CHAPTER 2

# 'When in Stockholm, …':[1] Interpretation, Gap-Filling and Modification of Commercial Contracts under Swedish Law – Some Comparative Reflections for Arbitrators and Counsel

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## §2.01 INTRODUCTION

Occasionally, a dispute referred to arbitration can be resolved without the arbitral tribunal ('tribunal') engaging with the merits of the case, e.g., based on the tribunal's determination that it lacks jurisdiction.

However, in most cases, the tribunal will be tasked with determining issues of substantive law. In commercial arbitrations, this will – invariably – include matters of contract law, including the formation, interpretation, adaption, modification, performance, termination and/or breach of contract and, in the vast majority of disputes, also include dealing with requests for monetary relief relating thereto.

As one of the world's major arbitral institutions, the SCC Arbitration Institute (SCC) administers, *inter alia*, a large number of international commercial arbitrations, many of which are of considerable legal and/or factual complexity and involve substantial amounts in dispute.

1. The famous proverb: 'When in Rome, do as the Romans do', which inspired the title of this article, is traditionally ascribed to St. Ambrose in a letter to St. Augustine from the 4th Century AD discussing fasting habits in Milan and Rome, respectively. The most well-known iteration of the saying is likely the 18th Century AD letter from Pope Clement XIV to Dom Gaillard: 'The *siesto*, or afternoon's nap of Italy, my most dear and reverend Father, would not have alarmed you so much, if you had recollected, that when we are at Rome, we should do as the Romans do.'

In the vast majority of commercial arbitrations proceeding under the SCC Rules,[2] Swedish law is elected as the *lex causae* and, as such, governs the so-called main or matrix contract, i.e., the contract, except for the arbitration clause. The arbitration clause, although included in the matrix contract, is considered a discrete contract between the parties based on the doctrine of severability.[3]

Commercial arbitrations frequently involve fundamental disagreements between the parties on how to construe or interpret the agreement underpinning and governing their contractual relationship as manifested in the (matrix) contract. This can be due to a number of factors that are not limited to poor drafting.[4]

The above considerations entail that arbitrators (and counsel) involved in commercial arbitrations under the SCC rules will often need to deal with and apply the various principles of Swedish law pertaining to contract interpretation, i.e., how to determine what rights and obligations the contract confer on the parties. This can be viewed as a 'meta' issue: only when the meaning of the contract has been established will arbitrators be able to move on to apply the contractual terms, as construed, to the other facts of the case and decide any other issues in contention.

Often, the arbitrators appointed in commercial arbitrations under the SCC Rules are legal professionals (typically lawyers, academics and judges) educated, trained and admitted to practice law in jurisdictions other than Sweden, including practitioners from common law jurisdictions such as England, USA, Canada, Ireland, Singapore, India, New Zealand and Australia.[5] Hence, if the laws of Sweden apply as the relevant *lex causae*, such 'foreign' arbitrators necessarily need to assimilate and comprehend parts of Swedish contract law, including the principles concerning contract interpretation.

Obviously, the parties' counsel will assist the tribunal by making submissions based on the applicable law and/or they may tender expert evidence regarding certain relevant legal principles, but I – emphatically – hold the view that an arbitrator cannot (and should not) rely exclusively on the parties or experts but will need to self-educate and get informed by studying the core principles of the laws on contracts and the relevant part of the law of obligations applicable in the relevant jurisdiction.

It is the principal purpose of this chapter to provide sitting and prospective arbitrators not familiar with Swedish contract law with a brief introduction to a few of

2. The most recent version of the SCC Arbitration Rules (2023) came into force on 1 Jan. 2023.
3. With respect to cases commenced in 2023, Swedish law was elected as *lex causae* in 140 out of a total number of 175 cases. It should be remembered that the SCC administers both domestic and international arbitrations. Among the residual *lex causae*, English law came in second (nine cases).
4. Frequently, the parties did not (and could not reasonably) envisage or foresee such an issue at the time of contracting, or they did indeed foresee the issue but were unable to agree on a way to regulate a certain issue and, therefore, consciously elected to omit a contractual provision. This may be an entirely valid commercial decision taken by savvy and experienced business people based on, e.g., a plausible *ex ante* assessment of the risk that such an event or instance will occur. The fact that *ex post* such an event did transpire does not negate the rationality of the original decision.
5. Obviously, also practitioners from other professions than law are appointed as arbitrators in SCC arbitrations, e.g., CPAs, engineers, architects, quantum surveyors, etc. This chapter should prove helpful to such professionals as well.

the core principles of contract interpretation and modification that such arbitrators will likely encounter when reviewing written submissions or listening to oral arguments in cases seated in Sweden and involving Swedish contract law.[6]

Moreover, in order to better understand certain initial positions potentially taken by arbitrators from, in particular, common law jurisdictions, it is also important for civil law-trained arbitrators to understand some of the core principles of contract interpretation under common law systems. This will facilitate communication and serve to enhance intersubjectivity within the tribunal and, thereby, hopefully, improve the quality of deliberations.[7] To that effect, I have contrasted the principles in Swedish law with some principles found in common law jurisdictions, predominantly England.

Given the constraints in terms of the length of the chapter, I will focus on some of the recurrent contract law issues pertaining to the interpretation and modification of contracts under Swedish law. Also, these constraints entail that I will only refer to case law and (with a few exceptions) not to relevant doctrine.

## §2.02 THE SWEDISH CONTRACTS ACT[8]

The main statutory instrument in Sweden regarding contracts is the Contracts Act (Swedish: 'Avtalslagen')[9] (SCA), which came into force back in 1915.[10]

The SCA does not set out a comprehensive or all-encompassing regulation of the legal principles pertaining to contracts under Swedish law but is limited to dealing with some issues of general relevance,[11] such as the rules governing the formation of contracts (Chapter 1, sections 1-9)[12] and invalidity and contract modification (Chapter

6. I am not Swedish, but I have over the past many years been involved as counsel and arbitrator in numerous cases (arbitrations and litigations) under Swedish law, and my comparative legal research often involves analysing Swedish law. Moreover, a close relationship exists between Swedish and Danish (and Norwegian) law within the area of contract law.
7. The practical importance of this fact is amplified by the fact that English law, as mentioned, is the second most agreed *lex causae* in SCC arbitrations (although a very distant second).
8. The analysis in this chapter is to some (limited) extent based on the 'Länderbericht' account on salient features of Swedish and English law (substantive and evidentiary) contained in my book 'Disruption Claims' (2024) and, as regards English law, also on my book 'Earn-Out Disputes' (2020).
9. Law No. SFS 1915:218. The SCA was the result of a joint effort by the Swedish, Danish and Norwegian governments in the late 19th and early 20th century to promote unified codes in Scandinavia across a number of commercially pertinent areas of contract law (law of obligations). The very similar, but not identical, Danish Contracts Act and the Norwegian Contracts Act came into force in 1917 and 1918, respectively.
10. Like a number of similar statutes, e.g., the Japanese Civil Code of 1898 and the Korean Civil Code of 1958, the provisions of the SCA are, to large extent, inspired by the German Civil Code, i.e., the Bürgerliches Gesetzbuch (BGB). The BGB was promulgated in 1896 with effect from 1 Jan. 1900.
11. Some principles contained in other statutes are of importance to contracts in general. As an example, a number of provisions in the Sale of Goods Act are considered to form a part of dispositive law, also outside the ambit of sale of goods.
12. CISG Part II (Arts 14-24) contains provisions on the formation of contract in international sale of goods.

3, sections 28-38).[13] Due not least to the sparsity of actual regulation and the somewhat archaic language employed in the statute, a prominent late Swedish legal scholar once described the SCA as a 'ruin'.

After entering into force, the SCA was left more or less unchanged for sixty years. However, in the mid-1970s, Sweden (and the other Nordic[14] countries) introduced a novel provision promulgated as a rewording of section 36 of the SCA. Since entering into force, section 36 is frequently invoked and relied upon by parties in contract disputes. The same applies to the other Scandinavian countries. I will deal with section 36 when discussing contract modification at §2.04[C] *infra*.

## §2.03 CONTRACT INTERPRETATION UNDER SWEDISH LAW

### [A] Introductory Remarks

#### *[1] Freedom of Contract, Party Autonomy and 'Pragmatism'*

Swedish contract law is fundamentally rooted in the principles of freedom of contract and party autonomy, alongside the complementary principle of enforceability of contractual rights. This framework allows parties engaging in commercial transactions considerable latitude to negotiate and delineate the allocation of risks, rights and liabilities within their agreements, which are then bindingly and enforceably expressed through a written instrument (contract).

In such a legal system, adjudicators (whether courts or arbitral tribunals) should be reluctant to rewrite or substitute the parties' contract with one deemed fairer or more reasonable by the adjudicator(s).[15] This deference persists unless and until a specific threshold or baseline for business ethics is breached or in cases where the contract fails to express or reflect the parties' intended agreement, e.g., due to a mistake or incorrect drafting. Additionally, intervention may be warranted in limited circumstances where an unforeseen and profound imbalance, typically in the value of deliverables exchanged, is evident and not sufficiently offset by other provisions in the contract. The establishment of such a baseline and identification of such imbalances will be further dealt with below. Conversely, I will not engage with questions about mistakes or drafting issues in this chapter.[16]

13. For completeness, it should be mentioned that the SCA Chapter 2 (sections 10-27) concerns rules regarding agency/representation and SCA Chapter IV (sections 39-41) sets out a few general provisions.
14. The Nordic area includes the three Scandinavian countries with the addition of Finland and Iceland.
15. As stated by Wallis JA in the South African Supreme Court case, *Natal Joint Municipal Pension Fund v. Endumeni Municipality, 2012 (4) SA 593 (SCA)*: 'Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made.' South Africa is a hybrid legal system, namely a combination of common law and Roman-Dutch law.
16. Therefore, I will not deal with questions of rectification/reformation of contracts.

However, in Scandinavian and Nordic legal jurisprudence, it is frequently stated that the approach to contract interpretation is 'pragmatic' – it has even spawned the term 'Nordic Legal Pragmatism,' which includes contract interpretation. The proponents of this approach to contract interpretation are often focused not only on normative concepts found in terms like 'fair', 'equitable' and 'reasonable' but less value-laden expressions such as 'common sense' are also suggested to provide adjudicators with a level of flexibility considered relevant and appropriate as opposed to an excessive 'formalism,' i.e., a too slavish adherence to the words employed.

Ultimately, the application of the law serves a practical purpose, namely, to attach legal consequences to human conduct.[17] When viewed through the prism of practical application, it appears quite obvious that vague and ambiguous terms like 'pragmatism' will inherently be fraught with problems. One such problem is that the concept may lack intersubjectivity outside a core sphere of application. Without clarification and clear demarcation lines, applying a concept like 'pragmatism' entails the risk of ending up doing commercial entities engaged in contractual relationships a disservice by introducing (*ex post*) a level of uncertainty and unpredictability as regards the allocation and apportionment of rights and obligations between the parties which they themselves sought to avoid (*ex ante*) by recording the rights and obligations in a written contract.

Contrasting any notions of 'pragmatism' with English law, reference can be made to the statement by Lord Mansfield, dating back approx. 250 years in *Medcalf v. Hall*:[18]

> Nothing is more mischievous than uncertainty in mercantile law.

More recently, Lord Hodge provided the following policy statement in *Wood v. Capita*,[19] echoing Lord Mansfield:

> The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation.

For completeness, it should be noted that the indicated 'pragmatic' approach to the contract interpretation concept is mostly found in legal doctrine, and it is not readily discernable in Swedish case law beyond the sparingly applied concept of a 'comprehensive reasonableness test' (Swedish: 'övergripande rimlighetsbedömning') and some potential interpretative 'dithering' by its highest court of law. Both of these issues will be discussed below.[20]

17. *See*, *e.g.*, Burrows: Remedies for Torts, Breach of Contact, and Equitable Wrongs (4th ed., 2019) p. 19: '(L)aw is a practical discipline and, if its theories are set at such a high level that they cannot answer the practical questions addressed by courts, they are of marginal help.' I agree.
18. *Medcalf v. Hall* [1782] 3 Doug 113.
19. *See infra* n. 39.
20. Moreover, the decision mentioned at n. 46 could be seen as expressing such a standard.

### *[2] Subjective Versus Objective Interpretation*

Overall, contract interpretation seeks to determine what the parties have agreed upon, i.e., the joint will of the parties.

It is well-known that a dichotomy between a subjective and an objective approach to contract interpretation has existed for centuries.[21] Very briefly, this distinction can be described as follows.

The 'subjective' approach focuses on discerning the subjective intent or will of the parties involved in forming a contract. As such, it searches for a 'meeting of the minds'.[22] The view from which this interpretative exercise is carried out can be said to be the will of each of the *promisors*.

Conversely, the 'objective' approach will determine the joint will based on the external manifestations or declarations of intent, i.e., the outward expressions of the parties. The view is said to be that of a *reasonable promisee* or a reasonable *third person* with knowledge of the circumstances.[23]

Under Swedish law, neither principle commands the exclusivity of the adjudicator's attention, but a theoretical hierarchy appears to exist, as will be developed below.

## [B] General Principles in Swedish Contract Law: Does An Interpretative Hierarchy Exist?

The SCA does not set out the general principles of contract interpretation applicable under Swedish law.[24]

Instead, these have been established in case law by the Swedish Supreme Court (Swedish: 'Högsta Domstolen') (HD).[25]

In a number of decisions from the last decennium, HD has dealt with questions of contract interpretation and helpfully set out and explained the applicable rules.[26]

21. In German jurisprudence, the underlying thinking of these concepts is aptly referred to as the 'Willenstheorie' and the 'Erklärungstheorie', respectively. In English, they are sometimes called the 'will theory' and the 'reliance theory'.
22. In Roman law known as 'aggregatio mentium' or 'consensus ad idem'.
23. *See, e.g.*, the French Civil Code 1188(2), quoted below.
24. Some provisions can be said by implications to include certain principles of interpretation, e.g., section 32 concerning mistake. Regarding international sale of goods, CISG Arts 7-9 contain provisions on contract interpretation.
25. This is also the case in Denmark and Norway.
26. Swedish law does not recognise a formal rule of *stare decisis* but there is no doubt that the more principled and general statements of the law by HD are considered binding directives and applied as such by the lower courts. A list of HD decisions dealing with issues of contract interpretation is provided by C. Ramberg in SvJT 2022 p. 519, footnote 4. The author concludes: 'There is no longer a drought of precedents in the field of contract law.'

In my view, the most comprehensive exposition by HD of these principles is *NJA 2014 s. 960*,[27] which concerned a design-and-build contract (Swedish: 'Totalentrepenad') for the construction of a commercial building.[28] The decision is also remarkable due to the fact that the overall majority was made up of only two justices (Swedish: 'Justitieråd') (JR), whereas three other JR issued individual dissenting opinions concerning different parts of the decision. As regards the principles for contract interpretation, however, all JR agreed on the following paragraphs (referring to HD's previous decisions in *NJA 2012 s. 597* and *NJA 2013 s. 271*):[29]

> 20. As is the case with *contract interpretation in general*, even when a construction project is governed by a standard agreement within the AB[30] family, the guiding principle is what the *parties have mutually agreed upon*. The discussions between the parties at the time of entering into the contract and similar circumstances are indicative of the *common intention* of the parties.
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> 21. In this case, it has not been asserted that the parties engaged in any discussions regarding the interpretation of the disputed conditions. Furthermore, there is *no discernible shared understanding*. Therefore, there is *no common intention* among the parties. In such a situation, interpretation should be based on *objective grounds*.
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> Principles for interpreting the relevant provisions
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> 22. The starting point for an objective interpretation of a standard contractual term is the *wording of the disputed condition*. When the wording allows for different interpretations or provides no clarity at all, guidance should be sought from *the structure and other conditions of the standard agreement*. This is particularly applicable when the provisions of the contract are intended to form a coherent system.
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> 23. When the structure of the agreement also fails to provide any guidance, the contractual term should be interpreted in light of mandatory law (see NJA 2013 p. 271 para. 7, which concerned the interpretation of terms in AB 92). The impact of mandatory law may need to be limited in certain cases, for example, when, on one side, the contractual context does not offer direct guidance, but on the other side, the relevant mandatory legal rule fits poorly into the contractual system. Thus, ultimately, a more *overarching/comprehensive (Swedish: 'övergripanda') assessment of reasonableness (Swedish: 'rimlighetsbedömning')* should be made, which may occasionally involve *filling a contractual gap* with a rule tailored to the specific agreement (emphasis by me).

27. NJA is an acronym for 'Nytt Juridiskt Arkiv', available online at lagen.nu (in Swedish).
28. *In concreto*, the contract to be interpreted was the Swedish standard terms for construction contracts designed by the contractor, called ABT 94 (now ABT 06). But, as stated by HD, the principles set out apply equally *mutatis mutandis* to other more bespoke or individual contracts.
29. The translations into English of the excerpts from Swedish case law are made by me. I am lawyer by training and not a translator and the translations are unauthorised. I have made initial use of AI when preparing the translations but considered the quality provided by the software and made corrections or amendments where relevant (in my opinion). Neither Swedish nor English is my first language, but I consider myself fluent in both languages. Needless to say, I am happy to receive suggestions for improvements of the translations.
30. AB is an acronym for 'Allmänna Bestämmelser', i.e., standard contracts for construction and engineering contracts in Sweden. The latest editions are AB 04 (build) and ABT 06 (design-and-build).

Interestingly, the first two steps in the approach adopted by HD concerning Swedish contract law correspond, e.g., to the statutory principles for contract interpretation set out in Article 1188 of the French Code Civil (CC), which provides as follows:[31]

> 1. A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms.
> 2. Where this intention cannot be discerned, a contract is to be interpreted in the sense that a reasonable person placed in the same situation would give to it.

Compared with the most relevant soft law instruments, HD's *ratio decidendi* mirrors Article 4.1 of the UNIDROIT Principles,[32] Articles 5:101(1) and (3) of the PECL,[33] as well as Article II 8-101 of the DCFR.[34]

The quoted part of *NJA 2014 s. 960* clearly suggests that the modalities of contract interpretation are prioritised, thereby establishing an authentic hierarchy of interpretation. Consequently, the interpretation process should be conducted sequentially following the structure or decision tree outlined by HD.

Notably, the structured framework for contract interpretation provided by HD in *NJA 2014 s. 960* does not support the notion of a 'pragmatic' approach to contract interpretation,[35] apart from the final statement that considerations of reasonableness should serve as a final check when interpreting a contract. This part of the decision is further developed at §2.03[C] below.

Later, HD provided a slightly different description of the principles in *NJA 2015 s. 741* concerning a dispute between a partner and a partnership of chartered public accountants regarding breach of a restrictive covenant (non-competition). In that case, HD expressed a related but seemingly more flexible (or less schematic) approach to contract interpretation, not least in a multiparty contractual setting:

> 9. One starting point in a dispute over how a contract should be interpreted is to ascertain what the *parties collectively intended* at the time of contracting. However, this is *not always possible*. Furthermore, the contract and the contractual situation may be of such a nature that it is hardly relevant to attempt to establish a common intention of the parties. This can be the case, for example, with contracts involving

31. Article 1188 is a revision of Art. 1156 in the version of the original CC (or Code Napoleon) promulgated under Napoleon Bonaparte in 1804 which only referred to the supremacy of the common intention of the parties, *vide*: 'One must in agreements seek what the *common intention* of the contracting parties was, rather than pay attention to the literal meaning of the terms.' (emphasis by me). France has been called 'the bastion of subjectivism'.
32. UNIDROIT Rules is short for 'UNIDROIT Principles of International Commercial Contracts' (2016) prepared by the International Institute for the Unification of Private Law (UNIDROIT). UNIDROIT is an independent intergovernmental organisation based in Rome, Italy, and established in 1926.
33. PECL is an acronym for 'Principles of European Contract Law' (2003). The PECL were prepared by prepared by the Commission on European Contract Law (the 'Lando Commission', named after the late Danish comparative scholar, Professor Ole Lando).
34. DCFR is an acronym for 'Draft Common Frame of Reference' (2009), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). These groups comprised legal scholars and experts from various European jurisdictions who collaborated on drafting the DCFR. It can be described as an unofficial EU project.
35. This is also the case in Denmark (*see, e.g., UfR 2012.3007H*) and in Norway (*see, e.g., Rt-2010-961* and *Rt-2014-520)*.

> a *large number of parties*. This is often also the case when the relationship between the parties is governed by a *standard contract*, even though the parties' discussions and similar matters prior to the conclusion of the contract may constitute circumstances that express a common intention of the parties that deviates from what would otherwise apply, cf. NJA 2014 p. 960 para. 20.
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> 10. When individual circumstances cannot be established or provide guidance, the interpretation or specification of contract terms must be based on *objective grounds*. The starting point is then the *wording* of the contract. When the wording allows for different interpretations, as well as when the wording does not provide any guidance at all, guidance must be sought from other factors. Other relevant interpretative data may include the *structure* of the contract and the specific contractual term's *relationship with other terms*, the *background* to the regulation, i.e., the *purpose* of the term, the *nature* of the contract's subject matter, and sometimes the parties' positions (cf. e.g. NJA 2010 p. 559 para. 9). It is generally also natural to assume that a contractual term should serve a *sensible function* and constitute a *reasonable regulation* of the parties' interests … (emphasis by me).

The decision provided no reason for not just adopting *verbatim* the principles set out in NJA 2014 s. 960.

The importance of NJA 2014 s. 960 as a legal precedent has since been confirmed on various occasions, including in *NJA 2015 s. 862*, which contained the following more condensed summary of the applicable principles:

> 12. In recent years, [HD] has had occasion, in several decisions, to apply the standard agreements pertaining to construction and engineering works and opined on the interpretation of clauses in such agreements. If no common intention among the parties can be considered to exist, and there are no circumstances outside the contractual text that can clarify how the parties perceived a disputed standard clause, the interpretation should focus on the wording of the clause. When assessing the meaning of the clause, guidance can be drawn from the structure and other conditions of the agreement; the provisions are intended to form a coherent system. In interpreting certain clauses, it may be necessary to consider the specific features of the construction contract. When the structure of the agreement also fails to provide any guidance, it is, therefore, natural to interpret the clauses in light of the mandatory law that would otherwise have been applied, some of which is expressed in the Sale of Goods Act. However, it should be noted that construction contracts differ from, for example, sales contracts, as they typically involve extensive, complex, and long-term work with multiple parties involved. Ultimately, a more comprehensive assessment of reasonableness must be made.

Once again, this was a majority decision, and the majority comprised two JR. Three JR expressed various dissenting opinions and views.

Even later, the principles set out in NJA 2014 s. 960 and NJA 2015 s. 862, were confirmed by HD in *NJA 2018 s. 653* concerning the question of defects in a design-and-build contract.[36]

36. In the decision, reference was made to previous HD decisions in NJA 2013 s. 271, NJA 2014 s. 960 and NJA 2015 s. 862.

In *NJA 2021 s. 643* concerning a commercial framework agreement related to the alleged exclusivity regarding the provision of certain services, HD referred to its decision in NJA 2015 s. 741, in particular, with respect to no discernable joint intention in such standard agreements.

However, a broader or more 'holistic' (for lack of a better adjective) approach to contract interpretation appears in *NJA 2018 s. 834* concerning an insurance policy. In that case, a unanimous HD stated as follows:

> 10. When interpreting a standard insurance condition, for example, in a liability insurance policy, several factors must be taken into account. Some of these are typical for insurance contracts. Other factors are those that are generally significant in interpreting standard conditions. The central aspect is often the wording of the disputed condition. When the wording allows for different interpretations, or when the wording does not provide any clear indication, guidance can be sought from the structure and other insurance conditions. Other factors may also be significant, such as the purpose of the condition to the extent it can be discerned and what is objectively a sensible and reasonable regulation.
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> 11. Therefore, several different factors must be considered when interpreting an insurance condition. Which interpretation factor or factors should be decisive cannot be stated generally but must be determined based on an overall assessment in the individual case (emphasis by me).

This was followed up in *NJA 2023 s. 630* concerning business interruption insurance and the COVID-19 pandemic, in which HD referred to NJA 2018 s. 834 (but not NJA 2014 s. 960 or, for that matter, NJA 2015 s. 741), *vide* the following:

> Interpretation of Insurance Contracts
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> 9. In the interpretation of a standard-type insurance provision, several factors must be considered. The central focus is often the wording of the disputed provision. When the wording allows for various interpretations, guidance can be sought from the systematics and other insurance provisions. Other factors may also be relevant, such as the purpose of the provision, to the extent that it can be ascertained, and what is objectively a reasonable and sensible regulation. Which interpretation factors are decisive must be determined based on an overall assessment in the individual case. (See … NJA 2018 p. 834, paragraphs 10 and 11).
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> 10. The interpretation should be based on the wording of the provision in an objective sense and the text's normal linguistic meaning (see … NJA 2017 p. 237, paragraph 14).
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> 11. Only if a result cannot be achieved through evaluation according to the specified criteria is there reason to resort to more general principles of interpretation (see … NJA 2001 p. 750). For example, there is normally no reason to consider whether the insurance company could have formulated a disputed provision more clearly when sufficient guidance for interpretation can be derived from other factors.

Moreover, reference can be made to *NJA 2023 s. 680*.[37] Even more recently, HD has confirmed a similar approach in its judgment of 25 January 2024 in case *HD T 4849-22*.[38] Both matters concerned insurance contracts.

37. *See* para. 36 of this decision which makes reference to NJA 2018 s. 834.
38. *See* para. 7 of this decision which makes reference to NJA 2023 s. 630.

At first glance, it may seem challenging to reconcile the principled, albeit differently framed, approaches in NJA 2014 s. 960 and NJA 2015 s. 741 (referred to in NJA 2021 s. 643), with the more holistic approach delineated in NJA 2018 s. 834 (referred to in NJA 2023 s. 630, NJA 2023 s. 680 and HD T 4849-22). These decisions appear to reflect distinct approaches to the hierarchical structure of the interpretative process.

However, reconciliation is possible if NJA 2018 s. 834, NJA 2023 s. 630, NJA 2023 s. 680 and HD T 4849-22, as suggested by the wording of the decisions themselves, are considered limited to insurance policies and thus offer a discrete and separate interpretative framework pertaining to such contracts.

Hence, it appears reasonable to maintain that the general exposition in NJA 2014 s. 960 applies as expounding the overall applicable principles to contract interpretation in general commercial contracts albeit, perhaps, in a slightly less rigid or schematic way as suggested by NJA 2015 s. 741.

Before contrasting the above with some decisions under English law, I note that in a number of cases, HD, unsurprisingly, has explained that the interpretation of the words employed in the contract must be based on their natural/ordinary linguistic meaning (Swedish: 'normala språkliga betydelsen'). I refer to the quote from NJA 2023 s. 630, *supra*. Also, reference can be made to *NJA 2007 s. 35* concerning the interpretation of standard terms in a consultancy agreement regarding architect and engineering services, called ABK 96:

> The interpretation must, therefore, be based on the contract's wording in an objective sense, starting from the text's natural linguistic meaning. When interpreting, the contract should be viewed as a cohesive whole, and the specific contractual provision should be read in conjunction with the other provisions in the contract.

Moreover, reference can be made to *NJA 2013 s. 271.*

These cases concerned terms in various standard contracts, but in my view, there is nothing to suggest that a different approach will apply to more bespoke contracts unless specific and singular parts of the factual matrix merit a departure from this commonsensical starting point.

The overall principles governing contract interpretation in Swedish law can be contrasted with the approach adopted in English law,[39] which can be illustrated by the decision of the Supreme Court (SC) in *Arnold v. Britton*[40] concerning service charges pertaining to holiday chalets in Wales. Here, Lord Neuberger[41] provided the following

39. In a number of decisions spanning the past more than fifty years, the Supreme Court (formerly the House of Lords) has had the opportunity to restate the principles of contract interpretation under English law, not least as regards commercial contracts. In this regard, reference can be made to the seminal decisions in Prenn *v.* Simmonds [1971] WLR 1381, *Schuler AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235, *Investors Compensation Scheme v. West Bromwich Building Society [1998] WLR 896*, *Chartbrook Ltd v. Persimmon Homes Ltd [2009] UKHL 38, Rainy Sky SA v. Kookmin Bank [2011] UKSC 50, Arnold and Ors v. Britton [2015] UKSC 36* and *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24.
40. *See supra* n. 39.
41. David Neuberger was president of the SC between 2012 and 2017.

enumerated restatement of the method applicable to contract interpretation under English law (internal quotations and references omitted):

> 15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean … And it does so by focussing on the meaning of the relevant words, … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

As recently as in February 2024, the Judicial Committee of the Privy Council (JCPC)[42] in *National Commercial Bank Jamaica v. NCB Staff Association*[43] helpfully updated the approach to contract interpretation in a case concerning a profit-sharing scheme ('scheme') for employees of the bank:

> 31. The modern approach of the common law to the interpretation of contracts has been clear at least in its outline since the judgment of Lord Wilberforce in the House of Lords in [Prenn v. Simmond][44] …
>
> 32. First, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement, having regard to the contract as a whole. Secondly, in so doing the court has regard to the factual background known to the parties at or before the date of the contract, but excluding evidence of prior negotiations. Thirdly, where there are rival meanings of the relevant contractual provision considered in its context, the court can give weight to the implications of the rival meanings, by considering which construction is more consistent with business common sense. But, fourthly, the court does not depart from an interpretation of the natural language of words just because the contractual arrangement has proven to be a bad bargain for one of the parties. Fifthly, the weight to be attached to the precise words used in the contract will vary depending upon the sophistication of the contractual drafting and whether skilled professionals have been involved in creating the contract. But, sixthly, even where there has been a process of sophisticated professional drafting, the court must be alive to the possibility that the text of a provision, which has been accepted to conclude a contract, is a compromise between parties with conflicting aims or the result of a failure of communication between the parties. Where that is so, the court may give more weight to the factual matrix or the purpose of similar provisions in contracts of the same type. Finally, events and the actions of the parties after the conclusion of the contract are not relevant to its interpretation. The court has regard to the facts and circumstances which existed at the time the contract was made and which were known or reasonably available to both parties.

42. The JCPC is *the court of final appeal for the UK overseas territories and Crown dependencies. The current twelve members of the panel are all justices of the English Supreme Court.*
43. *National Commercial Bank Jamaica Ltd v. NCB Staff Association (Jamaica)* [2024] UKPC 2.
44. *See supra* n. 39.

First, it is evident from the quote that English law applies the objective theory to contract interpretation, i.e., that the perceived joint intention of the parties is derived from and established by the objective meaning of the words, namely what the words would convey to a reasonable third person with all the requisite knowledge of the factual matrix.

However, this apparent distinction between Swedish and English law should not be overstated. First of all, it is rarely the case that a joint intention (other than the one expressed by the wording employed in the contract) is discernable. Second, the applicable principles regarding contract interpretation show considerable similarities, including the emphasis on the actual wording, the linguistic approach to determining the meaning of the words in the contract, the importance and role of the context in which the employed words appear, as well as the purpose of the clause to be interpreted.

However, some notable differences are apparent. First, the Swedish law concept of a 'comprehensive reasonableness test' is not the same as the English law concept of 'business common sense.' Second, the parol evidence rule does not apply in Swedish law. These two issues will be briefly discussed *seriatim*.

### [C] 'Comprehensive Reasonableness Test'

A characteristic feature of Swedish law on contract interpretation is the explicit inclusion of an 'overarching' or 'comprehensive' (Swedish: 'övergripande') test for reasonableness as the final element in the intellectual process, *vide* NJA 2014 s. 960 quoted above. As will be seen from the quotation, the principle or its application is not further explained in the decision. I will, inartfully, refer to this as the 'comprehensive reasonableness test' (CRT).

The only instance (that I am currently aware of) in which HD expressly engaged with the CRT is the aforementioned decision in NJA 2015 s. 862.[45]

The case concerned another design-and-build contract, this time regarding the conversion of a part of a building into a hostel. The standard terms of ABT 94[46] were adopted by the parties. The dispute turned on whether the commencement of the prescription period of three months for additional claims by the contractor was predicated on a final inspection (Swedish: 'slutbesiktning') being performed.

45. The Svea Court of Appeal (Swedish: 'Svea Hovrätt') ('SH') considered reasonableness in its decision of 22 Oct. 2020 in T-7981-19 (*Nordic Railway Construction Sverige AB v. Trafikverket*) concerning the question of whether the contractor was entitled to additional payment for geodesic measurement or that deliverable was included in the contract price. SH found in favour of the employer. Towards the end of its decision, SH stated: '(T)he contract interpretation put forward by the [employer] appears as both the most reasonable and the most consistent with the contract's systematics. On the other hand, [the contractor's] strictly semantic interpretation does not appear as reasonable or particularly well-adapted to the factual circumstances.' This could, potentially, be viewed as a singular example of the 'pragmatism' referred to earlier in this chapter.
46. As mentioned, the standard terms in ABT 94 have since been replaced by ABT 06.

In this regard, ABT 94 6§13 included, *inter alia*, the following wording:

> The contractor's claims regarding the works, a prescription period of six months applies, calculated from the approval of the works.

However, in the individual terms and conditions, the parties had, *inter alia*, deviated from ABT 94 6§13 by including the following provision:

> Final Settlement
>
> Amending [ABT94 6§13], the final settlement shall take place no later than 3 months after the approved final inspection (Swedish: 'Slutbesiktning').

After applying the 'decision tree' set out in NJA 2014 s. 960, the majority of the JR[47] noted, *inter alia*, as follows regarding the CRT:

> 18. In the more overarching reasonableness assessment that ultimately must be made, the question arises, among other things, whether the purpose of the relevant rule may lead to it being interpreted in a way that is not supported by its wording. What applies in this regard is related to the type of rule in question. Here, it concerns a prescription rule.

In the decision, HD then made a distinction between long-term and short-term prescriptions and added:

> 20. In this case, it concerns a rule regarding short-term prescription. The purpose can be assumed to be that the parties quickly clarify what applies regarding compensation for changes or additional work. It is an appropriate arrangement. The rule in ABT 94 [6§13] also clearly states that the contractor's claims for compensation for variations or additional work are subject to short-term prescription. Thus, such a prescription scheme should *not come as a surprise to either party*.
>
> 21. The function of the starting point is primarily to provide a clear indication of the endpoint for the short prescription period but also to indicate when it is time for the parties to discuss additional compensation for changes and additional work. This suggests that in a situation like the present one, it is an appropriate arrangement for the prescription period to be linked to the time when the construction works are considered completed. However, the question is whether purposes of that kind carry enough weight to *warrant an interpretative extension* in that direction. This assessment shall be made in light of the specific interpretative principles applicable to prescription provisions.
>
> 22. A prescription rule, due to its *drastic right-depriving effect*, may not be applied analogously and must be *interpreted restrictively*. This applies to both statutory and *contractual provisions*. Restrictiveness applies not only to the provision's scope but also to its application conditions, including the starting point for the prescription period. With respect to a contractual prescription rule, an interpretative extension should only be accepted if there are clear indications for it.
>
> 23. The foregoing has established that if no final inspection has taken place, it is *appropriate* for the prescription period, according to ABT 94 [6§13], to start running when the contractor has *completed their work*. However, there are no clear indications for such an arrangement in the general provisions, and neither does such a time seem to be determinable in an unambiguous manner without closer contractual regulation. In this situation, the conclusion is that the relevant

47. In this case, the majority consisted of three JR, and the minority comprised two JR.

> prescription rule cannot be applied when no final inspection has taken place. (emphasis by me).

When arriving at the opposite conclusion, the minority relied not least on a 'systematic reasoning' regarding, in particular, a coherent and unitary application of the various terms in such standard terms (Swedish: 'avtalssystematiska skäl'). In the case before HD, this approach included a uniform application of the concepts of performance period (Swedish: 'entreprenadtid') and warranty period (Swedish: 'garantitid'). This could be said to correspond to an interpretation based on considerations regarding the '*structure and other conditions of the standard agreement*', *vide* NJA 2014 s. 960.

The somewhat nebulous language employed in the decision makes it difficult to ascertain with certainty exactly what the CRT implied in the case, but it would appear that the strict consequences (loss of a payment claim) made the majority attach additional importance to the term 'final inspection' employed in the individual terms. Put differently, the wording of the *ratio decidendi* suggests that considerations of reasonableness in the view of the majority merited a deviation from otherwise applicable considerations of purpose and contractual coherence in favour of a restrictive interpretation. The minority held the opposite view.[48]

As a general guideline for arbitrators, the decision may serve primarily as an illustration of the mentioned inherent risk associated with a lack of intersubjectivity and linguistic relativism when applying broadly worded normative legal concepts to a factual matrix.

The CRT can be contrasted with the legal concept of 'Business Common Sense' (BCS), which features as an integral part of contract interpretation under English law, *vide* the quote from *Arnold v. Britton*.[49]

In *Rainy Sky v. Kookmin Bank*,[50] which concerned the interpretation of a guarantee, Lord Clarke provided the following guidance regarding contract interpretation:[51]

> 21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been

48. *See also* Herre & Johansson SvJT 2020.821 et seq., especially pp. 880-881 and 886. They consider that 'reasonable gave way for a restrictive interpretation' of the disputed clause. Based on the wording of the decision, this is, in my opinion, a debatable conclusion. On another view, the majority relied on reasonableness to deviate from the more unitary or systematic arguments emphasised by the minority.
49. *See supra* n. 39.
50. *See supra* n. 39.
51. Earlier, Lord Diplock had stated as follows in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191*: '(I)f detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.' In my view, this hardly reflects the current state of the law of England and Wales which appears more restrictive in respect of the application of business common sense. However, it may well *pro modo* express the state of Swedish law.

> available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

In *Wood v. Capita*,[52] Lord Hodge provided further context to the application and place of the principle of BCS when interpreting commercial contracts (internal references omitted):

> 11. … Interpretation is … a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause … and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest …Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

From recent case law, reference can be made to the Court of Appeal decision in *Nord Naphtha v. New Stream*[53] concerning a buyer's claim for repayment of an advance on the purchase price when delivery of the product (diesel) was not made due to force majeure and subsequent termination of the contract. In this case, the Court of Appeal (LJ Whipple) arrived at the following conclusion regarding the claim:

> 57. I conclude that the reasonable person reading clause 14.5, armed with the information available to [the seller] and [the buyer] as they entered the Contract, would have no real doubt that that clause provided Nord Naphtha with a right of repayment of the Advance in the event of non-delivery for force majeure reasons. The right is expressed by that clause, in words which are clear enough when read objectively.
>
> 58. I do not consider the clause is reasonably open to conflicting interpretations. But if I am wrong about that, then I am sure that the construction which is consistent with *common sense and the wider commercial context* is that advanced by [the buyer], and upheld by the Deputy Judge.
>
> 59. I do not in the circumstances need to consider the alternative of an implied term.

In that case, the court found no contractual ambiguity but stated that common sense would have resolved the matter in favour of the buyer if such ambiguity had been afoot. Conversely, it appears safe to assume that, had the wording of the contract been unambiguous in favour of the seller, notions of BCS would not have prevailed. In that event, the court would have had to resort to gap-filling in order to reach the result.[54] Under Swedish law, the CRT would almost certainly have entailed the same result. If

52. *See supra* n. 39.
53. *Nord Naphtha Limited v. New Stream Trading AG* [2021] EWCA Civ 1829.
54. In this regard, it should be noted that both the High Court and the Court of Appeal noted that the contract in question was poorly drafted.

not, the clause would have been exposed to modification under section 36 of the SCA, *vide* below.

Since the case law pertaining to the CRT is so sparse, it is hard to assess its relationship with the BCS principle with any degree of certainty. However, they appear to be similar in underlying thought, although the principle in Swedish law appears to be based on a more normative underpinning than the BCS-test.

It merits mentioning that BCS is explicitly limited to an *ex ante* perspective, as emphasised in *Arnold v. Britton*:

> 19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language.

The same principle, i.e., an *ex ante* view, should, in my view, apply in Swedish law; otherwise, the demarcation lines between contract interpretation and contract modification are completely blurred, not to say compromised.

### [D] Parol Evidence Rule

Most common law systems include a legal principle that extrinsic evidence is not admissible if the text of the contract is unambiguous. This is known as the 'parol evidence' rule (PER).[55] The PER is not a term of art, and it is applied differently in various common law jurisdictions.

At its core, however, the PER provides that where a written agreement between the parties exists, and its terms are considered unambiguous, evidence concerning the pre-contractual phase, typically concerning the negotiations between the parties, is inadmissible. The same applies to evidence regarding the subjective belief of a contractual party. The excluded evidence is often termed 'extrinsic evidence'.

It must be emphasised that the PER is considered to be a part of substantive law and is part of the methodology for contractual interpretation, *vide* Lord Neuberger's speech in *Arnold v. Britton*,[56] quoted above. Hence, a tribunal sitting in an SCC arbitration in Stockholm concerning an agreement governed by English law as *lex causae* shall apply the parol evidence rule if and when engaging in contract interpretation.[57]

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55. The term has its origin in the peculiar ancient jargon in English law known as 'legal French,' (the word 'parole' means word or speech in French).
56. *See supra* n. 39.
57. A potential clash of principles may be considered to exist if, under Swedish law, contrary to English law, the parol evidence rule is considered a procedural principle. In such circumstances, one can imagine a scenario where a losing party that has had evidence declared inadmissible under the parol evidence rule challenges the final award before the Swedish Courts, arguing that the party was not given a reasonable opportunity to present its case, *vide* section 34(1)(7) of the Swedish Arbitration Act viewed in conjunction with section 24(1) thereof. As far as I am aware, no Swedish court decision has yet grappled with this issue.

In *Nord Naphtha v. New Stream*, the court had to compare two contracts that were not identical. One of the parties argued (unsuccessfully) that considerable interpretative weight should be attached to this difference. LJ Whipple stated as follows:

> As to the second argument, the two contracts are self-evidently different, but why they are different is unknown. There is no evidence to explain the course of negotiations leading up to the Contract or to explain why a counterpart clause (an equivalent to clause 10.18) was not included – leaving aside for the moment the issue of whether such evidence would, in any event, be relevant or admissible to the question of construction. The reasons for the differences are not explained; this is a matter on which the Court cannot sensibly draw inferences, and the Court will not embark on speculation.

In my view, this quote aptly demonstrates the potential weakness of the PER. If you have to consider the evidence before deciding whether it is admissible, the principle is of limited value.[58]

Under Swedish law, a tribunal's ability to consider parol evidence is unfettered without any limitations apart from the requirement of timeliness, and HD, in a number of cases, expressly relied on pre-contractual negotiations when engaging in contract interpretation and also post-contractual conduct to discern the meaning of the contract.[59] Hence, common law-trained arbitrators should forget any notion of limiting the admissibility of parol evidence when deciding a dispute under Swedish law. The probative weight of such evidence is for the tribunal to assess.

## [E] Implication of Terms under Swedish Law

To me, it is obvious that interpretation of a contract and implication of terms into a contract (also known as gap-filling) are separate, albeit related, intellectual exercises. Interpretation involves determining the meaning of the words and sentences employed in the contract. If these words and sentences make it possible to arrive at a coherent meaning with respect to the disputed issue, there is no need for any implication of terms. It follows from this observation that considerations of gap-filling are relevant only when it is not possible to derive a meaning without implicating a pertinent additional contractual term.

58. A similar statement by Lord Neuberger can be found in *Arnold v. Britton*, at para. 12.
59. Whether an 'entire agreement clause,' potentially in combination with a 'non-reliance clause' will render extrinsic evidence inadmissible or rather limits the weight (or rather lack thereof) that the adjudicator can place on such evidence is, to my knowledge, not settled in Swedish law. Under Swedish law, the freedom of the courts to assess the evidence is well established. In my view, the principle of freedom of contract and party autonomy should provide the answer to the question; however, given that the point of departure is unlimited admissibility, such a provision must state with clarity and in an unambiguous manner that the parties agree that such evidence is inadmissible, not merely of no (or low) probative value.

A similar view was taken by the *English Supreme Court in Marks & Spencer v. BNP Paribas*.[60] Here, Lord Neuberger explained the difference as follows:

> 27. Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are *ex hypothesi* not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.
>
> 28. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. …

In Swedish law, however, HD has expressed doubts as to the possibility of (always) maintaining a clear and sequential approach to the implication of terms, *vide NJA 2010 s. 416*:

> 5. The question of how an agreement should be interpreted is not uncomplicated, and the boundary between contract interpretation and gap filling is somewhat blurred. …

In the quoted part of the ratio decidendi from *NJA 2014 s. 960, HD* noted that the 'overarching test for reasonableness' could 'occasionally' merit gap-filling. No further indications were made with respect to the requirements. To me, what is more likely to be 'blurred' is the demarcation lines between questions of gap-filling based on such overarching considerations of reasonableness and a subsequent modification (Swedish: 'jämkning') of the contract based on a test for unreasonableness or unconscionability, *vide* SCA section 36. Although contract interpretation and contract modification are distinct exercises taking place at different stages of the intellectual process, they are ultimately both expressed by the adjudicator in the same decision (unless these issues have been bifurcated, which rarely happens, if ever). I deal with contract modification at §2.04[B] *infra*.

I am aware that some Swedish scholars consider the distinction between interpretation and implication moot and prefer to include both exercises under the umbrella term interpretation and, more importantly, deal with them in a unitary manner. I, with due respect, disagree. To me, it is always possible to operate the distinction between these two parts of the intellectual process, and the distinction should be respected. The reason is straightforward: Interpretation is mandatory on the part of the adjudicator, whereas the implication of a term (gap-filling) is only relevant

60. *Marks and Spencer plc v. BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72.

and permissible if and when the words found in the contract do not provide an answer to a question of contract interpretation relevant to determining the issue in dispute.

This can be contrasted with the very principled approach to gap-filling adopted and maintained by the English courts.[61]

Reference can be made, in particular, to *Shirlaw v. Southern Foundries*,[62] in which the courts introduced the 'officious bystander' as an intellectual concept. At its core, the concept entails that the implication of a term should only be considered *'if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"'*. In a number of subsequent cases, courts have pondered what question the officious bystander would likely have asked the parties and how the parties would have answered that particular question.

The overall substantive test for implication of terms was formulated by *Lord Simon in the JCPC's decision in BP v. Shire of Hastings*:[63]

> For a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

More recently, in *Marks & Spencer v. BNP Paribas*,[64] the SC revisited, maintained and slightly developed the relevant criteria in English law. In that decision, Lord Neuberger added a number of interesting considerations. He stated, inter alia, as follows (internal references and quotations omitted):

> 21. In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments: … *First*, … the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. *Secondly,* a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and *thirdly,* it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. *Fourthly,* … although Lord Simon's requirements

61. The origin of the principle in English law is usually considered to be The Moorcock (1884) 14 PD 64.
62. *Shirlaw v. Southern Foundries Ltd* (1926) 1939 2 KB 206.
63. *BP Refinery (Westernport) Pty Ltd v. President, Councillors and Ratepayers of the Shire of Hastings* (1977) 16 A.L.R. 363.
64. *Marks and Spencer plc v. BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2015] UKSC 72.

> are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. *Fifthly*, if one approaches the issue by reference to the officious bystander, it is vital to formulate the question to be posed by [him] with the utmost care, … *Sixthly*, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of absolute necessity, not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.' (emphasis by me)

Unsurprisingly, the more professional the parties and the more complex and comprehensive the contract, the more reluctant English law will be with regard to the implication of further terms in the contract.

As is evident from the quotes above, English law employs a very strict test for gap-filling in commercial contracts that does not allow for the broader normative considerations of 'reasonableness' found in Swedish law.

It follows from the above that arbitrators have considerably more leeway under Swedish law to imply terms into contracts than most common law-trained arbitrators will be familiar with from cases proceeding under English law. Whether arbitrators should do so when dealing with reasonably sophisticated parties in a commercial contract dispute is a different question.

## §2.04 CONTRACT MODIFICATION (INCLUDING SETTING ASIDE) UNDER SWEDISH LAW

### [A] Introductory Remarks

As mentioned, any notion of contract modification is necessarily predicated on the meaning of the contract being established through interpretation and, if relevant, gap-filling. Put differently, only when a tribunal, through interpretation and – if relevant and pleaded – gap-filling by implication, has assessed the allocation of rights and obligations between the parties will the tribunal proceed to consider whether this contractual regime should be set aside completely or in part, or whether some provisions should be modified. Hence, conflating these processes should be avoided.

Under Swedish law (as well as under Danish and Norwegian law), two different, but in part related, concepts are of particular relevance when considering the issue of contract modification.

### [B] Doctrine of Assumptions

The first concept is most often termed the 'Doctrine of Assumptions' (DoA) (Swedish: 'Förutsättningsläran'). This legal construct originated in German doctrine in the

mid-19th century[65] but later (towards the end of the 19th century) gained traction in Scandinavia, and it has been a staple of Scandinavian contract law since then. I consider it safe to say that its 'popularity' as a legal argument has diminished while arguments based on section 36 of the SCA have proliferated. I shall, therefore, deal with it briefly.

Overall, an argument based on the DoA will involve ascertainment of whether a promise can be considered invalid or ineffective due to the promise either being made under assumptions that were incorrect at the time of the promise being made or these original assumptions turning out to be incorrect due to later events.

It is imperative to understand that while subsequent developments may be invoked to demonstrate the incorrectness of a specific assumption, the determination of whether the DoA applies is strictly and solely *ex ante*, meaning it is to be conducted at the moment of contracting. In other words, only those assumptions held by a party at that juncture carry legal relevance.

The application of the DoA is predicated upon the fulfilment of three conditions: First, that the incorrect assumption was essential (Swedish: 'väsentlig') to the promisor; second, that it was apparent (Swedish: 'synbar') to the promisee that the promisor held the assumption in question; and third, that the adjudicator deems the assumption 'relevant', which entails that it is appropriate to allocate the risk of the assumption being or turning out to be incorrect to the promisee.

The effect of the application of the DoA is complete/partial invalidity or ineffectiveness. Reference can be made to HD's decision in *NJA 1989 s. 614* regarding the agreement concerning the division of an estate where a requested amendment could not be based on the principles of the DoA:

> The legal consequences that may arise in the application of [the DoA] are total or partial invalidity or ineffectiveness.

The import of this limitation with respect to the available relief is that the DoA cannot be relied on for a more granular modification of the exchange of deliverables (Swedish: 'jämkning'), e.g., by requesting an increased payment.[66]

As an example of HD dealing explicitly with the DoA, reference is made to *NJA 1999 s. 575* regarding a bank seeking to reverse a payment executed by the bank to a payee. It turned out that the payor had insufficient funds to discharge the payment, and the bank unsuccessfully sought a repayment relying on *condictio indebiti*, fraud, *re integra* and the DoA. As regards the DoA, HD noted as follows:

> The bank has finally argued that the payment should be reversed because it is invalid according to the doctrine of assumptions. In this regard, the bank has claimed that it was an essential assumption/precondition for the payment that

65. Normally attributed to the German scholar Bernhard Windscheid: 'Die Lehre des römischen Rechts von der Voraussetzung' (1850).
66. This remains the position under Swedish and Danish law However, under Norwegian law, the DoA has been applied by the Norwegian Supreme Court (Norwegian: 'Høyesterett') as support for a wider or more granular contract modification, i.e., beyond full or partial invalidity/ineffectiveness, *vide*, e.g., Rt-2010-1345 og Rt-2014-866.

> funds were available in [the payor's] account and that this assumption/precondition has proven to be incorrect.
>
> A party to a contract or a payment transaction must typically bear the risk that their assumptions are flawed. Occasionally, after an objective assessment, it may be considered appropriate and reasonable to shift the risk of an assumption failing onto the counterparty. However, no reasons for this can be considered to exist in the present case, especially since [payee], as previously noted, lacked an overview of the circumstances affecting the payment.

In *NJA 1999 s. 793*, a bank's incorrect assumptions were similarly considered the risk of the bank and, therefore, irrelevant as a matter of law.

### [C] SCA Section 36

As previously noted, section 36 of the SCA was promulgated and incorporated into the statute during the mid-1970s. Its first subsection provides as follows:[67]

> A contract term or condition may be modified (Swedish: 'jämkas') or set aside if such term or condition is unconscionable (Swedish: 'oskäligt') having regard to the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and circumstances in general. Where a term is of such significance for the agreement that it would be unreasonable to demand the continued enforceability of the remainder of the agreement with its terms unchanged, the agreement may be modified in other respects, or may be set aside in its entirety.

It is trite to state that words and their meaning are of obvious importance when applying the law. In the English language, the word 'unconscionable'[68] carries a certain connotation of immorality or unethical behaviour, especially in a legal context, whereas 'unreasonable' is a more general term indicating a lack of rationality or fairness, including a manifest and substantial lack of equivalence between the deliverables to be exchanged.

From English case law, I refer to *Multiservice Bookbinding v. Marden*:[69]

> (I)n order to be freed from the necessity to comply with all the terms of the mortgage, the plaintiffs must show that the bargain, or some of its terms, was unfair and unconscionable: it is not enough to show that, in the eyes of the court, it was unreasonable. In my judgment a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience.

Since coming into force, section 36 has become a focal point of contention in a large number of contractual disputes across Scandinavia – also between professional

67. This translation is from JUNO, one of the largest legal information service providers in Sweden.
68. I note that in the 'Swedish-English Glossary' published by the Swedish Courts, the term 'oskälig' is translated as 'excessive, unreasonable.' The glossary is available here: svensk-engelsk_ordlista_2019.pdf (domstol.se).
69. *Multiservice Bookbinding Ltd and Ors v. Marden* [1979] Ch 84.

parties. Frequently, an argument based on section 36 serves as a fallback position as an argument for contract modification should the party's primary argument of contract interpretation fail to persuade the arbitrators.

Although the original legislative idea behind section 36 was primarily to provide for an equitable revision clause in contractual relationships involving consumers, there is no doubt that it applies in purely commercial relationships. However, the threshold for modification is considerably higher outside the realm of consumer contracts or contracts between parties of (substantially) unequal bargaining power.

From the travaux préparatoires, the following passage shall be quoted:[70]

> (O)bviously, it is out of the question to modify (Swedish: 'jämka') all agreements that cannot be said to entail a fair balance between the parties. This is certainly true in purely business relationships, which often involve a certain degree of conscious risk-taking from one or both parties.

In my view, it is equally 'obvious' that the words 'often' and 'from one or both parties' should be stricken from the quoted sentence to reflect commercial reality. Put differently, risk and risk-taking are inherent features in all business activities.

Moreover, it will most often be necessary to consider the contract as a whole and not merely focus on a discrete provision which may appear unreasonable but is 'offset' by other provisions in the instrument, *vide* the following quote from the travaux préparatoires:[71]

> (T)he assessment of whether a contractual term is considered unreasonable will often depend on how the agreement is otherwise structured. For example, it may happen that a contractual term that clearly disadvantages one party and which would normally be set aside (Swedish: 'underkännas') may be considered fully acceptable in certain instances because the disadvantages that the condition entails for one party are compensated by benefits for that party in other respects.

It follows from the wording of the provision that the assessment can be made *ex ante*, i.e., at the time of contracting, as well as *ex post*, i.e., considering subsequent events of importance for the normative assessment of the potential unconscionability of the agreement. The arbitrators' assessment is fact-sensitive, but it is important to understand that the clause is not meant as an invitation for tribunals to rewrite the commercial bargain struck by the (professional) parties even in circumstances where this bargain turns out to be disadvantageous to one of them.

In a similar vein, HD in *NJA 2022 s. 354* concerning a limitation of liability clause in a contract for tax advice provided by a major CPA firm (PwC) to a real estate company, provided the following more general statement:

> 33. The application of Section 36 of the Contract Act should always be nuanced, based on factual grounds, and exercised with some restraint. In its application, it should be noted that the provision is primarily intended for consumer relationships. In commercial contract law, the principle of freedom of contract should be given particular weight. Against this background, it should generally require

70. Prop.1975/76:81, p. 119.
71. Prop.1975/76:81, p. 118.

> significantly more for a contract term to be considered unreasonable/ unconscionable (Swedish: 'oskäligt') in a commercial relationship, especially between parties of equal strength.

The decision involved HD considering, *inter alia*, the following facts and issues:

> 38. At the same time, it should be noted that [the CPA firm] had undertaken a precise advisory assignment in its own specialized area. The core of this assignment was to provide [the client] with sufficient basis for assessing whether the real estate transfer had any negative tax consequences. Furthermore, it was clearly foreseeable for [the CPA firm] what damage inadequate advice in this regard risked causing, namely a specific expense for stamp duty. It is also worth mentioning that [the CPA firm] could reasonably insure itself against the risk that incorrect or incomplete advice would cause harm. Of significance in this context is also that a limitation of liability to ten times the base amount, approximately 450,000 SEK, appears low in relation to the nature and scope of the entire assignment – including the foreseeable economic risk at stake – and the fee that [the CPA firm] charged for the advice, slightly over 100,000 SEK
>
> 39. However, as indicated, the degree of negligence on the part of the tortfeasor is a central aspect in assessing whether a limitation of liability should be adjusted. For example, in advisory services, it is impossible to entirely avoid occasional harm related to one or more oversights or other minor forms of negligence. It is normally reasonable for a contractor to protect themselves against such damages giving rise to extensive liability through limitations of liability.

The loss claimed was calculated at approx. SEK 1.5 m. In the circumstances, the limitation clause was not set aside or modified.[72]

Moreover, it should be noted that HD in *NJA 2009 s. 672* relied on the principles set out in the DCFR regarding a reasonable notice period in an oral distribution agreement that did not contain any such provision.

Due to the constraints regarding the length of this article, I shall not quote further from Swedish case law. Outside the realm of consumer contracts, some classic areas of application of section 36 across the Scandinavian jurisdictions concern, *inter alia*, provisions regarding the size of liquidated damages, limitation of liability clauses, clauses regarding interest rates and indexation of payments, but the application of the statute is not limited thereto.

The application of section 36 does not, as a necessary feature, require any immoral or unethical behaviour on the part of the party to the contract but can rather be viewed as the legal valve for addressing instances of a profound imbalance in the exchange of deliverables, i.e., in some manner akin to the Roman law principle of '*laesio enormis*'. As such, it can be employed as a method of (re)establishing commutative justice when this has been skewed. However, it is not the function of the

72. The decision was by a majority vote (3-2). The minority would set aside in concreto the limitation of liability based on, *inter alia*, the level of culpability (which the minority found was considerable although not rising to the level of gross negligence, the general qualifications and market position of PwC within the area of tax advice (Swedish: 'kvalificerad och stor aktör') and the fact that PwC, but not the customer, could insure the risk, i.e., the unexpected negative tax implications based on the flawed advice provided.

principles of contract law to offer a party that voluntarily enters into a bargain that turns out to be bad protection from the consequences of such a decision.

If, however, immoral or unethical behaviour is demonstrated, the threshold for legal intervention will be lower, and other provisions in the SCA may apply, in particular section 30, section 31 or section 33. However, unethical behaviour should not in and of itself merit a modification if the resulting contract is considered reasonable but may, in certain circumstances, result in the entire contract being set aside.

There is an obvious risk associated with employing a legal standard of such broad and generic description as 'unreasonable' or 'unconscionable', namely that it lends itself to becoming an 'all-purpose' legal argument for seeking to set aside or subsequently amend the allocation of rights and obligations in the contractual instrument which, perhaps over time, may have turned out to be unfavourable to a party. Some legal practitioners will undoubtedly argue that this is already the case.

Contrasting section 36 with common law systems, the doctrine of 'unconscionable bargains' in common law jurisdictions, although not identically applied and understood, has a much narrower application. It is clearly based on a normative assessment of conduct and basically requires that a stronger person in some way or form exploits or takes advantage of another person's weakness to obtain a bargain that is manifestly unfair. Put differently, it is not sufficient that the bargain is 'unfair', 'improvident' or, in other ways, turns out to the considerable disadvantage of one of the parties. It is generally accepted that notions of commutative justice or 'equivalence' regarding deliverables will not assist a party where the contract was entered into by equals.

Regarding English case law on unconscionability, reference can be made to, e.g., *Fry v. Lane*,[73] *Creswell v. Potter*,[74] *Multiservice v. Marden*,[75] *Lobb v. Total*[76] and *PBS v. Dusangh*.[77]

A summary of the conditions for the application of the unconscious bargain doctrine is provided in the JCPC's decision in *Boustany v. Pigott [1995] 69 P. & C.R. 298*,[78] based on submissions made by the ultimately unsuccessful party (internal quotations and references omitted):

> (1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience …

73. *Fry v. Lane* (1888) 40 Ch.
74. *Cresswell v. Potter* [1978] 1 W.L.R. 255. The decision of the Chancery division is actually from 1968 but was only reported ten years later.
75. *See supra* n. 39.
76. *Alec Lobb (Garages) Ltd v. Total Oil Great Britain Ltd* [1985] 1 W.L.R. 173.
77. *Portman Building Society v. Dusangh* [2000] 2 All ER (Comm) 221.
78. *Boustany v. Pigott* [1995] 69 P. & C.R 298.

> (2) 'Unconscionable' relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety …
> (3) Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, it was not right that the strong should be allowed to push the weak to the wall …
> (4) A contract cannot be set aside in equity as 'an unconscionable bargain' against a party innocent of actual or constructive fraud. Even if the terms of the contract are 'unfair' in the sense that they are more favourable to one party than the other ('contractual imbalance'), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct…
> (5) In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances …

A more recent case comprehensively addressing the doctrine of unconscionability (and related topics) is the decision by the Singapore Court of Appeal (SGCA) in *BOK v. BOM*.[79] The case was unusual due to the fact that it involved the SGCA dealing with a number of legal principles leading to potential invalidity of the contract in the common law, namely misrepresentation, mistake, duress and unconscionability. The SGCA articulated, either as part of the *ratio decidendi* or as *obiter dicta*, its views on all these legal concepts, in particular unconscionability, and ultimately, it adopted a 'narrow doctrine of unconscionability'. The SGCA noted that adopting a 'broad doctrine of unconscionability' would look '*very much like a broad discretionary legal device which permits the court to arrive at any decision which it thinks is subjectively fair in the circumstances*'. In the view of the SGCA, this narrow doctrine of unconscionability was (almost) identical to the legal concept of '*Class 1 undue influence*'.[80]

Unconscionability under English and Singaporean law is more akin to SCA section 31, subsection 1, which provides:

> Where a person exploits the distressed circumstances, lack of mental capacity, irresponsibility, or dependence of another, in order to attain for himself or induce benefits which are manifestly disproportionate to the consideration paid or promised, or in respect of which no consideration shall be paid, such legal act shall not be binding on the person exploited.

It should be noted, however, that unconscionability has statutory expression in American law. Reference is made to § 2-302 of the Uniform Commercial Code (UCC). Subsection (1) thereof provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce

79. *BOM v. BOK* [2018] SGCA 18. The SGCA is a part of the Supreme Court of Singapore. Unconscionability is dealt with at paras 114 et seq. of the decision.
80. In short: Class 1 undue influence is also called 'actual undue influence', i.e., situations where undue influence is proven. Class 2 undue influence is 'presumed undue influence' based on a relationship of trust of confidence between the parties. Class 2 undue influence comes in two subheadings.

> the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

The UCC has subsequently been adopted by most states in the US. It is among the most debated provisions of the UCC.

In American law, a dichotomy between 'procedural' and 'substantive' unconscionability is recognised but the import of this dichotomy is debated.

As will be seen, the provision expressly limits the determination of unconscionability to an *ex ante* assessment of the bargain. This is contrary to section 36.

Hence, it is beyond contention that SCA section 36 has a much wider ambit than unconscionability under, not least, English common law, and a tribunal deciding a case governed by Swedish law as the *lex causae* will be vested with considerable discretion to set aside or modify contracts also in situations where, e.g., English law would uphold the parties' bargain.

As an illustrative case in point, reference is made to the exceptional factual matrix in *Arnold v. Britton*[81] concerning an indexation clause regarding service charges pertaining to holiday chalets in Wales. The clause provided for a 10% annual increase based on the applicable service charge for the previous year. The original charge was 90 GBP. In the words of Lord Neuberger: 'If one assumes a lease granted in 1980, the service charge would be over £2,500 this year, 2015, and over *£550,000 by 2072*.' A majority of the SC upheld the clause.[82] In my view, there can be no doubt that had a similar case been brought before HD (or the supreme courts of Denmark or Norway), section 36 could have and would have (if relied upon) been applied to modify such a provision.

Finally, as some uncertainty in this regard appears to be afoot, it should be noted that parties cannot contract out of section 36 as such, i.e., the statute will apply regardless of any contractual provision seeking to exclude it from the contractual relationship. However, the parties may well influence the threshold for its application *in concreto* by the language employed in their contract, in combination with the other parts of the factual matrix.[83]

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81. *See supra* n. 39.
82. The dissenting opinion by Lord Carnwath forms a stark contrast to the speech by Lord Neuberger for the majority.
83. A different position was adopted by the tribunal in an SCC arbitration regarding the sale of natural gas. In its award, the tribunal stated, *inter alia*, as follows: '(460) (Claimant) … agreed to waive any potential claims regarding the MinAQ Obligation. It also agreed that this provision could not be the object of modification through subsequent arbitration. (*Claimant*) *knew or ought to have known that by waiving any potential claim it was also waiving claims under Section 36 of the Contracts Act – otherwise it should have specified that this was not its intention* (emphasis by me).' This is, with due respect, wrong as a matter of law. Rather, a decision by the tribunal not to modify the contract based on (i) an assessment of the original valid and binding risk allocation agreed to by the parties and noting (ii) that subsequent events did not *in concreto* merit contract modification according to section 36 would have been the correct approach under Swedish (and Norwegian and Danish) law. The quote is from a recent article by B. Flodgren in SvJT 2024.32 et seq. (*see* p. 53). Whereas, the article as such is in Swedish, certain parts of the *ratio decidendi* in two arbitral awards concerning long-term natural gas contracts are quoted in English (the language of these arbitrations).

### [D] Comparing the DoA and SCA Section 36

There is no doubt that the principles of the DoA and section 36 have some overlapping spheres of application.

However, as mentioned the DoA as a legal argument has faded into the background over the past approximately fifty years, in particular in Sweden and Denmark, in favour of section 36 of the SCA.[84]

To me, there can be no doubt that this development is due not least to the fact that section 36 offers increased flexibility with respect to the time for assessment of unreasonableness/unconscionability (DoA: *Ex ante* – section 36: *Ex ante* and/or *ex post*) and the limitations of the DoA with respect to legal consequences and the relief available (DoA: Full or partial invalidity or ineffectiveness – section 36: Full or partial invalidity or ineffectiveness or general or specific contract adaption by amendment of the ratio of exchange of deliverables).

Finally, I shall make the following short observation.

This chapter does not cover issues of procedure or evidentiary matters. However, it is worth mentioning that the DoA and section 36 are *not* applied *sua sponte* by courts or arbitral tribunals. Hence, an argument based on, typically, section 36 must be a part of the pleaded case of a party in the arbitration. The fact that the principle of *jura novit curia* is deemed to apply does not change the fact that a party must invoke and rely on section 36 or the constituent parts of the legal rule in order for an arbitral tribunal to be allowed to consider and potentially rely on it in an award. Nor is such a procedural requirement impacted by the fact that the parties cannot contract out of the application of section 36, *vide* above.

## §2.05 FINAL REMARKS

Obviously, the above remarks are not in any way meant to be an exhaustive exposition of the many intricacies of the part of Swedish contract law that deals with interpretation (including gap-filling) and modification of commercial contracts.

It is, however, my stated hope and expectation that this article can serve as an introduction for foreign arbitrators (and counsel) to some of the more pervasive and recurring issues that these will likely face when involved in arbitrations governed by Swedish law as *lex causae* and perhaps even serve as inspiration for further (self)studies. Moreover, I hope that Swedish (or other civil law-trained arbitrators) will derive benefit from the contrasting of the Swedish concepts of contract interpretation with those set out and applicable in common law jurisdictions, in particular England.

84. By comparison, the DoA has, as mentioned, retained some of its 'popularity' in Norway, which is likely due to the fact that Norwegian law has allowed the application of the DoA to include contract modification more generally, i.e., a more granular adjustment of the deliverables, *vide supra* n. 65.