

# Excess of Mandate in International Commercial Arbitration Law

A Comparison of the US Federal Arbitration Act and the Swedish  
Arbitration Act

Jeremy L. Zell



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**Jeremy L. Zell**

Academic dissertation for the Degree of Doctor of Laws in Legal Science, specialisation in Procedural Law at Stockholm University to be publicly defended on Friday 1 December 2023 at 10.00 in hörsal 2, hus A, Södra huset, Universitetsvägen 10 A.

## Abstract

This study analyzes the concept of “excess of mandate” as a ground for set-aside in International Commercial Arbitration Law. In particular, it compares the US courts’ application of the concept in US law with Swedish courts’ application under Swedish law.

The study employs a standard comparative model. It examines the legal history, case law, statutory law, and legislative history of the two jurisdictions. The study seeks to identify, among other things, factual circumstances that would constitute excess of mandate in both jurisdictions, or lead to differing court rulings in each jurisdiction. Hypothetical scenarios are also used to identify unique and similar outcomes depending on the circumstances of a given case and the way in which the two different court systems apply the concept of excess of mandate.

The study concludes that, despite the fact that excess of mandate is treated as a wide-spread international concept in international arbitration, the concept’s application can vary greatly from jurisdiction to jurisdiction. This is due to, among other things, a given legislature’s purpose for writing the concept into national law and each jurisdiction’s procedural law traditions and practices.

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To Edith, Malcolm, and  
Oscar



## **ACKNOWLEDGEMENTS**

This dissertation has been a labor of love. Its roots lie in the period of my life in which I worked in the dispute resolution group of a large and well-respected law firm in Stockholm. My practice focused primarily on the field of international arbitration.

During that time, I began to notice that it was common for lawyers—both at my firm and in many others—to adopt a two-pronged approach to challenging an arbitration award in Swedish courts. That is, “The tribunal took a specific action. That action represents an excess of mandate. Or, alternatively, an error in the arbitral process. The law does not give much guidance to help distinguish between the two grounds.”

I hope I have been able to clarify the concept to some degree in the pages that follow. Not just in Sweden, but also in the United States and, by extension of this research, elsewhere. As with any research project, there is always more work to be done.

No success is accomplished alone. There are so many to thank.

First and foremost, I want to thank my supervisor, Patricia Shaughnessy. She made it a point to always be available with advice on my research, both substantively and stylistically. Her advice was

always well received. She has been a constant cheerleader and excellent sounding board.

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I would also like to thank the Stiftelsen Hans Thorstedts fond for their generous financial contributions to this research.

Finally, I would like to thank you, the reader, for taking the time to page through this book. I hope it is helpful and informative. It was a joy to write. For the most part.

Jeremy Zell  
Stockholm  
October 2023

## **SUMMARY IN SWEDISH**

### **UPPDRAGSÖVERSKRIVANDE I INTERNATIONELLA SKILJENÄMNDENS RÄTT**

En jämförelse mellan den amerikanska Federal Arbitration Act och skiljedomslagen och den svenska Lag om skiljeförfarande

Denna studie analyserar begreppet ”uppdragsöverskrivande” som en grund för skiljedomens upphävning i internationella skiljenämndens rätt. I synnerhet jämförs de amerikanska domstolarnas tillämpning av begreppet i amerikansk rätt med svenska domstolars tillämpning enligt svensk rätt.

Studien använder en jämförande standardmodell. Den undersöker de två jurisdiktionernas juridiska historia, rättspraxis, lagstadgad lag och lagstiftningshistoria. Studien syftar till att identifiera bland annat faktiska omständigheter som skulle utgöra överskridande av mandat i båda jurisdiktionerna, eller leda till olika domstolsbeslut i varje jurisdiktion. Hypotetiska scenarier används också för att identifiera unika och liknande utfall beroende på omständigheterna i ett givet mål och hur de två olika domstolssystemen tillämpar begreppet uppdragsöverskridande.

Studien drar slutsatsen att, trots att uppdragsöverskridande behandlas som ett utbrett internationellt begrepp i internationell skiljedom, så kan begreppets tillämpning variera mycket från jurisdiktion till jurisdiktion. Detta beror bland annat på en given lagstiftares syfte att skriva in begreppet i nationell rätt och varje jurisdiktions processrättsliga traditioner och praxis.

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# CHAPTER 1: INTRODUCTION AND METHODOLOGY

## 1. INTRODUCTION

The concept of “excess of mandate” is found in the national arbitral laws of most major arbitral jurisdictions. Nearly 70 countries have adopted it into their national legislation by adopting the Model Law on International Commercial Arbitration (the “Model Law”). The Model Law was promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”) in 1985. Even those countries that have not adopted the Model Law have adopted a form of the concept into their respective arbitral laws. My study pertains to two of those countries, the United States and Sweden.

Despite the general understanding that an arbitral award should be set aside if an arbitrator exceeds her mandate, there is little agreement as to the type of conduct that qualifies as an excess of mandate. Parties, arbitrators, and courts all suffer from a current lack of legal certainty.

Examples of excess of mandate range from easy cases to hard cases. It is generally accepted that an arbitrator cannot award more than what has been requested from her. If a party requests \$1 million in damages due to breach of contract, the arbitrator cannot award \$1.5 million. This is known as acting *ultra petita*.

The question becomes less clear when an arbitrator awards something different than what was requested. If a party requests that an arbitrator order the seller of defective goods to replace the goods, the arbitrator *might* be within her right to instead order the seller to pay for the repair of the defective goods (acting *extra petita*). It becomes murkier still if the arbitrator awards less than what was requested (*infra petita*). Returning to the first example, the arbitrator may decide that the claimant only proved a loss of \$750,000 and awards that amount instead of the requested \$1 million.

Currently, it is difficult to identify clear legal rules addressing whether the last two scenarios constitute an excess of mandate. Without these, courts have taken piecemeal and inconsistent approaches when deciding whether an arbitrator has exceeded her mandate.

My research seeks to promote certainty, at least in part, by suggesting a legal framework for understanding what type of conduct constitutes excess of mandate. This framework is based on a comparison between the United States and Swedish legal approaches to the concept—two countries that have not adopted the Model Law. The following provides more details regarding the scope of the inquiry, the applied methodology, the legal sources that are examined, as well as the study’s limitations.

## 2. HYPOTHESIS AND CORE RESEARCH

### QUESTIONS

I hypothesize that one can develop a clearer definition of what constitutes excess of mandate by comparing how two or more legal systems address the concept in their legislation and court practice. Consequently, my research compares the concept in the United States and Sweden and seeks to answer a number of research questions.

I employ three core research questions that seek to answer whether, and to what extent, similarities exist in each system's approach to the concept. First, whether certain instances of arbitrator conduct can clearly be identified as constituting excess of mandate regardless of whether the conduct is being evaluated under US or Swedish law. Conversely, whether one can identify instances of conduct that would not be considered excess of mandate regardless of which jurisdiction was evaluating the conduct. Finally, whether one can identify instances of conduct that would be considered excess of mandate in one jurisdiction, but not the other.

Having identified such instances of conduct, I then ask whether one can identify enough similarities between the instances of conduct so

as to create theoretical classes of conduct that cover a range of conduct that would also qualify as excess of mandate.

The details of my method of comparison is detailed below.

### 3. METHODOLOGY

My study adopts the comparative method. Specifically, I adopt an approach similar to the one that Zweigert and Kötz propose in their work, *An Introduction to Comparative Law*.<sup>1</sup>

#### 3.1. Structure of the methodology in relation to my study

According to Zweigert & Kötz's proposed method, determining which jurisdictions to compare is a question of functionality.<sup>2</sup> In other words, the elements of the systems that are to be compared must perform the same function, even if the ways in which they serve that function are wildly different.<sup>3</sup> It is not sufficient to assume that, for example, one cannot compare the Continental system of law with the Common Law system because of their structural differences.<sup>4</sup> The authors examine different criteria that may be taken into account when deciding these systems, but

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<sup>1</sup> KONRAD ZWEIFERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir, trans., Oxford University Press 3d ed. 1998).

<sup>2</sup> *Id.* at 34.

<sup>3</sup> *Id.*

<sup>4</sup> *See id.* at 37.

ultimately point out that any study must identify its own justifiable criteria.<sup>5</sup>

Here, I chose the United States and Sweden, because of the historical differences between the two nations' arbitral laws. Neither country has adopted the Model Law. Sweden's legislation, however, has been influenced by the Model Law to a much larger degree than US law. The United States' Federal Arbitration Act ("FAA") was adopted in 1925, while the Swedish Arbitration Act ("SAA") was adopted in 1999 (albeit as an update to the existing arbitration law from 1929). During the intervening 74 years, international arbitration continued to develop alongside the globalization of international trade. The most significant event was the promulgation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. To date, around 170 nations are signatories to the New York Convention.

In connection with the widespread adoption of the Convention, some nations sought to harmonize their national arbitral legislation—either by adopting the Model Law after its release in 1985 or adopting new legislation that was at least inspired by the Model Law. Sweden explicitly acknowledged that the SAA was

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<sup>5</sup> See *id.* at 40–42 ("If a selection must be made, a criterion of selection must be adopted, and for this purpose the rules of thumb outlined above—for they are no more than that—still seem to offer a useful point of departure) (emphasis added).

based on the core principles of the Model Law at the time of its adoption. The FAA on the other hand, was adopted long before the New York Convention or Model Law and has not undergone substantive amendments since that time.<sup>6</sup>

Moreover, the purposes behind the respective pieces of legislation is different. As stated above, the SAA was adopted as a means of bringing Swedish arbitral law into greater harmony with international principles. The FAA's principle purpose, on the other hand, was to ensure that arbitration agreements were enforceable across state lines.<sup>7</sup> Arguably, the drafters of the FAA paid less attention to the concept of excess of mandate than the drafters of the SAA.

Consequently, if one can identify common principles between these two seemingly disparate systems, then it is also likely that these principles can be identified in other legal systems that also struggle with identifying a clear definition of the concept.

Having identified the US and Swedish systems as suitable points of comparison, the question becomes exactly how my research will

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<sup>6</sup> There continues to be an ongoing discussion among many in US arbitration committee to "update" the FAA through amendments or outright replacement with the Model Law. *See, e.g.*, Daniel M. Kolkey, *It's Time to Adopt the UNCITRAL Model Law on International Commercial Arbitration*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 3 (1998); EDWARD BRUNET, ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006); and THOMAS E. CARBONNEAU, *TOWARD A NEW FEDERAL LAW ON ARBITRATION* (2014). This movement has gained little legislative traction.

<sup>7</sup> S. REP. NO. 536, at 2 (1924).

compare the systems. I adopt a three-phase approach. First, I develop a detailed description of how each jurisdiction addresses the concept. Zweigert & Kötz refer to this as a “report,”<sup>8</sup> but I refer to it as the systems’ approach to the concept. Regardless of terminology, my method stays true to the author’s philosophy that the description for each jurisdiction should be “objective, that is free from any critical evaluation.”<sup>9</sup> While there are many areas where one can be critical of the jurisdictions’ approaches on a national level, I do not engage in that criticism in the first phase of my research. Instead, I adopt a “law-as-it-currently-exists” approach.

The next phase is to actually compare the objective descriptions of the US and Swedish approaches to excess of mandate. Here I identify areas where the two systems address similar problems similarly or differently, as well as identify any problems that are unique to a particular system. The purpose of this phase is to identify functionality, or the solutions each country has adopted to address the problem of excess of mandate. According to the authors, this phase frees those solutions from “their national doctrinal overtones.”<sup>10</sup>

The third and final phase then attempts to build a framework for understanding the concept of excess of mandate. An ideal

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<sup>8</sup> ZWEIGERT & KÖTZ, *supra* note 1, at 43.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 44.

framework would be “functionally coherent”<sup>11</sup> in that it would present a uniform definition of excess of mandate that would sufficiently address problems of arbitrator conduct that arise either in US or Swedish law. This phase of my research is critical by definition. As pointed out, the US and Swedish legislation on excess of mandate is different—both in history and text. The framework will be built on the identification of core principles.

### 3.1.1. Purpose of the methodology

According to Zweigert and Kötz, the comparative method can serve multiple purposes. Two are most relevant to my research.

First, the comparative method can be used as a method for interpreting national rules. If ambiguities exist as to the meaning or implementation of a national legal rule, one can look to sources outside of that national system in order to find clarity. This can be done by looking for a “superior foreign solution.”<sup>12</sup> Second, the comparative method can be used to drive the “unification” of the law.<sup>13</sup> Unification seeks to, “reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems by inducing them to *adopt common principles of law.*”<sup>14</sup>

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<sup>11</sup> *Id.* at 45.

<sup>12</sup> ZWIGERT & KÖTZ, *supra* note 1, at 18.

<sup>13</sup> ZWIGERT & KÖTZ, *supra* note 1, at 24.

<sup>14</sup> ZWIGERT & KÖTZ, *supra* note 1, at 24 (emphasis added).

Using the comparative method to interpret the law and to unify the law can be seen as separate purposes, but there exist some cross-over between both practices. For example, my research uses the comparative method to both question whether one can identify a superior interpretation and whether there are possibilities to unify (or at least harmonize) the laws of the two systems.

According to Zweigert & Kötz, using the comparative method as an interpretive method is a narrower approach. For example, the meaning of the provision being studied must actually be ambiguous.<sup>15</sup> Then there are questions as to what systems are appropriate to compare.<sup>16</sup> May a judge look to a common law country to solve a question of civil law?<sup>17</sup> By contrast, the unification approach looks to find core principles that can be applied across multiple countries. The authors point to Model Laws as the best example of international attempts to unify legal systems.<sup>18</sup> Here several nations with different geographies, cultures, and legal traditions seek to draft legislation that would work almost universally because it is based on core principles.

My research method does separate the two approaches so distinctly. This is partly because of the way in which I have framed

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<sup>15</sup> *Id.* at 18.

<sup>16</sup> ZWEIGERT & KÖTZ, *supra* note 1, at 18.

<sup>17</sup> ZWEIGERT & KÖTZ, *supra* note 1, at 18.

<sup>18</sup> ZWEIGERT & KÖTZ, *supra* note 1, at 25.

my inquiry. In effect, I am comparing the two systems twice. First, to see if there are common principles that exist between the two jurisdictions. This is similar to the unification approach, except that I compare only two jurisdictions. (To compensate for this fact, I chose diverse jurisdictions.)

To the extent that I am not identifying commonalities, I am identifying differences. This leads to using the comparative method as an interpretive tool. Where the two systems approach a similar problem differently, I ask whether one system's approach is "superior." In this way, my research blends the interpretive and unification uses. Zweigert & Kötz argue that you can only use the comparative method to interpret areas of ambiguity, but not when a legal rule is clear.<sup>19</sup> The purpose of the comparison portion of my research, however, is to build a critical framework for defining excess of mandate. This requires asking whether there is a more appropriate way for US or Swedish law to address common questions.

Relatedly, my approach is both descriptive and normative.<sup>20</sup> It is descriptive in that it seeks to describe "how the law is being used" in the two jurisdictions.<sup>21</sup> I do not seek to present an idealized

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<sup>19</sup> Zweigert & Kötz, *supra* note 1, at 18.

<sup>20</sup> See Chris Dent, A Law Student-Oriented Taxonomy for Research in Law, 48 VICT. U. WELLINGTON L. REV. 371, 386 (2017).

<sup>21</sup> *Id.*

version of how I think the law should be in each jurisdiction. As discussed above, I am using a method in which one must first create descriptive “reports” for each jurisdiction before making comparisons.

The work becomes normative when I begin to compare the systems. To the extent that I can identify commonalities between the systems, I then explore whether the commonalities are useful. For example, does the commonality help to further the movement of international commercial arbitration toward a more legally harmonized, semi-autonomous system? Or does the commonality exist because the US and Sweden have both adopted a parochial rule of law that protects each jurisdiction’s sovereignty more than anything else?

Another way to consider the way in which my research blends unification with interpretation and description with normativism is by distinguishing between unification and harmonization. My research accepts Zweigert & Kötz’s definition of unification. That is, creating new, formerly non-existent Model Laws that are built on core principles found among diverse jurisdictions. I propose that under that definition, unification is different from harmonization, which seeks to bring already existing legislation into harmony by ensuring that its application is not contrary to identifiable core

principles. In a sense, harmonization is the attempt to achieve the goal of unification through the method of interpretation.

#### 4. LEGAL SOURCES

Just as my methodology contains descriptive and normative elements, my approach to the source material is both internal and external. During the descriptive stage, I review texts that are “canonical or authoritative” within each legal system.<sup>22</sup> Moreover, I adhere to each system’s rules for weighing the authoritativeness of each source. This is because, as mentioned above, I want to first identify the current state of the concept of excess of mandate within each system.

I examine the applicable legislation (including legislative history), as well as the legal literature and court decisions. Sweden and the United States, however, weigh these sources differently when attempting to express a rule of law. The United States adheres to *stare decisis*, whereas Sweden does not. Consequently, my method places greater weight to rules adopted by US courts concerning US law than I do rules stated by Swedish courts concerning Swedish law. Similarly, Swedish courts rely on legislative history and legal literature to a greater degree than US courts. Not only is the legislative history seen as helpful in understanding a provision of

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<sup>22</sup> Richard L. Schwartz, Internal and External Method in the Study of Law, 11 L. & PHIL. 179, 187 (1992).

Swedish legislation, it is arguably seen as an extension of the legislation itself.

Moreover, my treatment of court cases differs between the jurisdictions. In Sweden, the Svea Court of Appeals has significant expertise in hearing challenges to arbitration awards—particularly international arbitration awards. This, coupled with the fact that Swedish cases are viewed as instructive—not binding—precedent, means that other courts of appeal may issue rulings that are inconsistent with the line of legal principles that the Svea Court of Appeal has been developing. My research takes this fact in account by suggesting that Svea Court of Appeal and Supreme Court decisions are more valuable authoritatively than decisions from other courts of appeal.

Likewise, my research is greatly affected by the division of US courts into multiple circuits. The Circuit Courts of Appeals are divided on some fundamental issues underlying excess of mandate in US law. This presents a challenge in identifying a singular approach to the concept of excess of mandate. Consequently, my research has led to a two-prong approach to understanding excess of mandate in US law. I do not take a position on which approach is better in the descriptive portion of the research. Instead, I compare both potential approaches with the Swedish approach and then critically assess whether one approach is better than the other.

My research is limited to examining US federal law, and does not address US state law. The FAA is a federal statute and its meaning and interpretation are provided by the US federal courts. Narrowing the focus to only US federal cases helps to limit the breadth of the research into US law to a manageable, but still useful, number of cases.

Within US federal case law, however, my research is not limited to cases that arise out of international commercial arbitration disputes. On the contrary, the majority of cases I discuss arose within the context of domestic arbitration. The reason for this is that US domestic arbitral law has been the strongest driver of the development of the concept of excess of powers. Additionally, the FAA does not distinguish between international and domestic arbitration.

I must also examine cases that are not strictly related to commercial arbitration disputes. I discuss cases related to the separate field of labor arbitration. This approach would appear to be problematic at first glance. Labor arbitration is governed by section 301 of the Labor Management Relations Act of 1947 (“LMRA”), a statutory regime separate from the FAA. Moreover, commercial and labor arbitration address separate legal issues. Commercial arbitration traditionally arises out of contracts for the sale of goods or services entered into between two or more commercial parties that

ostensibly share the same level of sophistication. Labor arbitration arises out of collective bargaining agreements between employers and unions, the latter of which arbitrate grievances on behalf of one or more of their members. It has a specialized quality, because the arbitrators “are experts in the industrialized area and experienced in the general mores of the particular workplace.”<sup>23</sup>

Despite the differences in statutory and contractual bases, I must include labor arbitration cases. The two forms of arbitration share a “fundamental commonality in governing legal doctrine.”<sup>24</sup> Through a series of rulings, US courts—including the Supreme Court—extended the FAA’s jurisprudence to the LMRA. Today—and, importantly for the purposes of this research project—the courts apply identical legal rules when determining whether an arbitrator has exceeded her authority in both labor and commercial arbitration cases.

I also rely on legal literature when comparing the two jurisdictions. Here, I emphasize Swedish legal literature to a much larger degree than US legal literature. While US literature informs one’s understanding of how the legislature and courts approach the FAA, Swedish literature actually plays a substantive role in Swedish case law. To the extent that the literature identifies a rule or a collection

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<sup>23</sup> THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 395 (Juris Publishing 5th ed. 2014).

<sup>24</sup> Carbonneau, *supra* note 23 at 398.

of legal principles within Swedish cases, courts are arguably as likely to cite to the literature as they are to cite to past cases.

## 5. PROPOSED AUDIENCE

My intended audience are the actors in international commercial arbitration that are currently faced with uncertainty regarding what does and does not constitute excess of mandate. Therefore, I am writing for parties (more so in-house counsel), external counsel that litigate in arbitration, arbitrators, and judges.

In terms of tone, this means that the tone of my research is more technical in nature. While I always seek to present my work in the clearest language possible, my study assumes some general pre-existing arbitration knowledge on behalf of the reader. On the other hand, I understand that those reading the book may not have specialized knowledge of the particularities of the US or Swedish arbitration system. Consequently, I do spend time explaining areas in each system that might not be well known to the outside observer.

Aside from tone, the ultimate purpose of my research is to help promote a change in how legal systems approach excess of mandate issues. This is done by providing a clearer definition of excess of mandate. While it is difficult to state a cookie cutter definition that

should be applied, I hope the framework I propose adds to clarity by providing a method for addressing the issue.

Of Andras Jakab's seven role models,<sup>25</sup> I see myself aligning with "The Oracle" (although I approach the classification with much more humility than Jakab describes). I think that the current state of the law concerning the concept of excess of mandate is the largely the result of piecemeal judicial decision making. Consequently, I am writing for judges as well as academics who may further develop my proposed framework. More importantly, I do elements of system building in my current research.

## 6. CONCLUSION

Currently, the concept of excess of mandate in international commercial arbitration law is difficult to define, despite its ubiquity. Legal systems often address questions of whether arbitral conduct constitutes excess of mandate in a piecemeal and inconsistent manner. Consequently the state of the law leaves parties, counsel, arbitrators, and judges facing avoidable legal uncertainty.

My research hypothesizes that this problem can be addressed by comparing different legal systems' approaches to the concept with the goal of identifying common elements that exist between the systems. To that end I compare the United States and Sweden. Each

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<sup>25</sup> Andras Jakab, *Seven Role Models of Legal Scholars*, 12 GERMAN L.J. 757 (2011).

nation's arbitral law addresses the problem of excess of mandate, but the history behind the laws are vastly different. Therefore, any existing commonalities suggest the existence of core principles that transcend the differences in national legislation.

I compare the US and Swedish approaches by first providing an objective description of each country's approach to excess of mandate. Then, I compare those approaches in order to find areas where each country addresses similar problems in similar ways. Finally, I will propose a critical framework based on the core principles underlying those similarities.

As is discussed in the final chapter, the research concludes that there are enough dissimilarities to the two systems' approaches, that it is not possible to identify a coherently universal approach. Instead, the research helps to highlight the fact that a court's definition and application of the concept of excess of mandate may vary greatly depending on any given system's legal history and procedural traditions.

## CHAPTER 2: EXCESS OF MANDATE UNDER THE US FEDERAL ARBITRATION ACT

### 1. INTRODUCTION

This chapter discusses the concept of excess of mandate as it exists in US law. The FAA does not contain the phrase “excess of mandate.” Instead, it captures the concept in section 10(a)(4) of the FAA, which permits a federal court to set aside an award if the arbitrators “exceeded their powers.”

Section 10 of the FAA contains the principal grounds<sup>26</sup> for setting aside an award under the FAA. That section states that a court may set aside an arbitral award:

- (1) where the award was procured by corruption, fraud, or undue means;

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<sup>26</sup> I refer to section 10 as containing the “principal” grounds for set aside. The US Supreme Court has stated that the grounds in section 10 are the “exclusive” grounds for setting an award aside. *Hall Street Associates, LLC v. Mattel Inc.*, 552 U.S. 576, 584 (2008). Despite this finding, the US federal courts are split regarding whether other judicially-created grounds for set aside are allowed. This is discussed more in section 3.1.3 of this chapter.

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>27</sup>

An arbitrator may exceed her powers in many different ways, not all of which can be considered an excess of mandate. Consequently, this chapter will focus on two types of arbitral misconduct that constitute excess of mandate and fall under the definition of excess of powers.

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<sup>27</sup> 9 U.S. Code § 10(a)(1)-(4)

The first involves instances when an arbitrator fails to perform the basic arbitral tasks that the parties assign to her. According to US case law, those tasks are interpreting and enforcing the contract in dispute. The second involves instances when an arbitrator goes beyond the submission to arbitration. For the purposes of this chapter, “submission to arbitration” refers to issues that are covered by the scope of the arbitration agreement as well as issues that that parties have put to the arbitrator for a decision.

Section 10(a)(4) provides the type of arbitrator misconduct that may constitute excess of powers. US courts have then refined that concept by identifying specifically the types of arbitral conduct that constitute—and does not constitute—an excess of powers. As will be discussed in the analysis portion of this dissertation, this is often the way in which the US case law method works. The legislature enacts a statute, and the courts give that statute meaning through various rulings.

Accordingly, this chapter relies heavily on case law to develop a clearer understanding of what it means for an arbitrator to fail to perform her basic tasks or go beyond the submission to arbitration.

In addition to discussing case law, the ALI’s Restatement is also briefly discussed. Its section addressing section 10(a)(4) attempts to list the type of misconduct that falls within the definition of excess of powers. An extensive critique of the Restatement is beyond the

scope of this chapter. The Restatement is addressed because, it proposes a definition of excess of powers that incorporates going beyond the submission, but is silent regarding an arbitrator's failure to perform basic tasks.

### 1.1. Terminology used and reasoning behind the types of cases selected for discussion

It is useful to note two things the terminology used in this chapter and the reasoning behind the source of case law that is examined in this chapter.

Regarding terminology, excess of powers is meant to have the same meaning as excess of mandate, unless stated otherwise. This chapter addresses excess of powers section 10(a)(4) only. Federal courts do not usually use the term "mandate" when considering cases raised under section 10(a)(4). Instead, they most often use the text of the FAA and refer to excess of powers. This chapter refers almost exclusively to excess of powers for the sake of consistency. Terminology notwithstanding, the courts are in fact considering whether an arbitrator has gone beyond her mandate when they consider claims that an arbitrator exceeded her powers—at least in the context of the two types of arbitral misconduct identified above.

Regarding the types of cases that are examined, this chapter limits itself by discussing only cases decided by US federal courts. The FAA

is a federal statute and its meaning and interpretation are provided by the US federal court. Thus, the cases discussed in this chapter will only be US federal case law concerning the meaning of section 10(a)(4), even though the act has been applied and interpreted by state courts in some cases. Narrowing the focus to only US federal cases helps to limit the breadth of the research into US law to a manageable, but still useful, number of cases.

Within US federal case law, however, this chapter is not limited to cases that arise out of international commercial arbitration disputes. On the contrary, the majority of cases presented below arose within the context of domestic arbitration. The reason for this is that US domestic arbitral law has been the strongest driver of the development of the concept of excess of powers.<sup>28</sup>

This chapter also examines cases that are not strictly related to commercial arbitration disputes. It discusses cases related to the separate field of labor arbitration. This approach may appear to be discordant with commercial arbitration. Labor arbitration is governed by section 301 of the Labor Management Relations Act of

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<sup>28</sup> This is true of most, if not all, of the fundamental arbitral concepts in US law. For example, the US approach to the principles of separability and competence-competence were both first recognized and later developed in US domestic case law. Consequently, the development of academic literature regarding these and other fundamental arbitration principles has also arisen out of US domestic case law.

1947, a statutory regime separate from the FAA.<sup>29</sup> Moreover, commercial and labor arbitration find their bases in and address separate legal issues. Commercial arbitration traditionally arises out of contracts for the sale of goods or services entered into between two or more commercial parties that ostensibly share the same level of sophistication. Labor arbitration arises out of collective bargaining agreements between employers and unions, the latter of which arbitrate grievances on behalf of one or more of their members. It has a specialized quality, because the arbitrators “are experts in the industrialized area and experienced in the general mores of the particular workplace.”<sup>30</sup>

Despite the differences in statutory and contractual bases, this chapter must also include labor arbitration cases. The two forms of arbitration share a “fundamental commonality in governing legal doctrine.”<sup>31</sup> Through a series of rulings, US courts—including the Supreme Court—extended the FAA’s pro-arbitration policy to the FAA.<sup>32</sup> Today—and, importantly for the purposes of this research project—the courts apply identical legal rules when determining

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<sup>29</sup> Thomas E. Carbonneau, *The Law and Practice of Arbitration*, p. 397 (Juris Publishing 5th ed. 2014)

<sup>30</sup> Thomas E. Carbonneau, *The Law and Practice of Arbitration*, p. 395 (Juris Publishing 5th ed. 2014)

<sup>31</sup> Thomas E. Carbonneau, *The Law and Practice of Arbitration*, p. 398 (Juris Publishing 5th ed. 2014)

<sup>32</sup> Thomas E. Carbonneau, *The Law and Practice of Arbitration*, p. 397–98 (Juris Publishing 5th ed. 2014)

whether an arbitrator has exceeded her authority in both labor and commercial arbitration cases.<sup>33</sup>

Going forward, this chapter will discuss influential cases that have arisen in both the labor and commercial context. The type of arbitration is not particularly relevant to analyzing and understanding the concept of excess of powers under section 10(a)(4). The courts have relied on labor arbitration precedents when making precedents under section 10(a)(4) and vice versa. Therefore, this chapter will not highlight whether the type of arbitration that gave rise to the case being discussed. The facts of each case should make it clear to the reader the type of arbitration that gave rise to the disputed award, for what it is worth.

This chapter discusses cases that have precedential effect as well as cases that can be considered non-precedential.<sup>34</sup> Non-precedential cases are court rulings that are binding in operative part on the parties, but they are not binding precedent for future courts considering similar legal issues. Even though these opinions do not constitute binding precedent, they are still valuable in terms of the current research because they help to build a more complete

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<sup>33</sup> See Thomas E. Carbonneau, *The Law and Practice of Arbitration*, p. 398, fn 220 (Juris Publishing 5th ed. 2014) In this footnote, Professor Carbonneau draws attention to *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010), which he believes to be “the first case in which the Court acknowledges the unitary character of its decisional law on arbitration.”)

<sup>34</sup> See *infra* note 112, et seq., and accompanying text.

understanding of how courts treat the concept of excess of powers in the United States. They often contain the same elements as published, precedential, opinions. Namely, a factual description of the dispute, the court’s reasoning, and the court’s holding.

Finally, it is worth noting that current research does not seek to predict how US courts may approach the concept of excess of powers in the future based on current precedent. Rather, it seeks to understand how the concept is understood in practice and theory—not only in the United States, but also in the other identified jurisdictions, as well. With that in mind, non-binding opinions that contain useful insight will be helpful in developing a robust understanding of the concept.

## 2. EXCESS OF MANDATE AS EXCESS OF POWERS UNDER SECTION 10(a)(4) OF THE FAA

While many different types of arbitral misconduct may constitute excess of powers under the FAA,<sup>35</sup> this chapter identifies two categories of misconduct that constitute excess of powers under US law. Those are: instances in which the arbitrator fails to perform the most basic tasks inherent in an arbitral assignment; and instances in

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<sup>35</sup> See Thomas E. Carbonneau, *The Law and Practice of Arbitration*, p. 542 (Juris Publishing 5th ed. 2014) (“It is frequently the case that excess of authority refers to nearly every form of arbitrator misconduct, but no specific arbitrator conduct measures up to the applicable standard.”)

which an arbitrator goes beyond the submission to arbitration. These two classes are discussed because they are arguably fit well within the international general understanding of excess of mandate. Thus, they are the most useful in drawing comparisons between jurisdictions. Conversely, the other types of arbitral misconduct that are defined as excess of powers under US law are more related to issues beyond the scope of this research project. They include, but are not limited to, the validity of the arbitration agreement, procedural errors, and arbitrability and public policy.

Instances in which an arbitrator fails to fulfill the basic tasks inherent in her assignment will be examined first. Among the claims brought under section 10(a)(4), this ground is one of the most often invoked grounds. However, it is rarely successful due to the great deference given to arbitral awards under US law.

Cases where an arbitrator has gone beyond her submission are examined second. An arbitrator can go beyond the submission when she decides an issue that is outside the scope of the arbitration agreement or decides an issue that would otherwise fall within the scope of the arbitration agreement but was not presented to her by the parties.

## 2.1. Failing to fulfill the basic tasks of an arbitrator

An arbitrator can exceed her powers by failing to perform the basic arbitral tasks that are inherent in her assignment. Federal courts express this concept differently depending on the law of the circuit, but the principle is the same. The basic task of an arbitrator is to interpret and enforce the terms of the contract in dispute, which includes identifying and applying governing rules of law.<sup>36</sup> If an arbitrator engages in these tasks, but does so incorrectly, she has not exceeded her powers. Pursuant to US case law, she only exceeds her powers if fails to even arguably attempt to perform these basic arbitral tasks and instead bases her award on her general sense of fairness. Two cases are presented below in order to demonstrate how the rule fits within the context of excess of powers under section 10(a)(4).

The US district courts have arguably adopted rules that reach the same result, although they use different and less clear language. Some circuits have found that they may set aside awards if the award is “completely irrational” or “fails to draw its essence” from the contract underlying the dispute. One circuit has set aside awards for being completely irrational *and* failing to draw their essence from the underlying contract. Another set aside an award for being

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<sup>36</sup> See *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 672 (2010).

completely irrational *because* it failed to draw their essence from the underlying contract. Examples from various circuit courts of appeals are provided below.

Finally, any discussion regarding a failure to perform basic arbitral tasks as constituting excess of powers must address the “manifest disregard of the law” standard, which allows an arbitral award to be set aside if the arbitrator manifestly disregarded the law. Prior to 2008, this was a widely—albeit not universally—accepted ground for setting aside an award in federal courts. In a tangentially related ruling, the US Supreme Court raised the possibility that the ground was invalid. It, however, did not decide the issue and, in the intervening years, the various US federal circuits have taken differing positions on both the validity and the legal basis for applying the standard. To the extent that it remains a valid ground, it may best be understood as another way of stating that the arbitrator failed to perform the basic tasks inherent in an arbitral assignment.

Despite differing approaches among the circuit courts, each circuit court accepts the basic principle, as stated many times by the US Supreme Court, that arbitral awards should be set aside in exceptionally narrow circumstances. As a result, awards are rarely set aside on the ground that an arbitrator exceeded her powers by failing to perform basic arbitral tasks.

2.1.1. The primary rule that awards will be set aside in only very unusual circumstances

In practice, the number of cases in which courts have refused to set an award aside on this ground are far greater than the number of cases in which courts did set the award aside. There are two principle reasons for this. First, US courts have embraced a pro-arbitration policy toward the enforcement of arbitration agreements and toward the recognition and enforcement of awards. Great deference is given to an arbitrator’s factual and legal findings and interpretation of the underlying contract and governing law. There are many reasons for this, but one of the more often cited reasons is that expansive judicial review of arbitral awards would defeat the policy that arbitrations are supposed to result in a final and binding award between the parties.

Second, this ground is rarely successful because many claims that the arbitrator erred in interpreting the contract or interpreting the law do not rise to the level of error needed to demonstrate a failure to perform the arbitrator’s tasks. The Supreme Court has made it clear that mere mistakes of fact, interpretation, or law will not suffice to set an award aside. According to the Court, “It is not enough to show that the arbitrator committed an error—or even a serious error.” Moreover, “[o]nly if the arbitrator acts outside the scope of his contractually delegated authority—issuing an award

that simply reflects his own notions of economic justice rather than drawing its essence from the contract—may a court overturn his determination.”

2.1.2. The Supreme Court’s approach to an arbitrator’s basic tasks: interpret and enforce the agreement

The two cases that are most relevant to understanding how the US Supreme Court defines the basic tasks inherently assigned to an arbitrator are *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*<sup>37</sup> and *Oxford Health Plans LLC v. Sutter*.<sup>38</sup> While both concern the question of whether the arbitrators exceeded their powers by ordering class arbitration, the subject matter of the cases is less relevant than the legal rules that the Court sets out.

In *Stolt-Nielsen*, a group of shipping companies, including a firm named Stolt-Nielsen, sought to have an adverse arbitral award set aside on the grounds that the tribunal impermissibly interpreted the underlying contract to permit class arbitration. According to the facts of the case, AnimalFeeds produced raw materials used by animal feed producers around the world.<sup>39</sup> Stolt-Nielsen shipped

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<sup>37</sup> 559 U.S. 662 (2010).

<sup>38</sup> 569 U.S. 564 (2013)

<sup>39</sup> 559 U.S. 662 (2010).

AnimalFeeds’s material under the terms of a standard maritime contract, or “charter party.”

In the early 2000s, AnimalFeeds learned that Stolt-Nielsen and the other shipping companies were actively conspiring to illegally fix their prices. AnimalFeeds initiated arbitration under the charter party. AnimalFeeds requested that the arbitral tribunal certify it as the named claimant in a class arbitration.

Both sides agreed to stipulate that the arbitration agreement was silent as to the permissibility of class action arbitration. The question before the tribunal, then, was whether AnimalFeeds request for class arbitration should be granted despite the lack of agreement between the parties.

AnimalFeeds forwarded three arguments:

(a) the clause is silent on the issue of class treatment and, without express prohibition, class arbitration is permitted under [an earlier Supreme Court ruling concerning class arbitration];

(b) the clause should be construed to permit class arbitration as a matter of public policy;  
and

(c) the clause would be unconscionable and unenforceable if it forbade class arbitration.<sup>40</sup>

The tribunal rejected the first argument and did not address the third, but found that class arbitration was permissible under the public policy argument.<sup>41</sup> The tribunal based its decision at least partially on a number of previous “arbitral decisions that construed a wide variety of clauses in a wide variety of settings as allowing for class arbitration.”<sup>42</sup>

The Supreme Court set the award aside on the grounds that the manner in which the tribunal found that class arbitration was permissible constituted an excess of powers under section 10(a)(4) of the FAA. In supporting its holding, the Court recited the established principle in US law that “the task of an arbitrator is to *interpret and enforce a contract*, not to make public policy.”<sup>43</sup> Applying that rule to the facts of the case, the Court clarified that, “the arbitrators’ proper task was to identify the rule of law that governs.”<sup>44</sup> Specifically, the Court identified three possible legal

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<sup>40</sup> 599 U.S. at 672.

<sup>41</sup> 599 U.S. at 672-73.

<sup>42</sup> 599 U.S. at 673 (internal quotations omitted).

<sup>43</sup> 599 U.S. 672 (emphasis added). *Stolt-Nielsen* is by no means that first time that the US Supreme Court has stated this principle. The Court as invoked similar language both before and after its holding in *Stolt-Nielsen*. See, e.g., *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001).

<sup>44</sup> 599 U.S. at 673.

regimes that could hold such a rule and stated that the tribunal should have “inquir[ed] whether [one of those three sources] contains a ‘default rule’ under which an arbitration clause is construed as allowing class arbitration in the absence of express consent . . .”.<sup>45</sup> The Court found, however, that the tribunal had not attempted to find such a default rule and, thus, exceeded its powers.

Instead of “identifying and applying” a legal rule, in the Court’s view, the tribunal proceeded “as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied”<sup>46</sup> and relied on previous arbitral decisions to “simply impose[] its own conception of public policy.”<sup>47</sup>

Finally, the Court observed that the tribunal did reference New York law in the context of “ascertain[ing] the parties’ intention” whether to “permit or to preclude class arbitration,” but that reference was moot.<sup>48</sup> In the Court’s view, the arbitrators were not permitted to consider the question of the parties’ intent, because the charter party was not ambiguous.<sup>49</sup> The Court based this finding on the fact

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<sup>45</sup> 599 U.S. at 673.

<sup>46</sup> 599 U.S. at 673-74. For a critical take on this statement, see, Alan Scott Rau, “Gap Filling” by Arbitrators, 18 ICCA Congress Series 935, 977 (2015) (describing the quoted statement as “for my money the most mystifying sentence to be found in any opinion ever written by the Supreme Court on the subject of arbitration . . .”).

<sup>47</sup> 599 U.S. at 675.

<sup>48</sup> 599 U.S. at 676.

<sup>49</sup> 599 U.S. at 676. The Court’s finding is based on the so-called parol evidence rule. In most U.S. jurisdictions, the rule prohibits a fact-finder from going beyond

that the parties stipulated that the charter party was silent regarding whether class arbitration was permitted or precluded.

Following the Supreme Court's ruling, some viewed *Stolt-Nielsen* as adopting a rule that arbitrators must find a sufficient contractual basis for ordering class arbitration. While any discussion regarding the jurisdictional issues associated with class arbitration is beyond the scope of this research project, it is worth noting that is an overly broad reading of the case. *Stolt-Nielsen* should be read more narrowly. For the purposes of understanding how a failure to perform the basic tasks of an arbitral assignment, the most important aspect of the case is that Court confirmed the existing rule that an arbitrator exceeds her powers if she fails to perform the basic tasks of the arbitral assignment. The Court reaffirmed this principle *Oxford Health Plans LLC v. Sutter*.<sup>50</sup>

In that case, a doctor named John Sutter contracted with an insurance company named Oxford Health Plans to provided medical services that he provided to members of Oxford's network.<sup>51</sup> Oxford had entered into similar contracts with several other doctors.<sup>52</sup> After a time, Sutter filed a class-action claim in state court

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"the four corners" of the contract to determine the parties' intent unless the contract is ambiguous. The Court does not identify the legal basis for applying the parol evidence rule in this case.

<sup>50</sup> 599 U.S. at 676

<sup>51</sup> 599 U.S. at 676

<sup>52</sup> 599 U.S. at 676

on behalf of himself and the other similarly situated doctors.<sup>53</sup> He alleged that Oxford had failed to honor its payment obligations under the contract.<sup>54</sup> Oxford invoked the contract’s arbitration agreement and the parties entered into arbitration.<sup>55</sup> Sutter requested that the arbitrator authorize class arbitration.

The parties agreed that the arbitrator should decide whether their agreement permitted class arbitration.<sup>56</sup> The arbitrator found that answering that question was a matter of interpreting the arbitration agreement.<sup>57</sup> The arbitration agreement stated, among other things, that, “[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration . . . .”<sup>58</sup> The arbitrator held that class arbitration was allowed, because it fell within the category of the civil actions that the arbitration agreement covered.<sup>59</sup>

Oxford sought to have the award set aside, citing to the Court’s holding in *Stolt-Nielsen*. Oxford argued that the arbitrator ordered

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<sup>53</sup> 599 U.S. at 676

<sup>54</sup> 599 U.S. at 676

<sup>55</sup> 599 U.S. at 676

<sup>56</sup> Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 566 (2013).

<sup>57</sup> Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 566 (2013).

<sup>58</sup> Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 566–67 (2013).

<sup>59</sup> Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568 (2013).

class arbitration without a “sufficient contractual basis.” The Supreme Court rejected this argument.

The Court began by reciting the principle rule that courts will set arbitral awards aside only in “very unusual circumstances.”<sup>60</sup> Such circumstances do not include error in contract interpretation. According to the Court, “Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties’ contract correctly, but whether he construed it at all.”<sup>61</sup> On this point, the Court found that the arbitrator’s decisions regarding class arbitration were “through and through, interpretations of the parties’ agreement.”<sup>62</sup> Consequently, the Court let the award stand.

The Court also made a point of contrasting the facts of *Sutter* with *Stolt-Nielsen*. It pointed out that the parties in *Stolt-Nielsen* had stipulated that they had never reached an agreement regarding class arbitration, so the arbitrator could not be said to have made a determination regarding the parties’ intent.<sup>63</sup> Additionally, the arbitrator did not attempt to find a rule of law that might govern the

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<sup>60</sup> Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568 (2013).

<sup>61</sup> Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 572 (2013).

<sup>62</sup> Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 570 (2013). By way of highlighting the rule that the arbitrator need only perform the basic arbitral tasks in order for the award to survive a challenge, one should note that the arbitrator’s decision in this case has not gone criticized in commentary. Indeed, one commentator has simply stated that, “the award in fact was facially preposterous.” Alan Scott Rau, “Gap Filling” by Arbitrators, 18 ICCA Congress Series 935, 991 (2015).

<sup>63</sup> Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 571 (2013).

question of class arbitration in the absence of an agreement between the parties.<sup>64</sup> Conversely, it was uncertain what the parties in *Sutter* had agreed regarding class arbitration. The arbitrator interpreted the parties' arbitration agreement and found that they had intended to arbitrate class disputes. The Court found that the arbitrator had fulfilled the basic task of interpreting the agreement and, therefore, had not exceeded his powers—regardless of whether the interpretation was a correct one.

Read together, *Stolt-Nielsen* and *Sutter* gives insight into what the Court means when it says that the basic tasks of an arbitral assignment is to “interpret and enforce a contract.”<sup>65</sup> Pursuant to *Stolt-Nielsen*, “interpreting and enforcing a contract” involves more than interpreting the document itself. The parties stipulated that they had not reached an agreement. In the absence of an agreement, the Court expected the arbitral tribunal to look to the governing law to determine whether class arbitration was allowed. Failure to do so constituted a failure to interpret the agreement and, consequently, resulted in an excess of powers on the basis that the tribunal had not performed the basic tasks assigned to it.

In *Sutter*, the Court reaffirmed this rule and made clear that the tribunal need only do the bare minimum to fulfill those tasks. Oxford

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<sup>64</sup> Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 571 (2013).

<sup>65</sup> 559 U.S. 662, 672 (2010)

argued that the arbitrator permitted class arbitration despite a “sufficient contractual basis.” In doing so, it requested that the Court review the arbitrator’s findings and judge whether they were sufficient. That was effectively a request for a review of the merits of the arbitrator’s decision. The Court rejected Oxford’s request and let the award stand on the basis that the arbitrator had interpreted the agreement, regardless of whether his findings were “sufficient.”

Prior to and following *Stolt-Nielsen* and *Sutter*, the circuit courts had adopted standards for setting aside an award that would, at first glance, seem to be less stringent than the Supreme Court’s approach. Moreover, it is not entirely clear whether these standards should be based in the excess of powers standard of section 10(a)(4) or are somehow separate. Section 5 of this chapter will argue that the standards can be viewed other means of stating the same rule: arbitrators must fulfill the basic tasks of an arbitrator; otherwise, they have exceeded their powers.

### 2.1.3. The arbitrator’s basic tasks concerning fashioning remedies

In addition to the deference afforded arbitrators’ decisions on the merits of the case, federal courts in the United States uniformly recognize that arbitrators have broad discretion to fashion relief.

A natural extension of the arbitrator's power to adjudicate the parties' dispute is the power to award relief based upon that adjudication. In fact, it can be argued that the principle reason that a party initiates arbitration is to seek a remedy for an injustice that has occurred, or is occurring, within the parties' contractual relationship. Consequently, the authority to grant legally enforceable remedies is a defining characteristic of an arbitrator's mandate.

Claims that an arbitrator has granted relief that she was not empowered to grant are often raised in connection with claims that the arbitrator failed to interpret the contract or apply the law when deciding the merits of the dispute. On the face of things, this fact would appear to be a result of logical pleading and not because the two claims are conceptually related. In other words, a party seeking to have an award set aside argues, first, that the arbitrator exceeded her power rendering an award that was not based on the underlying contract and, second, in any event the arbitrator exceeded her authority by granting relief that was beyond her power to grant. Regardless of whether the arguments are meant to be relate to one another when pled, US courts generally resolve them using the same approach. In both instances, the courts will give great deference to the arbitrator's interpretation of the underlying contract and application of the law.

The Fifth Circuit Court of Appeals case, *BNSF Railway Co. v. Alstom Transportation, Inc.*,<sup>66</sup> provides a good example of such an approach. In that case, BNSF contracted with Alstom for services related to BNSF's locomotives.<sup>67</sup> During the course of the contractual relationship BSNF notified Alstom that it was reducing the number of active locomotives in its fleet, which effectively would reduce the size of BSNF's payments to Alstom.<sup>68</sup> The contract anticipated such an event and provided that he parties negotiate a reasonable economic solution to Alstom's loss.<sup>69</sup> Before the parties did this, however, BSNF terminated the agreement pursuant to another provision in the contract that permitted BSNF to terminate "at any time, without cause."<sup>70</sup>

The dispute ended up in arbitration under the arbitration agreement found in the contract.<sup>71</sup> The contract also stated that an arbitral tribunal could award "ordinary and direct damages, but not consequential or incidental damages, such as lost profits."<sup>72</sup> The parties agreed that Illinois law would be the law applicable to the contract.

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<sup>66</sup> 777 F.3d 785 (5th Cir. 2015).

<sup>67</sup> 777 F.3d at 786.

<sup>68</sup> 777 F.3d at 786–87.

<sup>69</sup> 777 F.3d at 787.

<sup>70</sup> 777 F.3d at 786.

<sup>71</sup> 777 F.3d at 787.

<sup>72</sup> 777 F.3d at 787.

The tribunal ruled in Alstom’s favor. It found that BSNF had violated Illinois’s so-called implied covenant of good faith and fair dealing<sup>73</sup> and had breached the contract by not compensating Alstom for the reduction in active locomotives.<sup>74</sup> The tribunal did not award Alstom lost profits damages pursuant to the contract.<sup>75</sup> The Tribunal did award Alstom “out-of-pocket” damages instead.<sup>76</sup>

BSNF sought to have the award set aside because the tribunal exceeded its powers.<sup>77</sup> Its first argument was that the tribunal rendered an award that was not based on the contract.<sup>78</sup> Second, it argued that the tribunal awarded damages that the parties had agreed to exclude.<sup>79</sup> Specifically, it argued that out-of-pocket damages were the equivalent of lost profits and the parties explicitly excluded lost profits.<sup>80</sup>

The court approached both arguments separately, but relied on the same starting point: whether the tribunal “(even arguably)

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<sup>73</sup> 777 F.3d at 787. The covenant of good faith and fair dealing is a term that is implied in contracts, absent express language excluding its application. The covenant has a number of applications depending on the jurisdiction. In this case, the covenant was used to interpret the provision allowing BSNF to terminate the agreement “without cause” and as a basis for calculating a remedy. *BSNF Ry.*, 777 F.3d at 788–89.

<sup>74</sup> 777 F.3d at 787.

<sup>75</sup> 777 F.3d at 787.

<sup>76</sup> 777 F.3d at 787.

<sup>77</sup> 777 F.3d at 787.

<sup>78</sup> 777 F.3d at 787.

<sup>79</sup> 777 F.3d at 788.

<sup>80</sup> 777 F.3d at 789–90.

interpreted the parties' contract."<sup>81</sup> The court also came to the same conclusion. The tribunal's award was based on an interpretation both in relation to the dispute's merits and in relation to the remedies that the tribunal granted. Regarding the remedies ground, the court found that the tribunal had "expressly or by implication" that it interpreted the agreement to allow out-of-pocket damages were a form of direct damage. The court also relied on the fact the tribunal refused to award damages that were excluded in the contract. Pointing to examples where the tribunal was engaged in contract interpretation, the court found that the tribunal had performed the basic tasks of contract interpretation. Thus, it refused to set the award aside.

#### 2.1.4. Manifest Disregard of the Law

Any discussion concerning excess of mandate under US law must at least mention the principle of "manifest disregard of the law" as a ground for setting aside an arbitral award. Neither case law nor commentary gives a clear answer regarding whether the manifest disregard standard is actually a valid grounds for set aside. If it is valid, its scope and legal basis are not clearly defined or consistently applied by the courts.

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<sup>81</sup> 777 F.3d at 788 (quoting *Oxford Health Plans, LLC v. Stutter*, 569 U.S. 564 (2013)).

The courts that do recognize manifest disregard as a valid ground for set aside have defined the concept in similar, but not identical terms. Despite differences in phrasing, one can identify a high-level definition that is sufficient for the purposes of this present discussion: an arbitrator renders an award in manifest disregard of the law when she is aware of an obviously applicable rule or set of rules of law but chooses to ignore them.<sup>82</sup>

The courts' current application of the manifest disregard standard finds its roots in the 1953 Supreme Court case, *Wilko v. Swan*.<sup>83</sup> The Court, while discussing whether arbitration could sufficiently protect a security buyer's rights under the 1933 Securities Act, stated in passing that "the interpretations of the law by arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation."<sup>84</sup> The Court did not elaborate as to what type of arbitral misconduct constituted a manifest disregard of the law.

It is curious that this case should be the starting block for the development of a standard for setting aside an award. For one thing,

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<sup>82</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (Third Edition), §1.02[A][2] (Kluwer Law International, Updated August 2022).

<sup>83</sup> *Wilko v. Swan*, 346 US 427 (1953).

<sup>84</sup> *Wilko v. Swan*, 346 US 427, 436–37 (1953) (emphasis added). The *Wilko* Court held that claims under the Securities Act were non-arbitral, because arbitration could not adequately protect a claimant's rights under the act. *Id.* at 334–35. That holding has since been overruled. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 US 477 (1989).

*Wilko* did not concern the setting aside of an award, but instead concerned the validity of a pre-dispute arbitration agreement in a securities contract.<sup>85</sup>

Over time, each federal circuit and the Supreme Court developed their own rule concerning the circumstances in which an award could be set aside for manifest disregard of the law. As stated above, the definitions varied slightly, but stood for the same general principles.

Today, the circuits are split regarding the validity and applicability of the manifest disregard standard. The split occurred after the Supreme Court's 2008 decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>86</sup> The question before the Court was whether parties could agree to expand the grounds for setting aside and modifying an award beyond the grounds listed in sections 10 and 11 of the FAA.<sup>87</sup> The Court held that sections 10 and 11 contained the exclusive grounds for set aside and modification and, thus, parties could not agree to expand those grounds.<sup>88</sup>

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<sup>85</sup> The plaintiff-petitioner in *Wilko* requested that the arbitration agreement in a securities sale contract be invalidated on the basis that pre-dispute arbitration agreements violated a provision of the 1933 Securities Act meant to protect the rights of buyers. *Wilko*, 346 US at 432. Specifically, the petitioner argued that, "arbitration lacks the certainty of a suit at law under the Act to enforce [a buyer's] rights." *Id.* The Court agreed. *Id.* at 334–35.

<sup>86</sup> *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 522 US 576 (2008).

<sup>87</sup> *Hall Street*, 522 US at 583–84.

<sup>88</sup> *Hall Street*, 522 US at 584.

The Court's holding that the grounds listed in section 10 are the exclusive ground for setting aside an award created uncertainty as to the validity of the manifest disregard standard. Namely, it was unclear whether manifest disregard was still valid considering that it was not explicitly listed in section 10.

The Court's ruling did not make it clear whether the manifest disregard standard could still be used as a ground for setting aside an award. The court addressed the standard in the context of Hall Street's argument that the existence of manifest disregard demonstrated that the grounds in section 10 were not exclusive. The Court was not convinced of the argument and stated,

Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.' We, when speaking as a Court, have merely taken the Wilko

language as we found it, without  
embellishment . . . .<sup>89</sup>

Following *Hall Street*, the federal circuits are divided on whether or not manifest disregard remains a viable ground for setting aside an arbitral award. Some Federal Courts of Appeal have eliminated manifest disregard of the law as a ground for setting aside arbitral awards. In their respective views, *Hall Street* set a firm rule that section 10 of the FAA provides the sole grounds for setting aside an arbitral award.<sup>90</sup> Neither party agreement nor judicial discretion justify maintaining the manifest disregard standard.<sup>91</sup>

Other Courts of Appeal have acknowledged the open question as to the validity of manifest disregard, but have refused to decide whether the standard survived *Hall Street* and, if so, in what form.<sup>92</sup>

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<sup>89</sup> *Hall Street*, 522 US at 585 (internal citations omitted).

<sup>90</sup> *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (eliminating manifest disregard of the law only “to the extent that [it] constitutes a nonstatutory ground vacatur . . . .”); *Air Line Pilots Ass’n v. Trans States Airlines, LLC*, 638 F.3d 572, 578 (8th Cir. 2011); *Citifinancial Corp. v. Frazier*, 604 F.3d 1313, 1323–24 (11th Cir. 2011).

<sup>91</sup> Some parties have attempted to argue that manifest disregard of the law should be the standard for determining whether an arbitrator has violated public policy. See, e.g., *Air Line Pilots Ass’n* 638 F.3d at 579. Courts have not been receptive to this argument. *Id.* In any event, this project does not claim to explore every possible theory that could be used to justify setting aside an award for manifest disregard of the law. As is explained further below, the current research is only concerned with instances in which courts have equated manifest disregard of the law with excess of powers.

<sup>92</sup> *Mountain Valley Prop. v. Applied Risk Services*, 863 F.3d 90, 94–95 (1st Cir. 2017) (finding that if manifest disregard survived *Hall Street*, it did so as a “judicial gloss” over the grounds found in the FAA and citing *Ortiz-Espinosa v.*

These courts have been able to avoid deciding the issue primarily by finding that, even if the standard continues to exist, the cases presented to them do not demonstrate a manifest disregard of the law.

The Second, Fourth, Sixth, and Ninth Circuit Courts of Appeal have all found—for different reasons—that manifest disregard is still a valid, albeit narrow, ground for setting aside an arbitral award. The Fourth Circuit has found that, in light of the US Supreme Court’s holding in *Stolt-Nielsen*, the standard continues to exist. That circuit, however, has declined to take a position regarding whether it exists as a non-statutory ground or a restatement of the grounds found in section 10. The Sixth Circuit recognizes manifest disregard of law as a non-statutory ground for setting aside an arbitral award. The court has found that *Hall Street* prevents parties from contracting around section 10, but it does not prevent courts from creating their own additional grounds for set aside. In contrast, the Second and Ninth Circuits have found that the manifest disregard of the law standard

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BBVA Sec. of Puerto Rico, Inc., 852 F.3d 36, 46 (1st Cir. 2017); Goldman v. Citigroup Global Markets, Inc., 834 F.3d 242, 255–56 (3d Cir. 2016) (declining to decide whether manifest disregard of the law is still a valid ground for set-aside, but also stating that it is “a judicially-created doctrine”); THI of New Mexico at Vida Encantada, LLC v. Lovato, 864 F.3d 1080, 1084, 1088 (10th Cir. 2017) (finding that manifest disregard of the law is a “judicially created” standard while, at the same time, declining to decide its validity).

is a “judicial gloss” that incorporates the<sup>93</sup> grounds listed in section 10 of the FAA—and, in particular, excess of powers.

Finally, the Seventh Circuit Court of Appeal had ruled that the section 10 grounds were exclusive prior to *Hall Street*.<sup>94</sup> To the extent that the Seventh Circuit has recognized manifest disregard of the law, it has done so narrowly and under the guise that the concept is synonymous with excess of powers.

In light of the above, one can eliminate most of the circuit court approaches to manifest disregard of the law from this research. The circuit courts that have yet to rule on whether or not the concept survives *Hall Street* have not, understandably, taken a position on its concept’s theoretical legal basis (*i.e.*, statutory or judicially-created). The circuit courts that eliminated manifest disregard, or recognized it as a potentially non-statutory ground, are also unhelpful to the present research. On the question of excess of mandate, this research is only concerned with potential overlap with the excess of powers provision in section 10(a)(4).

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<sup>93</sup> Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, (5th Circuit Court of Appeals).

<sup>94</sup> Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994).

Consequently, only three circuit court approaches will be examined below: the Second, Seventh, and Ninth Circuits. These circuits recognize the concept and tie it together with excess of powers.

#### 2.1.5. Manifest disregard as excess of powers

The above identified the two main theories underpinning the manifest disregard for law standard. That is, the theory that it is a nonstatutory ground that supplements section 10 of the FAA, or that it is another way of referring to the existing statutory grounds. The Second, Seventh, and Ninth Circuit Courts of Appeals have all adopted the statutory approach, which is the approach relevant to the current research. Therefore, those courts' legal basis for viewing manifest disregard of the law as a way in which an arbitrator can exceed her powers is examined below.

The Second and Seventh Circuits are examined first, because the legal underpinnings for their respective approaches to manifest disregard is purportedly identical. Indeed, the Second Circuit Court of Appeal has specifically stated that its current approach to manifest disregard of the law is taken from an earlier Seventh Circuit Court of Appeal holding.

Then, the Ninth Circuit's case law should be considered separately from the Second and Seventh Circuit. This is for three reasons. First, it adopted the view that manifest disregard of the law is a statutory

component of excess of powers at an early stage relative to the other federal circuits. It then has applied the statutory approach fairly consistency throughout a sizeable number of cases. Second, and relatedly, the court took this view because it found that the FAA's grounds for setting aside an award were exclusive (a conclusion it came to prior the Supreme Court's ruling in *Hall Street*). Third, despite the above, the court has not provided a satisfactory theoretical basis for adopting the statutory approach. In fact, no case could be identified where the Ninth Circuit Court of Appeals explained why the manifest disregard test fits within the statutory definition of excess of powers. Therefore, the Ninth Circuit's legal basis for connecting manifest disregard with excess of powers must be understood by examining how courts in that circuit apply the standard.

In contrast to the Ninth Circuit, both the Second Circuit have adopted a theoretical basis for viewing manifest disregard of the law as one of the ways in which an arbitrator can exceed her powers. Specifically, that: 1) the manifest disregard standard is a component of excess of powers under section 10(a)(4) of the FAA; and 2) section 10 of the FAA should be a mechanism to enforce the parties' agreement to arbitrate . . . ."<sup>95</sup> This view is explored in more detail

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<sup>95</sup> *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), overruled on other grounds by *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 599 U.S. 662 (2010).

below. Then, the question of whether the courts' stated basis is consistent with the application of the manifest disregard standard will be discussed.

The Second Circuit found that manifest disregard of the law is a component of excess of powers in *Stolt-Nielsen*.<sup>96</sup> In the court's view, an arbitrator "failed to interpret the contract at all" if she "knew of the relevant legal principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willingly flouted the governing law by refusing to apply it."<sup>97</sup> Such a failure to interpret the contract is synonymous with excess of powers because "parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law."<sup>98</sup>

The court of appeals in *Stolt-Nielsen* supported its view<sup>99</sup> by quoting *dicta* found in an earlier Seventh Circuit Court ruling, *Wise v. Wachovia*.<sup>100</sup> In *Wise*, the Seventh Circuit Court of Appeal stated:

It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to

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<sup>96</sup> *Stolt-Nielsen*, 548 F.3d at 95.

<sup>97</sup> *Stolt-Nielsen*, 548 F.3d at 95.

<sup>98</sup> *Stolt-Nielsen*, 548 F.3d at 95.

<sup>99</sup> *Stolt-Nielsen*, 548 F.3d at 96.

<sup>100</sup> *Wise v. Wachovia Securities, Inc.*, 450 F.3d 265 (7th Cir. 2006).

arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration, which unlike the one in this case is concerned with interpreting a contract, the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract’s arbitration clause.<sup>101</sup>

While the Second Circuit adopted the Seventh Circuit’s rationale, the courts came to same conclusion from separate starting points. In

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<sup>101</sup> Wise, 450 F.3d at 269.

fact, one could argue that each court was using the same means to reach inapposite ends. The Second Circuit adopted the manifest-disregard-as-an-enforcement-mechanism approach simply as a means to justify the manifest disregard standard's continued existence. The Seventh Circuit, on the other hand, was continuing its trend of reluctantly acknowledging the standard's existence, but defining it as narrowly as possible.

Following the *dicta* in *Wilko*, the Second Circuit adopted the manifest disregard of the law standard earlier than the other circuit courts. Second Circuit case law viewed it as a nonstatutory ground for setting aside an award. As the Court of Appeal stated in one holding, manifest disregard of the law "is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, *but where none of the provisions of FAA apply.*"<sup>102</sup> But, as with the other circuits, the Supreme Court's holding in *Hall Street* regarding the exclusivity of section 10 of the FAA forced the Second Circuit to reexamine the standard's validity. In *Stolt-Nielsen*, the court of appeals acknowledged that the Supreme Court's finding was inconsistent

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<sup>102</sup> *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003) (emphasis added). See also *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 208 (2d Cir. 2002) ("In addition to the grounds for vacatur explicitly provided for by the [FAA] . . . , an arbitral decision may be vacated when an arbitrator has exhibited a 'manifest disregard of the law.'")

with what it described as some of its earlier “*dicta*.”<sup>103</sup> Consequently, the court “reconceptualized” manifest disregard as a statutory ground by using the rationale stated above.<sup>104</sup>

The Seventh Circuit, in contrast, approached the manifest disregard standard with reluctance following *Wilko*. It was one of the last circuits to recognize its validity, and then it was one the first to eliminate it as a nonstatutory basis for setting aside an award following the overruling of *Wilko*.<sup>105</sup> In *Bavarti v. Josephthal, Lyon & Ross, Inc.*, the Seventh Circuit Court of Appeal stated, “The grounds for setting aside arbitral award are exhaustively stated in [the FAA]. Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation.”<sup>106</sup>

*Bavarti* did not completely eliminate manifest disregard of the law from Seventh Circuit jurisprudence, however. The court of appeals eventually recognized it as a possible method for setting aside an award, but narrowed its definition to include only one type of misconduct. According to the Seventh Circuit Court of Appeals, an

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<sup>103</sup> Stolt-Nielsen, 548 F.3d at 94.

<sup>104</sup> Stolt-Nielsen, 548 F.3d at 94.

<sup>105</sup> See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

<sup>106</sup> *Baravati*, 28 F.3d at 706. Judge Poser delivered the court of appeals’s opinion in this case. Twelve years later, he also delivered the opinion in *Wise*, which stated that section 10 of the FAA is a mechanism for enforcing arbitration agreements, not reviewing arbitral awards. Judge Posner hinted at this belief already in *Bavarti* when he wrote, “Judicial review of arbitration awards is tightly limited; perhaps it ought not be called ‘review’ at all.” 28 F.3d at 706.

arbitrator manifestly disregards the law if she “direct[s] the parties to violate the law.”<sup>107</sup> The court did not clearly state the legal theory underlying this definition when it first adopted it,<sup>108</sup> but in a later ruling the court made clear that the definition “fits comfortably under the first clause of the [section 10(a)(4) of the FAA]—‘where the arbitrators exceeded their powers.’”<sup>109</sup> The court went on support its finding using the enforcement mechanism rationale quoted above.<sup>110</sup>

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<sup>107</sup> *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001).

<sup>108</sup> The court seemed to blend the concept of manifest disregard of the law with a violation of public policy. *George Watts & Son*, 248 F.3d at 580. In support of its conception of manifest disregard, the court referred to the U.S. Supreme Court case, *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000). The court explained that

Eastern Associated Coal may at last clear up the confusion [over the manifest disregard of the law standard], having dealt with a related line of cases in which courts wrestled with the question whether violation of ‘public policy’ (a form of disregard of legal constraints) justifies setting aside an award. The Court concluded that the judiciary may step in when the arbitrator has commanded the parties to violate legal norms (principally, but not exclusively, those in positive law) but that judges may not deprive arbitrators of authority to reach compromise outcomes that legal norms leave within the discretion of the parties to the arbitration agreement. *George Watts & Son*, 248 F.3d at 580.

It is not entirely clear that the court meant to equate manifest disregard with a violation of public policy. It may have just been comparing two separate “form[s] of disregard of legal constraints.” *Id.* Regardless of the dicta’s true meaning, this research does not focus on the connection between manifest disregard and public policy. See *supra* note 91.

<sup>109</sup> *Wise v. Wachovia Securities, Inc.*, 450 F.3d 265, 268 (7th Cir. 2006).

<sup>110</sup> See *supra* note 101 and accompanying text.

To the extent that the Seventh Circuit felt compelled to recognize the manifest disregard standard, it did so as narrowly as possible. The Second Circuit, on the other hand, seemed eager to protect a ground for set aside that its courts had relied on for decades. Despite the contrasting acceptance of the manifest disregard standard, both courts of appeals relied on the same rationale: manifest disregard of the law is one component of an exclusive statutory scheme. The purpose of that scheme is to ensure that arbitrators are providing parties with the arbitration to which they had agreed.

The two courts came to the same conclusion from two different angles and, perhaps accordingly, have gone on to apply the standard differently. This raises the question of whether the mechanism approach to manifest disregard—and by extension, access of powers—is theoretically consistent.

## 2.2. Going beyond the submission to arbitration

Parties empower arbitrators by submitting their dispute to arbitration. It is axiomatic that an arbitrator has the power to decide issues that the parties submit to her during the course of the arbitration, but does not have the power to decide issues that the parties do not submit to her. Likewise, she has the power to fashion remedies requested by parties based upon those submitted issues. If she decides an issue that was not submitted or awards a remedy

that was not requested, she has exceeded her powers under section 10(a)(4) of the FAA.

The concept of “submission to arbitration” and how it confers powers to the arbitrator (or restricts her powers) becomes complicated in practice. Understanding the concept and its different effects on arbitral power is important, because the concept of submission to arbitration is a feature of excess of mandate in both the SAA and the Model Law.<sup>111</sup> Thus, it presents the most potential for drawing useful comparisons between the different legal systems.

US courts adopt the rule that an arbitrator’s authority is determined first by the parties’ arbitration agreement, but also by what they choose to submit to arbitration during the course of the proceedings. This rule means that the concept of “submitting” an issue to arbitration has two meanings. The first meaning concerns the scope of the arbitration agreement. Some cases involve scenarios in which a party seeks to have the award set aside the

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<sup>111</sup> The Swedish Arbitration Act allows for set aside of the award when an arbitrator has exceeded her “uppdrag,” which is best translated as mandate or assignment. Like the FAA, the SAA does not explicitly refer to decisions taken outside of the parties’ submissions. But, also like the FAA, going beyond the submissions to arbitration is a way in which an arbitrator can exceed her mandate under the SAA. The Swedish approach is discussed in more detail in Chapter 3. Unlike the FAA and SAA, the Model Law allows for set aside of an award when “the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

arbitrator decided an issue that was not within the scope of the parties' arbitration agreement. The second meaning refers to the issues that the parties submit during the course of the arbitration. These are the principle claims, the factual and legal bases for those claims, and the requested relief. They can be found in the initial request for arbitration, the parties' written and oral arguments, and the terms of reference, if any are agreed. If the arbitrator decides an issue that a party did not raise or awards a remedy that a party did not request, then she has exceeded her powers by awarding on an issue not submitted to arbitration.

The two meanings of submission can best be understood within the context of the arbitrator's jurisdiction. The first meaning concerns the question of whether an issue falls within the scope of the arbitration agreement—or, put another way, whether the issue falls within the scope of the arbitrator's jurisdiction. The second meaning covers the scenario where an arbitrator decides an issue that falls within her jurisdiction, but the parties did not put it before her. While generally separate from one another, the two meanings overlap in situations where the parties' submissions to the arbitrator expand the scope of the arbitration agreement.

2.2.1. Deciding issues outside the scope of the arbitration agreement

In *Saipem America v. Wellington Underwriting Agencies Limited*, the Fifth Circuit Court of Appeals was presented with a question of whether an arbitral tribunal decided claims that had not been submitted to it.<sup>112</sup> A company named Samedan Mediterranean Sea hired Heerema Marine Contractors Nederland B.V. to move an offshore oil platform from Texas and install it in Israel.<sup>113</sup> Heerema agreed to obtain insurance from several underwriters as part of the deal.<sup>114</sup> Samedan and Heerema also entered into subcontracts with another party, Saipem America.<sup>115</sup> Saipem America agreed to serve as Samedan's Certified Verification Agent and serve as a marine warranty surveyor under the contracts with Samedan and Heerema, respectively.<sup>116</sup>

The platform was severely damaged during transport.<sup>117</sup> Samedan and the underwriters requested arbitration against Saipem pursuant to an arbitration agreement found in the Heerema subcontract.<sup>118</sup> The arbitral tribunal found that Samedan and the

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<sup>112</sup> 335 Fed.Appx. 377 (5th Cir. 2009).

<sup>113</sup> 335 Fed.Appx. 377, 378 (5th Cir. 2009).

<sup>114</sup> 335 Fed.Appx. 377, 378 (5th Cir. 2009).

<sup>115</sup> 335 Fed.Appx. 377, 379 (5th Cir. 2009).

<sup>116</sup> 335 Fed.Appx. 377, 379 (5th Cir. 2009).

<sup>117</sup> 335 Fed.Appx. 377, 378 (5th Cir. 2009).

<sup>118</sup> 335 Fed.Appx. 377, 379 (5th Cir. 2009). This case presents a complicated multi-party and multi-contract scenario which is further complicated by the fact

underwriters had no direct contractual relationship with Saipem, but they could make a non-contractual claim of negligent misrepresentation.<sup>119</sup> The tribunal found in favor of Samedan and the underwriters on that claim and awarded actual damages and attorney’s fees and expenses.<sup>120</sup>

Saipem sought to have the award set aside on the grounds that the negligence claim did not relate to the underlying contract. The court rejected this argument. It found that, in addition to the underlying contract, the parties’ submissions should also be examined to determine whether the parties agreed to submit the issue to arbitration. In the case before the court, the parties submitted an agreed Terms of Reference, which included a summary of the parties’ positions that included the claimants’ request for a finding of negligent misrepresentation.<sup>121</sup> The Terms of Reference also included broad language that stated:

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that Samedan and the underwriters initiated arbitration against Saipem pursuant to an arbitration agreement found in a contract between Heerema, despite the fact that Heerema did not bring a claim against Saipem. *Id.* at 379. The facts could potentially raise an issue of binding non-signatories to arbitration, but, for reasons that are not clear from the facts of the case, it was Saipem that “compelled” Samedan and the underwriters to request arbitration. *Id.* at 379, note 1. Saipem participated in the arbitration and did not raise the jurisdictional issue during set aside proceedings. *Id.* at 379–82.

<sup>119</sup> 335 Fed.Appx. 377, 379 (5th Cir. 2009).

<sup>120</sup> 335 Fed.Appx. 377, 379 (5th Cir. 2009).

<sup>121</sup> 335 Fed.Appx. 377, 381 (5th Cir. 2009).

The Arbitral Tribunal is to resolve, by a preponderance of the evidence all issues of fact and law that shall arise from the claims and pleadings as duly submitted by the parties, including, but not limited to, the following issues as well as any additional issues of fact or law which the Arbitral Tribunal, in its own discretion, may deem necessary to decide upon for the purpose of rendering any Arbitral Award.<sup>122</sup>

During the course of the arbitration, the claimants argued the negligence claim before the tribunal and Saipem responded first by arguing that the claim was barred, but, alternatively, that it had not acted negligently.<sup>123</sup> The court considered these facts and found that, “In light of the parties’ submissions and grant of broad authority to the tribunal, we cannot find that the tribunal exceeded its authority.”<sup>124</sup>

One reading of *Saipem America* is that the agreed to Terms of Reference supplemented the scope of the arbitration agreement. Saipem argued, at least implicitly, that any claims made by Samedan and the underwriters must, using the language of the court, be

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<sup>122</sup> 335 Fed.Appx. 377, 381 (5th Cir. 2009).

<sup>123</sup> 335 Fed.Appx. 377, 381 (5th Cir. 2009)

<sup>124</sup> 335 Fed.Appx. 377, 381 (5th Cir. 2009)

“rationally inferable from the contract.” The court did not directly address whether the negligence claim was connected to the contract in some manner. Instead, it looked solely on what issues the parties had agreed to submit. Moreover, the court’s reliance on the broad grant of authority in the Terms of Reference further supports the view the parties supplemented the tribunal’s jurisdiction through their submission of the terms of reference.

#### 2.2.2. Deciding issues not submitted by the parties during the course of the arbitration

The second meaning of submission to arbitration involves the issues that the parties put in front of the arbitrators. Even though an issue may fall within the scope of the arbitration agreement, an arbitrator cannot decide it unless the parties request that the arbitrator decide it. Under US law, an arbitrator’s authority to decide which issues that parties have put before her is extensive.

Parties can put issues to an arbitrator through a number of means. An issue can be presented in the request for arbitration, the subsequent written and oral submissions, and any potential terms of references.

*Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.* serves as a clear example of an arbitral tribunal deciding matters beyond what has been submitted to them. North American agreed

to charter a vessel that it owned to Totem Marine. Totem Marine planned to use the vessel to tow a barge from Houston, Texas to Anchorage, Alaska. Totem terminated the agreement, alleging that the vessel needed “excessive repairs” and its poor condition had caused delays. North American requested arbitration.

Following the request for arbitration, Totem Marine requested that North American detail its claim. North American did so in a letter. North American’s total claim was just over \$87,000, with its largest request being a claim reimbursement for the cost of having the vessel returned, which totaled \$45,000.

North American did not seek damages for amounts owed under the charter agreement (the “charter hire”). In fact, North American conceded during the course of the arbitration that the charter hire was not an issue in the arbitration. Yet, the arbitral tribunal found that North American’s failure to request for the charter hire was “erroneous” and awarded North American “the balance of the charter hire due under the charter less the earnings of the vessel during that period.” The tribunal awarded that amount (\$117,440) instead of the \$45,000 requested for return of the vessel. Thus, the total award was nearly \$158,000—\$71,000 more than North American requested.

The court set the award aside. The court started with the rule that, “Although arbitrators enjoy a broad grant of authority to fashion

remedies, arbitrators are restricted to those issues submitted.” The facts of the case were clear: not only did North American not request for the charter hire, it specifically stated that the charter hire was not an issue before the tribunal.

Parties may also jointly stipulate the issues that are being submitted to an arbitrator for decision. One can identify cases where the parties agreed on a limited question or set of questions that the arbitrator should answer and submitted those questions to her for resolution. One such case is *Mobil Oil Corporation v. Independent Oil Workers Union*.<sup>125</sup> In that case, Mobil and a local union had entered into a collective bargaining agreement that allowed Mobil to terminate members of the union “for cause.” Mobil terminated one of the union’s members, Dominic Licciardello, and the union filed a grievance, claiming that the termination violated the collective bargaining agreement.

The dispute went to arbitration. At the hearing, the parties agreed that the question before the arbitrator was, “Did the Company have cause on December 3, 1979 to discharge Dominic Licciardello?”<sup>126</sup> The arbitrator found that the employee engaged in misconduct that would normally justify a firing “for cause,” but that the employee suffered from a “severe mental disorder.”<sup>127</sup> The arbitrator found

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<sup>125</sup> 679 F2d 299 (3d Cir. 1982).

<sup>126</sup> 679 F2d 299, 301 (3d Cir. 1982).

<sup>127</sup> 679 F2d 299, 301 (3d Cir. 1982).

that Mobil did not have cause to fire the employee, and ordered him conditionally reinstated with back pay.<sup>128</sup>

Mobil requested that the award be set aside on the grounds that the arbitrator's ruling that Mobil reinstate the employee went beyond the question that the parties had presented to him at the hearing. The Third Circuit Court of Appeals ruled on the case.

The court started its analysis by identifying an important issue regarding the arbitrator's understanding of the issues presented to him. The court stated that, "The scope of an arbitrator's authority is limited to the issue that the parties submit to him to decide."<sup>129</sup> However, that rule, according to the court, "does not indicate the standard by which federal courts should review the arbitrator's determination of his authority as defined by the submitted issue."<sup>130</sup> The court went on to explain that interpretations regarding what the parties submitted should be given the same deference as interpretations of the contract in general. The court then relied on that deferential standard to uphold the arbitrator's interpretation of the question presented to him.

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<sup>128</sup> 679 F2d 299, 301 (3d Cir. 1982).

<sup>129</sup> 679 F2d 299, 302 (3d Cir. 1982).

<sup>130</sup> 679 F2d 299, 302 (3d Cir. 1982).

2.2.3. The section 11(b) problem: partial set aside when the award goes beyond the submission

Thus far, this chapter has discussed the concept excess of mandate as found in 10(a)(4) of the FAA, which allows for set aside when arbitrators have “exceeded their powers.” The reason for this is simple. The grounds in section 10 are supposedly the exclusive grounds for setting aside an award under the FAA.<sup>131</sup> Thus, section 10 should be the focus of the research.

The statement that the exclusive grounds for set aside are found in section 10 of the FAA is generally true, but subject to a potential caveat. Section 11 of the FAA, which concerns the modification or correction of awards, can be read as providing grounds for partial set aside of an award when an arbitrator has decided an issue not submitted to arbitration.

Section 11 reads, in part:

[T]he United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration . . . (b) Where the arbitrators have awarded upon a matter not submitted

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<sup>131</sup> Hall Street

to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

Parties often rely on section 10(a)(4) when seeking to set aside an award on the grounds that the arbitrator decided a matter not submitted to her. They do so even though that section does not explicitly contemplate such a claim. As discussed above, however, this practice is accepted by courts and logically consistent with the concept of excess of powers. Moreover, the Restatement embraces this understanding of section 10(a)(4).

Still, one cannot ignore the fact that section 11 concerning correction and modification of an award explicitly addresses the scenario in which an arbitrator goes beyond the submission to arbitration. This raises the question of how to implicitly read going beyond the submission into section 10 without making the explicit language in section 11 redundant.

One could argue that the answer is as simple as the fact that section 10 deals with set aside and section 11 deals with “modifying or correcting” the award. That argument may hinge on a mere semantics, however. A party requesting that the award be “modified” to exclude the portion that goes beyond the submission is, in fact, requesting that the award be partially set aside.

In practice, courts have not drawn such a distinction. Instead, courts have entertained requests for partial set aside on the basis that the arbitrator went beyond the submission to arbitration under both section 10(a)(4) and section 11(b).<sup>132</sup>

The lack of court recognition of the potential interplay between the two sections is problematic, because allowing partial set aside under section 10 may render section 11 meaningless. According to the case law, section 10(a)(4) implicitly encompasses situations in which an arbitrator goes beyond the submission to arbitration and allows for partial set aside in that situation. But section 11(b) expressly, and exclusively, addresses the situation in which an arbitrator goes beyond the submission to arbitration. While section 11(b) allows for “modifying and correcting” an award, doing so has the same effect as partial set aside.

Multiple types of arbitral behavior may constitute excess of powers under section 10(a)(4), including going beyond the submission. But section 11(b) only contemplates going beyond the submission. If party can achieve the same result of partial set aside under section 10(a)(4) as it can under section 11(b), then section 11(b) serves no purpose.

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<sup>132</sup> See, e.g., *Executone Information Systems, Inc. v. Davis*, 26 F3d 1314 (5th Cir. 1994).

One could argue that going beyond the submission should not be considered an excess of powers under section 10(a)(4), because section 11(b) is the only portion of the statute to expressly address those circumstances. The problem with such a reading, however, is that section 11(b) does not contemplate complete set aside. Therefore, complete set aside would not be an option in situations where the arbitration has gone beyond the submission.

A more satisfying reading of sections 10 and 11 is that section 11 allows for partial set aside of an award when the offending portion of the award can be separated with the non-offending portion. This is consistent with the accepted international approach. The Model Law explicitly allows for partial set aside “if the decisions on matters submitted to arbitration can be separated from those not so submitted.”<sup>133</sup>

If this reading is correct, two things are worth noting. First, the reverse implication is that section 10 does not allow for partial set aside. If a party seeks to have an award partially set aside on the ground that the arbitrator went beyond the submission to arbitration, then that party must request modification of the award under section 11.

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<sup>133</sup> Model Law, article 34(2)(a)(iii).

Consider the following scenario. A-Co is a majority shareholder in Sub, Inc., which is a closely held corporation. Sub, Inc. manufactures heavy machinery using its own equipment and manufacturing facilities. One day A-Co exercises its majority voting rights and directs Sub, Inc. to sell its equipment and facilities to A-Co. A-Co will then lease those assets back to Sub, Inc. for a monthly fee. Over time, Sub, Inc. falls behind on its lease payments and A-Co terminates the lease agreement; thus, leaving Sub, Inc. without the equipment and facilities needed to continue its manufacturing activities.

The relationship between A-Co and the minority shareholders is governed by a shareholder agreement that contains an arbitration agreement. The minority shareholders initiate arbitration and demand damages for various breaches of the shareholder agreement. The party's submissions in the arbitration—written and at the final hearing—address the question of whether A-Co breached the shareholder agreement.

The arbitrator ultimately renders a final award in the minority shareholder's favor. She awards the minority shareholders \$1 million in damages for breach of contract. But she also awards another \$1 million on the grounds that A-Co breached its fiduciary duty to the minority shareholders. This is a statutory remedy found in the applicable law, but the minority shareholders did not request

it and, consequently, A-Co did not defend against it. A-Co files a motion with the relevant US court to have the award modified under section 11(b) of the FAA to remove the portion of the award concerning breach of fiduciary duty.

The findings of breach of contract and breach of fiduciary duty would appear to be easily separable from one another. While based on the same fact pattern, they are two distinct causes of action—one based in contract and one based in statute. The court could seemingly grant A-Co’s motion for modification easily, precisely because the finding of breach of contract is unaffected by the finding of breach of fiduciary duty.

Therein lies the problem with the phrasing of the second clause in section 11(b). The section allows a court to modify an award “unless it is a matter not affecting the merits of the decision upon the matter submitted.” The matter submitted in this scenario is a claim for breach of contract. The finding of a breach of fiduciary duty does not affect the merits of the breach of contract claim. Does that mean that the court is not allowed to modify the award? If the answer to that question is “yes,” then A-Co’s only recourse would be to argue that the arbitrator exceeded her authority under section 10(a)(4) by awarding on an issue not submitted to her.

The problem with forcing A-Co to invoke section 10(a)(4), however, is that it may lead to the entire award being set aside. As discussed,

one reading of sections 10 and 11 is that section 11 allows for partial set aside and, consequently, section 10 only allows for complete set aside. If that is true and section 11 is unavailable under this hypothetical scenario, then the court would find itself in the undesirable position of having to set aside the entire award even though only a portion of it was flawed.

This section does not offer a definitive answer to this issue. The underlying research is seeking to find a coherent understanding of the circumstances under which an arbitrator may exceed her mandate or, using the FAA's terminology, powers. What results when a court finds an excess of mandate is a secondary issue. It is worth mentioning, but only briefly.

### 2.3. The blurred boundary between scope of the arbitration agreement and the parties' submissions during the course of the arbitration

The two sections above present uncomplicated examples of cases where

The principle rule is that an arbitrator's powers are determined by the parties' arbitration agreement as well as the issues that the parties submit during the arbitration. But what if those sources are ambiguous regarding the submission to arbitration? The answer to that question differs based on whether the question concerns the

scope of the arbitration agreement or the parties' submissions during the arbitral proceedings.

The Sixth Circuit Court of Appeals considered this question in *Solvay Pharmaceuticals, Inc. v. Duramed Pharmaceuticals, Inc.*<sup>134</sup> Through a series of agreements, Solvay agreed to market a drug named Cenestin, which had been developed by Duramed, and Duramed agreed to market two of Solvay's drugs as well as help Solvay with the development of a third drug.<sup>135</sup> Instead of cash, the parties agreed that Solvay's services would serve as consideration for Duramed's services. One of the agreements, the Cenestin Co-Promotion Agreement ("CPA"), contained an arbitration agreement that covered "any dispute, controversy, or claim arising out of or related to the agreement." The CPA also stated, "Termination by one party shall be the exclusive remedy for a default by the other party under this AGREEMENT [the CPA] and, except as expressly provided herein, neither party shall have any liability for damages to or lost profits of the other, direct or consequential."

Duramed eventually found itself financially distressed. The parties agreed that Solvay would, among other things, increase its investment in marketing Cenestin. The parties further agreed that Solvay would receive 80% of the drug's gross profits until it had

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<sup>134</sup> *Solvay Pharmaceuticals, Inc. v. Duramed Pharmaceuticals, Inc.*, 442 F.3d 471 (6th Cir. 2006)

<sup>135</sup> *Solvay*, 442 F.3d 471.

recovered its marketing investment. Following that, Duramed would receive 80% of the profits until it recovered what it had invested in the drug. Once both parties had recovered their investments, they would split the profits evenly. The parties memorialized this profit sharing arrangement in a letter. The letter did not contain an arbitration agreement. Nor did it contain language like in the CPA that addressed termination as a remedy or limitations on damages.

Cenestin did not generate much profit. After a third party acquired Duramed, it notified Solvay that it was terminating the parties' agreements, including the CPA "as amended by the letter agreement." Solvay initiated arbitration, claiming for the over \$50 million in marketing costs that it had yet to recover under the parties' profit sharing arrangement.

In the arbitration Duramed argued that the CPA's prohibition on any remedy other than termination also applied to the profit sharing arrangement, because the letter memorializing that arrangement was actually an amendment to the CPA. Solvay countered that the letter constituted a separate agreement that the terms of the CPA did not cover. If, however, the letter did amend the CPA, it eliminated the termination/remedies provisions of the CPA. Finally, the termination/remedies provision of the CPA would be nonsensical if it completely barred damages. In the event of a breach

of contract because of a wrongful termination, termination would not be an adequate remedy.

The tribunal found in favor of Solvay and awarded it \$68 million in damages. It found that it had jurisdiction because the parties intended the arbitration agreement to extend to the disputed letter. It also found that damages were permissible because the parties had not intended the termination/remedies provision to also extend to the letter.

Duramed sought to have the award set aside on the grounds that the tribunal exceeded its powers. Duramed framed its case as one of the arbitrators' jurisdiction under the scope of the arbitration agreement. Duramed contended that the termination/remedies clause in the CPA excluded issues related to damages from any potential arbitration. Solvay contended that the provision was not meant to be a limitation on the scope of the arbitration agreement. Instead, it was one of many parts of the parties' agreements that the parties had tasked the tribunal with interpreting.

The way in which the parties framed the termination/remedies clause issue is important. Under Duramed's theory, the reviewing court should review the tribunal's decision *de novo*, because they relate to the arbitrator's jurisdiction. Under Solvay's theory, the reviewing court should give the same deference to the tribunal's interpretation of the parties' intent as it would any other

interpretation. In other words, the award should stand so long as the tribunal actually engaged in the basic task of contract interpretation.

The court recognized this distinction. If it was a matter of interpretation properly before the tribunal, then the tribunal's interpretation deserved "great deference." But if "a party to an arbitration proceeding challenges the arbitrator's authority to decide a particular issue, the function of a reviewing court is distinctly different. The threshold question of arbitrability is one of law, and a reviewing court is obligated to make its own determination of the issue."<sup>136</sup>

The court resolved the issue by examining the question of whether the parties had intended termination clause to limit the scope of the arbitration agreement. The court found that they had not. It came to this finding by, among other things, comparing the wording of the termination/remedies clause with the wording of the arbitration agreement. It found that the arbitration agreement's wording was broader than the termination/remedies clause. The arbitration agreement covered "*any* dispute, controversy, or claim arising out of or relating to the agreement."<sup>137</sup> Conversely, the

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<sup>136</sup> *Id.* at 477 (citing *Davis v. Chevy Chase Fin., Ltd.*, 667 F.2d 160, 167 (D.C.Cir.1981)).

<sup>137</sup> *Id.* at 481 (alterations omitted) (emphasis added by the court)

termination/remedies clause only covered “*this* AGREEMENT.”<sup>138</sup> In the court’s view, the difference in the clauses’ breadth meant that the parties had contemplated the arbitration agreement extending to future agreements, but not the termination/remedies provision.

*Solvay* is informative to this research for a number of reasons. One reason is that it demonstrates the potential overlap between the two types of excess of powers examined in this chapter: failing to perform basic arbitral tasks and going beyond the submission. The issue in *Solvay* is whether the arbitral tribunal went beyond the submission to arbitration. Resolving that issue, however, turned on whether the tribunal had performed the basic tasks assigned to arbitrators. The award stood because the court determined that the effect of the termination/remedies clause was a matter of interpretation properly before the tribunal and the tribunal did its job by interpreting the clause.

Another reason that it is informative is that it demonstrates that limitations on an arbitrator’s power to grant remedies does not fall within the scope of the arbitration agreement. Had the court in *Solvay* found differently than it did, it would be because it had determined that the parties intended any *claims* for damages be excluded from arbitration—not that the tribunal’s power to award damages was excluded from arbitration. This is a good example of

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<sup>138</sup> *Id.* (emphasis added by the court)

the distinction between *whether* an arbitrator can decide something and *what* the arbitrator is permitted to do once it has decided something.

### 3. THE RESTATEMENT

The American Law Institute has issued a Restatement (Third) U.S. Law of International Commercial Arbitration, which seeks to help in the interpretation of section 10(a)(4) of the FAA. Section 4.20 on excess of powers highlights the potential for section 10(a)(4) of the FAA to encompass a broad range of arbitral misconduct.

The Restatement states that:

An arbitral tribunal exceeds its powers in making an award if:

(1) the arbitration agreement does not exist or is invalid . . .;

(2) the arbitral award decides a matter beyond the terms of the submission to arbitration . . .;

(3) the arbitral procedure is contrary in a material respect to the agreement of the parties . . .;

(4) the arbitral award decides a matter not capable of arbitral adjudication . . . ; or

(5) recognizing or enforcing the arbitral award would be repugnant to public policy .

...

The text defines excess of powers in a way that tracks closely with the text of article 34(2)(a) and (b) of the Model Law. This may, at first glance, suggest that the drafters sought to bring the FAA more in line with the international standards embodied in the Model Law. Perhaps, more accurately, it represents an attempt to reconcile the FAA with the New York Convention. Regardless, the FAA predates both the New York Convention and the Model Law by thirty-two years and fifty-nine years, respectively.

The Restatement's approach, however, does raise two issues that touch upon this research project.

First, the Restatement's text highlights the many different types of scenarios in which an arbitrator can exceed her powers under section 10(a)(4). This chapter does not address every one of those scenarios. For example, US courts have found that arbitrators exceed their powers when rendering an award based on an invalid or nonexistent arbitration agreement. An arbitral tribunal can exceed its authority if it issues an award even though it was

constituted in a way different from what the parties had agreed. This scenario, and other procedural errors, are presumably what is meant by “the arbitral procedure is contrary in a material respect to the agreement of the parties.” And an arbitral tribunal can exceed its authority if it decides an issue that is non-arbitral or if it renders an award that’s enforcement would be contrary to public policy.

While all of the above types of misconduct can fall within the concept of excess of power, they are not forms of conduct within the scope of this research project. As described at the introduction of this chapter, this research addresses excesses of arbitral power that also constitute excesses of mandate.

Second, and more importantly, the Restatement does not address the situation in which an arbitrator fails to perform the basic tasks of enforcing the agreement and applying the law. This means, perhaps, that the drafters did not view it as a legitimate ground for setting aside an arbitral award. It is not entirely clear why they may have taken this position, but it is probably related to the Restatement’s position regarding manifest disregard of the law.

The commentary to the Restatement states that manifest disregard is not a valid ground for setting aside an arbitral award. One reason for this, among others, is that it is difficult to logically connect a failure to apply the law with an *excess* of power. As the commentary states, in order to find that an arbitrator exceeds her power when

she renders an award in manifest disregard of the law “one needs to find a source for the proposition that arbitrators lack power to decide cases in manifest disregard of the law. No such limit is expressed in the FAA.”<sup>139</sup>

The same logic can arguably be extended to the other circumstances in which an arbitrator fails to perform the tasks inherent in the arbitral assignment. The FAA does not expressly state that arbitrators lack the power to render awards that do not draw their essence from the arbitration agreement or render awards that are completely irrational.

This project addresses the Restatement primarily, because it helpful and instructive in highlighting the broad range of conduct that could be considered excess of powers under section 10(a)(4). This, in turn, helps to draw focus to the narrow class of misconduct that this research will engage with: failure of the arbitrator to before basic tasks and exercising powers that the parties did not grant or clearly prohibited. The Restatement is also addressed because it is noteworthy that its drafters have excluded failure to perform basic arbitral tasks as an excess of power, even though a strong argument can be made that it should be included.

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<sup>139</sup> Restatement, § 4.20(g)(ii).

#### 4. CONCLUSION

This chapter defines excess of mandate as falling within the context of excess of powers under section 10(a)(4). While the courts have found that the definition of excess of powers can cover many different forms of arbitral misconduct, this chapter has identified two circumstances that are useful for drawing comparisons between the United States and Sweden. First, where an arbitrator fails to perform the basic tasks inherent in the arbitral assignment. And, second, when an arbitrator goes beyond the submission to arbitration.

The basic tasks of an arbitrator, according to US courts, are to interpret and enforce the contract. This means that a court will not set aside an award as long as the award draws its essence from the contract. An erroneous—even severely erroneous—interpretation do not justify set aside as long as the arbitrator was actually engaged in contract interpretation. Likewise, a court will not set aside an award due to erroneous interpretations of the governing law, so long as the arbitrator was attempting to apply the governing law as part of her tasks of enforcing and interpreting the contract. Conversely, if the arbitrators ignores the terms of the contract and the law and fashions her own form of relief, the award can be set aside under section 10(a)(4).

An arbitrator can also exceed her powers by going beyond the submission to arbitration. Submission to arbitration is defined by the scope of the arbitration agreement and the issues that the parties present during the course of the arbitration. While generally separate, the two definitions interact when the parties effectively expand the scope of the arbitration agreement through what they submit during the course of the arbitration.

Claims that an arbitrator went beyond the submission to arbitration often involve questions of the arbitrator's interpretation—either how she interpreted the scope of the arbitration agreement or how she interpreted the claims, facts, legal bases, and requested remedies presented during the course of the arbitration.

Courts review claims that an issue is outside the submission to arbitration because it is outside the scope of the arbitration agreement *de novo*. Courts, however, treat claims that an issue that falls within the scope of the arbitration agreement was not presented to the arbitrator differently. It is in this area where the two types of misconduct discussed in this chapter intertwine.

Courts treat claims that an arbitrator impermissibly interpreted the parties' submissions to include a claim or a certain request for relief the same way that they treat claims that the arbitrator misinterpreted the underlying contract or the law. They afford the arbitrator's interpretations great deference, so long as it is apparent

that the arbitrator was arguably engaged in the assigned task of interpretation when determining the meaning of the parties' submissions.

There exists a difficulty when equating a failure to perform tasks as an excess of powers. In the view of the Supreme Court, rendering an award based a sense of fairness and not on the contract or law because doing so falls "outside the scope of [the arbitrator's] contractually delegated authority." This view, however, presupposes an implied agreement between the parties that the arbitrator is prohibited from rendering an award that is not based on the contract or the law. In this way failing to perform basic tasks is distinguishable from going beyond the submission to arbitration, because going beyond the submission most often consists of exceeding expressly agreed powers.

## CHAPTER 3: EXCESS OF MANDATE IN SWEDEN

### 1. INTRODUCTION

This chapter discusses the concept of the excess mandate under Swedish law.<sup>140</sup> In it I propose that excess of mandate in Swedish law can be divided into two broader categories. The first category involves situations in which the arbitrator rendered an award in excess of a mandate defined by party agreement. This includes awards that decide issues outside the scope of the arbitration agreement and awards that are rendered contrary to the parties' joint instructions. The second category concerns situations in which an arbitrator exceeded the mandate as defined by the parties individually. This includes awards that grant more relief than requested or are decided on circumstances that have not been invoked by the parties.

This chapter draws its analysis from three sources of Swedish law. Section 2 looks at the Swedish Arbitration Act ("SAA"), including the preparatory works. Section 3 of this chapter looks at the concept of

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<sup>140</sup> As discussed in the Methodology section in Chapter 1, I adopt the comparative approach in which the researcher first develops a "report" of the law as it exists in the jurisdiction. Consequently, my goal in this Chapter is describe the law as it exists. I do engage in some critical analysis to the extent necessary, but the majority of criticism is saved for Chapter 4, in which I compare the US and Swedish approaches.

excess of mandate as it is currently treated in Swedish legal literature. Section 4 then looks at selected Swedish court cases as examples of how the concept is applied in practice. Finally, Section 5 analyzes these sources and develops the proposed bifurcated approach in more detail.

## 2. SECTION 34 OF THE SAA

### 2.1 The text of Section 34

The grounds for set aside are found in Section 34.<sup>141</sup> The section is divided into three main paragraphs, but this research focuses on the first paragraph, which reads:

An award . . . shall, following an application,  
be wholly or partially set aside upon motion  
of a party:

1. if it is not covered by a valid arbitration agreement between the parties;

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<sup>141</sup> The SAA is not an adoption of the Model Law, but is partially inspired by it, or at least tracks the Model Law closely in some instances. For example, the grounds in Section 34 are similar to the grounds in Article 34(2)(a) of the Model Law. Section 34 of the SAA, however, does not address arbitrability or public policy. Those provisions are found in Section 33 of the SAA, which covers the awards “invalidity.” An award is invalid if it decides a non-arbitral issue, is contrary to Swedish public policy, or does not meet the form requirements set out in the SAA.

2. if the arbitrators have made the award after the expiration of the period decided on by the parties;
3. if the arbitrators have exceeded their mandate in a manner which probably influenced the outcome of the case;
4. if arbitral proceedings . . . should not have taken place in Sweden;
5. if an arbitrator has been appointed contrary to the agreement between the parties or this Act;
6. if an arbitrator was unauthorized due to any circumstance set forth in [the SAA]; or
7. if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.

The excess of mandate provision that will be the primary focus of this chapter is found in subsection 3. That provision will be the

primary focus of this chapter, but as will be seen, other subsections are relevant to understanding the concept of excess of mandate. For example, it is not always clear in the literature, or court cases, whether a certain situation should fall under subsection 3 (excess of mandate) or subsection 7 (procedural error).<sup>142</sup> And at least one Swedish court had difficulty distinguishing between the lack of a valid arbitration agreement (subsection 1) and excess of mandate.<sup>143</sup> These potential overlaps are discussed more below.

The text of the SAA simply states that an award shall be set aside if the arbitrator exceeds her mandate. It does not enumerate the types of situations that would qualify as excess of mandate. The act's preparatory works, however, provide further guidance on that issue.

## 2.2 The preparatory works

The following section discusses how the legislative preparatory works for Section 34 of the SAA discuss the concept of excess of mandate. Namely, the preparatory works reference the possible application of the Swedish Code of Judicial Procedure. The

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<sup>142</sup> See, e.g., *infra* Section 3.1.

<sup>143</sup> See *infra* Section 4.7.

preparatory works, however, do not make clear how this code should be applied, or when.

### 2.2.1 The role of the preparatory works in Swedish law

Before I address how the SAA's preparatory works affect Section 34 of the SAA, it is important to first identify general the role that the preparatory works play in Swedish law. The outside observer of Swedish law—especially someone trained in the common law system—may equate the works with legislative history. This is accurate, but does not capture the special legal authority that the preparatory works carry. While one can argue about the extent to which the works should be reviewed when considering a piece of legislation, few would argue that they should not be examined at all.

The preparatory works present the Council on Legislation's viewpoints concerning the meaning of the text of the SAA. The Council's views were prepared during the process of drafting the SAA and presented together with the law's text to Parliament. In particular, the preparatory works were meant to be a guide to arbitrators, judges, and others affected by the law.<sup>144</sup> The Council noted that it attempted to confine its comments to issues that were not open to question, although some statements could be

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<sup>144</sup> Gov't Bill 1998/99:35, p. 309–310.

questioned in rare circumstances.<sup>145</sup> Other issues should be resolved through the courts, according the Council.<sup>146</sup>

One could argue that, given the above statements, any views expressed in the preparatory works are almost always definitive. If the Council did not have a definitive view on how to interpret a provision of the SAA, it remained silent and left it to future courts to resolve the question. This view implies that the preparatory works should be viewed as “legislative text-lite.”

Others are less convinced that the works should be treated so reverently.<sup>147</sup> Lars Heuman, for example, argues that, while the Council’s statements “should carry considerable weight in the many cases where they have been cogently thought out,” they “lose much of their guiding power in the exceptional cases where they can be called into question.”<sup>148</sup> Even in his view, however, the preparatory works cannot be ignored. He argues that they be subject to “critical,

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<sup>145</sup> Gov’t Bill 1998/99:35, p. 310.

<sup>146</sup> Gov’t Bill 1998/99:35, p. 310.

<sup>147</sup> See, e.g., Patricia Shaughnessy, *The Right of the Parties to Determine the Place of an International Commercial Arbitration*, in INTERNATIONAL ARBITRATION COURT DECISIONS 1335, 1341 (Stephen Bond & Frederic Bachand eds., 2011) (highlighting the importance of interpreting the preparatory works “in light of international practice and with consideration of the impact of strictly applying a comment [in the works] that conflicts with the plain language of the statutory provision.”)

<sup>148</sup> Lars Heuman, ARBITRATION LAW OF SWEDEN: PRACTICE AND PROCEDURE, 23 (2003)

in-depth” analysis when determining their value in guiding the understanding of the SAA.<sup>149</sup>

This is an important point to understand when comparing how Swedish law treats the concept of “legislative history” with how a common law system might. It is true that the Swedish preparatory works are not dispositive, but they must be examined when considering the meaning and application of a provision in Swedish legislation. With that in mind, the next section addresses the impact that the SAA’s preparatory works have on Section 34.

### 2.2.2 The preparatory works and Section 34 of the SAA

The preparatory works identify a number of situations in which an arbitrator may have exceeded her mandate. These scenarios flow from the preparatory work’s basic premise that an excess of mandate occurs when “the arbitral tribunal exceeds the parties’ claims.”<sup>150</sup> The primary example of this, according to the preparatory works, is when an arbitrator decides the claim on circumstances that were not invoked by a party.<sup>151</sup> On this point, the works cite to Chapter 17, Section 3 of the Swedish Code of

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<sup>149</sup> Heuman, *supra* note 148, at 23.

<sup>150</sup> Gov’t Bill 1998/99:35, p. 145 (“Ett överskridande av uppdraget kan ha skett genom att skiljemännen gått utöver parternas yrkanden.”).

<sup>151</sup> Gov’t Bill 1998/99:35, p. 145.

Judicial Procedure (“CJP”), which prohibits Swedish courts from relying on circumstances that a party has not invoked.<sup>152</sup>

It is important to note that nothing in the text of Section 34 of the SAA requires the application of the CJP. The preparatory works, however, make it clear that it is applicable to some degree. They explain that in domestic arbitration it is “natural” for the Swedish parties to extend principles of court practice to arbitration.<sup>153</sup> The preparatory works, however, note that Chapter 17 acts as a “point of departure” and the parties can “proceed” with their arbitration from there.<sup>154</sup> Therefore, “the parties can draw the boundaries of their claims more widely or narrowly than if the CJP had been followed.”<sup>155</sup> An arbitrator cannot decide the dispute on something that was never referenced during the course of the arbitration, regardless of how loosely the requirement to invoke a circumstance should be applied.<sup>156</sup>

The preparatory works are less clear about the applicability of the CJP to international arbitration.<sup>157</sup> As stated above, it is assumed

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<sup>152</sup> The concept of “invoking” a circumstance is a formal requirement in Swedish procedural law, and plays an important role in arbitrations seated in Sweden.

<sup>153</sup> Gov’t Bill 1998/99:35, p. 145.

<sup>154</sup> Gov’t Bill 1998/99:35, p. 145.

<sup>155</sup> Gov’t Bill 1998/99:35, p. 145.

<sup>156</sup> Gov’t Bill 1998/99:35, p. 145.

<sup>157</sup> Gov’t Bill 1998/99:35, p. 145.

that Swedish parties would naturally fall back on their knowledge of court proceedings when arbitrating an issue.<sup>158</sup> The works acknowledge that the same may not be true for non-Swedish parties arbitrating in Sweden.<sup>159</sup> Specifically that “greater caution is required in international disputes” and that one cannot assume that the parties will rely on Swedish procedural principles.<sup>160</sup> The works do not provide any more guidance regarding international disputes and the applicability of the judicial code.

The Council concludes by underlining the reason for discussing the applicability of the procedural code is the importance of clarity of claims and arguments in the arbitral process.<sup>161</sup> It is difficult to formulate a comprehensive rule regarding excess of mandate, and many of the same questions arise concerning procedural error.<sup>162</sup>

### 2.3 The 2019 amendments to Section 34 of the SAA

The Swedish parliament adopted amendments to the SAA that took effect 1 March 2019. Prior to the amendments, excess of mandate was found in paragraph 2, which read, “if the arbitrators have made the award after the expiration of the period decided on by the

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<sup>158</sup> Gov’t Bill 1998/99:35, p. 145.

<sup>159</sup> Gov’t Bill 1998/99:35, p. 145.

<sup>160</sup> Gov’t Bill 1998/99:35, p. 145.

<sup>161</sup> Gov’t Bill 1998/99:35, p. 146.

<sup>162</sup> Gov’t Bill 1998/99:35, p. 146.

parties, or where the arbitrators have otherwise exceeded their mandate.” The amendments changed this provision in two ways. First, they decoupled excess of mandate from the timing of the award. Second, the amendments explicitly made clear that the award should be set aside only if the excess of mandate effected the outcome of the case. This was merely a codification of a version of the rule that courts had already been applying.<sup>163</sup>

### 2.3.1 Separating excess of mandate from the award’s deadline, but blurring the distinction between excess of mandate and procedural error

These amendments clarify certain issues, while creating uncertainty regarding others. One area where the law is clarified is the separation of the timing of the award from excess of mandate. Prior to the amendments, the law allowed for set aside if the award was not rendered in time or if the arbitrators had “*otherwise exceeded their mandate.*”<sup>164</sup> This implied that a late award was one of a

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<sup>163</sup> In two major cases, the Svea Court of Appeal an award should be set aside if one could not exclude the possibility that the excess of mandate affected the outcome of the case. T 4548-08 (Systembolaget, 1 December 2009), p. 20 and T 4548-08 (TNG, 25 June 2015), p. 47. This is a different standard than the one adopted in the SAA, which states that the excess of mandate *probably* affected the outcome of the case. Thus, it appears that the amended SAA adopted a more rigorous standard for setting aside an award.

<sup>164</sup> SAA (1999), Section 34(2). Emphasis added.

number of ways that arbitrators could exceed their mandate.<sup>165</sup> Now, however, the implied conceptual connection between timing of the award and excess of mandate no longer exists.

One can think of at least two reasons for this change. First, since the adopting of the modern SAA in 1999, excess of mandate has arguably become one of the most—if not the most—invoked grounds for challenging an award. The notes accompanying the Committee on Justice’s 2018 draft amendments state as much, but do not explicitly cite this fact as a reason to give excess of mandate its own separate paragraph.<sup>166</sup> However, in light of its prominence among the grounds for set aside, it makes sense to include it as a self-standing ground, instead of a catchall that follows the timing of the award.

There is a strong argument that the law never intended excess of mandate to be too closely related to the timing of awards in any event. When discussing excess of mandate, the SAA’s preparatory works focus on issues presented to the tribunal for determination

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<sup>165</sup> Prior to the amendments, Lindskog had argued that rendered an award outside of the agreed time limit could not be an excess of mandate. In his view, rendering an award after the time limit has expired cannot constitute an excess of mandate, because the mandate ceases to exist once the time limit has run out. As he states, “an excess of mandate requires the existence of a mandate.” STEFAN LINDSKOG, *SKILJEFÖRANDE: EN KOMMENTAR*, p. 868, fn. 36 (3d ed. 2020). On the other hand, the preparatory works suggest the opposite view. Gov’t Bill 1998/99:35, p. 146.

<sup>166</sup> Gov’t Bill 2017/18:257.

and the invocation of legal circumstances. The notes to the 2018 proposed amendment discuss the same issues.<sup>167</sup>

Moving excess of mandate to its own paragraph helped to clarify its status as an independent ground for set aside. The addition of the “probably affected the outcome of the case” language, however, takes away from that clarity.

In the amendment’s preparatory works, the Committee on Justice states that it was proposing the additional language because the SAA did not explicitly require that the excess of mandate affect the outcome of the case. Adding the causation requirement to the excess of mandate provision would bring it more in line with the procedural error provision, which already contained a causation requirement.

Moreover, adding the causation requirement to excess of mandate brought the text of the SAA into line with court practice. Prior to the amendments, the courts were already applying an implicit causation element in the excess of mandate ground, but there was no uniform burden of proof. As an example, the Svea Court of Appeal in the *Systembolaget* case applied the standard that an award should be set aside if it cannot be ruled out that the excess of

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<sup>167</sup> Gov’t Bill 2017/18:257.

mandate affected the outcome of the case.<sup>168</sup> And when the Committee on Justice solicited comments on proposed amendments, the Svea Court of Appeal proposed that Section 34 be amended to incorporate the “cannot be excluded” standard, as opposed to the “probably affected” standard that applies to procedural error.<sup>169</sup> The Committee on Justice rejected the court’s proposal and instead included the more stringent “probably affected the outcome of the case” standard.

The Committee on Justice also sought to increase judicial efficiency by applying a specific causation requirement to excess of mandate. The amendments’ preparatory works state that, “in any given case, it can be difficult to determine what is an excess of mandate and what is a procedural error.”<sup>170</sup> Specifically, its notes state, “In circumstances where both grounds for set aside have a requirement that the outcome be affected, it is in this respect less important

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<sup>168</sup> T 4548-08, p. 20 (Svea Hovrätt 1 December 2009).

<sup>169</sup> Gov’t Bill 2017/18:257.

<sup>170</sup> Gov’t Bill 2017/18:257. This is true. It has become commonplace for parties challenging awards under the SAA to argue excess of mandate first and procedural error in the alternative in relation to the same set of facts. One need only look to almost all of the cases presented above to see that strategy in practice. And prior to the 2019 amendments courts were applying lesser standards for causation for one of the grounds than the other.

whether a certain deficiency is attributed to an excess of mandate or procedural error.”<sup>171</sup>

It is important to note that the Committee on Justice is not necessarily stating that there is no conceptual difference between the two grounds. Instead, it is stating that a party does not need to definitively prove whether the alleged arbitral conduct constitutes an excess of mandate or a procedural error. In other words, regardless of whether the court finds excess of mandate or procedural error, the result is the same: the award is set aside. The Svea Court of Appeal took a similar approach in the *ALOS* case.<sup>172</sup> In that case, the court remarked on the difficulty in distinguishing between set aside for lack of jurisdiction and set aside for excess of mandate, but stated that it was not necessary to find for one ground over the other because the end result was the same.<sup>173</sup>

In light of the above, one can argue that the Committee sacrificed legal certainty for the sake of efficiency. On one hand, diminishing the importance between excess of mandate and procedural error serves procedural economy, which can be beneficial to parties and the courts. On the other hand, it has the potential to cause significant problems for those seeking to clearly define the type of

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<sup>171</sup> Gov't Bill 2017/18:257.

<sup>172</sup> T 9494-12. See *infra* Section 4.7.

<sup>173</sup> T 9494-12, p. 8.

conduct that constitutes excess of mandate from a conceptual point of view. For example, one of the drivers of this research project is the fact that the concept of excess of mandate is poorly defined and understood.

This approach also runs the risk of creating a hybrid ground for set aside that is unique to Sweden. If that becomes the case, not only will the SAA's goal of drawing inspiration from the Model Law be harmed, but it will also be more difficult to use Sweden as a point of comparison with other international laws.

### 2.3.2 Promoting judicial discretion

Another effect of explicitly requiring that an excess of mandate affect the outcome of the case is that it promotes judicial discretion in set aside proceedings. Specifically, allowing courts to consider the excess's effect on the outcome of the case softens the SAA's requirement that a court "shall set aside" an award if one of the relevant grounds are present.

SAA tracks many of the principles underlying the Model Law. Notably, the Model Law's stance on preserving the validity of the award. The SAA is not a verbatim adoption of the Model Law, however. This fact is demonstrated by comparing the phrasing of Section 34 of the SAA with its counterpart, Article 34(2) of the Model Law. Notably, the SAA's Section 34 begins, "An award . . . *shall* be

wholly or partially set aside,” while Article 34(2) of the Model Law begins, “An arbitral award *may* be set aside.”<sup>174</sup>

Taken at face value, these differences mean that Swedish courts do not have the same discretion as Model Law courts. The causality requirement, however, helps to preserve some judicial discretion and, by extension, uphold the validity of awards. Without the causation requirement, a Swedish court would be bound to set aside an award when confronted with an excess of mandate or procedural error regardless of how insignificant the excess or error was.<sup>175</sup> Maintaining judicial discretion may explain, at least in part, why Swedish courts began to read the causation requirement into excess of mandate cases prior to the 2019 amendments, as well as why the requirement was explicitly adopted in those amendments.

### 3. EXCESS OF MANDATE IN SWEDISH LEGAL LITERATURE

As discussed above, the text of the SAA does not define what type of conduct constitutes an excess of mandate. The preparatory works provide examples, but do not always offer detailed reasoning as to why the examples fit within the concept of excess of mandate.

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<sup>174</sup> Emphasis added.

<sup>175</sup> This assumes, of course, that a party to an award actually raised an issue before the court. Both Section 34 of the SAA and Article 34(2) of the Model Law require that a party request set aside before the court can act.

Therefore, it is necessary to examine Swedish legal literature to further develop an understanding the concept in Swedish law.

Among the different literature sources reviewed in this section, Stefan Lindskog's *Skiljeförfarande: En kommentar* and Lars Heuman's *Skiljemannarätt* stand out as two of the most often cited treatises in Swedish arbitration law. The courts in particular have relied on these sources in several holdings since the passage of the SAA in 1999. The following literature review does not rely exclusively on these sources, but their prevalence in Swedish arbitral law necessarily means that they receive the lion's share of attention in this chapter.

### 3.1 Mandate jointly determined by the parties

As a starting point, the arbitrator's mandate is defined by "positions that both parties have endorsed."<sup>176</sup> The most basic example of this is the arbitration agreement.<sup>177</sup> Consequently, an arbitrator may exceed her mandate if she incorrectly interprets the arbitration agreement and expands its scope beyond what the parties intended.<sup>178</sup>

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<sup>176</sup> LARS HEUMAN, *SKILJEMANNARÄTT*, p. 617 (1999) ("Med begreppet uppdrag måste menas *framställningar som båda parterna ställt sig bakom.*") (Emphasis in original).

<sup>177</sup> Lars Heuman, *Skiljemannarätt*, p. 617 (1999).

<sup>178</sup> Lars Heuman, *Skiljemannarätt*, p. 617 (1999).

The scope of the arbitration agreement, however, merely sets part of the “outer boundary” of the arbitrator’s mandate.<sup>179</sup> The mandate is further limited by an “inner boundary.”<sup>180</sup> This boundary is set by the dispute that is referred to the arbitrators. This includes, among other things, the parties’ jointly agreed instructions to the tribunal.

Lindskog and Heuman disagree as to types of instructions that should be considered to form the mandate. For example, Heuman points to a choice of applicable law as an example of a joint instruction that forms part of the mandate.<sup>181</sup> In his view, an arbitrator would exceed her mandate if she were to decide a dispute according to Swedish law even though the parties agreed English law should be applicable.<sup>182</sup> Lindskog, however, is skeptical that type of conduct constitutes an excess of mandate. In his view, disregarding the chosen law may better be classified as a procedural

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<sup>179</sup> See STEFAN LINDSKOG, *SKILJEFÖRANDE: EN KOMMENTAR*, p. 868 (3d ed. 2020). According to Lindskog, the outer boundary is also determined by identifying issues that can lawfully be settled by arbitration, regardless of the parties’ arbitration agreement. See STEFAN LINDSKOG, *SKILJEFÖRANDE: EN KOMMENTAR*, p. 720 (3d ed. 2020).

<sup>180</sup> See FINN MADSEN, *COMMERCIAL ARBITRATION IN SWEDEN*, p. 280 (Jure Förlag AB 4th ed. 2016). See also STEFAN LINDSKOG, *SKILJEFÖRANDE: EN KOMMENTAR*, p. 869 (3d ed. 2020).

<sup>181</sup> LARS HEUMAN, *SKILJEMANNARÄTT*, p. 616 (1999). See also FINN MADSEN, *COMMERCIAL ARBITRATION IN SWEDEN*, p. 284 (Jure Förlag AB 4th ed. 2016).

<sup>182</sup> Lars Heuman, *Skiljemannarätt*, p. 616 (1999).

error.<sup>183</sup> He argues that one should distinguish between joint instructions that shape the form of the arbitral procedure and instructions that bear on the procedure's result; namely, the award.<sup>184</sup> According to this argument, deviating from the former constitutes procedural error, deviating from the later constitutes excess of mandate.

Lindskog's view is not limited to choice of law, but instructions in general. In his view, disregarding party instructions should be considered an excess of mandate if those instructions concern the parties' "material rights and duties."<sup>185</sup> Conversely, Heuman casts a wider net when connecting party instructions with the concept of mandate. For example, he notes that deviating from a procedural

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<sup>183</sup> STEFAN LINDSKOG, SKILJEFÖRANDE: EN KOMMENTAR, p. 873 (2d ed. 2012). On the other hand, he also argues that applying a law that the parties have agreed should not apply may better fit within the definition of excess of mandate. STEFAN LINDSKOG, SKILJEFÖRANDE: EN KOMMENTAR, p. 873 (2d ed. 2012). This position touches on the US conception of Manifest Disregard of the Law—although Heuman and Lindskog are contemplating instances in which the parties have clearly agreed on what law to apply (or not apply), while Manifest Disregard of the Law concerns situations in which the arbitrator must decide on the applicable law.

<sup>184</sup> Stefan Lindskog, *Skiljeförande: En kommentar*, p. 874, fn. 68 (2d ed. 2012).

<sup>185</sup> Stefan Lindskog, *Skiljeförande: En kommentar*, p. 871 (2d ed. 2012).

order can constitute an excess of mandate if that order represents an agreement between the parties.<sup>186</sup>

As discussed above, it is uncontroversial that the arbitration agreement forms the arbitrator's mandate. Nor is it controversial that the parties' joint instructions form the mandate to at least some degree. Individual parties, however, are also able to form the arbitrator's mandate in certain ways. The next two sections address this issue further.

### 3.2 Mandate determined by an individual party: requests for relief

The above examples concern joint agreements by the parties. While it is uncontroversial that the parties' joint instructions help define the inner limits of the mandate, there are ways in which the parties can define the limits of the mandate individually.<sup>187</sup> The most common example of this is the parties' written factual and legal submissions, which include requests for relief.

It is a truism to say that an arbitrator may not grant more than what was requested (also known as *ultra petita*).<sup>188</sup> The simplest example

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<sup>186</sup> LARS HEUMAN, *SKILJEMANNARÄTT*, p. 621 (1999). The role of the procedural order forming the mandate is central to the *DEPA* and *CicloMulsion* cases discussed below.

<sup>187</sup> See Lars Heuman, *Skiljemannarätt*, p. 617 (1999).

<sup>188</sup> Stefan Lindskog, *Skiljeförande: En kommentar*, p. 871 (2d ed. 2012).

of this is the situation in which an arbitrator grants a monetary amount greater than what was requested. Nevertheless, there are other ways in which an arbitrator can go beyond a party's request for relief. Continuing to use quantitative examples, Lindskog notes that an arbitrator may exceed her mandate if she grants interest on the awarded amount when none was requested.<sup>189</sup>

There is less agreement concerning whether an arbitrator exceeds her mandate if she awards an amount less than what was requested (also known as *infra petita*). Eric Runesson has argued that the principle "the greater includes the lesser (*majus includit minus*)" should apply in these situations.<sup>190</sup> Therefore, it should be "uncontroversial" that awarding a lesser amount does not constitute an excess of mandate.<sup>191</sup> Heuman, however, is less certain of this. He argues that it "cannot be excluded" that *infra petita* constitutes an excess of mandate, because the arbitrators made a material assessment that was different from the formal assessment they were requested to make.<sup>192</sup>

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<sup>189</sup> Stefan Lindskog, *Skiljeförande: En kommentar*, p. 871 (2d ed. 2012).

<sup>190</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 *JURIDISK TIDSKRIFT* 172, 188 (2017).

<sup>191</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 *JURIDISK TIDSKRIFT* 172, 187–188 (2017).

<sup>192</sup> Lars Heuman, *Skiljemannarätt*, p. 618 (1999).

Purely quantitative claims provide easier examples of situations in which an arbitrator may exceed her mandate. As Runesson notes, however, “It is considerably more difficult to say what the mandate encompasses when the relief sought must be understood in *qualitative* terms.”<sup>193</sup>

Specifically, an arbitrator may exceed her mandate when she awards quantitative relief when the claimant requested qualitative relief. Lindskog points to a situation in which a claimant requests that the arbitrator declare a certain assessed value. But, in addition to making the assessment, she also orders the respondent to pay that value to the claimant.<sup>194</sup> This constitutes an excess of mandate.<sup>195</sup> Similarly, awarding monetary damages for defective goods when a party requested repair may also constitute an excess of mandate.<sup>196</sup>

Then there are situations concerning qualitative requests only, such as those for specific performance. For example, an arbitrator may

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<sup>193</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 JURIDISK TIDSKRIFT 172, 188 (2017). The *CicloMulsion* case discussed below provides an example of how an arbitrator can award more than what was requested by reformulating a request for relief. See *infra* section 4.5.

<sup>194</sup> Stefan Lindskog, *Skiljeförande: En kommentar*, p. 871 (2d ed. 2012).

<sup>195</sup> Stefan Lindskog, *Skiljeförande: En kommentar*, p. 871 (2d ed. 2012).

<sup>196</sup> See Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 JURIDISK TIDSKRIFT 172, 189 (2017).

order that the respondent repair defective goods instead of granting the claimant's request for redelivery.<sup>197</sup> According to Runesson, this might not constitute an excess of mandate if the awarded remedy serves "the same purpose as the relief sought, the economic consequences are less severe and the deviation appears as a simple and natural comprise solution."<sup>198</sup>

As can be seen from the above, one important method in which individual parties determine the arbitrator's mandate is through their requests for relief. The basic rule is that arbitrators may not award more than what has been granted. This is relatively easy to ascertain quantitatively, but becomes more complicated when it comes to qualitative claims. Harder questions arise when individual parties shape the arbitrator's mandate through their factual and legal submissions in the arbitration. The following section addresses the literature's approach to some of these issues.

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<sup>197</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 JURIDISK TIDSKRIFT 172, 189 (2017).

<sup>198</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 JURIDISK TIDSKRIFT 172, 189 (2017) (citing PETER WESTBERG, *DOMSTOLS OFFICIALPRÖVNING*, p. 487 (1988)).

### 3.3 Mandate determined by an individual party: submissions to the tribunal

In addition to requests for relief, parties also individually determine the arbitrator's mandate through their submissions. In fact, submissions to the tribunal play a significant role in arbitrations seated in Sweden.

As discussed in Section 2.2 above, the Swedish CJP's applicability in arbitration affects how the parties' submissions form the arbitrator's mandate. The SAA's preparatory works state that an arbitrator may not base her award on circumstances that a party has not invoked. This requirement comes from Chapter 17 of the CJP. The preparatory works assume that Swedish parties will naturally rely on these principles in domestic cases. The works do not exclude their use in international cases, but do urge caution.

It is important to understand what it means to "invoke" a circumstance in Swedish procedural law. Swedish procedural law employs an exacting method for classifying the many factual claims that arise during a civil dispute.<sup>199</sup> Depending on their nature, facts can be classified as "evidentiary facts" ("*bevisfakta*"), "ultimate facts" ("*rättsfakta*"), "counter facts" ("*motfakta*"), or "counter-

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<sup>199</sup> See Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 JURIDISK TIDSKRIFT 172(2017).

counter facts” (“*replikfakta*” or “*motfaktum av andra graden*”).<sup>200</sup> Each fact has a direct or indirect relationship with the concept of the “legal consequence” (“*rättsföljd*”).

Under the CJP, a party must “invoke” (“*åberopa*”)<sup>201</sup> facts that have a direct bearing on the desired legal consequence.<sup>202</sup> Other evidentiary facts that support the ultimate facts must be referred to in the submissions, but they need not be invoked in the formal sense.<sup>203</sup> A fact is considered invoked when the invoking party connects the fact to a requested relief so clearly that the opposing party “must realize that . . . it is considered immediately relevant to the relief sought.”<sup>204</sup> In Swedish court procedure and domestic arbitration, this is most often done using “recitals.”<sup>205</sup> The recitals are a comprehensive summary of the parties’ positions in the

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<sup>200</sup> PATRIK SCHÖLDSTRÖM, *TVISTEMÅLSANALYS FÖR PRAKTISKT BRUK*, p. 16 (Jure Förlag, 2017).

<sup>201</sup> This research project uses “invoke” and “invocation” when translating from “*åberopa*.” Some English texts on Swedish arbitration law use “refer” in place of “*åberopa*.” While technically correct, “refer” does not accurately convey the significance of the requirement under Swedish procedural law.

<sup>202</sup> PATRIK SCHÖLDSTRÖM, *TVISTEMÅLSANALYS FÖR PRAKTISKT BRUK*, p. 16 (Jure Förlag, 2017).

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<sup>204</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 *JURIDISK TIDSKRIFT* 172, 177 (2017). *See also* STEFAN LINDSKOG, *SKILJEFÖRANDE: EN KOMMENTAR*, p. 722 (2d ed. 2012).

<sup>205</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 *JURIDISK TIDSKRIFT* 172, 179 (2017).

dispute.<sup>206</sup> Tribunals often distribute recitals to the parties for comment.<sup>207</sup> If approved, the recitals are incorporated into the background portion of the award.<sup>208</sup>

A notional breach of contract claim is a useful way to demonstrate how different facts may be classified in Swedish procedural law. Keep in mind that the below example is purposely simplified in order to give the reader a general understanding of the concept of ultimate facts. There is no clear rule regarding what constitutes an ultimate fact. The correct classification of circumstances is usually a point of contention in Swedish court proceedings.

Assume the following: Party A (the “buyer”) enters into a contract with Party B (the “seller”) for the assembly of a specialized piece of construction equipment. The parties agree on a date and place for delivery and purchase price. When the date for delivery arrives, however, the seller informs the buyer that delivery will be delayed for at least three months. The delay in delivery means that the buyer will not be able to use the equipment on the intended construction project. The buyer is forced to withdraw from the

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<sup>206</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 JURIDISK TIDSKRIFT 172, 177 (2017).

<sup>207</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 JURIDISK TIDSKRIFT 172, 179 (2017).

<sup>208</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 JURIDISK TIDSKRIFT 172, 177 (2017).

project. The buyer sues the seller for breach of contract and demands compensation for the damages it incurred when it withdrew from the project.

The starting point for classifying the above facts is determining the buyer's desired legal consequence. The buyer wants the court to find that there has been a breach of contract, which then leads to the right of compensation. Therefore, the desired legal consequence is a finding of breach of contract.

In order to demonstrate the consequence of breach of contract, the buyer needs to prove that the seller did not deliver. The fact of non-delivery is the ultimate fact. Any evidence to support the fact that the seller did not deliver are considered evidentiary facts.

Continuing with the example, the seller denies that it breached the contract. In its defense, it claims that the buyer introduced new specifications to the design at a late stage that made timely delivery impossible. Moreover, the seller informed the buyer of this and the parties orally agreed to extend the delivery date by a "reasonable" amount of time. The oral amendment that modified the delivery date is considered a counter fact. If true, it demonstrates that the contract has not been breached.

The buyer responds that a provision in the sales agreement states that all change to the contract must be made in writing. Therefore,

even if the parties agreed to extend the delivery date orally, that agreement is void. The clause that prohibits oral amendments is the counter-counter fact; it is a counter fact that disproves the original counter fact.

Finally, evidentiary facts can be found underlying all of the other facts. The evidentiary facts are used to prove that the ultimate facts, counter facts, or counter-counter facts are true. For example, evidence that demonstrates the goods were not delivered on time; or that the parties did, in fact, reach an oral agreement to extend the delivery date; or that no writing exists that amends the delivery date. These facts must be presented during the court proceedings, but they do not need to be formally invoked.

To some, these means of classifying facts seems overly formalistic. To others, it is a natural way in which to make sure that the court (or arbitral tribunal) is perfectly clear as to what it needs to decide. One author argues that requiring such a clear distinction between evidentiary and ultimate facts helps to define the dispute in “concrete” terms.<sup>209</sup> In other words, the boundaries of the dispute are clearly known to the parties and the arbitrator, which has a number of advantages.

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<sup>209</sup> Bengt Lindell, *Allege or refer to Legal Facts—What Does It Mean?*, 63 SCANDINAVIAN STUD. L. 185 (2017).

It has also been argued that clearly defining the dispute in this way increases the ability of the parties and their counsel to assess the probability of the dispute's outcome.<sup>210</sup> Another advantage is that it promotes due process. Parties have the right to respond to the arguments made against them.<sup>211</sup> The last argument relates to the fact that Sweden's courts use the adversarial system. Likewise, arbitration is assumed to be adversarial,<sup>212</sup> unless the parties clearly agree to an inquisitorial process.<sup>213</sup> Consequently, the parties bear the responsibility for developing the dispute in arbitration as in court.

Finally, it is important to note that while the parties' submissions define the boundaries of the arbitrator's mandate, the arbitrator retains the discretion to adjudicate the dispute within those boundaries. Unless the parties agree to an inquisitorial process, an arbitrator must decide the case using the evidence that the parties submitted. Nevertheless, the arbitrator is not bound to draw the

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<sup>210</sup> Bengt Lindell, *Allege or refer to Legal Facts—What Does It Mean?*, 63 SCANDINAVIAN STUD. L. 185 (2017).

<sup>211</sup> *See, e.g.*, Section 24 of the SAA, which states, in part, "The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally." *See* FINN MADSEN, *COMMERCIAL ARBITRATION IN SWEDEN* 281 (Jure Förlag AB 4th ed. 2016).

<sup>212</sup> Stefan Lindskog, *Skiljeförande: En kommentar*, p. 540 (2d ed. 2012).

<sup>213</sup> Stefan Lindskog, *Skiljeförande: En kommentar*, p. 722 (2d ed. 2012).

conclusions that the submitting party requests.<sup>214</sup> She is free to give whatever conclusions from the evidence she sees fit. The evidence a party submits defines the mandate, but the arguments attached to that evidence do not.

### 3.4 Mandate as defined by the courts: Swedish case law

This section looks at selected Swedish court cases addressing excess of mandate under the SAA. The nationalities of the parties vary. Some cases can be considered “domestic” in that they concern only Swedish parties. Others are international in that they concern at least one non-Swedish party. This section is not intended to provide an exhaustive review of Swedish case law in the excess of mandate area. The below cases have been chosen because they are representative of the courts’ approaches to questions of excess of mandate.

### 3.5 Systembolaget Aktiebolag ./ V&S Vin & Sprit Aktiebolag<sup>215</sup>

The so-called *Systembolaget* case (also known as *Systembolaget I*)<sup>216</sup> concerns a domestic dispute over one party’s right to unilaterally amend a distribution agreement. It is significant in that it addresses important questions of the CJP’s role in arbitrations

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<sup>214</sup> Lars Heuman, *Skiljemannarätt*, p. 619 (1999).

<sup>215</sup> T 4548-08, Svea Hovrätt, 1 December 2009.

seated in Sweden. At the time of the dispute, Systembolaget AB held (and still currently holds) a government-sanctioned monopoly over the retail sale of alcoholic beverages. V&S was, and continues to be, among other things, a wholesale distributor of alcoholic beverages.

In 1995, the parties entered into a contract governing Systembolaget's purchasing of alcohol from V&S. The contract was intended to govern any subsequent purchase agreements between the parties. Section 1.2 of the contract's terms and conditions gave Systembolaget certain rights to unilaterally amend the terms and conditions.

During a span of time from 2001 to 2003, nine V&S employees were charged with bribery of Systembolaget personnel. The bribery was intended to secure purchase agreement for various V&S products.

In 2002, Systembolaget purportedly amended the terms and conditions to include provisions that granted it the right to wholly or partially terminate the agreement. In December 2006, Systembolaget notified V&S that the bribery constituted a material breach of the amended terms and conditions. Consequently, it was entitled to partially terminate the contract by canceling selected purchase agreements. One month later, Systembolaget followed up on its notice by publishing a list of products that it would no longer purchase from V&S as of March 2007.

V&S rejected Systembolaget's attempt at partial termination and initiated arbitration pursuant to the SCC Rules. V&S claimed that the 2002 amendments to the contract were invalid. Therefore, Systembolaget had no contractual basis for the partial termination. Specifically, V&S argued that Section 1.2 permitted Systembolaget to make minor changes to the terms and conditions, Systembolaget had attempted to rewrite the agreement. V&S claimed that never agreed to Systembolaget such broad authority.

The tribunal found in favor of V&S, stating that Systembolaget was not allowed to amend the Terms and Conditions in the manner that it did.<sup>217</sup> Consequently, Systembolaget had no right to partially terminate the parties' contract. The tribunal based its decision on an interpretation of Systembolaget's powers under Section 1.2 of the contract.<sup>218</sup> The court would later focus on this fact in the set aside proceedings.

Systembolaget requested that the Svea Court of Appeal set the award aside on the grounds that the tribunal exceeded its mandate. First, V&S argued that the tribunal was prohibited from interpreting Section 1.2, because V&S had neither invoked that provision nor requested that the tribunal interpret its scope.<sup>219</sup> According to

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<sup>217</sup> T 4548-08, Svea Hovrätt, 1 December 2009.

<sup>218</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p.5

<sup>219</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 5.

Systembolaget, V&S instead argued that Section 1.2 was invalid because it was unreasonable.<sup>220</sup> The tribunal did not decide on the question of whether Section 1.2 was valid, but instead assumed it was valid and then took the additional—and, Systembolaget’s view, impermissible—step of interpreting the provision.<sup>221</sup> Systembolaget argued that this constituted an excess of mandate.

Second, Systembolaget argued that the tribunal exceeded its mandate by arriving at a legal conclusion that V&S never requested. During the arbitration, Systembolaget had argued that there existed a general principle of contract law conferring the right to terminate an agreement in the event of a material breach. V&S argued that no such right existed, but if it did, no material breach occurred which would justify termination.<sup>222</sup> Instead of deciding on V&S’s arguments, the tribunal found that a right existed, but could be waived by the parties. The tribunal then went on to hold that the parties had agreed to waive the right.

Systembolaget claimed that the tribunal’s findings regarding waiver constituted an excess of mandate. V&S had not invoked any agreement regarding waiver during the course of the arbitration.<sup>223</sup>

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<sup>220</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 5.

<sup>221</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 6.

<sup>222</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 7.

<sup>223</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 8.

Systembolaget it was therefore “impossible for Systembolaget to respond and take a position on that issue.”<sup>224</sup>

V&S argued that Systembolaget had knowledge of V&S arguments, because they could be found in the separate documents that were submitted over the course of the arbitration. Moreover, V&S argued that Systembolaget mischaracterized the tribunal’s findings.<sup>225</sup>

The court held that the tribunal exceeded its mandate when it found that the parties had agreed that the 1995 Terms and Conditions were exclusive. The court set the award aside in its entirety on that ground, which meant that it did not need to rule on the tribunal’s findings regarding the applicability of the 2002 Terms and Conditions.

The court began its analysis by finding that the recitals contain the entirety of the arguments invoked by the parties.<sup>226</sup> Systembolaget had argued this, while V&S argued that one must look to all of a party’s submissions in order to find the arguments that it invoked (unless the parties had agreed otherwise).<sup>227</sup>

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<sup>224</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 8.

<sup>225</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 14.

<sup>226</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 17.

<sup>227</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 9.

There is one notable caveat to rule that the recitals contain all of the parties' invoked arguments. The court states that the recitals should be considered to contain all of the material circumstances after "the parties *approved* the recitals."<sup>228</sup> A tribunal cannot determine their own mandate by drawing up recitals independently. The parties must review and approve the recitals before their mandate is set. This has the potential to raise problems when parties are reluctant, or refuse, to approve the recitals.<sup>229</sup>

### 3.6 OAO Tyumenneftegaz ./ First National Petroleum Corporation<sup>230</sup>

This is another case where the Svea Court of Appeal set aside an award on the ground that the arbitrators exceeded their mandate by deciding an issue that was not invoked. It is an important case for two reasons. First, it extended the applicability of Chapter 17 of the CJP to international arbitrations seated in Sweden. Second, it demonstrates the important role that recitals play in defining the arbitrator's mandate.

The dispute concerned a joint venture agreement entered into by the Russian company OAO Tyumenneftegaz ("TNG") and the US

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<sup>228</sup> T 4548-08, Svea Hovrätt, 1 December 2009, p. 17 (emphasis added).

<sup>229</sup> In fact, that issue came up in the *TNG* case, which extended the invocation requirement to international arbitrations. See *infra* section

<sup>230</sup> T 2289-14, Svea Hovrätt, 25 June 2015.

company First National Petroleum Corporation (“FNP”).<sup>231</sup> The parties entered into the joint venture agreement in 1992 for the purpose of exploiting an oil field in Siberia through a jointly held company. The contractual relationship eventually broke down and FNP initiated arbitration in Stockholm under the SCC Rules.

FNP alleged that TNG had breached the joint venture agreement for a number of reasons. Among those, it alleged that TNG provided misleading information about oil field to FNP at an early stage in the parties’ contractual relationship.<sup>232</sup> The exact nature of misleading information became the focus of the set aside proceedings.

The tribunal found in favor in FNP on each of its breach of contract claims. TNG requested that the Svea Court of Appeal set the award aside. Among other reasons, TNG argued that the tribunal decided the breach of contract claim on oil flow rates, while FNP had invoked oil reserves.<sup>233</sup>

The first question the court considered was whether the Swedish CJP’s invocation requirement should apply in an international arbitration.<sup>234</sup> The court found that the CJP was applicable in this

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<sup>231</sup> T 2289-14, p. 2.

<sup>232</sup> T 2289-14, p. 2.

<sup>233</sup> T 2289-14, p. 2.

<sup>234</sup> T 2289-14, p. 35.

case, because the arbitration was closely connected to Sweden.<sup>235</sup> Specifically, the arbitration took place in Stockholm, the applicable law was Swedish, the chair of the tribunal was Swedish, and the parties' respective legal counsels were Swedish.<sup>236</sup> In the court's view, those factors combined meant that the parties would have been aware of the need to invoke ultimate facts.<sup>237</sup>

Having found that the CJP was applicable, the court next analyzed whether the tribunal had decided an issue that had not been formally invoked. The recitals was central to this inquiry. The parties disagreed as to the binding effect of the recitals. TNG argued that it was meant to preclude any other arguments.<sup>238</sup> FNP argued it was meant to serve as guidance for the tribunal as it considered the case.<sup>239</sup> The court looked at the history of the recitals to determine its nature.

The parties drafted the recitals at the request of the tribunal.<sup>240</sup> The first version contained a provision explaining that it was not meant to serve as an exhaustive list of the parties' "legal grounds,

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<sup>235</sup> T 2289-14, p. 36.

<sup>236</sup> T 2289-14, p. 35.

<sup>237</sup> T 2289-14, p. 36.

<sup>238</sup> T 2289-14, p. 36.

<sup>239</sup> T 2289-14, p. 36.

<sup>240</sup> T 2289-14, p. 36.

arguments or circumstances.”<sup>241</sup> The tribunal demanded more concrete recitals. It explained, “The Tribunal requires to be perfectly clear on what grounds are relied [on] at this stage.”<sup>242</sup>

After further resistance from TNG, the tribunal threatened to issue a “cut off order as to legal grounds” if the parties did not provide a concrete recitals within five days. The parties then sent a joint letter to the tribunal, explaining that they would not accept that the recitals would have a “precluding effect” regarding the submissions in the arbitration.<sup>243</sup>

On the first day of the main hearing, the chair of the tribunal stressed the importance of knowing the exact issues that the tribunal was to decide.<sup>244</sup> The parties submitted a recitals to the tribunal four days later on 5 July 2013.<sup>245</sup> That version of the recitals did not refer to previous submissions.<sup>246</sup> The chair responded the next day, stating, “The Tribunal will assume that [the 5 July 2013 recitals] reflects the final positions of the parties in this respect. It follows that the references to prior pleadings will not be

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<sup>241</sup> T 2289-14, p. 36.

<sup>242</sup> T 2289-14, p. 36.

<sup>243</sup> T 2289-14, p. 37.

<sup>244</sup> T 2289-14, p. 37.

<sup>245</sup> T 2289-14, p. 37.

<sup>246</sup> T 2289-14, p. 37.

considered.”<sup>247</sup> The tribunal reproduced the recitals in the award.<sup>248</sup>

Based on the above, the tribunal concluded that the recitals only the facts in recitals could be considered “invoked” in the arbitration.<sup>249</sup> The final question was whether oil flow rates or oil reserves constituted ultimate facts that needed to be invoked.

The court found that allegations concerning flow rates or reserves were ultimate facts.<sup>250</sup> It reasoned that FNP requested that the tribunal find that TNG breached the contract by providing misleading information.<sup>251</sup> This meant that the nature of the misleading information was directly related to the desired legal result: a finding of breach of contract. Therefore, the type of information should be considered an ultimate fact that needed to be invoked. The court found that the tribunal exceeded its mandate by finding that TNG breached the contract by providing misleading information concerning oil reserves, which was an ultimate fact that FNP had not invoked.

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<sup>247</sup> T 2289-14, p. 38.

<sup>248</sup> T 2289-14, p. 38.

<sup>249</sup> T 2289-14, p. 39.

<sup>250</sup> T 2289-14, p. 46.

<sup>251</sup> T 2289-14, p. 42.

### 3.7 Trannell Int'l Ltd ./ Green Cycle Assoc.<sup>252</sup>

*TNG* provides an example of a court distinguishing between ultimate facts and evidentiary facts. The Svea Court of Appeal decided a similar question in this case.

Trannell (a Maltese company) and Green Cycle (a Swedish company) entered into a sponsorship agreement in late 2006. According to the agreement, Trannell would be the main sponsor of a cycling team and pay Green Cycle EUR 8 million per year for four years. Clause 10.1 parties' agreement read, "This agreement may be amended only by further agreement in writing signed by the Parties."

The sponsorship agreement came to a premature end in November 2007. As of that date, Trannell had paid Green Cycle EUR 7 million. Green Cycle initiated arbitration in December 2015, requesting the remaining EUR 1 million. Trannell argued that, despite the existence of Clause 10.1, the parties had come to an oral agreement to lower Trannell's obligation to EUR 7 million.<sup>253</sup> In November 2016, the sole arbitrator awarded Green Cycle the full amount of its claim. Among other things, the arbitrator found that the representatives

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<sup>252</sup> T 1510-17, Svea Hovrätt, 28 June 2018.

<sup>253</sup> T 1510-17, p. 4.

of the parties intended Clause 10.1 to have effect, because the representatives came from “a non-Swedish legal tradition.”<sup>254</sup>

Trannell requested that the Svea Court of Appeal set the award aside on the ground that the arbitrator had exceeded his mandate or, in the alternative, committed a procedural error. Trannell claimed that the arbitrator exceeded his mandate by basing his decision on an ultimate fact that Green Cycle did not invoke during the arbitration. Specifically, that the parties’ representatives’ legal traditions demonstrated an intent to enforce Clause 10.1. Green Cycle countered that the fact in dispute was not an ultimate fact and, therefore, did not need to be invoked. Green Cycle argued that, at worse, the arbitrator erred in weighing the evidence when deciding whether the parties had orally agreed to reduce the amount of the contract. Wrongly weighing evidence, according to Green Cycle, did not constitute excess of mandate, but touched on the merits of the dispute instead.

The Svea Court of Appeal accepted Green Cycle’s argument and upheld the award. In making its findings, the court referred to SAA’s preparatory works and found that an arbitrator exceeds her mandate if she decides a dispute based upon an ultimate fact that has not been invoked.<sup>255</sup> The court then assumed the applicability

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<sup>254</sup> T 1510-17, p. 4

<sup>255</sup> T 1510-17, p. 5.

of the CJP and did not discuss the fact that the award concerned an international arbitration.<sup>256</sup>

In the court's view, the question of the representatives' legal traditions did not constitute an ultimate fact, because an ultimate fact is a fact that leads directly to the legal result. Instead, the question involved contract interpretation. According to the court, the arbitrator was free to consider the evidence of the legal traditions when deciding how to interpret the contract. Moreover, even if the arbitrator decided the question incorrectly, incorrect weighing of the evidence did not constitute an excess of the arbitrator's mandate.

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<sup>256</sup> T 1510-17, p. 5. From the original holding in Swedish:

Enligt 34 § första stycket 2 lagen (1999:116) om skiljeförfarande (LSF) ska en skiljedom helt eller delvis upphävas om skiljemanden har överskridit sitt uppdrag. I ett skiljeförfarande är utgångspunkten att skiljemanden är bunden att avgöra tvisten med stöd av de omständigheter som parterna åberopat till stöd för sin talan. Om en skiljemän grundat sitt avgörande på en omständighet som inte har åberopats av en part bör denne normalt anses ha överskridit sitt uppdrag. (Se prop. 1998/99:35 s. 144 f. jfr även 17 kap. 3 § rättegångsbalken.)

### 3.8 Public Gas Corporation of Greece (DEPA) ./. BOTAS Petroleum Pipeline Corporation<sup>257</sup>

The three cases presented above concerned instances when an arbitral tribunal allegedly rendered an award based on an ultimate fact that was not invoked. An arbitrator may exceed her mandate in other ways, as well. The following cases serve as examples that. In *DEPA*, the Svea Court of Appeal was asked to decide whether the tribunal's deviation from previous procedural orders constituted an excess of mandate.

The parties to the dispute were Public Gas Corporation of Greece (DEPA), a natural gas company in which the nation of Greece holds a majority share; and BOTAS Petroleum Pipeline Corporation (BOTAS), an oil and gas company wholly owned by the nation of Turkey.<sup>258</sup> In December 2003, the two companies entered into a fifteen-year agreement for the supply of natural gas.<sup>259</sup> BOTAS was to be the seller and DEPA the buyer.<sup>260</sup> The purchase price would be paid in U.S. dollars and determined by a formula with two factors.<sup>261</sup> The first factor would vary depending on the price BOTAS

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<sup>257</sup> T 6165-16, Svea Court of Appeal, 19 January 2018

<sup>258</sup> T 6165-16, p. 3.

<sup>259</sup> T 6165-16, p. 3.

<sup>260</sup> T 6165-16, p. 3.

<sup>261</sup> T 6165-16, p. 3.

paid to its supplier.<sup>262</sup> The second factor was dependent on an index rate made up of three set indicators of Brent crude prices.<sup>263</sup> The second factor, which became the focus of the dispute, was labeled “K” in the pricing formula.<sup>264</sup>

BOTAS began delivering gas under the contract in November 2007.<sup>265</sup> Five months later, BOTAS’s supplier requested a price revision in its contract with BOTAS.<sup>266</sup> BOTAS then approached DEPA and requested a corresponding price revision in their contract.<sup>267</sup> (During the arbitration, this became known as the “First Price Revision Request.”) BOTAS requested an additional revision in April 2011 (the “Second Price Revision Request”).<sup>268</sup> The contract allowed either party to request price revisions, but called for arbitration in the event the parties could not agree on a revised price.<sup>269</sup>

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<sup>262</sup> T 6165-16, p. 3.

<sup>263</sup> T 6165-16, p. 3–4.

<sup>264</sup> T 6165-16, p. 4.

<sup>265</sup> T 6165-16, p. 4.

<sup>266</sup> T 6165-16, p. 4.

<sup>267</sup> T 6165-16, p. 4.

<sup>268</sup> T 6165-16, p. 4.

<sup>269</sup> T 6165-16, p. 4.

The two parties could not agree on BOTAS's requested price revisions, and in December 2011, BOTAS initiated arbitration.<sup>270</sup> The arbitration was seated in Stockholm and conducted under the ICC Rules.<sup>271</sup>

In September 2012, the tribunal issued Procedural Order 3 ("PO 3"), in which it split the arbitration into two phases; Phase 1 would address the First Price Revision Request and Phase 2 would address the Second Price Revision Request.<sup>272</sup> PO 3 stated that Phase 1 would decide BOTAS's arguments as to the proper valuation of the K factor.<sup>273</sup>

The tribunal heard oral arguments concerning Phase 1 at the end of 2013. Following the hearing, the parties and the tribunal agreed that the tribunal would issue an "executive summary of its decision on phase 1."<sup>274</sup> This agreement was recorded in PO 8, which was issued in May 2014. PO 8 further stated that the executive summary would take the form of a procedural order and set out how the tribunal intended to phrase the pricing formula. The formula would

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<sup>270</sup> T 6165-16, p. 4.

<sup>271</sup> T 6165-16, p. 4.

<sup>272</sup> T 6165-16, p. 4.

<sup>273</sup> T 6165-16, p. 29. Phase 1 would also decide a counter claim that DEPA raised, but the counterclaim is not relevant to the set aside proceedings.

<sup>274</sup> T 6165-16, p. 5.

then be adopted in a partial award covering Phase 1.<sup>275</sup> Moreover, the revision would be based on changes to both factors in the contract's pricing formula (*i.e.*, the variable price relating to BOTAS's supply contract and the set oil index.)<sup>276</sup>

Following PO 8's issuance, the parties continued to disagree over how to define the K factor in the pricing formula. This disagreement was carried out through correspondence, as well as at a hearing in July 2014.<sup>277</sup> Following the hearing, the tribunal issued PO 11, in which it stated, "The revised Contract Price as a result of the First Price Revision request is to be directly based on [the pricing index] BAFA."<sup>278</sup> The tribunal reiterated that it may adopt a pricing formula different from the one in the agreement, but still reflected the parties' intention. Like PO 8, the tribunal stated that the contents of PO 11 were final.<sup>279</sup>

The tribunal also invited the parties to submit a joint proposal for the revised contract price that would fit within the tribunal's decision to base the price on BAFA. If the parties could not agree,

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<sup>275</sup> T 6165-16, p. 29.

<sup>276</sup> T 6165-16, p. 5.

<sup>277</sup> T 6165-16, p. 31.

<sup>278</sup> T 6165-16, p. 5. BAFA is the weighted average price of gas imports to Germany, as determined by Germany's Federal Office of Economic and Export Control. T 6165-16, p. 5.

<sup>279</sup> T 6165-16, p. 32.

however, the tribunal would determine “the precise wording of the revised Contract Price.”<sup>280</sup> Again, the parties could not agree. This led the tribunal to issue PO 12 in November 2014. In it, the tribunal stated it would decide the wording of the pricing formula, but felt that it needed to appoint an expert.<sup>281</sup>

The tribunal appointed an expert and instructed him to evaluate different iterations of the price formula. Both parties submitted multiple different possibilities for the expert to review. All of them had BAFA as a component, but also included an index related to Brent crude oil (the “Brent Index”). The expert issued his report in June 2015. The parties submitted written comments to the report, and questioned the expert at a hearing on 13 July 2015.

Two days later, on 15 July, the tribunal issued Procedural Order 15 (“PO 15”), which set out the formula the tribunal intended to adopt in the partial award for Phase 1. The tribunal announced that it settled on one of the formulas that BOTAS submitted. That formula’s K factor was indexed to Brent.<sup>282</sup> Unlike PO 8 and PO 11, PO 15 did not state that its contents were final and not subject to

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<sup>280</sup> T 6165-16, p. 32.

<sup>281</sup> T 6165-16, p. 33.

<sup>282</sup> T 6165-16, p. 34.

further discussion. The tribunal incorporated PO 15's price formula in the Phase 1 award, which was rendered in April 2016.<sup>283</sup>

DEPA requested that the Svea Court of Appeal set the award aside. Its principle claim was that the tribunal deviated from the contents of PO 11 by adopting a price formula that indexed the K factor to Brent, instead of directly basing the formula on BAFA. This constituted an excess of mandate or, alternatively, a procedural error.

DEPA focused significantly on the issue of the binding nature of the procedural orders. In its view, those orders—particularly PO 11—formed the boundaries of the tribunal's mandate. DEPA relied on two facts to support that claim. First, that the procedural orders represented agreements between the parties that were binding on the tribunal. Second, PO 8 and PO 11 specifically stated that their contents were final.

The court dismissed DEPA's claim for set aside. In order to assess the tribunal's mandate the court examined the principle disagreement between the parties, which it found was how to calculate the K factor. It then reviewed the procedural orders in the

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<sup>283</sup> T 6165-16, p. 5.

case to determine whether the tribunal was able to deviate from any or all of them.

It began by noting that PO 8 recorded an agreement between the parties and the arbitral tribunal. It also noted the agreement for an “executive summary” was meant to facilitate settlement between the parties. Further, the ICC Secretariat had confirmed that the ICC Rules permitted the proposed “executive summary.”<sup>284</sup> PO 8 did not settle the question of how to define the K factor, however.

According to the court, the K factor remained an open question even after PO 11. This could be seen from the appointment of the expert who assessed different formula. Moreover, during this process—which lead up to PO 15—the tribunal had made clear to the parties that it was considering formulas that indexed K to Brent. Moreover, the court noted that PO 11 did say that the contract price would be directly based on BAFA, but it did not say anything regarding the K factor.

The court ended its inquiry by finding that the partial award needed to be viewed in light of the Terms of Reference, which indicated that the tribunal was to determine how the K factor in the formula should be revised.

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<sup>284</sup> T 6165-16, p. 30.

Therefore, the court found that the tribunal did not exceed its mandate. It decided the issue it was supposed to decide according to the terms of reference. Moreover, that issue remained open and contested throughout the proceedings.

### 3.9 *CicloMulsion* AG ./ NeuroVive Pharmaceutical AB<sup>285</sup>

The *CicloMulsion* case provides a useful contrast to *DEPA*. Here the court found that the arbitral tribunal did exceed its mandate when it deviated from a previously issued procedural order.

In 2004, NeuroVive Pharmaceutical (a Swedish company) and *CicloMulsion* (a German company) entered into a license agreement. According to the contract, NeuroVive licensed pharmaceutical technology from *CicloMulsion*. The agreement also contained a purchase option, which NeuroVive exercised in 2010.<sup>286</sup>

*CicloMulsion* initiated SCC arbitration against NeuroVive in March 2013. NeuroVive counter-claimed. *CicloMulsion* made claims for declaratory relief, specific performance, and monetary relief. Three of its claims became the subject of the challenge proceedings.

The first claim concerned a request that the tribunal find that NeuroVive was required to pay royalties under the agreement.

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<sup>285</sup> T 2131-16, Haverätten över Skåne och Blekinge, 12 January 2018.

<sup>286</sup> T 2131-16, p. 3.

During the course of the arbitration, the tribunal issued Procedural Order 10 (“PO 10”). In it, the tribunal informed the parties that, when deciding whether NeuroVive owed royalties to CicloMulsion, the tribunal would assume that the payment of royalties was not contingent upon a “first launch” under the terms of the license agreement. The tribunal further explained that it might change its intended interpretation before finally deciding the issue. If it did, however, it would inform the parties and give them an opportunity to respond.<sup>287</sup> NeuroVive commented on the tribunal’s position in PO 11 in writing. CicloMulsion did not respond.

Later, the tribunal issued Procedural Order 12 (“PO 12”). In it, the tribunal invited the parties to comment on the use of expert and legal opinions. In the same procedural order, the tribunal that CicloMulsion “may also respond” to NeuroVive’s comments on the tribunal’s proposed contract interpretation in PO 10.<sup>288</sup> CicloMulsion did not respond. In the challenge proceedings, CicloMulsion claimed that it thought the matter had been settled by PO 10. It viewed NeuroVive’s comments as a means of preserving the right to challenge a future award, and not as a submission in the proceedings. Consequently, it did not feel that it needed to respond.

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<sup>287</sup> T 2131-16, p. 9.

<sup>288</sup> T 2131-16, p. 10.

In its partial award, the tribunal found NeuroVive was liable to pay some of the claimed royalties, but not others, depending on whether the royalty was tied to a first launch of the product.<sup>289</sup>

In the second claim, CicloMulsion requested that the tribunal declare that NeuroVive could not terminate the license agreement.<sup>290</sup> Specifically, CicloMulsion requested that the tribunal declare that “the License Agreement cannot be terminated by way of notice termination (Kündigung) by Respondent [NeuroVive].”<sup>291</sup> The tribunal also granted this request in its partial award. The award, however, phrased the declaration differently than what CicloMulsion had requested. The award read, “The Arbitral Tribunal declares that in the event Respondent terminates the License Agreement . . . Article 4 of the License Agreement will continue to apply . . . .”<sup>292</sup>

Under the third claim that became subject to the challenge proceedings, CicloMulsion requested that the tribunal declare that NeuroVive was obliged to make payments under the license agreement.<sup>293</sup> The tribunal granted this request, as well. While

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<sup>289</sup> T 2131-16, p. 38.

<sup>290</sup> T 2131-16, p. 18.

<sup>291</sup> T 2131-16, p. 18.

<sup>292</sup> T 2131-16, p. 19.

<sup>293</sup> T 2131-16, p. 45.

CicloMulsion phrased its request as a general obligation to pay, the award stated that NeuroVive was obligated to pay under Article 4 of the license agreement.<sup>294</sup>

Both parties challenged the award before the Scania and Blekinge Court of Appeal. CicloMulsion sought to have the royalties portion of the award set aside on the grounds that the tribunal committed a procedural error when it based its decision on a first launch. NeuroVive sought to have the two declaratory judgments set aside on the grounds that the tribunal exceeded its mandate when it “reformulated” CicloMulsion’s claim.<sup>295</sup>

The court granted CicloMulsion’s request and set aside the portion of the award relating to the royalties claim the tribunal committed a procedural error. The court explained that the tribunal did not err

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<sup>294</sup> T 2131-16, p. 45.

<sup>295</sup> T 2131-16, p. 18. NeuroVive also sought to have the same portion of the award set aside on the grounds that the tribunal committed a procedural error by admitting the claim too late in the proceedings. T 2131-16, p. 20. The court did not consider the procedural error ground, because it found for NeuroVive on the excess of mandate ground. T 2131-16, p. 44. And, in the alternative, NeuroVive sought to have the second declaratory award set aside on the grounds that the tribunal committed a procedural error by not informing NeuroVive that it intended to “reformulate” CicloMulsion’s claim. T 2131-16, p. 46. The court found that the tribunal did not exceed its mandate, because it did not reformulate the claim. T 2131-16, p. 45–46. Therefore, it likewise found that the tribunal did not have a duty to inform NeuroVive, because there was no reformulation. T 2131-16, p. 46–47. In any event, the court’s discussion regarding the procedural error ground will not be addressed in detail, because it does not add much value to the discussion in this chapter.

by changing the interpretation it set in PO 10. In fact, it had informed that parties that was a possibility. Instead, the court found that the tribunal erred by not following the procedure it had set out in case it should change the interpretation. Namely, that the tribunal would inform the parties that it decided to deviate from the interpretation and give them a chance to respond. Consequently, the court set aside the portion of the award related to the royalties claim.<sup>296</sup>

Regarding NeuroVive's claims, the court found that the tribunal exceeded its mandate by reformulating CicloMulsion's proposed declaratory relief. In the arbitration, CicloMulsion requested that the tribunal declare that NeuroVive was prohibited from terminating the license agreement. The court found, however, that the tribunal's declaration did not prohibit NeuroVive from terminating the license agreement. Instead, it made a declaration regarding the status of a provision in the contract in the event that NeuroVive would terminate. In the court's view, this meant that the tribunal granted something beyond what was claimed, which constituted an excess of mandate. In addition to finding that the

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<sup>296</sup> T 2131-16, p. 51. CicloMulsion had requested that the tribunal refer the royalties issue back to the tribunal so that they may amend the award to eliminate the ground for set aside, which is permitted under Section 35 of the SAA. T 2131-16, p. 50. The court denied CicloMulsion's request, partially on the basis that it would be inappropriate to send the award back to the tribunal if there was no clear, objective way the flaw could be remedied. T 2131-16, p. 51.

tribunal exceeded its mandate, the court also found that the excess affected the outcome of the case.<sup>297</sup>

Conversely, the court denied NeuroVive's claim to set aside the award for excess of mandate in relation to the second declaratory request. Here, the court found that the rephrasing did not result in a grant of something more than what CicloMulsion requested. The court noted that NeuroVive was correct to argue that Article 4 contained more obligations than just payment, and CicloMulsion's claim was a declaration regarding the payment obligation only. The court found, however, that the tribunal had only declared that NeuroVive was obligated to pay under Article 4. The declaratory judgment did not concern any other obligations. Consequently, the tribunal had not granted more than what was requested, despite the fact the declaration was phrased differently than the request for relief.<sup>298</sup>

### 3.10 Soyak International Construction & Investment, Inc. ./. Hochtief AG<sup>299</sup>

The *DEPA* and *CicloMulsion* cases touch on the potential overlap between excess of mandate and procedural error. In *DEPA*, the

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<sup>297</sup> T 2131-16, p. 44.

<sup>298</sup> T 2131-16, p. 45–46.

<sup>299</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009.

party challenging the award argued that deviation from a procedural order constituted excess of mandate, while the challenging party in *CicloMulsion* claimed that such deviation constituted procedural error. The *Soyak* case also deals with the difference between excess of mandate and procedural error—but in relation to an award’s reasoning.

In 1999, Hochtief, a German general contractor, entered into a construction contract with Soyak, a Turkish company, for work to be done on a movie theater in Moscow.<sup>300</sup> The contract contained an arbitration clause calling for arbitration that was to be administered by the SCC.<sup>301</sup> In June 2000, Hochtief terminated the agreement.<sup>302</sup> Soyak initiated arbitration proceedings, seeking a declaratory judgment and USD 5.5 million in damages. Hochtief counter claimed for USD 8 million.<sup>303</sup>

The arbitral tribunal dismissed Soyak’s declaratory claim, but awarded Soyak just over USD 950,000 and awarded Hochtief

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<sup>300</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 128.

<sup>301</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 128. The arbitration agreement called for the SCC to administer the arbitration under the ICC rules. At the request of the SCC, however, the parties agreed to conduct the arbitration under the 1999 version of the SCC rules, which were the rules applicable at the time the parties entered into their agreement.

<sup>302</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 128.

<sup>303</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 128.

approximately USD 1.7 million.<sup>304</sup> This meant that Soyak was liable to Hochtief for the difference between the two amounts.<sup>305</sup>

Soyak challenged the award, claiming that the tribunal had failed to provide sufficient reasons for its decisions. Soyak claimed that the tribunal rendered a defective, incomplete, or contradictory award, which constituted an excess of mandate under Section 34 of the SAA.

Hochtief made several arguments in its defense, many in the alternative. The first three are the most relevant here. First, Hochtief argued that the tribunal did not exceed its mandate, even if it rendered a defective, incomplete, or contradictory award.<sup>306</sup> Such conduct could only constitute a procedural error and Soyak had not argued that the tribunal committed a procedural error.<sup>307</sup>

Secondly, Hochtief argued that the tribunal did not exceed its mandate because it rendered an award that contained reasons, even if the rest of the award was faulty in the manner that Soyak alleged.<sup>308</sup> The parties, in Hochtief's view, agreed that the award

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<sup>304</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 128. The parties were equally liable for the costs of the arbitration and bore their own legal fees.

<sup>305</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 128.

<sup>306</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 129.

<sup>307</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 129.

<sup>308</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 129.

should contain reasons, but had not come to any agreement concerning the contents or quality of the reasoning.<sup>309</sup> Nor did the SCC rules contain and provisions regarding the quality of the reasoning, according Hochtief.

Third, Hochtief argued that if the court did find that the arbitration agreement called for an award that was not defective, incomplete, or contradictory, the award met those requirements in any event.<sup>310</sup>

Soyak's challenge was eventually heard by the Supreme Court. The court upheld the award in Hochtief's favor after considering two questions: whether alleged faults in an award constituted an excess of mandate or procedural error; and, regardless of classification, whether Soyak's allegations were enough to justify setting the award aside.

The court reviewed the SAA's preparatory works and relevant academic writings in order to determine whether insufficient reasoning constituted an excess of mandate. The court noted that the preparatory works indicate that an excess of mandate can occur if the arbitrators break from the parties' instructions, but quoted

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<sup>309</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 130.

<sup>310</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 129. Hochtief further argued—in the alternative—that the excess of mandate did not affect the outcome of the case, but if it did, only a portion of the award should be set aside.

similar language from the portion of the preparatory works concerning procedural error.<sup>311</sup>

The court looked to the separate writings of Lindskog and Finn Madsen, which defined procedural error as the failure of the tribunal to conduct the proceedings in accordance with the parties' agreements, among other things.<sup>312</sup>

Finally, the court looked to the expert evidence of Bengt Lindell, who gave evidence on behalf of Hochtief. According to Lindell, the question of an award's reasoning is part of the formal process in the arbitration. It has nothing to do with what is to be decided. Consequently, poor reasoning does not affect the tribunal's mandate and can only be challenged on procedural error grounds.

Based on its review, the court found the above sources persuasive and held that challenges to the reasoning in an award should be raised on procedural error grounds, not excess of mandate.

On the issue of whether the award in question contained sufficient reasoning, the court found that it could not review the quality of and the tribunal's written reasons. According to the court, stating reasons for an award guarantees legal certainty,<sup>313</sup> because it forces

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<sup>311</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 133–134.

<sup>312</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 134

<sup>313</sup> In Swedish: "rättssäkerhetsprincip"

the arbitrators to analyze the evidence and legal questions in a case.<sup>314</sup> Despite the value of legal certainty, however, the court also noted the importance of the finality of arbitral awards.<sup>315</sup> In the court's view, opening up awards for review of the quality of their reasoning would also open them up to a more general review for errors that is not permitted.<sup>316</sup>

### 3.11 Russian Federation ./ ALOS 34 S.L., et al.<sup>317</sup>

*ALOS* demonstrates the potential overlap of jurisdiction and mandate. A group of Spanish investment funds initiated arbitration against the Russian Federation. The funds claimed, among other things, that the Russian Federation had expropriated their investments in the Yukos Oil Company.<sup>318</sup> The claims were raised pursuant to the Spanish-Russian bilateral investment treaty and filed with the SCC.<sup>319</sup>

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<sup>314</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 140.

<sup>315</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 140.

<sup>316</sup> NJA 2009 s 128, Högsta domstolen, 31 March 2009, p. 140.

<sup>317</sup> T 9294-12, Svea Court of Appeal, 7 June 2018

<sup>318</sup> T 9494-12, p. 3.

<sup>319</sup> T 9494-12, p. 3. It is important to note that the claim was brought before the SCC and seated in Sweden. Therefore, set aside proceedings are governed by Section 34 of the SAA, despite the fact that the case involved an investment claim.

The Russian Federation challenge the tribunal's jurisdiction at the outset of the arbitration.<sup>320</sup> In March 2009, the tribunal found it had jurisdiction.<sup>321</sup> Then, in September 2009, the Russian Federation took its jurisdictional claims to the Stockholm District Court.<sup>322</sup>

In the meantime, the arbitration proceeded. Almost three years later, in July 2012, the tribunal found in favor of the Spanish investors.<sup>323</sup> The question of the tribunal's jurisdiction, however, was still pending before the Swedish courts and did not get resolved until January 2016, when the Svea Court of Appeal found that the arbitral tribunal did not have jurisdiction.<sup>324</sup>

The Russian Federation challenged the award on the ground that the Svea Court of Appeal found that the tribunal lacked jurisdiction. The Russian Federation claimed that the award should be set aside because no arbitration agreement existed between the parties and that the tribunal exceeded its mandate (or committed a procedural error) by deciding issues that were not covered by an arbitration agreement.<sup>325</sup>

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<sup>320</sup> T 9494-12, p. 3.

<sup>321</sup> T 9494-12, p. 3.

<sup>322</sup> T 9494-12, p. 3.

<sup>323</sup> T 9494-12, p. 3.

<sup>324</sup> T 9494-12, p. 3.

<sup>325</sup> T 9494-12, p. 4–6.

The court set the award aside. The court acknowledged that the Russian Federation claimed both lack of jurisdiction and excess of mandate, which are separate grounds for set aside under the SAA.<sup>326</sup> It further acknowledged that neither the SAA’s preparatory works nor the legal doctrine provided a clear answer about how to draw a boundary between the two provisions.<sup>327</sup> The court, however, did not attempt to bring clarity to what it admitted was an unclear area of the law. Instead, the court simply stated that deciding the case on one ground or the other did not make any “practical” difference.<sup>328</sup> Specifically, “Regardless of whether lack of jurisdiction is viewed as a grounds for challenge under the first or second [now third] paragraph of Section 34 of the SAA, the award should be set aside because the tribunal lacked the authority to deal with the claim brought by the Spanish investment funds.”<sup>329</sup>

## 4. ANALYSIS

In Section 5.3 below, I propose that Swedish law’s treatment of excess of mandate falls roughly into one of two approaches. Both approaches seek to clearly define the mandate, but one approach

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<sup>326</sup> T 9494-12, p. 8.

<sup>327</sup> T 9494-12, p. 8.

<sup>328</sup> T 9494-12, p. 8.

<sup>329</sup> T 9494-12, p. 8 (translation from Swedish by the author).

does so primarily for the sake of the parties. The other does so primarily for the sake of the arbitrator.

Before discussing the two approaches in greater detail, this section will first identify important principles from the legal sources above. Those principles form the basis of the proposed two-approach model.

First, this section discusses the application of the CJP to arbitrations seated in Sweden. Namely, that one should assume the application of the CJP to arbitrations seated in Sweden, based on the preparatory works and cases like *Systembolaget* and *TNG*. Even its application in international arbitration is theoretically consistent with the preparatory works, but it remains particularly unclear when an arbitration should be considered to have strong enough ties to Sweden to warrant its application.

Next, this section discusses the *Systembolaget* case's importance on the role of recitals in arbitrations seated in Sweden. Recitals should be considered binding and exhaustive in an arbitration—unless the parties agree otherwise. Relatedly, this section discusses how parties opt out of the strict application of recitals, with a focus on the *TNG* case.

Finally, this section analyzes the “two approach” understanding of excess of mandate in greater detail. The two-prong approach

understanding is then tested by applying it to a hypothetical factual scenario.

#### 4.1 Application of the CJP

It might be tempting to consider *Systembolaget* as the watershed moment in which Swedish courts formally adopted the position that Chapter 17 of the CJP should apply to arbitrations seated in Sweden. Similarly, one could view the *TNG* case as extending the same principles to international arbitrations. This approach is not incorrect, but does not identify the most important aspects of the two cases.

For example, one could argue that the *Systembolaget* holding would have generated more controversy if the court had not applied Chapter 17 of the CJP. The preparatory works make clear that it is “natural” for Swedish parties to rely the CJP’s application in domestic arbitrations. Its application is not rigid, however. Parties are free to agree to apply the code more or less restrictively.

Consequently, it is clear from the preparatory works, the legal literature, and case law that Chapter 17 of the CJP applies in arbitrations seated in Sweden. Even its application to international arbitrations seated in Sweden is consistent with the preparatory works in principle.

Despite this seeming clarity, one cannot deny that *Systembolaget* generated discussion, if not controversy, within the Swedish legal community.<sup>330</sup> One potential explanation for this is that the *Systembolaget* represented a confirmation of the historical expansion of the concept of excess of mandate as it was adopted in the 1999 SAA.

It is beyond the scope of this project to give an exhaustive historical analysis of the differences between the 1999 act and its predecessor, which was adopted in 1929. Still, one should quickly note that the boundaries of what constituted excess of mandate expanded from 1929 to 1999, despite the fact the 1999 act adopted essentially the same text as the 1929 act.<sup>331</sup> Both directed that an award be set aside if the arbitrator exceeded his or her mandate.

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<sup>330</sup> Compare, e.g., Niklas Elofsson, *Inverkandekrav vid skiljedomskländer*, SvJT 2010 s. 829 with Frekrik Sjövall, *Om vådan av lagstiftning genom förarbeten – en kommentar till artikeln Inverkandekrav vid skiljedomskländer*, SvJT 2011 s. 96. See also, Jan Ramberberg and Patricia Shaughnessy, *Excess of Mandate – Navigating Nordic Judicial Review of Arbitrator Decision-Making*, JFT 2011/4–5 s. 628.

<sup>331</sup> Section 21(1) of the 1929 act (SFS 1929:145) read: “*På parts talan skall skiljedom av domstol hävas . . . i den mån skiljemännen överskridit sitt uppdrag eller meddelat dom efter utgången av den därför bestämda tiden . . .*”, while Section 34 of the 1999 act (prior to the 2019 amendments) read, “*En skiljedom . . . skall efter kländer helt eller delvis upphävas på talan av en part . . . om skiljemännen har meddelat dom efter utgången av den tid som parterna bestämt eller om de annars har överskridit sitt uppdrag . . .*” (emphasis added).

When the 1929 act was adopted, the concept was meant to cover requests for relief, not the parties' pleadings.<sup>332</sup> Quite simply, the formalistic approach regarding which "circumstances" needed to be "invoked" did not exist in Swedish procedural law when the 1929 act was passed.<sup>333</sup> These terms of art were not adopted until 1948, which meant that they were not something that the drafters of the 1929 arbitration act considered.<sup>334</sup> Consequently, the focus was on whether an arbitrator awarded relief *ultra petita*, not on whether a party has properly invoked an ultimate circumstance.<sup>335</sup>

Conversely, the formal concept of invoking ultimate facts existed in Swedish procedural law at the time the 1999 act was adopted.<sup>336</sup> Moreover, the drafters of the 1999 acts preparatory works specifically addressed the concept, as described above.<sup>337</sup> Consequently, the Code of Judicial procedure was intended to apply to the SAA in some fashion, which the preparatory works made clear.

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<sup>332</sup> Sjövall, *supra* note 330, at 97–98.

<sup>333</sup> Sjövall, *supra* note 330, at 97. The current understanding of these terms is discussed in Section 3.3 above.

<sup>334</sup> Sjövall, *supra* note 330, at 97–98.

<sup>335</sup> Sjövall, *supra* note 330, at 97–98.

<sup>336</sup> Sjövall, *supra* note 330, at 97–98.

<sup>337</sup> See Section 2.2 above.

There remains an outstanding issue, however, regarding when it should apply in international arbitrations. As discussed below, the *TNG* court's reliance on "strong ties" to Sweden did not provide much guidance on the issue.

#### 4.1.1 "Strong ties" to Sweden

When it comes to international arbitrations seated in Sweden, the preparatory works allow for the application of Chapter 17 of the CJP.<sup>338</sup> The only caveat provided is that "greater caution" is needed when considering its application in international arbitrations than in domestic arbitrations. What that means is not exactly clear. In the *TNG* holding, the court examined the extent to which the arbitration had "strong ties" to Sweden.

Specifically, the court made passing reference to four potential factors: the seat of arbitration; the applicable law; the nationality of the chair of the tribunal; and the nationality of the parties' respective counsels. In *TNG*, all of those factors were connected to Sweden. But the court did not explain whether other factors should be considered, such as the applicable arbitral rules. Moreover, the court did not offer guidance on whether each factor should be weighed equally, or whether one or more factors should carry more weight. For example, consider the scenario in which all of the

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<sup>338</sup> See *supra* Section 2.2.

factors remained the same, but the applicable substantive law was non-Swedish. In that scenario, one could argue that the counsels and the chair would still “naturally” rely on Swedish procedural principles throughout the course of the arbitration.

On the other hand, consider if one of the counsels had been from a non-Swedish legal tradition and not familiar with Swedish procedural principles. It would be less “natural” to apply Chapter 17 of the CJP if it meant that one party’s counsel would face a disadvantage. Alternatively, consider the example where Swedish counsel were arguing Swedish applicable law before a non-Swedish tribunal that was unfamiliar with Swedish procedural norms. Should the award be jeopardized because the tribunal considered a fact that was disputed in the arbitration, but not “invoked” in the formal Swedish sense?

The *TNG* court did not answer these questions, much less raise them. And subsequent Swedish cases have not offered guidance on the issue. For example, the *Trannell* case was decided after *TNG*. In that case, one party was Swedish and the other Maltese. The sole arbitrator was Swedish, as were the law firms representing the two parties. The arbitration was international in that one party was non-Swedish. Despite this fact, the court did not raise the question of whether the CJP was applicable. It just assumed that it was.

I do not propose a definitive answer to the question of when Chapter 17 of the CJP should apply in international arbitrations, because answering that question does not change my suggested approach to understanding excess of mandate in Sweden. One can, however, identify some underlying principles that may help in finding an answer.

One possible approach would be to view the application of the CJP primarily as a question of efficiency. The preparatory works refer to the use of the CJP as “natural” when those involved already understand Swedish procedural law. In other words, the parties would be expected to apply those principles even if the preparatory works did not mention the CJP at all. This avoids requiring the parties to agree to and apply procedural norms and principles different from those with which they are all most familiar.

The question of efficiency can then be examined from the point of view of the who are the “main actors” in the arbitration. The main actors are those individuals who are the key drivers of the procedural elements of the arbitration. For example, primary counsel (if one or more parties are represented by multiple firms) and the members of the tribunal.

If the main actors are well versed in the Swedish procedural tradition, then the application of the CJP might be assumed. In such a case, one could argue that the most important factors in the

determining whether an arbitration has “strong ties” is the nationality of the parties’ primary counsels and at least one member of the arbitral tribunal.

Efficiency must be viewed in light of fairness, as well. In situations where Swedish-trained counsel is pleading before a Swedish arbitrator, then there is less possibility that one side will be disadvantaged by not knowing the Swedish procedural norms. On the other hand, if at least one of the counsels is not Swedish, the opportunity for disadvantage increases greatly. And if the tribunal is not trained in Swedish procedural law, it might unnecessarily endanger the award by expecting the tribunal to adhere faithfully to the CJP.

Finally, one can also question whether it makes a difference if the Swedish member of the tribunal is the chair or a wing arbitrator. One could argue that the chair is in a better position to guide her fellow arbitrators through the Swedish system than a wing arbitrator.

As stated above, it remains unclear from the preparatory works and the court’s approach in *TNG* when Chapter 17 of the CPJ should apply in international arbitrations. I do not offer a definitive answer, but do suggest that the legal backgrounds of the main actors serves as a useful analytical starting point.

In cases where Chapter 17 applies, the parties are required to invoke the relevant circumstances in the case. The default method for doing so is the recitals. These are discussed in the section below.

#### 4.2 The recitals are all encompassing, unless the parties agree otherwise

The recitals play an important role in Swedish arbitration law. Their use seems natural to Swedish parties, but international parties must also wrestle with their use if the arbitration is deemed to have “strong ties” to Sweden. The current state of the law demonstrates that the primary purpose of the recital is to collect the entirety of the issues in dispute in one document. In fact, this is where *Systembolaget*’s holding bears the most importance.

The court in *Systembolaget* was faced with the question of how strictly an arbitrator should apply the CJP if the parties are silent on that issue. Specifically, the parties argued over whether the recitals should be assumed to contain all of the invoked circumstances in the case. V&S argued that it should be considered as binding unless the parties agree otherwise. Systembolaget argued that the recitals should only be binding if the parties have agreed as much. In other words, V&S argued that the court should apply an opt-out approach to the binding nature of the recitals, whereas Systembolaget argued for an opt-in approach.

By finding in V&S's favor, the court set an important default rule. Unless the parties agree otherwise, the recitals should be assumed to contain the entirety of the invoked circumstances.

The facts in *TNG* complicated this rule. The parties made a concerted effort to opt out of the default rule, but great resistance from the tribunal. The potential implications of this are discussed in the next section.

#### 4.2.1 Opting out of the use of the recital

The *TNG* ruling raises an issue of how parties can opt out of the binding nature of the recitals. As discussed above, the parties in *TNG* did not want the recitals to be an exhaustive summary of their respective cases.<sup>339</sup> The first draft recitals that the parties submitted contained language stating just that. Despite this disclaimer, the tribunal insisted that the recitals needed to be exhaustive. Even in the face of this insistence, the parties sent a joint letter to the tribunal stating that they would not accept that the recitals be binding. It was only after the tribunal's continued insistence that the parties acquiesced.

There are two points where one could argue that the parties agreed to opt-out of the use of binding and exhaustive recitals. The first

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<sup>339</sup>See *supra* Section 4.2.

point where the parties might be considered to have agreed is in the disclaimer in the first draft recitals. This, of course, did not take the form of a formal agreement between the parties. But it did represent the parties' joint intention that the first draft was a non-binding summary of the dispute meant to assist the tribunal. If the disclaimer did not constitute a party agreement, then there is a stronger argument that their joint letter to the tribunal did.

It is unclear whether the tribunal's continued insistence on binding recitals despite the parties' agreement constituted an excess of mandate or procedural error in its own right. What is clear, however, is that the tribunal insisted on the recitals for reasons that they felt were well founded. They believed that they needed to be "perfectly clear" regarding what they needed to decide in their award. They wanted a clear definition of the boundaries of their mandate. Few would argue that this was an unreasonable request.

Still, the primary rule in *Systembolaget* and *TNG* is that recitals are exhaustive by default, but not an absolutely requirement for forming the arbitrator's mandate. Parties can opt out of the strict use of the recitals. The following section looks at how the boundaries of a dispute can be defined if the parties do just that.

#### 4.2.2 Invoking circumstances on a continuum

First, a distinction needs to be made between the applicability of Chapter 17 of the CJP in an arbitration and the role of recitals in an arbitration. The applicability of Chapter 17 requires that a party invoke the relevant circumstances that form the basis of its case. This is separate from the use of exhaustive and binding recitals, which is one method for invoking those circumstances. Therefore, opting out of the strict use of recitals does not necessarily mean the parties have opted out of the requirement that relevant circumstances need to be formally invoked.

As stated above, a circumstance is considered invoked if the opposing party “must realize that . . . it is considered immediately relevant to the relief sought.”<sup>340</sup> How this is done might best be considered in terms of a continuum. On one end of the continuum is the idea that an arbitrator cannot decide the case based on circumstances that have never been mentioned in the arbitration. Those circumstances do not need to be formally invoked, but they need to exist somewhere in the case materials. This requirement is a widely accepted norm in international arbitration; not just those seated in Sweden.

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<sup>340</sup> Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, 29 JURIDISK TIDSKRIFT 172, 177 (2017). *See also supra* fn. 204 and accompanying text.

As one moves along the continuum, the CJP becomes applicable at least in some form. If it is applied to the arbitration, the parties need to make clear the nature of the facts that they are using to support their case. Ultimate facts, for example, must be “invoked.” A party may make it clear in its written submissions the facts that it is invoking. It follows from the preparatory works and literature that the SAA requires at least this much fidelity to the CJP, unless the parties agree otherwise.

Finally, one can move to the opposite end of the continuum. At this end, not only does the CJP apply, but so do formal Swedish court procedures, such as the reliance on the recitals as the complete source of the invoked circumstances.

The above continuum represents the development of the CJP’s applicability in arbitrations seated in Sweden. The preparatory works moved the Swedish arbitration law from the far, most general end to the middle position. It was not enough that the circumstances exist somewhere in the file, but they should be invoked and their nature identified. Open questions remained as to how they needed to be invoked. *Systembolaget* then moved the law’s place even further along to the end of the continuum. Now the default position became that the recital was the source of all invoked circumstances, unless the parties agree otherwise.

#### 4.3 Two approaches: arbitrator-centric (well-defined dispute) or party-centric (avoiding surprise)

This chapter proposes that when a Swedish court sets aside an award for either excess of the arbitrator's mandate or procedural error, it is protecting two principle interests: ensuring a clearly defined mandate and preventing party surprise. The courts do not apply one approach to the exclusion of the other. Instead, it is a matter of which approach is given more importance.

I call the first approach the "arbitrator-centric approach." It promotes a system in which parties are required to clearly define the arbitrator's mandate through their submissions. It prioritizes certainty, even if that means adopting an overly formalistic slant. Cases that focus extensively on questions of whether the relevant circumstances have been properly invoked lean more toward the arbitrator-centric approach. These include *Systembolaget*, *TNG*, and *Trannell*. There the focus on questions of whether an ultimate fact had been invoked and what role the recitals should play in that process.

The party-centric approach is best represented by cases that are more concerned with questions of the parties' agreements during the course of the arbitration and whether the arbitrators were bound to their procedural orders. These include the *DEPA* and *CicloMulsion* cases.

One could argue that those two cases turned on whether or not the parties were surprised. The court in the *DEPA* case did not set aside the award, even though the tribunal deviated from its statements in previous procedural orders. The tribunal had made it made clear where it had changed course and gave the parties the opportunity to respond. In fact, PO 15 explicitly stated the formula that would be used in the final award. Thus, the respondents could not claim to be surprised by the outcome.

The court in the *CicloMulsion* did set the award aside. Like *DEPA*, the tribunal adopted a different approach to an issue than what it had stated in an earlier procedural order. The court did not fault the tribunal for changing its previously stated interpretation. In fact, the tribunal had informed the parties of that possibility. Instead, the tribunal committed a procedural error by failing to follow the procedure it set out in a procedural order. Here, one party was caught off guard by the tribunal's change of stance because it assumed that the tribunal would inform the parties of the change by following the stated procedure.

The application of the two approaches will be tested against a hypothetical scenario below.

#### 4.4 A hypothetical

Consider a hypothetical arbitration between two non-Swedish parties seated in Sweden. In this scenario, the parties meet for the case management conference to discuss different aspects of the arbitral procedure. They can only agree on a handful of the issues raised during the conference. The arbitrator asks if the parties consent to allowing her to decide the remaining issues. They consent.

Later, the arbitrator distributes PO 1, which details the arbitral processes up to and including the final hearing. PO 1 does not indicate which issues that the parties agreed to in the case management conference and which issues she decided.

PO 1 includes deadlines for written submissions and the submission evidence. PO 1 states, “In the spirit of due process and procedural efficiency, the identified dates shall not be changed under any circumstances.”

The arbitration proceeds and the parties adhere to the deadlines set out in PO 1. Following the last submissions, but prior to the final hearing, the arbitrator distributes draft recitals to the parties. The parties review the recitals and confirm that they are an exhaustive representation of the issues in their respective cases.

Two weeks before the final hearing, however, the claimant comes across new evidence that it believes is pertinent to its case. It submits this evidence to the arbitrator and the respondent, along with a short, written submission explaining the evidence's relevance. The claimant also explained that it only recently discovered the evidence and could not have reasonably discovered it before the final date set out in PO 1. The claimant further explains that, in its view, the deadlines were decided by the arbitrator according to her procedural authority. Consequently, she could use the same authority to extend the deadlines.

The respondent protests the submission of the new evidence. It submits its own notes from the case management conference, which it claims demonstrate that the parties had agreed on the dates. Therefore, the arbitrator does not have the authority to extend the dates.

In the alternative, the respondent argues that the entirety of PO 1 represented an agreement between the parties, because the parties agreed to allow the arbitrator to decide any undecided issues. In the respondent's view, any procedural issue decided by the arbitrator represented party agreement by extension.

The arbitrator notifies the parties that she is in possession of the new submission, but has not taken a decision as to whether to admit it. She instructs the parties that she will reserve a block of time

during the final hearing to allow the parties to argue whether or not the evidence is admissible.

Following the final hearing, the arbitrator issues an award in favor of the claimants. Not only does she decide to admit the new evidence, it is a key factor in her analysis. The respondent challenges the award on the grounds that the arbitrator exceeded her mandate under the SAA, among other grounds.

There are a number of ways that one can analyze the above scenario. But for clarity's sake, the following focuses solely on the excess of mandate issue, leaving aside any potential procedural error or due process concerns.<sup>341</sup>

An arbitrator-centric approach would center in on recitals. There would be a number of issues that the court would need to decide under this analysis. First, the court may consider the strength of the arbitration's connection to Sweden before deciding how stringently

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<sup>341</sup> Underlying these questions is a more fundamental question of deference to the arbitrator. The parties asked the arbitrator to determine the scope of her powers by interpreting PO 1 and party intent. It is unclear whether these issues should be reviewed de novo by the court. It is possible that they should be viewed as touching on the merits. To do that, she needed to interpret PO 1. Was it clear on its face that it represented an agreement between the parties on all issues? If she found that it was not, she then needed to interpret party intent. Did the parties agree on the issue of deadlines at the case management conference? If not, did they agree to treat the arbitrator's procedural decisions as though they were party agreement. Could the parties even bind the arbitrator in that way?

to apply Chapter 17 of the CJP. Taking an extreme example, if both parties, their counsels, and the arbitrator were from countries other than Sweden, the court may not put much weight on whether the new evidence related to the recitals.

If it did find that parties are required to formally invoke ultimate facts, the court might review whether the late submission invoked any ultimate facts that were not found in the recitals. If it had not, then the court would likely not find that the arbitrator exceeded her mandate. Finally, the court would consider the question of whether the new evidence affected the outcome of the case. If it did, then the award would be set aside.

Like *TNG*, a key issue in the dispute—whether the deadline should be extended—was still in dispute as of the final hearing. Still, the court did not consider whether this could have effectually surprised the claimant, who had expected the recitals were non-exhaustive leading into the final hearing. The issue of timing, however, is more relevant under the party-centric approach.

Under a party-centric analysis, the court would put more emphasis on whether the respondent was surprised by the change in deadline and late admission of evidence. Unlike *CicloMulsion*, there was no set procedure covering the process for the arbitrator changing her position regarding the deadlines. However, the procedure that was used came at a late stage in proceedings—which gives more leeway

for the respondent to argue surprise or that they were not given a fair opportunity to rebut the new evidence.

In any event, the above demonstrates how the factual issues that a court will consider will be different depending on whether they are relying on an arbitrator- or party-centric approach.

## 5. CONCLUSION

This chapter sought to present the current state of excess of mandate in Swedish law. Ultimately, the Swedish approach will be critically compared with the US approach that is laid out in Chapter 3.

Regarding the concept in Swedish law, one can note the following characteristics. The arbitrator's mandate is defined by party agreement and by individual parties to a dispute. Party agreement includes the arbitration agreement itself, as well as any other joint agreements that the parties enter into during the course of the arbitration. Deviating from the party's agreement usually constitutes an excess of mandate, although Swedish legal scholars do not agree regarding whether all deviations should be considered an excess of mandate.

Despite the importance of party agreements in forming the mandate, most allegations that an arbitrator exceeded her mandate are raised in relation to the parties' individual submissions. These

submissions can be divided into two categories. First, the request for relief. Allegations that an arbitrator deviated from the claimant's requests for relief form the traditional basis for excess of mandate claims. Here, one can consider the easy case in which a party asked for a certain amount in monetary damages and was awarded more than that amount. Harder cases also exist. These cases often concern situations when an arbitrator awards something that is different in nature from what was requested.

In addition to the request for relief, the parties' factual and legal submissions can also form the basis of the arbitrator's mandate. In light of the preparatory works and Swedish case law, questions regarding excess of mandate usually relate to whether the arbitrators decided an issue based on an ultimate fact that was properly invoked. Following *Systembolaget* and *TNG*, questions regarding the invoking of ultimate facts relate most closely to the role of the recital in arbitrations seated in Sweden. While it is clear that, absent party agreement, the recitals are the exclusive source of the ultimate facts being invoked, it is much less clear when—or if—these requirements should be applied in international arbitrations.

Additionally, deviating from procedural orders that represent the arbitrator's instructions may also give rise to claims that an arbitrator has exceeded her mandate. This research project,

however, was unable to identify any cases under the current SAA in which a court ruled that deviation from a procedural order that did not record a party agreement constituted an excess of mandate.

In light of the above, this Chapter argues that one can divide excess of mandate cases into two conceptual approaches. Under the first approach, courts are contributing to a system that clearly defines the arbitrator's mandate. This approach focuses on the question of whether ultimate facts have been properly invoked in the recitals. The other approach prioritizes the principle that a party not be surprised.

As will be described in the comparison portion of this research, this dichotomy fits loosely together with the US approach, which leans either toward emphasizing the arbitrator's judicial role or the arbitrator's contractual role.

## CHAPTER 4: ANALYSIS AND CONCLUSIONS

### 1. INTRODUCTION

The purpose of this chapter is to present a number of hypothetical scenarios and, based on the descriptions of US and Swedish law in the previous chapters, compare how a US court or a Swedish court may handle an application for set aside. In the preceding chapters, I examined the Swedish and US legal approaches to excess of mandate separately in order to identify and analyze the component parts of the concept in each jurisdiction. In this chapter, I will compare the elements of excess of mandate between the jurisdictions.

At the start of this research project, I set out to build a theoretically coherent definition of the concept of excess of mandate by identifying similarities between two seemingly disparate systems. Neither country has adopted the Model Law. The US FAA predates both it and the New York Convention by several years. Conversely, the current version of the SAA was enacted and amended following the adoption of the New York Convention and promulgation of the Model Law. It seeks to at least draw inspiration from the harmonizing principles underlying these sources of law. Moreover,

the United States' and Sweden's procedural traditions differ from one another. Among many other things, the United States generally grants its judges more authority over the case and the parties than Sweden does. This fact could, potentially, influence how each system views the rights and duties of arbitrators in their capacities as quasi-judges.

My initial hope was that the systems would define excess of mandate fundamentally the same, despite differences in language, legal history, and procedural traditions. This is not so. I am able to identify circumstances that constitute excess of mandate and, likewise, circumstances that do not constitute excess of mandate in both systems. In some ways, however, these similarities are superficial—at least in a legally scientific sense. Instances in which a Swedish and US court would both agree that certain conduct does or does not constitute excess of mandate are usually similar in outcome only. The way in which any of the two countries' courts come to the conclusion, however, are too different for me to conclude that there are identifiable, underlying principles that can lead to a framework for understanding the multiple other formulations of excess of mandate that exist.

I do not want to give the impression that this project is fruitless. In fact, the opposite is true. My research helps to reveal that there is no universal definition of “excess of mandate” (or, “excess of

authority”) despite the prevalence of that term or similar in the international commercial arbitration community. This is particularly the case when it comes to set aside proceedings in jurisdictions that have not adopted the Model Law (a list that includes not only the United States and Sweden, but France, Switzerland, England, Wales, and Northern Ireland, and the Peoples’ Republic of China, among others).

Below, I present a hypothetical scenario that will demonstrate just how differently the two systems approach the concept of excess of mandate. Finally, I present my research conclusions—chief among which is the fact that the law at the seat of arbitration is the primary driver in how one defines excess of mandate in set aside proceedings.

The two most common grounds for challenging arbitral awards under the SAA are excess of mandate (“*uppdragsöverskridande*”) and procedural error (“*handläggningfel*”). Parties often plead both in connection with the same facts. The reasons for the joint pleadings are two-fold. First, it is supposedly difficult to draw a clear theoretical distinction between the two grounds. Second, it is strategically worthwhile to plead both—either because it is difficult to distinguish between the two grounds or because the challenging party wants to ensure that it “covered its bases” by providing all colorable arguments.

As explained in Chapter 2, the two grounds may not be as indistinguishable as previously thought. Specifically, the Swedish courts have consistently focused on the scope and terms of the parties' submissions that the arbitrator considered when rendering the award when considering questions of excess of mandate. Conversely, courts have focused on potentially prejudicial errors that occurred during the course of the arbitration when considering questions of procedural error. At the risk of oversimplifying the difference, questions of excess of mandate relate to *what* the arbitrator decided in the final award, whereas questions of procedural error concern *how* the arbitrator conducted the arbitration leading up to the issuing of the final award. I highlight the most significant of those here in order to demonstrate my point.

One could argue that the two most important cases regarding excess of mandate since the adoption of the SAA in 1999 are the *Systembolaget* case and the *TNG* case. The reason for this is that they, in turn: 1) established the default rule for the use of recitals in Swedish domestic arbitration law; and 2) made clear that the same rule can apply in international cases.

In *Systembolaget*, the Svea Court of Appeal decided how recitals would be treated in Swedish domestic arbitration; *i.e.*, that they would be assumed to apply unless the parties agreed to opt out of their application. The reader may recall that under the Swedish

Code of Judicial Procedure, recitals are summaries of the parties' arguments that set out the so-called ultimate facts, and other related facts, that the parties rely on to either prove that the claimant is entitled to the requested relief or demonstrate that the respondent should not be held liable. In Swedish court proceedings, the recitals are assumed to encompass the entirety of the facts and circumstances that the parties are "invoking." A court cannot decide an issue on facts and circumstances that have not been invoked in the recitals.

As a matter of practice, Swedish lawyers and arbitrators adopted the same approach in domestic arbitration, but there was no express rule requiring that recitals be treated the same in arbitration as in court. At least not until the Svea Court of Appeal's decision in *Systembolaget*. In that case the party seeking to have the arbitral award set aside argued that the arbitral tribunal decided the case on facts and circumstances outside of the recitals. In response, the party seeking to preserve the award argued, among other things, that recitals should not be viewed as binding on the parties in arbitration, unless the parties have agreed that they be binding. The Svea Court of Appeal rejected that argument, thus establishing the rule that, by default, recitals are complete and binding in Swedish domestic arbitration, unless the parties agree otherwise.

The *TNG* case then extended this rule to international arbitrations seated in Sweden. As noted previously, the SAA’s preparatory works assume that some provisions in the CJP relating to invoking circumstances would “naturally” apply in Swedish domestic arbitration as a matter of practicality. Regarding international cases, however, the preparatory works call for “greater caution” concerning arbitrations with one or more foreign parties. The preparatory works do not provide specifics regarding how or under what circumstances arbitrators should exercise that caution.

Consequently, it remained unclear the extent to which the rule that the court set out in *Systembolaget* should carry over to international arbitrations—assuming it should carry over at all. The Svea Court of Appeal’s decision in *TNG* resolved the question of whether the rules concerning recitals should apply in international arbitration, but created a different level of vagueness regarding the questions of under what circumstances and to what extent.

The arbitral tribunal in that case found that the respondent in the arbitration had misrepresented the amount of oil reserves when negotiating with the claimant. The recitals, however, only concerned the question of whether the respondent had misrepresented the potential field’s flow rates. The party seeking to have the award set aside claimed that the arbitral tribunal exceeded its mandate by relying on circumstances—allegations

regarding reserves—that were not in the recitals. The counterparty claimed that the recitals should not be regarded as exclusive and that it had referenced reserves earlier in the arbitration.

The Svea Court of Appeal accepted the challenging party’s argument and set the award aside. It reasoned that the parties and the tribunal “must have been aware” of the applicability of the Swedish procedural principles of invoking material facts, because the case’s “strong ties” to Sweden. In effect, the court’s ruling in *TNG* extended the *Systembolaget* binding-recitals approach to international cases when the case has strong ties to Sweden.<sup>342</sup>

Swedish court decisions following *Systembolaget* and *TNG* have stayed within the excess of mandate framework that these cases created. That is: arbitrators are bound by the circumstances that parties “invoke” in the arbitration—most often through the recitals. If the arbitrators decide the case on circumstances that have not been formally invoked, they have exceeded their mandate.

From the above, one can see that Swedish courts’ handling of excess of mandate and procedural error claims does provide a fairly clear

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<sup>342</sup> It is not entirely clear what the court meant by “strong ties,” and subsequent Swedish court rulings in international excess of mandate cases have not clarified the issue. I suggest one approach that may resolve this uncertainty in Chapter 3. I do not expand on it in the current chapter, because providing a useful comparison of the US and Swedish approaches does not require resolving the question.

distinction between the two grounds. An arbitrator can commit a procedural error when managing the arbitral proceedings as they lead up to the rendering of the final award. Excess of mandate, however, occurs in the course of rendering the award; not by how the award is rendered, which still constitutes a procedural error, but by the content that the arbitrator considered and decided upon when rendering the award.

In this way, the Swedish approach to excess of mandate reflects the Model Law's provision. The Model Law allows for an award to be set aside if it "contains decisions on matters beyond the scope of the submission to arbitration." In Sweden, invoking facts and circumstances are a means by which the parties submit those facts and circumstances to the arbitral tribunal. Thus, when a Swedish court considers if an arbitrator exceeded her mandate by basing the award on a fact or circumstance that had not been invoked, the court is considering whether the arbitrator based the award on something that was not properly submitted to her. The SAA and the Model Law use different vocabulary to ask the same question.

The cases that I mention above concern themselves with issues and relevant circumstances. There remains an important open question related what the claimant submits as a request for relief. Can an award be set aside if an arbitrator grants relief that is less than, or

different from, what was requested (*infra petita* and *extra petita*, respectively). Here, Swedish courts have provided less guidance.

I submit that it is uncontroversial that an arbitrator cannot grant more than what has been requested. In Swedish law, at least, this would be considered an excess of mandate.

Another explanation for the jurisdictions' diverse approaches to the concept of excess of mandate is that the FAA and the SAA have different legislative histories and purposes. The FAA is one of the oldest national arbitration acts still in use. When passed, its main purpose was to ensure the enforceability of arbitration agreements across state lines within the territory of the United States. By comparison, the SAA is relatively new. It was adopted in 1999 and underwent limited revisions in 2019. Following in the footsteps of the UNCITRAL's push for harmonization and unification in International Commercial Arbitration, the SAA focuses on the entirety of the arbitral process—from the formation of the arbitration agreement to challenge and set-aside. As is explained below, these differences help to explain why the FAA and SAA approach the concept differently.

Prior to the 1920s, arbitration law in the United States was primarily regulated by the states and not the federal government. Consequently, there were several rules governing the arbitral process. In particular, the validity of arbitration agreements was not

universally accepted. Some states refused to recognize arbitration agreements entered into prior to the dispute having arisen; others viewed all arbitration agreements as entirely illegitimate. These diverse approaches became more problematic as inter-state commerce began to increase. The business community began to speak out against the patchwork approach. The US Chamber of Commerce along with various state chambers of commerce began lobbying state legislatures and the US Congress for legislation to resolve the uncertainty.

International comparative law is meant, in part, to study how diverse legal systems approach common problems. Many times, the solutions that the respective systems apply are different, but achieve a similar, yet comparable result.

My conclusion in this study, however, turns that notion on its head. The respective drafters of the SAA and FAA sought to solve different problems by adopting a similar principle—excess of mandate. Moreover, they did so at two different times in the history of international commercial arbitration law.

Consequently, all actors in the field of international arbitration—parties, counsel, arbitrators, expert witnesses, academics, and others—should not assume that the concept of excess of mandate travels well. We should pay careful attention to how it is applied at the seat. This is not to say that the concept is always radically

different between every seat. But, the concept is defined by the law and courts at the relevant seat.

## 2. HYPOTHETICAL SCENARIOS

The following addresses three hypothetical scenarios. The first based on relief, the second on procedural expectations, and the third on the legal expectations.

### 2.1. Relief: *Extra Petita, Infra Petita, Ultra Petita*

The common starting point for understanding the concept of excess of mandate is relief. An arbitrator could exceed her mandate by: 1) giving more than a party requested; 2) something else than a party requested; 3) giving something less than was requested.

In this hypothetical scenario, assume that Company A (headquartered in Nation A) contracts with Company B (headquartered in Nation B) to construct a modest public works project in Nation C, at an agreed purchase price.

The purchase price is delineated in Sodak, which is Nation C's currency. It will be paid in four installments after the deal closes, based on Company B demonstrating the following milestones: securing environmental approvals from Nation C's relevant authorities; ground breaking on the project; demonstrating the

viability of the project at the halfway-point; and, finally, the facility's successful activation.

The contract calls for binding arbitration in a fourth nation, Nation D, in the event of a dispute between the parties. The substantive law of Nation D is the applicable law of the contract, as well.

Due to an unrelated corruption scandal in Nation C's construction sector, Nation C pauses all pending construction approvals in order to review official approval processes. Consequently, Company B is unable to achieve government approval by the agreed-upon date. The deadline for the groundbreaking milestone also passes as a consequence of the delay. Company A contacts Company B to demand compensation for the ongoing delay, and to inform Company B of further potential requests if the delay continues. Company A also reserves the right to cancel the agreement entirely if it "becomes apparent that the project will experience long-term or permanent delay."

Company B responds that the delay is due to circumstances beyond its control, and therefore it is not responsible for any potential damages suffered by Company A. In any event, Company B is confident that Nation C's review will end soon and the project will be approved shortly thereafter.

Company A initiates arbitration pursuant to the arbitration clause in the contract requesting nominal damages for the existing delay. Specifically, Company A's Request for Damages asks for,

1. Sodak 100,000 as compensation for Company B's failure to secure environmental approval for the Project;
2. Sodak 1,000,000 as compensation for Company B's failure to meet the groundbreaking milestone for the Project; and
3. Any other remedy that the tribunal may see fit to restore justice under the terms of the contract.

Company A also reserves its right to amend its damage amount under the first two milestones, and bring further claims under the remaining two milestones. It does not specifically request interest on its claims.

During the course of the arbitration, but prior to the issuing of the final award, the deadline for the third milestone is missed. The final award is issued prior to the deadline for the fourth milestone. Additionally, from the date of the contract's signing to the issuing of the final award, the value of the Sodak plunges. At the contract's signing, and at the date for the Request for Arbitration, the value equaled 1 USD to 1 Sodak. At the date of the final award, the value equaled 1 USD to 15 Sodak, which greatly reduced the value of the contract and the value of the claims.

In the final award, the tribunal grants the following relief:

1. USD 150,000 to Company A for Company B's missing of the first deadline;
2. The contract will automatically terminate if the Project is not completed within two years of the agreed upon date of completion (*i.e.*, the fourth milestone); and
3. An amount of 1.5% interest per annum applied to all awarded amounts up and until the relevant milestone is met.

The tribunal based part 2 of its award on Section 10 of Nation D's 1937 Act on Public Works Construction, which allows a court to, on its own initiative, set a deadline for completion of a public works project, and terminate the underlying contract if that date is not met. Neither party argued any provision the 1937 Act, but instead focused their arguments on the meaning of the construction contract.

Company B challenges the award before the courts of the seat of arbitration: Nation D. Company B alleges that the tribunal exceeded its mandate by: granting more than was requested and granting something other than was requested. Namely, the tribunal granted unrequested declaratory relief and granted damages in the form of USD, instead of the requested amounts in Sodak. Company A challenges the award on the grounds that the tribunal granted less than was requested: it granted Company A's requested for damages

under the first missed milestone, but did not address the second missed milestone.

## 2.2. Analysis if Nation D is Sweden

In the above, Nation D is both the seat of arbitration and the source of the contract's applicable law. Assuming that Nation D is Sweden, Swedish courts would likely analyze the set-aside requests as follows.

First, assume that, in keeping with the facts of *Systembolaget* and *TNG*, the parties agreed to a recital that adopted Company A's Requests for Relief word-for-word. Assume further that a Swedish court would view this case as sufficiently Swedish to apply the CJP, despite the fact that neither of the parties are Swedish and the location of the proposed construction project was not in Sweden. Perhaps, as in *TNG*, the chair of the tribunal is Swedish and the parties' respective primary counsels are Swedish law firms.

Even with the adoption of the recital and the application of the CJP, the three grounds are not easily solved. On the first ground—that the tribunal granted more than was requested by granting USD 150,000 when Sodak 100,000 was in the recital—the excess, or *ultra petita*, could be argued in one of two ways. Company B could have argued that the “excess” constituted granting an additional 50,000. This would almost certainly be an excess under Swedish law, if the

Request for Relief and the recital specified 100,000. Interestingly, Company B could have also argued that the tribunal granted “more” than it requested by granting the amount in a currency that was effectively 15 times greater than the amount in the currency that governed the contract, and was stated in the Request for Arbitration as well as the recital.

Relatedly, the currency change could constitute an excess of mandate in that it represents something other than what was requested: the request, as recorded in the recital was in Sodak, but the tribunal, perhaps granting Company A’s request to “restore justice under the terms of the contract” may have changed the currency so as to grant an equivalent amount to what the parties had contracted for and an amount equivalent to what Company A had requested in its Request for Arbitration.

Finally, the failure of the tribunal to address the request for damages relating to the failure of Company B to meet the second milestone is a problem, especially if both parties argued the issue and included it in the recital. Section 32 allows for the tribunal to correct or supplement an award, either on their own initiative or on the request of a party. If, however, the tribunal does not address an issue, that may be considered more of a procedural error under Section 34, paragraph 7, than an excess of mandate. In any event, the failure to address every claim in the hypothetical case above,

would not necessarily affect the outcome of the entire award. Instead, the valid parts of the remaining award could stand, despite the tribunal's failure to address one of the claims.

Again, this assumes that the parties have not requested that the award be supplemented. If the parties did make the request, and the tribunal refused to do so, then there would probably be a clear argument that the tribunal had committed a procedural error. Still, it would be difficult to see how that would affect the outcome of the case to the extent that the award be set aside under Section 34 of the SAA.

The important point here, and one which will be a point of comparison in the US analysis that follows, is that it would be difficult to set aside an entire arbitration award under Swedish law if an arbitrator failed to take up a claim. As will be explored further below, it might well be grounds for setting aside an award under the FAA, because the arbitrator exceeded her mandate by not exercising it.

### 2.3. Analysis if Nation D is the United States

In this scenario, one does not need to consider the concept of recitals. That is, while parties in arbitrations seated in the United States do have control over their cases in much the same way that parties in Sweden do, there is more leeway given to the arbitrators

as the arbitral proceedings progress. As argued in Chapter 2, the power dynamic in the arbitration shifts during the course of the arbitration; starting heavily with the parties, then moving to the arbitrator. Absent party agreement otherwise, Company A's request for "any other remedy" may well open the door for a number of remedies that were not specifically requested by any one party. It is notable that, while standard court practice in the United States, the opposite is true in Sweden. Such requests are non-starters in Swedish procedural tradition.

For example, consider Company B's request for set-aside on the grounds that the tribunal granted more than Company A requested (150,000 instead of 100,000). There are a number of questions that might need to be answered. Did the tribunal grant the extra amount based on an analysis of the contract? Was a passing reference made during the course of oral arguments? Or simply out of a desire to "restore justice under the terms of the contract"?

As described in Chapter 2, tribunals in the United States are given wide latitudes of discretion in performing their duties. If the answer to any of the above questions is "yes," then, arguably, the tribunal was acting within its discretion. It may have made a mistake in increasing the amount requested. But, US arbitration law allows arbitrators to make mistakes. Conversely, if the tribunal granted

more than was requested for no discernable reason, then that would most likely constitute the classic idea of exceeding its powers.

However, the tribunal's failure to address Company A's second request may put the award in jeopardy of being set aside. An arbitrator is not allowed to ignore the principal arbitral tasks. Those are: making a good faith effort to interpret the contract; identify (if necessary) and apply the applicable law; and address the parties' requests for relief or defenses.

This may seem counter-intuitive in the face of the literal language of Section 10(a)(4) of the FAA. At first glance, it may seem strange that an arbitrator could "exceed" her powers by doing less than what the parties empowered her to do. But I, in fact, argue that it might constitute one of the chief reasons for setting aside an award under Section 10(a)(4).

If one needs to sync the literal meaning of "exceed" with the idea of doing less, then I would argue that a decision to do nothing is an affirmative decision. The parties appointed the arbitrator to do certain tasks. This is not necessarily meant to imply an employee-employer relationship between the arbitrator and the parties, but it rather draws focus to the very concept of the mandate.

Before appointment, an arbitrator is an individual who would not have the power to assess the parties' legal responsibilities under the

contract and applicable law and legally bind the parties to pay sums, or take or refrain from certain actions. Following appointment, though, the arbitrator is granted the mandate to assess the case and assign legal obligations. Specifically, the mandate confers to the arbitrator an affirmative responsibility to decide the case before her in whole. Absent the agreement of the parties, her powers do not allow her pick and choose which aspect or aspects of the mandate she wishes to fulfill. If she decides to ignore an aspect of the case—specifically a request for relief—then she is exercising a power that the parties did not grant her. Thus, failing to decide the issue is, counterintuitively, an excess of powers.

The analysis gets more complicated when it comes to the tribunal's decision, on its own initiative, to grant relief based on an unargued point of law. Specifically, the fictional 1937 Act of Public Works Construction.

As described in Chapter 3, Sweden does allow its courts—and its arbitrators—to apply the principle that the judge knows the law, or *jura novit curia*. This is despite the fact that the recitals carry a tremendous amount of weight in arbitrations seated in Sweden.

On the other hand, if the arbitration is seated in the United States, it is unclear whether the tribunal would have the authority to look into the effects of a statute that the parties had not argued. But, importantly, not only had the statute not been argued, the relief

granted in the award had not been requested. Under those circumstances, it seems that the award would not survive judicial scrutiny and be set aside.

### 3. CONCLUSION

This research project sought to find common ground between US federal law and Swedish law when it comes to the setting aside of arbitral awards for excess of mandate, or excess of authority. The hope was that by identifying common characteristics between the two arbitral systems that, for many reasons, are different in procedural and history, one could find a unifying definition of the concept that could be applied other systems that allow for set-aside of awards for excess of mandate—including countries that have or have not adopted the Model Law.

Ultimately, however, the conclusion is that there are not enough overlapping principles between the two approaches to justify the claim that the idea of excess of mandate can be universally defined. The reasons for this are many, but it is important to note the history, purpose, and application of the FAA and SAA, respectively. These laws derived from different purposes, for example.

The FAA was adopted in 1927 and is primarily meant to serve as a means to ensure the enforcement of arbitration agreements across state lines. At the risk of oversimplification, one could argue that

the idea of set-aside before a federal court was an afterthought to the drafters.

On the other hand, the grounds for set-aside under the SAA were modified as recently as 2019. Moreover, the idea of excess of mandate has existed in Sweden since at least the mid-to-late-1800s and has been modified over a series of legislative amendments based on practice, and, eventually, with a view toward the Model Law.

The fact that the idea of excess of mandate differs between the two jurisdictions is informative. Hopefully, it will help courts, arbitrators, academics, practitioners, and parties understand that while we in the international arbitration community use “excess of mandate” as shorthand, its definition and application can vary greatly between legal systems.



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