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The Challenge of Arbitral Awards

Arbitrators' application of the "wrong" substantive law – a ground for challenge!

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“When will mankind be convinced and agree to settle
their difficulties by arbitration?”¹

– Benjamin Franklin

¹ Quote taken from a letter from Benjamin Franklin to Joseph Banks in 1783.

Acknowledgments

“I just don't think that Brooke could've done this. Exercise gives you endorphins. Endorphins make you happy. Happy people just don't shoot their husbands, they just don't.”

– Elle Woods, *Legally Blonde*

My father always says that the reason I study law is because I watched the movie *Legally Blonde*. Although *Legally Blonde* is a great movie, I doubt it is the only reason. The main character, Elle Woods, is funny but ingenious in her legal reasoning and cross-examination, ultimately tricking the murderer into confessing. *Legally Blonde* is a comedy and thus, portrays legal reasoning in a simplistic way. And although most legal cases are inundated with facts, claims and circumstances, the legal reasoning behind them is almost always clearer and more straightforward than expected, and that is what fascinates me about law.

Arbitration caught my interest when I attended a main hearing in arbitration as an intern at a law firm in Stockholm. It was a privilege to see the lawyers act and cross-examine, just like it was scripted. It was then that I decided to write my master thesis in arbitration. I am endlessly thankful for the support I have gotten from my supervisor, doctoral candidate and barrister Victoria Bui. I would also like to thank Rasmus Lüning and Zachariah Snyder for proofreading and providing useful comments on the text.

The completion of my master thesis ends a very important time of my life. Studying law at Uppsala University has not only given me a great education, but has also given me a fantastic group of friends and family. *You know who you are*. And finally I want to thank my mother and father for their encouragement, love and for always being there. And thank you Michael for *always* believing in me.

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Abstract

This thesis examines whether arbitrators' application of the wrong substantive law is a ground for challenge of arbitral awards. The topic is divided into the theoretical question of whether to refer the arbitrators' application of the wrong substantive law to excess of mandate or procedural irregularity, and the practical question of how national courts handle the demarcation problems that occur in review of awards.

The scope of the thesis is limited to challenges on the grounds *excess of mandate* and *procedural irregularity* under section 34 of the Swedish Arbitration Act (SAA).² The SAA has thereby served as a basis for the study, but the legislative history, case law and doctrine have also been important.

The thesis finds that arbitrators' application of the wrong substantive law could in theory constitute both excess of mandate and procedural irregularity. However, there are several demarcation problems that occur in practice because it is difficult to distinguish between substantive and procedural errors. Therefore, it seems like only a deliberate disregard of the parties' choice of law could lead to awards being set aside.

Throughout the thesis, the interests of party autonomy and finality of awards are weighed against one another with the conclusion that theory seems to emphasize party autonomy whereas practice seems to emphasize finality of awards. The thesis provides an alternative school of thought of how national courts' could handle demarcation problems to allow for a wider scope of review on the provision procedural irregularity. This would permit review of also substantive matters to ensure that no significant procedural error has occurred and thus, it would lead to a better balance between party autonomy and finality of awards.

² Lag (1999:116) om skiljeförfarande.

Abbreviations

BIT	Bilateral Investment Treaty
Govt Bill	Government Bill (Sw. <i>proposition</i>)
ICC	International Chamber of Commerce
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006 and revisions made in 2010)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
NJA	Archive for Swedish Supreme Court cases (Sw. <i>Nytt juridiskt arkiv</i>)
SAA	Swedish Arbitration Act (Sw. <i>Lag (1999:116) om skiljeförfarande</i>)
SCC	Stockholm Chamber of Commerce
SCC Rules	The SCC Rules: the Arbitration Rules and the Rules for Expedited Arbitrations, entered into force on 1 January 2010
SOU	Government Official Report (Sw. <i>Statens offentliga utredning</i>)
Washington Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement Of Investment Disputes (Washington, 1965)

1 Introduction

1.1 Introduction to the topic

Arbitration is the most common and preferred form of dispute resolution between commercial parties.¹ Considering advantages such as party autonomy, flexibility and speedy procedures, the popularity of arbitration is understandable. The arbitrators render a final and binding award that cannot be challenged on substantive grounds. However, the interests of party autonomy and the finality of awards are not always easily balanced, which becomes apparent regarding the choice of substantive law.

The interest of party autonomy means that arbitrators are obligated to follow the will of the parties, but also the law, rules of law or principles chosen by the parties.² Thus, party autonomy includes the parties' right to determine the substantive law governing the merits of the case. Although the principle of party autonomy is universally accepted, arbitrators have significant authority in determining what law to apply. The arbitrators' authority is well illustrated by three arbitrations emerging from the Libyan oil nationalizations. The *Texaco*, *BP* and *Liamco* arbitrations³ all had the same choice of law clause:

“This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law, and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.”⁴

Each of the three arbitral tribunals interpreted the choice of law clause differently by appointing the substantive law to be either international public law, general principles of law or the law of Libya (excluding any part contradictory to the principles of international law). This example shows how unclear the parties' choice of law

¹ PwC, 2013 International Arbitration Survey: *Corporate Choices in International Arbitration – Industry Perspectives*, p 6 and Redfern-Hunter, *Redfern and Hunter on International Commercial Arbitration*, p 1.

² Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration*, p 101.

³ *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v Government of the Libyan Arab Republic* (1977), *BP Exploration Co. (Libya) Ltd. v Government of the Libyan Arab Republic* (1973) and *Libyan American Oil Co. v Government of the Libyan Arab Republic* (1977). Published in *Yearbook Commercial Arbitration* (1979) pp 177-187, (1980) pp 143-167 and (1981) pp 89-118.

⁴ The text is taken from the *Liamco* arbitration.

could be, and that the arbitrators have the ultimate authority on what substantive law to apply to the merits of the case.

The finality of awards means that awards can only be challenged on procedural grounds, which makes arbitration an efficient dispute resolution. The possibility to challenge on procedural grounds exists to ensure a minimum standard of objectivity, fairness and justice.⁵ However, the finality will conflict with the interest of party autonomy to some extent. The arbitrators must respect the parties' choice of substantive law, but the question is, what happens if the arbitrators violate the parties' choice of law? For instance, if the parties have chosen English law as substantive law but the arbitrators apply Swedish law instead, could this be a ground for challenging arbitral awards? If the parties' choice of law is unclear or contradictory, to what extent could the arbitrators interpret the parties' choice of law? Is it possible that the arbitrators could interpret the law incorrectly so it becomes a decision on equity?

The thesis will hopefully provide some theoretical and practical clarity regarding challenges if the arbitrators apply the wrong substantive law.

1.2 Scope and aims

This thesis aims to examine whether arbitral awards could be challenged if arbitrators apply the wrong substantive law. The scope is limited to challenges on the grounds provided in p 2, *excess of mandate*, and in p 6, *procedural irregularity*, under section 34 of the Swedish Arbitration Act (SAA). The focus is thus on arbitrations taking place in Sweden.

Inherent in the thesis' aim is the theoretical question of whether to refer arbitrators' application of the wrong substantive law to excess of mandate or procedural irregularity, and the practical question of how national courts handle the demarcation problems that occur in practice. Demarcation problems occur because it is difficult to distinguish between substantive and procedural errors.

⁵ Hobér, *International Commercial Arbitration in Sweden*, p 294.

The thesis is delimited from exhaustively examining what substantive law is applicable in arbitration. The only reference thereto is in the context of what law is considered “wrong” in relation to party autonomy and restrictions of party autonomy. Thereby is the aim to examine the theoretical and practical possibilities of challenge, rather than examining the situations of when the application of the wrong substantive law calls for a challenge.

Furthermore, the thesis addresses the readers both familiar and unfamiliar with arbitration. The familiar reader could therefore overlook some of the introductory parts.

1.3 Method and materials

In order to examine the topic properly, all relevant sources have been studied. The SAA serves as a basis, but the legislative history, case law and doctrine play important roles in the study. The sources have thus been described, investigated and evaluated in a traditional legal dogmatic method.

Both Swedish and international sources have been consulted. Swedish sources have been studied in connection to the main question, but international sources have been useful for a global perspective. International sources have also been useful in proving universally accepted principles and practices in international arbitration law. Recent sources have mainly been studied, but, when imperative to establish a base for principles and practices in arbitration, older sources have been consulted. Moreover, due to the international nature of arbitration, I have chosen to write the thesis in English.

The topic of applicable substantive law is complex. In order to focus on the procedural questions of challenges if arbitrators apply the wrong substantive law, I have had to generalize some details. Firstly, the law has simply been defined as “wrong” when the parties’ choice of law has not been, with the exception of restrictions on party autonomy, respected. Secondly, the parties’ choice of law has been treated as

an instruction to the arbitrators without defining it as substantive or procedural. The important part has been how the arbitrators handle the instruction.

The case law regarding challenges when arbitrators apply the wrong substantive law is neither explicit nor numerous. Therefore, I have to some extent had to “read between the lines” to draw conclusions, and particularly in connection to the practical question of how national courts handle demarcation problems that occur. I believe I can defend the method because I am in the conclusions attempting to provide an alternative school of thought regarding how national courts could handle demarcation problems.

Although arbitral institutions have started to publish awards or parts of awards, they are still generally confidential or difficult to find.⁶ As a result, I have used secondary sources and unofficial translations when referring to some cases. When self-translations are made, the original Swedish text is found in footnotes.

1.4 Thesis outline

The thesis is composed of 5 chapters that present the topic pedagogically. For readers unfamiliar with arbitration in Sweden, chapter 2 provides the basics. Apart from a presentation of the regulatory system, the features of the SAA are presented. The SAA’s scope of application, the applicable substantive law and grounds for challenge of awards are discussed in this chapter. Therefore, readers who are familiar with arbitration in Sweden could overlook this chapter.

Chapter 3 is also introductory, but necessary in relation to the main question. It discusses party autonomy and what is considered to be the “wrong” substantive law. Chapter 4 constitutes the main part of the thesis. Firstly, it introduces the reader to the balance between finality of awards and the possibility to challenge awards on the grounds excess of mandate and procedural irregularity. Secondly, it discusses the

⁶ Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 140. Arbitration is in Sweden considered to be a private process, but the Swedish Supreme Court held in NJA 2000 p 538 (*A1 Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd*) that there is no legal duty to observe confidentiality in arbitration. See also Poudret-Besson, *Comparative Law of International Arbitration*, p 318.

theoretical question of whether to refer arbitrators' application of the wrong substantive law to excess of mandate or procedural irregularity. Thirdly, it discusses the practical question of how national courts handle the demarcation problems that occur in review of awards.

Lastly, chapter 5 provides some conclusive remarks on the arbitrators' application of the wrong substantive law as a ground for challenge of awards. In the conclusions, an alternative way of thinking regarding how national courts could handle demarcation problems is provided.

2 International Arbitration in Sweden

2.1 The regulatory framework

The arbitration agreement is the fundamental legal basis for arbitration.⁷ Arbitration agreements entail, as opposed to other agreements, the doctrine of separability and the theory of competence-competence.⁸ Therefore, the arbitration agreement can be valid even when the main contract is invalid, the arbitrators can determine their own jurisdiction, and most importantly for the thesis, different substantive laws can apply to different parts of the arbitration. Apart from the arbitration agreement, there are procedural rules, substantive laws, guidelines and international treaties that govern arbitration.⁹

The parties are usually free to determine their own procedural rules in the arbitration agreement or decide upon institutional rules.¹⁰ The parties must, however, adhere to the arbitration law at the place of arbitration, which is called the *lex arbitri*.¹¹ The *lex arbitri* contains mandatory rules that cannot be deviated from, such as grounds for challenge of awards. Also, it contains non-mandatory rules of procedural matter such as composition of the tribunal, conduct of the proceeding and features of the award. The UNCITRAL has developed the Model Law to harmonize arbitration laws around the world.¹² The Model Law is frequently used as the *lex*

⁷ Steingruber, *Consent in International Arbitration*, p 321.

⁸ The doctrine of separability implies that the arbitration clause incorporated in the main contract should be seen as a separate agreement (see section 3 of the SAA). The theory of competence-competence implies that the arbitrators have the jurisdiction to determine their own jurisdiction. See Hobér, *International Commercial Arbitration in Sweden*, p 106 and Redfern-Hunter, *Redfern and Hunter on International Commercial Arbitration*, pp 117 and 347.

⁹ Moses, *The Principles and Practice of International Commercial Arbitration*, p 6.

¹⁰ Institutional rules become part of the agreement between the parties, see Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 55.

¹¹ Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 180.

¹² UNCITRAL is the United Nations Commission on International Trade Law that works to harmonize and unify the law of international trade. The UNCITRAL Model Law on International Commercial Arbitration was adopted on 21 June 1985, amended in 2006 and last revisions made in 2010.

arbitri in arbitrations and has been adopted into several national jurisdictions.¹³

The substantive laws applicable in arbitration are mainly the substantive law governing the arbitration agreement itself and the substantive law governing the merits of the case. The substantive law governing the merits of the case in addition to what is considered to be the “wrong” law is further discussed in chapter 3.

Soft law, such as guidelines and recommendations, has become commonplace in harmonizing different jurisdictions in arbitration.¹⁴ Additionally, international treaties are important for the recognition and enforcement of awards. The most significant treaty is the New York Convention.¹⁵ According to the New York Convention, a foreign award should obtain recognition and enforcement regardless of where the award was rendered. Almost 150 countries have ratified the New York Convention, and consequently, it provides a high likelihood for obtaining recognition and enforcement of awards in other countries.¹⁶

2.2 The Swedish Arbitration Act

2.2.1 History and scope of application

Sweden has a long history of arbitration, and it is presumed that arbitration existed even before the Vikings.¹⁷ The first statutory text referring to arbitration is a text from the 14th century that contained a clause stating that “entrusted” persons should settle the dispute arising out of the contract if the parties agreed thereupon.¹⁸ Sweden later adopted its first arbitration act in 1887, revised it in 1929 and the existing Swedish Arbitration Act (SAA), and thusly *lex arbitri*, is from 1999.¹⁹

¹³ E.g. Australia, Canada and Nigeria have with only small modifications adopted the Model Law as the *lex arbitri*.

¹⁴ Examples are The IBA Rules on the Taking of Evidence in International Arbitration (2010) and the IBA Guidelines on Conflicts of Interest in International Arbitration (2004).

¹⁵ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), UN DOC/E/CONF.26/8/Rev.1.

¹⁶ The signatories to the New York Convention is found at <http://www.uncitral.org>.

¹⁷ Govt Bill 1998/99:35 p 32, SOU 1994:81 p 55 and Madsen, *Commercial Arbitration in Sweden*, p 14.

¹⁸ Visby Stadslag (Visby city law) 2:9, see Govt Bill 1998/99:35 p 32 and SOU 1994:81 p 55.

¹⁹ *Lag (1999:116) om skiljeförfarande*.

In the development of the SAA, foreign laws and the Model Law were taken into consideration in order to harmonize arbitration.²⁰ Although the provisions of the Model Law were considered to a great extent, it was important not to copy it for several reasons.²¹ Firstly, there was no reason to differ between domestic and international arbitration in Sweden (the Model Law is only applicable to international arbitration). Secondly, it was important to keep solutions coherent to Swedish tradition and legal perceptions. Thirdly, many European jurisdictions with a tradition in arbitration have decided to develop their own *lex arbitri* and hence, the uniformity of international arbitration would still be limited. Therefore the provisions in the Model Law were considered, but not copied.

The SAA is applicable to all arbitrations taking place in Sweden.²² Thereby, the applicability is broad since it applies to both commercial arbitration and so-called investment arbitration.²³ The meaning of *take place in Sweden* refers to whether the arbitration should take place in Sweden (i) according to the arbitration agreement, (ii) if the arbitrators or an institution pursuant to an agreement have decided that the arbitration should take place in Sweden, or (iii) if the arbitration takes place in Sweden due to the parties' consent.²⁴ The reference is rather formal since the actual hearings can take place in any other geographical location, even though the place²⁵ for arbitration is Sweden.²⁶

The SAA contains fundamental principles of arbitration such as party autonomy, the aim of mitigating obstruction in proceedings and no requirement that the arbi-

²⁰ Govt Bill 1998/99:35 p 45 and SOU 1994:81 p 71.

²¹ Govt Bill 1998/99:35 p 45 and SOU 1994:81 p 71.

²² Section 46 of the SAA.

²³ The term "commercial" arbitration has its root in the past when only commercial agreements were possible to resolve by arbitration. The meaning of "commercial" is thereby arbitration arising out of a business relationship on contractual ground. Investment arbitration is usually based on national legislation, bilateral investment treaties or multilateral investment treaties. See Redfern-Hunter, *Redfern and Hunter on International Arbitration*, pp 13-14 and Bishop-Crawford-Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, p 8.

²⁴ Section 47 of the SAA.

²⁵ The terms "place" and "seat" are used interchangeably in arbitration and refer to the legal place of arbitration and not the geographical place for hearings, see Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 180.

²⁶ Madsen, *Commercial Arbitration in Sweden*, p 280.

trators should have a legal education.²⁷ The SAA is concise, simple and flexible to uphold arbitration as an attractive form of dispute resolution for both international and domestic disputes.²⁸ The SAA can be used independently without reference to the Swedish Code of Judicial Procedure that applies in national courts.²⁹ The success of the SAA is a fact since arbitration is the preferred method to resolve commercial disputes in Sweden.³⁰

2.2.2 Applicable substantive law

The SAA lacks a provision regarding the choice of substantive law governing the merits of the case. Nevertheless, the legislative history states that arbitrators should base the award on law if the parties have not agreed otherwise.³¹ This statement has two consequences. Firstly, party autonomy prevails and the parties could thereby determine the applicable substantive law.³² Secondly, if the parties have not agreed upon a substantive law, the arbitrators should resolve the dispute by applying the law.³³

If the parties have not chosen the applicable substantive law, the choice of law is reassigned to the arbitrators. The question arises as to how the arbitrators should determine the substantive law, either through a direct approach or by applying conflict of law rules.³⁴ It was previously suggested that arbitrators should apply Swedish

²⁷ SOU 1994:81 p 71 and Govt Bill 1998/99:35 p 42.

²⁸ Madsen, *Commercial Arbitration in Sweden*, p 27.

²⁹ *Rättegångsbalken (1942:740)*.

³⁰ Roschier, *Dispute Index 2012: Facts and Trends in International Dispute Resolution – A Nordic Perspective*, p 4. See also Fiber-Storskrubb “Arbitration in Sweden: Features of the Stockholm Rules” in *International Commercial Arbitration – Different Forms and Their Features*, p 322.

³¹ Govt Bill 1998/99:35 p 121.

³² Lindskog, *Skiljeförfarande – En kommentar*, p 1107.

³³ As opposed to decide the case as on equity, see section 3.2.1.

³⁴ The modern and international view is that arbitrators should use the direct approach and apply the substantive law they consider most appropriate to settle the dispute. See art. 22 of the SCC Rules and art. 28 of the Model Law. This more direct approach is coherent with the view that the place of arbitration rarely has anything to do with the dispute itself and therefore, that jurisdiction’s conflict of law rules have no bearing on the choice of substantive law, see Hobér, *International Commercial Arbitration in Sweden*, p 60 and Redfern-Hunter, *Redfern and Hunter on International Arbitration*, pp 234-236. Nevertheless, it has been discussed that the difference between the two methods is minimal or even identical in some instances, see Girsberger-Voser, *International Arbitration in Switzerland*, p 285 and reference to Poudret-Besson, *Comparative Law of International Arbitration*, p 583.

conflict of law rules when the place for arbitration was in Sweden.³⁵ In the late 1990's, it was concluded that arbitrators were not obligated to apply Swedish conflict of law rules, but they were recommended to do so.³⁶ Although arbitrators have no obligation to apply conflict of law rules, the conflict of law rules might serve as a basis when determining the substantive law in arbitration in Sweden today.³⁷

The arbitrators' possibility to determine the substantive law is only indirectly relevant for the thesis, and then in relation to what law is considered "wrong".³⁸ For instance, if the parties have chosen an insufficient law that does not cover the issues at hand, the arbitrators may have to apply a complementing law. This is more connected to the question of applicable substantive law whereas the thesis focuses on procedural questions of challenge if the arbitrators apply the wrong substantive law. Nonetheless, it is important to acknowledge that the arbitrators' application of a complementing law could affect the possibility to challenge awards since it relates to when the substantive law applied is "wrong".

There is a lack of a provision for applicable substantive law in the SAA for several reasons. It was concluded in the legislative history that the legal consequences of provisions on applicable substantive law might be problematic. There would be demarcation problems, and grounds for challenge would have been necessary to incorporate in the SAA.³⁹ The rationale for this argument seems, however, to be diminished.

³⁵ Hobér, *International Commercial Arbitration in Sweden*, p 60 and Stockholm Chamber of Commerce (publ), *Arbitration in Sweden*, pp 46-47.

³⁶ SCC Awards no 80/1998 and no 81/1998 published in Stockholm Arbitration Report 2002:2, pp 45-59. For a detailed description on the conflict of law rules in Sweden see Hobér, *International Commercial Arbitration in Sweden*, p 61.

³⁷ Hobér, *International Commercial Arbitration in Sweden*, p 61. The use of conflict of law rules has been emphasized in Lindskog, *Skiljeförfarande – En kommentar*, p 1109 note 43. Observe that art. 22 of the SCC Rules give the arbitrators the right to determine the law they consider most appropriate.

³⁸ See chapter 3.

³⁹ Govt Bill 1998/99:35 p 121.

2.2.3 Challenge of arbitral awards

The SAA permits review of awards in national court. The SAA distinguishes between invalid awards (section 33) and challengeable awards (section 34). The reason for the distinction is to emphasize that the grounds for invalidity are beyond the parties' control, such as public interests and affected third parties, whereas the grounds for challenge are situations over which the parties have control.⁴⁰ A successful challenge results in the award being set aside.

The challenge grounds in section 34 of the SAA stipulate that an award *shall, following an application, be wholly or partially set aside upon motion of a party*:

1. If it is not covered by a valid arbitration agreement between the parties;
2. if the arbitrators have made the award after the expiration of the period decided on by the parties, or *where the arbitrators have otherwise exceeded their mandate*;
3. if arbitral proceedings, according to section 47, should not have taken place in Sweden;
4. if an arbitrator has been appointed contrary to the agreement between the parties or this Act;
5. if an arbitrator was unauthorized due to any circumstance set forth in sections 7 or 8; or
6. *if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.* (Emphasis added).

As illustrated above, no substantive review on the merits of the case is allowed. The enumerated list of grounds upon which the award can be challenged is exhaustive and covers only procedural errors.⁴¹ In the context of the arbitrators' application of the wrong substantive law, the only relevant grounds are excess of mandate and procedural irregularity (see emphasis in provision above).⁴² Furthermore, the challenge grounds in the SAA reflect the wording of the New York Convention. The challenge grounds are developed in accordance with the grounds for refusal of recognition and enforcement of awards in article V of the New York Convention.⁴³

⁴⁰ Govt Bill 1998/99:35 pp 138-140.

⁴¹ SOU 1994:81 pp 173-176 and Govt Bill 1998/99:35 pp 141-148. See also Lindskog, *Skiljeförfarande – En kommentar*, p 862 and Heuman, *Skiljemannarätt*, p 587.

⁴² Hobér, *International Commercial Arbitration in Sweden*, p 35.

⁴³ Govt Bill 1998/99:35 p 138. See also Govt Bill 1971:131 that proposes the ratification of the New York Convention in Sweden.

Based on the wording *shall*, if the requirements for challenge are fulfilled, the national court must set aside the award.⁴⁴ There is no room for national courts' discretion if the requirements are fulfilled. However, the challenge grounds' precise scopes of application are unclear, and, in the legislative history, it is stated that the challenge grounds will be clarified in case law.⁴⁵ Therefore, national courts must have some discretion as to when the challenge grounds are applicable.

Section 34 of the SAA also states that challenges must be brought within three months of the date upon which the party received the award. Also, due to a passivity rule, if a party wants to rely upon a circumstance, the party must object as soon as the party finds out about the circumstance. The forum for challenge is the Svea Court of Appeal, and its decision cannot be appealed unless the appeal concerns a matter of precedent and the Court grants a leave to appeal to the Swedish Supreme Court.

2.3 The SCC Rules

The Stockholm Chamber of Commerce (SCC) played an important role in Sweden's emergence as a major place for arbitration. In the 1970's, model clauses were developed for use in trade contracts between the east and west, in which the SCC was appointed for institutional arbitration.⁴⁶ The SCC is now a leading international arbitration institution with over 150 cases each year.⁴⁷

⁴⁴ Madsen, *Commercial Arbitration in Sweden*, p 223 and Hobér, *International Commercial Arbitration in Sweden*, p 310. See also Govt Bill 1998/99:35 p 142.

⁴⁵ Govt Bill 1998/99:35 pp 309-310. See also Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p 22.

⁴⁶ For instance, see the US/USSR Optional Clause Agreement of 1977 reproduced as Appendix 5 in Stockholm Chamber of Commerce (publ.), *Arbitration in Sweden*, p 203. See also Gernandt, "Ulf Franke – Thirty-five Years and Afterwards" in *Between East and West: Essays in honour of Ulf Franke*, p 169 and Moser, "Ulf Franke, Stockholm Arbitration, and the Bridge to China" in *Between East and West: Essays in honour of Ulf Franke*, p 343.

⁴⁷ White & Case, 2010 International Arbitration Survey: *Choices in International Arbitration*, pp 23-24. See also Fiber-Storskrubb "Arbitration in Sweden: Features of the Stockholm Rules" in *International Commercial Arbitration – Different Forms and their Features*, p 323. The Arbitration Institute of the Stockholm Chamber of Commerce publishes statistics available on the website <http://www.sccinstitute.com/hem-3/statistik-2.aspx> (2013-10-08).

In SCC arbitration, the parties must adhere to the SCC Rules.⁴⁸ The SCC Rules are modern and flexible to allow the parties and arbitrators the autonomy to construct an effective arbitration tailored for the particular dispute. The rules follow the best practices in international arbitration.⁴⁹ Even though the parties choose SCC arbitration, the SAA still regulates the challenge of awards.

⁴⁸ The SCC Rules: the Arbitration Rules and the Rules for Expedited Arbitrations, entered into force on 1 January 2010.

⁴⁹ See SCC's website <http://www.sccinstitute.com> (2014-01-13).

3 Party Autonomy and the “Wrong” Law

3.1 Applicable law in arbitration

Applicable law is one of the classic issues in international arbitration.⁵⁰ The parties could originate from different countries, might have concluded the contract in a third country, have the place of performance in a fourth country and chosen the place of arbitration in a neutral fifth country. The international character of arbitration and its regulatory system imply that at least five different systems of law could be relevant to different parts of the same arbitration.⁵¹ It is beyond the scope of the thesis to examine all applicable laws in arbitration, but, in this chapter, some remarks will be made on the substantive law that governs the merits of the case and what constitutes the “wrong” substantive law.

In arbitration, the arbitrators are initially tasked with establishing the relevant facts in the dispute. Once this is done, the arbitrators may be able to resolve the dispute by applying the facts to the terms of the contract.⁵² Contracts are often detailed, and disputes could thereby be resolved without having to consult the applicable substantive law. However, there are disputes in which the substantive law governing the merits of the case must be consulted. For instance, the substantive law may have to be consulted when the main contract needs interpretation, when there is a question of the main contract’s validity or when the consequences of a breach of contract must be examined.⁵³ In these instances, the important substantive law is the one governing the disputed contract.⁵⁴

⁵⁰ Hobér, *International Commercial Arbitration in Sweden*, p 33.

⁵¹ The different applicable system of laws govern (i) the arbitration (*lex arbitrii*), (ii) the arbitration agreement itself, (iii) the parties’ capability to enter the arbitration agreement, (iv) the merits of the case and (v) recognition and enforcement of awards, see Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 165.

⁵² Hobér, *International Commercial Arbitration in Sweden*, p 33, Lew-Mistelis-Kröll, *Comparative International Commercial Arbitration*, p 440 and Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 163.

⁵³ Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 194.

⁵⁴ Hobér, *International Commercial Arbitration in Sweden*, p 34.

When the substantive law governing the merits of the case needs to be consulted, the choice of applicable law is often decisive for the outcome of the case. Therefore, it is important that the parties can influence the choice of substantive law.

3.2 The principle of party autonomy

3.2.1 Party autonomy

To thoroughly examine the applicable substantive law requires extensive research. Therefore, the applicable substantive law will henceforth be discussed in connection to party autonomy and the restrictions thereof. The interest of party autonomy serves as a basis for the definition of when the substantive law is wrong.

The principle of party autonomy is recognized under all modern arbitration laws regarding the substantive law governing the merits of the case.⁵⁵ Party autonomy has many advantages. By letting the parties determine the substantive law, the process of arbitration becomes more certain, predictable and uniform.⁵⁶ Thereby the parties can prepare their argumentations and predict the outcome of the dispute. The parties could also not challenge the award on the grounds that the arbitrators chose the wrong substantive law. Consequently, party autonomy guarantees finality of awards. Party autonomy has been described in an arbitral award:

“There are few principles more universally admitted in private international law than that referred to by the standard terms of the ‘proper law of the contract’ – according to which the law governing the contract, is that which has been chosen by the parties, whether expressly or [...] tacitly.”⁵⁷

In contrast to many arbitration laws that explicitly recognize the principle of party autonomy, the SAA has remained silent on how the substantive law is chosen. Nev-

⁵⁵ E.g. art. 28 of the Model Law, section 46 of the English Arbitration Act (1996), art. 187 of the Swiss Federal Statute on Private International Law, art. 21 of the ICC Rules and art. 22 of the SCC Rules. Also national courts recognize the principle of party autonomy, see for instance art. 3 of the Rome Convention on Contractual Obligations (1980).

⁵⁶ Hobér, *International Commercial Arbitration in Sweden*, p 39 and Lew, *Applicable Law in International Commercial Arbitration*, p 79.

⁵⁷ Quote by professor Lalive in the ICC Award no 1512 (1971). See Hobér *International Commercial Arbitration in Sweden*, p 39.

ertheless, the principle of party autonomy is fundamental regarding the choice of substantive law in Sweden.⁵⁸

The parties have several choices in the selection of substantive law. Also, many arbitration laws stipulate that “rules of law” can be applied, which indicates that the substantive law does not have to be a national law.⁵⁹ The choices at the parties’ disposal generally include national law, public international law (and general principles), concurrent laws (e.g. common principles) and transnational law (e.g. *lex mercatoria*).⁶⁰ The transnational law *lex mercatoria* consists of universally recognized principles common in commercial contracts (e.g. *pacta sunt servanda* and *force majeure*), but the exact content is usually difficult to determine. The application of *lex mercatoria* could thereby cause questions of what law the arbitrators actually applied. Moreover, the parties could also agree to let the arbitrators decide as *amiables compositeurs* or *ex aequo et bono*. Although a jurisprudential difference seems to exist between *amiables compositeurs* and *ex aequo et bono*, they are often used interchangeably and will, in the thesis, fall under the term “equity”.⁶¹ A decision on equity generally requires the parties’ explicit consent.

When the parties have agreed upon a national law as substantive law, the arbitrators should apply this law to the merits of the case. It is universally accepted that conflict of law rules do not apply in arbitration when the parties have appointed the substantive law.⁶² Conflict of law rules are widely considered irrelevant since the dispute

⁵⁸ See section 2.2.2. See also Govt Bill 1998/99:35 p 121 and Lindskog, *Skiljeförfarande – En kommentar*, p 1107.

⁵⁹ Hobér, *International Commercial Arbitration in Sweden*, p 42. See art. 28 of the the Model Law and art. 22 of the SCC Rules.

⁶⁰ Redfern, *Redfern and Hunter on International Arbitration*, pp 199-229.

⁶¹ Hope-Rosengren, ”Arbitrators: A Law unto Themselves?” in *CDR Commercial Dispute Resolution* November-December 2013, p 62. The difference is that *amiables compositeurs* means that the arbitrators decide according to law and legal principles but could modify the effects of the application of the provisions. A decision *ex aequo et bono* is a decision outside the law. See also Belohlávek, “Application of Law in Arbitration, *Ex Aequo et Bono* and *Amiable Compositeur*” in *Czech (& Central European) Yearbook of Arbitration* no 3 (2013) p 25.

⁶² Hobér, *International Commercial Arbitration in Sweden*, p 46. See also art. 22 of the SCC Rules stipulating that a reference to “the law” of a state should be deemed to refer to substantive laws and not conflict of law rules of that state. See also Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 234 about the “almost total abandonment” of the conflict of law rules in these cases.

rarely has any connection to the place of arbitration.⁶³ Nonetheless, case law has shown that conflict of law rules could become relevant in the arbitrators' interpretation of the parties' choice of law.⁶⁴

3.2.2 Restrictions on party autonomy

The principle of party autonomy regarding the choice of substantive law has its restrictions.⁶⁵ These restrictions exist because obligatory rules should not be derogated from by way of contract.⁶⁶ Therefore, the restrictions on party autonomy could influence whether the arbitrators' application of law is "wrong".

In the context of restrictions of the parties' choice of substantive law, mandatory rules and public policy rules are of interest.⁶⁷ At this point, it is first necessary to differ between national public policy and international public policy. National public policy is composed of the fundamental legal, economic and moral standards in a jurisdiction.⁶⁸ International public policy differs from national public policy since it has no connection to a particular national jurisdiction.⁶⁹ The exact content of international public policy is difficult to determine, but according to doctrine there seems to be unanimity that bribery, corruption, human trafficking, slavery and discrimination are included in the notion of international public policy.⁷⁰ International

⁶³ Compare the discussion under section 2.2.2 regarding the arbitrators' determination of choice of law to the relevance of conflict of law rules.

⁶⁴ See discussion in section 4.4.2.1 regarding *JSC Aeroflot v Russo International Venture et al.*

⁶⁵ Lew-Mistelis-Kröll, *Comparative International Commercial Arbitration*, p 418.

⁶⁶ Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 205 and reference to art. 3 of the Rome Convention on the Law Applicable to Contractual Obligations (1980).

⁶⁷ Hobér, *International Commercial Arbitration in Sweden*, p 48 and Girsberger-Voser, *International Arbitration in Switzerland*, p 278.

⁶⁸ Hobér, *International Commercial Arbitration in Sweden*, p 50. The test under Swedish law requires that a foreign law is manifestly incompatible with the fundamental principles of Swedish law, see Bogdan, *Svensk internationell privat- och processrätt*, pp 76-77.

⁶⁹ Hobér, *International Commercial Arbitration in Sweden*, p 57. Judge Lagergren's dismissal of a request for arbitration in the ICC Award no 1110 (1963) is the landmark case on international public policy. He concluded that "it cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonus mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators."

⁷⁰ Hobér, *International Commercial Arbitration in Sweden*, p 59.

public policy would under all circumstances constitute a restriction on party autonomy in the choice of substantive law.⁷¹

Mandatory rules and national public policy rules as restrictions on party autonomy are debatable. Two important considerations arise. The first is what jurisdictions' rules would constitute restrictions and the second is determining if they constitute any restrictions on party autonomy.

Mandatory rules and national public policy rules in laws other than the substantive law chosen generally do not constitute restrictions on party autonomy. For instance, arbitrators have no obligation to apply mandatory rules or public policy rules of the substantive law at the place for arbitration since no conception of a jurisdiction exists in which the legal action is brought, and therefore, arbitration lacks a *lex fori*.⁷² Arbitration as a dispute resolution is international and the arbitrators are not obligated to uphold the national law of the place of arbitration. Also, arbitrators have no obligation to ensure that the award is enforceable, and therefore should mandatory rules and public policy rules at the place of enforcement not constitute restrictions on party autonomy.⁷³ There are dissenting views, but the arguments therefore have been described as doubtful.⁷⁴ Mandatory rules and public policy rules of other substantive laws than the law chosen by the parties would probably only constitute restrictions on party autonomy when they form part of international public policy.⁷⁵

⁷¹ Redfern-Hunter, *Redfern and Hunter on International Arbitration*, pp 197 and 205, and art. V of the New York Convention.

⁷² Hobér, *International Commercial Arbitration in Sweden*, p 49 and Lew-Mistelis-Kröll, *Comparative International Commercial Arbitration*, p 419. This has also been confirmed in ICC Award no 1581 (1971) and ICC Award no 1422 (1966).

⁷³ Hobér, *International Commercial Arbitration in Sweden*, p 55.

⁷⁴ Hobér, *International Commercial Arbitration in Sweden*, p 55. See references to Werner, "Application of Competition Laws by Arbitrators. The Step too Far" in *Journal of International Arbitration* (1995) pp 23-34 and Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration" in *Journal of International Arbitration* (1997) pp 58-62. For instance, in art. 7 of the Rome Convention on the Applicable Law to Contractual Obligations, effect *may* be given to mandatory rules of law of another country. This implies that state courts have no obligation to apply mandatory rules of another system of law than chosen but may consider them. See Hobér, *International Commercial Arbitration in Sweden*, p 56 and reference to Pålsson, *Romkonventionen*, pp 122-125.

⁷⁵ Hobér, *International Commercial Arbitration in Sweden*, p 56.

Mandatory rules and public policy rules in the substantive law chosen by the parties must be applied unless the parties have agreed otherwise.⁷⁶ The question is mainly whether the parties can agree to exclude mandatory rules and public policy rules in the substantive law chosen. On the one hand, Hobér⁷⁷ means that party autonomy is supreme and if the parties have decided to omit some otherwise applicable rules in the substantive law chosen, the arbitrators must respect that.⁷⁸ On the other hand, others are of the opinion that mandatory rules and public policy rules such as EU antitrust rules cannot be deviated from regardless of party autonomy.⁷⁹ For instance, the European Court of Justice clarifies in *Eco Swiss v Benetton*⁸⁰ that national courts must set aside awards according to public policy if EU competition rules have been violated.

3.3 The “wrong” substantive law

The term “wrong” is relative regarding the substantive law. A party pleased with the outcome of the case would rarely agree that the substantive law applied was wrong. Therefore, the wrong law must be defined in its context.

The substantive law could be wrong in many contexts. As discussed above, the principle of party autonomy prevails, and the arbitrators must therefore apply the parties’ choice of law. The simplest way to define when the law is “wrong” is to state that the substantive law is wrong when the arbitrators deviate from the parties’ choice of substantive law, except if the reason for the arbitrators’ deviation stems from restrictions on party autonomy.

Nonetheless, it must be acknowledged that the substantive law could be wrong in other situations, apart from when the arbitrators deviate from the parties’ choice of

⁷⁶ Lew-Mistelis-Kröll, *Comparative International Commercial Arbitration*, p 420, Redfern-Hunter, *Redfern and Hunter on International Arbitration*, p 205 and Hobér, *International Commercial Arbitration in Sweden*, pp 50-56.

⁷⁷ Professor at Uppsala University and partner at the law firm Mannheimer Swartling in Stockholm.

⁷⁸ Hobér, *International Commercial Arbitration in Sweden*, p 53.

⁷⁹ Hobér, *International Commercial Arbitration in Sweden*, p 54 with reference to Dalhuisen, “The Arbitrability of Competition Issues” in *Arbitration International* (1995) p 161.

⁸⁰ C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*, E.C.R. I-3055.

law. For instance, if the parties have chosen an insufficient law that needs to be complemented by another law, the complementing law could supposedly be wrong. Depending on the situation, the arbitrators have an obligation to resolve the dispute, and the choice of law would thus be reassigned to the arbitrators if parties have not chosen the applicable substantive law. It is unclear whether the award could be challenged if the parties made no choice of law. Therefore, it is unclear whether the arbitrators' choice of complementing law could be "wrong". Perhaps the law could be wrong depending on the method the arbitrators' used to determine the substantive law. Nevertheless, the thesis regards the substantive law to be "wrong" when the arbitrators deviate from the parties' choice of law.

Instead of continuing the discussion of when awards can be challenged based on that the substantive law is wrong,⁸¹ it is time to examine the theoretical question of whether to refer arbitrators' application of the wrong substantive law to excess of mandate or procedural irregularity, and the practical question of how national courts handle the demarcation problems that occur in review of awards.

⁸¹ For a discussion of when awards can be challenged, see Cordero Moss, "Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?" in *Stockholm International Arbitration Review* 2005:1.

4 The Challenge of Awards

4.1 The principle of finality

The principle of finality implies that no higher instance will review the award on the merits of the case.⁸² By choosing arbitration, the parties have waived their right to appeal, and consequently, arbitration is an efficient dispute resolution.⁸³ The finality of awards is emphasized in law, legislative history and case law, and it is on the international level reflected in the Model Law as well as in the New York Convention.⁸⁴ The European Court of Justice has also emphasized the importance of finality of awards in the famous case *Eco Swiss v Benetton*:

“it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.”⁸⁵

Although the principle of finality implies that awards cannot be challenged on substantive grounds, there are procedural grounds upon which awards could be challenged within the framework of the *lex arbitri*.⁸⁶ The rationale behind permitting challenge on procedural grounds is to ensure minimum standards of objectivity, fairness and justice in arbitration, and thusly to create a fair balance between finality and review of awards.⁸⁷ Another rationale of permitting challenge exclusively on procedural grounds is that many disputes are typically suitable for arbitrators and

⁸² Govt Bill 1998/99:35 p 138, Madsen, *Commercial Arbitration in Sweden*, p 222, Cordero Moss, “Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?” in *Stockholm International Arbitration Review* 2005:1, p 4 and Lew-Mistelis-Kröll, *Comparative International Commercial Arbitration*, p 665.

⁸³ Govt Bill 1998/99:35 pp 118 and 149.

⁸⁴ Govt Bill 1998/99:35 pp 142, 148 and 234. See also the Swedish Supreme Court’s emphasis on finality in NJA 1979 p 527 (*Götaverken Arendal AB v General National Maritime Transport Co.*) about the recognition and enforcement in Sweden of an ICC award and NJA 1992 p 733 (*Forenede Cresco Finans AS v Datema AB*) about the recognition and enforcement of an award rendered in Oslo. See also the list under § 502 of cases confirming no review on the merits of the case according to art. V of the New York Convention at:

http://www.arbitration-icca.org/publications/ny_convention_commentary_cases/nyc_articles.html#502(2013-11-20).

⁸⁵ C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*, E.C.R. I-3055, paragraph 35.

⁸⁶ Hobér, *International Commercial Arbitration in Sweden*, pp 294 and 234. See also Girsberger-Voser, *International Arbitration in Switzerland*, p 35.

⁸⁷ Hobér, *International Commercial Arbitration in Sweden*, p 294.

not a national court.⁸⁸ Perhaps the dispute is technically complex, or the dispute should be resolved in accordance with a law other than one the court is familiar with. Nonetheless, without the ability to have awards set aside through a challenge, there is a risk that arbitration could become discredited if irregularities occurred.⁸⁹

The grounds upon which awards can be challenged in Sweden are found in section 34 of the Swedish Arbitration Act (SAA). Although national courts under the SAA *shall* set aside the award if the prerequisites are fulfilled, the courts must recognize the arbitrators' discretion in procedural issues as long as it does not violate the party instructions, the law or other procedural rules.⁹⁰

The finality of awards is supported by the principle of *in dubio pro validitate*. The principle implies that national courts in uncertain cases should uphold awards instead of setting them aside.⁹¹ It has been argued that the Swedish Supreme Court, at least partially, has emphasized the principle of *in dubio pro validitate* in *Jansson v Retrotyp AB*.⁹² The Supreme Court confirmed that only serious procedural errors or mistakes may serve as a basis for a request to challenge an award on procedural grounds.

In order to adequately assess whether or not arbitrators' application of the wrong substantive law is a ground for a challenge of arbitral awards, it is in section 4.2 essential to present the general scopes of application for the relevant challenge grounds. Next, section 4.3 examines the theoretical question of whether to refer arbitrators' application of the wrong substantive law to excess of mandate or procedural irregularity. Thereafter, section 4.4 examines the practical question of how the courts handle demarcation problems that occur in national courts' review. Lastly, section 4.5 gives some chapter conclusions.

⁸⁸ Heuman, *Skiljemannarätt*, p 608.

⁸⁹ Heuman, *Current Issues in Swedish Arbitration*, p 164.

⁹⁰ Heuman, *Skiljemannarätt*, pp 588-589.

⁹¹ Hobér, *International Commercial Arbitration in Sweden*, p 296.

⁹² NJA 1975 p 536 (*Jansson v Retrotyp AB*), see section 4.4.3.2. See also Hobér, *International Commercial Arbitration in Sweden*, p 296.

4.2 The challenge grounds

4.2.1 Excess of mandate

4.2.1.1 *The scope of application*

The challenge ground excess of mandate, in p 2 of section 34 of the SAA, requires that the award should be set aside *where the arbitrators have otherwise exceeded their mandate*. This challenge ground exists to ensure the adversarial principle in addition to due process and to guarantee the consensual nature of arbitration.⁹³ An excess of mandate is considered to occur if the arbitrators go beyond the party instructions about limiting the judicial review to certain aspects of the dispute.⁹⁴ It is virtually impossible to determine the precise point at which the arbitrators exceed the scope of their mandate, but it can be concluded that the normal scope of application is the substantive object of the dispute.⁹⁵

It is a matter of debate whether the provision excess of mandate actually addresses both quantitative and qualitative excess of mandate.⁹⁶ A quantitative excess of mandate would occur if the arbitrators go beyond the parties' claims, or if the arbitrators consider circumstances that should not be considered. For instance, quantitative excess of mandate is illustrated by the Svea Court of Appeal's judgment in *If Skadeförsäkring AB v Securitas AB*,⁹⁷ in which the Court held that the arbitrators had exceeded their mandate by ignoring the respondent's claim about not paying attention to certain circumstances that were not yet established. The arbitrators had considered circumstances that should not have been considered. Also, if the arbitrators fail to consider some claims it could constitute quantitative excess of mandate.⁹⁸

⁹³ See Heuman, *Skiljemannarätt*, p 607 and Hobér, *International Commercial Arbitration in Sweden*, p 324.

⁹⁴ SOU 1994:81 p 177 and Govt Bill 1998/99:35 p 146. See also Heuman, *Skiljemannarätt*, p 616.

⁹⁵ Cordero Moss, "Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?" in *Stockholm International Arbitration Review* 2005:1, p 5.

⁹⁶ Lindskog is skeptical toward qualitative excess of mandate, see Lindskog, *Skiljeförfarande – En kommentar*, p 870 whereas Heuman, *Skiljemannarätt*, pp 610-611 is more convinced.

⁹⁷ Svea Court of Appeal's judgment 3 November 2005 (T 8016-04), *If Skadeförsäkring AB v Securitas AB et al.*

⁹⁸ Hobér, *International Commercial Arbitration in Sweden*, p 314.

A qualitative excess of mandate is a violation of joint party instructions concerning the *conduct* of the proceedings.⁹⁹ It is difficult to determine whether the arbitrators' violation of joint party instructions actually should be referred to excess of mandate or to procedural irregularity. Therefore, there is an uncertainty as to whether qualitative excess should be included in the challenge ground excess of mandate. For instance, since the parties' choice of law is a joint party instruction, the arbitrators' violation of the parties' choice of law would be qualitative excess of mandate. The different views and perspectives of joint party instructions, regarding the conduct of the proceedings, will be discussed further in relation to whether the arbitrators' application of the wrong substantive law should be referred to excess of mandate or procedural irregularity.

4.2.1.2 *The arbitrators' mandate*

Now that the general scope of application has been presented, it is necessary to discuss how the arbitrators' mandate is determined. The arbitrators' mandate represents the framework for the arbitrators' role in arbitration.

Firstly, the legal foundation upon which the mandate is based must be acknowledged. The legal foundation is connected to the consensual nature of arbitration and could be explained by two different theories, either by the contractual theory or the statutory theory. The contractual theory is based on a trusteeship agreement between the arbitrators and the parties whereas the statutory theory is based on statutory rules.¹⁰⁰ Both theories encounter difficulties and therefore the legal foundation of the arbitrators' mandate is best explained by combining the contractual and statutory theories.¹⁰¹

Secondly, and more important in relation to the mandate as in the challenge ground excess of mandate, is how the arbitrators' mandate is defined in each case. The parties set the conditions for arbitration in the arbitration agreement and subsequent

⁹⁹ Lindskog, *Skiljeförfarande – En kommentar*, p 870.

¹⁰⁰ Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p 199.

¹⁰¹ None of the theories should be perceived as dominant and issues should be resolved in a pragmatic way, see Heuman, *Arbitration Law of Sweden: Practice and Procedure*, pp 202-203.

joint party instructions.¹⁰² Thereby, these conditions define the arbitrators' mandate, and therefore, the arbitrators are to resolve the dispute under these conditions. Since arbitration is consensual, the arbitrators must follow joint party instructions, which set the limitations of the mandate. It has been debated whether also statutory rules could limit the arbitrators' mandate.¹⁰³ It seems like statutory rules could also determine the arbitrators' mandate, but a violation thereof should probably be challenged on the ground procedural irregularity.¹⁰⁴

Now that the arbitrators' mandate is defined by the conditions in the arbitration agreement and subsequent joint party instructions, the question arises as to what extent the principle of *jura novit curia* applies in arbitration. The principle applies in Swedish courts and implies that the court is not bound by the parties' legal arguments. The principle generally applies also in arbitration in Sweden, but the application is debated, and particularly when parties to the arbitration come from other jurisdictions where the principle is not recognized.¹⁰⁵ Although the principle of *jura novit curia* would apply, the arbitrators must stay within the boundaries set by the parties.¹⁰⁶ In other words, the arbitrators must only act within their mandate. The principle is closely related to active case management and it is recommended that the arbitrators manage the dispute resolution in order to avoid surprises.¹⁰⁷ Active case management could, in some situations, avoid the application of the wrong substantive law, or at least, the bad consequences thereof.

This definition of the arbitrators' mandate is important for the following discussion on the application of the challenge ground excess of mandate and national courts' scope of review. If the arbitrators comply with the conditions set in the arbitration agreement and subsequent joint party instructions, the arbitrators are within the

¹⁰² Hobér, *International Commercial Arbitration in Sweden*, p 313 and Madsen, *Commercial Arbitration in Sweden*, p 226.

¹⁰³ Heuman, *Skiljemannarätt*, p 620, Lindskog, *Skiljeförfarande – En kommentar*, p 869 and Hassler-Cars, *Skiljeförfarande*, p 138.

¹⁰⁴ Lindskog, *Skiljeförfarande – En kommentar*, p 869 and Heuman, *Skiljemannarätt*, p 620.

¹⁰⁵ Govt bill 1998/99:35 p 144. See also Svea Court of Appeal's judgment 18 May 2000 (T 8090-99), *Rolf Gustafsson v Länsförsäkringar Bergslagen-Wasa ömsesidigt*, in which the Court held that the arbitrators may apply a provision not invoked by the parties. See Madsen, *Commercial Arbitration in Sweden*, p 228.

¹⁰⁶ Madsen, *Commercial Arbitration in Sweden*, p 228.

¹⁰⁷ Govt Bill 1998/99:35 p 144.

mandate. In a study based on challenges under the SAA, it was concluded that as long as the arbitrators comply with these conditions set by the parties, the arbitrators have considerable liberty in their conduct of the examination.¹⁰⁸

4.2.1.3 *An implicit requirement of influence on the outcome of the case?*

Uncertainty exists as to whether or not the challenge ground excess of mandate requires an influence on the outcome of the case. According to the provision's wording, no such requirement exists, and the only importance is whether the arbitrators exceed their mandate.¹⁰⁹ However, the award should *wholly or partially* be set aside as specified in section 34 of the SAA, which implies that only the affected part of the award should be set aside.¹¹⁰ Consequently, some kind of implicit causal connection seems to be required.¹¹¹

A causal connection test could be performed relatively easily if the excess is qualitative. It must then only be established whether the arbitrators went beyond the parties' claims, or considered circumstances that should not have been considered to see that this part of the award should be set aside. However, a causal connection test is more difficult to perform if the excess is qualitative. It must then be established what part of the award that the violation of the joint party instruction (qualitative excess) affected for the award to be set aside.¹¹² Such a test on qualitative excess would be similar to the test in the challenge ground procedural irregularity of whether the irregularity influenced the outcome of the case. This could be used as an argument to refer any qualitative excess to the challenge ground procedural irregularity.¹¹³

¹⁰⁸ Elofsson, "Skiljemäns uppdragsöverskridande och handläggningsfel. En analys med utgångspunkt i klandrade skiljedomar under perioden 1999-2009" in *Affärsjuridiska uppsatser 2010/2011*, p 86.

¹⁰⁹ Hobér, *International Commercial Arbitration in Sweden*, p 324.

¹¹⁰ Hobér, *International Commercial Arbitration in Sweden*, p 324. See also Govt Bill 1998/99:35 p 235.

¹¹¹ Lindskog, *Skiljeförfarande – En kommentar*, p 870, Heuman, *Skiljemannarätt*, pp 609-611 and Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p 595.

¹¹² Lindskog, *Skiljeförfarande – En kommentar*, p 870.

¹¹³ Lindskog, *Skiljeförfarande – En kommentar*, p 870.

4.2.2 Procedural irregularity

4.2.2.1 *The scope of application*

The challenge ground procedural irregularity, in p 6 of section 34 of the SAA, states that awards should be set aside *if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.* This challenge ground functions as a general clause, and it ensures due process of arbitration and the parties' legitimate expectations.¹¹⁴ It has in the legislative history been emphasized that this general clause should be applied restrictively.¹¹⁵ The fact that the SAA has a general clause, as opposed to the Model Law, could imply that there is no reason to extend the scope of application of other challenge grounds.¹¹⁶

There is no definition of what type of procedural irregularity is intended, but the provision has been drafted to include a wide variety of “unacceptable errors”.¹¹⁷ The unacceptable errors could, for example, include violations of due process, procedural errors regarding amendment and dismissal of claims, *res judicata* issues and violations of joint party instructions.¹¹⁸ The provision is meant to be vague since it is not possible to exhaustively enumerate all procedural errors that could occur.

The word “otherwise” in the provision indicates that the general clause is subsidiary to other challenge grounds. National courts would generally first examine whether one of the other grounds is applicable, and then the general clause.¹¹⁹ However, it has also been reasoned that the general clause can be applied even though another challenge ground is applicable.¹²⁰ It is sometimes difficult to determine what challenge ground to rely upon. Particularly problematic is the distinction between excess of mandate and procedural irregularity concerning joint party instructions of the

¹¹⁴ Hobér, *International Commercial Arbitration in Sweden*, pp 327 and 329.

¹¹⁵ SOU 1994:81 p 179 and Govt Bill 1998/99:35 p 148.

¹¹⁶ Lindskog, *Skiljeförfarande – En kommentar*, p 883.

¹¹⁷ Govt Bill 1998/99:35 p 146. See also Hobér, *International Commercial Arbitration in Sweden*, p 327.

¹¹⁸ Govt Bill 1998/99:35 p 146. See also Hobér, *International Commercial Arbitration in Sweden*, p 327.

¹¹⁹ Hobér, *International Commercial Arbitration in Sweden*, p 328.

¹²⁰ Heuman, *Skiljemannarätt*, p 635, Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p 623 and NJA 1998 p 189 (*Esselte AB v Allmänna Pensionsfonden*) in which the claimant clarified that he did not rely on the ground excess of mandate but only procedural irregularity, which the Court applied. See also Bolding, *Skiljedom*, p 172, who argues that the scope of application of procedural irregularity is rather limited not to encroach on the other challenge grounds.

conduct of the proceedings.¹²¹ Again, the question is whether qualitative excess should be referred to excess of mandate or to procedural irregularity exclusively. Nonetheless, the provision procedural irregularity explicitly requires a probable influence on the outcome of the dispute, which lays a higher burden of proof upon the claimant.

4.2.2.2 “Probably influenced the outcome of the case”

Through the prerequisite that the irregularity probably (Sw. *sannolikt*) influenced the outcome of the case, the scope of application has been limited to only cover procedural errors of some extent.¹²² The reason for the prerequisite is procedural economy since, without influence on the outcome, it would be unnecessary to set aside awards.¹²³ The prerequisite promotes the finality of awards.

Sometimes it is required that the claimant shows extensive evidence concerning the merits of the case in order to convince the court that the irregularity probably influenced the outcome of the case.¹²⁴ The court has to assess whether the arbitrators would have come to a different conclusion without the irregularity.¹²⁵ In the review, national courts perform a hypothetical test to see whether a causal connection exists. The causal connection must according to the legislative history be significant.¹²⁶ However, in some gross procedural irregularities, the causal connection is presumed.¹²⁷

¹²¹ Hobér, *International Commercial Arbitration in Sweden*, p 328, Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p 598 and Lindskog, *Skiljeförfarande – En kommentar*, pp 901-902.

¹²² Heuman, *Skiljemannarätt*, p 635.

¹²³ Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p 595.

¹²⁴ SOU 1994:81 p 178 and Govt Bill 1998/99:35 p 147. See also Heuman, “Editionsföreläggande i civilprocesser och skiljetvister – Del II” in *Juridisk Tidskrift* 1989-90 p 244.

¹²⁵ Heuman, *Skiljemannarätt* p 636 and Bolding, *Skiljedom*, p 180 and Svea Court of Appeal’s judgment in NJA 1973 p 740 in which the Court made a thorough assessment of the award.

¹²⁶ SOU 1994:81 p 179 and Govt Bill 1998/99:35 p 147.

¹²⁷ Heuman, *Skiljemannarätt*, p 637. See also *Soyak v Hochtief* under section 4.4.3.3 in which the Court stated that it may be presumed that a complete lack of reasons have influenced the outcome of the case.

4.2.2.3 *The assessment*

In the assessment of whether a procedural irregularity has occurred, it is necessary to compare the arbitrators' actions against the norm of how they should have acted. These norms are portrayed in statutory rules, institutional rules and in joint party instructions.¹²⁸ If the arbitrators deviate from these established norms, the award could be set aside. Also, the parties' legitimate expectations must be considered.¹²⁹ It is also important to emphasize that the challenging party must not have caused the procedural error.¹³⁰

In the assessment, it is necessary to consider the arbitrators' discretion. The arbitrators have certain discretion when the norms are unclear.¹³¹ The discretion is more questionable when, for instance, the joint party instructions are clear. In a study based on challenges under the SAA, it was concluded that the arbitrators have a narrower discretion in "other kind of irregularities" than on the ground excess of mandate.¹³² A procedural irregularity would simply result in the award being set aside if the procedural irregularity is significant. This rhymes well with older doctrine, which is of the opinion that even minor deviations from joint party instruction of procedural art lead to awards being set aside.¹³³ It was considered to be of major importance that the arbitrators respect joint party instructions as set out in the arbitration agreement or subsequent party instructions.¹³⁴

Moreover, in the legislative history it is stated that national courts will do no substantive review of awards.¹³⁵ At the same time, the provision requires that the claimant can prove that the irregularity probably influenced the outcome of the case. The legislative history also recognizes that the claimant might have to provide extensive evidence that shows both the existence of an error and its influence on the

¹²⁸ Hobér, *International Commercial Arbitration in Sweden*, p 328.

¹²⁹ Hobér, *International Commercial Arbitration in Sweden*, p 329.

¹³⁰ Govt Bill 1998/99:35 p 148.

¹³¹ Hobér, *International Commercial Arbitration in Sweden*, p 329.

¹³² Elofsson, "Skiljemäns uppdragsöverskridande och handläggningsfel. En analys med utgångspunkt i klandrade skiljedomar under perioden 1999-2009" in *Affärsjuridiska uppsatser 2010/2011*, p 86.

¹³³ Heuman, *Skiljemannarätt*, p 653 and Bolding, *Skiljedom*, pp 175-176.

¹³⁴ Bolding, *Skiljedom*, p 175 and Berglund, *Om skiljeavtal och skiljedom*, p 114.

¹³⁵ Govt Bill 1998/99:35 p 148.

outcome of the dispute.¹³⁶ It is debatable whether or not mandating such extensive evidence to show the existence of an error and the error's influence on the outcome of the case would require national courts to conduct a substantive review to some extent. In the context of providing extensive evidence, it is difficult to distinguish between substantive and procedural errors. This will be discussed further in connection to the practical question of how national courts handle demarcation problems that arise in review of awards.

4.3 Application of wrong substantive law – excess of mandate or procedural irregularity?

4.3.1 Overlapping challenge grounds

The distinction between excess of mandate and procedural irregularity is difficult. In general, excess of mandate regards the substantive object in dispute whereas procedural irregularity regards joint party instructions on the conduct of the proceedings.¹³⁷ However, since it is uncertain if the provision excess of mandate includes qualitative excess of mandate, such as joint party instructions on the conduct of the proceedings, the two challenge grounds seem to overlap.

The parties' choice of substantive law is an instruction to the arbitrators on how to resolve the dispute. Since the challenge grounds seem to overlap and the prerequisites differ, the theoretical question arises as to whether the arbitrators' application of the wrong substantive law should be referred to the challenge ground excess of mandate or procedural irregularity.

The arbitrators' application of the wrong substantive law has been discussed in the legislative history, doctrine and in case law. The views differ as to which challenge

¹³⁶ Govt Bill 1998/99:35 p 145.

¹³⁷ Hobér, *International Commercial Arbitration in Sweden*, pp 314 and 336 and Cordero Moss, "Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?" in *Stockholm International Arbitration Review* 2005:1, p 5. See also Elofsson, "Skiljemäns uppdragsöverskridande och handläggningsfel. En analys med utgångspunkt i klandrade skiljedomar under perioden 1999-2009" in *Affärsjuridiska uppsatser 2010/2011*, p 70 with reference to *Soyak International Construction & Investment Inc v Hochtief AG*, see section 4.4.3.3.

ground should be relied upon. This section examines the theories behind referring arbitrators' application of the wrong substantive to either excess of mandate or procedural irregularity.

4.3.2 Legislative history

The legislative history of the SAA recognizes the possibility to challenge awards if the arbitrators apply the wrong substantive law. However, it is only recognized in relation to the challenge ground excess of mandate, and not in relation to procedural irregularity. The legislative history clearly states that the arbitral award could be challenged if the arbitrators apply the wrong substantive law:

“Is it clear that the arbitrators, in breach of such an agreement [parties' choice of substantive law], have applied the law of another country, the arbitration award may by a court action be set aside on the ground that the arbitrators exceeded their mandate. However, the court should at a challenge of course not examine if the arbitrators misapplied the law the parties have agreed upon.”¹³⁸

The legislative history thereby clarifies that if the arbitrators apply a national law other than the parties' choice of law, the award could be challenged on the provision excess of mandate. It is also explicitly stated that the award cannot be challenged if the arbitrators apply the law incorrectly.¹³⁹ Such a misapplication of the substantive law belongs to the merits of the case, which cannot be reviewed in national court. This demarcation between substantive and procedural errors is a practical problem.

There are at least two questions relating to the application of excess of mandate on the choice of substantive law. Firstly, assuming the wording of the legislative history reflects the law, excess of mandate could only be applied if the parties have agreed upon a national law. Secondly, the practical question arises as to how national courts

¹³⁸ Govt Bill 1998/99:35 p 122. My translation. The original text in Swedish is as follows: ”Framgår det att skiljemännen, i strid med en sådan överenskommelse, har tillämpat ett annat lands lag, kan skiljedomen efter talan vid domstol komma att hävas på den grund att skiljemännen överskridit sitt uppdrag. Däremot bör domstolen vid en klandertalan givetvis inte pröva om skiljemännen felaktigt tillämpat den lag som parterna enats om.” See also SOU 1994:81 p 154, which has almost the exact same wording.

¹³⁹ SOU 1994:81 p 154 and Govt Bill 1998/99:35 p 122.

handle the demarcation between substantive and procedural errors in the review of awards, which is discussed further below.

Notwithstanding that the legislative history does not explicitly recognize that arbitrators' application of the wrong substantive law could be challenged on the ground procedural irregularity, the general clause has a wide scope of application. The legislative history clarifies that for the possibility to react against "unacceptable procedural errors", the provision needs to be vague.¹⁴⁰ The circumstance that procedural errors are not clearly defined indicates that any type of procedural error could be included. The application of the wrong substantive law is evidently a procedural error.¹⁴¹ Therefore, an application of procedural irregularity, if the arbitrators apply the wrong substantive law, should not be excluded based on the legislative history.

4.3.3 Doctrine

There are different opinions on whether to refer the arbitrators' application of the wrong substantive law to excess of mandate or to procedural irregularity. The most established view is that the situation would constitute an excess of mandate.¹⁴² However, there are indications that the situation also could constitute a procedural irregularity.¹⁴³

The foremost advocates of the different schools of thought in Sweden are Heuman¹⁴⁴ and Lindskog.¹⁴⁵ Heuman emphasizes that the arbitrators' application of the wrong substantive law should constitute excess of mandate whereas Lindskog rather refers the situation to procedural irregularity. The different opinions are mainly

¹⁴⁰ Govt Bill 1998/99:35 p 146.

¹⁴¹ SOU 1994:81 p 153-154 and Govt Bill 1998/99:35 p 147.

¹⁴² Hobér, *International Commercial Arbitration in Sweden*, p 320, Madsen, *Commercial Arbitration in Sweden*, p 233 Heuman, *Skiljemannarätt*, pp 611 and 616, and Cordero Moss, "Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?" in *Stockholm International Arbitration Review* 2005:1, p 5.

¹⁴³ Lindskog, *Skiljeförfarande*, pp 873-874. See also Cordero Moss, "Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?" in *Stockholm International Arbitration Review* 2005:1, p 5.

¹⁴⁴ Professor at Stockholm University.

¹⁴⁵ Professor at Stockholm University and Justice of the Swedish Supreme Court.

based on differences regarding (i) what type of instruction the parties' choice of law is, (ii) the interpretation of the arbitrators' mandate and (iii) practical arguments.

Firstly, the parties' choice of law is an instruction to the arbitrators on how to resolve the dispute. It is questionable whether this instruction could be defined more clearly and thereby decide beforehand, which challenge ground a violation thereof should be referred to. Lindskog argues that if the arbitrators' violation of the parties' choice of substantive law constitutes excess of mandate, then perhaps violations of also other joint party instructions should constitute excess of mandate.¹⁴⁶ For instance, he exemplifies by questioning whether the arbitrators' violation of the parties' choice of geographical location for the hearing also should be referred to excess of mandate.¹⁴⁷ He concludes that if so, then every violation of a joint party instruction would constitute excess of mandate and therefore, finds it more reasonable to refer the arbitrators' violation of the parties' instructions to the challenge ground procedural irregularity.¹⁴⁸

The reasoning assumes that it is possible to define the parties' choice of substantive law beforehand as any other instruction on the conduct of the proceedings. To some extent, the reasoning is appropriate since it would make sense not to differ between different types of joint party instructions. However, the parties' choice of law has particularities that cannot easily be compared to other joint party instructions, such as the instruction on the geographical place for the hearing. The particularities connected to the parties' choice of law would include the interests at stake, legal consequences and the close connection to the arbitrators' mandate. These particularities are closely related to each other. The interest of party autonomy regarding the parties' choice of law is to ensure certainty, predictability and uniformity in the arbitration,¹⁴⁹ and the consequences of a violation of the parties' choice of law could therefore be severe and affect the outcome of the case. Hence, the parties' choice of law is closely connected to the arbitrators' mandate as opposed

¹⁴⁶ Lindskog, *Skiljeförfarande – En kommentar*, p 873.

¹⁴⁷ Lindskog, *Skiljeförfarande – En kommentar*, p 873.

¹⁴⁸ Lindskog, *Skiljeförfarande – En kommentar*, p 874.

¹⁴⁹ Hobér, *International Commercial Arbitration in Sweden*, p 39 and Lew, *Applicable Law in International Commercial Arbitration*, p 79.

to the party instruction on the geographical place for the hearing. In the section regarding how to define the arbitrators' mandate, it was concluded that the mandate in each case is defined by the conditions in the arbitration agreement and subsequent joint party instructions.¹⁵⁰ Therefore, the parties' choice of law defines the arbitrators' mandate. The arbitrators are obligated to follow this joint party instruction since it constitutes a condition under which the arbitrators are given the mandate, and thereby, a violation of the parties' choice of law could constitute excess of mandate. Consequently, the parties' choice of law could not be defined as any other joint party instruction. It is necessary to look at the particularities of each instruction before excluding the applicability of any challenge ground.

Secondly, the arbitrators' mandate could be viewed from different perspectives. It is debatable, whether the arbitrators *exceed* the mandate by applying a law other than the one chosen by the parties.¹⁵¹ The arbitrators' duty is to resolve the dispute between the parties, and Lindskog argues that by applying a law other than the parties' choice of substantive law, the arbitrators do not exceed their mandate since their duty is to resolve the dispute.¹⁵² He means that the arbitrators have to apply some substantive law, even though they might not have followed the joint party instruction. Therefore, it would be an error within the mandate rather than an excess of mandate.¹⁵³

Although it is possible to see the reasons behind Lindskog's argument, it is not convincing on a theoretical level. Again, the focus of the argument is on the arbitrators' duty, rather than the joint party instruction on substantive law. It is true that the arbitrators' duty is to resolve the dispute, but the arbitrators should fulfill the duty as defined in the arbitrators' mandate. The parties' choice of law is closely related to and intertwined with the conditions under which the arbitrators have been given the mandate, and the parties' choice of law should therefore be seen as an

¹⁵⁰ Hobér, *International Commercial Arbitration in Sweden*, p 313 and Madsen, *Commercial Arbitration in Sweden*, p 226.

¹⁵¹ Heuman, *Skiljemannarätt*, p 611 and Lindskog, *Skiljeförfarande – En kommentar*, p 874.

¹⁵² Lindskog, *Skiljeförfarande – En kommentar*, p 874.

¹⁵³ Lindskog, *Skiljeförfarande – En kommentar*, p 874.

integral part of the arbitrators' mandate to resolve the dispute.¹⁵⁴ Consequently, it is at this theoretical stage difficult to not view the arbitrators' application of the wrong substantive law as an excess of mandate. Lindskog's argument that the application of the wrong substantive law is an error within the mandate is more valid in the practical application of excess of mandate and the manner in which national courts handle demarcation problems that occur in review of awards.¹⁵⁵

The discussions of whether the arbitrators' violation of joint party instructions should constitute excess of mandate, and whether it constitutes an *excess* are closely related to whether the excess of mandate provision includes both quantitative and qualitative excess of mandate. If the provision excess of mandate only applies to quantitative excess, the scope of application of the provision is reduced. For instance, the parties' instructions about how to resolve the dispute would not be possible to challenge on the ground excess of mandate,¹⁵⁶ despite the close relation between the parties' choice of law and the arbitrators' mandate. This indicates that the arbitrators' application of the wrong substantive law could be referred to as an excess of mandate.

Thirdly, practical arguments regarding the legal consequences could shed some light on what challenge ground to rely on if the arbitrators apply the wrong substantive law. If the arbitrators' application of the wrong substantive law is referred to as excess of mandate, the legal consequence is the award being set aside, even though the error would not have influenced the outcome of the case.¹⁵⁷ This would be an impractical consequence. However, as discussed above,¹⁵⁸ there might also exist a causal connection requirement also for the challenge ground excess of mandate since the award *wholly or partially* should be set aside. Therefore, it seems also as if the provision excess of mandate has a causal connection requirement and not mere-

¹⁵⁴ See also Hobér, *International Commercial Arbitration in Sweden*, p 313 and Madsen, *Commercial Arbitration in Sweden*, p 226, who confirm that conditions of the mandate may be defined in party instructions.

¹⁵⁵ Compare the discussion in section 4.5.2 and how the arbitrators' interpretation of the parties' choice of law is within the mandate.

¹⁵⁶ Heuman, *Skiljemannarätt*, p 611.

¹⁵⁷ Lindskog, *Skiljeförfarande – En kommentar*, p 874.

¹⁵⁸ See section 4.2.1.3.

ly the provision procedural irregularity. The legal consequence that awards risk being set aside even though there is no influence on the outcome of the case is, thereby, not a valid argument.

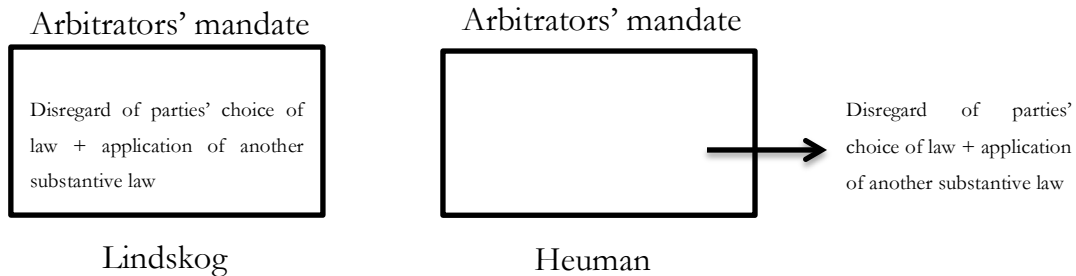
Another practical argument regarding what challenge ground to rely on is that the provision procedural irregularity puts a higher burden of proof on the claimant.¹⁵⁹ Heuman argues that the scope of application of excess of mandate should include the arbitrators' application of wrong substantive law since the burden of proof is too high in the provision procedural irregularity.¹⁶⁰ The argument that procedural irregularity has too high a burden of proof is not reasonable. Firstly, it could hardly be rational to refer a situation to a certain challenge provision purely on the basis that it has a lesser burden of proof. Secondly, the arbitrators' application of the wrong substantive law would probably influence the outcome of the case in any event. Therefore, the argument regarding the high burden of proof is not a valid argument against the arbitrators' application of the wrong substantive law constituting procedural irregularity. A more valid argument is that the legislative history explicitly states that the arbitrators' application of the wrong law could be challenged on the provision excess of mandate.¹⁶¹ Consequently, when discussing the theoretical question of whether arbitrators' application of the wrong substantive law constitutes excess of mandate or procedural irregularity, the focus must be on the joint party instruction itself and the particularities of the instruction. The focus should not be on practical arguments that awards risk being set aside or that the burden of proof is too high.

¹⁵⁹ Heuman, *Skiljemannarätt*, p 611.

¹⁶⁰ Heuman, *Skiljemannarätt*, p 611 and reference to NJA 1942 p 236 in which the Swedish Supreme Court concluded that it constitutes excess of mandate if the arbitrators had ordered a party to pay a certain amount even though the instruction was only to evaluate damages. See also Hassler-Cars, *Skiljeförfarande*, p 139.

¹⁶¹ Heuman, *Skiljemannarätt*, p 611, SOU 1994:81 p 154 and Govt Bill 1998/99:35 p 123.

The different schools of thought of whether or not arbitrators' violation of the parties' choice of law constitutes excess of mandate is understood when illustrated:



The arbitrators' application of the wrong substantive law should in theory be possible to challenge on both excess of mandate and procedural irregularity. The strongest argument for the situation to be referred to excess of mandate is the statement in the legislative history. Additionally, the party autonomy to determine the substantive law is closely connected to the arbitrators' mandate. The arbitrators have the duty to resolve the dispute in accordance with the parties' choice of law. Furthermore, although the legal reasoning for the application of procedural irregularity is more vague, there is nothing that indicates that the provision could not be applied. On the opposite, the scope of application of procedural irregularity is wide and includes procedural errors, such as violations of instructions on the conduct of the arbitration. The parties' choice of law is an instruction to the arbitrators on how to resolve the dispute, which is closely connected to the conduct of the arbitration. Thus, a violation thereof could be challenged on the ground procedural irregularity. Also, older doctrine proposes that also minor deviations from joint party instructions should constitute procedural irregularity.

Furthermore, the challenge grounds excess of mandate and procedural irregularity overlap, and there is nothing that indicates that the challenge grounds would not be applicable to the same situation. The arguments for and against the arbitrators' application of the wrong substantive law to constitute either excess of mandate or procedural irregularity are not conflicting. In other words, it is difficult to try to define different type of party instructions and based on this definition apply them to

either excess of mandate or procedural irregularity. The scopes of application of excess of mandate and procedural irregularity are imprecise and overlap. Additionally, case law has explicitly confirmed the application of excess of mandate and indirectly confirmed the application of procedural irregularity.¹⁶² It is therefore difficult to exclude the arbitrators' application of the wrong substantive law to constitute either excess of mandate or procedural irregularity. Henceforth, it will be assumed that the arbitrators' violation of the parties' choice of law could constitute both an excess of mandate and a procedural irregularity.

4.4 Practical demarcation problems in national courts' review

4.4.1 The difference between substantive and procedural errors

Now that the theoretical question has been answered that the arbitrators' application of the wrong substantive law could constitute excess of mandate and procedural irregularity, it is time to look into the practical question of how national courts handle the demarcation problems that occur in the review of awards. This is where party autonomy conflicts with finality of awards since the parties' choice of law must be respected, but the award could only be reviewed for procedural errors.

The parties' choice of law is an instruction to the arbitrators on how to resolve the dispute. It is beyond the scope of the thesis to define what type of instruction the parties' choice of law is. Significant for the thesis is rather how the arbitrators receive, react to and transform the instruction into practice, *i.e.* how the arbitrators determine what law to apply. It is in this practical process that arbitrators might determine and apply the wrong substantive law, which is a procedural error but could include substantive errors.

The distinction between substantive and procedural errors is difficult, and the discussion thereof is similar regardless of what challenge ground is relied on.¹⁶³ It has been argued that a procedural error, resulting from a substantive decision, could not

¹⁶² See *JSC Aeroflot v Russo International Venture et al* and *Czech Republic v CME Czech Republic* under section 4.4.2.

¹⁶³ Lindskog, *Skiljeförfarande – En kommentar*, pp 884-885.

be challenged.¹⁶⁴ The substantive decision has then led to the procedural error, and awards cannot be reviewed on substantive grounds. Although the error is procedural, it originates from a substantive decision, and therefore, the award cannot be challenged. Heuman provides an example of when the arbitrators reject evidence due to irrelevancy. The arbitrators have then made a substantive decision that the evidence is irrelevant for the case. Furthermore, the distinction between substantive and procedural errors could be more difficult if an error is both substantive and procedural. It could then not be excluded that the error is also a procedural error that should result in the award being set aside.¹⁶⁵ Heuman gives an example that if a clause in the main contract specifies how the evaluation of damages should be calculated, a violation thereof would be of both substantive and procedural art.¹⁶⁶

Due to the difficulty in differentiating substantive and procedural errors, there are several demarcation problems that occur in national courts' review of awards. In the legislative history, it is clearly stated that arbitrators' misapplication of law is a substantive error that cannot be challenged, but the arbitrators' disregard of the parties' choice of law is a procedural error that can be challenged.¹⁶⁷ The issue is that the arbitrators' application of the wrong substantive law most likely comprises both substantive and procedural errors. Therefore, the question arises how national courts handle the demarcation problems that occur in the review of awards without entering the merits of the case.

The demarcation problems are studied by analyzing case law. Firstly, the analysis below examines the application of excess of mandate on the arbitrators' application of the wrong substantive law. Secondly, the analysis examines the application of procedural irregularity on joint party instructions. The arbitrators' application of the wrong substantive law has in practice not been thoroughly examined on the provision procedural irregularity and therefore, it is necessary to look at how other joint party instructions have been handled. The case law below does not claim to be exhaustive, but it does illustrate the demarcation problems, and attempts to find

¹⁶⁴ Heuman, *Skiljemannarätt*, p 641.

¹⁶⁵ Heuman, *Skiljemannarätt*, p 641.

¹⁶⁶ Heuman, *Skiljemannarätt*, p 641.

¹⁶⁷ Govt Bill 1998/99:35 p 122 and SOU 1994:81 p 154.

tendencies on how national courts handle such demarcation problems. There could be a difference in national courts' scope of review depending on the challenge ground.

4.4.2 Excess of mandate

4.4.2.1 *JSC Aeroflot v Russo International Venture et al*

The difficulty in distinguishing between substantive and procedural errors is evident when the arbitrators have to interpret the parties' choice of law. Interpretation is needed when the parties' choice of law is unclear or contains several contradictory choice of law clauses.

The Svea Court of Appeal tried a dispute in 2005 between *JSC Aeroflot v Russo International Venture et al*¹⁶⁸ with a choice of law clause appointing two substantive laws. The parties had signed an arbitration agreement with a choice of law clause saying “[t]his Agreement is governed by the regulations and shall be construed by the laws of Russian Federation and the State of New York (USA).” The choice of law clause thereby appointed both Russian and New York substantive law. One critical question was which jurisdiction's statute of limitations should apply since the substantive laws were contradictory. The Court clarified, *inter alia*, that:

“If the substantive rules are contradictory, the arbitral tribunal must therefore decide which rules are to apply. To do so does not constitute excess of the mandate; on the contrary it must be deemed to form part of the mandate. There is excess of mandate, if the arbitral tribunal knowingly disregards a choice of law provision. An erroneous interpretation, by contrast, forms part of the evaluation of the substance.”¹⁶⁹

The Court thereby clarifies that if there are several applicable substantive laws according to the arbitration agreement, and these are contradictory, then the arbitrators have the mandate to determine what substantive law to apply. The arbitrators have only exceeded their mandate in the event that they have deliberately

¹⁶⁸ Svea Court of Appeal's judgment 21 February 2005 (T 1164-03), *JSC Aeroflot Russian Airlines v Russo International Venture Inc* and *MGM Productions Group Inc*.

¹⁶⁹ Translation from Hobér, *International Commercial Arbitration in Sweden*, p 322.

disregarded the parties' choice of law.¹⁷⁰ Consequently, it is within the arbitrators' mandate to determine which substantive law that shall be applied from the several laws appointed by the parties.

However, the parties agreed upon the substantive laws and not the conflict of law rules. As discussed above,¹⁷¹ when the parties appoint a substantive law, it is generally accepted that its choice of law rules should not apply. Conflict of law rules would particularly in this case not be applied since the SCC Rules were applicable, which explicitly state that any designation of the parties should refer to substantive law and not conflict of law rules.¹⁷² Despite this, the arbitrators used conflict of law rules to determine the substantive law. The Court regarded the arbitrators' method as follows:

“This [the application of conflict of law rules by the tribunal] cannot in the view of the Court of Appeal be understood such that the arbitral tribunal has made a completely new choice of law and thereby disregarded the fundamental – but incomplete – choice of law by the parties pursuant to the provision in item 15. Rather, it must be seen as a way of dealing – by way of interpretation – with the difficulty built in into the clause by virtue of the fact that it indicates contradictory substantive rules.”¹⁷³

The Court thereby means that the arbitrators' use of conflict of law rules cannot be understood as the arbitrators disregard the parties' choice of law. When the parties' choice of law is unclear, the arbitrators have to interpret the agreement. Consequently, not only is the arbitrators' interpretation of the parties' choice of law included in the mandate, but also the method of interpretation. Therefore, it seems that the arbitrators' mandate includes interpreting the choice of law clause and the discretion of how the choice of law is to be interpreted. The Court seems to have classified the interpretation of the parties' choice of law as a substantive issue.¹⁷⁴ The Court does not therefore, review whether the arbitrators used a correct method of interpretation despite the fact that choice of law rules normally do not apply. Moreover, the Court also concluded that no procedural irregularity had occurred.

¹⁷⁰ Madsen, *Commercial Arbitration in Sweden*, p 230.

¹⁷¹ See section 3.2.1.

¹⁷² Art. 22 of the SCC Rules.

¹⁷³ Translation from Hobér, *International Commercial Arbitration in Sweden*, p 322.

¹⁷⁴ Hobér, *International Commercial Arbitration in Sweden*, p 322.

4.4.2.2 *Czech Republic v CME Czech Republic*

Another case in which the parties' choice of law was debated is *Czech Republic v CME Czech Republic*.¹⁷⁵ The arbitration was based on a Dutch-Czech bilateral investment treaty (BIT) with the wording that the tribunal should decide the dispute on the basis of law and taking into account the sources enumerated in a non-exclusive list. The difference from the *JSC Aeroﬂot v Russo International Venture et al* case is thus that the parties have only indirectly made a choice of law.

The Svea Court of Appeal held in the challenge proceedings that the wording of the choice of law clause in the BIT seemed to imply that the arbitrators should determine the applicable law based on the enumerated sources. Thus, the arbitrators should base the award on law and take the not exhaustive enumerated sources into account. It is beyond the scope of this thesis to analyze the exact implications of the choice of law clause in the BIT, but it is interesting to see what the Svea Court of Appeal stated after ruling that the legislator has desired to reduce the possibilities to appeal awards on the basis that the arbitrators apply the wrong law:

“The arbitrators may be deemed to have exceeded their mandate *only* where they have applied the law of a different country in violation of an express provision that the law of a particular country shall govern the dispute; in the opinion of the Court of Appeal, a deliberate disregard of the designated law must be involved.”¹⁷⁶ (Emphasis added).

Similar to the legislative history, the Court stated that the arbitrators may be deemed to have exceeded the mandate only when they apply another national law than that which the parties expressly agreed upon. However, the Court adds “only” in the sense that this is the only instance in which the arbitrators' application of the substantive law could constitute excess of mandate. The Court also emphasized that there needs to be a deliberate disregard of the parties' choice of law. As opposed to the Court's statement, the legislative history states that it is “clear” that the arbitra-

¹⁷⁵ Svea Court of Appeal's judgment 15 May 2003 (T 8735-01), *Czech Republic v CME Czech Republic*.

¹⁷⁶ My translation. Original text in Swedish is as follows: ”Skiljemännen kan anses ha överskridit sitt uppdrag endast om de i strid med en uttrycklig bestämmelse om att ett visst lands lag skall tillämpas på tvisten tillämpar ett annat lands lag; det måste, enligt hovrättens bedömning, i det närmaste vara fråga om ett medvetet ignorering av den anvisade lagen.”

tors exceed the mandate in this case.¹⁷⁷ The legislative history does not state that a deliberate disregard of choice of law is the *only* instance that would constitute excess of mandate.

To stress the Court's opinion, it reversed the argument and concluded when there is no excess of mandate:

“There is no excess of mandate where the arbitrators have applied the designated law incorrectly and nor can there hardly be any question of excess of mandate where the arbitrators have been required to interpret the parties' designation of applicable law and, in doing so, have interpreted the designation incorrectly.”¹⁷⁸

Therein the Court clarifies that there is no excess of mandate when the arbitrators misapply the parties' choice of law or when the arbitrators must interpret the parties' choice of law. Not even in the circumstance that the arbitrators interpret the parties' choice of law incorrectly would excess of mandate exist.

Nonetheless, the Court stated when an interpretation of the parties' choice of law could constitute an excess of mandate:

“In the opinion of the Court of Appeal, an excess of mandate may be involved only where the arbitrators' interpretation of the choice of law clause proved to be groundless such that their assessment may be equated with the arbitrators almost having ignored a provision regarding applicable law.”¹⁷⁹

Consequently, the Court goes even further than the *JSC Aeroﬂot v Russo International Venture et al* judgment and states when an interpretation could constitute excess of mandate. Only when an interpretation that is so groundless that the assessment could be equated with a deliberate disregard of the parties' choice of law could an

¹⁷⁷ Govt Bill 1998/99:35 p 122 and SOU 1994:81 p 154.

¹⁷⁸ My translation. Original text in Swedish is as follows: ”Det är inte ett uppdragsöverskridande om skiljemännen tillämpat den anvisade lagen felaktigt och det kan knappast heller vara fråga om ett uppdragsöverskridande om skiljemännen haft att tolka parternas anvisning om tillämplig lag och de därvid har tolkat anvisningen felaktigt.”

¹⁷⁹ My translation. Original text in Swedish is as follows: “Enligt hovrättens mening kan det bli fråga om ett uppdragsöverskridande endast om skiljemännens tolkning av lagvalsklausulen skulle visa sig vara grundlös så att deras bedömning får anses likställd med att de i det närmaste ignorerat en bestämmelse om tillämplig lag.”

excess of mandate exist.¹⁸⁰ Moreover, the Court also stated that the claimant did not show that a procedural irregularity had occurred.

4.4.2.3 *Amco Asia Corporation v Indonesia and Klöckner v Cameroon*

In the two cases discussed in the previous section, the courts concluded that the interpretation and the method of interpretation are within the arbitrators' mandate. In addition to these cases under the SAA, there are two international cases, under the Washington Convention¹⁸¹ as *lex arbitri*, of interest. The reviewing committees held in both cases that the arbitrators had exceeded their mandate. According to the Washington Convention, the substantive law applicable is the law of the contracting country.

In *Amco Asia Corporation v Indonesia*,¹⁸² the parties had not determined the substantive law and therefore the substantive law applicable was Indonesian law. In the committee's review, it was held that the arbitrators "failed to apply the relevant provisions of Indonesian law."¹⁸³ The committee explicitly held that the arbitrators had failed to apply the correct provisions, which must be seen as a misapplication of law rather than disregard of law. Hence, the committee practically reviewed the award on the merits of the case.¹⁸⁴

In *Klöckner v Cameroon*,¹⁸⁵ the parties had not determined the applicable law and therefore the substantive law applicable was French law, which was considered to be the law applicable in Cameroon. The arbitrators had in the award explicitly stated that their conclusions had been reached based on French law. Although the committee that set aside the award noted the difference between a misapplication of law

¹⁸⁰ Madsen, *Commercial Arbitration in Sweden*, p 230.

¹⁸¹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement Of Investment Disputes, Washington (1965).

¹⁸² *Amco Asia Corp., Pan American Development Ltd. And P.T Amco Indonesia v Republic of Indonesia*, excerpts published in *International Legal Materials* (1985) p 1022.

¹⁸³ Decision of *Ad Hoc* Committee on Annulment of Arbitral Award in *Amco Asia v Indonesia* is an English translation in *ICSID Review – Foreign Investment Law Journal* (1986) pp 166-190.

¹⁸⁴ Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration*, p 105.

¹⁸⁵ *Klöckner Industrie-Anlagen GmbH, Klöckner Belge S.A and Klöckner Handelsmaatschappij B.V v United Republic of Cameroon and Société Cameronnais des Engrais* ICSID Case no. ARB/81/2. published in *Yearbook Commercial Arbitration* (1985) pp 71-78.

and disregard of law, it concluded that the arbitrators had manifestly exceeded their mandate by resolving the case on equity.¹⁸⁶ Since the arbitrators explicitly stated that French law was applied, it is debatable whether or not the arbitrators rather misapplied the law and thus the committee reviewed the award on the merits of the case.¹⁸⁷

Similar to the *Czech Republic v CME Czech Republic*, the parties had not explicitly agreed upon substantive law in these disputes, except indirectly through the Washington Convention that appointed the contracting state's law. The interest of party autonomy is not as substantial through this indirect choice of substantive law, but the reviewing committees still held that (i) the arbitrators' misapplication of law and (ii) decision on equity can constitute excess of mandate. A decision on equity could constitute excess of mandate since it needs the parties' explicit consent, but the grounds on which the committee came to this conclusion are dubious.

The cases demonstrate the difficulty in distinguishing the misapplication of law from disregard of law. Both cases have been heavily criticized as going too far in the review of awards,¹⁸⁸ and therefore, the cases should not serve as an example on how national courts should handle demarcation problems that occur.

4.4.3 Procedural irregularity

4.4.3.1 NJA 1937 p 120

The application of procedural irregularity on joint party instructions could also illustrate the demarcation problems that occur in national courts' review of awards. The cases below shed some light on the scope of review of procedural errors. To my knowledge, there has not been any case law dealing in depth particularly with procedural irregularity and the arbitrators' application of the wrong substantive law.

¹⁸⁶ Decision of the *Ad Hoc* Committee on Annulment of Arbitral Award in *Klückner v Cameroon* is published in an English translation in *ICSID Review – Foreign Investment Law Journal* (1986) pp 90-144.

¹⁸⁷ Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration*, p 104.

¹⁸⁸ See for instance Redfern, "ICSID – Loosing its Appeal?" in *Arbitration International* (1987) pp 107-108 and 117-118, and Craig "Uses and Abuses of Appeal from Awards" in *Arbitration International* (1988) pp 2011-214.

Therefore, it is necessary to look at how other party instructions have been reviewed by national courts.

In the Swedish Supreme Court case NJA 1937 p 120 an insurance holder challenged the award. The ground for challenge was that the arbitrators did not follow the list that the insurance company had provided, and that the arbitrators should set specific values in relation to the list when they estimated the damages. The Court found that the fact that the arbitrators did not follow the list or set specific values, constituted a procedural irregularity (although it did not influence the outcome of the case). Hence, the case illustrates two interesting circumstances. Firstly, the provision procedural irregularity could include the arbitrators' internal deliberations regarding the award.¹⁸⁹ That is, a procedural irregularity does not have to be something that occurs in the actual proceedings with the parties, as it could also be an irregularity more closely related to the substantive matters of the dispute, such as the arbitrators' assessment of the case. Secondly, since the Court actually reviewed whether or not the arbitrators had followed the joint party instructions in the deliberations, there is a tendency toward a wide scope of review of procedural errors. It seems like the Court actually reviewed whether the arbitrators' assessment was in accordance with the joint party instruction. Consequently, when the joint party instructions are clear on how the arbitrators should resolve the dispute or assess parts of the dispute, it seems as though the court does not review whether the arbitrators had any discretion in the deliberations and assessment, but rather concludes that a procedural irregularity occurred.¹⁹⁰

4.4.3.2 *Jansson v Retrotyp*

An interesting case, in which the scope of the national courts' review of procedural errors is explicitly discussed, is the Swedish Supreme Court's judgment in *Jansson v Retrotyp*.¹⁹¹ In the arbitration, the arbitrators found that one of the parties' state-

¹⁸⁹ Bolding, *Skiljedom*, p 175.

¹⁹⁰ This assertion is also concluded in Elofsson, "Skiljemäns uppdragsöverskridande och handläggningssfel. En analys med utgångspunkt i klandrade skiljedomar under perioden 1999-2009" in *Affärjuridiska uppsatser 2010/2011*, p 86.

¹⁹¹ NJA 1975 p 536 (*Jansson v Retrotyp AB*).

ments meant that the party had withdrawn from the request for arbitration. The party then claimed that the arbitrators' dismissal of the dispute should be revoked. The Court clarified, after stating that the award cannot be challenged on substantive ground, in the judgment:

”The provisions express the view that a party agreeing upon an arbitration agreement, without reservation of challenge, nevertheless has a right to judicial review to ensure that no significant violation of the procedural rules occur. For this view to be adequately met requires not only that the grounds for challenge against the award apply by analogy to decisions, whereby arbitration concluded without considering the issue, but also that such "errors in relation to the procedure" under § 21 Arbitration Act thereby consider both errors on the actual assessment of the procedural issue and errors with respect to the procedure.”¹⁹²

The Court then stated that some supposedly substantive matter in the arbitrators' dismissal is not an obstacle for reviewing whether the arbitrators had interpreted the party's withdrawal correctly. Consequently, the judgment implies that parties have an interest that the procedural rules not to a significant extent are breached and therefore, the scope of review could be extended.

The Court's statement could be interpreted differently depending on which part you emphasize. On the one hand, Hobér asserts that the statement implies that only significant procedural errors or mistakes may serve as a basis for a request to challenge an award.¹⁹³ On the other hand, reading the Court's next sentence stating that, for the parties' right to not have the procedural rules breached, procedural mistakes should include both the assessment of the procedural question and mistakes regarding the deliberations thereof. Mistakes regarding the deliberations must, in my opinion, relate to the assessment of the procedural question *i.e.* how the arbitrators come to a conclusion in the procedural question. This is also supported by the

¹⁹² My translation. The original Swedish text is as follows: “Bestämmelserna ger uttryck för uppfattningen, att part som träffar skiljeavtal utan förbehåll om klandertalan likväl har anspråk på domstols kontroll av att processuella regler icke i väsentlig mån åsidosatts. För att denna uppfattning skall bli i rimlig utsträckning tillgodosedd fordras ej blott att bestämmelserna om klander av skiljedom tillämpas analogiskt på beslut, varigenom skiljeförfarande avslutats utan prövning av saken, utan även att såsom "fel i avseende på ärendets behandling" enligt 21 § lagen om skiljemän därvid betraktas såväl fel beträffande själva bedömningen av den processuella frågan som fel med avseende på handläggningen av denna.”

¹⁹³ Hobér, *International Commercial Arbitration in Sweden*, p 296.

previously discussed case NJA 1937 p 120. That would imply that courts should review substantive matters to the extent necessary to ensure that no significant procedural error has occurred.

The two interpretations, either to emphasize significant procedural errors or to permit the inclusion of the deliberations of the procedural error, are not completely contrary. They are linked together by the fact that the scope of review of procedural errors should be extended in order to ensure that no significant procedural error has occurred. In my opinion, it seems like the Court's statement implies that even a procedural question that involves substantive matters could be reviewed in national court to ensure that significant procedural rules are not breached. Although only significant procedural errors should be challengeable, the statement could indicate that the scope of review of procedural errors needs to be extended. The scope of procedural review would thus extend to both the assessment of the procedural question and mistakes regarding the deliberations thereof. This is regardless of whether a substantive issue has to be reviewed in order to reach a conclusion about the procedural error. Consequently, national courts seem to handle the demarcation problem between substantive errors and procedural errors pragmatically since it seems like the matter of concern is if a procedural error has occurred.

4.4.3.3 *Soyak v Hochtief*

In the discussion concerning demarcation problems, indirect party instructions through institutional rules are also relevant. In the Swedish Supreme Court's ruling in *Soyak v Hochtief*,¹⁹⁴ the party instruction regarded giving reasons in the award. If the previous two cases have shown tendencies toward a wider scope of review of procedural errors, the *Soyak v Hochtief* would conversely indicate a narrow scope of review in national courts.

The arbitration was under the SCC Rules, which stipulate that the arbitrators *shall state the reasons upon which the award is based*.¹⁹⁵ By accepting the SCC Rules, these form

¹⁹⁴ NJA 2009 p 128 (*Soyak International Construction & Investment Inc v Hochtief AG*).

¹⁹⁵ Section 36 of the SCC Rules.

part of the agreement between the parties. One of the parties challenged the award, claiming that the award should be set aside due to lack of, or incomplete, reasons on the provision excess of mandate. However, the Court concluded that the excess of mandate provision addresses the object of the arbitrators' assessment on the merits and gave examples of quantitative excess of mandate.

Instead, the Court argued, instructions that address the conduct of the proceedings within the scope of the arbitration agreement, claims, invoked circumstances and evidence are to be assessed through the challenge ground procedural irregularity. Hence, the parties' instructions on giving reasons should rather be assessed on the ground procedural irregularity.¹⁹⁶ The Court further noted regarding giving reasons that:

“A challenge does not allow for a substantive review of the arbitration tribunal's decisions. Because of this, and that a qualitative assessment of the reasons would cause major demarcation difficulties could only a complete lack of reasons or reasons, which under the circumstances must be considered to be so incomplete that it can be equated with that reasons are missing, imply that a procedural error exists. In such a gross procedural error it may, on the other hand, be presumed that the lack of reasoning have influenced the outcome.”¹⁹⁷

Although the *Soyak v Hochtief* case concerns giving reasons in the award, it is an instruction similar to the instruction of what substantive law to apply. The difference between the two instructions is that giving reasons serves as a procedural safeguard for correct awards whereas the parties' choice of law serves the interest of party autonomy. The Court stated that since a substantive review cannot be done and that an assessment of the reasons would cause demarcation difficulties, only in cases of complete lack of reasons or when the reasons are so incomplete that they are equated with no reasons, could a procedural irregularity have occurred. The

¹⁹⁶ Earlier doctrine claims that an award cannot be challenged due to lack of reasons or incomplete reasons, see Heuman, *Skiljemannarätt*, p 654.

¹⁹⁷ My translation. The original text in Swedish is as follows: ”En klanderprövning ger inte utrymme för en materiell överprövning av skiljenämndens ställningstaganden. På grund av detta och då en kvalitativ bedömning av domskälen skulle ge upphov till stora gränsdragningssvårigheter, kan bara en total avsaknad av domskäl eller domskäl som med hänsyn till omständigheterna måste anses vara så ofullständiga att det kan likställas med att domskäl saknas medföra att ett handläggningsfel föreligger. Vid ett sådant grovt handläggningsfel kan det å andra sidan presumeras att avsaknaden av domskäl har inverkat på utgången.”

Court concluded that in such a gross procedural error it could be presumed that the lack of reasons has influenced the outcome.

The Court's assessment is similar to the Svea Court of Appeal's judgment in *Czech Republic v CME Czech Republic* where it was stated that an interpretation of the parties' choice of law must be so groundless that it can be equated with the arbitrators' disregard of the parties' choice of law. Consequently, the interest finality prevails over the interest of party autonomy and the procedural safeguard of giving reasons in awards, unless there is no manifest violation of the parties' choice of law or of giving reasons. Thereby, the scope of review of procedural errors is similar in *Czech Republic v CME Czech Republic* and *Soyak v Hochtief*, notwithstanding the fact that different challenge grounds were relied on.

4.5 Chapter conclusions

4.5.1 General

Both party autonomy and the principle of finality of awards are emphasized in law, doctrine and case law. In challenge of awards, the principle of finality is always weighed against other interests such as party autonomy or the importance of due process. Regarding the arbitrators' application of the wrong substantive law, the balance between party autonomy and finality of awards seems to be weighed differently in theory than in practice. Although the situation could be referred to both excess of mandate and procedural irregularity in theory, it is very difficult to be successful in a challenge proceeding. Consequently and simply put, theory emphasizes party autonomy whereas practice emphasizes finality of awards.

The fact that theory emphasizes party autonomy and the possibility to have awards set aside if the arbitrators apply the wrong substantive is not surprising. The arbitrators' application of the wrong substantive law is a procedural error. However, this demands the question, why does practice emphasize the finality of awards when the arbitrators' application of the wrong substantive law is a procedural error? The answer seems to be that national courts are in challenges addressed with demarca-

tion problems pertaining to whether or not the application of the wrong substantive law is a substantive or a procedural error. Therefore, it is interesting to see how national courts handle the demarcation problems in the review of awards. The cases above indicate that although it would be possible to challenge the arbitrators' application of the wrong substantive law, it is difficult for national courts to review on a purely procedural basis.

4.5.2 Excess of mandate – narrow scope of review

The Svea Court of Appeal's judgment in *JSC Aeroflot v Russo International Venture et al* and *Czech Republic v CME Czech Republic* are important for the demarcation between substantive and procedural errors. In both judgments, the Court reached similar conclusions. It was maintained that the arbitrators' interpretation of the parties' choice of law is within the arbitrators' mandate, regardless of method of interpretation. Therefore, arbitrators could interpret the parties' choice of law without exceeding their mandate under the condition that the interpretation is not so groundless that it could be equated with a deliberate disregard of law. As the legislative history seems to state according to the wording, awards could only be challenged in the event that arbitrators apply a national law other than the parties' choice of law.¹⁹⁸ Since the arbitrators must deliberately disregard the parties' choice of law, it is difficult to review whether arbitrators have disregarded vague rules of laws. Therefore in practice, national courts could most likely clarify exclusively in the event that national law has been disregarded, not merely when rules of laws have been disregarded.

There are two possible reasons to why national courts cannot review the arbitrators' interpretation of the parties' choice of law. On the one hand, the interpretation could be regarded as substantive since an error in interpretation would be a misapplication of law. National courts cannot review substantive matters. It could also be argued that the arbitrators must have some discretion in the process of determining and applying the parties' choice of law. On the other hand, instead of just explaining

¹⁹⁸ See section 4.3.2.

that the interpretation is substantive, it is possible to develop the Court's statement that *the interpretation is within the arbitrators' mandate*. If the interpretation is within the mandate, the arbitrators could hardly exceed the mandate by interpreting something that is within the mandate. Thereby, an error in interpretation would also be within the arbitrators' mandate, and this means that the arbitrators have some discretion in their interpretation of the parties' choice of law if reviewed on the ground excess of mandate.

The way of reasoning is complex and seems to be contradictory to the argument that the parties' choice of law is an integral part of the arbitrators' mandate.¹⁹⁹ Therefore, an attempt to differ between the discussion on the theoretical level and on the practical level is needed. On the theoretical level it is argued that the parties' choice of law is an integral part of the arbitrators' mandate. Hence, an application of the wrong substantive law constitutes an excess of mandate. On the practical level it is argued that the interpretation is within the arbitrators' mandate. Hence, the arbitrators have discretion when interpreting the parties' choice of law, which is evident on the challenge ground excess of mandate since the mandate must be defined. Thus, the difference between the theoretical and practical level is that the arbitrators' *discretion* must be considered in national courts' review on the challenge ground excess of mandate.

Consequently, the reason that national courts cannot review the interpretation could be because errors in interpretation are within the arbitrators' mandate, and not because it belongs to the substantive matters. If this argument is valid, there is a possibility that the arbitrators' interpretation of the parties' choice of law could be challenged on the ground procedural irregularity that could allow for a wider scope of review of procedural errors. Perhaps it should be clarified that the Svea Court of Appeal in both *JSC Aeroflot v Russo International Venture et al* and *Czech Republic v CME Czech Republic* stated that no procedural irregularity had occurred. Therefore, this is a rather unconventional perspective, which is discussed further down in section 4.5.3 and in the conclusive remarks in chapter 5.

¹⁹⁹ See section 4.3.3.

As opposed to the cases under the SAA, in both *Amco Asia Corporation v Indonesia* and *Klöckner v Cameroon*, the reviewing committees held that the arbitrators had exceeded their mandate by way of a misapplication of law or by deciding the case on equity. The reviewing committees did in both cases review the arbitrators' misapplication of law, which is a substantive error. The cases could however, not be taken into too much consideration because they compose a narrow international perspective of the issue and have been heavily criticized. The arbitrators would, under the SAA, be within their mandate when they interpret the substantive law.

The arbitrators' application of the wrong substantive law seems to become a hybrid between a substantive and procedural error. The application of the wrong substantive law is a procedural error, but in the process of the arbitrators' determination and application of the substantive law, the error entails substantive matters. National courts cannot, on the challenge ground excess of mandate, review the arbitrators' interpretation either because it belongs to substantive matters or because it is within the arbitrators' mandate.

Consequently, national courts have, based on the challenge ground excess of mandate, a narrow scope of review of the arbitrators' application of the wrong substantive law. It could be argued that the balance between party autonomy and finality of awards is thereby reasonable since the arbitrators must have some discretion without risking the award being set aside. It seems as though the only possibility for a successful challenge is when the arbitrators deliberately disregard the parties' choice of law. Nonetheless, new problems arise concerning what constitutes a deliberate disregard of the parties' choice of law. For instance, the application of *lex mercatoria*, whose content is unclear, could easily be close to an award decided on equity.²⁰⁰ Also, the application of an insufficient law could lead to the arbitrators' application of a supplementing law, which could be wrong. These issues are however; more connected to situations in which the substantive law is wrong and will not be further investigated.

²⁰⁰ See for instance ICC Award dated 26 October 1979 (1984) *Pabalk Ticaret Limited Sirketi v. Norsolor SA*, and Svea Court of Appeal's judgment 21 April 2004 (T 7483-02), *Venantius AB v Innovativ Informationsteknologi i Sverige Aktiebolag*.

4.5.3 Procedural irregularity – wider scope of review

The lack of case law dealing particularly with the arbitrators' application of the wrong substantive law and procedural irregularity leads us to draw conclusions from other cases dealing with similar joint party instructions. Therefore, it is especially important to be critical in the conclusions. It is not obvious that national courts would handle the demarcation problems that occur regarding arbitrators' application of the wrong law as other joint party instructions.

The application of the challenge ground procedural irregularity seems to some extent to allow the court a wider scope of review, both in theory and practice. The legislative history recognizes that the claimant might have to show extensive evidence to prove that a procedural irregularity occurred.²⁰¹ This is also shown in NJA 1937 p 120 and *Jansson v Retrotype*. In the first case, the Swedish Supreme Court concluded that a procedural irregularity had occurred (although not necessarily influenced the outcome of the case) since the arbitrators had not in the deliberations and assessment of the procedural question followed the joint party instruction on how to resolve the dispute. In the latter case, the Court explicitly discussed the scope of review. The Court's discussion indicates that procedural mistakes should include both the assessment of the procedural question and mistakes regarding the deliberations thereof. Consequently, the cases indicate that substantive matters could also be reviewed to ensure that no significant procedural error has occurred. As a result, national courts seem to have a wider scope of review of procedural errors on the challenge ground procedural irregularity. Additionally, as has been concluded regarding procedural irregularity, it seems like national courts have a tendency to set aside the award if the procedural irregularity is significant because the arbitrators seem to have narrower discretion in regarding "other kind of irregularities" than on the ground excess of mandate.²⁰²

²⁰¹ Govt Bill 1998/99:35 p 145.

²⁰² Elofsson, "Skiljemäns uppdragsöverskridande och handläggningsfel. En analys med utgångspunkt i klandrade skiljedomar under perioden 1999-2009" in *Affärsjuridiska uppsatser 2010/2011*, p 86.

Suppose that the challenge ground procedural irregularity provides a wider scope of review regarding violations of joint party instructions. The question arises as to whether or not this also applies to the parties' choice of law. The parties' choice of law is a joint party instruction on the conduct of the proceedings, or in other words, on how the arbitrators should resolve the dispute. As discussed in relation to the theoretical question above,²⁰³ the parties' choice of law is a joint party instruction with some particularities. It was argued that the parties' choice of substantive law cannot be defined as any other instruction on the conduct of the proceedings. That still applies, but that was held in the context of what challenge ground to refer the arbitrators' application of the wrong substantive law to, and the discussion now regards national courts' scope of review. Although there probably is a difference between the parties' choice of law and other joint party instructions, it is not necessary that this difference should be reflected in national courts' scope of review.

Nonetheless, it is debatable whether national courts could have a wider scope of review on the grounds of procedural irregularity regarding the arbitrators' application of the wrong substantive law. The Svea Court of Appeal's judgments did in *JSC Aeroflot v Russo International Venture et al* and *Czech Republic v CME Czech Republic* not differ in the scope of review between the two challenge grounds. In the judgments, it was simply stated that it had not been shown that a procedural irregularity had occurred, with reference to the discussion on excess of mandate. Additionally, the demarcation between substantive errors and procedural errors would be similar, although national courts could handle the demarcation differently depending on the challenge ground. As discussed in relation the challenge ground to excess of mandate, it could be argued that the reason why national courts cannot review the interpretation is because it is within the arbitrators' mandate, and not because it belongs to the substantive matters. Consequently, there are indications that it could be possible to extend the review of the arbitrators' application of the wrong substantive law on the challenge ground procedural irregularity. The principle of finality of awards would still be protected since there is a requirement of influence on the outcome of the case.

²⁰³ See section 4.3.3.

As opposed to the previous cases on procedural irregularity, in *Soyak v Hochtief* the Swedish Supreme Court took a rather narrow approach to the scope of review of joint party instructions. The instruction regarded giving reasons in the award and the Court concluded that only if the reasons are so incomplete that they can be equated with no reasons could a procedural error have occurred. There is a difference between this instruction and the previous instructions, which concerned how the dispute was to be resolved and thusly, closely connected to party autonomy. The instruction concerning giving reasons in *Soyak v Hochtief* is, however, more related to the safeguard of due process. On the one hand, this could be an explanation as to why the scopes of review seem to differ. On the other hand, there might be practical arguments as to why this eventual procedural error of not giving reasons cannot be reviewed to the same extent. There might also be a change of times since NJA 1937 p 120 and *Jansson v Retrotyp* are considerably older. Also, it is explicitly stated in mostly older doctrine that arbitrators should follow joint party instructions or awards risk being set aside even for minor deviations from the instructions.²⁰⁴

²⁰⁴ Heuman, *Skiljemannarätt*, p 653.

5 Conclusive remarks

“Finality is a good thing but justice is better”²⁰⁵

– Lord Atkins, House of Lords

For arbitration to remain a preferred form of dispute resolution, the party autonomy and finality of awards must be well balanced. In the context of the arbitrators’ application of the wrong substantive law, party autonomy means that the arbitrators must respect the parties’ choice of law and finality means that awards not too easily should be set aside. The need for balance between party autonomy and finality implies that there must be an effective remedy for the arbitrators’ application of the wrong substantive law. However, both challenge grounds, excess of mandate and procedural irregularity have been relied upon in challenge proceedings, but none has been successful under the SAA.

The challenge ground excess of mandate could be relied upon if the arbitrators apply the wrong substantive law. Apart from statements in the legislative history, the theory behind the application of this challenge ground could be explained by party autonomy and the arbitrators’ mandate. The parties’ choice of law is closely connected to the arbitrators’ mandate. Consequently, it is reasonable that the parties can challenge awards if the arbitrators apply the wrong substantive law.

The application of excess of mandate has practical demarcation problems. It is difficult to distinguish between substantive errors and procedural errors. As seen in *JSC Aeroﬂot v Russo International Venture* and *Czech Republic v CME Czech Republic*, the arbitrators’ interpretation of the parties’ choice of law is within the arbitrators’ mandate. National courts therefore have a narrow scope of review. Since the scope of review is narrow, awards could basically be set aside only if the arbitrators deliberately disregard the parties’ choice of substantive law. Consequently, national courts handle the demarcation problem between substantive and procedural errors by only permitting awards to be set aside if the arbitrators deliberately disregarded the law.

²⁰⁵ Zaiwalla, “Challenging of Arbitral Awards: Finality is Good but Justice is Better” in *Journal of International Arbitration* (2003), pp 199-204 with reference to *Ras Bihari v. The King-Emporer* (1933) 50 T.L.B. 1.

The challenge ground procedural irregularity could also be relied upon if the arbitrators apply the wrong substantive law. The theoretical arguments behind the application of this provision are not as explicit as for the challenge ground excess of mandate. Nevertheless, procedural irregularity has a wide scope of application as the parties' choice of law is an instruction on how to resolve the dispute and the courts in *JSC Aeroflot v Russo International Venture et al* and *Czech Republic v CME Czech Republic* refer, although briefly, to this challenge ground. Therefore, the arbitrators' application of the wrong substantive law could constitute a procedural irregularity.

The application of procedural irregularity has not been thoroughly tried in practice when the arbitrators apply the wrong substantive law. In national courts' review of other joint party instruction, there seems to be a wider scope of review on this challenge ground, but it is unclear whether this would apply to the arbitrators' application of the wrong substantive law. Provided that the mandate is the explanation to why national courts cannot review the arbitrators' interpretation more closely, there could be an opening for a wider scope of review on the grounds of procedural irregularity. National courts thereby seem to handle demarcation problems between substantive and procedural errors by permitting a more extensive review of the procedural error to also include substantive matters. It would be interesting to have the arbitrators' application of the wrong substantive law examined by the Swedish Supreme Court on the distinct arguments regarding a wider scope of review on the grounds of procedural irregularity.

The difficulty to challenge if the arbitrators apply of the wrong substantive law could have several undesirable consequences. For instance, the arbitrators could (mis)interpret the parties' choice of law on purpose,²⁰⁶ or an application of *lex mercatoria* could be a hidden decision on equity. Additionally, as the arbitrations *Texaco*, *BP* and *Liamco* as discussed in the thesis' introduction show, the same choice of law clause could be interpreted in different ways.

²⁰⁶ See also Cordero Moss, "Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?" in *Stockholm International Arbitration Review* 2005:1, p 20 and Lindskog, *Skiljeförfarande – En kommentar*, pp 883-884 footnote 113.

The imbalance between party autonomy and finality of awards regarding the arbitrators' application of the wrong substantive law is not desirable. Throughout the thesis, the interests have been weighed against one another with the conclusion that theory seems to emphasize party autonomy whereas practice seems to emphasize finality of awards. National courts are addressed with the demarcation problem of how to review procedural errors without reviewing the award on substantive grounds. Permitting a wider scope of review on the ground procedural irregularity provides an alternative school of thought of how national courts' could handle this demarcation problem. This would increase the interest of party autonomy in practice, which is desirable when the parties have appointed the applicable substantive law. It is also coherent with the consensual nature of arbitration. As Lord Atkins asserts, finality is a good thing but justice is better.

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