

Allege or Refer to Legal Facts – What Does it Mean?

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1 Introduction

The Code of Judicial Procedure, Chapter 17, Section 3, second sentence provides that a judgement may not be based on “circumstances other than those pleaded by a party as the foundation of his action”. This provision has been understood in the sense that “circumstance” in the provision refers to facts, factual conditions and the course of events, but not to the legal qualification of the fact, e.g. “purchase” or “ownership”. It must furthermore be a question of a circumstance alleged as the ground for the claim, and this refers to a legal fact.¹ Established practice sets a high requirement on clarification, at least if the other party contests.² The provision must also be applied analogically in the arbitration proceedings and is considered to be difficult for foreign arbitrators to understand because of its legal and technical meaning and requirement on precision.³ In international arbitration, it is often only required that the party has “referred” to the ground for a claim.⁴ The motives behind 17:3 second sentence are examined extensively by Robert Boman in his 1964 dissertation *Om åberopande och åberopsbördan i dispositiva tvistemål (On allegation and the burden of allegation in cases amenable to out-of-court settlement)*. The major aims of the provision, Boman argues, are to define the process to that which is in dispute and to make it clear for the parties what they need to defend themselves against and prepare evidence for. Another key aim is to make it possible to apply the rules on the burden of proof, because these are only applicable on legal facts and not on evidentiary facts, which the parties do not have to allege.⁵

The theoretical framework surrounding the allegation of legal facts and subsumption is, in brief, that: norms or rules of law are abstract and neither true nor false; that the allegations made in the case by the parties on the course of events to be assessed are, however, true or false, but that in general one must be content with probabilities; that the evidentiary activities in the dispute usually require evidentiary themes that are as descriptive as possible so that what needs to be proven can be assessed and so that the other party can defend themselves; and that the ultimate evidentiary theme is a concrete legal fact which is then subsumed under the relevant rule of law.

The term “ground” is usually not used for individual concrete legal facts. It instead generally refers to all elements in a prerequisite that, according to the plaintiff, are required for the legal consequences to ensue. For example, the plaintiff alleges as basis for the claim “negligence”, “complaint” or “implied-in-fact contract” and the defendant objects with “contributory negligence”, “inaction” or “statutory limitation”. The judicial process is about these grounds and the adverse party’s objections and these both constitute and define the parties’ battleground in the process. Similarly, the parties must specify both

1 Boman, Robert, *Om åberopande och åberopsbörda i dispositiva tvistemål*, (Stockholm 1964) p. 46 with references.

2 See e.g. NJA 1980 p. 352 and Boman p. 72 f.

3 SOU 2015:37 p. 131.

4 *Ibid.*

5 Boman p. 19 ff.

grounds and objections in arbitration. The question, however, is how detailed these should be. To decide this, it is necessary to first look more closely at the Swedish concept formation in this area.

2 Different Types of Facts

General sentences of experience or commonplace generalisations connect evidentiary facts and auxiliary facts with the evidentiary theme and also have significance in the subsumption itself. Without commonplace generalisations, it would not be possible to draw any conclusions on empirical relationships between facts. Subsumption means that the legal facts in the case are compared with the abstract rules of law. The specified legal rule that the court ultimately uses in the case consist of relevant legal facts in the sequence of events, to which a legal consequence is linked, e.g. liability to pay damages. The connection between legal facts and legal consequences is not empirical; it contains an element of *volition* concerning how things *should be*. Commonplace generalisations furthermore do not need to be alleged, nor is an allegation of a legal rule required, even if such is the reason for a commonplace generalisation or if it is used in the application of law. This is considered in any case to apply on principle.

The difference between commonplace generalisations and facts are that the first are abstract, e.g. “People are mortal” is – strictly speaking – a general sentence of experience, while the sentence “Nick is mortal” is a statement of fact. Moreover, this is a notorious fact, just as the sentence of experience is commonly known. Notoriety means that no evidentiary activity is required at all concerning the existence of a fact that everyone can be assumed to know. According to Boman, even notorious legal facts must be alleged in cases amenable to out-of-court settlement. If a “vehicle” were to be a legal fact in a dispositive legal rule, this must, according to Boman, be alleged under RB 17:3, second sentence.⁶ I permit myself, however, to call into question whether Boman is right about this. Why is it necessary to allege e.g. a car as a “vehicle” when it is implied already from the outset in the lawsuit that it is about a “vehicle”?

In procedural law, the concept “inferred” is also important. An inferred fact is a fact that follows from other premises that have already been presented in the case, i.e. it is concluded. A circumstance can thus lead to a conclusion about the existence of another fact, which is thereby inferred into the case: A was seen walking into a room and has not come out. A must therefore still be in the room. Or: A is wearing ripped jeans. He has presumably not hired the jeans from a clothing firm. If, during the procedure, the judge looks out of the window and thinks, “beautiful weather”, this is probably not a thought that has arisen as a result of the case. Furthermore, if on the other hand the judge thinks that one of the parties seems “poorly briefed on the case”, this fact is of course inferred as a result of the case, but it is perhaps irrelevant. In short, the term comprises thoughts that arise among the participants in the proceedings in view of the case

6 Boman p. 67.

to be decided. However, it cannot be assumed that all of the participants in the proceedings make the same reflections and infer the exact same circumstances. This does not seem to matter because only such facts that have been inferred and which have legal or evidential relevance may ultimately be significant. Not even with this limitation, however, can one be certain that the parties and the court have made the same observations. It is furthermore possible that the court, perhaps first during deliberation, discovers an important evidentiary fact that follows from the body of evidence and that the parties overlooked.

As shown above, the concept “infers” is comprehensive. It comprises everything that happens during the main hearing and facts which are inferred from the case documents, if these documents are referred to during the main hearing, even if these facts are not mentioned. However, in dispositive cases a concluded legal fact must have been alleged during the main hearing in order to be regarded as a foundation for the claim. In arbitration, no distinction is made between preparatory proceedings and main hearing. All conclusions concerning facts during the case procedure may therefore be used. Because the decision basis in the judicial process formally is limited to that which has arisen during the main hearing, facts inferred during the preparatory proceedings and not during the main hearing may not be taken into consideration. But how is this decided? In this respect, there is probably little difference between arbitration and judicial process in practice.

Facts that have been inferred have also occurred in the case. Ekelöf & Boman argue, however, that the language used in this area is strange, because what is inferred should also have been *mentioned* by the court.⁷ However, there is no requirement concerning this mention. The term in question thus does not require any *action* from the court or the parties, but is instead aimed at a conclusion of an inductive or deductive nature raised by the process material or events during the judicial process. Yet if the court then in this way brings in facts relevant to the outcome of the proceedings, should not the parties be permitted to give their opinion on these, considering the adversarial principle? Yes, one may perhaps think. Yet this would be, as Fitger points out, process economic madness⁸ because, first, it is not appropriate to seek to limit the court’s ability to think and draw conclusions in view of the process material, and second, it is not practically possible. Furthermore, the courts intellectual work raises the question of whether it is possible to draw a distinct line between legal reasoning and alleging facts. There are different stages in legal reasoning and also different levels, e.g. hypothetical ones, and various sorts of conclusions about facts. Must these concluded facts have been alleged? I would answer this in the negative. Usually, these facts are on an abstract and principled level and also necessary to find in accordance with the principle of *jura novit curia* in order to reach and clarify the legal rule that will be applied in the individual case. However, it could be difficult to define and draw a distinct line between legal reasoning and the allegation requirement, if this comprises details in the necessary conditions. As far as evidence is concerned, however, the court should, in light of the

7 Ekelöf, Per Olof and Boman, Robert, *Rättegång IV*, (Stockholm 1992) p. 22.

8 Fitger, Peter, *Rättegångsbalken*, (Stockholm 2014) 35:52.

adversarial principle, inform the parties about a more *substantial* evidentiary fact inferred during the main hearing so that they are not *surprised* and so that any relevant rebutting or contrary evidence can be presented.⁹ If this occurs during deliberation, it will be possible to hear the parties before judgement is rendered.

Another concept that belongs to this troublesome family of concepts is the concept of “fact of interpretation” or “application of law fact”.¹⁰ Typical examples of such circumstances, which deal with *the meaning of a rule*, are statements in the preparatory work, legal cases and doctrine on the rule’s meaning. However, certain circumstances in a specific case and in a contract can also serve as a fact of interpretation. In a contract dispute, for example, certain clauses can be used as facts of interpretation for what the parties intended or meant. The distinction between facts of this type and evidentiary and legal facts can be subtle and discretionary because issues of contract interpretation exist in the grey zone between evaluation of evidence and application of law. Facts of interpretation do not need to be alleged. It is enough that they are inferred into the case, in this example through the contract itself.

The concepts discussed above are part of the procedural law toolbox. Their meanings, however, are not unequivocal. The distinction between evidentiary and legal facts in particular can be difficult to determine, as will be exemplified below. Similarly, the term “allege” is not set in stone. It is not a requirement that a party *explicitly* alleges a circumstance. The allegation may interpretively follow from the content of the summons application and other process documents showing that the party may be considered to have shown a willingness for the circumstance to be used as basis for the decision.

3 Precision Requirement

It is accepted in the literature that the evidentiary theme in a process should be concrete and descriptive so that the process can be defined, the evidence prepared and a reliable probability assessment conducted. It is also customary and established that concrete legal facts are arranged through subsumption under legal necessary conditions such as “inaction”, “negligence” or “employee”. Just as definitive legal facts should be concrete, evidentiary facts should also be concrete and precise. The reason in both cases is that legal and evidentiary facts must be *operative*. For this requirement to be optimally met, these facts must be clear enough that it is possible to make well-grounded assumptions of both their existence and their significance. If they are vague, this may be difficult to assess, just as the evidentiary activities and defence capabilities are at risk of suffering.

Clarification means that the parties’ action must be broken down into smaller components. The more generally a necessary condition is formulated, the more times it must be broken down into smaller components, if it has been contested. The more it is broken down, however, the more difficult it becomes to distinguish between evidentiary, auxiliary, legal and even interpretative facts. It

9 Ekelöf, Per Olof, Edelstam, Henrik, Pauli, Mikael, *Rättegång V*, (Stockholm 2011) p. 35.

10 Op. cit. p. 40.

is furthermore known that a single circumstance can have multiple significations in a judicial process. In a case of negligent driving, for example, slippery conditions, high speed, fog and poor visibility can be alleged to support the driver's negligence. These circumstances are then alleged as concrete legal facts by the plaintiff; negligence consists, according to the plaintiff, of these facts in combination.¹¹ However, fog is also an evidentiary fact for poor visibility and can even be an auxiliary fact that lowers the evidentiary value in the case of a witness's observations of the driving. This means that a single circumstance, e.g. fog, can be both a legal and an evidentiary fact in the same case. I have called such circumstances *polycentric* because they can have different meanings and functions in different contexts. In a judicial process, the burden of proof rules should thus be applied on them as legal facts, while their evidentiary value as evidentiary facts may be assessed freely according to the principle of free evaluation of evidence.¹²

The requirement on the precision of legal facts and evidentiary themes should, however, not be exaggerated. Suppose that the court finds that "it must be assumed that Nick had a material interest in matters concerning a contractual relationship between Liz and the company. It is therefore likely that Nick handled the agreement between them." In this example, "material interest" is an evidentiary fact. What constitutes a "material interest", however, is not easy to determine because it is both vague and evaluative. It also expresses *the strength of a rating* of the interest, which can be weak or strong. Suppose, however, that Liz is married to Nick and performed work for the company, they own 25 percent each of the company and that the company started to falter. Instead of arranging these concrete circumstances – which could have been used as evidentiary facts instead of the more general term "material interest" – they are arranged under this general evidentiary fact, similarly to how concrete legal facts are subsumed under a necessary condition.

This way of placing the evidence-founding circumstances within a generally overriding concept leads to a higher evidentiary value in this example because the interest is *qualified*. "Material interest" thus not only consists of the facts that they are married, together own 50 percent of the company and that she performed work for the company that began to falter. In reality, these facts have no significance unless there is a commonplace generalisation that gives them meaning. The "material interest" thus arises as a result of the existence of a general sentence of experience, which basically says that if work is performed for a company that is going downhill, it is not unusual that legal action is taken to protect one's own finances and those of related parties. The commonplace generalisation, in turn, is *caused by legal rules*, which say that related parties otherwise risk losing compensation for work performed. This means that the strength of the commonplace generalisation in a specific case depend on how the relevant rules in question are applied or, to be more precise, how the party

11 Lindell, Bengt, *Sakfrågor och rättsfrågor. En studie av gränser, skillnader och förhållanden mellan faktum och rätt*, (Uppsala 1987) p. 37.

12 Lindell, Bengt, *Helhetsbedömningar och intresseavvägningar. En introduktion till användningen av multikriterieanalys och oskarp logik i en juridisk kontext*, (Uppsala 2015) p. 204.

believes that they will be applied; will the financial loss be total or limited, perhaps so limited that after an objective assessment it may be determined that there is no “material interest”? But, again, the party may not have believed that. Another problem is that the strength of the commonplace generalisation in a specific case depends on the party’s finances. For a wealthy party, a small loss means little or nothing at all. For a party who is poor, however, a slight decline can create a “material interest”.

Given the above, one might ask if it really is a commonplace generalisation that creates the evidentiary value. Perhaps it is instead a *legal rule*? This question is difficult to answer because how evidentiary value arises and is used has not been sufficiently examined. One test could be if a *legal* consequence is linked to “material interest” in the evidence situation. Is it so, in other words, that Nick should be assumed to have had a substantive or legal “material interest” in the contractual relationship between Liz and the company because they are married to each other, together own 50 percent of the company and she performed work for the company on which they are financially dependent? Let us, in order to examine this in more detail, assume that the company has gone bankrupt and that Liz makes a claim for payment under the Wage Guarantee Act. Pursuant to Chapter 7a, Section 3 of this Act, the employee, who is not covered by Chapter 12, Section 6 of the Rights of Priority Act (1970:979) in bankruptcy, is entitled to a wage guarantee. This last provision states that right of priority is not applicable if the employer “owned a substantial share of the company and had a significant influence on its activities, i.e. had a substantive “material interest” in the company. If Liz and Nick are married and Liz performed three hours of work per month and owned 25 percent of the company, the question may arise of whether Liz is entitled to a wage guarantee. Because this is a legal question, the aim of the provision becomes significant: Why was this provision introduced? What does the preparatory work say about this? Are there any legal cases as precedent?¹³ If there is any precedent in which the courts held that a 30 percent share in the company is required to meet the necessary condition of “substantial share”, the case is clear, legally speaking. Liz is entitled to compensation under the Wage Guarantee Act. Even so, a “material interest” for Nick to handle the agreement existed because of the legal relation between them and the company, on which they are dependent for their livelihoods. If, on the other hand, established practice shows that Liz had both a “substantial share” and a “significant influence in the company”, the provisions in question certainly will imply that Nick had a substantive “material interest” to handle the agreement.

Even assuming that the questions about the meaning of “material interest” do not arise in the *same case*, but instead that the first process is between the company and Liz, and the second on the right to wage guarantee, it can, at least in the absence of the right to wage guarantee, seem contradictory to claim that it

13 The term “significant influence” is thus a legal concept; for its definition, see Government Bill 1996/97 102 p. 13, where it is written that it is inappropriate to introduce a rule of presumption regarding the impact of ownership on influence. The examination should instead be carried out in light of the circumstances of the specific case, i.e. legally an overall assessment must be performed. It should also be noted that the Wage Guarantee Act in question has been amended several times and that there are a number of legal cases in the area.

is possible to consider that a legal “material interest” was not present in the first process, but was present in the second. Of course, it could certainly be argued that “material interest” in the evidence situation is an epistemological question in which general commonplace generalisations should be used, while “material interest” in the second situation is a legal question in which material interest has a different meaning, but the legal system should be *congruent* and *predictable*.

For my part, I have asserted that the evaluation of evidence is not a pure epistemological science, but instead belongs to the application of law in a broad sense.¹⁴ It seems obvious to me that there is a feedback between commonplace generalisations and legal rules and evaluation of evidence and application of law in the administration of justice, particularly in commercial cases, in which the judicial system is largely self-sufficient in both types of sentences; legal rules cause commonplace generalisations which often become normative. Of great importance in this context is also that life experience is vague and that quite often there are no applicable commonplace generalisations. In such cases, the court *creates* a general sentence of experience: *if* a commonplace generalisation would exist it would look in a certain way.¹⁵ This construction is based on an *expectation* that a party in a certain situation should have acted in a certain way. An expectation is in itself a norm and the expectation will furthermore, I argue, come to correspond with other legal regulations in place. In light of this, it would in any case not be reasonable if significant influence and material interest were to be attributed different meanings in the same case.

4 Legal Rule Clarification Determines the Nature of the Facts

In the following example, the distinction between issues of law and issues of evidence is not as simple as in the above example on “negligence”. A shareholder sells his shares in a company, but retains voting rights for the shares, and the question arises whether this right has ceased because of inaction. It emerges that:

- 1 The assignee voted for the shares as the assignor wanted for 10 years.
- 2 The assignor stated the reservation after five years and said that he might use the voting rights.
- 3 12 years after the assignment, the assignor clearly raised the reservation against the assignee.
- 4 The assignor has stated that his intention was to retain voting rights his entire life.
- 5 The assignee voted for a long period of time without asking the assignor.

14 Lindell, Bengt, *Civilprocessen – rättegång samt skiljeförfarande och medling*, (Uppsala 2012) p. 530 ff.

15 *Op. cit.* p. 519, Stening, Anders, *Bevisvärde*, (Stockholm 1975) p. 41.

- 6 There have been no significant disagreements between the parties since the assignment took place 15 years ago.¹⁶

“Inaction” essentially means not doing anything, e.g. not taking countermeasures showing, or at least being considered to show, an intention.¹⁷ In common language, it would not seem unusual to consider inaction as something that in certain cases can be directly observed and clarified through evidential activities. To take another example, the same could sometimes apply to the necessary condition “employee”. This may appear to be true, particularly in regard to people who wear uniforms, such as police officers and security guards. Adlercreutz, who examined the meaning of the concept of “employee”, does not only use the pair of terms evidence/legal fact, but also speaks of *indicators*; certain circumstances that denote that a person is an employee.¹⁸ It is, however, a legal concept and Adlercreutz argues that it best fits in the category of legal facts. The contents of the concept must thus be determined; certain criteria must be met for someone to be considered an employee (are wages paid, and if so, how; who owns the tools; are there agreed working hours; holiday entitlement; and so on) and these criteria are legal facts, which constitute the content of the term.

With inaction, the absence of countermeasures can have a legal impact, e.g. contractual obligation arises or a right is considered to have been provided. This obligation may obviously not be assessed freely as an issue of evidence pursuant to RB 35:1, if limits have been set legally, through statements in the preparatory work or through case law, for when and how inaction has legal effects. If the matter is unregulated, the parties may perhaps not be able to make a well-grounded assessment in advance of how the inaction asserted by the plaintiff with regard to different details will be assessed – as an issue of evidence or an issue of law. They can thereby also not for sure determine what should be alleged as legal or evidentiary facts. Furthermore, the legal significance of inaction may not be absolute, but rather it is instead given a presumption effect and shifts the burden of proof.

The issue of inaction is thus a legal issue. There is, regardless of what the legal sources say, an element of volition in the assessment, which is thus not merely epistemological, i.e. an empirical question of what something *is*. The question is instead whether a course of events, in which certain concrete circumstances – legal facts – have been proven, *should* lead to inaction being deemed to exist. Hurwitz, however, seems to argue that the assessment can come

16 Cf. NJA 1972 p. 29. This case, like NJA 2011 p. 429, however, does not directly raise the distinction between different types of facts, but instead the so-called “splitting ban”, which means that voting rights and ownership rights for the shares may not be separated. A shareholder agreement between the parties that is in contravention of this ban may, however, be valid from a contractual law standpoint.

17 For a discussion of the term “inaction”, see e.g. Cervin, Ulf, *Om passivitet inom civilrätten*, (Lund 1960) and Herre, Johnny, *Rättsverkan av passivitet vid mottagande av avtalsbekräftelse*, JT 2006-07 p. 687 f.

18 Adlercreutz, Axel, *Arbetstagarbegreppet. Om arbetstagarförhållandet och därtill hörande gränsdragningsfrågor i svensk civil- och socialrätt*, (Lund 1964) p. 223 ff.

in another position if it were so that the higher court were bound by what the lower court has ruled about the factual course of events.¹⁹ That the circumstances in the historical course of events are established does not mean, however, that they cannot be legally evaluated in a different way in the higher court than they were in the lower court. These facts are also legal facts in the higher court, but they might be subsumed under the legal rules in another way than in the lower court.

When a prerequisite, such as inaction for example, is broken down into multiple smaller circumstances, it can thus be difficult to assess how the court will classify these when it ultimately clarifies the legal rule that it applies in the case. One possibility is to clarify the legal rule briefly and categorically, e.g. say that a reservation must have been clearly raised by the assignor within 10 years. This is an objective assessment disengaged from the party's subjective perception of the situation. The reservation in question becomes in this case and according to this opinion a legal fact to which legal consequences are linked. Another possibility would be to consider the assignor's *intentions* and say that the examination shows that the assignor clarified that he intended to retain the voting rights his entire life and therefore cannot be deemed to have waived these rights. A continuation of this in the other direction would be to add that the assignee must have understood this. What the assignee has actually understood is an evidentiary issue. Should the legal rule be clarified so that inaction is connected to what the *assignee actually understood*, it would be an ultimate evidentiary theme (legal fact), and thus the circumstances in the example above, at least some of them, become evidentiary facts instead of legal facts of relevance for the subsumption. This requires, however, that there is an allegation of this factual realization.

5 Who Decides the Label?

Pursuant to NJA 1992, p. 375, the parties must state what they allege as legal facts and the provision does not seem under this legal case to empower the courts to sort concrete circumstances into the proper category. This may be what is written, but what it means is unclear. As discussed in the introduction to this article, it is not required that a party set a legal label on factual circumstances in the sense that these are classified under a concept such as “inaction” or “complaint”, but it is of course a great advantage if this occurs. This begs the question of whether it is required that the party alleges a course of events as constituting legal facts. Closer at hand is to assume it is sufficient that the course of events is stated as grounds for an obligation of the defendant, which should follow from the principle that the evaluation of evidence and the application of law are activities that the court or arbitration tribunal basically handle *ex officio*. Should the plaintiff have been mistaken concerning the question of whether the facts are evidentiary facts or legal facts or something else, this does not matter if the alleged course of events according to the courts' classification leads to a legal

19 Hurwitz, Stephan, *Den danske strafferetspleje*, København (1949) p. 563.

consequence. The same applies for the defendant's objections. Furthermore, if an important circumstance has been expressly alleged by the party as a legal fact, but the court in its final position deems that it is an evidentiary fact, it may be used as such because it has occurred in the case.²⁰ However, if the party has alleged a circumstance as an evidentiary fact, the court may not on its own motion attribute this circumstance to a legal fact, which follows from the prevailing interpretation of RB 17:3, second sentence. There is thus *no symmetry* between these situations, unless one is not content that it is sufficient for the parties to allege grounds and objections, i.e. without putting a label on various details.

Boman attaches great importance to the significance of the allegation for defence possibilities. If the defendant does not know exactly what he should defend himself against, he will need to defend himself against all conceivable circumstances that could potentially prompt the assessment that e.g. "negligence" has occurred. This would make the process more extensive and increase its costs. The problems that arise with respect to the allegation and its clarification would seem, however, to have little bearing on the ability of the parties to know what they should defend themselves against. To claim that the requirement on allegation of elements and details in the course of action as concrete legal facts is very important for the parties to be able to defend themselves would be tantamount to asserting that the parties in cases in which the principle of official examination is applied (indispositive cases) – and where there is thus no requirement on allegation – means that the defence capabilities of the parties are poor. To my knowledge however, no one has claimed this, but rather one relies on the contradictory principle and the court's direction of proceedings, instruments that seem to work well. In addition, the parties must provide evidentiary themes on beforehand that will clarify the dispute. Certainly one can, as Boman argues, conceive that a *witness* introduces a legal fact that the court then uses as a ground for its ruling.²¹ It must, however, be assumed to be very rare that this occurs in regard to a circumstance that is not related to the party's own argumentation in the case. Thus, the question of the significance of the allegation and *who* makes the allegation must also be clearly differentiated.

6 Concluding Thoughts

Different procedural rules or principles are applied depending on the type of fact in question, but the procedural concepts can be difficult to separate from each other. The allegation requirement applies only to legal facts but not evidentiary facts and auxiliary facts, and commonplace generalisations may be used *ex officio*, just as the evaluation of evidence and the application of law are in principle carried out *ex officio*. Commonplace generalisations for evidentiary purposes can, however, be difficult to differentiate from the significance of legal rules in a particular case. In addition, the allegation requirement could – as

20 The party should thus in this case not be considered to have made a binding arrangement.

21 Boman p. 23.

shown above – be difficult to distinguish from the principle of *jura novit curia*, particularly if the allegation requirement is detailed. Uncertainty can furthermore arise as to what is notorious and if notorious facts really need to be alleged or if a legal fact alleged by a party instead should be used as a fact of interpretation or an evidentiary fact. As far as notorious facts are concerned, one may in addition ask why they must be generally known in order to be used while at the same time the court is allowed to infer facts and use them without even informing the parties about it.

The final classification of facts in a case takes place when the court or arbitration tribunal specifies and clarifies the legal rule applied in the case. The parties' classification and clarification of their action must, however, be done before this. Given that the parties, at least in more complicated cases, cannot with certainty know what the final clarified legal rule will be, they can thus not determine in advance what significance various individual circumstances will be given, and will therefore not know for certain what they should allege as legal facts. In the end, however, the court or arbitration tribunal must take a position on this if the circumstance is uncertain and questions concerning the burden of proof are raised, because the burden of proof is only applicable on legal facts.

It is thus quite understandable if the parties do not want to lock their position through explicit and exact allegations of certain concrete circumstances as legal facts and refer to others as evidentiary facts. This is particularly true for prerequisites in the grey zone between factual and legal issues, such as "inaction". Yet this can also be difficult for the parties to assess, even if it is unequivocally a legal issue but the necessary condition is undetermined, e.g. "unreasonable" in Section 36 of the Contracts Act. Reasonably, the court should furthermore not force a position on the nature of a particular circumstance without being sure how it will ultimately be assessed, which perhaps is not possible before deliberation.

A strict application of the requirement on allegation of elements and details may not necessarily lead to a quicker and more streamlined process, but the drawbacks can be significant, particularly the risk that it will not be legally secure. Compared with a process not amenable to out-of-court settlement, in which the principle of official examination is applied, it becomes worse from a rule of law standpoint, provided it is not supported by an active substantive direction of proceedings aimed at clarifying and correcting the allegations of the parties. Furthermore, a strict application is hardly consistent with the plaintiff's objective for the process, which is to have certain contentious *issues* examined and not to, right from the outset, put the proper label on various circumstances using a concept formation that works well on paper, but which can become very complicated in actual application situations. Added to this is that it can be presumed that the party also wants the court to consider all circumstances in the course of events the party presents as argument for how the contentious issue should be resolved in substance, irrespective of how these facts may have been classified by the party. In light of this, the simplest solution would be that the parties just allege e.g. inaction as legal basis or – to put it differently – as a legal fact (on a more general level) and then present arguments on the issue at hand. The court would then do the final sorting and classification when clarifying the

legal rule used in that instance, which is the case in civil actions not amenable to out-of-court settlement.

Finally, to link with the introduction, it is proposed in Chapter 34, Section 1, third clause of the Review of the Arbitration Act, SOU 2015:37, that the Arbitration Act should be amended to contain the more liberal expression “referred to” instead of the stricter “alleged”.²² Decisive should be if a circumstance is referred to in such a way that the adverse party must have understood that it could form the basis of the arbitration award. In connection with the introduction of the present Arbitration Act, the legislators pronounced that in international arbitration disputes, adherence to the Swedish conceptual apparatus could not be expected and that greater caution should thus be taken in these cases.²³ The thought was, as the review commission points out, that international arbitration may need to be handled differently. On the whole, the analogical application in international arbitration of RB 17:3, clause 2 seems to be inconclusive. What should it actually be analogous to? Regarding international arbitration, it should rather comply with sources of law in that area of law. There is scope for such an application even in current regulation. An arbitration tribunal ultimately rules on *issues* according to the mandate it has received and not on circumstances that the parties allege or refer to and how these have been labelled in regard to these issues.

22 SOU 2015:37 p. 131, 186.

23 Government Bill 1998/99:35 p. 145.

