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Excess of Mandate, Failure to Exercise the Mandate, and the Interpretation of Procedural Acts in Swedish Arbitration Law

♦ *This article examines two closely related questions. The first concerns the limits of an arbitral tribunal's authority to interpret the parties' procedural acts, particularly pleadings of facts. It is argued that a fact may be treated as pleaded only where the party's intended procedural effect has been expressed clearly and unequivocally. Where uncertainty remains, the tribunal should ordinarily clarify the parties' positions through its substantive direction of the proceedings rather than resolve ambiguities through extensive interpretative efforts. The second question concerns the classification of errors arising where an arbitral tribunal fails to determine the entirety of the dispute submitted by the parties. The article analyses situations in which the tribunal, through mistake, oversight, or misinterpretation of the parties' procedural acts, determines less than the dispute submitted to it. It is argued that such situations should not merely be regarded as procedural irregularities. Rather, they also constitute failures to exercise the mandate conferred upon the tribunal by the parties. Consequently, both excesses and deficiencies in the exercise of the arbitral mandate should be understood as manifestations of the same underlying principle: that the tribunal must respect the scope of the proceedings as determined by the parties' procedural acts. The article has originally been published in Svensk Juristtidning (SvJT) 2025 pp. 962–979 under the title »Uppdragsunderskridanden och feltolkning av processhandlingar«.*[1]

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1. Introductory Remarks

Arbitration is governed by *the principle of party disposition*.[2] Under that principle, an arbitral tribunal may undertake procedural acts only upon the initiative of the parties.[3] One consequence of the principle is that the parties determine both the content and the scope of the proceedings through their own procedural acts.[4] In the context of arbitration, this is commonly expressed by saying that the parties determine the *inner limits* of the tribunal's mandate.[5]

The rule that a judgment in a case amenable to out-of-court settlement may not be based on a circumstance that has not been pleaded by the proper party in support of its claim is expressed in the second sentence of Ch. 17, Sec. 3 of the Swedish Code of Judicial Procedure.[6] Preparatory works,[7] case law,[8] and legal scholarship[9] provide substantial support for the proposition that this rule applies by analogy in arbitral proceedings governed by the Arbitration Act, although some commentators have argued that the principle embo-

1 The original Swedish version underwent double-blind peer review. The article is an expanded version of a legal opinion previously prepared in Svea Court of Appeal case T 10581-24, exhibit 101. The Court of Appeal decided the set-aside proceedings on the issue of separability as a prerequisite for partial setting aside. The judgment therefore does not address the issues that constitute the focus of the present article.

2 See, for example, Statens offentliga utredningar (SOU) 1994:81 Ny lag om skiljeförfarande [New Act on Arbitration], pp. 146 and 176 ff.; and Reg. prop. 1998/99:35 Ny lag om skiljeförfarande [Government Bill 1998/99:35 New Act on Arbitration], pp. 115 and 145.

3 *Cf.* Per Olof Ekelöf *et al*., Rättegång. Häfte 1 [Trial. Booklet 1], 2016, p. 61. The term procedural act(s) is used throughout this article.

4 For similar descriptions, see Lars Heuman, Skiljemannarätt [Arbitration law], 1999, p. 280; and Stefan Lindskog, Skiljeförfarande [Arbitral Proceedings], 2020, III, Section 2.1.5. On the tribunal's responsibility for the substantive direction of the proceedings and its relationship to the parties' authority over the subject matter of the dispute, see SOU 1994:81, pp. 151 ff.; and Government Bill 1998/99:35, pp. 119 ff. See further notes 38–41 below.

5 See Lindskog 2020, IV:0, Section 3.2. For illustrative descriptions of the legal position, see Svea Court of Appeal, case T 1356-18, judgment of 4 November 2022, pp. 32–33; and case T 8492-23, judgment of 28 November 2024, p. 10. For a commentary on the 2024 judgment, see Lars Heuman, Ett hovrättsfall om ett klandergrundande uppdragsöverskridande som består i att avtalsinnehåll inte åberopats [A Court of Appeal Case on a Reviewable Excess of Mandate Consisting in Failure to Plead Contractual Content], Juridisk Tidskrift (JT) 2024–25, pp. 724 ff.

6 That section in the Code of Judicial Procedure has generated an extensive body of conceptual and theoretical scholarship within Swedish procedural law, see Robert Boman, Om åberopanden och åberopsbörda i dispositiva tvistemål [On Pleadings and the Burden of Pleading in Dispositive Civil Litigation], 1964; Alexander Hardenberger, Åberopsbörda i dispositiva tvistemål [The Burden of Pleading in Dispositive Civil Litigation], 2023; and Peter Westberg, Domstols officialprövning [The Court's Ex Officio Examination], 1988.

7 See note 2 above and Government Bill 2017/18:257 En modernisering av lagen om skiljeförfarande [Modernization of the Arbitration Act], p. 49. See, however, SOU 2015:37 Översyn av lagen om skiljeförfarande [Reform of the Arbitration Act], pp. 130–131.

8 See Nytt Juridiskt Arkiv (NJA) 2009 p. 128 (»Soyak«); and NJA 2016 p. 51. There are numerous judgments of the Svea Court of Appeal confirming that the second sentence of Ch. 17, Sec. 3 of the Code of Judicial Procedure applies by analogy in arbitral proceedings under the Arbitration Act, several of which are cited in this article.

9 See, for example, Karl Erik Danielsson, Något om åberopande i skiljeförfarande [Some Remarks on Pleadings in Arbitration], in Ulf Bernitz, Jan Kleineman, Jori Munukka and Jessika van der Sluijs (eds.), Festskrift till Lars Pehrson, 2016, p. 99; Heuman 1999, pp. 337–338; Heuman, JT 2024–25, pp. 724 ff.; Lars Heuman, Förhållandet mellan principerna om partsautonomi och åberopsskyldighet i skiljetvister [The Relationship Between Party Autonomy and the Duty to Plead in Arbitration Disputes], JT 2024–25, pp. 924 ff.; Lotta Maunsbach, Uppdragsöverskridande och handläggningsfel som klandergrund [Excess of Mandate and Procedural Irregularities as Grounds for Setting Aside an Arbitral Award], in Lotta Maunsbach and Alexander Hardenberger (eds.), Festskrift till Peter Westberg. 2024, pp. 420 ff.; and Peter Westberg and Lotta Maunsbach, Civilrättskipning II [Civil

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died in the provision applies directly in arbitration without any need for analogy.[10]

Whether the rule applies directly or by analogy, it constitutes a rule governing the tribunal's conduct. It follows that an arbitral tribunal may rely only on facts pleaded by the proper party in support of its case. A prerequisite for the tribunal to include a particular circumstance as an element of *the factual basis of the award* is therefore that the party controlling whether that circumstance falls within the inner limits of the proceedings – that is, the party bearing *the burden of pleading* with respect to the circumstance in question – has chosen to submit it to the tribunal through a pleading of fact.

In other words, a unilateral procedural act by the party concerned – a pleading of fact – is required before the tribunal may determine the circumstance on the merits by evaluating its evidentiary significance and legal relevance and ultimately rely upon it as a *material fact* supporting the legal consequence at issue.[11]

A judgment rendered in violation of the second sentence of Ch. 17, Sec. 3 of the Code of Judicial Procedure constitutes a serious procedural defect under Swedish procedural law.[12] Such defects may result in the judgment being set aside through either ordinary[13] or extraordinary[14] remedies, provided that the defect can be assumed to have affected the outcome of the case.[15]

Similarly, an arbitral award based upon a fact that has not been pleaded constitutes an *excess of mandate* under Sec. 34(1)(3) of the Arbitration Act. For the award to be set aside, in whole or in part, the excess of mandate must probably have affected the outcome of the case.[16] Given the structural similarities between these remedial frameworks, there are compelling reasons to draw guidance from the case law concerning serious procedural defects when analysing excess of mandate under the Arbitration Act, and vice versa.[17]

Several distinct situations must be distinguished when analysing the relationship between arbitral proceedings and the parties' procedural acts.

The first category consists of cases in which the arbitral tribunal, acting on its own initiative (*ex officio*), determines on the merits a circumstance that has not been pleaded or determines on the merits a circumstance that has been admitted by the party entitled to dispose of it.[18] In such situations, the tribunal may have *acted outside the inner limits* of its mandate as determined by the parties' procedural acts. The issue therefore falls to be assessed under Sec. 34(1)(3) of the Arbitration Act concerning excess of mandate.

A second category consists of cases in which the tribunal, through mistake, oversight, or misinterpretation, fails to determine on the merits a pleaded and non-admitted circumstance. The same applies where the tribunal erroneously treats a circumstance as undisputed, both factually and legally, and therefore relies upon it without conducting an independent determination on the merits.[19] In such situations, the tribunal *restricts its examination* to less than what falls within the mandate conferred by the parties' procedural acts.

To the extent that the tribunal has misinterpreted, or entirely disregarded, a procedural act, the situation may be analysed under

Adjudication II], 2021, p. 55. See, however, Bengt Lindell, Civilprocessen. Rättegång samt skiljeförfarande och medling [Civil Procedure: Litigation, Arbitration and Mediation], 2021, pp. 742 ff.

10 See Lindskog 2020, IV:0, Section 3.2.1, note 3011 (37).

11 I am aware that the terms *material fact* (sv. *rättsfaktum*) and *evidentiary fact* (sv. *bevisfaktum*) are not employed in arbitral proceedings to the same extent as in ordinary civil litigation. Nevertheless, it is the parties to an arbitration who, through their procedural acts, determine the limits of the tribunal's mandate, including how the tribunal is to treat the various factual circumstances appearing in the record. Certain circumstances are to be determined on the merits and assessed against the applicable substantive rules of law. Others are to be taken into account solely as part of the tribunal's evaluation of the evidence.

Circumstances that a party wishes to submit for determination on the merits and assessment of legal relevance must be *pleaded* (sv. *åberopas*) through a procedural act, whereas circumstances that a party wishes the tribunal to consider solely for evidentiary purposes need only be *introduced into* (sv. *föras in*) the proceedings. The precise terminology used for these categories is of secondary importance. For reasons of convenience, however, I employ the terminology of Swedish civil procedure throughout this article.

Accordingly, the term material fact refers to a factual circumstance which, either alone or in combination with other factual circumstances, satisfies a requirement contained in a rule of law. An *alleged material fact* refers to a party's assertion that a particular factual circumstance is relevant to the disputed legal consequence and therefore constitutes a material fact. By contrast, a *material fact relied upon by the tribunal* refers to a factual circumstance that the tribunal subsumes under a rule of law and relies upon in its reasoning in support of the outcome of the case.

A party may, of course, plead a group of circumstances and request that the tribunal determine them on the merits without expressly articulating the legal relevance of each individual circumstance. In such situations, it may be appropriate simply to refer to the circumstances as *pleaded facts*. The same observation applies in ordinary civil litigation. See further Hardenberger 2023, pp. 53–54 and 207 ff.

12 See, for example, NJA 2016 p. 791; and NJA 2019 p. 802 (»Abbes bygg«).

13 Ch. 50, Sec. 28 of the Code of Judicial Procedure.

14 Ch. 59, Sec. 1(4) of the Code of Judicial Procedure.

15 See notes 13 and 14 above.

16 For examples from the case law of the Supreme Court, see note 8 above. See also Heuman 1999, pp. 605 ff.; and Lindskog 2020, V:34, Sections 4.3.4 and 4.3.8.

17 For a discussion of the scope for such analogies, see Lars Heuman, Vilken betydelse har prejudikat om domvilloklagan för bedömningen av klandermål rörande handläggningsfel? Del I [What Significance Do Precedents on Complaints for Grave Procedural Error Have for the Assessment of Set-Aside Proceedings Based on Procedural Irregularities? Part I], JT 2016–17, pp. 729 ff.; and Lars Heuman, Vilken betydelse har prejudikat om domvilloklagan för bedömningen av klandermål rörande handläggningsfel? Del II [What Significance Do Precedents on Complaints for Grave Procedural Error Have for the Assessment of Set-Aside Proceedings Based on Procedural Irregularities? Part II], JT 2016–17, pp. 985 ff.

18 An admission may, but need not, extend both to the factual issue (the existence of the circumstance) and to the legal issue (its legal relevance). Cf., for example, Boman (1964), pp. 49 ff.; Ekelöf, Edelstam & Heuman, *Rättegång. Häfte 4* [*Trial. Booklet 4*] (2009), pp. 67–68; and Westberg, »Parts förfoganderätt och domarens rättsanvändning« [Party Disposition and the Court's Application of Law], JT 2011–12, pp. 168 ff.

19 See the preceding note.

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Sec. 34(1)(7) of the Arbitration Act concerning *procedural irregularities.*[20] The distinction between excess of mandate and procedural irregularities nevertheless gives rise to difficult borderline questions, particularly where the parties' procedural acts are capable of more than one interpretation.[21]

An alternative view is that a tribunal also exceeds its mandate where it fails to determine the entirety of the dispute submitted by the parties, for example by failing to determine a claim, a pleaded ground, or a fact supporting an objection.[22] On that view, the situation could likewise be assessed under Section 34(1)(3) of the Arbitration Act. I return to this issue below.

2. Clear and Unequivocal Pleadings of Facts

A pleading of a fact constitutes a procedural act intended to produce procedural legal effects.[23] When analysing the degree of clarity required for such a procedural act, it is important to distinguish between *the procedural act itself*[24] and *the object*[25] of that act. Put differently, one issue is whether the party's intended procedural effect has been expressed with sufficient clarity; another is whether the circumstance that forms the object of the procedural act has been described in a sufficiently concrete and specific manner.

The present discussion focuses on the clarity required for the procedural act as such. In this respect, Swedish procedural law imposes a stringent standard. According to the case law of the Supreme Court, a party must express *clearly and unequivocally* that a particular circumstance is pleaded in support of its claim.[26] This standard has been adopted not only in ordinary civil litigation,[27] but also in set-aside proceedings relating to arbitral awards.[28] Legal scholarship has suggested that the requirement effectively means that a circumstance must be presented in such a manner that it would have been apparent to both the opposing party and the tribunal that the circumstance was pleaded in support of the legal consequence asserted.[29] The assessment is objective. The decisive question is not whether the party subjectively intended to plead a particular circumstance, but whether that intention was expressed so clearly that neither the opposing party nor the tribunal could reasonably misunderstand it.[30]

The stringent requirement of clarity is motivated primarily by the opposing party's interest in knowing what case it must meet.[31] The opposing party must be able to identify the circumstances that require a response and must be given a meaningful opportunity to protect its interests in the proceedings. Since this interest arises with equal force in arbitration and ordinary civil litigation, there is little reason to apply a lower standard in arbitral proceedings than in court proceedings.[32] In international arbitrations, however, a more active exercise of the tribunal's substantive direction of the proceedings may be justified in order to ensure that the parties clarify their respective positions in accordance with the said criterion.[33]

The requirement that pleadings of facts be expressed clearly and unequivocally also serves an important *adversarial function*.[34] Only when the parties know which circumstances have been pleaded can they effectively challenge, contest, or respond to one another's positions. A lower threshold would create uncertainty as to what must be addressed and would simultaneously expand the tribunal's

20 See, for example, NJA 1975 p. 536 (»Repotype«); NJA 1990 p. 419 (»Red Sea«); NJA 2019 p. 171 (»Belgor«), paras. 28 and 34; Svea Court of Appeal, case T 11225-23, judgment of 5 March 2025, pp. 17–18; and case T 10465-23, judgment of 28 May 2025, pp. 126 and 140. See also Heuman (1999), p. 612; Heuman, JT 2016–17, p. 989; and Lindskog (2020), V:34, note 3711 (190) to Section 4.3.4, Section 5.1.5, and Section 5.2.2. See also I:0, Section 1.3.3, note 342 (25).

21 See Government Bill 1998/99:35, pp. 144–145; Lindell (2021), pp. 764–765; and Lindskog (2020), V:34, Section 5.1.1.

22 For this view, see Heuman (1999), pp. 612 ff.; Hobér, *International Commercial Arbitration in Sweden* (2021), p. 291, para. 8.81; Lindell (2021), pp. 764–765; and Maunsbach (2024), p. 427. The view also finds support in the case law of the Svea Court of Appeal; see case T 1356-18, judgment of 4 November 2022, p. 36; and case T 540-23, judgment of 10 January 2025, p. 20.

23 For a discussion of the concept of a procedural act, see Ekelöf *et al.* 2016, p. 39. It should be noted that certain procedural acts may be significant for reasons other than the legal effects they produce.

24 For an extensive treatment of the procedural act consisting in a pleading of a fact within the context of civil litigation, see Hardenberger 2023, Chapter 8.

25 For an extensive treatment of the object of a pleading of a fact within the context of civil litigation, see Hardenberger 2023, Chapter 7.

26 The requirement was established in NJA 2019 p. 802 (»Abbes bygg«), para. 13. See also NJA 1990 p. 419 (»Red Sea«) at p. 433 concerning the requirement of clarity in relation to a withdrawal of a claim; and NJA 2010 p. 643, para. 6, concerning the requirement of clarity in relation to an admission. *Cf.* NJA 1974 p. 454 concerning the requirement of clarity in relation to an amendment of the indictment in criminal proceedings (»must appear unequivocally«).

27 See, for example, Svea Court of Appeal, case T 1326-23, judgment of 20 December 2024, pp. 5–6; and case T 349-24, judgment of 28 February 2025, p. 4.

28 See, for example, Svea Court of Appeal, case T 9246-21, judgment of 23 February 2023, p. 23; case T 9629-23, judgment of 19 June 2024, p. 9; case T 10465-23, judgment of 28 May 2025, p. 126; and case T 12192-25, judgment of 18 September 2025, p. 5.

29 So expressed by Lindskog 2020, IV:0, Section 3.2.2. For similar observations in relation to civil litigation, see Boman 1964, p. 15; Hardenberger 2023, pp. 298 ff.; and Peter Westberg, Överraskande rättsbildning på grundval av handelsbruk eller allmänt tillämpade standardvillkor [Unexpected Judicial Development of the Law on the Basis of Trade Usage or Generally Applied Standard Terms], JT 2000–01, pp. 370–371.

30 Cf. Boman 1964, p. 14; and Westberg 1988, pp. 111–112. The Svea Court of Appeal has expressed the matter by stating that an opposing party should not be required to guess, from an extensive record, which circumstances are being pleaded; see Svea Court of Appeal, case T 10465-23, judgment of 28 May 2025, p. 126.

31 See the sources cited in the preceding note, at the same page.

32 See Lindskog 2020, IV:0, Section 3.2.2.

33 See SOU 1994:81, pp. 176–177; and Government Bill 1998/99:35, pp. 144–145. See also Heuman 1999, p. 338; Heuman, JT 2024–25, pp. 728–729; and Svea Court of Appeal, case T 1356-18, judgment of 4 November 2022, p. 33. For reasons of space, the present article does not pursue the issue of international arbitration in greater depth. The tribunal's substantive direction of the proceedings (sv. *materiell processledning*) is discussed further below.

34 This constitutes one of the principal arguments in NJA 2016 p. 791, para. 7.

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task by requiring it to assess the legal relevance of a considerably larger body of factual material. Ultimately, a more permissive approach would not only undermine procedural fairness but would also impair procedural economy.[35]

In practice, difficulties rarely arise in relation to circumstances that have been clearly and unequivocally pleaded or circumstances that have not been mentioned at all. Problems arise instead where a circumstance has been discussed during the proceedings, yet the parties and the tribunal may reasonably have understood the parties' procedural acts differently. What characterises such situations is that the record contains a concrete description of a factual circumstance, while it remains unclear whether the circumstance has been submitted to the tribunal for determination on the merits through a pleading of a fact. The circumstance has entered the proceedings, but its procedural status remains uncertain.

In such cases, the starting point – sometimes described as a presumption[36] or an *in dubio* rule – is that the circumstance has not been pleaded in a manner that permits it to form part of the factual basis of the award. The presumption may be displaced only where there are objective and visible indications that the circumstance has been pleaded in support of a party's claim. Where doubt remains, it should be assumed that the circumstance has not been pleaded in a manner that permits the tribunal to rely upon it as a material fact.

This starting point is closely connected to *the tribunal's substantive direction of the proceedings*.[37] In situations of the kind described above, it will often be appropriate for the tribunal to intervene and clarify the parties' positions. An important function of the tribunal's substantive direction of the proceedings is to ensure that, before the dispute is decided, it is clear which facts have been pleaded by each party and which have not.[38] In an ideal situation, there should be no factual circumstances discussed in the proceedings in respect of which it remains uncertain whether they have been submitted to the tribunal through a pleading of a fact.[39] Such uncertainties should instead have been resolved through questions and observations from the tribunal, enabling both the parties and the tribunal to proceed on the basis of a common understanding of the issues to be determined.[40] This is particularly important in international arbitration; where the parties may come from different legal traditions and employ different pleading techniques, the need for clarification through the tribunal's substantive direction of the proceedings becomes even more pronounced.[41] If uncertainty nevertheless remains despite the tribunal's efforts to clarify the parties' positions, the tribunal should not rely upon the circumstance as a material fact. Absent a sufficient clarification, the circumstance should be regarded as introduced into the proceedings but not pleaded.[42]

Both the stringent requirement that pleadings of facts be expressed clearly and unequivocally and the tribunal's responsibility for the substantive direction of the proceedings serve to *prevent surprises*. As noted above, the requirement of clarity protects the opposing party's legitimate interest in knowing what case it must meet. The opposing party must know which circumstances require a response and must be afforded a meaningful opportunity to protect its interests within the proceedings.

If it has not been made sufficiently clear that a party intended to plead a particular circumstance, yet the tribunal nevertheless treats the circumstance as part of the factual basis of the award, the resulting award will come as a surprise to at least one of the parties. Such surprise should not occur. It may be avoided either by clarifying the parties' positions through the tribunal's substantive direction of the proceedings or by refraining from relying upon the circumstance in question.

The conclusion is therefore that a party's intended procedural effect – that is, its intention to rely upon a circumstance in support of its claim – must be expressed clearly and unequivocally. The intended procedural effect must, on an objective assessment, have been expressed in such a manner that neither the tribunal nor the opposing party could reasonably misunderstand it. The requirement applies to every circumstance that the tribunal includes as an element of the factual basis of the award. In cases of uncertainty, it is incumbent upon the tribunal to clarify the parties' positions through its substantive direction of the proceedings. Absent such clarification, the preferable starting point is that ambiguity concerning a party's pleadings prevent the circumstance from being relied upon as a material fact in the award.

3. Pleadings of Facts under Legal Headings and by Reference to Subsections and Appendices

Neither the Swedish Code of Judicial Procedure nor the Arbitration Act imposes any formal requirements regarding how a pleading of a fact must be made. An important difference between court proceedings and arbitration is nevertheless that civil litigation is governed by the principles of orality[43] and immediacy,[44] whereas arbitral proceedings are not.[45] In court proceedings, a pleading of a fact must, as a general rule, be made orally and immediately before the court at the main hearing. In arbitration, by contrast, pleadings of facts may be made in a considerably less formal manner. This follows from the arbitral principle that all material introduced into the

35 A more extensive discussion of this issue is found in Hardenberger 2023, pp. 312 ff.

36 See, for example, Lindskog 2020, IV:0, note 3010 (36) to Section 3.2.1.

37 See SOU 1994:81, pp. 150 and 177; and Government Bill 1998/99:35, pp. 120 and 146. See also NJA 1973 p. 740, where the Supreme Court observed that it remained an open question to what extent deficiencies in the tribunal's conduct of the proceedings might constitute grounds for setting aside an arbitral award. Today, it may be regarded as settled that serious deficiencies in the tribunal's substantive direction of the proceedings may constitute reviewable defects; see Maunsbach 2024, pp. 446 ff. On the scope of the tribunal's substantive direction of the proceedings, see also SAA Arbitration Reports 2024:1–5, Högkvalitativa skiljeförfaranden i Sverige [High-Quality Arbitration Proceedings in Sweden], pp. 95 ff.

38 For similar observations, see Heuman 1999, pp. 338 and 384 ff.; and Lindskog 2020, III:21, Section 6.1.4. See also III:0, Section 2.1.5.

39 On terminology, *cf.* note 11 above.

40 *Cf.* NJA 1976 p. 289; NJA 1987 p. 450; and NJA 2014 p. 212, paras. 9–10. Although these cases concern civil litigation, they illustrate the need for substantive direction of the proceedings where a party's position has not been articulated with sufficient clarity. It should also be noted that the Supreme Court, in NJA 1990 p. 419 (»Red Sea«), emphasised that the arbitral tribunal had repeatedly sought clarification of the party's position.

41 See note 33 above.

42 On terminology, *cf.* note 11 above.

43 Ch. 43, Sec. 5 of the Code of Judicial Procedure.

44 Ch. 17, Sec. 2 of the Code of Judicial Procedure.

45 See Government Bill 2017/18:257, p. 18; SOU 1994:81, p. 68; and Government Bill 1998/99:35, pp. 40 and 110 ff.

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proceedings ordinarily forms part of the record, including material that has not been discussed during the hearing. The same requirement regarding clarity of pleadings nevertheless applies in both forms of proceedings.

The absence of formal requirements means that, in principle, a pleading of a fact *need not* appear in a particular submission or under a particular heading. As a result, there is generally no obstacle to parties distributing their description of the relevant factual background across several documents, including written submissions, appendices, and sub-appendices. Nor is there any obstacle to parties distributing their pleadings of facts under different headings within those documents. This freedom is subject to an important qualification. For *each*[46] pleaded fact, it must be clear and unequivocal that the party intended to submit that particular circumstance to the tribunal for determination on the merits as an alleged material fact.[47]

The methods described above frequently give rise to difficulties. Consider, for example, a party referring to a factual circumstance under a heading that is unrelated to the grounds of its claim. Is the reference alone sufficient to establish the intended procedural effect? Probably not.[48] Consider next a party invoking a legal concept such as »defect«, »negligence«, or »notice«, thereby indicating that a particular legal issue should be determined by the tribunal. Does this mean that every factual circumstance capable of falling within the legal concept has thereby been submitted to the tribunal as a pleaded fact? Again, the answer is probably no. Rather, the party must identify and plead each specific circumstance that it considers directly relevant to the assessment of defect, negligence, or notice. The principle of party disposition requires that the tribunal's determination of these issues be based only on those material facts that have actually been pleaded.[49] The mere fact that a circumstance may be relevant to one of the legal issues in dispute does not mean that it has been pleaded.

The same requirement applies to every specific circumstance that a party seeks to rely upon as a material fact. Even where parties attempt to organise their pleadings by reference to legal concepts or through cross-references to appendices and sub-sections, the intended procedural effect must be expressed with sufficient clarity. For that reason, such techniques will often come into tension with the stringent requirement that pleadings of facts be clear and unequivocal.

The difficulties described above raise the question of the extent to which the context in which a circumstance is mentioned may be taken into account when interpreting the parties' procedural acts. Guidance may be found in the case law of the Swedish Supreme Court concerning pleadings of facts in ordinary civil litigation. In NJA 1980 p. 352, the Supreme Court considered whether a court of appeal had based its judgment on a circumstance that had not been pleaded. The claimants (purchasers) in the case had referred to certain financial circumstances relating to the transactions at issue not as a factual basis of the claim, but when the party *developed its reasoning*. The court of appeal relied upon those circumstances when dismissing the claim. Before the Supreme Court, the claimants argued that the court of appeal had thereby based its judgment on unpleaded facts. In its reasoning, the Supreme Court attached significance to the *context* in which the statement had been made. Having regard to that context, the circumstance could not be regarded as having been pleaded.[50]

The case illustrates that the procedural context in which a statement appears may constitute an important interpretive indicator when determining whether a circumstance has been submitted to the court or tribunal through a pleading of a fact. This view is well supported in legal scholarship.[51] The issue has sometimes been described as one of identifying the procedural context in which a procedural act takes place.[52] If a circumstance is described under a heading dealing with the grounds of a claim or defence, that context may constitute a strong indication that the circumstance has been pleaded. Conversely, the mere fact that a circumstance is mentioned during witness testimony will ordinarily point in the opposite direction. In the absence of additional interpretive indicators, such a statement should not normally be understood as a pleading of a fact.[53]

The same reasoning applies to the location of a statement within written submissions and appendices. A distinction must therefore be drawn between, on the one hand, circumstances described in direct connection with headings dealing with pleaded grounds and, on the other hand, circumstances appearing elsewhere in the record, for example in evidentiary appendices or under headings concerned primarily with legal argumentation. NJA 1996 p. 52 demonstrates that the mere fact that a circumstance is mentioned under a heading devoted to legal argument is insufficient, by itself, to establish that the circumstance has been pleaded.[54] The same applies to references appearing in evidentiary appendices and similar supporting materials. In such situations, additional interpretive indicators are required before it can be concluded that the intended procedural effect was to submit the circumstance to the tribunal for determination on the merits.[55] Relevant interpretive indicators may include the content of the circumstance itself, the existence or absence of a stated theme

46 See NJA 2019 p. 802 (»Abbes bygg«), para. 13. It should be noted that the Supreme Court refers to the *circumstance* (in the singular), not to the ground of claim, the factual context, or similar broader categories.

47 On terminology, *cf.* note 11 above.

48 See NJA 1996 p. 52. The case is discussed further below.

49 See Hardenberger 2023, pp. 259 ff. In this context, reference is sometimes made to different constituent elements of a material fact; see, for example, Heuman, JT 2024–25, pp. 724 ff.

50 The Supreme Court also attached significance to the *content* of the statement in question, namely that it concerned a circumstance unfavourable to the purchasers and therefore one which they had no apparent interest in pleading in support of their claim; see NJA 1980 p. 352, at p. 358.

51 See Hardenberger 2023, pp. 305–306 and 309; Bengt Lindell, Processuell preklusion [Procedural Preclusion], 1993, pp. 230–231; Westberg 1988, pp. 105–108; and Peter Westberg, Konflikt och kontrakt [Conflict and Contract], 2020, p. 439.

52 See Gotland District Court, case T 309-17, judgment of 8 September 2017, p. 27.

53 See, for example, Svea Court of Appeal, case T 10465-23, judgment of 28 May 2025, pp. 133 ff. and 145 ff.

54 See NJA 1996 p. 52, at p. 61.

55 For an arbitral example involving a factual statement contained in documentary evidence, see Svea Court of Appeal, case T 9246-21, judgment of 23 February 2023, pp. 26–27. The case is discussed by Heuman, JT 2024–25, pp. 927 ff.

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of evidence directed at the circumstance,[56] and whether the circumstance has been identified by the tribunal as part of the party's case in the tribunal's recital.[57]

The foregoing does not mean that pleadings of facts cannot be structured by reference to legal concepts or through cross-references to appendices and sub-sections. In complex disputes involving extensive factual material, such techniques may be both necessary and desirable. They may serve important functions in making the parties' positions comprehensible and in rendering the factual record manageable. Suppose, for example, that a party identifies a particular factual circumstance under a heading dealing with the grounds of its claim and indicates that the detailed content of that circumstance is set out in an appendix or in a separate section of its written submissions. In such a situation, the party has constructed its pleading of a fact through a reference. At first sight, this may appear compatible with the requirement that pleadings of facts be clear and unequivocal.

The issue nevertheless requires closer examination. Assume that the appendix or section referred to contains a large number of factual statements, many of which could *potentially* be relevant to the dispute. Should the reference be understood as meaning that every factual statement contained in the material has been submitted to the tribunal for determination on the merits? And does the tribunal's mandate then extend to determining the legal relevance of each of those statements? In my view, such an approach would undermine the rationale underlying the stringent requirement that pleadings of facts be expressed clearly and unequivocally. It would become increasingly difficult for the opposing party to identify which circumstances require a response. At the same time, the tribunal's task would expand substantially, since the tribunal would be required to assess the legal relevance of an ever-growing body of factual material. The practical consequence would be that the tribunal would be given a broad mandate to search the record on its own initiative (*ex officio*) in order to identify those factual circumstances that may be relevant to the outcome of the dispute. The tribunal would further be required to compile and categorise the material facts upon which the dispute should be decided. Responsibility for identifying and organising material facts would thereby shift from the parties to the tribunal.[58] Such an arrangement is difficult to reconcile with the principle of party disposition. The parties determine the inner limits of the tribunal's mandate through their procedural acts. The tribunal's role is to assess the legal relevance of those material facts that have been pleaded. It is not the tribunal's role to identify, select, and formulate the material facts upon which the parties' claims and objections should rest. The Swedish Supreme Court has rejected the notion that a court may assume such a role.[59] Responsibility for identifying those circumstances that are relied upon as material facts rests with the parties themselves. The tribunal may determine the legal significance of pleaded facts, but it may not replace the parties in the task of identifying which facts are pleaded.

Accordingly, a party seeking to construct a pleading of a fact through a reference to an appendix or a particular section of a submission must ensure not only that it is clear that *something* is being pleaded, but also precisely *what* is being pleaded. The requirement of clarity therefore extends both to the existence of the pleading and to the identification of the particular circumstance or circumstances that fall within it. Where the party succeeds in identifying clearly the specific factual statements to which the pleading relates, there is no formal obstacle to constructing a pleading through a reference. The interpretation of the procedural act must nevertheless be undertaken in light of all available interpretive indicators. Relevant indicators may include the procedural context, the content of the circumstance itself,[60] the existence or absence of a stated theme of evidence[61] and the extent to which the parties have addressed the circumstance in their submissions and argumentation.[62] Only where the available interpretive indicators point clearly and unequivocally towards the conclusion that a particular circumstance has been submitted to the tribunal through a pleading of a fact may that circumstance form part of the factual basis of the award.

A final observation should be made concerning disputes involving extensive factual records. In cases where the material permits multiple conclusions concerning the legal relevance of the facts described and where the parties' factual narratives are themselves contested, it becomes even more important that the party relying upon a circumstance clearly identifies the specific facts that are pleaded. In such disputes, more subtle interpretive indicators – such as legal relevance, the focus of the parties' argumentation, or themes of evidence – will often provide limited assistance in determining which circumstances have been submitted to the tribunal through a pleading of a fact. As a starting point, there should be little room for the tribunal and the opposing party to understand a procedural act differently. Nor should extensive interpretative efforts be required merely to identify which circumstances are pleaded as alleged material facts. Where such efforts become necessary, the intended procedural effect has not been expressed with sufficient clarity. In these circumstances, the tribunal may rely upon the circumstance only if, through its substantive direction of the proceedings, it succeeds in obtaining a clarification from the party concerned as to which specific circumstances fall within the pleading. Absent such clarification, the circumstances should be regarded as introduced into the proceedings but not pleaded.

The preceding discussion has focused on the identification of pleaded facts and the interpretation of procedural acts. It has been argued that a circumstance may form part of the factual basis of

56 See Hardenberger 2023, pp. 311–312.

57 For a discussion of the recital of the parties' positions as a mechanism for verifying and clarifying pleadings of facts, see Hardenberger 2023, pp. 322 ff. It should be noted that a circumstance can be recorded in the tribunal's recital as pleaded only if the party has previously expressed an intention to perform the procedural act in question. An initial lack of clarity may, however, be cured where the tribunal records the circumstance as pleaded in its recital and the party raises no objection.

58 See Måns Wigén, Vem bär ansvaret för att kategorisera rättsfakta i dispositiva tvistemål? [Who Bears Responsibility for Categorising Material Facts in Dispositive Civil Litigation?], SvJT 2024, pp. 509 ff.

59 *Cf.* NJA 1992 p. 375, at p. 401. See also Hardenberger 2023, pp. 216 ff. In that case, one of the parties argued that it was for the court to distinguish between pleaded circumstances (material facts) and merely introduced circumstances (evidentiary facts). The Supreme Court rejected that view. A court or arbitral tribunal is concerned only with determining the legal relevance of circumstances that have actually been pleaded in support of a party's claim.

60 See Hardenberger 2023, pp. 306–307 and 309.

61 See note 56 above.

62 See, for example, Svea Court of Appeal, case T 11225-23, judgment of 5 March 2025, pp. 15–16.

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the award only where the intended procedural effect has been expressed clearly and unequivocally, and that any remaining uncertainty should ordinarily be resolved through the tribunal's substantive direction of the proceedings rather than through extensive interpretative efforts. The significance of these issues becomes particularly apparent where the tribunal misconstrues a procedural act. In such situations, the tribunal's interpretation of the parties' procedural acts may affect not only the factual basis of the award but also the scope of the tribunal's mandate. A misinterpretation may lead the tribunal to determine matters that were never submitted to it, or conversely to refrain from determining matters that were submitted to it. The consequences of such misinterpretations are examined in the following section.

4. Failure to Exercise the Mandate and the Misinterpretation of Procedural Acts

The tribunal's authority is defined by both the outer and the inner limits of its mandate. The outer limits are determined by the scope of arbitrability and by the arbitration agreement. The inner limits are determined by the parties' procedural acts.[63]

Like any juridical act, a procedural act must be interpreted before its legal effects can be determined. Without interpretation, it is impossible to establish its content.[64] This applies equally to procedural acts intended to produce legal effects within the proceedings.

It follows that an arbitral tribunal must interpret the parties' procedural acts in order to determine the inner limits of its mandate.[65] When deciding a dispute, the tribunal must therefore interpret procedural acts such as claims, concessions, pleadings of facts, and admissions, and determine the dispute submitted to it in light of those acts. The tribunal's task is to determine the entirety of the dispute submitted by the parties, while at the same time refraining from determining matters that fall outside the limits established by the parties' procedural acts.

This interpretative authority must, however, be viewed in light of the principle of party disposition. Although the tribunal necessarily possesses authority to interpret the parties' procedural acts, it should not, as a general rule, attempt to resolve substantial ambiguities through interpretation alone. Where the parties' procedural acts are unclear, the tribunal should instead employ its substantive direction of the proceedings in order to clarify the parties' positions.[66] An important objective of the tribunal's substantive direction of the proceedings is to ensure that the parties' positions are sufficiently clear that extensive interpretative efforts become unnecessary.[67] Where it cannot reasonably be assumed that the parties themselves, or their opponents, attach the same meaning to a procedural act as the tribunal, the tribunal should seek clarification.[68] If the tribunal fails to do so and instead bases its decision upon an interpretation that may come as a surprise to one of the parties, the result will at least be a procedural irregularity.[69]

Challenges to arbitral awards frequently involve allegations that the tribunal misconstrued one or more procedural acts. In such cases, the reviewing court must determine both whether the tribunal correctly interpreted the procedural acts in question and whether the tribunal remained within the limits of its mandate when viewed in light of the correct interpretation of those acts. When addressing the first of these questions, it is important to distinguish between procedural acts that produce procedural legal effects and procedural conduct that does not.

The parties determine the inner limits of the proceedings through claims and concessions, pleadings of facts, and admissions.[70] Alongside these procedural acts, however, the parties may also deny one another's factual assertions and raise legal objections against one another's legal arguments.[71] Unlike claims, pleadings of facts, and admissions, denials and legal objections do not themselves alter the scope of the tribunal's mandate. Consequently, the tribunal remains obliged to determine whether a pleaded fact has been established, irrespective of whether the opposing party expressly denies it. Similarly, the tribunal remains responsible for determining the applicable law, irrespective of whether the opposing party advances legal objections against a particular legal argument. Departures from this starting point occur only where the opposing party admits the circumstance in question.[72]

A consequence of this distinction is that, for the purpose of determining the inner limits of the tribunal's mandate, the interpretation of denials and legal objections is ordinarily of limited significance. The decisive questions concern the interpretation of pleadings of facts and admissions, and passivity on the side of the parties should ordinarily not be interpreted as admissions.[73] This principle applies not only in ordinary civil litigation but also in arbitral proceedings governed by the Arbitration Act.[74] The significance of this observation becomes apparent in set-aside proceedings. Disputes concerning the limits of the tribunal's mandate will frequently turn not on how the parties denied one another's allegations or responded to legal arguments, but on whether the tribunal correctly interpreted a pleading of a fact or an admission and whether that interpretation affected the scope of the dispute submitted to the tribunal.

63 See Lindskog 2020, IV:0, Section 3.2.

64 See, for example, Joel Samuelsson, Fullmaktsläran [The Law of Agency and Powers of Attorney], 2023, pp. 35 ff.

65 See Lindskog 2020, I:0, Section 1.3.3; and III:0, Section 4.1.2.

66 See, for example, the dissenting opinion in RH 1991:70; and Maunsbach 2024, p. 426.

67 See the sources cited in notes 37, 38 and 40 above.

68 *Cf.* note 26 above.

69 See Lindskog 2020, V:34, Section 5.2.7. On the threshold for what constitutes a surprise to a party, see Westberg, JT 2000–01, pp. 348 ff. It should also be noted that a tribunal may have some latitude, within the linguistic meaning of a pleading of a fact, to reformulate its content; see Westberg 2020, p. 437, note 502.

70 For a discussion of these procedural acts, see Ekelöf *et al.* 2016, pp. 40 ff.

71 See the preceding note, p. 45.

72 See Hardenberger 2023, pp. 365–366. For an illustrative example, see Svea Court of Appeal, case T 10465-23, judgment of 28 May 2025, p. 135. According to Ekelöf, an admission may also extend to the legal significance of the circumstance in question; see the sources cited in note 18 above.

73 See NJA 1990 C 24; NJA 2008 N 12; NJA 2010 p. 643; NJA 2016 p. 668, paras. 12–13; Lars Heuman, Skyldigheten enligt RB 17:3 att göra förnekanden och kontradiktoriska och konträra åberopanden [The Duty under Ch. 17, Sec. 3 of the Code of Judicial Procedure to Make Denials and Contradictory and Counter-Pleadings], JT 2007–08, pp. 909 ff.; and Westberg, JT 2011–12, pp. 168 ff.

74 See Svea Court of Appeal, case T 1323-17, judgment of 29 March 2018, p. 15; and Heuman 1999, p. 354. See, however, RH 1991:70 and Heuman, JT 2024–25, p. 926.

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Legal scholarship has occasionally suggested that a misinterpretation or misassessment of a procedural act that has, in fact, been considered by the tribunal does not in itself constitute a reviewable defect. On this view, a procedural irregularity arises only where the procedural act has not been taken into account in an appropriate manner.[75] Read in isolation, such a proposition may appear surprising. It should, however, be understood in the broader context of procedural acts generally.[76] Viewed in that context, the proposition may be understood as asserting that a mere error in interpretation does not, *by itself*, constitute a reviewable procedural irregularity.[77] The matter becomes more complex where the misinterpretation affects the scope of the tribunal's mandate. If a tribunal misconstrues a procedural act and, *as a consequence*, determines matters that were never submitted to it, the resulting excess of mandate undoubtedly constitutes a reviewable defect.[78] It would therefore be difficult to maintain that the underlying misinterpretation can never give rise to review.

Indeed, an award based upon a circumstance that has not been pleaded will in many cases be the direct consequence of a misinterpretation of a procedural act. A reviewing court may conclude that a circumstance should not have been understood as pleaded, whereas the tribunal reached the opposite conclusion and therefore considered itself entitled to rely upon the circumstance as part of the factual basis of the award. The distinction therefore reflects a deeper conceptual division between errors relating to the conduct of the proceedings and deviations from the mandate conferred upon the tribunal.

This issue is particularly significant in relation to pleadings of facts and admissions. Situations in which a tribunal relies upon a circumstance that has not been sufficiently pleaded or restricts its examination on the basis of an admission that did not in fact exist, will often be characterised precisely by the fact that the tribunal interpreted a procedural act differently from the reviewing court. Examples include situations where the tribunal concludes that a party must be regarded[79] as having pleaded a particular circumstance or where a party's silence is interpreted as an admission,[80] while the reviewing court concludes that the intended procedural effect was never expressed with sufficient clarity.[81] In such cases, the tribunal has, according to the reviewing court, misconstrued the procedural act. The misinterpretation has then produced a further consequence: the tribunal has either exceeded the limits of its mandate or restricted its examination in a manner not justified by the parties' procedural acts.

The proposition that such interpretative errors cannot give rise to review sits uneasily with legislative materials, case law, and legal scholarship.[82] The reviewable defect in these situations consists in the tribunal's reliance upon a circumstance that was not pleaded or in its failure to determine the entirety of the dispute submitted by the parties. In many cases, the tribunal will additionally have failed to clarify the parties' positions through its substantive direction of the proceedings. At the same time, it is often the tribunal's misinterpretation of a procedural act that explains why the reviewing court concludes that the defect occurred. The tribunal's interpretation of the procedural act and the consequences of that interpretation for the scope of the mandate are therefore closely connected.

A further question concerns situations in which the tribunal, through mistake, oversight, or misinterpretation, determines only part of the dispute submitted by the parties. One example is where the tribunal, as a consequence of misconstruing a pleading of a fact, fails to determine an alternative ground that was in fact pleaded and not admitted.[83] Another example is where the tribunal incorrectly treats a circumstance as admitted, both factually and legally, and therefore relies upon it without conducting an independent determination on the merits.[84] According to one view, such situations do not involve *excess* of mandate because the tribunal has not gone beyond the limits of its authority.[85] The defect is instead characterised as a procedural irregularity arising from the tribunal's handling of the proceedings, and will not necessarily justify setting aside the award. Other authors have taken a different position.[86] In their view, a tribunal that, as a consequence of misinterpreting a procedural act, determines only part of the dispute submitted by the parties has not merely committed a procedural irregularity. The tribunal has also failed to exercise the mandate conferred upon it by the parties.

The disagreement outlined above ultimately concerns the relationship between the interpretation of procedural acts and the limits of the tribunal's mandate. A tribunal that misconstrues a procedural act may commit a procedural irregularity. This is particularly true where the tribunal fails to clarify the parties' positions despite the existence of genuine uncertainty concerning the meaning of a procedural act. In such situations, the tribunal may have failed in its substantive direction of the proceedings and thereby deprived the

75 See Lindskog 2020, I:0, Section 1.3.3; and V:34, Section 5.1.3, note 3787 (266).

76 It should be noted that the cases discussed by Lindskog concern withdrawals of claims; see NJA 1975 p. 536 (»Repotype«); and NJA 1990 p. 419 (»Red Sea«).

77 The proposition is open to criticism in light of the case law of the Supreme Court; see NJA 1975 p. 536 (»Repotype«); NJA 1990 p. 419 (»Red Sea«); and NJA 2019 p. 171 (»Belgor«), paras. 28 and 34. Consistently with the Supreme Court's reasoning in *Belgor*, the Svea Court of Appeal appears to proceed on the basis that a misinterpretation of an admission or a pleading of a fact may, in itself, constitute a procedural irregularity; see Svea Court of Appeal, case T 11225-23, judgment of 5 March 2025, pp. 17 ff., although the Court of Appeal ultimately concluded that no misinterpretation had occurred in that case.

78 Cf. Lindskog 2020, V:34, Section 4.3.

79 See NJA 1988 p. 567, penultimate paragraph of the reasoning.

80 See NJA 2010 p. 643, para. 6.

81 See the cases cited in note 26.

82 See notes 7–9 above.

83 *Cf.* Svea Court of Appeal, case T 540-23, judgment of 10 January 2025. Cf. also Svea Court of Appeal, case T 10465-23, judgment of 28 May 2025, pp. 125 ff., where numerous allegations concerning the tribunal's failure to determine pleaded material facts and facts supporting objections were advanced. Only one ground for review (Section 4.2.4 of the judgment) was successful.

84 See NJA 2019 p. 171 (»Belgor«), paras. 28 and 34. Cf. also Svea Court of Appeal, case T 11225-23, judgment of 5 March 2025, pp. 17 ff; and NJA 2014 s. 212, paras. 11 and 12. On the question whether an admission may extend to the legal relevance of a circumstance, see the sources cited in note 18 above.

85 See the sources cited at the end of note 20 above.

86 See the sources cited in note 22 above.

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parties of a fair opportunity to address the basis upon which the dispute was decided.

The misinterpretation of a procedural act should nevertheless be distinguished from the consequences that the misinterpretation produces for the tribunal's determination of the dispute. Where a misinterpretation leads the tribunal to rely upon a circumstance that was never pleaded, the tribunal determines a matter that was not submitted to it by the parties. Conversely, where a misinterpretation leads the tribunal to disregard a pleaded circumstance, an alternative ground, or a fact supporting an objection, the tribunal determines less than the dispute submitted to it.

In both situations, the tribunal has departed from the limits established by the parties' procedural acts. The difference lies only in the direction of the deviation. In the first situation, the tribunal determines more than the parties submitted. In the second, it determines less.

From the perspective of the principle of party disposition, however, the two situations are closely related. The parties have defined the scope of the dispute through their procedural acts. The tribunal's mandate extends neither further nor shorter than the dispute thereby defined. A tribunal that relies upon an unpleaded circumstance disregards the parties' determination of the outer limits of the dispute submitted to it. A tribunal that fails to determine a pleaded circumstance, an alternative ground, or another issue falling within the dispute disregards the parties' determination of the inner content of that same dispute. The underlying defect is therefore the same. In both situations, the tribunal has failed to respect the mandate conferred upon it by the parties.

For my own part, I find it difficult to accept that an unjustified restriction of the tribunal's determination should fall outside Section 34(1)(3) of the Arbitration Act. A first reason is that such an interpretation is inconsistent with the manner in which the provision has been applied in the set-aside case law of the Svea Court of Appeal.[87]

A second reason is that such an approach would mean that the consequences of misconstruing a procedural act that expands the scope of the tribunal's determination (review on the ground that the award is based on an unpleaded circumstance) would differ from the consequences of misconstruing a procedural act that restricts that scope (a non-reviewable procedural irregularity, provided that the procedural act has not been disregarded in its entirety). It is difficult to accept that the two situations should be distinguished systematically merely because one results in an excess of mandate and the other in a failure to exercise the mandate, solely on the basis of the wording of Sec. 34(1)(3) of the Arbitration Act.[88] The situations are directly comparable both in terms of the tribunal's error and in terms of the consequences for the parties, namely a disregard of the principle of party disposition.[89]

Finally, it should be noted that both a judgment based on an unpleaded circumstance (an excess of mandate) and a judgment in which the court has failed to determine all elements required for the claim to succeed (a failure to exercise the mandate) constitute a serious procedural defect under the Code of Judicial Procedure.[90] The same applies where a court has incorrectly proceeded on the basis that a circumstance was undisputed.[91] There are no differences between arbitral proceedings and civil litigation that justify treating these situations differently under the Arbitration Act than under the Code of Judicial Procedure.

5. Conclusion

This article has examined two questions concerning the relationship between procedural acts and the arbitral tribunal's mandate.

The first question concerned the limits of the tribunal's authority to interpret the parties' procedural acts. It has been argued that a circumstance may form part of the factual basis of the award only where the party's intended procedural effect has been expressed clearly and unequivocally. The requirement applies to every circumstance relied upon by the tribunal as a material fact. Where uncertainty remains, the preferable course is not extensive interpretation but clarification through the tribunal's substantive direction of the proceedings.

The analysis further suggests that the interpretation of procedural acts should be guided by a range of interpretive indicators, including procedural context, evidentiary themes, the parties' argumentation, and the content of the circumstance itself. Nevertheless, if extensive interpretative efforts are required merely to identify what has been pleaded, the intended procedural effect has not been expressed with sufficient clarity. In such circumstances, the relevant facts should be regarded as introduced into the proceedings but not pleaded.

The second question concerned the classification of defects arising where the tribunal determines less than the dispute submitted by the parties. The article has argued that such situations should not be characterised solely as procedural irregularities. Where a tribunal, through mistake, oversight, or misinterpretation of a procedural

87 See Svea Court of Appeal, case T 1356-18, judgment of 4 November 2022, p. 36; and case T 540-23, judgment of 10 January 2025, p. 20. It should be noted, however, that in case T 10465-23, judgment of 28 May 2025, pp. 125 ff., the Court of Appeal examined alleged failures to exercise the mandate as a question of procedural irregularity.

88 For a similar view, see Lindell 2021, pp. 764–765. It should be noted that the Svea Court of Appeal, in cases T 1356-18 and T 540-23, acknowledged that a failure to exercise the mandate does not fit comfortably within the *wording* of Sec. 34(1)(3) of the Arbitration Act, yet nevertheless concluded that the provision encompasses such situations.

89 Where a tribunal incorrectly interprets a procedural act as constituting an admission, it performs a procedural act of its own (treating the circumstance as admitted and relying upon it accordingly) without the parties having conferred such authority upon it through their own procedural acts. In other words, the requisite party initiative is absent. This is contrary to the principle of party disposition.

90 As regards the former situation, see the second sentence of Ch. 17, Sec. 3 of the Code of Judicial Procedure and, for example, NJA 2003 p. 58 and NJA 2019 p. 802 (»Abbes bygg«). As regards the latter, see NJA 2000 C 19; NJA 2014 p. 212; NJA 2016 p. 668; and Hardenberger (2023), pp. 390 ff. Lindell also uses failures to exercise the mandate as an example; see Lindell 2021, p. 765. It should be noted, however, that dismissal of a claim requires only that the court find that one of several necessary conditions for relief has not been satisfied; see Svea Court of Appeal, case T 10465-23, judgment of 28 May 2025, p. 144; and Hardenberger 2023, pp. 390 ff.

91 NJA 2001 p. 282, at p. 285. The Supreme Court referred to the reasoning of the Court of Appeal: »In the present case, the Court of Appeal based its decision to remit the case on the fact that a procedural error had occurred before the District Court, in that the District Court had incorrectly proceeded on the assumption that a certain circumstance was undisputed between the parties. As a consequence, the scope of the court's determination was affected.« The passage illustrates the connection between a misinterpretation of a procedural act (the admission) and its consequence, namely a restriction of the scope of adjudication.

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act, fails to determine part of the dispute submitted to it, the tribunal has failed to exercise the mandate conferred upon it.

The difference between excess of mandate and failure to exercise the mandate lies only in the direction of the deviation. In the former situation, the tribunal determines more than the parties submitted. In the latter, it determines less. In both situations, however, the tribunal departs from the scope of the proceedings as determined by the parties through their procedural acts.

Against that background, there are strong reasons to regard both excesses and deficiencies in the exercise of the arbitral mandate as manifestations of the same fundamental principle. In each case, the tribunal has failed to respect the mandate established by the parties themselves.

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