CHAPTER 13

The Authority to Interpret Awards Without Support in Statutory Provisions or Arbitration Rules: Where Does the Tribunal's Jurisdiction End, and the Court's Begin?

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§13.01 INTRODUCTION

The finality of the award is often described as one of the advantages of arbitration. However, unfortunately, awards occasionally contain shortcomings or imperfections. For example, it is sometimes the case that the operative part of the award, also called the award's dispositif, by itself or in combination with the award's reasoning, is phrased in an unclear manner, thereby creating doubt as to the proper interpretation of the award.

As a means to address this issue, the Swedish Arbitration Act of 1999[1] (hereinafter referred to as the 'Arbitration Act' or simply the 'Act'), like many national arbitration laws, allows the arbitrators to interpret the award at the request of either party within thirty days of the date when the award was rendered. This follows from section 32(1), which states that (emphasis added):

> If the arbitrators find that an award contains any obvious inaccuracy as a consequence of a typographical, computational, or other similar mistake by the arbitrators or any another person, or if the arbitrators by oversight have failed to

1. Lagen (1999:116) om skiljeförfarande. The original wording of the act has been translated by the Swedish Ministry of Justice (Ds 1999:22). Translations into English of Swedish authorities referred to in this submission have been made by the author.

> decide an issue which should have been dealt with in the award, they may, within thirty days of the date of the announcement of the award, decide to correct or supplement the award. *They may also correct or supplement an award, or interpret the decision in an award, where any of the parties so requests within thirty days of receipt of the award by that party.*[2]

By way of comparison, under Article 33(1)(b) of the UNCITRAL Model Law, a party may 'request the arbitral tribunal to give an interpretation of a specific point or part of the award', but only 'if so agreed by the parties' that is, typically, where the applicable arbitration rules allow it.

Most commonly used sets of rules for administered and non-administered (ad hoc) arbitrations – domestic and international – also allow for interpretation of awards within a certain period of time.[3] For example, Article 47 of the 2023 Stockholm Chamber of Commerce Arbitration Rules (SCC Rules) allows for an application 'for the interpretation of an award' to be made 'within 30 days from receipt of the award'.[4]

However, disagreements regarding the interpretation may also arise at a later stage of the parties' dispute. The issue is particularly prominent at the enforcement stage, where, for example, the losing party may seek to limit the scope of the binding effect of the award. Issues of interpretation may also arise where the award in question contains one or more declaratory relief(s). For example, a claimant may rely on a declaratory relief on liability issues in a subsequent arbitration relating to quantum. In such cases, the issue of whether the tribunal possesses the mandate to interpret an arbitral award in the absence of explicit support from statutory provisions or arbitration rules holds significant practical implications. This contribution delves into the existing literature and case law relevant to this topic from a Swedish law perspective. It also endeavours to provide practitioners and arbitrators with a more comprehensive understanding of issues relating to the interpretation of arbitral awards.

2. The meaning of the wording 'interpret the decision in an award' used in the provision relates only to the operative part of the award, *see* SOU (Eng. *Official Swedish Government Report*) 1994:81 p. 168 and prop. (Eng. *Government Bill*) 1998/99:35 p. 135. The provision further refers to the 'arbitrators', while the interpretation of the award is carried out by the arbitral tribunal as a judicial body. Hence, the award may be interpreted by a tribunal with a new composition. In the following, the term 'tribunal' refers to the judicial body, without distinction as to which individual arbitrators are members of the tribunal.
3. *See* 2021 UNCITRAL Rules, Art. 37(1); 2021 Swiss Rules, Art. 37(1)(a); 2018 HKIAC Rules, Art. 39(1); 2016 SIAC Rules, Art. 33(4); 2022 ICSID Rules, Rules 69 and 70; 2018 DIS Rules, Art. 40(2)(3); and 2021 VIAC Rules, Art. 39(1)(2).
4. Unlike the Arbitration Act, the SCC Rules do not limit the scope of interpretation to the operative part of the award but refer to a 'specific point or part of the award'. In order for a request to be entertained, however, it should in most cases need to concern the operative part of the award, *see* Annette Magnusson et al. (eds), *International Arbitration in Sweden: A Practitioner's Guide*, p. 322 (2nd ed., Kluwer Law International 2021) and Jakob Ragnwaldh et al., *A Guide to the SCC Arbitration Rules*, p. 143 (Kluwer Law International 2020).

§13.02 SOURCES AND LIMITATIONS OF THE TRIBUNAL'S INTERPRETATION MANDATE UNDER SWEDISH LAW

Under Swedish law, the scope of the arbitrators' mandate is determined by the arbitration agreement.[5] The scope of the arbitration agreement is, in turn, determined by, first, the interpretation of that particular agreement and, second, the legal limitations imposed by mandatory law, including the requirement in section 1(1) of the Arbitration Act that disputes referred to arbitration must concern an identified legal relationship (the *identification requirement*).[6] In other words, the determination of the tribunal's mandate to interpret an arbitral award involves both contractual and statutory interpretation. Each of these matters will be considered below, subject to a general preliminary comment.

The question of the tribunal's interpretation mandate is linked to the doctrine of res judicata. While there is no express provision on the res judicata effects of an arbitral award in the Act, the Supreme Court has stated that the binding effect of an arbitral award in principle has the same objective scope as a court judgment.[7] In very simple terms, according to the doctrine of res judicata, as applicable in arbitration, a final award typically prohibits subsequent proceedings involving the same parties concerning the same cause of action as covered by the award. This means that a request for relief that has been put forth and ruled upon in previous proceedings cannot be re-examined in subsequent proceedings. It also means that all facts which were or could have been invoked in favour or against the relief sought in previous proceedings can generally not be invoked in subsequent proceedings.[8]

According to former Supreme Court Justice Stefan Lindskog, the leading academic commentator on Swedish arbitration law, an arbitration agreement does not *in dubio* give a broader mandate to interpret awards than what follows from section 32(1) of the Act. If a dispute arises regarding the meaning of the award and the thirty-day period under section 32(1) has expired, it is thus for a court of general jurisdiction to

5. *See, e.g.*, Stefan Lindskog, *Skiljeförfarande En kommentar* (Eng. *Arbitration A commentary*), Chapter I.0-1, p. 91 and section 34:4.3.1, p. 936 (here disregarding the instances of statutory based arbitration) (3rd ed., Norstedts Gula Bibliotek 2020) (cit. 'Lindskog'); Magnusson et al., *supra* n. 4, p. 138; Fredrik Andersson et al, *Arbitration in Sweden*, p. 57 (Jure Förlag 2011); Finn Madsen, *Commercial Arbitration in Sweden,* p. 40 (5th ed., Jure Förlag 2020); and Lars Heuman, *Skiljemannarätt* (Eng. *Arbitration law*), p. 46 (6th ed., Norstedts Juridik 1999).
6. *See, e.g.*, Lindskog, Chapter I:0-6.1.1, p. 194 (n. 799) and Magnusson et al., *supra* n. 4, p. 110.
7. *See Esselte AB v. Allmänna Pensionsfonden et al.* (NJA 1998 p. 189). Notably, the rules on res judicata are among the most complex and debated under Swedish procedural law, and caution may be called for in the application of the principle in international arbitration, *see, e.g.*, Lindskog, Chapter III:0:3.2.3-3.2.4, p. 595; Magnusson et al., *supra* n. 4, p. 324; and Kaj Hobér, *International commercial arbitration in Sweden,* p. 259 at para. 7.105, (2nd ed., Oxford University Press 2021).
8. *See, e.g.*, Robert Nordh, *Processens ram i tvistemål* (Eng. *Procedural framework in civil cases*), p. 40 (4th ed., Iustus Förlag 2019) and Per Olof Ekelöf et al., *Rättegång III* (Eng. *Trial III*), p. 165 (8th ed., Norstedts Juridik 2018). Notably, for the res judicata effect to apply, the first award must be invoked in the subsequent proceedings, *see,* e.g., Lindskog, Chapter III:0:3.2.3, p. 595 and Andersson et al, *supra* n. 5, p. 146.

decide on its interpretation unless the arbitration agreement expressly states otherwise.[9] In other words, the parties are free to enter into an arbitration agreement that gives the arbitral tribunal the mandate to interpret an award that goes beyond the mandate given under section 32(1) of the Act.[10]

Lindskog further adds to this point that, according to section 32(1) of the Act, an award may only be interpreted by the tribunal that rendered the award in question.[11] Thus, if a question of interpretation of a previously rendered award arises in a new arbitration, any interpretation issue rests with the first tribunal – that is, in the unlikely event that the time limit for taking recourse to the specific provision in section 32(1) of the Act or the applicable arbitration rules has not expired.

As mentioned, these considerations are relevant when a request for specific performance is based on an award of declaratory nature, such as an award on liability. If a declaratory award has been issued, then, as a rule, the examination of a request for performance as such is covered by the arbitration agreement.[12] However, according to Lindskog, in the described scenario, if the respondent raises defences such as alleged insufficient causation or contributory negligence by the claimant, any interpretation issue regarding the final determination of such defences through the first award would fall under the jurisdiction of a court of general jurisdiction to resolve.[13] Another highly regarded commentator, Professor Lars Heuman, however, seems to take the opposite position, holding that the arbitration agreement should be considered applicable to any new disputes based on a previously rendered award.[14]

It is well established that a request for interpretation under section 32(1) of the Arbitration Act can only seek to clarify the award. In other words, the request cannot seek to modify or annul the award.[15] If an interpretation goes beyond what is allowed

9. *See* Lindskog, Chapter I.0-4.3.2, p. 146 (n. 585 *in fine*), Chapter I:0-6.1.4, p. 200, Chapter IV.0-4.4.4, p. 775, Chapter IV.0-5.2.7, p. 788, Chapter IV, section 29-4.3.3, p. 844 and Chapter IV, section 33:4.3.1, p. 880.
10. *See* Lindskog, Chapter I.0-6.1.4, p. 201 (n. 797) and Chapter IV, section 32:3.5, p. 877. It may be noted that one commentator holds that caution should be exercised in upholding an agreement to restrict the right to interpretation under section 32(1) of the Arbitration Act, *see* Cars, *Lagen om skiljeförfarande En kommentar* (Eng. *The Arbitration Act A commentary*), p. 153 (2nd ed., Tierp 2000).
11. *See* Lindskog, Chapter I:0-6.1.4, p. 200 and Chapter IV, section 33:4.3.1, p. 880.
12. *See* Lindskog, Chapter I.0-4.3.2, p. 146 (n. 585 *in fine*) and Chapter I:0-6.1.4, p. 201 (n. 799).
13. For a fuller discussion on the separation between liability and quantum under Swedish law, *see* Henrik Johansson, *Mellandom – nu och i framtiden* (Eng. *Partial award – now and in the future*), SvJT 2001 pp. 505 et seq. and the *dictum* by Lindskog in *Handelsbolaget Tylöbaden v. Halmstads kommun* (NJA 2008 p. 339, '*Handelsbolaget Tylöbaden*').
14. *See* Heuman, *supra* n. 5, p. 560. It is worth noting that Heuman's analysis lacks a distinction between scenarios where the arbitral tribunal derives a subsequent award from its own earlier decision and cases where an award is based on a previous tribunal's ruling, *see further* section [B] (The relevance of section 32(1) of the Arbitration Act).
15. *See* Lindskog, Chapter IV, section 32:4.3.1, p. 880. It may be mentioned that such agreements may be concluded in advance, i.e., before the question of interpretation arises, without prejudice to the identification requirement, *see* Lindskog, Chapter I.0-6.1.4, p. 200 (nn. 797 and 801).

under section 32(1) of the Act, the award may be challenged. If not set aside, the interpretation becomes a part of the award.[16]

§13.03 DETERMINATION OF THE PARTIES' INTENTIONS REGARDING THE TRIBUNAL'S INTERPRETATION MANDATE

[A] Introduction

As noted, the first step in determining the tribunal's mandate to interpret an award is to assess the parties' arbitration agreement. As confirmed by the Swedish Supreme Court in, among other cases, *Belgorkhimprom v. Koca* (NJA 2019 p. 171, '*Belgor*'), the scope of an arbitration agreement is determined in accordance with general principles of contract interpretation.[17] This means that the scope of an arbitration agreement regarding the tribunal's mandate to interpret awards is determined based on the parties' mutual intention, provided that such a mutual intention is ascertainable. If discerning a specific mutual intention among the parties proves unattainable, other objective factors must be considered.[18]

The primary manifestation of the parties' mutual intent typically resides within the confines of the written contract. However, arbitration agreements often adhere to standardised templates, rendering the language insufficient for deducing any distinct

16. *See* Lindskog, Chapter IV, section 32:6.2.1, p. 887. The error most likely constitutes an excess of mandate according to section 34(1) p. 3, as the (wrongful) interpretation becomes part of the award unless challenged.
17. *See Belgor*, para. 13. *See also Components Plastunion AB v. Husqvarna* (NJA 2023 p. 437, '*Husqvarnas skiljeavtal*'), where reference is made to *Belgor* (para. 14) (although in another context than questions of interpretation). The Supreme Court's ruling in *Belgor* has received considerable attention in the legal debate, *see*, *e.g.*, Christer Danielsson, *Swedish Arbitration-Related Case Law*, in *Stockholm Arbitration Yearbook 2019*, pp. 9 et seq. (The Netherlands: Kluwer Law International 2019); Reldén & Frank, *The Belgor Case: Towards an Extensive Interpretation and Application of Arbitration Agreements*, in *Stockholm Arbitration Yearbook 2020*, pp. 65 et seq. (The Netherlands: Kluwer Law International 2021); Heuman, *Har det skett en omsvängning eller omläggning av praxis från restriktiv till extensiv tillämpning av skiljeavtal?* (Eng. *Has there been a shift or change in practice from restrictive to extensive application of arbitration agreements?*), SvJT 2019 pp. 534 et seq.; and Patrik Schöldström, *Har Belgor förändrat prövningen av en skiljenämnds behörighet och handläggningsfel)* (Eng. *Has Belgor changed the review of an arbitral tribunal's jurisdiction and procedural errors?*), JT 2019 pp. 243 et seq.
18. *See Belgor*, para. 13. Here, reference was made to *Grant Thornton Sweden AB v. Hans Nilsson* (NJA 2015 s. 741, '*Partneravtalet*'). Similar statements from the Swedish Supreme Court, confirming this order of interpretation objectives are found in numerous cases, *see, e.g.*, *Det Andra Bolaget House Sweden AB v. John Svensson Byggnadsfirma AB*, paras 21-25 (NJA 2014 p. 960, '*Det andra bolaget*'); *Bilstudion Sverige AB v. Anders Fredling*, para. 11 (NJA 2021 p. 597, '*Mätarställningen*'); and *Idermark och Lagerwall Reklam AB v. Nordens Välfärdscenter*, para. 11 (NJA 2021 p. 643, '*Ramavtalet*'). It may be noted that Swedish contract law also protects unilateral intentions that remain uncontested by the other party who is aware of that (real) intention, *see, e.g.*, Ramberg & Ramberg, *Allmän avtalsrätt* (Eng. *General contract law*), p. 182 (12th ed., Norstedts Juridik AB 2022) and Adlercreutz & Gorton, *Avtalsrätt II* (Eng. *Contract law II*), p. 130 (6th ed., Juristförlaget i Lund 2010). Given the rarity of scenarios prompting the utilisation of this rule of interpretation within the realm of arbitration agreements, it will not be expounded upon any further in this contribution.

common intent.[19] Consequently, when determining the scope of the tribunal's mandate to interpret an award, reliance on other factors is often, if not always, necessary.

In this context, the Supreme Court held in *Belgor* that where the language permits varied interpretations and other relevant factors fail to provide direction, it is natural to assume that the arbitration agreement should serve a rational purpose (Sw. '*förnuftig funktion*') and take the parties' interests into account in a reasonable manner. It further went on to state that '[i]n such situations, the parties must be assumed to have wanted that the disputes shall be solved without delay and in one proceeding before an arbitral tribunal chosen by them'.[20]

[B] The Relevance of Section 32(1) of the Arbitration Act

Consistent with the precedent set by the Supreme Court in *Belgor*, in cases where an arbitration agreement is silent on the tribunal's mandate for interpretation, reliance should be placed upon 'other relevant interpretation data'. Such relevant interpretation data could potentially be the content of non-mandatory legal provisions.[21] As explained earlier, section 32(1) of the Arbitration Act clearly defines the limits of an arbitral tribunal's mandate to interpret its own award. Therefore, a primary question is whether, in the absence of an express agreement to the contrary, section 32(1) of the Arbitration Act is to be regarded as an interpretative factor supporting the conclusion that a tribunal may not interpret an arbitral award beyond the scope of the statutory provision.

As stipulated in section 27(4) of the Act, section 32 is one of two explicit exemptions from the general principle that arbitrators lose jurisdiction over the dispute upon issuing a final award.[22] This is commonly known as the tribunal becoming *functus officio* (the other exception being the remittance of the award back to the arbitrator for reconsideration in response to a setting-aside application, as per section 35 of the Act).[23] Section 32(1) of the Arbitration Act is based on Article 33(1)(b) of the Model Law,[24] which departs from the principle of the finality of the award. During the drafting phase of the Model Law, a strong view of the United Nations Commission on International Trade Law (UNCITRAL) favoured the removal of this provision, fearing its potential to undermine the finality of the award and provoke unwarranted attempts to reopen settled matters. Others argued for the necessity of an interpretative mechanism, particularly in international commercial arbitrations where awards are often not drafted in the arbitrators' native language. After discussion, it was unanimously agreed to accept the retention of the provision, subject to its reformulation to contain a

19. *See Belgor,* para. 13.
20. *Ibid*.
21. *See, e.g.*, *Bilstudion Sverige AB v. Anders Fredling*, para. 12 (NJA 2021 p. 597, '*Mätarställningen*'); Ramberg & Ramberg, *supra* n. 18, p. 195; and Bert Lehrberg, *Avtalstolkning* (Eng. *Contract interpretation*), p. 234 (10th ed., Iusté 2023).
22. *See also* prop. 1998/99:35 p. 99.
23. The provision does not specify exhaustively when an arbitrator's mandate ends, *see* prop. 1998/99:35 p. 100.
24. *See* SOU 1994:81, p. 167 and prop. 1998/99:35, p. 136.

requirement that a request for interpretation might be made only if agreed between the parties.[25]

Against this background, the underlying reasons for the inclusion of section 32(1) in the Arbitration Act can be seen to point in different directions, depending on the situation in which the question of interpretation arises.

The expression 'final award' is often used to mean different things. The expression 'final award' in section 27(4) of the Act, which terminates the tribunal's mandate and renders the tribunal *functus officio*, refers to an award which concludes the case (such that no other issues are left to be decided).[26] The parties may also decide that the arbitrators shall rule on a particular aspect of a dispute in a *separate award* (Sw. *särskild skiljedom*) according to section 29(1) of the Act. A separate award could – for instance – be rendered when there are a large number of claims that could be ruled upon separately. Separate awards are subject to the same formal requirements as other types of awards and have the same legal status as 'regular' final awards.[27] Accordingly, a separate award on specific performance is enforceable immediately upon being rendered.[28] Such awards are therefore sometimes referred to as 'final' awards, even though they are not final within the meaning of section 27(4) of the Arbitration Act.

If an award on specific performance is final according to section 27(4) of the Act, it is clear based on the wording of the Act alone that the mandate to interpret the award – unless the parties have expressly agreed otherwise – ceases at the end of the 30-day period stipulated in section 32(1) of the Act.[29] The fundamental principle of finality of the award justifies this restrictive approach.[30] This view is confirmed by the *travaux préparatoires* to the Arbitration Act, where the legislator held that (emphasis added):[31]

> The starting point should be that the mandate ceases when a final arbitral award has been rendered. […] *This means that the arbitrators are not authorised to deal with the dispute after a final arbitral award has been rendered, unless specifically provided for by law or the parties' agreement.* Explicit exceptions to this general rule should apply to the possibilities for correction, interpretation, supplementation and remission [of a dispute to the arbitrators] provided for by the act.

25. *See* Commission Report, UN Doc A/40/17, paras 265-269.
26. *See also* Art. 43 of the SCC Rules.
27. *See*, *e.g.*, Lindskog, Chapter IV, section 29:3.1. p. 840 and Magnusson et al., *supra* n. 4, p. 304.
28. *Ibid*.
29. An exception may be if the award is so vague or incomplete that the tribunal's assessment on the merits cannot be ascertained from it. In such instances, however, it may be called into question whether this constitutes an interpretation in the truest sense. Instead, it appears to be more about the tribunal fulfilling its duty of issuing a legally enforceable award, *see* Lindskog, Chapter IV, section 33:4.3.1, p. 880 (n. 3481 *in fine*).
30. In this context, a party intending to use the final award as basis for an enforcement application arguably has little reason to hesitate in requesting interpretation under section 32(1) of the Arbitration Act (or applicable arbitration rules) if the award appears unclear. Conversely, the respondent may raise arguments – whether genuine or not – alleging ambiguity in the final award during the enforcement phase. The fact that such an objection is deliberately raised after the expiry of the time limit for taking recourse to the specific provision in section 32(1) of the Arbitration Act (or the applicable arbitration rules) does not seem to have been intended to affect the question of the mandate of the arbitral tribunal to interpret the award, *see infra* nn. 31-32.
31. Prop. 1998/99:35 p. 99.

In line with this, the *travaux préparatoires* also state that disputes concerning the interpretation of awards at the enforcement stage should primarily be resolved by general courts.[32]

In relation to declaratory awards, the conclusion becomes less evident. Notably, such awards may be both final and non-final within the meaning of section 27(4) of the Act. In the example where issues of liability and quantum are separated, it may be the case that both the determination of liability and any subsequent request for specific performance are adjudicated by *the same tribunal*, with the first award having the form of a separate award according to section 29(1) of the Act. The tribunal then retains its mandate to render a final award based on the separate award without being rendered *functus officio*, while section 32(1) of the Act, as explained above, is an *exception* to the principle that the arbitral tribunal may not interfere with an award that is final according to section 27(4) of the Act.[33] As such, it appears misplaced to view section 32(1) of the Act as a manifestation of the parties' contractual intentions. It is worth noting the following remark from the legislator, which pertains to how the arbitral tribunal's mandate to interpret awards under section 32(1) of the Act should be modelled (emphasis added):[34]

> The next question then becomes whether a mutual agreement between the parties should be required for interpretation to take place [according to Section 32(1) of the Act]. However, it can be immediately stated that it appears incomprehensible why there should be a requirement for a mutual agreement regarding interpretation but not have a corresponding requirement concerning the correction and completion of an arbitral award. *Parties surely do not contemplate the need for interpretation until they receive an unclear arbitral award. In that situation, one party generally does not have an interest in clarification.*

The Swedish legislator thus seems to reject the notion of a general requirement for an *explicit agreement* from the parties for interpretation to fall under the scope of their arbitration agreement. As further discussed below, it may also appear artificial to assume that the parties to an arbitration agreement would prefer to have the general courts decide on issues of interpretation simply because of the separation of different issues in dispute and that thirty-day time limit (or whatever time limit that is applicable under the arbitration rules) have lapsed.

It is possible that these considerations apply even in scenarios where there is separation between different issues in dispute between *different arbitral tribunals*, and the tribunal must rely on a final award of declaratory nature by a *previous tribunal* in rendering its own subsequent award. In such instances, however, the new arbitral

32. *See* SOU 1994:81 p. 214 and prop. 1998/99:35 p. 178.
33. It is worth noting that although the origin of the *functus officio* principle shows that it was intended to protect the integrity and finality of awards, it may have the opposite effect if the mandate to interpret an award requires an express agreement, since the arbitral proceedings may extend to judicial proceedings, i.e., by forcing parties to seek an authoritative decision on the correct interpretation of the award before a court.
34. Prop. 1998/99:35 p. 137.

tribunal, unlike the first tribunal, would admittedly lack the advantage of being considered best placed to carry out the interpretation.[35]

To summarise, it appears uncontroversial that the tribunal, save for what is provided for under section 32(1) of the Act or applicable arbitration rules, may not interpret a final award on specific performance unless specifically provided for in the parties' arbitration agreement. Whether the scope of the arbitration agreement covers interpretation of awards of a declaratory nature is less clear. At heart is the question of how the principle of *functus office* operates in situations that are outside of its primary intended scope. This issue is further complicated by the fact that declaratory awards may be interpreted by the tribunal that issued the award as well as by subsequent tribunals.

[C] The Significance of the General Courts' Ultimate Jurisdiction in Interpreting Arbitral Awards

In support of the position that an arbitration agreement does not *in dubio* give a broader mandate to interpret awards than what follows from section 32(1) of the Act, Lindskog relies primarily on the statement made in the *travaux préparatoires* that, at the enforcement stage, it is for the general court to resolve any disputes of interpretation.[36] In doing so, Lindskog abstains from exploring the presumed intentions of the parties in consideration of both section 32(1) of the Arbitration Act and the underlying purposes of the provision, as previously discussed. Lindskog also argues that this conclusion does not depend on whether the award is for performance or declaratory relief or on the stage of the arbitral proceedings at which the dispute over the interpretation of the award arises.[37]

Instead, Lindskog asserts that the mandate for interpreting the award by the general court aligns best with its ultimate jurisdiction to adjudicate the legal effects of arbitration awards.[38] In support of his position, Lindskog also cites the following (relatively old) rulings:[39]

> NJA 1918 p. 478. A clause in an insurance contract provided for a dispute concerning a certain causal relationship to be settled by an arbitration tribunal. During the proceedings of the policyholder's claim in the general court, an arbitration tribunal was established. Two of the arbitrators found, with different reasons, that a relationship 'in all probability' existed, while the third arbitrator came to the opposite conclusion. Whether a causal link had thus been established by the tribunal was examined by the general court.
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> NJA 1932 p. 73. In the case, an arbitration award initially addressed various matters, including the timeframe for the delivery of goods. Subsequently, a later

35. Cf. *supra* n. 2.
36. *See* Lindskog, Chapter I:0-6.1.4, p. 200 (n. 796) and Chapter IV:0-4.4.4, p. 775 (n. 3059). Here, Lindskog also relies on statements from Professor Mæland's work *Voldgift*, p. 86 and 177 (Universitetsforlaget, 1988).
37. *See* Lindskog, *supra* n. 9. *See also* Lindskog, Chapter IV, section 29:4.3.3, p. 844.
38. *See* Lindskog, Chapter IV:0-4.4.4, p. 775.
39. *See* Lindskog, Chapter I.0-6.1.4, p. 201.

award established a revised delivery date due to intervening circumstances. An application to enforce the latter award was rejected, citing that it relied on an interpretation of the former award.

NJA 1936 p. 663. An arbitral tribunal held that an insurance company was entitled to withhold compensation until an issue of criminal liability had been resolved by a general court. In a subsequent arbitration, a new tribunal awarded the claimant insurance compensation. The Supreme Court held that the award of the first arbitral tribunal was binding and that the second arbitral tribunal was prevented from considering the claim for insurance compensation since the issue of criminal liability had not yet been decided by the general court.

It is unclear how Lindskog views the issue of the parties' presumed intention regarding the tribunal's right to interpret an award.[40] Possibly, Lindskog, in his determination of the scope of the typical standardised arbitration agreement, attaches decisive importance to what could be characterised as systematic considerations and, more specifically, the ultimate distribution of jurisdiction between tribunals and courts of general jurisdiction. In addition to the fact that the age of these judgments raises doubts about their relevance in contemporary contexts, Lindskog acknowledges that only one of the cited judgments (NJA 1936 p. 663) concerns the tribunal's mandate to interpret a previous award of declaratory nature. Additionally, that case is arguably not immediately relevant to the issue at hand, as it concerned whether the condition imposed by the first arbitral tribunal, that the right to insurance compensation was dependent on the outcome of criminal proceedings, was in fact a binding declaratory award and, if so, whether this condition was fulfilled at the time of the second arbitral award.[41]

[D] The Significance of a Swift Resolution Before a Tribunal Appointed by the Parties

As already mentioned, the Supreme Court in *Belgor* held that where the wording and other factors relevant to the interpretation of the arbitration agreement give no clear guidance as to the parties' genuine contractual intentions, the arbitration agreement should be construed as serving a rational purpose, which implies that the parties must be assumed to have intended that disputes are to be solved without delay and in one proceeding before an arbitral tribunal chosen by them.[42]

If one were to concede that the tribunal's mandate to interpret an award under uncertain circumstances lies beyond the scope of the arbitration agreement for any of the reasons given by Lindskog, it might be contended that this statement by the Supreme Court holds no relevance in determining the scope of the parties' arbitration agreement concerning a potential interpretation mandate. In the view of the author, there are at least two fundamental objections to be raised against this approach.

40. It may be mentioned that the Supreme Court's judgment in *Belgor* has been subject to severe criticism by Lindskog, *see* Lindskog, Chapter I, section 1:5.1.2, p. 262 (n. 1049).
41. *See* Lindskog, Chapter I:0-6.1.4, p. 201 (n. 799).
42. *See Belgor,* para. 13.

First, general principles of contract interpretation say that due consideration should be given to *all relevant circumstances*.[43] It would thus not be correct to completely overlook the parties' presumed desire for a swift dispute resolution within a single forum.

Second, the legal sources relied on by Lindskog cannot, at least not in the author's view, be said to speak unequivocally either in favour or against the conclusion that an interpretation mandate is inherent within the parties' arbitration agreement. Hence, the presumption established in *Belgor* should serve as the basis for determining the scope of the arbitration agreement regarding the tribunal's interpretation mandate.

Indeed, Lindskog's position would incentivise resorting to judicial review when the tribunal is faced with interpreting an award of declaratory nature – regardless of whether the award was rendered by the tribunal itself or by a previous arbitral tribunal. There may, for instance, be little point in presenting the costly and complex damages case before a tribunal based on a previous award on liability if the scope of liability as correctly recognised in the first award cannot be established by interpretation by a subsequent arbitral tribunal. At this point, the uncertainty over the tribunal's interpretation mandate may bring the proceedings to a halt pending judicial review. To allow the arbitration agreement to fulfil a sensible function, it seems most reasonable that a question of interpretation is first resolved in the context of arbitration. In line with the statements of the Swedish legislator,[44] it is also hard to see that the parties to the arbitration agreement intended for the general court to intervene and decide on a question of interpretation. The author therefore submits that an arbitration agreement should, as a starting point, include the mandate to interpret awards of declaratory nature, whether final or not, in the meaning of section 27(4) of the Act.

§13.04 DEALING WITH DISAGREEMENTS ON INTERPRETATION

As will be recalled, the absence of a mandate to interpret the award does not prevent the tribunal from considering a request for specific performance based on a previously rendered award.[45] Nor does necessarily the fact that an arbitral tribunal encounters a question of interpretation that such request should be dismissed for lack of jurisdiction.

This is because the tribunal retains the discretion to address the interpretation of the initial award as a preliminary matter (Sw. *prejudiciell fråga*), even though such a decision is not legally binding on the parties involved.[46] To this end, Lindskog submits that a tribunal should only render an award based on a preliminary (non-binding) decision on the interpretation of a previous award if it is 'obvious' what the result of the interpretation will be. Otherwise, the tribunal should refer the party whose claim

43. *See supra* n. 18.
44. *See supra* n. 34.
45. *See supra* n. 12.
46. *See* Lindskog, Chapter I.0-6.1.4, p. 200 (n. 800).

depends on the question of interpretation to initiate proceedings in a court of general jurisdiction.[47]

Lindskog's statement initially raises the question of what is meant by the result of an interpretation being 'obvious'. Contrary to its supposed purpose, this proposed discretion for the tribunal to decide whether it should decide on the interpretation issue as a preliminary matter rather contributes to increasing the degree of difficulty for tribunals and parties faced with questions of interpretation.

It is further not entirely obvious for what underlying reasons the general court should decide on the issue of interpretation. Particularly, a wrongful decision by the tribunal on the interpretation issue as a preliminary matter may be challenged.[48] Hence, having the tribunal decide on the interpretation issue as a preliminary matter does not alter the ultimate distribution of jurisdiction between tribunals and courts of general jurisdiction, which is a factor on which Lindskog bases his fundamental position. On this point, however, Lindskog seems to be of the opinion that *if* the tribunal is given a mandate to interpret a previously rendered award of declaratory nature, its decision on the interpretation issue will not be of preliminary nature but binding on the parties.[49] As such, a wrongful decision by the tribunal may no longer constitute grounds for challenging the award. Since the parties have control over the res judicata effects of the award, it is certainly possible for the parties to give such mandate to the tribunal, at least once an interpretation issue has arisen.[50] At the same time, Lindskog holds that if the parties argue for different interpretations of the award and neither of them claims that the arbitral tribunal lacks the mandate to decide the interpretation issue, then normally, this matter is deemed to have been referred to the tribunal's discretion through an implicit arbitration agreement.[51] A party wishing to preserve the possibility of having the effects of a special award examined by a general court is therefore well advised to make this clear.

As for the tribunal's considerations, once an issue of interpretation arises, they likely depend on how confident it feels in its conclusion. If the tribunal is confident that a preliminary decision will be upheld if challenged before a general court, there is much to gain by continuing the arbitration based on the decision, possibly even pending the

47. *See* Lindskog Chapter IV, section 32:4.3.1, p. 881 (n. 3482). Notably, the forum provisions in section 43 of the Arbitration Act are not applicable and the district court is the court of first instance.
48. *See* Lindskog, Chapter I:0-6.1.4, p. 201 (n. 800). However, it may be noted that the fact that an issue is first assessed by a tribunal may affect any subsequent assessment by general courts. Particularly, the Supreme Court in *Belgor* established yet another presumption, namely that it is the tribunal that is best positioned to determine the issue of its own jurisdiction. *See further* Schöldström, *supra* n. 17.
49. *See* Lindskog, Chapter V, section 34:5.2.5, p. 971. Cf., however, Lindskog, Chapter I:0-8.1.1, p. 206 (n. 854), where Lindskog (although with some doubt) expresses that an arbitration agreement *in dubio* may be understood as including the mandate of the arbitral tribunal to decide on issues of interpretation as a preliminary matter.
50. *See supra* n. 15.
51. *See* Lindskog, Chapter V, section 34:5.2.5, p. 971 (n. 3864).

court's final determination.[52] Conversely, if the outcome of a general court's assessment seems more questionable, there are arguably advantages of 'getting it done right' over 'getting it done fast'.

§13.05 SUMMARY

The question of whether the arbitral tribunal has the mandate to interpret an arbitral award in the absence of explicit backing from statutory provisions or arbitration rules ultimately hinges on the interpretation of the arbitration agreement. Legal literature and case law suggest that, as a rule, an arbitration agreement should not be construed to allow for the interpretation of the award beyond what is stipulated in section 32(1) of the Arbitration Act or applicable arbitration rules. However, neither these provisions nor previous statements in the legal literature and case law appear to primarily address cases where a prior declaratory award serves as the basis for an award for specific performance. Furthermore, modern principles of contract interpretation emphasise the importance of swift dispute resolution in a single proceeding before an arbitral tribunal chosen by the parties. Therefore, the author submits that the tribunal's mandate to interpret an award, whether in the form of a separate award or a final award rendered by a previous arbitral tribunal, is inherent in its mandate until it becomes *functus officio* under section 27(4) of the Act.

Even if it is accepted that arbitration agreements typically do not cover interpretation of awards, the limited references to such situations do not suggest that a request for performance should be dismissed for lack of jurisdiction because of a question about interpretation. Instead, they suggest that the tribunal, in later proceedings, might assess the content of the declaratory award as a preliminary matter. Although making a mistake on this matter could be seen as a challengeable error, the advantages of taking such a decision are likely to be many, not least if the question of interpretation is clear.

52. According to section 2(2) of the Arbitration Act, the tribunal may continue the arbitration pending the court's determination on the tribunal's jurisdiction.