CHAPTER 4

The Mandate for Arbitrators to Supplement Contracts under Swedish Law: A Brief Study with Particular Focus on Gas Price Review Arbitrations

Kristoffer Löf & David Akrad

§4.01 INTRODUCTION

As a starting point, arbitration is a judicial endeavour. Under Swedish law, this premise is set out in the first paragraph of section 27 a of the Swedish Arbitration Act (the 'Act'), pursuant to which the dispute is to be adjudicated with application of the law or rules agreed by the parties. Under this mandate, the tribunal's primary role is to resolve disputes by adjudicating facts and applying legal principles to them. Essentially, the parties bring a disagreement to the tribunal, which then establishes the disputed facts and interprets them with application of the legal rules to provide a binding resolution. This exercise of an arbitral tribunal to adjudicate a dispute referred to it with application of law may be referred to as *the ordinary judicial mandate* of a tribunal. In the vast majority of arbitrations, this is the mandate under which the tribunal decides the dispute.

However, according to the Act, tribunals can operate under two other kinds of mandate, which are different from the ordinary judicial mandate. When operating under these mandates, a tribunal is not bound strictly to assess the existence of alleged facts and give the facts legal consequences by applying law, as under the ordinary judicial mandate.

The first type of such 'non-legal mandate' is the mandate provided for in the third paragraph of section 27 a of the Act. Pursuant to this paragraph, an arbitral tribunal may base its award on reasonableness and equity (*skälighet och billighet*), but only if the parties have so agreed. In this role, the arbitrators thus act as *amiable compositeurs*

or decide *ex aequo et bono* and resolve disputes not strictly by applying legal principles but by determining what is fair and just in the circumstances. In this capacity, the arbitrators may consider the presented facts more freely without strictly giving consequences to the facts that have legal relevance under the applicable rules. This mandate grants the tribunal broader discretion to achieve equitable outcomes based on the tribunal's perception of fairness than would have been possible if applying rigid legal rules.[1] This mandate will not be further discussed here.

Then, there is a third kind of mandate, which will be the focus of this paper, namely the mandate to supplement contracts (*avtalskomplettering*). The fact that this kind of mandate exists and may be given to arbitrators transpires not in section 27 a, which addresses the two other kinds of mandate, but in section 1 of the Act, which sets out what kind of issues are arbitrable and thus may be adjudicated in arbitration.[2] The second paragraph of the statute provides that parties may 'allow arbitrators to supplement contracts beyond what follows from contract interpretation'.[3] As will be discussed in the following sections of this paper, this essentially means that when parties cannot agree on a specific contractual term, they can authorise an arbitrator to decide the content of the contract on their behalf. Thus, this type of mandate allows the tribunal to go beyond mere application of law and contract and actively shape the contractual terms on the parties' behalf.

The leading academic commentators on Swedish arbitration law have addressed this subject and agree that a mandate to supplement the contract gives the tribunal powers that extend beyond an ordinary judicial mandate and, consequently, beyond what an ordinary court could be tasked to do.[4] However, it is still not entirely simple to define the boundaries of such mandate and what has been written on the subject is almost entirely in Swedish. Hence this attempt to approach the issues here. The perspective will be that of practitioners. We will seek to compensate the lesser academic wisdom that we possess compared to previous commentators with practical examples, starting with a number of arbitrations that have come to public knowledge through challenges of the arbitral awards.

1. *See*, for example, Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng*. Arbitration: A Commentary), commentary to section 27 a of the Act, paras 5.3.1 and 5.3.2 (3rd ed., Juno 2020), for a further discussion.
2. The boundaries of what is arbitrable is defined positively: all matters that the parties themselves may settle. Section 1, first paragraph of the Act thus stipulates: 'Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution. Such an agreement may relate to future disputes pertaining to a legal relationship specified in the agreement. The dispute may concern the existence of a particular fact.'
3. Although section 1(2) refers to supplementing contracts, such mandate may also encompass altering or amending contractual provisions. The preparatory works to the Act and the commentary to the Act by former Chief Justice Lindskog explain that such mandate may for example include the power to determine changed prices or other contractual terms in a long-term contract. Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng*. Arbitration: A Commentary), commentary to section 1 of the Act, para. 6.2.2 (3rd ed., Juno 2020); Govt. Bill 1998/99:35, pp. 61-63.
4. Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng*. Arbitration: A Commentary), commentary to section 1 of the Act, para. 6.2.2, footnote 803 (3rd ed., Juno 2020); Lars Heuman, *Skiljemäns rätt att komplettera avtal* (*Eng.* Arbitrators' power to supplement contracts), in *Festskrift till Ulf K. Nordenson*, pp. 180-181 (Jure 1999).

In recent years, the Svea Court of Appeal has seen a whole host of challenges against awards in gas price review arbitrations.[5] A price review under a long-term supply agreement (whether for natural gas, electricity or 'power', component supply, or other types of products or commodities) is perhaps the typical situation in which an arbitral tribunal is given a mandate by the parties to supplement the contract, by revising the price terms on the parties' behalf.

In a very brief summary, a long-term supply agreement for natural gas contains an undertaking for the buyer to take a minimum volume of gas each year for the duration of the contract. The price payable for that supply is set at the beginning of the contract term and is typically indexed either to the price of other natural gas products or of other energy products. By the indexation, the parties hope that the price will self-adjust to changes in the market. But the parties also know that circumstances will change during the lifetime of the contract, which sometimes exceeds thirty years, in ways that the indexation will not be able to adjust for and that this will necessitate a renegotiation of the contract price.[6]

Such a renegotiation of the contract price is referred to as a 'price review' or a 'price revision'. Typically, a party to the contract has a right to request a price review at three-year intervals.[7] The requesting party must then first show that circumstances have changed in a way which is not reflected in the applicable price formula in accordance with certain specific conditions set out in the contract ('the trigger criteria').[8] Provided that the trigger criteria are met, the parties are then under an obligation to enter into negotiations to agree on a new price. If those negotiations do

5. The gas dispute awards under review by the Svea Court of Appeal in recent years include: *Gazprom v. Naftogaz of Ukraine,* Case No. T 10191-17 (Svea Court of Appeal 27 Nov. 2019); *Gazprom v. PGNiG,* Case No. T 8990-18 (Svea Court of Appeal 23 Dec. 2020); *Akfel Gaz v. Gazprom,* Case No. T 1806-19 (Svea Court of Appeal 8 Jun. 2021); *Enerco Enerji v. Gazprom,* Case No. T 1040-19 (Svea Court of Appeal 6 Oct. 2021); *Kibar Enerji v. Gazprom,* Case No. T 7865-19 (Svea Court of Appeal 1 Dec. 2021); *Botaş v. Depa,* Case No. T 4182-20 (Svea Court of Appeal 24 Feb. 2022); *Gazprom v. PGNiG,* Case No. T 6254-20 (Svea Court of Appeal 9 Mar. 2022).
6. The account of typical features of a gas price review in this Introduction is based on our practical experience of such disputes, having, in the case of the senior author of this contribution, been involved on the side of about ten different buyers of natural gas in more than twenty gas price reviews in the past 15-20 years (primarily working together with fellow Mannheimer Swartling partner Robin Oldenstam). The involvement has ranged from legal and contractual advice in the trigger and/or negotiation phases, counsel assignments (as lead counsel or for matters of Swedish law) in gas price review arbitrations, to a few cases of challenges of arbitral awards before Swedish courts. The typical features of gas price reviews accounted for here have also been described by other practitioners based on their experience; *see*, for example, Marco Lorefice, *Gas Price Review Arbitrations*, in *The Guide to Energy Arbitrations*, p. 1 (5th ed., GAR 2022); and Mark Levy, *Gas Price Review Arbitrations: Certain Distinctive Characteristics*, in *Global Arbitration Review, The Guide to Energy Arbitrations*, p. 185 (2nd ed., GAR 2017).
7. Marco Lorefice, *Gas Price Review Arbitrations*, in *The Guide to Energy Arbitrations*, p. 1 (5th ed., GAR 2022). *See also* Mark Levy, *Drafting an Effective Price Review Clause*, p. 13, para. 3.1 and Marnix Leijten & Martje de Vries Lentsch, *The Trigger Phase*, p. 34, para. 2.1, both in *Gas Price Arbitrations: A Practical Handbook* (1st ed., Globe Law and Business 2014).
8. Mark Levy, *Drafting an Effective Price Review Clause*, p. 13, para. 3.1, and Marnix Leijten & Martje de Vries Lentsch, *The Trigger Phase*, p. 35, para. 2.2 and p. 37, para. 3.1, both in *Gas Price Arbitrations: A Practical Handbook* (1st ed., Globe Law and Business 2014).

not lead to agreement, the contract typically provides that the matter may be referred to arbitration, thus granting the right to determine a new price to an arbitral tribunal.[9]

In most of the challenges heard by the Svea Court of Appeal concerning price review arbitrations, the question of the nature of the tribunal's mandate when determining a new price has not been addressed or has not played a central role in the decision. However, in two cases determined in 2022, the issue of the mandate was discussed. The authors of this article were part of the counsel teams representing the respective buyers (and respondents in the challenges) in both cases, which gave us reason to reflect further on the nature and scope of the mandate to supplement contracts.

The two cases will be briefly summarised below for context. However, the focus of the discussion in this article is not primarily these particular cases as such but what was not discussed in detail in those judgments (because it was not relevant for the court to go further in order to reach its conclusions).

§4.02 THE MANDATE TO SUPPLEMENT CONTRACTS ACCORDING TO THE SVEA COURT OF APPEAL: TWO GAS PRICE REVIEW ARBITRATIONS

[A] *Botaş v. Depa*

On 23 December 2003, Turkey's Botaş and Greece's Depa concluded a contract for pipeline supply of natural gas by Botaş to Depa. Under the contract, the price of the gas would be calculated using a price formula consisting of two factors: Pc + K. The Pc factor was linked to the agreed purchase price from a specific upstream supplier of gas to Botaş, and the K factor was linked to the market price of oil.

Article 9.6 of the contract provided that either party was entitled, under certain conditions, to request a revision of the price formula by submitting a price revision request, opening up a price review negotiation between the parties. If such a review did not result in agreement, the contract entitled either party to refer the matter to arbitration.

The parties have requested several price revisions, but the request of relevance here is one submitted by Botaş in 2011. On 13 June 2017, Depa requested arbitration against Botaş on the basis of this request since the negotiations under it had not resulted in a new price. Depa asked that the tribunal revise the price formula by replacing the aforementioned Pc and K factors with a direct indexation to the average price of imported gas in one of the larger European economies. Botaş objected to this request. The tribunal issued its award on 10 January 2020 and revised the price by replacing the Pc and K factors with a direct indexation to the average price for imported gas in one of the larger European economies.

9. Mark Levy, *Drafting an Effective Price Review Clause*, p. 15, para. 3.1, in *Gas Price Arbitrations: A Practical Handbook* (1st ed., Globe Law and Business 2014).

Botaş lodged a challenge against the award with the Svea Court of Appeal, seeking partial annulment of the award. Depa opposed Botaş's request. Botaş claimed that the arbitral tribunal exceeded its jurisdiction (*behörighetsöverskridande*) or mandate (*uppdragsöverskridande*) when it changed the structure of the price formula by removing the Pc and K factors.

In support of its claim that the tribunal exceeded its jurisdiction, Botaş essentially argued that the content of Article 9.6, which undisputedly gave the tribunal the right to supplement the contract with a new price, affected the tribunal's jurisdiction. Therefore, the tribunal allegedly exceeded its jurisdiction by modifying the structure of the price formula set out in Article 9.6. Botaş argued that the right of the arbitral tribunal to supplement the contract under Article 9.6 stemmed from section 1(2) of the Act and, as such, was a procedural rule and part of the arbitration agreement.

However, as the Court explained, section 1(2) expresses what is arbitrable, which is not the same as regulating the jurisdiction of a tribunal. No power of the tribunal as such is derived from or based on section 1(2), which merely states that if such power is granted to the tribunal (elsewhere, by the parties), that power may be exercised in arbitration. Moreover, the Court found that if the parties had intended Article 9.6 to limit the jurisdiction of the tribunal, they would have done so in the arbitration agreement.

The Court of Appeal then considered whether the arbitral tribunal had exceeded its mandate. In doing so, it made some observations about a tribunal's mandate to supplement a contract, referring to former Justice Stefan Lindskog's writings on the subject:

> In order for a contract to be supplemented, there must be support in the contract or in an instruction submitted jointly by the parties. The contractual support can be found not only in the arbitration agreement but also in the substantive provisions. A special case of exceeding the mandate is when the arbitral tribunal has supplemented the parties' contract without any support in the contract for a mandate to supplement it.[10]

The parties agreed that the contract supported such a mandate. However, they disagreed as to how far that mandate extended, i.e., how Article 9.6 should be interpreted.

In the arbitration, the tribunal itself found that Article 9.6 was a substantive provision and that, by that provision, the parties had given a third party (the tribunal) the right to revise a contractual provision (the price) in the place of the parties could they not agree themselves. Moreover, the tribunal found that Article 9.6 gave it, as well as the parties, the right to revise some or all elements of the price formula.

The question then naturally arose as to how the Court of Appeal should approach the issue in the light of the tribunal's own assessment of the matter. The Court wrote:

10. *Botaş v. Depa*, Case No. T 4182-20, p. 25 (our own translation, Svea Court of Appeal 24 Feb. 2022); and Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng.* Arbitration: A Commentary), commentary to section 1 of the Act, para. 6.2.3 and commentary to section 34, para. 4.3.6 (3rd. ed., Juno 2020).

> When reviewing a tribunal's assessment of the scope of its mandate, just as in reviewing the issue of jurisdiction, it is reasonable to assume that the tribunal is in the best position to assess the issue and that the tribunal's interpretation and assessment of the evidence is therefore correct as a starting point.
>
> As noted above, a mandate to supplement contracts may follow from a substantive provision of the contract. The arbitral tribunal's assessment that Article 9.6 constitutes a substantive provision to be applied in accordance with Swiss law is supported by the fact that the parties confirmed this during the arbitral proceedings. The Court of Appeal finds no reason to depart from the arbitral tribunal's assessment in this respect.
>
> Accordingly, the substantive provision in Article 9.6 provided the necessary support for the arbitral tribunal to adjust the price. There was therefore no excess of the mandate. Since the Court of Appeal should not review the tribunal's decision in the context of challenge proceedings, the Court of Appeal should not revisit the tribunal's interpretation and application of Article 9.6.[11]

Based on this analysis, the Court concluded that the tribunal had not exceeded its mandate nor its jurisdiction. Thus, the challenge was rejected.

[B] *Gazprom v. PGNiG*

In the other price review discussed here, the dispute arose under a long-term gas supply agreement between Poland's PGNiG, as buyer, and Russia's Gazprom, as seller. The contract provided that the price of gas was to be determined in accordance with a price formula consisting of several different components related to the market price of alternative energy sources. The contract allowed the parties to request a revision of the price formula if certain trigger criteria were met. If the parties could not agree on a new price, the contract allowed either party to refer the matter to arbitration.

Arbitration was requested by the buyer. In a separate award issued on 29 June 2018, the arbitral tribunal concluded that it had a mandate under section 1(2) of the Act to decide on a price revision under the contract and that such revision could be different from the one requested by the buyer. It also concluded that the conditions for a price revision were met in the present case. The seller protested against these findings and also (unsuccessfully) challenged the separate award.[12]

On 30 March 2020, the arbitral tribunal issued a final award setting out a new price formula. Somewhat simplified, the new price formula included components that had been agreed by the parties in the arbitration, albeit the values to be ascribed to those components were debated. The final award provided for values between those requested by the buyer and the seller for each respective component of the formula.

The seller challenged the final award.[13] In the challenge proceedings before the Svea Court of Appeal, the seller argued that the arbitral tribunal had exceeded its mandate, as the parties had not given the arbitral tribunal any joint instructions, either

11. *Botaş v. Depa,* Case No. T 4182-20, pp. 25-26 (our own translation, Svea Court of Appeal 24 Feb. 2022).
12. *Gazprom v. PGNiG*, Case No. T 8990-18 (Svea Court of Appeal 23 Dec. 2020).
13. *Gazprom v. PGNiG*, Case No. T 6254-20 (Svea Court of Appeal 9 Mar. 2022).

in the contract or during the arbitration, that would allow it to supplement the contract. The seller argued that the arbitral tribunal had engaged in contract supplementation by setting a new price formula, thereby exceeding its ordinary judicial mandate. The seller further argued that in order for the arbitral tribunal to have a mandate to supplement the contract, it must have been given complete discretion to decide on the content of the contract, which was not the case here as the contract included a number of guidelines for how a new price should be arrived at, either by the parties themselves or, failing agreement, by a tribunal.

The buyer opposed the challenge. It pointed to the fact that the arbitration agreement empowered the arbitral tribunal to set a new price (including a new price formula) and argued that the arbitral tribunal had thus been given an express mandate to set a new price (including a new price formula). Irrespective of whether this mandate was to be interpreted as an ordinary mandate to interpret the contract or, instead, as a mandate to supplement the contract, the buyer argued that the tribunal had not exceeded any mandate since the decision had not been outside the scope of the facts argued by the parties.

In its judgment, the Svea Court of Appeal first addressed the concept of a mandate to supplement the contract. The Court noted that section 1 of the Act delineates the scope of arbitrability, that is, the issues that may be referred to an arbitral tribunal. It also highlighted that the second paragraph of the same section, which permits parties to grant an arbitral tribunal a mandate to supplement the contract, was included in the Act to define the boundaries of arbitrability. The Court noted that contract supplementation is permissible regardless of whether the agreement in dispute provides precise instructions for the exercise or whether the mandate is more broadly defined. Consequently, the Court concluded that distinguishing between an ordinary judicial mandate, which includes the right to fill gaps through interpretation, and a mandate to supplement the contract is not always practically possible. The judgment provides:

> Section 1 of the Act sets out what is arbitrable, i.e. what matters can be referred to an arbitral tribunal for adjudication (see Govt. Bill 1998/99:35 p. 210). The second paragraph of the section states that the parties may allow the arbitrators to supplement a contract in addition to what follows from the interpretation of contracts. The provision was introduced so that the arbitral tribunals authority to supplement contracts would be clearly stated by law (Govt. Bill p. 61). It thus aims to clarify the limits of what is arbitrable in this respect.
>
> The competence of an arbitral tribunal may thus include a right to supplement contracts in such respects where there is no basis for how the assessment is to be made and this regardless of whether the mandate may be considered as exercise of law (Govt. Bill p. 61). However, such a lack of guidance for the arbitral tribunal's assessments is not, in the opinion of the Court of Appeal, a prerequisite for a right to supplement the contract within the meaning of the law, but constitutes the outer limit for the matters that may be referred to an arbitral tribunal. It follows from this, that it is not meaningful to maintain any sharp distinction between a right to supplement a contract and a right to, for example, gap-filling (cf. Lindskog, Skiljeförfarande, En kommentar (*Eng*. Arbitration: A Commentary), 2020, p. 281 note 1120). Neither the text of the law nor the

> preparatory work contains any definition of a right to supplement contracts or even an attempt to define such a right.[14]

The Court further reasoned that determining whether an arbitral tribunal has a mandate from the parties to supplement the contract, and the extent of that mandate, cannot be based on a theoretical legal definition of what such a mandate encompasses. Rather, it must be ascertained from the arbitration agreement and other pertinent documents.

In the present case, the Court noted that the arbitral tribunal had determined that it possessed a mandate to supplement the contract as per section 1(2) of the Act. Additionally, during the arbitration, the parties concurred that the tribunal was empowered to establish a new pricing formula, subject to certain conditions. The contention arose over whether this authority was to be qualified as such a mandate to supplement the contract that, under section 1(2) of the Act, requires the parties' agreement and, if so, how to define that mandate. Again, the Court repeated that such legal qualification of a mandate has no independent meaning. The Court, applying Swedish arbitration law, agreed with the arbitral tribunal's conclusion that the contract authorised it to supplement the contract by adjusting the price formula. The Court found that there were some points of reference for the arbitral tribunal's assessment in the contract, but these were not particularly guiding for the arbitral tribunal. Thus, the Court concluded that the arbitral tribunal had been given wide discretion to revise the price formula. In the end, it held that the arbitral tribunal had not exceeded its mandate when it determined the new price formula.[15]

[C] Further Questions Remaining

In the two cases discussed above, the issue of contract supplementation was raised, but it was not ultimately decisive for the outcome. In *Botaş v. Depa*, there was no dispute that the tribunal had been given a mandate to supplement contracts; the contentious issue was the scope of the tribunal's mandate and whether it was limited to adjusting existing price components or replacing them. This was deemed a substantive issue determined by the interpretation of the contract and, thus, outside of the Court of Appeal's review.[16] In *Gazprom v. PGNiG*, it was in dispute whether the tribunal had been given a mandate to supplement contracts, but the parties agreed in principle that the arbitral tribunal had a right to adjust the price formula, regardless of whether this was characterised as contract supplementation or as an ordinary application of law and

14. *Gazprom v. PGNiG*, Case No. T 6254-20, pp. 12-13 (our own translation, Svea Court of Appeal 9 Mar. 2022).
15. *Gazprom v. PGNiG*, Case No. T 6254-20, pp. 13-18 (Svea Court of Appeal 9 Mar. 2022). The Svea Court of Appeal gave the parties permission to appeal its judgment to the Supreme Court because it considered that the case involved issues where it is important for the guidance of the application of the law that an appeal be heard by the Supreme Court. However, the judgment was not appealed.
16. *Botaş v. Depa*, Case No. T 4182-20, pp. 25-26 (Svea Court of Appeal 24 Feb. 2022).

contract.[17] In both cases, the Court of Appeal found that the parties' contract provided the tribunal with the power to revise the price formula, that the price formula determined by the tribunal fell within its discretion and, importantly, that it did not deviate from how the issues in dispute had been defined by the parties in the arbitrations through their requests for relief and argued facts.[18]

So the question of what happens if it is established that the parties have *not agreed* on giving an arbitral tribunal a mandate to supplement contracts, but the tribunal is said to have done so in any event, was not asked. How does one then determine whether the arbitral tribunal has engaged in its ordinary judicial mandate or in unauthorised contract supplementation? This will be addressed in section §4.03 below.

In section §4.04, we will look at the boundaries of a mandate to supplement the contract once it has been established that the arbitral tribunal has been provided with such powers. As will be explained, the parties' dispositions[19] in the arbitration are critical in shaping the boundaries of the arbitral tribunal's powers.

§4.03 DISTINGUISHING BETWEEN AN ORDINARY JUDICIAL MANDATE AND A MANDATE TO SUPPLEMENT THE CONTRACT

[A] Contract Interpretation under the Ordinary Judicial Mandate (and in the Grey Zone)

As noted above, the parties may 'allow arbitrators to supplement contracts beyond what follows from contract interpretation' (section 1(2) of the Act). The starting point of the analysis of what this means is thus to determine what 'follows from contract interpretation'.

Contract interpretation is, of course, part of a tribunal's ordinary judicial mandate. It requires no specific agreement by the parties. But evidently, according to the provision in section 1(2), a tribunal can go beyond that and beyond what is possible for a court[20] if the parties have allowed the tribunal to do so. Since this kind of operation thus requires the parties' agreement – and consequently is prohibited absent such agreement – it is relevant to consider where to draw the demarcation line between the

17. *Gazprom v. PGNiG*, Case No. T 6254-20, pp. 13-14 (Svea Court of Appeal 9 Mar. 2022). According to Gazprom, the tribunal was empowered to revise the price formula provided that it kept within an ordinary judicial mandate.
18. *Gazprom v. PGNiG*, Case No. T 6254-20, pp. 13-16 (Svea Court of Appeal 9 Mar. 2022); and *Botaş v. Depa*, Case No. T 4182-20, pp. 25-26 (Svea Court of Appeal 24 Feb. 2022).
19. The Swedish law principle of *party disposition* will be developed in this paper and essentially entails that the powers of a court or tribunal is limited by the parties' dispositions (i.e., requests for relief, instructions given, facts invoked, and positions taken) as presented during the course of the proceedings.
20. Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng.* Arbitration: A Commentary), commentary to section 1 of the Act, para. 6.2.2, footnote 803 (3rd. ed., Juno 2020); and Lars Heuman, *Skiljemäns rätt att komplettera avtal* (*Eng.* Arbitrators' power to supplement contracts), in *Festskrift till Ulf K. Nordenson*, pp. 180-181 (Jure 1999).

ordinary filling of gaps through contract interpretation and the extraordinary supplementation of contracts.

To draw that demarcation line, we start by looking at the non-controversial filling of gaps through contract interpretation.

Consider a long-term supply agreement between a manufacturer (seller) and a retailer (buyer) for the delivery of goods. The contract specifies the type of goods, the quantity to be delivered, the price per unit, and the total duration of the contract. However, it omits a crucial detail: the specific delivery dates or intervals. To fill this gap, a delivery schedule must be inferred. This inference could be based on the nature of the business, industry standards, and the parties' past dealings, if any. The parties in the arbitration would argue the normative framework to apply and the facts that correspond to it. The tribunal would then base its interpretation on the argued contractual data (any prior agreements, communications, and practices between the parties) and on non-mandatory legal rules (legal principles and industry norms that provide a framework for filling gaps in contracts). That is in itself a judicial endeavour that requires no specific mandate.

Another situation could be that all terms around a purchase have been agreed – quality, number of units per shipment, place of delivery, duration of the contract – but not the unit price. There may then be legal norms to apply in the situation where the price, or the principles for determining the price, are not agreed on, as in Article 55 of the CISG or section 45 of the Swedish Sale of Goods Act. It naturally falls within the ordinary judicial mandate to apply those norms (if they are applicable), whether the issue is faced by an arbitral tribunal or by a court.[21]

What the above-mentioned examples have in common is that the solution is provided for by legal norms. Perhaps, rather than referring to the filling of gaps through contract interpretation, it would have been more to the point if section 1(2) was phrased: 'The parties may allow the arbitrators to supplement a contract beyond what follows from interpretation and application of law.' This wording would be in line with how the permitted and ordinary filling of gaps, under the ordinary judicial mandate, has been defined by former Justice Lindskog in his commentary to section 1 of the Act:

> However, such supplementation [through contract interpretation] must be based on either contractual data or non-mandatory legal rules.
>
> In other words, there must be a legal basis for the interpretative operation by which the contract is filled out so that the operation can be characterised as administration of justice in the true sense of the word. A filling of a gap may thus not be based on mere considerations of what is appropriate under the circumstances.[22]

21. Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng.* Arbitration: A Commentary), commentary to section 1 of the Act, paras 6.2.1 and 6.2.2, footnotes 800 and 804 (3rd. ed., Juno 2020); and Lars Heuman, *Skiljemäns rätt att komplettera avtal* (*Eng.* Arbitrators' power to supplement contracts), in *Festskrift till Ulf K. Nordenson*, pp. 187-188 (Jure 1999).
22. Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng.* Arbitration: A Commentary), commentary to section 1 of the Act, para. 6.2.1 (our own translation, 3rd. ed., Juno 2020). In the Swedish original (footnotes omitted): 'En sådan utfyllnad måste dock vila på antingen avtalsdata eller dispositiva rättsregler. Det hela kan uttryckas så att det måste finnas ett rättsligt underlag för den

Accordingly, if the gap can be filled by way of ordinary administration of justice in the true sense of the word, the operation requires no special mandate.

Let us now turn to another example (based on a real-life situation). Consider a supply agreement between a manufacturer and a buyer for the delivery of a specific product. The contract includes the following provisions:

> If, during the term of this agreement, circumstances change in a way that significantly affects the availability and market price of the Product, then the parties agree to negotiate in good faith and reach a mutual agreement on an adjusted price for the Product within 30 days of either party providing written notice of such change. If no agreement is reached within this period, the parties shall continue to perform their obligations under the original terms of this agreement unless and until an adjusted price is agreed upon.

The provision is a classical 'agreement to agree'. It evidently provides no remedy (legal consequence) for the situation that no agreement is reached. Would it still be possible for the party seeking renegotiation to initiate arbitration and request the tribunal to determine an adjusted price? To answer that question, one must, of course, read the whole contract, but for this purpose, let us agree that there is no provision in the contract that provides that if the parties cannot come to agreement on a specific point, they may refer their disagreement to arbitration.

In this situation, unlike the example above where there was no price, non-mandatory provisions in CISG or the Swedish Sale of Goods Act cannot be used to determine a price since there *is* a price (what the requesting party wants is a *new* price). This thus seems like a situation that cannot be resolved through contract interpretation.[23] We are thus at the point where an arbitral tribunal's adjustment of the contract to compensate for the parties' failure to agree would go 'beyond what follows from contract interpretation'. That is therefore something that the tribunal ought not do, absent an instruction from the parties allowing it to supplement the contract.

The problem could be more difficult if the renegotiation clause instead had the following wording:

> If, during the term of this agreement, circumstances change in a way that significantly affects the availability and market price of the Product, then the parties agree to enter into negotiation in good faith within 30 days of either party providing written notice of such change and reach a mutual agreement where (a) the possibility for the Buyer to offtake the Product in a certain month should be restricted if availability of the product is 50 per cent or less of current availability

---

tolkningsoperation varigenom avtalet fyllts ut så att operationen kan karaktäriseras som rättsskipning i egentlig mening. En utfyllnad får således inte vila på rena lämplighetsöverväganden.'

23. There may, however, be other ways to argue a case under the applicable legal rules based on the facts resulting in the situation addressed by the provision, such as hardship, impossibility and unconscionability, even if there is no support for that in the contract clause. A case based on such theories could result in termination, avoidance, adjustment and possibly other remedies, but not in contract supplementation or gap-filling per se. Possibly, if one of the parties would have breached the express obligation in the clause to negotiate in good faith, that could also be seen as a breach of contract entitling the other party to damages and possibly other remedies but not in a new agreement.

> in the preceding month and (b), if the market price has changed by more than 20 per cent and has remained so for more than six months, the price for the Product is to be adjusted upwards or downwards, with a percentage corresponding to the change in market price in average seen over the duration of the contract to date.

Again, the contract includes no provision by which the parties agree that a tribunal may amend the agreement on their behalf should they fail to agree on a revision themselves. The clause still says that an adjustment can take place only by the parties' '*mutual agreement*'. But this situation is still more difficult than in the previous example because here, the provision is normative and sets out the parameters necessary to know what the renegotiation should result in. It would thus be possible for an arbitral tribunal to assess evidence relied on by the parties in support of factual allegations and apply principles of burden of proof to determine whether the facts are established. If they are, the legal consequence could be ascertained.

This kind of provision could thus give ground for a cause of action that would allow a tribunal to establish what the revised contract terms should be had the parties complied with their good faith obligation. That could take the form of declaratory relief and also damages, ordered under the tribunal's ordinary judicial mandate. However, it would likely be to stretch the interpretation to say that a tribunal would have the mandate to actually change the contract based on this contract wording since the legal consequence of the requirements being at hand is that the parties are to agree – not that the contract is to be changed. In other words, it would likely be a case of (prohibited) contract supplementation if a tribunal were to declare a revision of the contract based on the clause.[24]

[B] Revision of the Price Based on a Traditional Price Review Clause

Let us now return to the kind of provisions that were the basis for the arbitrations in the two cases outlined above. Here, it is clear that the tribunal may order a new price to apply and thus change the contract. In both contracts, the parties had included price review clauses that are fairly 'typical' for long-term supply of natural gas (even if every clause is unique and includes its own specific requirements).[25] In order for this chapter

24. The existence of normative guidance does thus not itself imply that the tribunal may step into the shoes of the parties and reach the agreement that they should have reached themselves. And conversely, when there is guidance sufficient for a finding of the new contract term based on burden of proof, it may still be a question of contract supplementation that requires the parties agreement. Lindskog explains as follows: 'When the parties enter into an arbitration agreement and leave room in it for the arbitral tribunal to supplement the agreement if the need arises, it may often be appropriate to set out certain normative guidelines for how the supplementation is to be carried out. This is, of course, mainly because if the parties agree on the normative guidelines, it increases the chances that they will be able to reach agreement without having to refer the matter to arbitration. And if they do so, the risk of surprises from the arbitral tribunal is reduced.', Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng.* Arbitration: A Commentary), commentary to section 1 of the Act, para. 6.2.2 (3rd. ed., Juno 2020).
25. Mark Levy, *Gas Price Review Arbitrations: Certain Distinctive Characteristics*, in *Global Arbitration Review, The Guide to Energy Arbitrations*, pp. 187-188 (2nd ed., GAR 2017).

to be of general interest and not focused on the peculiarities of individual cases, we have asked ChatGPT 4o to provide a typical price review clause for analysis:

Article 10: Price Review

10.1 Trigger Events for Price Review

If during the term of this Agreement, one or more of the following trigger events occur, either party (the 'Requesting Party') shall have the right every three years to initiate a price review:

a. Significant Market Changes: A substantial change in the market conditions affecting the natural gas industry, such as significant fluctuations in the market price of natural gas or alternative energy sources, which makes the price set forth in this Agreement no longer reflective of the current market value.
b. Regulatory Changes: The introduction, modification, or repeal of any laws, regulations, or governmental policies that materially affect the cost or availability of natural gas to either party.
c. Economic Hardship: A substantial change in economic circumstances that significantly impacts the financial viability of the Agreement for either party.

The Requesting Party shall provide written notice to the other party (the 'Responding Party') of its intention to initiate a price review. The notice shall specify the trigger event(s) and provide reasonable evidence supporting the occurrence of such event(s).

10.2 Good Faith Negotiations

Upon receipt of the notice, the parties shall enter into good faith negotiations to agree on a revised price for the natural gas supplied under this Agreement. The negotiations shall aim to establish a price that is fair and equitable, taking into account:

a. The current market conditions and prices for natural gas.
b. The impact of the trigger event(s) on the costs and revenues of both parties.
c. Any other relevant economic or regulatory factors.

10.3 Referral to Arbitration

If the parties are unable to reach an agreement on the revised price within a sixty (60) day negotiation period, either party shall have the right to refer the matter to arbitration in accordance with Article 12 of this Agreement.

10.4 Continuation of Supply

During the period of negotiations and any subsequent arbitration proceedings, the parties shall continue to perform their obligations under this Agreement, including the supply and payment for natural gas, at the price currently in effect, until a new price is agreed upon or determined by the arbitral tribunal which price is to apply retroactively as from the date of the notice.

The above example coincides well with what, in our experience, may be deemed an 'average' price review clause, particularly in 'East-West' gas supply contracts of a

somewhat older vintage.[26] As per the above example, the first step in a price revision arbitration is to determine whether the trigger criteria have been met. The trigger criteria usually require that the party requesting price revision can establish certain conditions relating to changed circumstances which are not reflected in the price formula.

When adjudicating the trigger criteria and thus establishing whether there is a right per se to have a new price, the arbitral tribunal clearly engages in an ordinary judicial determination. The trigger criteria constitute legal norms[27] that can be construed through contract interpretation to include precise requirements that, if proven to be fulfilled, provide for a specific legal outcome. In other words, when arguing that there is a right to a price review, the requesting party can present facts corresponding to requirements of the rule. An arbitral tribunal may apply an ordinary operation of burden of proof to ascertain whether the argued facts are supported by the evidence on the record. It follows that an arbitral tribunal tasked with assessing whether the trigger criteria in Clause 10.1 above have been met may assess and interpret the facts and arguments by applying relevant legal rules in order to reach a binding decision. The tribunal does not need any extraordinary power to fulfil this task; an ordinary judicial mandate authorising it to adjudicate the dispute with application of law is sufficient.[28]

Once it has been established that the trigger criteria are met, the next step is to negotiate the revised contract price formula. As in Clause 10.2 in the example above, the price review clause often contains instructions as to how the revision should be carried out, and there are two very common phrases of relevance here:

(a) The revised contract price shall be '*fair and equitable*' (or alterations of this with a similar meaning).

26. Many of the Western-European contracts for supply of Russian (and previously Soviet) natural gas have their origin in the 1970s, although most have been amended and sometimes reinstated as new contracts several times since their conclusion. In our experience, the price review clauses of those contracts are often rather concise but with a few clear themes as per the example provided above. More modern contracts for the supply of Liquefied Natural Gas as well as many of the 'North-South contracts', for supply from the North Sea to Continental Europe, are often slightly more technical in how they are drafted albeit with the same or similar main features. For further examples of price review clauses, *see* Mark Levy, *Gas Price Arbitrations: A Practical Handbook*, pp. 173-177 (Globe Business Publishing Ltd 2014), where Mr Levy has included an appendix with a few other sample clauses, some of which include many but not all the elements included in the example provided above.
27. In Swedish procedural law nomenclature, these elements or requirements are referred to as abstract facts (*abstrakta rättsfakta*) or prerequisites (*rekvisit*). In order for the prescribed legal consequence (*rättsföljd*) to materialise, a party must prove that the facts in the case (*konkreta rättsfakta*) match the abstract facts in the relevant rule. This should all be quite obvious for a lawyer irrespective of legal background, even if the Swedish terminology is confusing and unhelpful (even for most Swedish lawyers).
28. Lars Heuman, *Skiljemäns rätt att komplettera avtal* (*Eng.* Arbitrators' power to supplement contracts), in *Festskrift till Ulf K. Nordenson*, p. 190 (Jure 1999). Professor Emeritus Lars Heuman explains that the power to assess the existence of facts includes the power to make legal qualifications, for example, to decide whether certain acts entail force majeure or whether the goods supplied meet the relevant requirements. Similarly, it naturally falls within an ordinary judicial mandate to find that the trigger criteria in a long-term gas supply agreement have been satisfied.

(b) The revision shall '*take into account*' relevant economic data pertaining to the gas market, as further detailed in the price review clause. Although the provision includes some criteria to be followed, this instruction is hardly a rule, nor is it particularly tangible, as it merely sets out certain facts and circumstances to '*take into account*'.

If the parties are unable to reach agreement in accordance with these instructions, the price revision clause sets out the legal consequence: either party has the right to refer the matter to arbitration. The task of the arbitrators is then to step into the shoes of the parties and revise the price, i.e., to finish what the parties themselves have been unable to do.[29]

What the tribunal has to consider and take into account in revising the contract prices are the same substantive provisions that were before the parties. Accordingly, the tribunal shall '*take into account*' relevant market data and ensure that the revised contract price is '*fair and equitable*'.

The requirement that the revision be '*fair and equitable*' encapsulates that the issue submitted to the tribunal is not a matter that could be resolved by exercising an ordinary judicial mandate. In the words of one president of a tribunal considering a gas price review, when the scope of the mandate came under debate at a hearing: 'this is not a burden of proof exercise … we are not applying burden of proof, we are rewriting the contract … and we will do that as professionally we can on the basis of the data we have'. That the revision shall be '*fair and equitable*' is not a concrete requirement possible to apply the burden of proof to; the requirement does not correspond to specific facts that can be proven.

29. Mark Levy, *Gas Price Review Arbitrations: Certain Distinctive Characteristics*, in *Global Arbitration Review, The Guide to Energy Arbitrations*, pp. 185-193 (2nd ed., GAR 2017). As Lindskog points out, the task of the tribunal in these situations is similar to that of an expert in an expert determination procedure (*godmansförfarande*); *see* Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng.* Arbitration: A Commentary), at 0 para. 3.2.1. (3rd. ed., Juno 2020). A typical example of a provision subject to expert determination is a purchase price adjustment clause in a sale and purchase agreement for the sale of a company. The parties often agree in the contract that, should they not agree on how to adjust the contract price following receipt of a closing balance sheet, an independent expert (often an auditor) is to complete the task on their behalf with binding effect. Such a decision is binding in the sense that the parties become contractually bound by the decision. Such a procedure is similar but not the same as contract supplementation through arbitration. Lindskog explains as follows (in our translation): 'When attempting to define what constitutes an arbitration, international literature often emphasise that the award is binding and that arbitration has its own procedure. *See* e.g. Fouchard et al. no. 7 et seq. and Lew, Mistelis & Kröll 1-20. But also an expert determination is binding. What distinguishes the two types of decisions is their respective legal quality: an arbitral award is an enforceable judgment, whereas an expert determination has the character of a contract. A contract can (as a general rule) be concluded informally. For expert determinations there may consequently be full party autonomy. An arbitral award has much more far-reaching legal effects than an expert determination. In the interests of due process, therefore, both the procedure and the award must be subject to special scrutiny. In this context, there is also reason to point out that arbitration is an exception to the principle of the inalienable right to a trial that is recognised by the legal system […]. This is not the case with expert determination.' *See* Stefan Lindskog, *Skiljeförfarande: En kommentar* (Eng. Arbitration: A Commentary), footnote 149 at 0 para. 3.2.1. (3rd. ed., Juno 2020).

Put simply, as the provision reads, there is nothing to test evidence against, and a tribunal cannot determine a revised price formula only by applying the law. One could possibly interpret the directions to '*take into account*' certain data as providing concrete requirements that may correspond to facts that may be proven. However, even if that would be the case, the price revision clause does not set out any legal consequence of establishing such facts.

Instead of merely assessing whether the operative facts correspond to the abstract facts, a tribunal with a mandate to supplement the contract arrives at revised contract prices by also taking into account arguments of economic and commercial nature, just as the parties were supposed to do during their negotiations. Under such a mandate, which goes beyond an ordinary judicial mandate, it is not for the arbitral tribunal to simply assess whether a specific price formula has been entirely proven by one party and, if not, dismiss the entire case. Instead, it is for the tribunal to revise the price formula on behalf of the parties and, in doing so, apply its business acumen based on the presented data. But are there no limits to the discretion? We will turn to that now.

§4.04 LIMITS TO THE POWERS OF A TRIBUNAL EXERCISING A MANDATE TO SUPPLEMENT CONTRACTS

[A] The Boundaries of the Tribunal's Powers Are Set by the Contract and the Parties' Dispositions

There are limits to the tribunal's powers, regardless of whether it has been vested with a mandate to supplement contracts or an ordinary judicial mandate. The starting point for identifying these limits is not section 1(2) of the Act, as explained above, but the contract and the parties' dispositions (i.e., requests for relief, instructions given, facts invoked and positions taken) during the course of the arbitration.[30]

It follows that the task of an arbitral tribunal empowered to supplement contracts is to exercise its power in accordance with the principles indicated by the parties. In the absence of any such principles, the arbitral tribunal is allowed to more freely decide the new content of the parties' contract, however, guided by the nature of the contract and the underlying purpose of the supplementation to be made.[31]

30. In the judgment in *Gazprom v. PGNiG*, the Court of Appeal stated: 'Neither the statutory text nor the preparatory work contains any definition of a right to supplement contracts or even an attempt to define such a right. Consequently, whether the arbitral tribunal has a right to supplement the contract, or how far that right extends, cannot be assessed on the basis of an intended definition of what constitutes a mandate to supplement the contract within the meaning of the law. Instead, it is the underlying arbitration agreement and other documents, and what can be read from the provisions therein concerning the limits of the arbitral tribunal's mandate, that may have an impact on the arbitral tribunal's right to supplement the contract. This is also the starting point in the preparatory works (see Govt. Bill. p. 62 and p. 210 *et seq*.). A limit for the arbitral tribunal in this context consists of what is considered as arbitrable, pursuant to section 1(2) of the Act.' *Gazprom v. PGNiG*, Case No. T 6254-20, p. 13 (Svea Court of Appeal 9 Mar. 2022).
31. Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng.* Arbitration: A Commentary), commentary to section 1 of the Act, para. 6.2.4 (3rd. ed., Juno 2020).

The scope of an arbitral tribunal's powers emanating from a contract must be interpreted on a case-by-case basis in accordance with general principles of contract interpretation. Under Swedish law, it is the common intention of the parties at the time of entering into the contract that ultimately determines the content of an agreement.

The scope of an arbitral tribunal's powers arising from the dispositions of the parties within the arbitration may be more difficult to determine, as these dispositions are likely to evolve during the course of the proceedings, requiring, to some extent, a dynamic interpretation of the mandate. Critically, when assessing the parties' dispositions, an arbitral tribunal may not go beyond the prayers for relief or consider facts other than those presented by the parties.[32]

The importance of the parties' dispositions, and not least the requests for relief, is an outflow of the *principle of party disposition* (*dispositionsprincipen*), which is at the heart of the Swedish Act and serves to ensure that the parties remain in control of the proceedings, the issues to be adjudicated and thus, the issues to be addressed by the parties. The Svea Court of Appeal has succinctly summarised this principle in *CMP v. Minmetals* as follows:

> The principle implies that the arbitral tribunal may not act in an inquisitorial manner, but that the content and scope of the proceedings are to be determined by the dispositions of the parties. Thus, there is an excess of mandate if the arbitral tribunal unexpectedly adjudicates matters not covered by the parties' dispositions. The two most obvious situations are that the award goes beyond the underlying request for relief or that the award is based on a fact that has not been adduced.[33]

It follows that a tribunal may not award more than what a party has asked for (*ultra petita*) since such award goes beyond the parties' dispositions and, thus, the mandate. Nor may the tribunal award something different (*aliud*) from what the parties have requested. However, the tribunal may award something less (*infra petita*), pursuant to the principle that the greater includes, the lesser (*majus includit minus*).[34]

Lindskog and Heuman seem to agree that a tribunal exercising a mandate to supplement the contract is not limited to the parties' specific requests for relief but that it may also award a compromise between the parties' respective positions. It is not always easy to find a compromise when the differences between the parties' requests for relief are not only quantitative but also qualitative. We will illustrate this through the lens of price review arbitrations in the following section.

32. Lars Heuman, *Skiljemannarätt* (*Eng.* Arbitration law), Nordsteds, p. 336 (Jure 1999). One effect of this is that the exact scope of the arbitration will not always be defined from day one but will, to some extent, develop during the course of the proceedings.
33. *Chelyabinsk Metallurgical Plant v. Minmetals*, Case No. T 1356-18, p. 32 (our own translation, Svea Court of Appeal 4 Nov. 2022).
34. Eric Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, in *Juridisk Tidskrift nr 1 2017/18*, pp. 187-190.

[B] The Arbitral Tribunal's Room for Manoeuvre Between the Parties' Dispositions

In price reviews, the parties sometimes have different views on the components that should be included in the revised price formula. For example, if one party seeks gas market price indexation and the other prefers oil indexation, finding a middle ground may be challenging.

Already, in ordinary arbitrations, the tribunal has a mandate to render the award it deems appropriate.[35] It may do so as long as it does not exceed the parties' dispositions. It follows that an arbitral tribunal may make awards that represent natural compromises between the parties' prayers for relief, even beyond numerical compromises. However, an arbitral tribunal may not make an award which – on an overall assessment – appears to be more burdensome to the respondent than the claimant's requests for relief.

However, a tribunal exercising a mandate to supplement the contract has an even wider mandate to make compromises and to award something different than requested by the parties. By the time a tribunal is given a mandate to supplement the contract, the parties have typically conducted negotiations for some time and to no avail. In such cases, when the tribunal is tasked to step into the shoes of the parties and finish what the parties themselves have been unable to do, the tribunal's mandate can hardly be limited to strictly amend the contract as requested by the parties. In Heuman's words:

> When supplementing contracts, the parties have typically conducted detailed negotiations without succeeding to agree on how to alter or amend the agreement. In these cases, the task of the arbitrators can hardly be limited to amending the agreement solely in the manner requested by one of the parties.[36]

A tribunal that has been given a mandate to supplement the contract is empowered not only to assess the facts and evidence of the parties but also to develop terms and conditions that it considers appropriate. Such terms and conditions may, for example, be construed by the tribunal using a combination of different components of any specific contract amendment argued by the parties. For example, in a price review,

35. Heuman states in his paper on contract supplementation that there are good arguments why determining a 'reasonable price' in fact does not require a mandate to supplement the contract, but only an ordinary judicial mandate. In Heuman's view, deciding what constitutes a reasonable price falls within an ordinary judicial mandate, because a court can decide such price with reference to section of 45 in the Swedish Sale of Goods Act, which only include vague directions as to what constitutes a reasonable price, Lars Heuman, *Skiljemäns rätt att komplettera avtal* (*Eng.* Arbitrators' power to supplement contracts), in *Festskrift till Ulf K. Nordenson*, pp. 187-188 (Jure 1999). Section 45 of the Swedish Sale of Goods Act reads 'If the price does not follow from the contract, the buyer shall pay what is reasonable having regard to the nature and quality of the goods, the market price at the time of purchase and the other circumstances.' As illustrated in section §4.03[A] above, however, there are several conceivable situations in which the provisions of substantive non-mandatory law do not provide tools to a tribunal to supplement or amend a contract.

36. Lars Heuman, *Skiljemäns rätt att komplettera avtal* (*Eng.* Arbitrators' power to supplement contracts), in *Festskrift till Ulf K. Nordenson*, p. 192 (our own translation, Jure 1999).

the tribunal may adopt certain parts or components of a contract price formula proposed by one or both parties.

In departing from the parties' requests for relief, the arbitral tribunal may not award more or something different than what a party has requested, but it may award something less. It is fairly straightforward to ascertain what is more, less or different when there are only monetary reliefs at stake. However, the task becomes more difficult when the reliefs sought are qualitative in nature, e.g., to determine revised prices or other terms of a contract. In such cases, the parties' submissions will be important in further clarifying the boundaries of the parties' requests.

Lindskog submits that when a tribunal considers different compromises between the parties' positions, a general principle should be that the tribunal needs to stay within the positions presented by the parties so that neither party have reason to be surprised by the result. In Lindskog's words, one could speak of a *range of expectations*. An award is not outside the range of expectations only because the parties did not expect all the specifics of the tribunal's determination. However, an award that is significantly outside the range of expectations may constitute an excess of mandate.[37]

Lindskog's view appears to be aligned with the model developed by Professor Emeritus Peter Westberg for determining whether a judgment falls within or outside the parties' requests for relief (i.e., *infra* or *ultra petita*). Under this model, a deviation in the award from the requests for relief is not something different or more, but something less, provided: (i) that the outcome of the award serves the same purpose as the requests for relief, and (ii) that the award is less onerous for the respondent compared to the reliefs sought by the claimant. This approach is particularly applicable when straying from the requests for relief appears to be a straightforward compromise that readily comes across as a clear and understandable reconciliation of opposing requests for relief.[38]

The rationale for this model ought to be uncontroversial: the parties should be in control of the proceedings and have the opportunity to address all issues that may be

37. Stefan Lindskog, *Skiljeförfarande: En kommentar* (*Eng.* Arbitration: A Commentary), commentary to section 1 of the Act, para. 6.2.4 (3rd. ed., Juno 2020). In footnote 812, Lindskog writes: 'Heuman (FS Nordenson, p. 192 *et seq*.) states that the arbitral tribunal should not be bound by the parties' proposals in relation to the content of the contract supplementation, but should be able to determine the content of the contract in a manner representing a compromise. This is certainly correct, and the parties' proposals should then constitute the framework within which the tribunal must operate. But how can a compromise be reached between two proposals that differ not only in term of quantity but also fundamentally in qualitative terms? It appears that a general principle could be that the arbitral tribunal should stay within the parties' positions in such a way that neither party has any reason to be surprised by the content of the contract supplementation (one can speak of a range of expectations). The parties nonetheless need to accept that they may be surprised; only a supplementation of contracts that is significantly outside the range of expectations should constitute a challengeable error (see footnote 3883 below).'

38. Peter Westberg, *Domstols officialprövning* (*Eng*. Court adjudication), p. 487 (Juristförlaget i Lund 1988). Lindskog and Westberg may well have different views on how far the range of expectations can be stretched, as Westberg's perspective is that of the Swedish courts, while Lindskog's is that of the arbitrators. Nevertheless, they seem to be in agreement on a principal level.

relevant to the award in accordance with the principle of party disposition. Accordingly, the award should not come as a surprise to the parties, even if the tribunal departs to some extent from the parties' specific requests for relief.

The views of Lindskog and Westberg are also in line with the case law of the Svea Court of Appeal. An example of this case law is the challenge of a price review arbitration brought by the Turkish gas purchaser Kibar against Gazprom. In the set-aside proceedings, Kibar argued that the tribunal had exceeded its mandate by awarding something different from what Gazprom had requested. According to Kibar, Gazprom had requested a price revision that included two elements: (i) the removal of a discount, and (ii) a revision of the base price (a separate component). According to Kibar, the two elements were inseparable parts of the same request, and the tribunal could not grant one while rejecting the other. Thus, Kibar claimed that the tribunal exceeded its mandate by only removing the discount and not revising the base price as requested by Kibar.[39]

In its judgment of 1 December 2021, the Svea Court of Appeal found that it was within the tribunal's mandate to assess the individual elements of Gazprom's request for relief and award the discount only. The Court of Appeal emphasised that Gazprom's position in the arbitration was that the tribunal could grant individual elements of Gazprom's request for relief and that this had been made clear to Kibar.[40] Although expressed differently than Lindskog and Westberg, it appears that the Court of Appeal based its reasonings on the parties' range of expectations and, in particular, on what Kibar could reasonably have expected in light of Gazprom's position in the arbitration.

It may be difficult for the tribunal to establish an appropriate range of expectations when only one of the parties clearly presents its position, whereas the other party does not. In such situation, the tribunal may consider providing further directions to the parties and seeking to clarify the procedural framework. Should the tribunal's mandate nevertheless remain unclear, it may be put in question whether it is appropriate for the tribunal to seek a compromise by supplementing the contract in ways that have not been briefed and argued in the arbitration by at least one of the parties.

One could derive from the above that it may be challenging for arbitrators and counsel to ascertain the tribunal's room for manoeuvre when the tribunal has been given a mandate to supplement contracts, not least given that it may vary throughout the proceedings. Nonetheless, we would respectfully submit that at least the principles for exercising a mandate to supplement contracts and conquering this room for manoeuvre are straightforward.

Put simply, the arbitral tribunal should carefully balance the parties' positions and expectations, ensuring that any terms or conditions it develops or adopts are within the range of expectations articulated by the parties. The difficult part is that this requires a meticulous assessment of the facts and arguments alongside the evidence on record, together with a creative yet cautious approach to formulating terms that

39. *Kibar Enerji v. Gazprom*, Case No. T 7865-19, p. 4 (Svea Court of Appeal 1 Dec. 2021).
40. *Kibar Enerji v. Gazprom*, Case No. T 7865-19, pp. 10-11 (Svea Court of Appeal 1 Dec. 2021).

reconcile the parties' differing requests in a manner that does not surprise or unduly burden either party. In doing so, the tribunal ought to honour the principle of party disposition while effectively exercising its mandate to supplement the contract, thereby facilitating a resolution of the parties' dispute that reflects a fair and reasonable adjustment of the original contract terms.