of freedom of association, but not the only one. The right to industrial actions is therefore not explicitly regulated in Art. 11, given that a state can ensure the freedom of association by offering other legal remedies.[228] The ECtHR has also judged in cases concerning freedom of association and industrial actions. The first case on this topic handled by ECtHR was whether the freedom of association had been violated when the members who had gone on strike did not earn the retroactive salary increase that those who had not taken industrial did. The two workers Schmidt and Dahlström had not themselves taken any industrial actions but were members of the union which initiated it. When the new collective agreement finally was engaged, after both strike and lockout, did the new agreement include an exception. An exception stating that all employees except for those who were members of the union which took industrial action received retroactive compensation for not earned salary increase.[229] The court stated that Art. 11 did not guarantee any right to retroactive benefits and that it could not be considered inherent in the rights.[230] In conclusion, the court declared that the freedom to protect the unions interests must be permitted and made possible by the state, nevertheless is

[226] Wilson & Palmer v. United Kingdom, 2 July 2002, p. 46.
[227] Demir & Baykara v Turkey, 2008,
[228] Danelius (2015). *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*, p. 530.
[229] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 315.
[230] Schmidt & Dahlström v Sweden, 1976, p. 34.

the concerned country free to choose a measure that fits the specific legal system.[231] In this case the state obviously had offered the right to strike and therefore the members had the possibility to make their interests heard.

Another interesting case concerning the right to strike in the context of the ECHR is UNISON v The United Kingdom.[232] The case concerned the public hospital UCLH that was in concept to transfer some of the employees to a private company. Trying to secure the working conditions of its members UNISON tried to arrange a collective agreement stipulating that the new employer would be obligated for 30 years apply the same or at least similar work conditions as the remaining employees would have. UCLH refused to enter such an agreement and consequently UNISON gave notice of strike, which the national courts ruled as unlawful. Firstly, the ECtHR determined that the matter was within the scope of Art. 11 and continued with examining whether the restriction was violating the Convention. Initially, the court established that the restriction did have a legitimate purpose, namely to ensure the interests of the hospital. But was the restriction a necessity? ECtHR submitted that UNISON was free to take action for instance if UCLH unlawfully changed the existing conditions prior to the transfer. Furthermore, UNISON still had the right to take action also after the transfer. The court further described that the members did not suffer any actual damage or obvious risk from the restriction, as they maintained their right to strike against future employers if the conditions for instance deteriorated. The court ruled that an employer cannot be forced to "enter into, or remain in, any particular collective agreement or accede to its requests on behalf of its members.[233]

In a similar case taking place in the oil rigs of Norway, the state restricted the parties to take industrial actions due to the tremendous economic consequences it caused the country. In addition to the prohibition, the parties also became bound by an arbitration. The union complaint to the ECtHR. The court repeated what was stated in Schmidt & Dahlström about the state being free to choose its methods to ensure the freedom of association and that the right to strike was one way, but not the only. Further, the court submitted that the union did in fact have numerous ways to practice its freedom of association. Interesting with this particular case

[231] Schmidt & Dahlström v Sweden, 1976, p. 36. Referring to their own ruling, see: National Union of Belgian Police v Belgium, 1975, p. 18.
[232] Applic. No. 53574/99 by UNISON V the United Kingdom, 2002.
[233] Applic. No. 53574/99 by UNISON V the United Kingdom, 2002.

is that the court never ruled whether the restriction violated Art. 11:1 but instead assumed that it did and in that way jumped to its reasoning regarding 11:2. As for the legitimacy of the purpose, the court declared that it could find several; "the interests of public safety and for the protection of the rights and freedoms of others and health". The court declared that the state has a wide margin of appreciation and looked into its own case law. Further the court attached attention to the fact that 36 of strike actually had been allowed and what consequences it caused. Reasoning whether the restriction was a necessity the court took into consideration the exceptional circumstances of this particular case. In the ruling, the court emphasize that a compulsory arbitration not should be considered necessary as a legal principle.[234]

Yet another case from Turkey concerning the freedom of association, but this time the right to strike, is Enjeri Yapi-Yol Sen v Turkey. The case concerned a Turkish union that was about to implement industrial actions. Five days before the planned actions the Government published a circular prohibiting all civil servants from taking part of the actions. ECtHR did rule that the prohibition violated the Convention. Although a restriction of some civil servants may be compatible there could never be a general prohibition.[235]

4.2.2.3 The negative freedom of association

In Art. 11 the freedom of association is explicitly described. This is described as a right to for instance create and enter a union. The wording did however raise the question whether the right to not enter or to be unorganised also was covered by the Article. In a ruling from 1970 did the commission lay down that such a right was included in the Convention.[236] In fact, all the rights to freedom in the Convention has a corresponding negative right. This could for example be the right to not be religious. The negative freedom can be restricted exactly as the positive freedom may be according to 11:2.[237] To exemplify the negative freedom of association and its interpretation, a selection of the ECtHR's case law will be presented.

Several cases concerning the negative freedom of association have reached the ECtHR, the first of which was Young, James & Webster v United Kingdom.[238] The applicants had been

[234] Federation of Offshore Workers' Trade Unions and Others v Norway, 2002.
[235] Enerji Yapi-Yol Sen v Turkey, 2009.
[236] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 334.
[237] Danelius (2015). *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*, p. 531.
[238] Danelius (2015). *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*, p. 531.

dismissed due to their refusal to enter specific trade unions. The employer had agreed on a so called "closed shop" with three unions, meaning that all employees had to be a member in one of these to keep their employment. When entering their employment, no such clause existed.[239] The court's opinion was that such a threat of dismissal struck against the very substance of the Article, but was the restriction lawful according to 11:2?[240] At this point, the court was very clear they did not examine the closed shop system itself but instead the specific circumstances in this matter.[241] Accordingly, the court pinpointed that the necessity of the interference was examined.[242] The court took many facts into consideration, namely; that 95% of the employees already were members, other closed shop agreements did not demand entrance of non-union employees and the fact that the Royal Commission on Trade Unions and Employers' Associations in a report stated that further safeguarding was desirable. Overall, the court reasoned that the British Rail had gone further than what was required to achieve a proper balance between the conflicting interests.[243]

Young, James & Webster was ruled in 1981 and therefore it is worth comparing with the newer case Sørensen & Rasmusen v Denmark from 2006. The case is interesting partly because it includes two individuals *applying* for a job, and mainly because it finally establishes closed shops as unlawful. The court took consideration to the special features of the Danish labour market and estimated closed shop agreements to cover only circa 10% of the labour market.[244] Further, the court attached weight to the fact that the Danish Minister of Employment repeatedly had attempted to renew the legislation and thereby eliminating shops and also the fact that the system only is permitted in a few of the member states.[245] In their ruling, the court comes to the conclusion that Denmark has failed to protect the two applicants freedom of association by allowing a closed shop system.[246] Nevertheless, a closed shop system must not always violate the Convention, but the court declared that the state has a much narrower margin.[247]

[239] Young, James & Webster v United Kingdom, 1981, p. 54.
[240] Young, James & Webster v United Kingdom, 1981, p. 55.
[241] Young, James & Webster v United Kingdom, 1981, p. 61.
[242] Young, James & Webster v United Kingdom, 1981, p. 62.
[243] Young, James & Webster v United Kingdom, 1981, p. 64-65.
[244] Sørensen & Rasmusen v Denmark, 2006, p. 66-67.
[245] Sørensen & Rasmusen v Denmark, 2006, p. 68-70.
[246] Sørensen & Rasmusen v Denmark, 2006, p. 75-77.
[247] Nyström (2007). *Svensk arbetsrätt i ett europaperspektiv*, p. 392-393.

Another case from the UK is Sibson v United Kingdom. In the case, Sibson resigned from the union because of his great dissatisfaction.[248] The union decided to go on strike if Sibson continued working without being member in the union. When offered to either enter the union or be relocated Sibson refused both and instead resigned with immediate effect.[249] When in the ECtHR the court submitted that Sibson was not in the same situation as Young, James & Webster and further highlighted the differences;

> 1) Sibson did not object to rejoining TGWU on account of any specific convictions as regards trade union membership (and he did in fact join another union instead). It is clear that he would have rejoined TGWU had he received a form of apology acceptable to him and that accordingly his case, unlike theirs, does not also have to be considered in the light of Articles 9 and 10 of the Convention.
> 2) Furthermore, the present case is not one in which a closed shop agreement was in force.
> 3) Above all, Mr Sibson was in a rather different position: he had the possibility of going to work at the nearby Chadderton depot, to which his employers were contractually entitled to move him; their offer to him in this respect was not conditional on his rejoining TGWU; and it is not established that his working conditions there would have been significantly less favourable than those at the Greengate depot.[250]

Consequently, the court declared that Art. 11 not had been violated in the case. Important to notice in this case is that the court did not even bother to reason whether 11:2 was violated, which is only necessary if the violation is to the "very substance" of the freedom of association.[251] In Sigurdur A. Sigurjonsson v Iceland was the question whether it was lawful that only those who were members in the union Frami were able to perform licensed taxi driving in the capital Reykjavik. Sigurjonsson was well aware of the requirement of membership when he first received his license in 1984. Nevertheless, Sigurjonsson resigned his membership a year later and consequently got his license withdrawn.[252] However, it was first in 1989 that requirement of membership came into legal force. ECtHR submitted that the compulsion struck against the very substance of the Article.[253] Thus, the court approached to subject whether the

[248] Sibson v United Kingdom, 1993, p. 9.
[249] Sibson v United Kingdom, 1993, p. 10-11.
[250] Sibson v United Kingdom, 1993, p. 29.
[251] Herzfeld Olsson (2003). *Facklig föreningsfrihet som mänsklig rättighet*, p. 341.
[252] Sigurdur A. Sigurjonsson v Iceland, 1993, p. 8-10.
[253] Sigurdur A. Sigurjonsson v Iceland, 1993, p. 36.

interference was justified. The government referred to the importance of their supervisory, which was possible due to the membership requirement.[254] The court did admit that the supervisory was of both occupational and public interest. ECtHR then declared that first of all, the government did not even have the main responsibility for this area. Secondly, this was by no means the only way of ensuring the supervision, and lastly, nothing prevented Frami from protecting its members interests without the compulsory membership. In conclusion, Art.11:2 was violated in this case.[255]

Lastly, in this section the case Gustafsson v Sweden must be mentioned. The case concerns a non-organised Swedish restaurant owner who refused to enter a collective agreement. In 1987 Gustafsson was approached by a union who offered him to either join the employer association or to enter a so called substitute agreement, *hängavtal*[256]. Gustafsson refused both options and referred to the facts that the employees already had better conditions than those granted in the collective agreement and that the employees themselves did not want Gustafsson to sign a substitute agreement. Gustafsson also declared that he was ideological against the collective agreement.[257] Reacting to the refusal the union placed Gustafsson's restaurant under a blockade and declared a boycott against it. In addition, sympathy actions were taken, causing that all deliveries to the restaurant were cancelled.[258] In 1991 the applicant sold his restaurant due to difficulties caused by the industrial actions.[259] The ECtHR initially declared that the state has a wide margin independence in choosing its method to secure the freedom of association.[260] Further, the court points to the fact that Art. 11 does not guarantee the right to enter a collective agreement (referring to Swedish Engine Drivers' v Sweden, 1976) and that the compulsion in this particular case did not significantly strike against the freedom of association.[261] The fact that Gustafsson was subject for the industrial actions was not his non-membership in the employer association but the absence of collective agreement, an important distinction that

[254] Sigurdur A. Sigurjonsson v Iceland, 1993, p. 40.
[255] Sigurdur A. Sigurjonsson v Iceland, 1993, p. 41.
[256] A type of collective agreement that literally means "a hanging collective agreement". Such an agreement obligates an employer who is a non-member of an employer association to apply the active collective agreement for the particular type of business. A *hängavtal* gives the employer no right to affect the content but still makes it legally binding to apply it. The upside being that you do not have to join an employer association. See: Hanau & Agell (1999). *Föreningsfrihet och stridsåtgärder på arbetsmarknaden: Gustafssonmålet i perspektiv*, p. 21.
[257] Gustafsson v Sweden, 1996, p. 10-11.
[258] Gustafsson v Sweden, 1996, p. 14.
[259] Gustafsson v Sweden, 1996, p. 23.
[260] Gustafsson v Sweden, 1996, p. 45.
[261] Gustafsson v Sweden, 1996, p. 52.

probably could have changed the ruling of the court.[262] In conclusion, emphasizing the states wide margin of appreciation the court found that Sweden did not violate the Convention.[263] The legal principles of the ruling must be considered as accepted by, at least, the Labour court as a result of the court's ensuing ruling in the so called Kellerman case[264]. AD did however, not confirm that a principle of proportionality may restrict the right to take industrial actions in Sweden.[265] Even though Sweden in fact is bound to apply this principle in accordance with EU law, not as an independent legal rule but to complement and specify a legal position.[266]

4.2.3 The European Union

Perhaps the most important legal source when describing Sweden's international labour law obligations is EU-law. Sweden has been a member in the EU since a public vote in 1995.[267] EU-law has in many ways affected the Swedish labour law and tradition with legislation as well as case law.[268] In fact, practically all changes in Swedish labour law since the membership derive from EU-law.[269] EU was founded on the idea of collaboration between the member states. To achieve this purpose, it is stated that the Union should;

> "establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. "[270]

In the light of above stated principles, the free movements are found. The free movements included in the TFEU 26.2 are goods, persons, services and capital. With consideration of the thesis' scope, solely the freedom of services will be described further. The right of establishment and services is regulated in TFEU 49-62. For instance, Art. 56 states that providing services should be free as a legal principle. The impact of the freedom of services has in fact not affected Sweden and its legislation that much, because there are very few

[262] Herzfeld Olsson, *Förhållandet mellan ratten att vidta stridsåtgärder och den negativa föreningsfriheten aktualiseras i Europadomstolen*, p. 612.
[263] Gustafsson v Sweden, 1996, p. 55.
[264] AD 1998 nr 17.
[265] Källström, *Kellerman och omfattningen av den negativa föreningsrätten*, p. 1160-1162.
[266] Nyström (2007). *Svensk arbetsrätt i ett europaperspektiv,* p. 396.
[267] Nyström (2017). *EU och arbetsrätten*, p. 19.
[268] Nyström (2017). *EU och arbetsrätten*, p. 23.
[269] Nyström, Edström & Malmberg (red.) (2012). *Nedslag i den nya arbetsrätten*, p. 9, p. 11.
[270] Art. 3.3 TEU.

employees who utilize the right. The interesting situation for this thesis however, is when foreign companies temporary post workers in for instance Sweden.[271]

This was partly the case in the well-known Britannia case in 1989.[272] Britannia concerned a Cypriot ship with Filipino employees that arrived the port of Gothenburg. The Britannia ship was covered by a collective agreement when it got welcomed to the Swedish port with industrial actions. The actions aimed to replace the existing agreement.[273] In its ruling did the Labour court lay down that actions to achieve an unlawful collective agreement are unlawful themselves. Further, AD established that 42 § MBL also covers industrial peace following agreements from other legal systems. In conclusion, the ruling establishes that it is unlawful to take industrial actions against an employer bound by a collective agreement with the purpose to replace it and also that such actions taken in Sweden are unlawful if they are unlawful in the legal system the existing collective agreement was entered.[274] The ruling raised concern in Sweden that industrial actions no longer could be implemented against posted workers. Consequently, Lex Britannia was introduced in MBL. Lex Britannia mainly stated that the prohibition in 42 § MBL only was applicable in conditions and regulations covered by MBL. Lex Britannia was however to be changed as a result of the Laval case. Although, the regulation itself is still in effect in MBL. However, the regulation is nowadays applicable only against collective agreement not included by the Posting of Workers Directive.[275] Furthermore, one could argue that the Britannia case in some ways is based on a principle of proportionality. In this case, the proportionality is weighed between the interest of the employees and the interest to maintain in an already entered agreement with another party.[276]

The Laval case consisted on the one side of the Latvian company Laval un Partneri Ltd and on the other side the Swedish union Byggnads. The background was that the Latvian company refused to sign a collective agreement with Byggnads and instead entered one with a Latvian union. Byggnads undertook industrial actions and sympathy actions from Swedish Electricians' Union was implemented as well.[277] AD decided to request a preliminary ruling from ECJ. The ECJ took Swedens national legal system and its implementation of the Posting of Workers

[271] Nyström (2017). *EU och arbetsrätten,* p. 119-120.
[272] AD 1989 nr 120.
[273] Göransson, *Stopp för stridsåtgärder mot bekvämlighetsflaggade fartyg?,* p. 536.
[274] AD 1989 nr 120.
[275] Nyström (2017). *EU och arbetsrätten,* p. 120-121.
[276] Källström (2005). *Proportionalitetsprincip i Svensk arbetsrätt,* p. 401.
[277] C-441/05 Laval un Partneri Ltd. and Svenska Byggnadsarbetareförbundet.

Directive into consideration when reasoning. In conclusion, ECJ laid down that industrial actions against a company posting workers to achieve in some ways better conditions than those regulated in the directive is unlawful. Further, ECJ explained that it is not reasonable to demand collective bargaining when there are no specific minimum wages in the country. Lastly, ECJ also reasoned that the demands set by Byggnads were other than those regulated in the Posting of Workers Act and therefore did not concern the so called hard core.[278]

Additionally, the ECJ accused 42 § MBL (Lex Britannia) for being discriminating in the sense that foreign employers with collective agreement can be imposed with the same actions as a Swedish employer with no collective agreement at all.[279]

At almost the same time as the Laval ruling was the similar case of Viking.[280] Viking Line was a Finnish ferry company connecting Finland with Estonia. The company was obligated to apply Finnish conditions and salaries but instead wanted to enter an Estonian collective agreement. The Finnish union gave notice of industrial actions while the ITF (The International Transport Workers' Federation) asked all its affiliates to not enter an agreement with Viking Line. In the ruling, it was the first time that ECJ described the right to take industrial actions as a fundamental right. Further, the court declared that this fundamental right could however be restricted in accordance with the principle of proportionality to respect the fundamental freedoms within the internal market. ECJ explained that the actions could be justified if 1) the conditions of employment were genuinely jeopardized or under serious threat, 2) if the actions were suitable to ensure the objective and 3) if the actions did not go beyond what is necessary to attain the object.[281]

To summarize, Sweden implemented the Posting of Workers Directive in 1999[282] and then got criticized in the Laval ruling. Several inquiries were performed by the government, which generated in the addition of Lex Laval in MBL and the Posting of Workers Act. Lex Laval aimed to align Swedish labour law with EU law.[283] First of all, Lex Laval lead to a modification

[278] Nyström (2017). *EU och arbetsrätten,* p. 164-166.
[279] Nyström (2017). *EU och arbetsrätten,* p. 163-164.
[280] C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.
[281] C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.
[282] Lag (1999:678) om utstationering av arbetstagare.
[283] Nyström (2017). *EU och arbetsrätten,* p. 175.

in the 5a § in Posting of Workers Act so that industrial actions only were lawful when fulfilling three cumulative requisites, often referred to as the hard core. Furthermore, 41c § was changed so it referred to the 5a § Posting of Workers Act and thereby made industrial actions unlawful according to MBL. As a consequence of the changes in MBL, Lex Britannia became only applicable on employees not included by the Posting of Workers Act. In addition, there were some minor changes for instance in the wording of 42 §. Lex Laval came into legal force April 15, 2010.[284] The regulations of Lex Laval have been hardly criticized, not at least the burden of proof. The burden of proof included a total prohibition of all industrial actions, presuming the employer could prove that the working conditions is comparable with an existing Swedish collective agreement concerning the same area of application. For instance, the CEACR of ILO criticized the new regulations for violating both Convention 87 and 98.[285] The two central union federations TCO and LO turned to the Council of Europe to see if the regulations in fact were violating Sweden's international obligations.[286] The conviction put Sweden in a peculiar position, in which Sweden fulfilled their obligations against EU but violated those against ILO and the Council of Europe.[287] Furthermore, it has been discussed both to implement minimum wages in Sweden and the possibility to introduce *Erga Omnes*[288]. Both solutions have been opposed by experts as well as the social partners, mainly based on the argument that it is not compatible with the Swedish model.[289] As of June 1, 2017 a new legislation came into force. The new legislation aimed to extend the possibility to enter a collective agreement with posted workers. This is to be achieved mainly by the implementation of so called collective agreements for posted workers. Such agreements should regulate limited conditions (the hard core) and also have limited legal consequences.[290] Furthermore, the new legislation extends the right to strike, which is no more restricted by the fact that the employer ensures the employees have similar conditions as equivalent workers in Sweden.[291]

[284] Regeringens proposition 2009/10:48, *Åtgärder med anledning av Lavaldomen,* p. 5-9.
[285] Nyström (2017). *EU och arbetsrätten,* p. 179-181.
[286] No. 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden.
[287] Nyström (2017). *EU och arbetsrätten,* p. 181.
[288] A universally applicable collective agreement.
[289] Nyström, *Stridsåtgärder – en grundläggande rättighet som kan begränsas av den fria rörligheten,* p. 872.
[290] Regeringens proposition 2016/17:107, *Nya utstationeringsregler,* p. 1. In her article (Stridsåtgärder – en grundläggande rättighet som kan begränsas av den fria rörligheten, p. 8) Nyström discuss the implementation of what she calls "a light collective agreement".
[291] Regeringens proposition 2016/17:107, *Nya utstationeringsregler,* p. 206.

4.2.3.1 Charter of Fundamental Rights of The European Union

In the year 2000 the CFREU was introduced as a statue, but did not become legally binding. When introducing the CFREU EU waited until the last second to decide whether or not the statue would be a part of the Treaty of Nice. The legal status of the CFREU was thereafter debated and both the European Commission and the European Parliament wanted the statues to in some way become legally binding. The European Court of Justice did however raise their concern that a legally binding statue would also force the court to rule in matters regarding for instance freedom of association, consequently making binding rulings for the member states. A few years later in 2009, the CFREU became binding as a result of the Treaty of Lisbon.[292] The charter is entitled the same legal status as the TFEU and TEU.[293] The charter is applied where EU law is and should not improve the jurisdiction of EU, but only ensure the fundamental rights within the Union. In the scope of this thesis and its delimitations it is mainly Art. 28 which is relevant.[294] The article ensures the right of collective bargaining and action and reads as follows;

> "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."[295]

It the charter it is stated that in areas where ECHR is applicable, the charter should protect at least the same rights.[296] Furthermore, as a result of the Treaty of Lisbon EU itself is to join the ECHR.[297] This is however a process that is still ongoing, more than ten years later.

[292] Nyström (2017). *EU och arbetsrätten,* p. 91-93.
[293] Art. 6.1 TEU.
[294] Nyström (2017). *EU och arbetsrätten,* p. 94.
[295] CFREU Art. 28.
[296] CFREU Art. 52.3.
[297] Art. 6.2 TEU. See: Iossa (2017). *Collective Autonomy in the European Union,* p. 132.

5. The conflict in the port of Gothenburg

The conflict in the Port of Gothenburg, often referred to as *Hamnkonfllikten*, is a conflict consisting of many aspects. Ever since 1972 when Hamnfyran was excluded from LO[298], there has been turbulence with the union in general and in the port of Gothenburg especially. Actually, even before the break up the port of Gothenburg was burden with wildcat actions.[299] In addition, in the aftermath of the exclusion SHF has been a frequent part in the Labour court's case law.[300] The latent struggle of power did however escalate when APMT was announced as the new employer in the port of Gothenburg. After various industrial actions from both parties the conflict had caused massive economic consequences for both APMT but also Swedish export on a national level.[301] Hamnfyran express that they feel falsely accused for being trouble makers when in fact it is the employer who has caused 98% of the strike hours in 2017.[302] Nevertheless, Hamnfyran admits to periods of blockades against working overtime and recruitments. The employees have worked their daily schedules but consistently refused to sign up for overtime. Meanwhile, all employees on call have declined to work all hours after 16 o'clock.[303] In excess of the conflict in Gothenburg, Sveriges Hamnar has announced that the association is making a general distinction between unions with and without collective agreement. The distinction has resulted in Hallands Hamnar disrupting their relationship with SHF.[304]

5.1 What does Hamnfyran want to achieve?

Hamnfyran has been criticised for not being clear with what they actually want to achieve with their industrial actions. For instance, the mediator from the conflict Jan Sjölin says that he is not entirely sure, even after seven months mediating, what Hamnfyran really wants.[305] To find a solution Jan Sjölin insists there must be concrete objects that can be negotiated and compromised. The employer must know what is needed from their side to find an arrangement, something that has been fundamentally missing in the mediation with Hamnfyran. Hamnfyran

[298] Schmidt (1997). *Facklig arbetsrätt*, p. 49.
[299] http://arbetsmarknadsnytt.se/80-ar-av-konflikter-hamnarbetarforbundet-har-satt-upp-spelreglerna/
[300] See for example: AD 1979 nr 165, AD 1980 nr 94, AD 1981 nr 160, AD 1982 nr 157, AD 1985 nr 88 and AD 1990 nr 67.
[301] http://www.gp.se/ekonomi/den-bittra-kampen-om-g%C3%B6teborgs-hamn-1.4262579
[302] http://www.gp.se/nyheter/debatt/lyssna-p%C3%A5-oss-s%C3%A5-blir-hamnen-l%C3%B6nsam-igen-1.4811401
[303] http://hamn.nu/article/2430/Fragor--svar-om-situationen-pa-APM-Terminals.html
[304] https://www.lag-avtal.se/arbetsratt/hallands-hamnar-bryter-med-hamnarbetarforbundet-6904121
[305] https://www.svt.se/special/speletomhamnen/

does of course not agree and claims they have presented a number of options, but that the mediators were stuck in the idea of a substitute agreement.[306] Moreover, on their official website Hamnfyran explicitly declares what six demands the union decided to take industrial actions to achieve. These demands will be translated and compiled below;

1) To be guaranteed the right to assign negotiation delegations and the right to keep their members informed concerning ongoing negotiations.
2) Their jobs to be respected. Their jobs cannot be delegated to other groups of workers with the purpose of saving money or to avoid security rules.
3) Respect entered agreements and collective agreements. No more delay with promised compensation for working extra shifts.
4) Stop exploiting sick and elderly temporary employed to put pressure on the members of SHF.
5) Reassume the systematic work with the work environment. Do not shut out the work environment representatives from SHF.
6) Be compliant with the Annual Leave Act[307] and Parental Leave Act[308].[309]

Furthermore, the union explains that they are willing to enter a collective agreement or if possible a three-part solution containing APMT, Transport and SHF. Hamnfyran means that in other ports the two unions have a fully functional cooperation, but that APMT is forcing the unions against each other. SHF does not want to displace the existing agreement between APMT and Transport, but only earn the same rights.[310] Moreover, a substitute agreement does not interest SHF. A substitute agreement does not give SHF the power to influence or affect what is regulated in the agreement. Neither does such an agreement give SHF the right to represent and negotiate matters concerning their employees. SHF also clarifies that a collective agreement not necessarily is the only solution, but the one suggested by the mediation office. The union further explains that a collective agreement is not the problem, but perhaps the solution. Nevertheless, Hamnfyran makes clear that they will not sell their industrial peace to a lower price than others. Which practically means that they will not sell it for less than Transport

[306] https://www.lag-avtal.se/arbetsratt/medlaren-facken-svavar-pa-malet-i-medlingar-6909348
[307] Semesterlagen (1977:480).
[308] Föräldraledighetslag (1995:584).
[309] http://hamn.nu/article/2430/Fragor--svar-om-situationen-pa-APM-Terminals.html
[310] https://www.svt.se/special/speletomhamnen/

did, namely by obtaining the legislated full union rights that traditionally follows with a collective agreement.[311]

In addition to the demands set on their annual association meeting Hamnfyran has presented five concrete suggestions on how to make the port world leading again;

1) Embrace the Swedish model. Give SHF the same rights and influence as we have in other ports in Sweden. Make us of our competence and experience.
2) Adapt the production after the demand and interests of the customers. Do not restrict the flexibility with narrow time limitations, it decreases the profit. Instead, let us together find solutions to meet the customers' demands by being efficient and reliable during high conjunctures.
3) Solve the negotiating situation. It is indefensible to shut out 85% of the employees, it only follows with lack of information and worsened working conditions. In the long term, APMT is the key to a working three-party agreement.
4) Job security ensures productivity. With job security, we can contribute to and focus on increased profit. Permanent employments cannot be forced into employments through staffing companies or employments with no guaranteed hours. Today's system decreases the productivity and increases the total salary cost.
5) Flexible staffing and scheduling without staffing companies. Before, Hamnfyran had a solution with an extremely flexible group of workers which did not have any guaranteed salary and got assigned when needed. This group consisted of one fifth of the total work force. The flexible group was used by numerous terminals in the port and therefore was very efficient.[312]

5.2 Presented solutions by the Mediation Office and the parties themselves

In the Mediation office's report, it appears that even though APMT and Hamnfyran negotiated at 32 different times they did not find any suitable solution.[313] In their second petition the MI propose an agreement that briefly puts Hamnfyran in an equal position with a part in a collective

[311] http://hamn.nu/article/2430/Fragor--svar-om-situationen-pa-APM-Terminals.html
[312] http://www.gp.se/nyheter/debatt/lyssna-p%C3%A5-oss-s%C3%A5-blir-hamnen-l%C3%B6nsam-igen-1.4811401
[313] Medlingsinstitutets medlingsrapport (2017). *Rapport från medlingsförhandlingar i tvist mellan APM Terminals Gothenburg AB/Sveriges Hamnar å ena sidan och Svenska Hamnarbetarförbundet avdelning 4 å andra sidan*, p. 1.

agreement concerning MBL, AML, FML and LRS. In return Hamnfyran would be obliged to maintain industrial peace. Hamnfyran denied the proposal and the mediators were unable to clarify what modifications that could change their standing.[314]

Further on, the mediators expressed in their report that after six months of mediation the dispute was not clarified but rather extended to include everything. The mediators explained that in the strive to define and specify the initial six demands the conflict instead had escalated to concern the entire management of the port. In the beginning of the mediation APMT expressed that "it does not really concern the things you describe but rather who has the power of the port, APMT or Hamnfyran". At this point, the mediators also write that they considered asking to be discharged from their mission due to the fact that they have exhausted all their opportunities and that the conflict is escalating heavily. At the request of Sveriges Hamnar, the employer association, and the Mediation Office the mediators stayed at their assigned mission.[315]

The mediators met with Hamnfyran to understand their demands and to concretise them. Hamnfyran called their solutions "shadow agreements" and "parallel agreements". All proposals from Hamnfyran did however interfere with the existing collective agreement and was therefore invalid. When asked to clarify their demands in writing Hamnfyran refused. Hamnfyran also suggested a mirroring agreement, *spegelavtal,* referring to an identical agreement as Transport providing full rights to Hamnfyran. Meaning that Hamnfyran would be a party in their agreement and furthermore be in an equivalent position as Transport on a local level. However, Sveriges Hamnar made it very clear that such an arrangement will never be accepted. Several times during the mediation did Hamnfyran propose that the easiest solution would be going back to the old system where no agreement at all existed. APMT was however not interested in re-establishing a system where Hamnfyran keeps their right to take industrial actions but also earns privileges.[316]

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[314] Medlingsinstitutets medlingsrapport (2017). *Rapport från medlingsförhandlingar i tvist mellan APM Terminals Gothenburg AB/Sveriges Hamnar å ena sidan och Svenska Hamnarbetarförbundet avdelning 4 å andra sidan,* p. 10.
[315] Medlingsinstitutets medlingsrapport (2017). *Rapport från medlingsförhandlingar i tvist mellan APM Terminals Gothenburg AB/Sveriges Hamnar å ena sidan och Svenska Hamnarbetarförbundet avdelning 4 å andra sidan,* p. 11-12.
[316] Medlingsinstitutets medlingsrapport (2017). *Rapport från medlingsförhandlingar i tvist mellan APM Terminals Gothenburg AB/Sveriges Hamnar å ena sidan och Svenska Hamnarbetarförbundet avdelning 4 å andra sidan,* p. 13-14.

When discussing the petitions presented by the mediators APMT reasons that they must at least ensure two, if possible three, years of industrial peace to convince their customers to come back. On the other side is Hamnfyran who reasons that whatever solution comes up is provisional and therefore an agreement cannot run for longer than six months. Given this information the mediators proposed a compromise of 18 months. Reluctantly, the employer accepted the compromise whilst Hamnfyran refused. After this last push, the mediators finally asked to be resigned from their mission.[317]

5.3 The legal disputes

In addition to all mediation and negotiation concerning a collective agreement, there are also numerous active legal disputes between the parties in the port. In fact, starting the year of 2018 the parties had five simultaneous disputes in the Labour Court. The disputes concern everything from unlawful industrial actions, freedom of association, refusal to negotiate and withdrawn privileges of workers' representatives.[318]

The first case that the Labour Court had to rule was AD 2018 nr 9. In the case SHF stated the demand to 200.000 SEK for violation against 10 § and 16 § MBL. The matter in the case was whether Sveriges Hamnar was obligated to enter a collective bargaining with SHF concerning a central agreement, *ett rikstäckande förbundsavtal.* Initially, the court reasoned that the obligation found in 10 § MBL primary concerns the bargaining between the union and the employer on plant level, not the employer association centrally. The court exhaustively investigated relevant preparatory work and legal history as well as conventions from both ILO and ECHR. For instance, it was mentioned that by ILO Convention 98 Sweden is obligated to facilitate and encourage bargaining between the parties. Further, the court reasoned that such a right must not be laid down by law. However, given that the preparatory works states that one of the purposes behind 10 § MBL was to avoid industrial actions to achieve collective bargaining the court rules that the section of law covers the right to bargain concerning a *förbundsavtal.* Due to the particular circumstances in the case the damage was however

[317] Medlingsinstitutets medlingsrapport (2017). *Rapport från medlingsförhandlingar i tvist mellan APM Terminals Gothenburg AB/Sveriges Hamnar å ena sidan och Svenska Hamnarbetarförbundet avdelning 4 å andra sidan,* p. 15-16.
[318] https://www.lag-avtal.se/arbetsdomstolen/parterna-i-hamnkonflikten-gor-upp-i-ad-6893283

depressed to 20.000 SEK.[319] In conclusion, the ruling established that SHF's right to collective bargaining with Sveriges Hamnar was protected by 10 § MBL.

The second case in this regard was the extensive case AD 2018 nr 10. The case concerned numerous aspects but especially whether APMT had the right to withdraw the privileges a workers' representative from SHF had obtained over the years. When appointed in 2006, the representative initially earned a part time salary for union work and during 2012-2016 the compensation was full time. The main dispute concerned whether these privileges were earned by two special collective agreements (In 2006 and 2012) or a one-sided assurance. Even though AD established that the agreement from 2006 fulfilled all requisites stated by law the court laid down that the parties did not deliberately enter a collective agreement and thus no agreement was in place. Without any presented documentation, neither did the agreement from 2012 become classified as a collective agreement. Since no collective agreement ever existed and therefore not could have merged into the individual employment contract, the act of withdrawing the one-sided assurances could not objectively equate a dismissal. Neither was the employer ruled to have violated the freedom of association nor taken an unlawful industrial action by withdrawing the privileges. AD rejected all SHF's actions and awarded the union with damages of 618.434 SEK.

In addition to the cases already ruled by AD there are a few waiting in line. One matter concerns the calculation of total time of employment of on call workers in regard of deciding who should be made redundant. The case should have no juridical consequences in the sense that it should affect the national debate, nor the scope of the thesis. Moreover, there are two active disputes concerning unlawful industrial actions. The first case summons 18 of SHF's workers for unlawful actions in January. When ordered to load a ship the employees refused by doing nothing. In addition, some employees with other work tasks accompanied them for 30 minutes. Sveriges Hamnar claim 2700 SEK per every employee.[320] Perhaps the most interesting aspect of the mentioned oncoming case is that SHF counterattacked one week later by suing Sveriges Hamnar for unlawful actions when giving warnings and withholding salary for those taking part of the action.[321]

[319] AD 2018 nr 9.
[320] https://www.lag-avtal.se/arbetsratt/hamnarbetare-stams-for-vild-strejk-6839083
[321] https://www.lag-avtal.se/arbetsdomstolen/hamnkonfliktens-parter-far-gora-upp-i-ad-6842778

6. Discussion

When examining the freedom of association and the right to take industrial actions from various perspectives, it is in many ways clear that the legal concepts have a close connection. For instance, collective bargaining and industrial actions are not the only way, but perhaps the most certain way to ensure the freedom of association? But what other options are at hand? How can a country restrict the right to strike and still fulfil its international obligations imposed by ECHR and ILO? As previously described, there is also the peculiar situation in which Sweden keeps conformity with EU but violates ECHR and ILO, and most likely it is also possible the other way around. In this sense, there are many aspects to take into account when considering a new legislation. In addition to Sweden's international obligation, there are of course numerous aspects within the Swedish model to consider as well. Proposing new legislation on the Swedish labour market is often met by a general resistance and the problem gets instead solved in-between the social partners. But what happens when the parties cannot solve the situation themselves? The Swedish model is well-known for being adaptable, but when reaching a point perhaps it is instead particularly problematic?

Further, the conflict in Gothenburg has created national interest, not the least due to the massive economic losses it has caused the port and Swedish export in general, but likewise due to the discussion of the possibility to by law restrict the right to strike. Why did this particular conflict arise in the first place? Is there a deficiency in the Swedish model? Why cannot the social partners solve the conflict themselves? And what could a possible modification of the right to take industrial actions look like, taking into account both the Swedish model and Sweden's international obligations?

With this brief introduction, this discussion further aims to elaborate and analyse what is previously described about the freedom of association and the right to industrial actions. This will be analyzed mainly from three different points of view, the first being from a Swedish perspective, the second being from an international perspective and the last being with the concrete exemplification from the conflict in the port of Gothenburg.

6.1 The Swedish model

The Swedish model has no exact definition or year of birth. However, there are two historic events that somewhat can be used to at least partly answer the two questions, *Decemberkompromissen* in 1906 and *Saltsjöbadsavtalet* in 1938. These two events symbolize how the social partners find a suitable win-win solution when needed. One side earning the freedom of association while the other finally establishes the prerogative, the right to lead and manage the work place. The fear of legislation works as a lubricant and puts pressure on the parties. The Swedish model is well-functioning in many ways, leaving the solutions to the ones being the closest to the problem until the very last. Although, the notable absence of the government and the legislator may perhaps have its downsides. The most relevant downside for this thesis being the developed aversion to legislate. It is not unlikely that this aversion leads to further resistance from the social partners. It appears reasonable that when the labour market parties are used to be the decisive factor themselves, it is even more remarkable when legislation is mentioned in Sweden than in other countries. This discussion can be somewhat illustrated by a thin line, where the one side is that the social partners have great incitements and liberty to act themselves and the other side being a rusty legislator that starts in head wind. Further, it also appears reasonable that the cases the parties cannot solve themselves are the most complicated ones, leaving the legislator in an even worse situation. With this reasoning, it appears that the Swedish model might be agile and innovative, but when not working it is perhaps its own enemy.

As mentioned above, both the December compromise and the Saltsjöbad Agreement have been very influential concerning Swedish labour law. The first one establishing the freedom of association while the other founded the *Saltsjöbadsandan.* They have both become corner stones of the Swedish labour market and nowadays they are both in some ways constituted rights. It is worth underlining that it is very unusual that labour law is constituted in Sweden. In Swedish legislation, the freedom of association and the right to take industrial actions are separated into different sections. The freedom of association is regulated in 7-9 §§ MBL whilst the industrial peace is regulated in 41-44 §§ MBL. Moreover, the freedom of association found in today's version of MBL is in many ways resembling the one implemented in 1940. The absence of further regulations or restriction perhaps show in some way how far reaching the freedom of association is in Sweden.

The right to take industrial actions is not per se laid down by law, instead there is a legal principle that industrial actions are lawful in every case except for those four mentioned in 41 § MBL. This legal principle could be described as characteristic for the Swedish regulation on the topic. Furthermore, there is no principle of proportionality setting limits for how or what actions that are lawful. Such a principle is found in various other countries as well as EU and ECHR, but not in the Swedish labour law. Another example of the generous right to industrial actions is that the rights are equivalent for employers and employees, which is unlike other countries.

Moreover, the definition of the concept is fairly generous as well. Due to the lack of definition the interpretation is somewhat wide. As described in earlier chapters the purpose behind the taken measure is what is accredited the most weight. This has led to for instance a notice of a strike to be ruled as an action itself. Perhaps the withheld salary and the announced disciplinary warnings in the port of Gothenburg will be considered an industrial as well? This wide definition works in both ways. On the one hand, it is in this sense easily possible to be accused for taking unlawful actions during a period of collective agreement, but on the other hand the party has a large number of options when considering what actions might strike the hardest on the opposite. Practically, the latter is perhaps the most relevant one.

As described in previous chapters, the single most important aspect concerning industrial peace is whether the party is bound by a collective agreement with the opposite side. Additionally, there are of course the prohibitions stated in the 41 § MBL. Other than that, there are a few further regulations concerning notice, an action being authorized in the proper order and that the action does not violate any other law. These regulations of formalities do however not cause any controversy and only contributes with a sense of predictability and stability. In conclusion, except for a few regulations concerning formalities the right is vast when not being a part of a collective agreement. The collective agreement is in many ways the key to the Swedish model. The collective agreement does not only affect the industrial peace but also have numerous legal consequences. Usually, one says that a union sell their industrial peace in favor for a collective agreement. Losing their right to strike the union earn all previously described privileges concerning for instance negotiation and of course the possibility to bargain for decent working conditions. The employer on the other hand obtains stability in the shape of industrial peace. One can easily understand why Hamnfyran feel that they cannot ensure the interest of its members when Transport and APMT have a collective agreement.

In accordance with the Swedish Model, the government rarely intervenes on the labour market. In the case of intervention, the government makes sure to underline the fact that it is the last solution and that the measures taken are not more than necessary. In the thesis, a few examples of an intervening government are presented. Given that these occasions are very rare, naturally there are only a few to present. Further, it is important to emphasize that not all of the mentioned intervention even came into force. For instance, the Police conflict in 1947, the Nurse conflict in 1951 and the Naval commander conflict in 1955 all solved themselves before the proposal earned legal force. The first two regarded the national security and safety while the Naval commander conflict raised concern to the severe economic damages it would cause Sweden. Although, all these occurred before MBL was introduced they are all examples of how and when the government may act. Further, even though they did not come into force they point on situations when the state may intervene. The very few times the government have intervened illustrate the overall absence of the government in Swedish labour law. Even when intervening, the government in some way excuses itself by explaining the severity of the intervention and by assuring that the measures taken are not more than necessary. The government itself also criticize when over-intervening or taking inefficient measures. The absence of the government and perhaps even more symbolic the autonomy of the parties on the labour market is indeed deeply rooted in the Swedish model, which is important to understand before further scrutinizing the subjects of this thesis.

Examining the case law from the Labour Court it is clear that the court does not rule industrial actions against an employer already bound by another collective agreement as unlawful. AD has been persistent in its ruling that there is no problem except if the purpose is to remove, change or undermine the existing collective agreement. Which according to the case law of AD appears to almost never be the case. However, it is important to remember that the second entered agreement does not achieve the same legal consequences as the first one. Even though, AD does not see the situation as a juridical problem it might still be problematic for example to the social partners. Some discussions in the inquiry *Demokrati på arbetsplatsen* for instance, show that the subject has been up for debate. In this legal history to MBL the labour law committee reasoned about various restrictions to the right to strike. The first one being a solution in which AD would rule whether an action is lawful based on the purpose and the second being a requirement of representation for the union. Reasoning further, the committee arrived at the conclusion that neither was aligned with the Swedish model nor would any ease the legal position. The committee concludes that instead the social partners should maintain the

responsibility for the stability. This illustrates that the even though the legal position is clear and that AD has no problem ruling in such matters, there might still be a need to evaluate in consideration of the social partners. It also illustrates that even when an inquiry identifies a problem, they may still leave the problem in the hands of the social partners. Thus, the social partners are informed of the potential problem and may adapt themselves when required.

6.2 An international perspective

With an international perspective, it is even harder to differentiate the right to take industrial actions from the freedom of association. The rights are not always protected explicitly and might in some cases be derived from the same wording. Furthermore, the rights are regulated in various conventions by different organisations. Naturally, the legal concepts have procured somewhat different legal positions in the respective areas. When taking Sweden's international obligations into account it is important to remember their influence and legal status in comparison to Swedish law. EU law being supranational and therefore making all rulings in ECJ binding to its members. EU is the most influential and important obligation to consider, not the least highlighted by the fact that EU law practically has initiated all changes in Swedish labour law since Sweden's entrance. ECHR is incorporated to Swedish law and any future legislation must not violate the Convention. ILO is often referred to as "soft law" due to the limited impact it has on the national system. ILO has well-functioning surveillance organs and may warn members, but the rulings and reports are not binding in the same way as especially EU but also ECHR. Instead ILO publish reports which damage the country with negative publicity, thus making the reports a preventing and dissuasive weapon.

6.2.1 Industrial actions

When examining the international regulations of the freedom of association differences and similarities between the conventions and organisations are found. First of all, the right to take industrial action is not explicitly regulated in neither ILO nor ECHR. Although the right is considered to be derived from both conventions. The right to industrial actions is in that way enshrined in the freedom of association, frequently referred to as one of the most certain ways to ensure freedom of association for the member state. Moreover, without the right to undertake industrial actions it is hard to ensure a legitimate right to collective bargaining, since it might

in reality become collective begging.[322] In ILO, the right has grown by the years and is nowadays accepted as a natural part of the Convention. The protection of industrial actions prohibits all national restrictions that do not have a reasonable intention and go further than what is necessary. It seems that the Convention aims to make industrial actions an available option, but every country is then partly free to restrict in accordance with its legal system. For instance, regulations making industrial actions the last option is compatible with the Convention. Although, as described the regulations must not go further than what is necessary. 20 days between giving notice and the industrial action was reasonable, whereas 60 days was considered to be over the line. Furthermore, the Convention emphasizes that all restrictions must be compensated for and that a general restriction never is compatible with the Convention. Thus, the organisation protects the right in many ways.

The legal position of freedom of association in the ECHR is in some ways similar to ILO. First, the ECtHR have a much more extensive case law than ILO and is also incorporated into Swedish law. However, the ECtHR use a similar method to investigate national restrictions as the ILO. When deciding whether a restriction is within the Convention the ECtHR first investigate if the restriction is necessary for the democratic society. If so, the court applies a principle of proportionality to determine whether the action taken is proportionate, relevant and sufficient. The thorough procedure aims to protect the Convention from being undermined by the national legislation, which is in line with the Conventions purpose of protecting individuals right from an intervening state. This procedural method is obviously similar to the mind-set ILO apply with restrictions being reasonable and not more than necessary. Further, the legal position of freedom of association within the ECHR resembles the one in ILO in many ways. The legal principle to remember is that industrial action is one of the most important aspects of freedom of association, but not the only one. The court has made it clear several times that a state can ensure the freedom of association by offering other legal remedies. Meanwhile, in the Schmidt and Dahlström case it is ruled that because the employees had the right to strike and therefore their right to ensure their interest and thus the Convention was not violated. The case illustrates how highly a right to industrial action is classified in these circumstances. The case law also includes two rulings where a restriction has been lawful. The first one was UNISON v The United Kingdom, in which ruling the court declared that the employees did not suffer any actual damage due to the restriction, given that they kept their future right to strike and in

[322] See: Waas (2014). P 10. to compare with Germany, where the Federal Labour Court established that bargaining without the right to strike is indeed solely collective begging.

fact did not know whether their conditions de facto would get worse with the new employer. The concern for the patients did compose a legitimate purpose for a restriction. Another case was the Offshore Workers v Norway, in which the exceptional economic damages for the country was reason enough to restrict the right to strike. Both cases being examples of when the ECtHR ruled a restriction of the right to strike as lawful.

The rulings of ECtHR keep conformity with EU law in the sense that interests are weighed against each other. For instance, the Laval case where the free movement of service is compared with the right to strike. It should not be less attractive to provide services in Sweden for certain employers than in other countries. Even though the right to strike is declared as a fundamental right, the right might be restricted according to a principle of proportionality with respect to the freedom of movements. This was for instance the case in Viking and partly in Laval. In Viking, the ECJ reasoned whether the actions were suitable to achieve the objective and also if the actions went beyond what was necessary to attain that same object. In the Laval ruling the court mainly centered to the fact that the actions aimed to achieve better conditions than what is regulated in the Posting of workers Directive, the actions aimed further than the so called hard core. Thus, the ECJ perhaps attaches more weight to the proportionality of the action in a more restricting way than the other international obligations.

6.2.2 Collective bargaining

Even though the conventions in some way regulate the right to take industrial action, they mainly concern the freedom of association. Nevertheless, freedom of association is versatile and it varies what is put into the concept of freedom of association, thus making the right to strike sometimes a part of it. Another component included is the right to collective bargaining and furthermore the right to enter a collective agreement. Already in 1976, a Swedish case concerning whether there is a right to enter a collective agreement found its way to the ECtHR. The commission clarified that the union had a right to collective bargaining and therefore also the possibility to enter an agreement. When established that Sweden offered these rights, the chief question became if an employer could be obligated to enter a collective agreement. In its reasoning, the court explains that the article protects a union's right to strive for its members interests, but can never ensure an absolute right to a collective agreement.

A few decades later the court was faced with a similar case, Wilson & Palmer in 2002. With this sentence, the ECtHR confirmed that the Convention does not ensure any special rights but leaves the state to fulfil its obligations. The court further explained that while collective bargaining might be one way to ensure the Convention, it must not be the only way. For instance, the right to take industrial actions is one of the most essential ways of securing the freedom of association. The two cases show that the states have a wide margin to adapt the Convention into its legal system. The court seems to centre on flexibility and that there might be different ways to protect the rights in different legal systems. For instance, there is no absolute right to enter a collective agreement or even collective bargaining, because allowing industrial actions is another way to ensure the unions possibility to endeavour the interests of the members. Although the court seems to leave the states a generous acting space, Turkey restricting the right to form new trade unions was obviously violating the Convention. If one cannot form a union, it is of course impossible to then serve the interest of the members.

In opposition to the right to form and join a union, is the right to not join a union. This so called negative freedom of association is not regulated by ILO but ECtHR has ruled in a handful of cases. When ECtHR examine a case concerning the negative freedom of association, the court first rule whether the action strikes against the very substance of Art. 11 and only afterwards reason whether the restriction violated 11:2. If a restriction does not violate the very substance, the court does not bother to examine whether 11:2 is violated.[323] A principle of proportionality is applied even in these matters. The court has for instance laid down that there is no right to not enter a collective agreement, but only not to enter a union or in the case of Gustafsson an employer association. EU law does not explicitly protect the right to negative freedom of association. However, given that EU according to CFREU should guarantee at least the same rights as ECHR the right should be indirectly protected. Furthermore, the Charter did also state that EU should join the ECHR. Given that for almost ten years nothing has happened in this matter, it appears reasonable to think that nothing will happen in the closest future.

The legal principle that the Convention protects individuals from an intervening state is both found in ECHR and ILO. In ILO, the principle is well illustrated by the purpose behind the Convention, namely that diversity of organisations should be made possible, but not enforced. For instance, national system giving special rights to a certain union is not violating the

[323] See: Sibson v United Kingdom, 1993

Convention *provided* that the union has earned these rights and that other unions might earn it the same way. This of course reminds very much of the Swedish system, which the CEACR ruled as having an unfair impression but given that all organisations may earn the same privileges it is fair. What ILO significate with an intervening state is instead governments affecting the choice by giving economic support, not recognising unions or in any other way put a union in a less favourable position.

The second ILO convention accounted for is No. 98. This Convention protects the right to collective bargaining and states that every country should take appropriate measures to encourage and facilitate negotiation between the parties. Of course, the encouragement of negotiation is closely linked to the right to strike, which obviously is one way of facilitating the possibility. This close connection is also why any of the conventions rarely is mentioned without the other. Furthermore, collective bargaining must be recognized all over the world according to the Philadelphia declaration. This is because collective bargaining is considered perhaps the most crucial way to ensure the interests of employees and consequently decent working conditions. Once again, one could question what collective bargaining is without the possibility to go on strike. Although the right to collective bargaining is considered vital there may of course be restrictions in the national systems. For instance, the most represented union on the work place might earn an exclusive positon with certain privileges.

6.3 The conflict in the port of Gothenburg

As described previously in this thesis, the conflict in the port of Gothenburg is multifaceted and long-drawn. One might say that the conflict has its origins from 1972 as well as 2015. The reason why one might derive today's conflict from 1972 is the underlying conflict with LO. Hamnfyran not being a member in LO is partly the reason why the employer is troubled with the industrial actions. In addition, Hamnfyran has been a troublemaker for quite a while and they have been a frequent visitor in AD over the years. Recently, Hamnfyran has been an even more frequent visitor and this is of course because of the contaminated relation with APMT. With legal disputes, numerous medial statements from the parties and not the least a great deal of industrial actions against one another, there is with no doubt an infected situation in the port of Gothenburg. The course of events itself is however not that big of a judicial interest, but instead the underlying principles of the right to take industrial actions against an employer already bound by a collective agreement and furthermore what a possible restriction of the right

to take industrial actions has for national and international frameworks to take into account. However, the conflict in Gothenburg does not only highlight a peculiar judicial dilemma but is of course also in great need of an actual solution.

6.3.1 What is the actual problem?

Depending on who is asked, the answer to what the problem in the port of Gothenburg is will for certainty vary. That is why, this thesis will elaborate with a broad variety of potential explanations to why the conflict arose and is still ongoing. The conflict has somewhat been latent since 1972 and to totally neglect the influence of that would perhaps narrow the understanding of the underlying principles that might explain the course of events. SHF broke out from LO because of the increased centralization of the organisation. However, SHF has later on applied for membership in LO after their secession. It appears possible, that their secession and denied membership is perhaps a foundation to the latent conflict between the parties. Depending on perspective, one could describe it as a David and Goliath-situation. LO being the established and dominant social party on the labour market that withal denies SHF to be a member of their well-being. There is of course a catch, LO does not deny SHF membership arbitrarily. The statues of the organisations are not compatible with one another and thus LO *de facto* cannot accept SHF with today's statues. SHF believes strongly in the opinions of its members, while LO for instance decides in their highest organ whether a strike should be undertaken. That is why, if SHF would want to enter LO they would have to restrict the influence of their members. This *status quo* does in some way amplify the David and Goliath metaphor even more. The righteous David in the one end, and the bureaucratic Goliath in the other.

In the aftermath of the break up with LO, SHF was a frequent visitor in the Labour court during the 1980's.[324] This further accentuate that SHF can be described as an unruly party on the labour market. In fact, the ongoing conflict in the port can somewhat verify the same statement. Hamnfyran undertakes industrial actions because they feel mistreated and because they can. They are not going to surrender to the good practice of the labour market or between the parties, because they are not a part of it. Hamnfyran follow their own rules and agenda, which in this case (at least fundamentally) happen to be lawful.

[324] See for example: AD 1979 nr 165, AD 1980 nr 94, AD 1981 nr 160, AD 1982 nr 157, AD 1985 nr 88 and AD 1990 nr 67.

The history between SHF and LO might explain the conflict partially, or at least why today's conflict intensified so quickly. The fact that the underlying conflict detonated must however also be explained by the most recent course of events. The recent course of events, in this context, being the last years happenings. It seems probable to assume that the recent happenings started with APMT being the new employer. Before APMT there were special agreements giving Hamnfyran non-insignificant privileges such as co-determination and the right to assign worker's representatives. These rights were withdrawn from APMT, who promptly believed in the Swedish model in the sense that solely the union bound by collective agreement earns these rights. SHF has not been a part of a collective agreement since the break-up, so that is not the core problem. The idea of a collective agreement, or perhaps a substitute agreement, was in fact the mediators' solution to the conflict. Hamnfyran has actually stated that a collective agreement is not a demand from their point of view, they are interested in finding a suitable solution in whatever shape it comes. To enter an agreement however, Hamnfyran has made it clear that they will not sell their industrial peace to a lower price than any other union would. That is why a substitute agreement does not solve Hamnfyrans problem, but only APMT's.

Examining the case law from AD it appears clear that there is no judicial problem with industrial actions against an employer bound by a collective agreement. Thus, Hamnfyran is free to undertake whatever lawful actions they want, given that they are not bound by an agreement and therefore does not have any obligation to maintain industrial peace. Consequently, there is in fact no juridical dilemma *per se*, but rather a practical. This is why the mediators presented a collective agreement, in some form, which could solve the conflict for both parties. A collective agreement is more or less the only way to stop Hamnfyran from having the right to take industrial actions. During the mediations, Hamnfyran repetitiously suggested that going back to the way it used to be would solve all their problems. APMT has however strictly directives from their employer association that such a solution is unthinkable. Moreover, going back to how it used to be would not by law protect APMT from being subject for further industrial actions. In addition, going back to how it used to be may be complicated now that the conflict has reached this far point. This section is however not dedicated to discussing solutions, but rather the reason why the conflict started in the first place. But Hamnfyran's repetitiously suggestions of going back to how it used to be is perhaps an underlying explanation rather than a solution.

Perhaps not a reason behind the conflict, but at least a symptom of it are all the legal disputes between the parties that have reached AD in the last year. The legal disputes vary in their main themes but could be considered to have a common hard core. They concern freedom of association, unlawful industrial actions, refusal to collective bargaining and withdrawn privileges of workers' representatives. They are all somewhat derived from AMPT's new way of treating Hamnfyran, namely depriving their old rights and special treatment. The revoked privileges of Hamnfyran has then resulted in industrial actions to regain the same rights and furthermore legal disputes regarding whether the employer even could revoke these rights in the first place. The theme of all the motions in AD may perhaps indicate what in fact are the most important questions for Hamnfyran. As stated above, these motions illustrate the new treatment of Hamnfyran. Hamnfyran wants their old rights back and to be treated like a respected union in that sense. They do not mind what the solution is but rather that they can practice their right and take care of their members. In addition, Hamnfyran historically feel like the odd one of the social partners on the labour market and therefore is perhaps even more sensitive when being the sole subject of certain actions.

The demands set by Hamnfyran further illustrate the hard core of the conflict. Unfortunately, the demands are vaguely formulated and lack of obvious solutions. The hard core however, seems to be that SHF wants to be respected as an established union and thus obtain some of the special rights a union with collective agreement has a legislated right to. In other words, Hamnfyran believe that being the superior union they have the highest capability and interest to ensure for instance a secure work environment. Another main point appears to be that the worker's jobs should be respected, thus not replaced by other groups of workers or agencies. Lastly, there are some demands that could be summarized as APMT following the law and entered agreements. The problem is that APMT is free to lead and manage the work, with no collective agreement a union have no legislated right to special privileges and lastly APMT are of course bound to follow applicable law and agreements in the same way as all other employers in Sweden. In their suggested solutions Hamnfyran emphasize the Swedish model and that it is indefensible to shut out 85% of the employees from information, work environment and negotiation. Hamnfyran argue that in the long term, APMT cannot run the port with such an arrangement.

In conclusion, it seems Hamnfyran feels mistreated over the years and especially since APMT revoked its rights. Ironically, the fact that a they do not demand a collective agreement nor mind

the shape of the solution, is perhaps illustrating what the union want to achieve, at least on a fundamental level. However, it is uncontestably complex to find a solution that satisfy all parties. Neither can one forget that Transport, and therefore LO, also is a part of the conflict that must be taken into account.

6.3.2 Is there a solution to the conflict in the port of Gothenburg?

The conflict is still an open wound, with disputes in AD as well as redundancies and an awaited inquiry. Nevertheless, it is of importance and interest to discuss and analyse potential solutions, both of judicial and practical matter. The conflict has been ongoing for quite a while now and generate huge economic losses for especially APMT but in some ways Hamnfyran as well. With no insight in the financial situation of Hamnfyran, it appears reasonable to consider it being not unaffected. First of all, it is expensive to process legal disputes in the Labour court, not the least if you lose. For instance, in AD 2018:10 SHF was imposed with damages of over 600.000 SEK. In addition, probably most of the dismissed employees' salaries are paid by the union. Moreover, all hours on lock out by the employer, meaning that the employees are not allowed to work, are usually compensated by the union. Concerning the economic losses of APMT it seems severe that the number of containers handled by the port is the lowest in over ten years.[325] Apparently, the port aimed to capitalize on the so called "containerisation" and therefore expand their volumes to about 2 million containers a year. This aim has however, of course been omitted or failed. In addition to the losses of APMT, there are significant damages to many Swedish exporters such as Volvo, Stora Enso and SKF. According to Svenskt Näringsliv, over 50 percent of the affected companies have taken actions to minimize the damages caused by the conflict. In the same survey, 13 percent of the companies admit to totally avoiding the port of Gothenburg nowadays.[326] Regardless of perspective, it appears the conflict result in great economic damages for APMT and SHF as well as Swedish exporters and thus Swedish economic in general.

These damages, may however serve as a lubricant in the conflict and bring the parties closer to one another. It seems reasonable that by time, APMT's interest to get a solution to the conflict increases. The same seems applicable for Hamnfyran as well, which using the David and Goliath reference once again, is the most exposed party in this sense. Further, increased losses

[325] http://www.gp.se/ekonomi/den-bittra-kampen-om-g%C3%B6teborgs-hamn-1.4262579

[326] https://www.businessregiongoteborg.se/sv/kontext/analys-darfor-ar-hamnkonflikten-sa-kostsam

in the port combined with increased costs for Swedish exporters most likely expand the concern of the Swedish government and society in general. Regarding strikes and economic losses, this thesis detects that historically the Swedish state has in fact intervened when industrial actions have proven to cause too much of a damage. Concerning this matter, there is also the case from the Norwegian oil rig were the government's intervention was ruled lawful in in ECtHR due to the severe economic consequences it caused the country. In this particular conflict however, it seems that a temporary restriction of the right to strike would not ease the conflict, but rather that a more intrusive intervention of the government is required. Perhaps a partial restriction concerning only the rights of third parties against employers bound by collective agreement?

With the appointed inquiry, the state has somewhat approached the conflict by showing its presence. Even though the inquiry itself is of no judicial value, in the sense that it is not binding what so ever, the approaching state may also serve as a lubricant for the parties. In accordance with the Swedish model, especially LO and Transport, but also SHF, are bothered by the intervention of the state. The parties are reluctant to let go of the power to solve the conflict. Although the inquiry is not binding, it will be influential and most probably suggest how a possible restriction would be legislated. Consequently, it has flourished news about the parties reaching a possible solution. Transport has even suggested that the inquiry should be paused in favour of further time for the parties to find a suitable solution.[327] Naturally, both parties are nervous of what the inquire will contain. This illuminates the worry the parties have concerning an intervening government, but also that the approaching government is a mean of pressure itself. It cannot be stressed enough though, that the parties have had over 40 years to solve the situation themselves. Given that there have been plenty of time for solutions over the years, also during this recent peak in the conflict, the conflict is perhaps in need of a governmental mean of pressure to come any further.

6.3.3 Potential solutions within today's legislation

Regardless of what the inquiry will contain, there are in fact several possible but perhaps improbable solutions to the conflict. The existence of possible solutions is in many ways a theoretical reasoning applied on the concrete situation in the port of Gothenburg. Obviously, many of the so called solutions would never be possible. These are nevertheless important to present, not the least to underline the agility and flexibility of the Swedish model. When

[327] https://www.lag-avtal.se/avtalsrorelsen/arbetsgivarkanga-till-transport-ni-har-redan-fatt-46-ar-pa-er-6906938

presenting the solutions, the theoretical possibility is problematized with the help of concrete obstacles. This is an attempt to highlight that there *de facto* are a number of solutions, but also why they are more or less probable.

1) First of all, there is the situation were APMT enters a second collective agreement with SHF. This would be the second entered agreement and thus have limited legal consequences. The agreement between APMT and SHF would however include industrial peace on one end and for example the right to negotiate and appoint workers' representatives on the other. Further, the first entered agreement will not be affected in its area of applicability. The second entered agreement will only be applied in areas the first one does not cover. The agreement between APMT and SHF must however not replace or remove the first agreement. A solution with two agreements in force, will however be inconvenient for the employer who for instance would be obligated to negotiate with two unions according to MBL.

2) The second solution to the conflict is that APMT enter a collective agreement only with SHF. This was a possible scenario when the previous agreement between Transport and APMT expired in the beginning of 2017. For this solution to even be possible, the existing agreement between APMT and Transport would have to expire. Thus, this solution is not practically possible for quite a while. In addition, the employer association Sveriges Hamnar has a tradition of entering agreements with Transport in over 40 years. Of course, APMT always are free to secede the association and thereafter enter agreements with whoever they want. One could argue though, that such a solution would not solve the actual conflict but rather turn the tables around. The turn of tables would create a situation where SHF has a collective agreement and therefore bound by industrial peace, while Transport would be in a similar position as SHF is today. The major difference would of course be that Transport only represent a minority of the employees, making it hard to undertake industrial actions that would trouble APMT notably. Considering this solution, all members of Transport would of course have the possibility to become members in SHF.

3) Another solution, closely related to the previous one is a merging of the two unions, going back to how it used to be before 1972. A merging of the two unions would only leave one union for the employer to bargain with. This would in some ways make everybody happy. Although, it would apparently require some party to compromise. The obvious compromise is that SHF or its members in some way become a part of Transport. This could probably take two forms,

the first one being that all members from Hamnfyran change their membership to Transport. The second one being that Hamnfyran as a union is in some way gets merged into Transport. This solution does however come with a few implications. If all members from SHF changed union to Transport they would have to abandon their beloved union, at the same time they would easily become the majority on plant level in the port in Gothenburg. Being the majority they would have great influence in the union and its work. On the other hand, they would have to abandon their values and principles that characterised SHF. SHF being incorporated into Transport would in many ways be the end of the SHF as a union. Not only would SHF cease to exist, but all its members would be forced to get in line with the bureaucratic and centralised Transport. In the minds of Hamnfyran that would bring the power further away from the union's members. Further, it is hard to imagine how an alliance between the two unions would function after the recent years characterized by constant conflict. Even though the unions have a common enemy in the employer, it seems somewhat farfetched that they would be able to cooperate and take both parties' interests into consideration. Thus, this would most probably generate in a power struggle between the Hamnfyran-majority on plant level trying to go their own way and LO doing all in their power to domesticate them by central regulations. Additionally, this scenario could put APMT in a position where they are forced to bargain perhaps not with SHF but its old members.

4) If SHF's application for membership in LO would be granted, the conflict would be somewhat solved. This would probably stop the damages effecting APMT. The conflict would become an internal conflict for LO to handle, according to their own Organisation plan. For this solution to be possible, SHF would most probably be forced to change its statues, which has been the complication in previous applications. Further, there are some other political issues with LO trying to slim their organisation and therefore have reduced the number of unions and instead integrated them into one another. This problem has somewhat been discussed above and will not be taken any further. Anyhow, *assuming* that SHF would be accepted as members in LO, it is reasonable to assume that LO's imperative demand to have Transport as the established union in the port would be reduced. In a situation where SHF is a part of LO, the organisation undoubtedly increases its number of members and keeps the right to the collective agreements in the ports to itself. That is why, in a scenario where SHF is included in LO the conflict would perhaps lose its edge. If LO secures the members and the position as the established union, the conflict would perhaps be easier to solve. LO could in this way promise SHF the collective agreement in the port. Transport would of course get a somewhat weakened

position, but maybe that is a sacrifice the union is willing to do for the greater good, for LO and the Swedish model. Perhaps Transport would have no saying, or perhaps they would be repaid in a totally different area that LO could help them with. Even if this suggestion would ease APMT's problems in some ways, it would complicate them in others. There would not be any rivalling organisations at the same work place, but APMT would not have any choice but to enter collective agreements with SHF in the future.

5) To form some kind of three-part agreement could also be an option to solve the conflict. Hamnfyran themselves suggested a three-part solution during the period of mediation. That solution did however not interest Transport, which instead could enter a regular agreement with APMT. In their five concretes suggestions on how to make the port world leading, Hamnfyran once again mentions the importance of a three-part solution. In this case, Hamnfyran emphasise that it is indefensible to manage the port and at the same time exclude 85 percent of the employees. However, what shape a three-part agreement would take is unclear. For SHF to be a part, it would have to fulfil the demands or at least some of them. Obviously, Transport has nothing to gain from including Hamnfyran in their agreement. Entering a three-part agreement would most probably mean Transport would be forced to give up or share some of their special rights. For Transport to ever consider such an arrangement, their position as the pronounced union to enter collective agreement with would have to be questioned. Another reason could be political pressure from LO to avoid legislation. AMPT on the other hand would finally receive their belonged industrial peace with all workers. The cost would most probably be that they would have to negotiate with Hamnfyran and allow them to appoint workers' representatives. A three-part agreement would most probably be more preferable than two separate agreements in the eyes of APMT. They could perhaps limit Hamnfyran's influence and the expected inconvenience a bit more. From Hamnfyran's point of view this solution would most probably be accepted, given that they have declared that a collective agreement is not the reason behind the conflict. Meaning that they do not request a collective agreement of their own *per se*, but rather a satisfying and pragmatic outcome.[328]

6) Derived from what was just said about a collective agreement not being the absolute key to the conflict their might be different ways to go. Given the powerful legal consequences of the collective agreement and the mediators focus on a solution involving some kind of collective

[328] Compare with Jan Sjölin's most recent solution: https://www.lag-avtal.se/arbetsratt/tidigare-medlaren-foreslar-losning-pa-hamnkonflikten-6909347

agreement as the foundation, it is hard to imagine how a solution without a collective agreement would look. Obviously, APMT would demand some kind of industrial peace, which is mostly commonly obtained by entering a collective agreement. Consequently, it is naturally to seek a solution including a collective agreement. However, the fact remains that there is nothing obstructing the parties from finding different a solution. Important to remember is that before APTM was the employer there were no collective agreements either, and the port at least functioned somewhat during this period. With the extremely infected relation between the Hamnfyran and APMT it is however hard to imagine APMT being a part of an agreement without a promised industrial peace.

7) Speaking of controversial solutions to the conflict, there is of course the option to do as Hamnfyran suggests and go back to the way it used to be. Given that APMT actively has revoked all the rights Hamnfyran traditionally had, this solution is of course unlikely but nevertheless not impossible. It is more of a theoretical possibility than an actually solution to consider. The previous set-up did not include any certainty of industrial peace but was instead some kind of gentlemen's agreement where Hamnfyran did not undertake action if they were pleased. The set-up obviously malfunctioned in the sense that Hamnfyran could go on strike whenever they were not satisfied. This latent strong-arming is what APMT wanted to avoid in the first place. In addition, Sveriges Hamnar has declared that a distinction between unions with and without collective agreement must be made in all their ports in Sweden. APMT is of course free to secede from Sveriges Hamnar at any time.

8) As described in the thesis, the Swedish government has intervened in a few particularly critical situations. The government has this possibility in the conflict in Gothenburg as well. To clarify, for further reasoning there is a distinction between an intervention and legislation. Legislation will be touched upon following this point of solution, but to be able to elaborate even further the distinction has been made. Thus, this point will only include possible interventions except for legislation. Historically, the government has intervened by for instance freezing the right to strike for a limited time or by introducing a compulsory arbitration. Important to underline before discussing potential ways for the government to intervene is that the intervention must not be further than necessary. The advantage of an intervening government, in this context, is that the intervention could be much narrower or perhaps limited to a certain period of time. The downside is that such an interference perhaps would solve the conflict solely for that given period of time. Even though the case of the naval commanders has

great similarities with the conflict in Gothenburg, there are some fundamental differences. A compulsory arbitration would for instance stop the industrial actions, which are not the main concern right now, but most probably not ease the conflict itself. What kind of intervention that would be most suitable for this particular conflict is hard to establish, but the possibility is still important to include when presenting these solutions.

9) First of all, one could ask if it is reasonable to consider restricting the right to strike for the entire labour market due to a conflict of a few hundred workers. Perhaps the Swedish model is well-functioning in general and to modify it is perhaps a too big solution for a too small problem. Given that the Swedish model is proven to be flexible and to find suitable settlements, it is perhaps the wrong lever to pull. The fact remains although, that legislation might be one way to solve the conflict. How a potential legislation would be constructed will be discussed further below, given that it perhaps is the most controversial and intrusive of the presented solutions to the conflict.

6.3.4 Potential restriction of the right to take industrial actions

Ever since Ylva Johansson, the labour market minister, declared that she overviewed the possibility to restrict the right to strike, the matter has been in national spotlight. The conflict has intrigued labour law experts as well as politicians and union leaders. The chief question is of course, how would a restriction be constructed? What restriction would solve the conflict in Gothenburg? Indeed, the restriction must solve the actual conflict. What are the consequences for the remainder of the Swedish labour market? Moreover, how would Sweden's international obligations be compatible with a proposed legislation? When discussing the possible restriction, there are many points of view to take into account. Not the least, the opinions from various experts and especially influential social partners that strongly object to a legislated restriction.

With the main purpose to solve the conflict in Gothenburg but still affect the remainder of the labour market as little as possible, the restriction would most probably centre on industrial actions against party already bound by a collective agreement. A potential legislation would have to restrict a third party from undertaking industrial actions against, in this case, an employer bound by a collective agreement. It is quite clear, that such a regulation would solve the conflict in the port of Gothenburg, since Hamnfyran (or Transport) would no longer be allowed to undertake industrial actions. The set of rules to prohibit a party from taking industrial

actions is however unclear. There are a few set ups that appear possible. The first one being, a rule of representation. A rule of representation would allow a union with a specified level of representation to bargain with the employer. In other words, an employer would not be obligated to collectively bargain with more than one union, the most represented one. One accompanying problem is obviously that the employer loses his right to bargain with whoever he chooses. A rule of representation would most likely work in favour for Hamnfyran, why LO would most probably be in opposition to this option. Given that LO have great influence over Swedish labour law and are represented in almost every corner of the labour market, their opinion would have to be valued. In addition, the general opinion is that a rule of representation would limit the Swedish model by restricting the agility and autonomy of the social partners. Additionally, a minority organisation's right to practice their freedom of association must not be restricted according to the ILO. Thus, with this option both unions right must be ensured regardless of who attains the right to collective bargaining. In Wilson & Palmer, the ECtHR declared that if the union does not have a right to collective bargaining, there must be another way for the union to be recognized, preferably by the possibility to take industrial action.

This potential legislation must not indirect or direct restrict the possibility for numerous organisations to act on the same work place. For instance, legislation giving certain unions approval to act on specific work places would violate Convention No. 87, even if the employees still were free to join another union. The second union would not be considered to have possibility to practice its freedom of association. Furthermore, the government cannot lawfully put a union in a more favourable position or in any way influence the choice for the workers. A more favourable position is described by for example economic support or statements from ministers. The legal principle is clear, that the state should not affect the choice of organisation. The Convention's purpose is to make diversity of unions possible. For instance, today's Swedish system is lawful according to the Convention. CEACR investigated the Swedish model and reported that because all unions in fact have the same possibility to earn the same rights, the system is not violating No. 87. Thus, to keep conformity with ILO a new system would have to offer the same options for all unions on the work place. The system could of course give certain rights to the selected union, presuming all unions had and will have equal chances of earning those privileges. Neither could the new legislation regulate how many unions that could be active in the port, that would indeed violate the Convention.

In addition, the right to strike has grown essential in ILO and the right is considered a requirement for the right to collective bargaining to become meaningful. The rights are closely linked to one another, and the right to collective bargaining is indeed one of the most crucial ways to ensure the interests of the employees. The exception from the legal principle, that all unions may bargain, is in systems alike the Swedish model. To earn such an exclusive position, must the selection be fair and objective. As established in the ECtHR's case with The Swedish engine drivers', there is however no absolute right to a collective agreement. Meaning, that even though a union has the right to undertake actions and to bargain, there is never a right to enter an agreement. Scrutinizing the ECtHR further, the court is emphasizing that even though bargaining or industrial actions are ways to secure the freedom of association, they are not the only ways. Instead, the court offers every state a wide margin to adapt the national system to the Convention. Speaking of ECtHR, the court mentioned in the Wilson & Palmer case that with a legal system allowing the employer to choose whoever he wants to bargain with, it is essential that the other unions might be recognized in other ways. To summarize, as in Sweden where there is one exclusive union the selection must be fair and objective. With this system, the other unions' possibility to be recognized must be ensured. A new legislation would have to fulfil both these requisites.

As previously described, a system selecting union based on a criterion of representation is indeed fair and objective. However, with a system where the employer is free to choose whichever union he wants and the other unions right to take action is limited, one could question whether that would be lawful according to the Convention. A restriction of the third party's right to take industrial action might be problematic. Such a restriction could leave the third party with no right to bargain nor to undertake industrial action. In what other ways might this union ensure the rights of its members? The new legislation must not only offer freedom of association in theory, but the unions must also be able to *de facto* practice their right. If the two most essential ways to ensure freedom of association are denied, according to both ECHR and ILO, one could question what is left to practice? What other ways would there be for the non-bound unions to be recognized?

The union would be denied collective bargaining and the right to strike during periods of, commonly, three years. Consequently, the union would be able to practice their freedom of association every three years. During the meantime, they would be allowed to exist and the members would not be discriminated, but not be recognized or practice their freedom in any

actual way. The international obligations of Sweden would most probably be violated with this legislation. Perhaps there is a possibility to compromise in some way? A restriction of the third party's right, but exceptions to the restriction and thus offer an actual capacity to practice their right. What the restriction and possible exceptions would include is of course not decided yet. One discussion could be if the union bound by collective agreement should be appointed the right to rule whether the industrial action is lawful or not. This proposal would keep the decisive power with the unions, although another union. In this way, at least in theory, the right to take industrial actions would still be somewhat generous. In reality though, for instance in the port, the most probable outcome is that Transport would deny SHF the right to take action. Assuming this solution is conform with Sweden's obligations, it would most likely solve the conflict in Gothenburg. Hamnfyran would be denied the right to strike, meanwhile APMT and Transport would go on with their corporation undisturbed. It would be hard to see why the union with collective agreement ever would allow actions from the other unions. SHF especially and non-established unions in general would be disappointed if this example entered into force. Taking all circumstances into account, this restriction would probably offer an insufficient right according to ECHR and ILO. Even though third parties would have the possibility *de jure*, there would more or less be no right *de facto*.

Another option for the legislator is to introduce a principle of proportionality. This would indeed restrict today's mostly free right to undertake industrial actions. Although, the principle of proportionality is already somewhat in force in Sweden. AD was faced with this principle in the Kellerman case, but did neither confirm nor deny the principle's existence in the Swedish legal system. Nevertheless, Sweden are bound by the principle in accordance with the national obligations from ECHR and EU. In this reasoning of *de lega ferenda* the possibility to actualize this very principle is interesting to entertain. Given that a Swedish case in the ECJ as well as the ECtHR would be subject for a principle of proportionality, the principle is in some ways already in indirect force. The principle was especially applied in Viking, where the court established that industrial actions must be suitable to achieve the object and that the actions must not go beyond what is necessary to attain this object. Apparently, Sweden could introduce this principle and not only keep conformity with EU, but almost become conform. The problem is that the parties on the labour market would have to give up some of their influence in favor for, most probably, the Labour court. Other than the parties being forced to relinquish some of their influence, a principle of proportionality would restrict the right to strike. If the other option is no restriction at all, it is easy to understand why the parties are skeptical. However, when

discussing a restriction of industrial actions, perhaps a principle of proportionality is not the worst way.

Would a principle of proportionality solve the conflict in the port of Gothenburg? A future principle of proportionality in Sweden would most possible take inspiration from the one applied by ECJ. Applying on the conflict in Gothenburg one could ask 1) are the actions suitable? and 2) are they beyond necessary? The actions taken by Hamnfyran are suitable and in no ways unconventional methods for attaining a collective agreement. Neither are the actions taken beyond what could be considered as necessary. Also, Hamnfyran has not undertaken that many hours of strike in the recent events of the conflict, why a principle of proportionality even less would resolve the situation. If the principle of proportionality in practice would make actions to attain a second collective agreement unlawful, there could as well be a general prohibition against such actions. In this sense, a general prohibition would mean a less intrusive measure, given that an acceptance of the principle of proportionality would apply on all of the Swedish labour market. In addition, industrial actions where a collective agreement already is in place amount to a very small part of all actions on the entire labour market. Thus, it could be questioned whether the restriction would in fact be more than what is necessary to attain the purpose. Even though a principle of proportionality would be a somewhat intrusive measure regarding the Swedish model, it would be easier accepted internationally since that is the origin of the principle.

Perhaps there must not be a principle of proportionality as it is known internationally, but instead a Swedish version. When undertaking industrial actions, the union or employer must leave notice to the Swedish Mediation office. Perhaps, the MI could be given a more active and decisive role in deciding whether the purpose of the action is legitimate? In that way, the Labour court would not have to be included, but still the parties would have to relinquish some of their power. Within this particular solution, there might of course be various versions. One could be that the action must be relevant and not more than necessary to attain the object of the actions, thus resembling the international principle as we know it. Another option could perhaps be that the purpose must be clear, what does the action want to achieve? This would also offer, most commonly, the employer an understanding of why the action is taken. Applying this new system on the conflict in Gothenburg would force Hamnfyran to concretize *what* they want to achieve with their actions. For this new system to be effective, must of course the MI (or the Labour court) be given the authority and necessary means.

Further, the ECtHR has ruled in a couple of cases concerning whether a restriction of the right to strike is legitimate and necessary. For instance, there is the somewhat similar case of the Offshore Workers' Union in Norway. The matter is similar to the conflict in the port in the sense that both of them are associated with devastating economic consequences for the country. Important to remember when reasoning is that the ECtHR in fact never ruled whether Art. 11:1 was violated. Anyhow, the court took great consideration to the exceptional circumstances in the case when ruling. The court also underscored that 36 hours of strike was allowed. In Gothenburg, industrial actions have been taken and undeniable economic consequences are documented. However, the actions in Gothenburg have occurred during a much longer period of time and the state did not act immediately. Moreover, a solution with a compulsory arbitration would not solve the active conflict in Gothenburg. Perhaps, it would have been a suitable option in the beginning of the conflict. It is however, unfortunately of no pragmatic point to discuss what could have been done. The common denominator in many of the cases in ECtHR are that there is an exception or peculiar situation. This is of course the case in the port of Gothenburg as well. However, a legislation that would restrict the right to take industrial action not only in this particular case but for the entire labour market is not an exception. For the new legislation to be lawful, the restriction must be legitimate and necessary.

What is the purpose of a restriction? The main purpose is presumably to strengthen the protection of employers with collective agreement and to ensure that the incitement to enter a collective agreement is efficient. The purpose seems legitimate, given that without the guarantee of industrial peace the employers would no longer have any interest in entering agreements. With no incitement, there would be no collective agreements and thus no Swedish model. Another purpose might of course be to secure Sweden's export, for which the port of Gothenburg is obviously pivotal. There seems to be various purposes with the legislation. With this reasoning, it might appear reasonable to restrict the right to take industrial actions. Although, the purpose may not be to ensure certain unions a right to collective agreement. Neither can the purpose be to withdraw rights from certain unions. The restriction must offer the same possibilities for all unions.

As for the necessity, is a general restriction the least intrusive solution there is? Given that the conflict has been ongoing for quite a while, a distinctive measure would most probably not ease the conflict. Add the fact that there more or less have not been any industrial actions this year

and it is even more unlikely that a compulsory arbitration or a restriction during a certain period of time would help the conflict. This raises the question of the necessity of the prohibition? Is a general restriction in fact necessary to solve the conflict? It might be argued that it is, meanwhile there are all of the above presented solutions. As previously discussed, a distinctive measure would most probably not solve the conflict but only put it on pause. If any, there is perhaps need for a fairly intrusive measure. However, is the supposed measure more than necessary? Initially, it appears that changing the entire legal system is interfering more than necessary to solve a conflict on one workplace with a few hundred employees. On one hand, one must keep in mind that the conflict is a symptom of a potential larger problem in the Swedish model. On the other, there are only a few active unions outside of TCO, LO and SACO, which according to MI do not undertake a disturbing amount of actions. Furthermore, even though this conflict only is at one work place, SHF have unions in numerous ports in Sweden. Given that there only are a few un-established unions, a general restriction would not affect the entire labour market in this sense, but rather only the work places where there are more than one active union.

7. Conclusion

In conclusion, the right to take industrial action and the freedom of association is indeed interesting in general and especially in regard of the conflict in Gothenburg. The main conclusions are perhaps that there in fact are several existing solutions within today's legislation, even if some are rather possible than probable. Further, it is concluded that every state has an extensive freedom to ensure the rights from the various conventions. The union must however always have the possibility to be recognized. The right to undertake industrial action and collective bargaining are the most essential ways to secure freedom of association, but not the only ways. Although, restricting both, one could question what freedom of association the union might practice?

The conflict has been ongoing for over two years and evidently there is no apparent solution. When discussing a solution to the conflict, one must take consideration to mainly three aspects: the conflict itself, the Swedish model and lastly Sweden's international obligations. First of all, the measures taken must of course contribute to the actual solving in the port. However, this solution must also be compatible with both the Swedish model and Sweden's international obligations. The many stakeholders and systems to take into account does not help the peculiar conflict. Even after a long period of mediation, the conflict could not be solved. One particularly alarming condition is that until now it is not certain what Hamnfyran wants to achieve. During the mediation, Hamnfyran denied all presented solutions, refused to clarify their demands in writing and instead suggested going back to how it used to be. This mindset illustrates why it was indeed problematic for the mediators to propose any concrete solutions. The mediation office did center all their options around a collective agreement in some form, a natural suggestion given that it is one of the conventional ways to ensure APMT industrial peace from Hamnfyran. Hamnfyran seems however not interested in selling their industrial peace to any lower price than other unions do. It seems the parties are incapable of finding a satisfying solution, even with the help from professional mediators. Apparently, the conflict was not going to be solved on plant level, nor by the help of the government agency MI.

When scrutinizing the Swedish model, it is identified that the model has been well-functioning and adaptive over the years. The model is characterized by autonomy and innovation from the parties on the labour market. This is perfectly illustrated by the Saltsjöbad agreement, which also strengthened the future of the model by introducing its famous spirit. However, these

features of autonomy, agility and innovation have clearly not been enough concerning the port of Gothenburg.

With this background, it appears reasonable that Ylva Johansson escalated the conflict by giving her statement. As discussed, the bare statement that the government would consider restricting the right to strike might raise the incitements for the parties to find a solution. Even though there has been an intensification the last months before the inquiry will be published, the parties have not shown any additional interest in solving the conflict due to the statement. The uncommon interference of the government has occurred a few times in the history of Swedish labour law, and perhaps this should be categorized as another one. Regardless of what the inquiry will contain, it will undeniably affect the conditions and balance of power. Given that the legal position and case law of industrial actions against an employer bound by a collective agreement is clear and unproblematic, it is even more interesting how the inquiry will approach a solution.

In the discussion about potential solutions to the conflict in Gothenburg, it is remarkable how many different options there actually are within today's legislation. As underlined in the discussion, some of the solutions aim to rather contribute to the theoretical discourse than the conflict itself. Nevertheless, the number of possible solutions meritoriously stress the agility the Swedish model offers. Speaking of these possibilities, even in the aftermath of the inquiry the parties are free to find a suitable solution with no requirement of that solution being aligned with the inquiry. The general upside of these suggested options is of course that there would be no need to legislate, also meaning that no one outside this specific conflict would be affected. However, even if the parties would find a solution autonomous from the inquiry, the statements and reasoning from the labour ministry and experts would still be public and therefore probably affect the debate of industrial actions anyhow.

It seems, that the conflict is an historical accumulation of mistreatment, absence of respect and recent events that have resulted in a complex dynamic where SHF perhaps need LO but at the same time consider the organisation as its archenemy. The numerous legal disputes and the dream of going back to how it used to be highlights the great dissatisfaction that the employees of Hamnfyran struggle with. However, the fact that they cannot define what would please them makes it of course problematic to help them. The hard core of demands that Hamnfyran has formulated, seems to at least somewhat embody their dissatisfaction and that a respectful

treatment of them, the union being undeniable most represented, would be as good solution as any. It is however understandable that it is hard to find a satisfying solution when there are no concrete conditions to trade and compromise. If all demands are imperative and somewhat nonconcrete, while no solutions of their own are presented it seems reasonable that the mediators found it hard to satisfy both parties.

When examining the conflict in Gothenburg, it is often APMT and Hamnfyran that are mentioned as the key players. The fact remains though, that Transport might be a required piece to complete the puzzle. A three-party solution is perhaps the least controversial and thus the most likely. Finding a solution that includes all three parties is perhaps the only way to get industrial peace from both unions and at the same time meet their respective demands. The mediation has been concentrating on APMT and Hamnfyran, but perhaps Transport needs to be more integrated, even if the initially do not want to. Furthermore, with Transport and LO striving to avoid a legislated restriction, it might be in their interest to find a solution. A three-party solution could for instance offer 1) APMT industrial peace from both unions, 2) Transport to be part in the collective agreement and 3) Hamnfyran to earn some special privileges without being part in the collective agreement. With such an arrangement, all three parties would have to sacrifice something but foremost attain their respective "hard core". The mediators did however present a similar solution, which Hamnfyran denied without concretizing what would make them accept the agreement.

Furthermore, discussing the potential legislated restriction there are a number of questions that needs to be stressed. There are various options within the Swedish model, but the final solution is of course required to not violate any international conventions. To maintain international conformity the restriction would have to be legitimate and necessary. Meaning the restriction must have a lawful purpose and not interfere more than what is necessary. The thought of a principle of proportionality and a rule of representation are both entertained in the thesis, even though there is a general opposition from the labour market making it very unlikely that neither would come into legal force. Looking at Laval and Britannia, Sweden seems to rather modify or add a minor regulation than introducing notable changes. It is however questionable if a minor, in this sense, restriction of third party's right to take industrial action is compatible with the international conventions. As discussed, how could the third-party union practice their right if they neither can bargain nor take industrial action?

Moreover, there is place for a discussion whether legislation is necessary at all. Even if theoretical, there are all of the above stated solutions. Can Sweden justify restricting the right to take industrial actions for third parties in general, when there in fact are a fair number of existing options? Further, as seen from the case law of the Labour court, the legal position is clear and even unproblematic. Additionally, the Mediation Office published statistics emphasizing that third-party actions not are a commonality on the Swedish labour market. The need for legislation seems to derive only from this actual conflict. That is why it perhaps might seem reasonable to also solve the problem by taking measures distinctively in this conflict. The strong opposition from experts and union representatives further illustrate how devastating it could be to intrude on the entire labour market. The opposition is of course ideological and political in many ways. But then again, how many work places would a restriction affect in reality?

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