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Preface

This issue of MarIus contains papers submitted by speakers at the seminar co-hosted by the Institute on 16 January 2020, entitled "Norwegian Arbitration Day". This issue should be seen in conjunction with the corresponding seminar in 2019, with articles published in MarIus 515 of 2019. We are grateful to the authors for their contributions, which offer valuable insight into the diversified topic of arbitration, primarily seen from a Nordic law perspective.

Trond Solvang (editor)
Trine-Lise Wilhelmsen (co-editor)

Content overview

INVITATION

NORWEGIAN ARBITRATION DAY

16 January 2020

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19.00 – 23.00	**Tapas and wine in Professorboligen**

To what extent might the arbitral tribunal provide guidance on substantive matters?

Borgar Høgetveit Berg[1]

[1] Justice of the Norwegian Supreme Court.

Abstract

This piece is based on a speech given at the Norwegian Arbitration Day in Oslo on 16 January 2020. It is a shortened version of my article "Materiell prosessleiing i voldgift?" ("Guidance on substantive matters in arbitration?") published in *Tidsskrift for forretningsjus* (*Norwegian Journal of Commercial Law*) 2017, pages 81–96.

The article discusses whether such guidance is appropriate in Norwegian domestic and international arbitration. The legislature's idea of Norway as a "Model Law country", the the wording of the Arbitration Act and, not least, the basic principles of equality and the arbitral tribunal's position with regard to the procedural steps of the parties, imply that the arbitral tribunal may not provide guidance on substantive matters beyond its duty to clarify the parties' submissions.

Introduction

Parties and counsel seem ever more often to take their gloves off – with frequent partiality accusations, invalidation actions and even claims against arbitrators. It is therefore essential to understand the arbitral process and the role as an arbitrator. Arbitration differs materially from civil procedure on several points, which may have dramatic consequences if the process is not steadily manoeuvred. While guidance on substantive matters is one minefield amongst several, it is also where the traditional Norwegian approach differs from best practice in international arbitration.

Guidance on substantive matters means the court's – or the arbitral tribunal's – instructions as to how the substantive issues in the present case may or should be resolved. This may be by interrogating the witnesses, requesting more evidence, or, more typically, by proposals or questions implying new or alternative submissions.

There is a distinction between clarification and guidance. Clarification is generally unproblematic; it may even be necessary for all parties to understand what is being claimed. The problem is that there tends to

be a blurry line between the *clarification* of a submission and questions inviting a party to elaborate.

The intervention taking place through guidance on substantive matters may easily clash with the *equality principle* and the *principle of party autonomy*, i.e. the principle that the parties shall be treated equally in all stages of the process, and the principle that the tribunal may not rule beyond the presented evidence, claims and submissions. One of the parties will always benefit from the guidance – regardless of whether it arises from a duty or a right.

Guidance on substantive matters may therefore be a violation of section 20 of the Arbitration Act on equal treatment of parties. It may also have the effect that one or more arbitrators are disqualified under section 13 subsection 1. Both may be grounds for invalidity under section 43 subsection 1 (d) or (e) – or grounds for refusing recognition or enforcement under section 46 subsection 1 (d) or (e).

The Norwegian tradition for arbitral procedure, at least before the Arbitration Act was adopted, has been a blueprint of the litigation procedure in the ordinary courts. But is this correct when it comes to guidance on substantive matters?

The Dispute Act

To understand the Norwegian civil procedure tradition, the rules on guidance on substantive matters for the ordinary courts is a good place to start. The right and obligation to provide guidance under section 11-5 of the Dispute Act 2005 go beyond the Dispute Act 1915. When the Dispute Act 1915 was adopted, the prevailing opinion was that the courts should have a secluded role – and only consider the issues presented by the parties. The preparatory works firmly expressed that guidance on substantive matters was off limits.[2] Nonetheless, an acceptance of a certain substantive procedural guidance eventually developed.[3]

[2] Civilproceskommissionen (1908) p. 81–82.

[3] For further reading, see Berg 2017 p. 83.

Section 11-5 subsection 2 of the Dispute Act states that the court shall provide guidance that "contributes to a correct ruling in the case", but does not describe any independent duty to do so. Yet, the desire to reach a "substantively correct" result is not mentioned in section 1-1 of the Dispute Act stating the objective of the Act.

In larger disputes between professional parties, the wish for a "substantively correct" result clearly conflicts with the procedural ideology formulated in section 1-1 subsection 1 of the Dispute Act on the objective of fair, sound, swift and efficient proceedings and in the proportionality principle in section 1-1 subsection 2. For this reason alone, one must be aware that the wish for a "substantively correct" result may not be given too much weight when balanced against the other fundamental goals of civil procedure.

Section 11-5 subsection 3 of the Dispute Act stipulates that the court "shall endeavour to clarify disputed issues and ensure that the parties' prayers for relief and their positions regarding factual and legal issues are clarified". Within the principle of the arbitral tribunal's restricted position with regard to the procedural steps of the parties (*disposisjonsprinsippet*) in section 11-2, it is unlikely that the court may decide anything if submissions and opinions have not been clarified. The rule also derives from the principle of the right to be heard (*kontradiksjonsprinsippet*) – the counterparty must know what he is defending himself against. TThis part of guidance on substantive matters is entirely acceptable, also in arbitration – and this *clarification duty* will not be part of my further discussion. The question I ask is whether a line must be drawn between clarification and guidance in arbitral proceedings.

Beyond the mentioned clarification duty, the ordinary courts are mainly free – but not obliged – to provide substantive guidance. We may refer to this as a *right to provide guidance* or a *right to supplement*. In extraordinary circumstances, nonetheless, there may be a duty in this regard laid down in preparatory works – a *duty to provide guidance or to supplement*:

According to section 11-5 subsection 4 of the Dispute Act, the court may therefore "encourage a party to take a position on factual and

legal issues", and may under subsection 5 "encourage a party to present evidence". According to the preparatory works, such invitations should only be made when it is "likely" that the evidence will determine the outcome of the case.[4]

Section 11-5 subsection 6 of the Dispute Act provides that the court "shall show particular consideration to whether or not the party is represented by counsel". The core area of application of the entire section 11-5 is, precisely, cases where a party is not represented by counsel.

Section 11-5 subsection 7 of the Dispute Act draws two absolute lines, stating that the guidance must not impair the court's impartiality or function as advice to the parties. On this point, there is a slight conflict between the different preparatory works and also the key literature on the subject. The Ministry of Justice anticipates a larger degree of guidance on substantive matters and more "directly" than what the expert committee that prepared the law and the authors of the commentary to the Dispute Act may appreciate.[5] In any case, section 11-5 subsection 7 of the Dispute Act shows that there is only a very limited possibility for ordinary courts to provide such guidance – at least between equally strong parties represented by counsel.

The Arbitration Act

The preparatory works to the Arbitration Act emphasised the wish for Norway to be a "Model Law country" with the adoption of the Arbitration Act.[6] To obtain such a status, national legislation must be based on UNCITRAL Model Law on International Commercial Arbitration and incorporate most of the rules therein. Furthermore, national legislation must exclude provisions that are incompatible with international arbitration practice. Norway has obtained status as a Model Law country.

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4 Ot.prp. nr. 51 (2004–2005) p. 407.

5 Ot.prp. nr. 51 (2004–2005) p. 407, conf. NOU 2001: 32 p. 709 and Tore Schei & al: *Tvisteloven* (2nd ed., Oslo 2013) p. 418.

6 Innst. O. nr. 51 (2003 –2004) p. 10–11, Ot.prp. nr. 27 (2003–2004) p. 24 –25, NOU 2001: 33 s. 20–21.

The Model Law does *not* contain provisions on guidance on substantive matters. Considering the legislature's aspiration for Norway to be a "Model Law country", the question is *nonetheless* whether the Arbitration Act or its preparatory works may warrant the provision of such guidance in arbitration.

We may establish at once that the Arbitration Act also lacks provisions on guidance on substantive matters. The explanation that first comes to mind is the context: Arbitration is mainly a form of proceedings for professional parties – while the Dispute Act also covers non-professionals, which includes parties representing themselves and counsel with less court experience.

Guidance on substantive matters is not discussed in the preparatory works, either. The question is: Can we conclude anything from this – and from the legislative solution in the Arbitration Act in light of the Dispute Act? In my opinion, yes.

The principle of the arbitral tribunal's position with regard to the procedural steps of the parties is laid down, in nearly identical forms, in both section 11-2 of the Dispute Act and section 32 subsection 1 of the Arbitration Act. In civil procedure, section 11-5 of the Dispute Act interferes with the principle in section 11-2 of the Dispute Act. When it comes to arbitration, the principle is reflected in section 32 subsection 1 of the Arbitration Act – *without exceptions*. There is no equality principle in the Dispute Act, but equality may well be derived from one of the numerous objectives in section 1-1 subsection 1 of the Dispute Act. In that case, section 11-5 of the Dispute Act also interferes with this principle in civil procedure. In arbitration, the principle of equal treatment is found in section 20 of the Arbitration Act – *without exceptions*.

According to section 28 subsection 1 of the Arbitration Act, the parties are *alone* responsible for clarification and for presenting evidence. The arbitration process is entirely party-driven. Contrary, according to section 11-2 subsection 2 first sentence of the Dispute Act, the parties in civil litigations only have the "primary responsibility" for presenting evidence, which implies that the court may also arrange the presentation of evidence, see section 11-2 subsection 2 second sentence and section

21-3 subsection 2 second sentence. This is operationalised in section 11-5 subsection 5 of the Dispute Act, among other places, stating that the court may encourage a party to present evidence. A similar general provision is found nowhere in the Arbitration Act.

Norway's status as a Model Law country, the absence of legal rules on substantive procedural guidance, and the legislative solution in general, clearly invites an antithesis. But it does not stop there.

The rules of procedure in arbitration are distilled down to a few sections. Section 20 of the Arbitration Act, cf. Article 18 of the Model Law, establishes among other things that the parties shall be treated equally at all stages of the proceedings. Apart from that, section 21 subsection 1 of the Arbitration Act, cf. Article 19 of the Model Law, states that the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate, subject to the agreement between the parties and the Arbitration Act.

As a basic starting point, the rules of procedure in the Arbitration Act say *nothing* about supplementation from the Dispute Act. The preparatory works states that the Arbitration Act will only be supplemented by "basic principles for general dispute resolution". This is clearly *not* a reference to the Dispute Act or to civil procedure. Thus, a legal basis for guidance on substantive matters in arbitration must be sought elsewhere.

As mentioned, the legislature emphasised the wish that Norway, with the adoption of the Arbitration Act, become a "Model Law country". To obtain such a status, the national Arbitration Act must not contain provisions that are incompatible with international arbitration practice. Moreover, the limits for the conduct of the arbitral tribunal must be fixed in accordance with international best practice. This means that the use of guidance on substantive matters in Norwegian arbitration must derive from international practice.

Best Practice

So, how is the situation out there? UNCITRAL's Model Law has, as mentioned, no provisions on guidance on substantive matters. On the contrary, Article 18 states that the parties shall be treated with equality. As far as I know, there is no domestic arbitration law in any comparable countries that contains provisions similar to those found in section 11-5 of the Dispute Act – apart from various provisions on clarification and active process control. The use of *Terms of Reference* – for instance ICC Rules Article 23 – implies that the tribunal takes an active part in "tailoring" the dispute. But this does not involve material guidance.

Which prominence the abovementioned principles are to have in the process, becomes the centre – and controversy – of all debate on guidance on substantive matters. The debate will therefore be strongly marked by *procedural ideology* and opinions regarding the *objective of the process*.

The question touches the heart of the issue of role distribution between the parties to a dispute and the court. We are already aware of the tension between the restrictions on the ordinary courts' position with regard to the procedural steps of the parties in civil procedure and several of its objectives and principles. The tension will likely grow between the extensive restrictions on the arbitral tribunal and the strict equality principle in arbitration and other objectives of the process. In ordinary courts, the parties have only limited possibilities of control. In arbitration, the parties control in principle the whole process. International arbitral proceedings are infused with party autonomy and equality, see for instance Articles 18 and 19 of the Model Law.

The rules of procedure in arbitration and in ordinary court proceedings are based on fundamentally different judicial policy considerations. Ordinary court proceedings are governed by the objectives listed in section 1-1 of the Dispute Act – as well as in section 11-5 subsection 2 – while in arbitral proceedings, most of these objectives – to the extent they apply – are of a secondary nature. The reasoning behind the international consensus that guidance on substantive matters should be avoided in arbitration, may therefore be summarised in two expressions: equality

and *the arbitral tribunal's position with regard to the procedural steps of the parties*.

Ordinary courts and arbitral tribunals must keep to the truth that may be documented. The establishment of facts alone may be a challenge. In procedural terms, both the abovementioned principle and the negotiation principle limit the court's possibility of establishing the "correct" facts. One may say that the court process, based on the mentioned principles, does not seek the substantive, but the formal truth. These principles, built on the party autonomy, are far more prominent in arbitration than in civil procedure. Compared to the equality principle, and with the different objectives of the process, the desire to reach a substantively more "correct" judgment is less prominent in arbitration than in civil procedure.

More to the point, the control question with regard to the objective of the arbitral proceedings is whether the arbitrators are to find a substantively "correct" result – whatever that is – or to treat the parties equally throughout the entire process and decide the individual legal issues based on the parties' *submissions* and *presentation of evidence* before the arbitral tribunal.

Yet, *Woxholth* holds that the same factors and considerations are as a starting point relevant to the issue of guidance on substantive matters in civil procedure and in arbitration. The lack of a right to appeal and the desire to reach a substantively correct result imply that the arbitral tribunal should have more freedom than ordinary courts to provide such guidance.[7] In my opinion, this reasoning is flawed. Both the desire for a substantively "correct" result and the fact that arbitration is a "one-shot" affair, may just as well suggest that guidance on substantive matters has *no place*. The lack of freedom to provide guidance in arbitration is explained by the fact that it *is* arbitration, and *not* civil procedure.

Woxholth also holds that as long as the principle of the right to be heard is honoured, guidance on substantive matters must be accepted. If the arbitral tribunal's guidance makes the case take a turn, the negotiations are likely to be disrupted and postponed to give the parties a

7 Geir Woxholth: *Voldgift* (Oslo 2013) p. 716–718.

chance to prepare themselves.[8] This reasoning too, is flawed. Of course, the principle of the right to be heard also applies if such guidance is allowed. But this principle cannot be a *legal basis* for providing guidance on substantive matters that "trumps" the restrictions on the arbitral tribunal's position with regard to the procedural steps of the parties and the equality principle. These are two different questions.

Finally, *Woxholth* holds that guidance on substantive matters in arbitration is acceptable as long as it does not diminish the trust in the impartiality of the arbitral tribunal.[9] We recognise this from section 11-5 subsection 7 of the Dispute Act. However, this reasoning is also flawed: As mentioned, such guidance *per se* gives the receiving party an advantage. The fact that the guidance may be subtle, emerging from indirect questions or similar, does not change this. When the legislature has allowed guidance on substantive matters in civil procedure, thus giving the less professional party a privilege, it is necessary to limit this privilege. But such a measure cannot be a *legal basis* for naterial guidance in arbitration.

Conclusions

My conclusion is in line with International Law Association Resolution No. 6/2008: "*In general […] arbitrators should not introduce legal issues – propositions of law that may bear on the outcome of the dispute – that the parties have not raised.*" In my opinion, *Heuman* gives an apt summary:[10]

> "*If one considers the effects of the process management and the requirement that the arbitrators be strictly neutral, one cannot accept that they give instructions to a party simply because the instructions were vague. ... If you disregard the issues of the evidence and legal rules, process management may be conducted to get a party to clarify claims and submissions. The arbitrators should otherwise confine themselves to asking questions on such points where the parties are*

8 Geir Woxholth: *Voldgift* (Oslo 2013) p. 717.

9 Geir Woxholth: *Voldgift* (Oslo 2013) p. 717.

10 Lars Heuman: *Skiljemannarätt* (Stockholm, 1999) p. 385–386 (translated here).

> *unclear or their arguments are incomplete. Thus, if the claims and submissions are clearly worded, the arbitrators should not provide material guidance and, through questions to a party, imply that he may strengthen his case by invoking an alternative submission or demanding higher compensation or a different sanction than that claimed."*

Similarly, *Lindskog* writes that even if guidance should be allowed to obtain clarification, guidance inviting a party to act in a certain way should be avoided; the clarification should be so restrained that it does not encourage a party to present new contentions or evidence. He also mentions that although the arbitral tribunal, on its own initiative, must apply current legal rules – *jura novit curia* – such application must not surprise the parties, as arbitration takes place in one instance only. The arbitral tribunal must therefore inform the parties of their thoughts on legal rules that may be applicable. As this may give one of the parties an incitement to make new submissions, Lindskog emphasises that the arbitral tribunal should not point at legal rules that, in order to apply, require stronger submissions or further evidence.[11] I fully agree on this.

The essence thereof is that the arbitral tribunal *neither may nor should* take on the task of equalling the parties' – and counsel's – various degrees of professionalism through guidance on substantive matters. However, the arbitral tribunal must still ensure *clarification* of the parties' submissions.

The fact that it may be difficult in practice to distinguish between clarification and guidance, does not change the conclusion. At the same time, it stresses the importance of watching one's step as an arbitrator. A clarifying question may in itself have the result that the party understands that he should adjust his arguments, and not only explain what he has said or believed. But the crucial distinction is that the initiative then lies with the party or with the counsel. Active reasoning is required – and if the party is unable to give the necessary reasoning, the procedural situation remains unchanged.

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[11] Stefan Lindskog: *Skiljeförfarande* (2nd ed., Stockholm, 2012) p. 609–612.

If there should be an opportunity or an obligation to provide guidance on substantive matters in arbitration, this must be agreed separately, see section 32 subsection 3 of the Arbitration Act. If no such agreement is made, the arbitral tribunal should, during the initial discussion with the parties under the Arbitration Act section 21, make clear that it will *not* provide such guidance.

One may then object: Is my scepticism towards guidance on substantive matters an effect of "due process paranoia"? Such paranoia is defined by arbitrators' reluctance to employ the procedural tools available to them in fear of accusations of partiality and invalidity actions. They may desist from precluding evidence or from observing a time schedule – which indirectly gives the party (mis)using the process an advantage. However, in my opinion, scepticism towards material guidance is *not* "due process paranoia" – but quite the opposite. Guidance on substantive matters in arbitration involves active interference with a party-controlled process, while "due process paranoia" is a phenomenon involving a choice *not* to use the procedural tools that are *meant* to be used.

Specification requirements of requests for document production

Daria Kozlowska-Rautiainen[1]

[1] Doctor of Laws, Senior Lecturer at the Stockholm University, Director of the International Commercial Arbitration Law LL.M. Programme.

1 Introduction

This article analyses the specification requirements under the IBA Rules on the Taking of Evidence in International Arbitration. The analysis is also broadly relevant to the interpretation of the NOMA Rules of Evidence (Appendix 2 to the NOMA Guidelines), as the requirements of specificity and narrowness under the NOMA Rules of Evidence are exactly the same as those under the IBA Rules.

Documents are commonly considered to be the most valuable evidence in international arbitration.[2] However, parties in international arbitration do not always have all documents necessary to support their case. Sometimes the party will need to obtain the documents relevant to its claims and defenses from the opponent through a document request. For years now, document requests have been fairly common in international arbitration.[3] Nonetheless, the process of obtaining documents from the opponent is also notoriously considered to cause delays and raise costs of arbitration.[4] One of the reasons is overbroad and vague document requests.

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2 See e.g. Blackaby, Nigel – Partasides, Constantine – Redfern, Alan – Hunter, Martin J. *Redfern and Hunter on International Arbitration,* Sixth Edition, Oxford University Press 2015, para 6.90.

3 According to a survey conducted in 2012, 62% of respondents stated that document requests took place in more than half of arbitrations in which the respondents were involved. Whereas according to 22% of respondents, document requests took place in less than a quarter of arbitrations involving them. See 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, Queen Mary University of London and White & Case. Available at http://www.arbitration.qmul.ac.uk/research/2012/index.html, (accessed 26.5.2020) p. 20.

4 See e.g. 2010 International Arbitration Survey: Choices in International Arbitration, Queen Mary University of London and White & Case. Available at http://www.arbitration.qmul.ac.uk/research/2010/index.html (accessed 26.5.2020), p. 32 where respondents provided that document production is the longest stage in arbitral procedure, thus contributing the most to delays in resolving the dispute.

It is commonly accepted that the requested documents should be sufficiently specified.[5] The specificity and narrowness requirements are, next to the requirements of relevance and materiality, the most important limitation of the scope of document production in international commercial arbitration. This is true especially with regard to the right to request categories of documents, which could be abused to submit overly broad and vague requests. The requirements of relevance and materiality are intertwined with narrowness and specificity requirements and work together to prevent "fishing expeditions".[6]

The specification requirements serve a very practical function, namely they allow the requested party to find the requested document[7] and comply with the request voluntarily. They also help the tribunal to decide whether to order production of the requested documents.[8] Finally, the requirement of narrowness and specificity can contribute to efficient resolution of a dispute.[9]

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5 Berger, Bernhard – Kellerhals, Franz. *Internationale und interne Scheidsgerichtsbarkeit in der Schweiz*, Stämpfi 2006, p. 429; Born, Gary B. *International Commercial Arbitration,* Second Edition, Kluwer Law International 2014, pp. 2360–2361; Hamilton, Virginia, *Document Production in ICC Arbitration*, In: ICC Publication Document Production in International Arbitration, 2006 Special Supplement to ICC International Court of Arbitration Bulletin, ICC 2006, pp. 71–72. The researched ICC cases and soft law support this view.

6 See e.g. Hanotiau, Bernard. *Document Production in International Arbitration: A Tentative Definition of 'Best Practices'*, In: ICC Publication Document Production in International Arbitration, 2006 Special Supplement to ICC International Court of Arbitration Bulletin, (ICC 2006), p. 117. "Fishing expeditions" are understood as wide-in-scope requests that are made on a vague guess in hope of obtaining evidence that might not be connected to the allegations made by the party, but to support a future claim or for other purposes which are not connected to the current proceedings.

7 As one tribunal stated in the researched ICC Case 5: "[t]he request for production must identify each document or specific category of documents sought with precision. Otherwise, the other party may not be able to trace a document and the arbitral tribunal may possibly be unable to rule on its production." See also Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, available on https://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0, p. 8.

8 See e.g. Commentary on the IBA Rules, supra n. 6, p. 8 with regard to specificity requirements contained in the IBA Rules.

9 See e.g. *Hanotiau*, supra n. 5, p. 117.

This article is based on the dissertation titled: "Obtaining documents from the opponent in international commercial arbitration".[10] As in the dissertation, I refer, apart from the IBA Rules and the multiple books and articles on document production, also to source materials that I have gathered at the Secretariat of the ICC in Paris. Materials, such as terms of reference, document requests and procedural orders, from six anonymized cases numbered 1–6 serve as a valuable source of practice.

2 Guiding principles of the IBA Rules

In order to fully understand the detailed analysis of the specification requirements under the IBA Rules, it is important to be aware of the relevant principles that guided the drafters of the IBA Rules. The principles are enumerated in the Commentary on the IBA Rules.[11]

According to the first principle, wide discovery procedures are not welcome in international arbitration. As one of the drafters of the IBA Rules argued:

> [t]here shall be no US-style pre-trial discovery. Excluded from the very beginning are also so-called 'fishing expeditions'. Pre-trial discovery and fishing expeditions by one party against another are out of place in international arbitration. (…) An ongoing arbitration should be no excuse for fishing expeditions concerning documents which are not relevant to the proceedings, but may be used by the requesting party for other purposes.[12]

[10] Kozlowska-Rautiainen, Daria, Obtaining Documents from the Opponent in International Commercial Arbitration (September 16, 2016). ISBN 978-951-51-2410-4 Unigrafia Helsinki 2016. Available at SSRN: https://ssrn.com/abstract=3482448 or http://dx.doi.org/10.2139/ssrn.3482448.

[11] The Commentary on the 1999 IBA Rules is available here: https://www.ibanet.org/Document/Default.aspx?DocumentUid=07505D49-78A9-4025-87C8-4ED9E67A5612, pp. 20—21 and the Commentary on the IBA Rules, supra n. 6, pp. 7—8.

[12] Raeschke-Kessler, Hilmar, *The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence,* Arb. Int. 2002 Vol. 18 Iss. 4, p. 415.

The second principle, however, provides that limited requests for documents, also internal documents, are appropriate.[13]

Other important principles relating to obtaining documents from the opponent are contained in Article 2 and in the Preamble of the IBA Rules. The Preamble emphasizes that the procedure of taking evidence is to be "efficient, economical and fair" especially when the parties to arbitration come from different legal traditions.[14] The same principles are underlined in Article 2, which provides a mandatory early cooperation of the tribunal with the parties with regard to inter alia the requirements, procedure and format applicable to the production of documents. The aim of the consultation on evidentiary issues is that efficient, economical and fair procedures are agreed upon.[15] Moreover, good faith is also emphasized in the Preamble and strengthened with a threat of a sanction provided in Article 9(7) according to which if a party has not acted in good faith, the tribunal can *inter alia* allocate costs accordingly.

3 Specificity and narrowness requirements

The IBA Rules provide in Article 3(3)(a) that a request for document production shall contain:

> "(i) a description of each requested Document sufficient to identify it, or
>
> (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal

[13] The presented principles are provided in the Commentary on the IBA Rules, supra n. 6, pp. 7–8.

[14] IBA Rules, Preamble 1.

[15] Article 2(2)(c) of the IBA Rules.

> may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner"

As already stated, the NOMA Rules of Evidence provide the same specification requirements.[16]

In the researched ICC cases, the tribunals provided the following requirements regarding specificity. In ICC Case 1, the tribunal required that the documents be "identified in sufficient detail to avoid a 'fishing expedition' and so as not to impose an unreasonable burden to produce the requested evidence." In ICC Case 4, the tribunal stated in PO No. 1 that the IBA Rules might be taken into consideration where ICC Arbitration Rules are silent or unclear. It then went on to require that a request produced "must identify each document or specific category of documents sought with precision."

4 Requests for individual documents

What makes a request for an individual document specific or identified in sufficient detail? It has been suggested that ideally an individual document should be identified by three components: (a) the author or recipient of the document, (b) the date or time period when the document was drafted, sent or received and (c) the content of the document.[17] In some cases a document could be identified simply by providing the file number or a specific title.[18]

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16 Article 3(3)(a) of the NOMA Rules of Evidence

17 See e.g. Kaufmann-Kohler, Gabrielle – Bärtsch, Philippe, *Discovery in international arbitration: How much is too much?* Zeitschrift für Schiedsverfahren, 2004, p. 18; Raeschke-Kessler 2002, supra n. 11, p. 418.

18 Similarly, Marghitola, Reto. *Document Production in International Arbitration*, Kluwer Law International 2015, pp. 37–38.

However, it does not mean that all of the above are necessary. It might not always be possible to provide the three elements, but it might be possible to identify the document in some other way. As in ICC Case 5, for instance, the requesting party provided the following information: "[t]he entire revised draft SPA accompanying Y's binding offer dated [specific date given]". In ICC Case 4, a party requested for an agreement using its name and providing for further information that might help identify it.[19]

The interpretation of the requirement of specificity relating to an individual document is unlikely to cause significant problems. The purpose of this requirement is for the requested party to be able to identify the document so that it can be found and produced, and for the tribunal to have the knowledge needed to decide on whether to order the production or not.

5 Requests for categories of documents

The right of a party to request a category of documents is the most interesting and controversial,[20] because if not limited by requirements of narrowness, requests for categories of documents could lead to very

[19] The request was as follows: "Request for Agreement X. This document appears to exist because it is referred in amendment to agreement V (exhibit A) out of which this arbitration arises. Because the requested document is one of the amendments to the Agreement V which is central to this arbitration, the requested document should be included in the record (…)"

[20] The requirement of specificity relating to a category of document was under much discussion when the 1999 IBA Rules were drafted. The Commentary on the IBA Rules provides as follows: "[p]ermitting parties to ask for documents by category, however, prompted more discussion. The Working Party and the Subcommittee did not want to open the door to "fishing expeditions". However, it was understood that some documents would be relevant and material and properly produced to the other side, but that they may not be capable of specific identification. Indeed, all members of the Working Party and of the Subcommittee, from common law and civil law countries alike, recognised that arbitrators would generally accept such requests if they were carefully tailored to produce relevant and material documents." Commentary on the IBA Rules, supra n. 6, p. 9.

wide U.S.-style disclosure or "fishing expeditions".[21] It is undisputed that "fishing expeditions" are unwelcome in international arbitration.[22] Nonetheless the drafters of the IBA Rules agreed that it should be possible to obtain relevant documents which the parties are unable to identify as individual documents.

5.1 What constitutes a category of documents?

It is considered that documents create a category when they are the same or similar and relate to the same issue that the requesting party wants to prove.[23] Typically, documents which cannot be identified, but can be described as a narrow and specific category are internal documents, i.e. minutes of board meetings, internal memoranda and reports. Due to their internal nature, the requesting party does not know of their existence, but based on a set of circumstances can assume that they exist.[24]

An additional requirement, especially important with regard to requests for categories of documents, is that they are reasonably believed to

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21 Hamilton, supra n. 4, p. 71; Hafter, Peter, *The Provisions on the Discovery of Internal Documents in the IBA Rules of 1999*, In: Gerald Aksen et al. (eds.) Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner, ICC 2005, pp. 348, 360.

22 As Habegger argues: "[a]s for the requirement of specification, unspecific and excessive demands are, in general, not accepted. Fishing expeditions or US-style discovery, enabling a party to formulate its allegations and to present its case are thus not permitted. This is also reflected in Article 3(3)(a) IBA Rules, which requires either a description of a requested document sufficient to identify it, or a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist." Habegger, Philipp, *Document Production – An Overview of Swiss Court and Arbitration Practice*, In: ICC Publication Document Production in International Arbitration, 2006 Special Supplement to ICC International Court of Arbitration Bulletin, ICC 2006, p. 29.

23 Raeschke-Kessler, supra n. 11, p. 418; Zuberbühler, Tobias – Hofmann, Dieter – Oetiker, Christian – Rohner, Thomas, *IBA Rules of Evidence. Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, Schulthess 2012, p. 52.

24 Hafter, supra n. 20, p. 348.

exist.[25] The requesting party explains why it believes that such documents exist. This requirement aims at avoiding "fishing expeditions", i.e. a party cannot request for documents it only hopes to find.

5.2 How to specify a category of documents?

The IBA Rules require that a request contains "a description in sufficient detail (including subject matter)" of a narrow and specific category of documents. Apart from the subject matter, according to an example provided in the Commentary on the IBA Rules, the category of documents could be described by providing the nature of the documents and the general time frame.[26] In principle, a category of documents could be described by the same information as individual documents.[27] However, it needs to be remembered that if the party was capable of such detailed description it could request individual documents as opposed to categories.

One could ask whether there is a difference between a "narrow" category and a "specific" category of documents. The interpretation of the IBA Rules suggests that the narrowness and specificity both relate in the same way to how the category of documents is described. The Commentary to the IBA Rules does not distinguish between the two adjectives[28] and neither do authors writing on the topic.[29]

The requirements are connected but are not synonyms. It could be argued that the specificity requirement pertains more to how the category is described; whereas the narrowness requires that the category does not

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[25] Although as seen in the ICC Case 4 a request for an individual document can also refer to such document that the party has not even seen, but has reason to believe that it exists. For instance, because this document has been referred to in some other document that the requesting party has seen.

[26] Commentary on the IBA Rules, supra n. 6, p. 9.

[27] See Marghitola, supra n. 17, pp. 40–41.

[28] Commentary on the IBA Rules, supra n. 6, p. 9.

[29] See e.g. Blackaby – Partasides et at., supra n. 1, paras 6.96–6.102; O'Malley, Nathan D., *An Annotated Commentary on the 2010 Revised IBA Rules of Evidence for International Arbitration*, International Construction Law Review, October 2010, Vol. 27, Part 4,, p. 468; Zuberbühler – Hofmann et al., supra n. 22, pp. 51–53.

cover too broad a time frame, too many authors, or too many types of documents. A narrow category will most probably also be specific, but a specific category might not be narrow, especially when it is disguised as many requests for categories.[30] However, it is important to bear in mind that the narrowness requirement should not be equated with the amount of documentation that is going to be produced. The amount of evidence that falls under the category will not be known to the requesting party and much less to the tribunal at the time the request is made.[31] A request for a seemingly narrow category of documents can result in a large number of responsive documents whereas a request for broad category of documents might result in just a few documents being produced. The issue is that in the latter case the request was probably not specific enough.

5.2.1 Examples – the good and the bad

To understand how the narrowness and specificity requirement can be interpreted with regard to categories of documents, it is interesting to look at some examples of requests for categories of documents supplied by commentary and cases. The Commentary on the IBA Rules provides the following guidance as to when a category could be requested:

> [I]f an arbitration involves the termination by one party of a joint venture agreement, the other party may know that the notice of the termination was given on a certain date, that the Board of the other party must have made the decision to terminate at a meeting shortly before that notice, that certain documents must have been prepared for the Board's consideration of that decision and that minutes must have been taken concerning this decision.[32]

Even though the party cannot identify the particular document, the known information should allow the party to identify the requesting

30 Marghitola, supra n. 17, p. 41.

31 Darwazeh, Nadia, *Document Discovery and the IBA Rules on Evidence: A Practitioner's View*, In: International Arbitration Law Review, 2002, Vol. 5, Iss. 4, p. 106.

32 Commentary on the IBA Rules, supra n. 6, p. 9.

documents to the extent that it constitutes a narrow and specific category of documents.

Other examples can be found in the literature. One author provides the following scenario. A claimant alleges that a respondent has an implied contractual obligation. The respondent's defense is based on proving that the obligation was discussed during negotiations and explicitly refused by the respondent. The respondent is aware of the fact that the claimant discussed the negotiations with the board and suspects that there needs to be documents passing between the claimant and the board that can prove that the respondent refused the obligation. The respondent should submit a request for a category of documents, i.e. board protocols concerning negotiations with respondent that regard the alleged obligation of respondent.[33]

On the basis of the above examples it could be concluded that a request for a narrow and specific category of documents should contain the description of at least a few of the following: the subject matter, the persons involved or the type of document. What is not stated explicitly in those examples is that the requesting party could also narrow down the time frame when the requested category of documents has been drafted.[34]

Another example is from the LCIA case *ABB Ag v Hochtief Airport GmbH & Anor*[35] where Hochtief requested for the following categories of documents:

> [A]ny and all documents within its possession, custody or control purchased between 1 July 2002 and 31 March 2003, including communications and evidence of communications, correspondence and internal notes, in preparation for, during or following the discussions held in and around January 2003 between ABB and [Hochtief] relating to the possibility that ABB would transfer its AIA shares to [Hochtief], including but not limited to documents

[33] Raeschke-Kessler, supra n. 11, p. 418.

[34] See also O'Malley, Nathan D. *Rules of Evidence in International Arbitration: An Annotated Guide*, Informa Law 2012, p. 42.

[35] [2006] EWHC 388 (Q.B. Comm.).

> evidencing related communications between ABB and any company or officer of the Copelouzos Group.[36]

The above category of documents is limited by a time frame which is not overly long and it is limited by the persons involved in the communications. Despite the fact that the request begins with the term "any and all documents" the tribunal has decided that this request was acceptable and ordered their production.[37]

The researched ICC cases also provide examples of requests for categories of documents. The following requests from ICC Case 5 were considered to be sufficiently specific[38] by the tribunal: (i) "all letters of intent from potential buyers of Company A received by Respondent during due diligence process between time period X-Y (one year)"and (ii) "all possible binding offers from potential buyers of Company A other than Claimant and D received by Respondent during due diligence process between time period X-Y (one year)."

Similarly, to the examples provided previously, the above requests describe the type of the documents and the persons involved. Here, the time period is specifically determined. In the above-mentioned case, the subject matter of the requested documents was explained in the part of the request focusing on explaining the relevance and materiality of the requested documents.[39]

Examination of overly-broad requests can also be insightful in determining where the line between specific and unspecific request goes. As one commentator rightly points out: "[t]here is a fine but important

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36 *ABB Ag v Hochtief Airport GmbH & Anor* [2006] EWHC 388 (Q.B. Comm.), at 29.

37 *Ibid*. at 30.

38 The specificity standard provided by the tribunal was as follows: "[t]he request for production must identify each documents or specific category of documents sought with precision." The tribunal also stated in the Procedural Rules that it "may seek guidance from, but will not be bound by, the IBA Rules"

39 The document request had the form of a Redfern Schedule. A Redfern Schedule is a table, typically comprised of four columns: Request, Reason for request, Objection and Tribunal's decision. It is a tool which is designed by Alan Redfern in order to manage submissions regarding document production. It helps to organize the requests, objections and tribunal's orders.

distinction between an incoherent and non-specific categorization and a detailed narrow and specific description."[40] The same author provides hypothetical examples of both specific and insufficiently specific requests. He argues that a request for "all documents being, evidencing, relating to, touching upon or concerning communications between A and B"[41] would most probably be assessed as not fulfilling the requirement of specificity and narrowness, but a request for "all emails and letters between A (acting by its employees C,D or E) to B (acting by its employees F,G or H) in the period from J to K relating to L together with any documents attached or enclosed, located in the paper files in the offices at M or on the computer servers at M and containing one or more of the following words N, P or Q" would have much better chance in being sustained by the tribunal.[42]

Another author provides examples of requests for categories of documents from real cases. These two requests for categories of documents were denied due to that fact that they did not fulfill the narrowness and specificity criterion. The first was for "[c]opies of any correspondence or other written communications to or from potential buyers or their representatives regarding or referring to their receipt of the internal audit reports and/or the internal audit reports themselves."[43] Whereas the second one aimed at obtaining "[c]orrespondence, reports, meeting minutes, notes, internal memoranda and emails relating to twelve specified topics and a period exceeding six years."[44]

Finally, the researched ICC cases serve as a valuable source of what can be understood as an overly wide request. As the tribunal in ICC Case 1 stated, "requests for 'all' documents is too vague and cannot be accepted. The documents shall be identified in sufficient detail to avoid a 'fishing expedition' and so as not to impose an unreasonable burden to produce the requested evidence." In ICC Case 4 the respondent requested for

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40 Ashford, Peter, *Documentary Discovery and International Commercial Arbitration*, The American Review of International Arbitration, 2006, Vol. 17, No. 1, p. 101.

41 *Ibid*. pp. 101–102.

42 *Ibid*.

43 Hamilton, supra n. 4, p. 72.

44 *Ibid*.

> [a]ny and all invoices issued by or on behalf of Claimants or any affiliate and any other documents bearing indication to the amount of products sold and its prices for the same time period as the documents requested above [from the beginning to the termination of the contract].

The tribunal did not order the production of the requested category of documents. The reason was not stated specifically to be the lack of specificity of the request, but the requested party objected to the request on a number of grounds, one of which was lack of specificity of the request. Nonetheless, the above request could be considered as an example of a not-sufficiently-specific request for categories of documents.

5.2.2 Interpretation of the specificity requirements

The above examples of sufficiently-specific and narrow requests, on the one hand, and not specific and broad requests, on the other hand, assist in determining how the requirement of specificity should be interpreted.[45] Ideally, a request for a category of documents should contain a description of the type of the documents, their contents, the parties involved (author and/or recipient), a specific date or a narrow time period.[46] Whereas requests commencing with wording such as "any and all documents" bear a higher risk of being considered too vague.[47]

It has been argued that the time period as well as the subject matter serve as a very useful guideline because they can be in some way

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[45] How a request is going to be interpreted by the tribunal and the other party (the opponent might produce the documents voluntarily) will depend on whether wider in scope requests are commonplace in their practice. The opponent might also produce a vast number of documents which answer to the request if they are not damaging for its case just to flood the requesting party with documents.

[46] See also Ashford, supra n. 39, pp. 101–102; Habegger, supra n. 21, p. 29; Raeschke-Kessler, supra n. 11, p. 418.

[47] ICC Case 1; Hanotiau, supra n. 5, p. 117; Veeder, V. V., *Document Production in England: Legislative Developments and Current Arbitral Practice*, In: ICC Publication Document Production in International Arbitration, 2006 Special Supplement to ICC International Court of Arbitration Bulletin, (ICC 2006), p. 59.

measured.[48] However, as has been emphasized the specificity needs to be examined with regard to particular circumstances.[49] In some cases a request expanding on a time period of ten years could be considered narrow, whereas in another case a time period of one year could be too long. Moreover, it is not always easy to foresee if a certain time limit will lead to production of many documents or not. The point should not be that the time period is short but that it is a relevant time period, so that the time period is connected to the issue that the party wants to prove with the help of the requested documents.[50] In this way, the requirement of specificity and the requirement of relevance are interrelated. It is even more so with regard to the subject matter the requested document is to relate to. From the point of view of the narrowness and specificity requirement, the subject matter of the requested document assures that the party is not fishing for evidence. It is not enough that the subject matter is specified, it needs to be relevant and material.[51]

As has been seen in the above examples, despite the fact that the specificity requirements are commonly required, the parties still request for overly broad categories of documents.[52] The parties' excuse might be that in its legal tradition such requests are allowed.[53] This reasoning is, however, not acceptable where the IBA Rules' requirements were mentioned as a guideline or the tribunal provided requirement of specificity in own procedural rules and the parties did not agree on wide disclosure. Parties might just be taking the risk of requesting too wide category of

48 O'Malley, supra n. 28, p. 468.

49 Hanotiau, supra n. 5, p. 117.

50 See also O'Malley, supra n. 28, pp. 468–469.

51 For instance, if the requested party made an admission with regard to the said issue, the request, even though specific, will be denied on the basis of lack of materiality.

52 See also Hafter, supra n. 20, p. 351.

53 As one author stated: "[p]arties often serve broad document requests early in the arbitration seeking 'all documents' relating to the claims and defenses in the case. Although the IBA Rules provide that parties may seek specific documents or 'narrow and specific' categories of documents, document requests in the United States are often broad and focus on categories as opposed to specific documents." Kimmelman, Louis B., *Document Production in the United States*, In: ICC Publication Document Production in International Arbitration, 2006 Special Supplement to ICC International Court of Arbitration Bulletin, ICC 2006, p. 54.

documents in the hope that the requested party complies with such a request or that the tribunal orders the documents. The reason is the fear of omitting some important documents in the request. Such risk might, however, not be worth taking, as the requested party will most probably oppose to such a request and the tribunal might simply deny the request all together and not give the party a possibility to narrow down the request or order a narrower category of documents, e.g. regarding a shorter time period.

5.3 Specificity and narrowness requirements relating to electronic documents

Such characteristics of electronic documents as their volume and dispersion mean that limiting their production is of utmost importance from the point of view of efficiency. Requests for electronic documents also need to be sufficiently specified. However, how the requested party can search for electronic documents can be specified differently to paper documents. Some of the soft law instruments provide additional guidance regarding specifying electronic documents.

The IBA Rules provide additional ways of specifying categories of electronic documents:

> the requesting Party may, or the Arbitral Tribunal may order that it shall be required to identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner.

According to the Commentary on the IBA Rules, the parties can agree that a category of electronic documents should be identified more precisely than a category of paper documents. The Commentary enumerates the following data which can help identify electronic documents: "file name, specific search terms, individuals (for example, specific custodians or authors)."[54] The IBA Rules state that "the requesting Par-

[54] Commentary on the IBA Rules, supra n. 6, p. 9.

ty may, or the Arbitral Tribunal may order that is shall be required to" provide this additional information. It is, therefore, not an obligatory requirement.[55] This does not mean that the specificity requirements regarding documents in general are not applicable.

The requirements regarding electronic documents should be seen more as a way of utilizing characteristics of electronic documents to specify them more clearly. If a party was to only provide search terms and custodians, the request might amount to a "fishing expedition". In fact, one author discourages the use of search terms as he doubts their use can improve efficiency of the proceedings.[56] Such a clear-cut statement might be too strict. It is true that using only search terms is problematic as the search might result in providing documents that are irrelevant as well as missing the relevant documents.[57] However, it is not stated in the IBA Rules that the documents need to be located on the basis of the search terms, but that the search terms can be provided in the request. In some cases, the provided search terms as an additional tool can prove helpful, whereas in others, the requested party might know immediately after looking at the search terms and knowing its databases and filing systems that the search terms are not going to be helpful and decide to locate the documents in another way.

The difference between the specificity of a category of paper documents and a category of electronic documents is that the emphasis with regard to electronic documents is even more strongly placed on efficiency. There is a great volume of electronic documents created every day and those documents are then stored in multiple locations. Therefore, the additional requirements relating to electronic documents aim primarily to assist the requested party to search the documents more efficiently. Hence, despite the fact that those additional requirements are discussed under the heading of specificity, they relate also to the topic of the burden

55 Similarly, Marghitola, supra n. 17, p. 43.

56 *Ibid*. p. 45.

57 Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery 2007, pp. 201–202.

of production. The general specificity requirements[58] apply to both paper and electronic documents in order to avoid 'fishing expeditions' and help ensure that the parties do not involve in unnecessarily wide document production. The ease of locating a document is a logical consequence of a specifically drafted request, but the problem is that the general requirements might not be enough to locate electronic documents efficiently.

Who should be the one to identify additional information about the requested documents? Article 3(3)(a)(ii) of the IBA Rules states that it is the requesting party who provides the additional information. However, it might be that it is the requested party who will be in the best position to know what search terms and file names can facilitate the searching process.[59]

One of the advantages of electronic documents is that search terms, such as file names, can be used in order to expedite the process of collecting the requested documents. Whether the efficiency is achieved depends, however, more on whether the general requirements of specification are duly observed.

6 Conclusions

The requirements of specificity and narrowness are arguably the most controversial requirements from the point of view of the scope of the allowed document production as they refer to requests for not only individual documents, but also categories of documents. According to these requirements, an individual document has to be sufficiently specified and a category of documents needs to be sufficiently narrow and specific. Whether a request for a category of documents is assessed as suf-

[58] As applicable to paper documents.

[59] Smit, Robert H., *E-Disclosure under the Revised IBA Rules on the Taking of Evidence in International Arbitration*, International Arbitration Law Review, 2010, Vol. 13, Iss. 5, p. 203.

ficiently narrow and specific will depend on a number of factors, but based on the analyzed examples, one could state that the requesting party should specify a category by providing the authors or recipients of the documents with the subject matter as well as a time frame of when the documents were drafted.

From a practical point of view, the specification requirements enable the requested party to search for and identify the documents it is asked to produce. A specific description of the documents, the authors, addressees, subject matter and/or time frame assist the tribunal in deciding whether the requested documents are relevant and material and should be ordered as requested or in modified scope.

From a broader perspective, two values seem to be in the foreground of the discussion on specification requirements: the right to present one's case and efficiency. The very right to request documents is the fulfillment of the due process right to present its case. There are, however, limits to this right which assist in making the process more efficient. For the reasons of efficiency, the individual documents need to be specified and the categories narrow and specific. However, due process is not always in conflict with efficiency. For instance, the requirements of relevance and specificity functioning together against "fishing expeditions" further not only efficiency, but also fairness. Submitting requests for overbroad and vague categories of documents, whether done in the hope of obtaining relevant documents or as a dilatory tactic, cannot be justified by the right to present one's case which is a basis for obtaining relevant documents. Therefore, taking those values into consideration does not necessarily entail that one will be considered to be more important than the other, but that depending on the circumstances and the perspective taken, they can work conjointly.

A few thoughts on the evolution of case management in arbitrations[1]

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[1] This article is based on a presentation given by the author as part of a panel at the Norwegian Arbitration Day in 2020.

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1 Times have changed

I started my career in arbitration in the mid 1990's. By then Stockholm was already one of the recognized hubs for international arbitration, in particular for so called east-west disputes under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"). This notwithstanding and although the number of arbitrations with non-Swedish parties had been steadily increasing since the 1980's, the procedural culture in Swedish arbitrations remained relatively domestic and informal. There were several reasons for this.

At the time, the Swedish arbitration community was mostly centred around a few law-firms and individuals in Stockholm and Gothenburg. The typical counsel in a Swedish seated international arbitration was a Swedish practitioner, doing mainly domestic court litigation (and occasionally even venturing into transactional work). The level of specialisation in arbitration, let alone international arbitration, ranged from low to non-existent. Arbitrators were commonly chosen from the ranks of current or former Supreme Court judges or other senior members of the Swedish judiciary. Consequently and as a general rule, the actors in a Swedish seated arbitration represented a highly homogenous group, sharing a common nationality, language, culture and legal background. Most importantly, they shared an appreciation for the Swedish Code of judicial procedure (Sw. rättegångsbalken) and the procedural practises before the local, Swedish courts.

The number of foreign counsel or arbitrators appearing in Swedish seated arbitrations remained relatively low. If a foreign counsel was seized with a matter involving an arbitration seated in Sweden and governed by Swedish law, he (at the time almost all of them were male) would as a general rule refer the entire matter to a local, Swedish colleague. He would then largely assume a passive role as a liaison between Swedish counsel and his (foreign) client.

In this relatively small, local, homogenous community, practitioners would regularly encounter each other in international as well as domestic

arbitrations (and court litigations), either as counsel or as arbitrators. This catered for a certain level of social control and streamlining, as practitioners knew each other and what was accepted and expected from both a procedural and behavioural perspective. It also helped foster a relatively co-operative and less contentious environment in which to conduct the arbitrations.

Although a few truly high value claims found their way into arbitration even back then, cases rarely involved values going beyond 100 million SEK and most claims were for lesser amounts.

As a result of the various factors mentioned above – i.e. shared procedural expectations, a relatively co-operative environment, lesser value claims etc. – most arbitrations also involved a low level of procedural complexity. Typically, an arbitration would simply be run as a less formal version of a domestic court litigation. As for international arbitrations, except for generally being conducted in the English language, little else distinguished them from the conduct of Swedish domestic arbitrations.[3]

Finally, the emphasis on efficiency as to time and cost was much less pronounced than it is today. Although most users of arbitration wanted proceedings to be run efficiently, rules and incentives specifically catering for increased speed and control of costs were largely absent and arbitration matters were more or less allowed to run their natural course. However, in light of other factors facilitating for proceedings to be kept relatively simple and straightforward, it was nevertheless unusual for arbitrations to become extremely costly or protracted.

All in all, the environment of the time made it sufficient for arbitrators to run arbitrations without adopting much, if anything, in the way of formal procedural rules and to take a light-touch approach to case management. If procedural guidance became needed, it was generally accepted that reference could be made to the Swedish Code of Judicial Procedure and prevailing practices before the local courts.

[3] The Swedish Arbitration Act being applicable to both international and domestic arbitration, without much distinction, likely encouraged practitioners to conduct them more or less in the same manner.

Now, over the course of some 25 years, things have changed quiet dramatically.

Arbitrations seated in Stockholm are no longer the remit of a select few Swedish lawyers. It is very much an international business, with some cases even being conducted without a Swedish lawyer in sight, either as arbitrator or as counsel. A foreign counsel seized with an arbitration matter seated in Sweden and governed by Swedish law will only rarely refer the entire matter to a Swedish colleague. Instead, he or she (it has fortunately become a lot more gender equal) will typically only engage Swedish local counsel to advice on Swedish legal or procedural matters, but remain as lead-counsel in the arbitration. It has also become a lot less common for members of the Swedish judiciary to be appointed as arbitrators in international matters (although some such appointments are still made, albeit not by the SCC). Overall, the environment has become much less Swedish-centric.

As a result, there is also considerably less cultural and legal commonality amongst participants. Settling procedural issues with reference to the Swedish Code of Judicial Procedure has thus largely become a thing of the past. Instead, if procedural arguments or guidance is needed, references are typically made to common or "best" practices in international arbitration, as such practices may be found in soft-law guides by e.g. the International Bar Association ("IBA") or the Chartered Institute of Arbitrators ("CIArb") or in leading international commentaries and articles.[4]

This enlargement and diversification of the arbitration community has also meant less social control and less streamlining with regard to expected and accepted procedural behaviour. One aspect flowing from this is a more contentious atmosphere, including an increased tendency by parties in international arbitrations to assert due process infringements, to adopt obstructive tactics and to challenge arbitral awards.

[4] See e.g. Oldenstam and Löf, Best Practice in International Arbitration, p 279-305, in AVTALT PROCESS – Voldgift i praksis, edited by Høgetveit Berg and Nisja, Universitetsforlaget 2015

Cases have also grown to become a lot larger and more complex over time. Disputes involving billions of SEK are now relatively common. Coupled with more diverse cultural and procedural expectations and behaviours, the complexity of international arbitrations have increased.

Finally, the emphasis on efficiency has grown significantly. This development has largely been driven by users of arbitration voicing an ever increasing concern over the time and cost of bringing a claim. As a result, most of the leading institutional rules are nowadays permeated by provisions such as Article 22.1 of the International Chamber of Commerce Arbitration Rules (the "ICC Rules"), which calls for arbitrators to "make every effort to conduct the arbitration in an expeditious and cost-effective manner". The duty of arbitrators to conduct the proceedings efficiently is also increasingly being monitored and financially sanctioned by the institutions.[5] In this environment, few (if any) arbitrators will take a back-seat approach and simply allow an arbitration to run its natural course.

All in all, this evolution has created a need for a lot more structure, by way of formal procedural rules as well as stricter and more active case management by arbitrators. The old, relatively informal ways to conduct arbitrations, which worked fine in the past, simply won't do anymore.

2 A few guiding principles

Against this background and in my own work as arbitrator, I try to adhere to a few general principles, which I have found helpful in creating

[5] See, e.g. the SCC Arbitration Rules, Art. 49(3) stating that: 'In finally determining the Costs of *the Arbitration, the Board shall have regard to the extent to which the Arbitral Tribunal has acted in an efficient and expeditious manner.*' See also ICC's, Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC rules of arbitration, stating that, '*Where the draft award is submitted after the time referred to in paragraph 84 above, the Court may lower the fees as set out below*'

a structured, efficient and reasonably friendly environment in which to conduct an arbitration.

First, as arbitrator, you should already from the start take a polite, but firm, hands-on and proactive approach, and maintain that throughout the proceedings. There should be no room for doubt that you are monitoring the proceedings closely and that you are ultimately in charge. It is also important for an arbitrator to actively try to foresee potential procedural issues, before they arise, and to take appropriate measures to implement solutions to be readily available. Additionally, an arbitrator need to act swiftly when issues anyway do arise and not allow them to get out of control. It can be very frustrating to watch an exchange between counsel become increasingly heated and unbalanced, whilst the arbitrator remains passive. Many procedural problems may be avoided or at least significantly mitigated, by arbitrators swiftly intervening and taking charge over such situations.

Second, an arbitrator should align expectations by providing clear rules on all anticipated matters of procedure. This is typically done by a detailed set of procedural rules being prepared at the outset and included as part of the arbitrator's first procedural order ("PO 1"). Such rules should, amongst other, provide the arbitrator with tools to ensure a front loaded arbitration and to dismiss any late or unsolicited submissions. However, and although one of the primary purposes of such rules is to provide procedural clarity and foreseeability, it is nevertheless important that they are drafted in a way which allows the arbitrator sufficient "wriggle-room". Arbitrators need to be able to adjust to specific situations, make exceptions or work-arounds and take an overall reasonable and balanced approach.

Third, as early as reasonably possible and in close consultation with the parties, an arbitrator should adopt a timetable covering the entire proceedings from start to finish. This is typically done following an initial case management conference and as another part of the arbitrator's PO 1. Considerable efforts should then be made by the arbitrator to resist any attempts to deviate from that timetable, particularly deviations which

may jeopardize any scheduled hearing and, thus, ultimately the due date for the Final Award.

Fourth, an arbitrator should always try to solicit the parties agreement with regard to governing procedural rules, timetable and other matters of procedure. A consensual approach may be expected to significantly increase acceptance and adherence by the parties. It may also lessen the risk of procedural decisions, which are based on such agreed rules or timetable, forming the basis for ensuing challenges by the party finding itself at the losing end. Notwithstanding the foregoing, if no agreement can be reached between the parties using reasonable efforts and within reasonable time, an arbitrator must be prepared to simply decide the matter him- or herself without further ado.

Fifth and finally, arbitrators must not only be and remain independent and impartial. They must also try to always ensure that their actions and words are perceived as being independent and impartial by both parties. Arbitrators maintaining a neutral and polite tone throughout the proceedings (no matter what a party may throw at them) and giving clear and balanced reasons for procedural decision, will often go a long way to achieve this.

3 Due process and other considerations

As mentioned above, over time there has been an increased tendency by parties in international arbitrations to assert due process infringement every time a procedural decision doesn't go their way. At the same time, frustration has been voiced over what has become popularly known as "due process paranoia" on the part of arbitrators. The perception has been that some arbitrators, harbouring an exaggerated fear of their awards being challenged, are being overly cautious and indecisive in making procedural decisions. This perceived "due process paranoia" may, by way of example, manifest itself in such arbitrators allowing late

introduction of new claims or new evidence which, in turn, may disrupt timetables and result in increased time and cost of arbitrations. With regard to these two parallel developments, I would offer two counter-balancing observations.

First, and on the one hand, procedural decisions (e.g. on whether to allow or disallow the late introduction of new claims or new evidence) generally fall within the broad discretion of the arbitrators. As such and according to the standard set by the Swedish Supreme Court in the so called Belgor case,[6] a procedural decision has to appear "indefensible" (Sw. oförsvarbart) given the circumstances, in order to infringe due process. In addition and in order to form the basis for a successful challenge, it must also be demonstrated that such an "indefensible" decision likely influenced the outcome of the case, i.e. that it ultimately affected the operative part of the arbitral award. Taken together, these two conditions create a very high threshold for a disgruntled party to overcome in order to launch a successful challenge based on an alleged procedural irregularity. This is also borne out by statistics, where allegations of procedural irregularities are a favourite basis in challenges of arbitral awards before the Swedish courts, but rarely, if ever, succeed.[7] All in all, this ought to bolster the confidence of those arbitrators who may have a tendency to be overly cautious and persuade them to take a more robust approach to case management. Doing so would likely benefit procedural efficiency and timeliness.

Second, and on the other hand, even if considerations of procedural efficiency and timeliness are of very real and growing importance, they need to be balanced against other considerations, including broad concepts of procedural fairness. To most arbitrators, including myself, such considerations go beyond the bare minimum that may be required to avoid due process infringements and the risk of annulment of the award. Ultimately, it may simply rest on an ambition by the arbitrator to

6 Supreme Court case NJA 2019 p. 171

7 As far as the author knows, allegations of procedural irregularity have only lead to an award being set aside by the Swedish courts in one single case, namely the case called CicloMulsion, Supreme Court case NJA 2019 p. 382.

leave the losing party feeling that, at least, it had its full "day in court". For a seasoned arbitrator that ambition typically has less to do with any deep-felt sympathy for the loosing party and more to do with a broad, long-term sense of risk management. To put it simply, a party that feels fairly treated, even though it ultimately lost the arbitration, is less likely to challenge the award. Even if the vast majority of challenges are unsuccessful,[8] they are better avoided altogether, not least because they will undermine the certainty and finality of the award and add further time and cost. If one takes such broader considerations into account, what may sometimes be perceived as an overly generous and thus economically inefficient procedural decision in the short term, may potentially save time and cost in the long term.[9]

4 Practices from international arbitration migrate into domestic arbitrations

In my experience, adopting procedures such as the ones described above, which implement best practices in international arbitration, will generally facilitate control, foreseeability and efficiency. Although such practices have mainly emerged through the need to manage large, multi-cultural, complex international cases, they may be equally useful in many domestic arbitrations. Interestingly, this is so not least for domestic expedited arbitrations. Although typically involving smaller value claims, the heavy emphasis on speed and efficiency as to cost in such proceedings creates a need for a special structure. To create that structure, elements may be borrowed from best practices in internation-

[8] Although there are no official statistics, assessments made indicate that only some 5 to 10 per cent of challenges of arbitral awards are successful in that they result in the award being set aside in whole or part by the Swedish courts.

[9] See Oldenstam, Due process Paranoia or Prudence?, pages 121-128, Stockholm Arbitration Yearbook 2019, edited by Axel Calissendorff and Patrik Schöldström, Kluwer Law International 2019

al arbitration. Such elements may, amongst other, include a compressed and front-loaded timetable, a set of special procedural rules to deal with any attempts to derail that timetable and the use of written witness statements to shorten or even do away with the need for an oral hearing. Because the parties to smaller value, expedited, domestic proceedings will typically recognize the special need for speed and efficiency, they are also generally willing to accept the use of at least some such elements from international best practice.

As an overall tendency, I have thus found that best practices from international arbitration are increasingly influencing domestic arbitration, blurring the procedural lines between the two. This is hardly surprising, since the practices used in international arbitrations have been developed through trial and error by thousands of seasoned, international arbitrators over the course of many thousands of arbitral proceedings. The result is a dynamic set of procedural tools that have been thoroughly tested and generally proven to work. When Swedish arbitrators and arbitral counsel participate in international cases, they encounter such international best practice. Having seen that it works, they become open to the idea of also implementing at least parts of it in domestic arbitrations. As a result (and although not without exceptions), the procedures in international and domestic arbitrations are increasingly converging.

Procedural management in arbitration

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Principles of efficient procedural management of international arbitration

All parties to an arbitration, be it the claimant or the respondent, the lawyers, the arbitrators and arbitration institutes, all agree that after the claimant and the respondent have entered into an agreement, referring their dispute to be decided through arbitration, the process should entail an unbiased, rational and foreseeable procedure in accordance with clear, detailed and fair rules and be efficient with a well-balanced timetable. The parties should be treated equally and allowed to present their case before the tribunal to make the parties feel that they were heard by the tribunal. Their expectations should be aligned. The award should be clear and easily executed in all New York Convention countries without any risk of being challenged or set aside.

No one could disagree to the statement that these are crucial and decisive elements in all arbitration matters.

That, however, makes big demands on the arbitrators and the arbitration institutes.

They must encourage the parties to agree on clear and detailed procedural rules to apply throughout the whole process. They should assist on the drafting of the procedural rules, if applicable, agree on timetables and the consequences of not adhering to them, the format of the oral hearing, appearance and presentation of witnesses and experts. All in all, the arbitrators should take a proactive approach with the view to finalise the matter in a correct and appropriate manner to the satisfaction of both the parties and any arbitration institute involved.

And, finally, the arbitrators should be very cautious when drafting the award.

All of this is common knowledge to all parties involved, and all parties would officially state that this is exactly the way they would expect the dispute to be handled.

The trouble is, however, that it is very rare that all parties, including arbitrators and arbitration institutes, follow and adhere to these best practices.

Attack on the principles of efficient procedural management

Even if the parties solemnly declare that they will adhere to all the rules and best practices, it is my feeling that many arbitrators experience another attitude when it comes to the specific arbitration cases.

Arbitrators often see examples of extensive correspondence exchanged between the parties already when the arbitrators are suggested and appointed. The proposed arbitrator must undergo a very strict vetting process with numerous queries from the "not appointing party" to make sure that the proposed arbitration is completely non-biased. You often get the feeling that the queries have nothing to do with verifying whether the arbitrator is non-biased but are tactics or even attempts to jeopardize the process already before it takes off.

Other examples are extensive discussions about the Procedural Order even in institutional arbitration cases where you would expect the parties to comply with the basic rules of the institutions. The parties even try to challenge the rules or to agree on amendments.

Agreeing on the timetable with dates for the filing of submissions, etc. is initially rather uncomplicated. Both parties fight for the timetable to fit into their own schedules and strategy. Compromises are easier to reach.

When it comes to following what has been agreed as regards the timetable and exchange of pleadings, arbitration cases are jeopardized by untimely filings of submissions and evidence or last-minute requests for postponements. The deadlines are not respected and consequently the whole timetable must be altered which may result in the hearing being

postponed as well. The other party always objects, and the arbitrators are dissatisfied, but the delay is allowed.

The parties are also extremely skilled when it comes to procedural objections – some of them so farfetched that the only limit is your imagination. But the other side must take them into consideration and file a counter-submission and the tribunal must spend time rejecting them. Delays of the timetable, probably already under pressure, may be inevitable.

The tension increases to a higher level when the parties are not holding back their reservations for setting aside proceedings if the arbitrators do not consider their various objections and criticism. It is well known that such proceedings are the last thing a tribunal wants and hence the tribunal sees the benefit in giving in and balance not only the parties' position but also their own in the hope that this will then not be the basis for setting aside proceedings after the award has been issued.

The above attacks on the principles are only examples of main categories.

A search on the internet on how to annoy in arbitration proceedings gives several suggestions, such as

- do not pay any advances, except those for your counterclaim
- do not offer any help in appointing the tribunal
- choose an obstructing arbitrator and challenge the other arbitrators for whatever insignificant reasons
- change lawyers in mid-stream or refuse or delay to pay them
- do not sign the Terms of Reference
- submit unsolicited pleadings with several procedural motions every Friday afternoon
- do not adhere to any procedural orders
- ask for extensions on a regular basis
- file your submissions late
- refuse to produce documents
- present documents or witnesses at the very last moment
- try to postpone hearings, do not appear for a hearing or walk out from a hearing
- threaten to sue the arbitrators or the arbitral institution

How do the arbitrators react to this?

Even if the above seems to be rather exaggerated, many arbitrators feel that they have experienced at least some of the attacks on the best practice principles. This is frustrating for the arbitrators as they wish to act efficiently and are keen on parties being treated equally and given the right to present their case. This is an arbitrator's obligation according to all arbitration acts and institutional rules, cf. also the Uncitral Arbitration Rules, article 17.

When confronted with these attacks, all arbitrators will try to settle the disputes when they arise in order to avoid any present or subsequent conflicts. Such wish is enhanced by the risk of seeing their award being challenged, set aside or refused recognition under the New York Convention – although the latter is extremely rare. Arbitrators are private practitioners and protect not only their reputation but also their income, and they do not want to create any ground for not being recognised by colleagues or appointing lawyers in the legal community.

The attacks result in the arbitrators being reluctant to make the decisions they feel are the right decisions, but instead accommodate the difficult party by giving leave for their queries, such as last-minute pleadings or admittance of irrelevant documents. The whole arbitration process is delayed, costs are increased, and all parties involved in the arbitral proceedings are frustrated and reasonably annoyed.

The same parties, however, also often complain about an increasingly slow process in arbitration and that one of the advantages of choosing arbitration is compromised.

Many practitioners have criticized the increasing amount of time spent on arbitration stating that often arbitration is just as slow as the ordinary courts. An English High Court judge described arbitration as "unwigged Court proceedings" – involving the same amount of time and costs as court proceedings – the only difference being that arbitrators do not wear wigs as the judges do.[2]

[2] www.Luxmediation.com

Jeopardizing the best practice principles in arbitration may of course not be the only reason for the necessity to spend more time on arbitration than before. Many disputes have become very large and very complex in term sof the amount in dispute, the facts and law, they are international and there are cultural differences. It is still, however, the opinion of many practitioners that for the main part of arbitration proceedings the reason for the slow process is the jeopardizing of the best practice principles caused by the parties – which does not include themselves.

Do national courts increasingly interfere with the tribunals' procedural decisions?

Assuming that it is correct that arbitrators are more subject to criticism than ever and that the parties do not hold back from filing setting aside proceedings before the ordinary courts, one would also assume that more judgements, statistics and studies would prove that. Although, there may be a minor increase in filed setting aside proceedings, the facts show that the fear of such proceedings is exaggerated as they are based on nothing more than assumptions and feelings. This fear of adopting a robust and proactive approach to case management may endanger the final award as the arbitrators, because of this fear, may neglect their duty under the rules, including the Rule 17 of the UNCITRAL Arbitration Rules, to run the proceedings in a fair and efficient manner.

If the fear becomes so strong that their conduct leads to proceedings not being conducted in accordance with the parties' agreement, this in itself may be a reason for setting aside proceedings or the award not being recognized under the New York Convention.

Studies show that most national courts rarely interfere with the tribunal's procedural decisions. On the contrary, the national courts afford the tribunals wide discretion to determine the most suitable procedure to resolve the dispute. The arbitrators are presumed to know better. Studies

by Professor Klaus Berger and Constantine Partasides, QC, Lukas Lim[3] state that this is the conclusion in most national courts.

It is the same in the Nordic countries[4]. There are no decisions setting aside an award due to alleged undue process – even if procedural irregularity is "the most frequently invoked basis by parties challenging arbitral awards before the Swedish Courts of Appeal".[5]

The risk of the arbitrators experiencing their award being criticized or even subject to control by the ordinary courts seems to be very limited, but nevertheless some practitioners express that such fear of exercising due process has developed into paranoia. The arbitrators should adopt a more firm and decisive attitude in a fair manner and not always think of the risks this may cause.

Have arbitrators become paranoid?

Arbitrators may admit that the risk of their awards being set aside is extremely limited, but it still affects their work. Queen Mary University of London made a study of the alleged paranoia in 2015 concluding that due process paranoia was a growing concern.[6]

The study revealed that the paranoia actually affected the decisions to the extent that the arbitrators had become too cautious and too gen-

3 Lukas Lim, CMS, 21 August 2019, Undue paranoia over due process

4 In a judgment handed down on 28 August 2020 in B-710-18 IMSPL Pte Ltd vs. MAN Energy Solutions SE, the Danish High Court, Eastern Division, stated that the Plaintiff had not proven that the arbitral tribunal had not exercised due process to the effect that the award could be set aside in accordance with section 37 of the Danish Arbitration Act.

5 Robin Oldenstam "Due Process Paranoia or Prudence"? in Stockholm Arbitration Yearbook 2019.

6 Queen Mary University of London, International Arbitration Survey, Improvements and Innovations in International Arbitration, http://www.arbitration.qmul.ac.uk/research/2015/, and Robin Oldenstam "Due Process Paranoia or Prudence"? in Stockholm Arbitration Yearbook 2019.

erous in accepting breaches of the rules or the principles of best practice. This caused delays and an increase of costs.

I believe that all arbitrators must have felt the same paranoia to varying degrees. It is for instance well known (and accepted) that arbitrators give leave for late submissions, new evidence and new claims, especially to the party with the most difficult case as this party may loose and then feel inclined to express criticism or to initiate proceedings before the ordinary courts. All arbitrators wish to deliver the award with the highest level of quality and will do their utmost to avoid a conflict with either of the parties. Moreover, some arbitrators may consider their position amongst their peers and in the market.

The way to effectively balance fairness against efficiency – suggestions

Arbitrators are different and so are the parties and their lawyers, and the ways to balance fairness against efficiency are numerous. It is up to the arbitrators to find their way into the specific dispute at hand and to be firm in their approach towards both sides of the arbitration proceedings, always taking fairness into account.

Clear, detailed and well-balanced procedural rules must be the starting point of all cases, and in the preparation of them the arbitrators must show the parties that they want to be robust and proactive and act boldly without excessively worrying about due process. The tribunals must be firm and robust towards attempts to challenge the agreed rules and only allow amendments in case of very reasonable circumstances.

The arbitrators should be cautious and of course try to avoid circumstances that could lead to one of the parties raising concerns about due process. Since the award is final and there are no possibilities of appeal on the merits, the arbitrators, on the other hand, should of course

be certain that all relevant information and documentation has been correctly presented to the tribunal.

Finally, the arbitrators should conduct the proceedings in such a manner that when the award is delivered, the losing party has no doubts that he has been heard and has had his day in court even if he is disappointed about the result.

Disclosure of evidence – the cost issue

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1 Introduction – the issue

The ultimate aim of arbitration proceedings is to seek materially correct Awards. The various legislations, regulations, rules, practices and guidelines on disclosure of evidence is meant to be a part of a system seeking to ensure materially correct Awards.

Therefore, the general legislative purpose of document production rules in arbitration is that they promote substantively correct decisions. Nevertheless, the ideal of obtaining a complete evidence base and correct findings of fact must to some extent yield to other important considerations. Thus, the flipside of the coin is the costs involved with disclosure of evidence.

In many common law jurisdictions and in the United States civil discovery in both court and arbitral proceedings are wide-ranging, and involves very high costs. In the Scandinavian tradition – both in courts and in arbitration – such US style discovery process is not permitted. Nevertheless, also Scandinavian style discovery proceedings in arbitration and courts have a considerable cost dimension, and the question to be discussed here is the relationship between discovery and the costs involved. Obviously, a thorough discovery process might – at least in a theoretical sense – increase the likelihood of materially correct awards. At the same time, a thorough discovery process comes with a high cost. How are these contradicting considerations balanced in Scandinavian style arbitrations?

2 The Cost Dimensions

It is commonly accepted that when Tribunals make decisions on disclosure of evidence, the cost issue is a relevant consideration the Tribunal needs to consider.

It follows from the International Bar Association's (IBA) Rules on the Taking of Evidence Preamble para 1 that the rules are intended to provide for an "economical and fair process". Furthermore, it follows from the same rules Article 3(3)(a)(ii) when it comes to discovery of documents that one shall search "… for such Documents in an … efficient and economical manner".

The same principle follows from the Best Practice Guidelines of the Nordic Offshore and Maritime Arbitration Association (NOMA) section 1.1.

Hence, cost considerations are without doubt relevant. The issues, however, are how much weight a Tribunal shall put on such considerations and also who are to carry such costs.

3 The Norwegian Perspective – a fragmented picture

3.1 The Norwegian Arbitration Act of 2004

The Norwegian Arbitration Act does not provide a Tribunal with competence to order evidence. This means that unless the Tribunal and the Parties agree to follow certain rules or guidelines, e.g. the IBA Rules on the Taking of Evidence, the Tribunal has no competence to order discovery.

The Norwegian Arbitration Act provides, however, the Tribunal and the Parties with another instrument. It follows from Norwegian Arbitration Act section 30 paragraph 1 that:

> *"The arbitral tribunal, or a party by consent of the arbitral tribunal, may request that the courts obtain testimony from parties or witnesses as well as other evidence. The arbitral tribunal shall receive reasonable advance notice of the taking of evidence. The arbitrators are entitled to be present and to put questions" (unofficial translation)*

Therefore, the Tribunals and the Parties have an ultimate instrument if needed. However, it is rarely seen that section 30 is utilized. There might be many reasons for this, but one possibility is that the existence of section 30 alone makes the Parties willing to disclose evidence without going through the cumbersome section 30 proceedings. It should also be mentioned that going through and completing section 30 proceedings is a cost issue in itself.

3.2 The Rules of the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce (OCC)

In the Norwegian tradition, the OCC Rules of 2017 does not provide the Tribunal with competence to order evidence.

This is opposite to the Arbitration Rules of The Arbitration Institute of The Stockholm Chamber of Commerce (SCC) of 2017 art 31(3), which gives the Tribunal such competence.

3.3 NOMA

According to the NOMA Rules Article 24 paragraph 3 it is clear that the Tribunal may order disclosure of evidence. The more detailed process follows from the NOMA Rules on the Taking of Evidence, which again refers to the IBA Rules on the Taking of Evidence.

3.4 The IBA Rules on the Taking of Evidence

The IBA Rules on the Taking of Evidence has in Article 3 rather detailed rules on the document disclosure process.

3.5 The Norwegian Civil Procedure Act of 2005

The Norwegian Civil Procedure Act of 2005 has regulation on document production; however, such rules are not applicable in arbitration. An-

other issue, however, is whether the pre-trial provisions on disclosure of evidence in the Norwegian Civil Procedure Act is applicable for disputes under arbitration clauses. See below in section 5 below.

4 Do costs really matter?

When it comes to disclosure of evidence and document production one has the issue of evidentiary value and the importance of materially correct Awards on the one hand, and the cost issue on the other. In such perspective cost consideration will – rightfully so – not be particularly weighty in most cases. However, when the list of requested documents becomes extreme – and has similarities with US style document production – costs might matter.

An example of this can be seen from the Norwegian Supreme Court in the case reported as HR-2019-997-A. The Court of Appeal had ordered a party to present a very large number of electronic documents. The Supreme Court pointed out that the consideration for obtaining substantively correct decisions is weighty; and the central purpose is to ensure that the case is clarified to the extent possible. However, there are certain limitations, such as the requirements of relevance and specification. Limitations may also follow from the requirement of proportionality. The legislative intent has not been to introduce a system where a party has a duty to present all material that might be relevant. Based on this, the Supreme Court found it unreasonable to request a party to search each and every relevant document if the volume of documents is vast and the order is formulated in very general terms. The Supreme Court also evaluated the costs involved, and did find them to be very high. Hence, the Court of Appeal's order was set aside.

The same considerations might be relevant in arbitration. Very lengthy Redfern schedule exchanges with large amounts of requested documents and several disagreements between the Parties also comes

with considerable costs. It is also a common experience among litigators that the important evidence – a so-called smoking gun – rarely is found in document production processes. Therefore, in my opinion arbitrators should be careful in initiating and allowing lengthy and voluminous disclosure proceedings. One should always balance cost benefit considerations against the need for very wide-ranging document production proceedings.

5 Uncertain terrain – the Norwegian rules on pre-trial disclosure

As mentioned above the Norwegian Civil Procedure Act of 2005 Chapter 28 has pre-trial provisions on disclosure of evidence. These rules, so-called "*Bevissikring utenfor rettssak*", is a rather lethal and potentially very costly weapon in ordinary civil proceedings. It seems likely, however, that the Supreme Court decision mentioned above (case HR-2019-997-A) has limited the scope of such discovery, see section 4 above.

Another interesting question is whether these pre-trial Civil Procedure Provisions could be used also for disputes under arbitration clauses. If so, this would have very interesting and far-reaching consequences.

There are certain arguments in favour of these provisions actually being applicable also for disputes governed by arbitration clauses. The wording of the Civil Procedure Act is quite open ended in this regard. Based on the wording of the Arbitration Act, Danish case law and a judgement from Bergen city court (TBERG-2011-13681), Geir Woxholth asserts in *Voldgift* page 160 that the provisions are applicable for disputes governed by arbitration clauses.[2] Woxholth's arguments seems to be that since the Civil Procedure Act regulations on pre-trial provisions on disclosure of evidence does not clearly state that it cannot be used in

[2] Geir Woxholth, *Voldgift*,Oslo 2013.

potential upcoming arbitrations, the Civil Procedure Act actually gives a legal basis for claiming such disclosure also for arbitrations. Furthermore, Woxholth emphasises that policy considerations supports such interpretation of the Civil Procedure Act.

In my opinion, there are several weighty arguments against Woxholth's proposed solution. Firstly, one can make solid arguments that the wording of the Civil Procedure Act makes it clear that it is only meant for disputes before the ordinary courts and not arbitrations. Hence, one might *inter alia* point towards wording like "utenfor rettssak" (§ 28-1) and "for den domstol der sak i tilfelle kunne vært reist" (§ 28-3(1)). One might also rely on the fact that the main object clause of the Civil Procedure Act (§ 1-1) makes it clear that it act governs public court proceedings.

In addition, the judgement from Bergen city court that Woxholth relies on was overturned by the Gulating Appellate Court in case 11-092858ASK-GULA/AVD2. Finally on might add that system considerations goes against using the Civil Procedure Act for disputes that are to be decided by arbitration. Hence, the Civil Procedure Act should be used for court proceedings and the Arbitration act for arbitrations since we most likely are better off without mixing provisions of the Civil Procedure Act into arbitration. However, as of today the answer is not clear-cut, and if these provisions are open for all kind of disputes, this might have a significant impact on discovery – and costs – in arbitration proceedings.

Evidence Disclosure – Significance for case planning

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1 Introduction and legal framework

1.1 In an arbitration as a private conflict solution mechanism between parties, planning of the pretrial as well as the trial phase is extremely important. One of the primary responsibilities of the arbitrators is to hold a planning conference with the parties and their lawyers in order to agree on a timetable for the conduct of the arbitration process. Already at this conference, the parties and arbitrators should discuss the question of evidence disclosure, especially if a party anticipates that it may have to make provocations in order to obtain some of the evidentiary material. This possibility must then be taken into consideration when the parties and tribunal agree on a timetable for the arbitration. It is necessary that the parties as well as the arbitration tribunal follow this timetable. An arbitration is often an expensive venture and any delays may multiple the costs.

1.2 As an aid to the parties/their lawyers, as well as to the arbitrators, several organizations– national, regional or international – and national legislators have adopted rules or standards setting out procedural standards to be followed by arbitrators when a named set of rules have been agreed upon by the parties.

UNCITRAL adopted in 1985 a Model Law on International commercial Arbitration and the UN adopted on 11. December 1985 a Resolution encouraging governments to take the UNCITRAL Model Law into consideration when adopting national rules on international arbitration as a mean to encourage international uniformity in this field. The Model Law ensures arbitration as an effective conflict solution mechanism. It contains rules on the conduct of arbitral proceedings in chapter V (articles 18 to 27), but these rules do not specifically deal with questions relating to evidence disclosure. The Model Law constitutes the basis of national statutes on arbitration found in many countries. The Model Law also constitutes the basis for rules adopted by arbitration institutes and other organizations. Some of these rules may contain rules on disclosure that give the parties more possibilities. The legislative solutions with regard

to evidence disclosure vary between the legal systems of the world and this is reflected in the rules adopted by arbitration institutions.

The International Bar Association (IBA) adopted in 2010 new Rules on the Taking of Evidence in International Arbitration that are "designed to supplement the legal provisions and the institutional, *ad hoc* or other rules that apply to the conduct of the arbitration". The IBA Rules of Evidence are not intended to provide a complete mechanism for the conduct of an international arbitration (whether commercial or investment). Parties must still select a set of institutional or *ad hoc* rules, or design their own rules, to establish the over-riding procedural framework for their arbitration. The IBA Rules on Evidence fill in gaps intentionally left in those procedural framework rules with respect to the taking of evidence. Hence, the IBA Rules exclusively deal with questions related to evidence and supplement other procedural rules that the parties have agreed on. The Rules are detailed and open to the possibility to request production of documents from a person or an organisation who is not a party to the arbitration.

The Nordic Offshore and Maritime Association (NOMA) has adopted procedural rules for arbitration based on the UNCITRAL Rules. The Rules are followed up by the NOMA Rules on The Taking of Evidence as well as Best Practice of Guidelines. The Rules on Evidence are there found in Article 10.

Generally, it is important to the parties to an arbitration that the award is recognized in as many countries around the world as possible and that it can be enforced in countries, where the other party has assets, when necessary. The UN Convention of 10. June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (New York-convention) has been ratified by a large number of states all over the world and assures the recognition and enforcement of arbitration awards.

2 Planning an arbitration

If the parties have not previously agreed upon a set of rules on procedure that should apply to the proceedings, it is desirable that they agree on that issue at the case management conference. At this conference, the parties should also agree on the schedule for the arbitration proceedings: The dates of the main hearing, deadlines for statements of claim, defense, the numbers of subsequent pleadings and dates for their presentation and the date of closing submissions. In addition, it is highly recommended that the parties agree on a cut-off date for the presentation of new evidence.

At the case management conference, the parties should in addition make it clear if they intend to present written witness statements. If that is the case one should agree on a deadline for that. In addition, the parties and the tribunal should also agree on a deadline for the presentation of the parties' preliminary lists of witnesses of fact. Questions related to the use of expert witnesses should be discussed – should it be a joint expert witness or should each party present its own. In this context, one should also discuss and agree upon when and how potential expert witnesses shall present their material in advance of their testimony.

Agreement at the case management conference on these matters are instrumental in assuring that the arbitration process is fair and expedient.

3 Disclosure of evidence

As a rule, a party requested to disclose a document etc. will provide the other party with the requested material at the earliest opportunity. However, in some instances such requests are denied. A denial may have many reasons. The requested party may repudiate disclosure because that party alleges that the wanted document is without relevance to the

case at issue, or contains privileged matters, or that the requested material has not been sufficiently identified by the requesting party. If that is the case, the requesting party has the possibility to ask the arbitration tribunal to intervene and to request that the material produced within a time limit, cf. NOMA Rules 10.6. In accordance with NOMA Rule 10.7, the tribunal may also determine "the admissibility, relevance, materiality and weight of the evidence offered".

According to the NOMA Rules Article 24 para. 3 the arbitral tribunal may at any time during the arbitral proceedings "require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall decide". If a party has not produced documents, exhibits or other evidence within the established period, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the basis of the evidence before it, cfr. Article 26 para. 3. The same follows from point 10.6 in the NOMA Guidelines.

The tribunal may at any time during the proceedings require the parties to produce documents, exhibits or other evidence within a time limit set by the tribunal. However, if the request is not followed the only remedy available to the tribunal is to consider the importance of the non-production of requested evidence etc. when deciding the matter.

In order not to cause delays, the tribunal must rule on questions of admissibility of requests quickly. The tribunal will have to decide the question in accordance with the powers given them in the arbitration agreement, or at the conference on case management.

The Norwegian act relating to arbitration adopted on May 14 2004 contains rules on evidence in section 28. The main rule is that the parties are responsible for substantiating the case and are entitled to present such evidence as they wish. However, according to para 2, of the section the arbitral tribunal may disallow evidence that is obviously irrelevant to the determination of the case. Furthermore, the arbitral tribunal may limit the presentation of evidence if the extent of such presentation is unreasonably disproportionate to the importance of the dispute or the relevance of the evidence to the determination of the case. Para 3 allows the parties to contract out of the provisions of section 3.

It is of importance to the arbitral process that questions related to evidence is dealt with as early as possible during the preparation for the hearing in order to assure that both parties have had adequate time to prepare. In order to assure that there are no surprises at the hearing of the case with regard to evidence all evidence should be made known to the other party – as well as the panel – during the pre-trial phase, and prior to the agreed upon date for the presentation of new material.

4 Costs

As stated initially an arbitration is a private conflict solution process. The parties are responsible for all costs involved in the process. At the same time, an award from an arbitration tribunal is not appealable, and it is therefore necessary that the parties have had the opportunity to present all the evidence and arguments to the tribunal that they feel necessary to sustain their claim. This calls for a difficult balance in many cases. An arbitration is a costly way to settle a dispute while it often is a time efficient mean to settle the matter. In order to assure a balance evidence should be limited to what is necessary to sustain ones claim and to rebut the allegations by the other party.

Fast track Arbitration – Efficiency vs. due Process

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1 Introduction

Fast track arbitration is a form of arbitration that aims to reach final decisions in a cost- and time-efficient manner. It is typically used in relatively limited, straightforward disputes, where the value of the claim does not justify the use of regular arbitration.

Since the first fast track procedure was introduced almost thirty years ago by the Geneva Chamber of Commerce and Industry, a number of leading arbitral institutions have adopted similar procedures.[2] In the Nordic countries, the Stockholm Chamber of Commerce (SCC), the Finland Arbitration Institute (FAI), the Danish Institute of Arbitration (DAI) and the Oslo Chamber of Commerce (OCC) have offered fast track alternatives for several years.[3] In addition, the Nordic Offshore and Maritime Arbitration Association (NOMA) is in the process of adopting a fast track procedure.[4]

As has been pointed out, in streamlining the arbitration procedure through fast track arbitration rules, the notion of due process should not be overlooked.[5] This is perhaps the most challenging aspect of developing fast track rules: fostering efficiency, while preserving due process.

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2 The International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC) and American Arbitration Association (AAA) are examples of international arbitration institutions that have adopted fast track procedures.

3 The Nordic Arbitration Centre of the Iceland Chamber of Commerce has not adopted a separate fast track procedure. However, some of the typical features of fast track arbitration are present in the Nordic Arbitration Centre's ordinary arbitration rules (Arbitration Rules 2013). For example, the rules impose a six-month timeframe on the arbitral tribunal to render an award and include arbitration with a sole arbitrator and no oral hearings as default rules, see art. 11 (2), art. 31 (1) and art. 39 (1): https://www.vi.is/files/thjonusta/2016_12_15%20ger%C3%B0ard%C3%B3msreglur_ensk%20%C3%BAtg%C3%A1fa.pdf.

4 The author participated in the working group that developed the draft fast track rules.

5 Cordero-Moss, Giuditta, "Arbeid med forenklet voldgift", *Lov og Rett* 2019 pp. 1–2 at p. 2 and UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session (New York, 4 – 8 February 2019) p. 5, available at https://undocs.org/en/A/CN.9/969.

In the following, I will consider why arbitral institutions have adopted and are continuing to adopt and develop fast track rules, and to what extent these are actually applied in practice. Further, I will present some of the characteristics that clearly distinguish fast track arbitration from ordinary arbitration and show how these characteristics are reflected in different sets of arbitration rules. The underlying question is how the "efficiency vs. due process" balancing act plays out. I will focus on the fast track rules of the Nordic institutions mentioned above, as well as the NOMA draft.

2 Why are arbitral institutions adopting fast track procedures?

2.1 Dissatisfaction with certain aspects of ordinary arbitration

We have all been told that arbitration has numerous benefits. It is supposedly cheaper, faster and more private and specialised than traditional litigation.[6]

While this might have been an accurate description in the past, the trend seems to have resulted in longer, more complex and more resource-intensive proceedings. This has caused some users to complain that arbitrations are overly sophisticated and that they are neither quicker nor cheaper than proceedings in national courts.[7]

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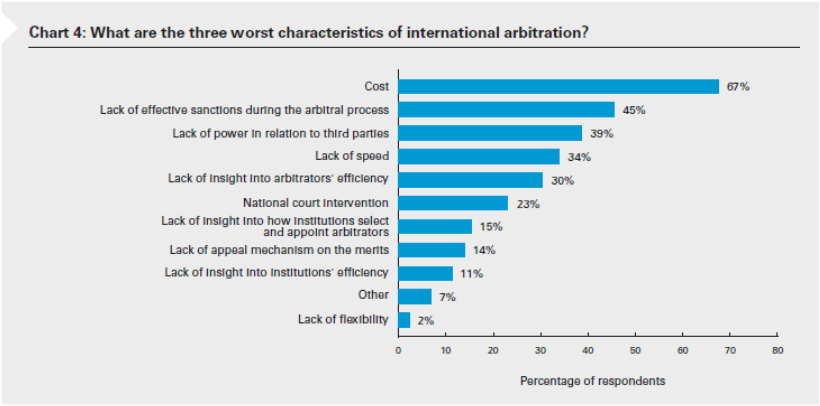
6 Brækhus, Sjur, "Voldgiftspraksis som rettskilde", in Nils Christie (ed.), *Den urett som ikke rammer deg selv. Festskrift til Anders Bratholm*, 1990, pp. 447–461 at p. 451 also lists internationality as a main reason to choose arbitration.

7 Ipp, Anja Havedal, *Expedited Arbitration at the SCC: One Year with the 2017 Rules*, Kluwer Arbitration Blog, 2 April 2018: http://arbitrationblog.kluwerarbitration.com/2018/04/02/expedited-arbitration-scc-one-year-2017-rules-2/?doing_wp_cron=1596366648.6471979618072509765625.



The chart above is from an international arbitration survey, conducted by the School of International Arbitration at Queen Mary University of London in 2018.[8] The survey examines *inter alia* the improvements and innovations that would make international arbitration more appealing. It concludes that two of the most pressing issues are reducing the cost and increasing the speed of arbitration. As is clear from the chart, respondents listed the cost as the "worst characteristic" of international arbitration, while lack of speed was listed in fourth place.

In my opinion, the growing interest in fast track arbitration should be seen against this backdrop.

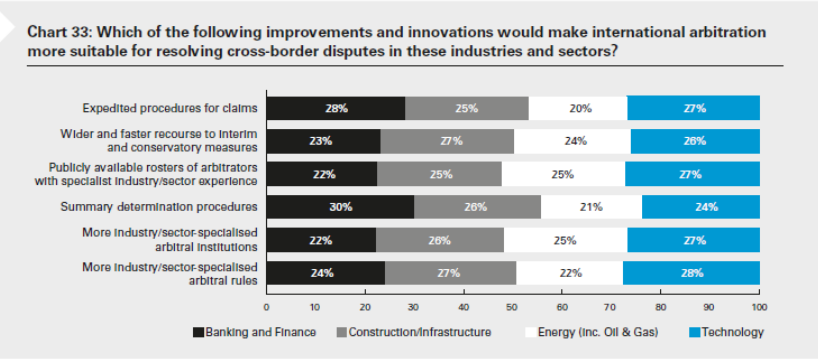
2.2 A growing interest in fast track arbitration

Many arbitral institutions have adopted or are in the process of adopting fast track rules, and I believe it is fair to describe fast track as a current trend in arbitration. However, while in the past, it was seen as a competi-

[8] 2018 International Arbitration Survey: The Evolution of International Arbitration, conducted by the School of International Arbitration at Queen Mary University in partnership with White & Case LLP: http://www.arbitration.qmul.ac.uk/media/ arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

tive advantage for institutions to offer fast track arbitration,[9] increasingly the fast track alternative seems to be an expected service.

There also seems to be a positive attitude towards—and a growing interest in—fast track arbitration from users.



In the international arbitration survey referred to above, fast track procedures are listed as one improvement or innovation that according to users would make arbitration more suitable for resolving cross-border disputes.[10] As the chart above indicates, there is also an interest in fast track arbitration across different sectors, such as banking and finance, construction, energy and technology.

Still, an essential question is whether fast track rules are actually applied in practice.

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9 Scherer, Matthias and Domitille Baizeau, "Swiss Rules of International Arbitration Awards before the Swiss Federal Supreme Court", in Rainer Füeg (ed.), *The Swiss Rules of International Arbitration – Five Years of Experience*, 2009 pp. 129–151 at p. 147.

10 See footnote 8. See also Nisja, Ola Ø. and Thomas K. Svensen, "Oslo Chamber of Commerce (OCC): Institusjonell voldgift og mekling i Norge", *Lov og Rett* 2019 pp. 38–47 at p. 45, where it is stated that the OCC fast track rules have been very well received by users.

3 Numbers from the Nordics

DIA
2019: 5/129 (4%)
2018: 9/121 (7%)
2017: 5/103 (5%)
2016: 12/135 (9%)

FAI
2019: 7/67 (10%)
2018: 2/62 (3%)
2017: 7/79 (9%)
2016: 5/64 (8 %)

OCC
2019: 2/13 (15%)

SCC
2019: 52/175 (30%)
2018: 52/152 (34%)
2017: 72/200 (36%)
2016: 55/199 (28%)

Above are some "numbers from the Nordics". The pie graphs show the proportion of new cases that were registered under fast track rules in the period 2016–2019.[11]

As the chart shows, the percentage of fast track proceedings in Finland, Norway and especially Denmark are quite low. In 2019, only 5 out of 129 cases (4%) from the DIA, 7 out of 67 cases (10%) from the FAI and 2 out of 13 cases (15%) from the OCC were registered under fast track rules. The numbers from the SCC, however, stand out: in 2019, out of 172 cases, 52 (30%) were registered under fast track rules. While the proportion of fast track cases varies significantly from one institution to another, the numbers from the SCC give reason for optimism regarding the future of fast track arbitration.

Another relevant question is whether awards under fast track rules are actually rendered in a more time- and cost-efficient manner. This is difficult to measure, but the statistics from the Nordic institutions indicate, not surprisingly, that the overall duration of proceedings under fast track

[11] Statistics are available at https://voldgiftsinstituttet.dk/wp-content/uploads/2020/01/statistics-2019-5.pdf (DIA), https://arbitration.fi/the-arbitration-institute/statistics/ (FAI) and https://sccinstitute.com/statistics/ (SCC). There are no similar official statistics available from the OCC. The numbers from 2019 referred to above were provided to the author directly from the board of the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce.

rules is normally shorter than in other arbitration proceedings. While the duration of the majority of arbitrations under general arbitration rules in 2019 seemed to lie somewhere between six and twelve months from referral, the majority of arbitrations under fast track rules lasted between three and six months.[12]

4 Key characteristics of fast track arbitration

4.1 Reduced number of arbitrators

One key characteristic of fast track arbitration is that the number of arbitrators is normally reduced. While three arbitrators is the standard rule in arbitration, fast track rules usually provide for the appointment of a sole arbitrator.

This reflects the assumption that arbitration with only one arbitrator is more efficient. Obviously, it saves on costs, as it is less expensive to carry out arbitration proceedings with one arbitrator. However, it has been suggested that arbitration with a sole arbitrator also makes it easier for the arbitration panel to handle the proceedings in a time-efficient manner.[13]

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[12] The statistics from the SCC show that in 2019, half of the awards under the SCC Arbitration Rules were rendered within 6–12 months from referral, while more than 50% of the awards rendered under the SCC Rules for Expedited Arbitration were rendered within three months, see https://sccinstitute.com/statistics/. Statistics from the FAI and the DIA show that the median duration of arbitrations under the general arbitration rules was 8 months and 10 months respectively, while the median duration for arbitrations under the fast track rules was 3 months and 6 months respectively, see https://arbitration.fi/the-arbitration-institute/statistics/ and https://voldgiftsinstituttet.dk/wp-content/uploads/2020/01/statistics-2019-5.pdf.

[13] UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session (New York, 4–8 February 2019) p. 7, available at https://undocs.org/en/A/CN.9/969.

At the same time, the composition of the panel is a key procedural issue, which touches upon due process.[14] In itself, the use of only one arbitrator does not seem very problematic.[15] However, rules that impose the appointment of a sole arbitrator regardless of the parties' agreement may raise due process concerns. This may also create difficulties at the enforcement stage, as national courts might refuse to recognise and enforce an award if the composition of the arbitral tribunal is not in accordance with the parties' agreement, cf. the New York Convention art. V (1) (d).[16]

The fast track rules of the SCC, the FAI, the DIA and the OCC all provide for the appointment of a sole arbitrator.[17] This is also the starting point of the NOMA draft fast track rules.[18] What distinguishes the different sets of rules from each other, in addition to the appointment mechanisms, is the *character* of the rule (i.e. whether it is modelled as mandatory or default).

In the fast track rules of the Nordic institutions, the decision of the case by a sole arbitrator is set out as a mandatory rule, leaving no room for parties under the fast track procedure to agree on more than

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14 *Ibid*.

15 See, along the same lines, Serbest, Fatih, "Fast-Track Arbitration – Should it be Encouraged in International Commercial Disputes?", in C. Yenidünya, M. Erkan & R. Asat (eds.) *Adalet Yayınevi*, 2013, pp. 309-336 at p. 320.

16 There are examples of such enforcement issues being raised before national courts, see UNCITRAL Settlement of commercial disputes, Issues relating to expedited arbitration, Note by the Secretariat p. 4, available at https://undocs.org/en/A/CN.9/WG.II/WP.207. For instance, the Singapore High Court ruled that an arbitral award rendered by a sole arbitrator did not violate the agreement of the parties, while a Chinese court reached the opposite conclusion in a similar case (both cases concerned arbitration under SIAC Rules). The judgment from the Singapore High Court is available at https://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/[2015]%20SGHC%2049.pdf, while a summary of the facts and rulings in the Chinese case is available at https://www.lexology.com/library/detail.aspx?g=412f18a5-f910-4fbc-8055-eb421d1de522.

17 Rules for Expedited Arbitrations (2017) of the Arbitration Institute of the Stockholm Chamber of Commerce art. 17, Rules for Expedited Arbitration of the Finland Chamber of Commerce art. 16, the Danish Institute of Arbitration Rules of Simplified Arbitration art. 9 and Rules of the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce art. 35.

18 NOMA draft art. [40].

one arbitrator.[19] In the NOMA draft, however, the rule is set out as a default rule. This means that the parties may deviate from it, by expressly agreeing to appoint, for example, three arbitrators instead of one. The thought behind this is to preserve flexibility through party autonomy, while still promoting efficiency by providing for the appointment of a sole arbitrator as the default rule.[20] The different Nordic institutions, on the other hand, seem to have pushed the balancing act further, giving more weight to efficiency, at the expense of flexibility and party autonomy.

4.2 Shorter deadlines

Another key characteristic of fast track arbitration is shorter deadlines. Some fast track procedures set deadlines for key procedural steps, while others have a deadline for the overall duration of the case. Often, a combination of these two approaches is applied. It is also common to combine shorter deadlines with restrictions on the number of pleadings that the parties may submit to the tribunal.

As with the rules on the number of arbitrators, the reason for imposing shorter deadlines is the assumption that these will make the arbitration proceedings more efficient, thus saving the parties time and money. As with all trade-offs, there are side effects: due process may be undermined and, more specifically, the right to be heard. Rules imposing short deadlines or very strict restrictions on written submissions may therefore prove problematic.

With the exception of the DIA rules, the fast track rules of the Nordic institutions and the NOMA draft all impose a deadline for the overall

[19] See also the ICC Arbitration Rules Appendix VI – Expedited Procedure Rules art. 2: ”The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator”.

[20] In addition, art. [40 (1)] of the NOMA draft stipulates that ”[a]n arbitration agreement referring to disputes being resolved by a panel of three arbitrators and expressly referring to the Rules shall not be understood to displace this rule unless the arbitration agreement expressly provides that even Fast Track Arbitration disputes shall be resolved by three arbitrators”.

duration of the case.[21] However, the time allowed differs. Under both the FAI and SCC rules, the final award must be rendered within three months; the OCC rules and the NOMA draft have opted for a six-month deadline.[22] These rules, especially those of the FAI and the SCC, set quite short deadlines that clearly distinguish the fast track procedure from ordinary arbitration. The deadlines, however, are not absolute, as all sets of rules provide for the possibility of extending the time for making the final award.[23]

As already mentioned, it is also common to have different deadlines for key procedural steps, *inter alia* for appointing the arbitrator(s) and for filing written submissions. The OCC and DIA rules do not set deadlines for the appointment of the arbitrator. This must, however, be seen in connection with the fact that both sets of rules leave it to the institute to appoint the arbitrator.[24] The SCC and FAI rules, on the other hand, leave it to the parties to appoint the arbitrator and, if this fails, provide a procedure for appointment, which includes certain deadlines.[25] More specifically, if the parties have not agreed on a procedure, or if they fail to appoint the arbitrator within a set time period (agreed or decided by the institute), they are given a deadline to jointly appoint the arbitrator:

21 SCC art. 43, FAI art. 42, OCC art. 36 and NOMA draft art. [43]. Even though the DIA rules do not provide for a similar deadline for the overall duration of the case, it follows from art. 19 (1) that a draft version of the arbitral award must be submitted to the DIA secretariat "[a]s soon as possible, and, if possible, not later than 30 calendar days from the referral of the case to the arbitrator".

22 These deadlines start to run "from the date on which the sole arbitrator received the case file from the Institute" (FAI art. 42), "after the case was referred to the arbitral tribunal" (OCC art. 36), "from the date the case was referred to the Arbitrator" (SCC art. 43) and "after the commencement of the arbitration" (NOMA draft art. [43]).

23 SCC art. 43 ("The Board may extend this time limit upon a reasoned request from the Arbitrator, or if otherwise deemed necessary, having due regard to the expedited nature of the proceedings"), FAI art. 42 ("The Institute may extend this time limit upon a reasoned request of the sole arbitrator or, if deemed necessary, on its own motion"), OCC art. 36 ("To the extent possible, the parties shall be notified of the arbitration award … not later than six months after the case was referred to the arbitral tribunal") and NOMA draft art. [43 (1)] ("In exceptional circumstances, and after consultation with the parties, the arbitral tribunal may extend the time for making such final award").

24 OCC art. 35 (1) and DIA art. 10 (1).

25 SCC art. 18 and FAI art. 17.

10 days under the SCC rules and 15 days under the FAI rules.[26] If the parties fail to appoint an arbitrator within this deadline, the board of the institute makes the appointment.[27] In the NOMA draft, a slightly simpler procedure is suggested. If the parties are unable to agree on who should be appointed within 14 days, NOMA appoints the arbitrator.[28]

When it comes to deadlines for filing written submissions, the Nordic institutions leave it to the arbitrator and/or the institute to fix the deadlines,[29] although the SCC and FAI rules do set default time limits for submitting additional written submissions (i.e. submissions other than the statement of claim and statement of defence).[30] The NOMA draft rules, on the other hand, provide specific deadlines for the filing of all written submissions, including the statement of claim and the statement of defence.[31] However, the time limits set out in the three sets of rules (SCC, FAI and NOMA) are not absolute and may be deviated from at the discretion of the arbitrator.[32]

As indicated above, rules setting very short deadlines—both on the overall duration of the case and on key procedural steps—may raise due process and enforcement concerns. It might *inter alia* be argued that the accelerated nature of the proceedings means that the parties are not able to fully present their case. As none of the deadlines referred to above are absolute, but leave at least some room for extension, the rules in themselves do not seem particularly problematic from a due process

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26 SCC art. 18 (2) and (3) and FAI art. 17.2, 17.3 and 18.

27 SCC art. 18 (3) and FAI art. 18.

28 NOMA draft art. [40 (2)].

29 FAI art. 31.1 and 31.2, DIA art. 15 and OCC art. 35 (3) (which leave it to the *arbitrator* to fix the deadlines), and SCC art. 9 (1) and DIA art. 7, (which leave the decision to the institute's *secretariat*).

30 SCC art. 30 (2) and FAI art. 31.4 (c).

31 NOMA draft art. [41 (1) and (2)]. Pursuant to these rules, both the statement of claim and the statement of defence must be submitted within 21 days, while subsequent submissions must be submitted within 14 days.

32 SCC art. 30 (2) ("… subject to any other time limit that the Arbitrator, for compelling reasons, may determine"), FAI art. 31.4 ("Unless the sole arbitrator in special circumstances decides otherwise …) and NOMA draft art. [41 (3)] ("The tribunal may decide, upon written request by a party, that the time limit set out herein for submitting a statement shall be extended …").

point of view. However, whether due process is maintained in practice, will depend heavily on how the rules are actually applied, as the extension of deadlines is generally at the discretion of the arbitrator and/or the institute/association.

4.3 Limitation on hearings

A third key characteristic of fast track arbitration is that there is normally some kind of limitation on hearings. In some sets of rules, hearings are limited in time or to a specific purpose,[33] while in others, it is decided that the proceedings shall be conducted without a hearing, based on documents alone.[34]

The thought behind such restrictions is to make the proceedings more cost- and time-efficient, in line with the overall goal of expediting proceedings. In theory, these restrictions should not pose any problems as long as the parties agree to them. However, the situation is more complicated where there is no such consensus, for example where only one of the parties wishes to conduct a hearing. The concern is of course that due process may be violated, specifically, the right of a party to be heard and to present its case in a dispute, which may create difficulties at the recognition and enforcement stage.

The starting point in the fast track rules of the different Nordic institutions, as well as in the NOMA draft, is that proceedings are conducted based on documents alone.[35] The approach taken reflects the view that the exclusion of oral hearings will generally expedite proceedings.[36] However,

[33] See, for example, the Fast Track Procedures of the American Arbitration Association's Construction Industry Arbitration Rules F-11, setting out as a starting point that the hearing shall not exceed one day. See also OCC art. 35 (4), where it is stated that if an oral hearing is held, it must not exceed three days.

[34] See, for example, SCC art. 33, FAI art. 35.1, DIA art. 15 (3), OCC art. 35 (4) and NOMA draft art. [42], further presented below.

[35] SCC art. 33, FAI art. 35.1, DIA art. 15 (3), OCC art. 35 (4) and NOMA draft art. [42].

[36] There is, however, no consensus as to whether the exclusion of oral hearings is in fact a suitable means for expediting proceedings, see UNCITRAL Report of Working Group II (Dispute Settlement) on the work of its seventieth session (Vienna, 23–27 September 2019) p. 15, available at https://undocs.org/en/A/CN.9/1003.

to preserve some flexibility—and to reduce due process concerns—the rule that cases be decided on documents alone is not absolute. Under the fast track rules of the SCC, the FAI and the OCC, an oral hearing may be held if requested by a party and/or agreed to or deemed necessary by the arbitral tribunal.[37] The fast track rules of the DIA, on the other hand, make document-based proceedings the default rule, but allow parties to deviate from this rule by agreement.[38] The NOMA draft adopts a combination of this approach and the approach taken by the SCC and the FAI.[39]

The fast track rules of the Nordic institutions, as well as the NOMA draft, all seem to promote proceedings based on documents only, while still preserving some flexibility. However, the level of flexibility differs. The OCC rules, for example, offer a very flexible solution: it is sufficient that one of the parties request an oral hearing.[40] This approach should remove the risk of allegations of violation of due process and difficulties at the recognition and enforcement stage. On the other hand, it does not promote efficiency to the same extent as the fast track rules of the SCC, for example, under which an oral hearing will be held only if it is requested by a party *and* the arbitrator considers the reasons for the request to be compelling. The solution adopted in the DIA rules also seems to promote efficiency. However, unlike the solution adopted by the SCC, it emphasises party autonomy rather than the tribunal's discretion regarding whether to hold a hearing or not. At the same time, the solution adopted by the DIA might be the most problematic in light of due process, as it leaves no possibility of holding an oral hearing in situations where the parties do not agree.

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37 SCC art. 33 ("A hearing shall be held only at the request of a party and if the Arbitrator considers the reasons for the request to be compelling"), FAI art. 35.1 ("A hearing shall be held only if requested by a party and if deemed necessary by the sole arbitrator") and OCC art. 35 (4) ("An oral hearing shall be conducted if the arbitral tribunal deems it necessary or if requested by one of the parties").

38 DIA art. 15 (3).

39 NOMA draft art. [42].

40 If none of the parties requests an oral hearing, such a hearing may nevertheless be held if the arbitral tribunal deems it necessary, cf. OCC art. 35 (4).

5 Summing up

To address the need for time- and cost-efficient dispute resolution, many arbitral institutions have adopted, or are in the process of adopting, a fast track option in their arbitration rules. The Nordic arbitral institutions are not lagging behind; the SCC, the FAI, the DAI and the OCC have offered fast track alternatives for several years. In addition, NOMA is in the process of adopting a fast track procedure.

The fast track rules of the SCC, the FAI, the DIA and the OCC, as well as the NOMA draft, display many of the same solutions and all contain the key characteristics referred to above, i.e. appointment of a sole arbitrator, shorter deadlines and limitations on oral hearings. However, the balancing act—how to strike the right balance between the tools that can be used to expedite the procedure and the risk of due process challenges—seems to have been carried out quite differently in the various sets of rules.

Despite the differences in approaches taken, my overall impression is still that all the reviewed sets of rules have adopted solutions that are well suited to speeding up arbitration proceedings, while at the same time ensuring that due process is upheld. It might be asked whether it is possible to push the balancing act even further, in order to achieve more substantial efficiency gains. In my opinion, this is possible and I believe that a more streamlined fast track procedure would increase the attractiveness of arbitration as an alternative to litigation.

Fast Track Arbitration: What the Peasant Does Not Know, He Will Not Eat[1]

Ola Ø. Nisja[2]

[1] This article is based on a comment given to the insightful presentations by Marie Nesvik and Gisela Knuts at the Norwegian Arbitration Day. Many of the views expressed are expanded upon in a piece published in the Stockholm Arbitration Yearbook 2020 (Fast Track Arbitration in the Nordics: Where Do We Go From Here?). I thank my colleagues Mike Stewart and Haakon Orgland Bingen for valuable comments to an earlier draft of this article.

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1 Introduction

The main Nordic arbitral institutions have for years offered fast track arbitration,[3] as do many commonly used institutions outside the Nordics.[4] Still, as demonstrated by Nesvik, use is – with an exception for the Stockholm Chamber of Commerce (SCC) – limited.[5] In Norway, where the clear majority of arbitration cases are handled *ad hoc*, the number of fast track arbitrations is insignificant. This article explores how this can be.

2 Why fast track arbitration?

"Fast track",[6] "expedited"[7] or "simplified"[8] arbitration provides a more efficient system for lower value or less complicated disputes. The essence of fast track arbitral processes is that awards can be obtained quicker and at a lower cost than through ordinary (full scale) arbitration. By way of example, the Oslo Chamber of Commerce (OCC) states as follows in the Preface of its 2017 Rules:

> "A simplified form of arbitration is Fast-track Arbitration, a method which is fast, more efficient and less costly."

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3 See 2017 OCC Arbitration and Fast-track Arbitration Rules chapter VII, 2017 SCC Rules for Expedited Arbitration, 2013 Danish Institute of Arbitration (DIA) Rules of Simplified Arbitration and 2020 Finland Arbitration Institute (FAI) Expedited Arbitration Rules. The pan Nordic Nordic Offshore and Maritime Arbitration Association initiative (NOMA) is also working on its own rules on fast track arbitration.

4 See e.g. 2017 International Chamber of Commerce (ICC) Arbitration Rules Article 30 and Appendix VI ("Expedited Procedure Provisions")

5 See the article by Marie Nesvik.

6 Terminology applied by the OCC.

7 Terminology applied by the SCC and the FAI.

8 Terminology applied by the DIA.

Users of all arbitral processes invariably require greater efficiency and lower cost dispute resolution. Specifically adopted fast track procedures are very well suited to meet such requirements.[9]

3 The OCC fast track regime

When adopting its 2017 rules, the OCC chose to move away from having a separate set of fast track rules towards implementing a separate chapter in its joint arbitration and fast track arbitration rules.[10] This approach was adopted in order to make it easier for users to see the differences from conventional (full scale) arbitration.

Under the OCC regime, the parties must have agreed to use fast track arbitration.[11] Thus, neither the institute nor the tribunal can impose a fast track process on the parties if they have not agreed to that process, notwithstanding how well suited the dispute may be to resolution on an expedited basis. The reason of course being concerns about preserving party autonomy.

Disputes handled under the OCC fast track regime will be decided by a sole arbitrator, appointed by the OCC. Before the OCC appoints a sole arbitrator, the parties shall be given the opportunity to comment on potential candidates.[12] If the parties agree as to who should be the sole arbitrator, assuming that the suggested candidate has the requisite competence, it is likely that the OCC will agree to that appointment.

It follows clearly from the OCC rules that the proceedings shall be arranged with the objective of conducting the arbitration as efficiently as possible.[13] This is an important rule, which the tribunal should take into account throughout the process, and particularly when applying

9 See the article by Marie Nesvik.

10 See further Ola Ø. Nisja and Thomas Svensen, "Oslo Chamber of Commerce (OCC), Institusjonell voldgift og mekling i Norge", LoR 2019 page 38 on 41-42 and 44-45.

11 2017 OCC Rules Article 34.

12 2017 OCC Rules Article 35 (1).

13 2017 OCC Rules Article 35 (2).

the principle of adopting a suitable process as set out in the Norwegian Arbitration Act 2004.[14] The tribunal must adhere to this principle whenever the process is not regulated in other ways, be it the OCC Rules, the parties separate agreement or in the Act.

Exchange of pleadings is specifically regulated in the OCC Rules. The parties may not submit more than one pleading each, in addition to the statement of claim and the statement of defence, unless sanctioned by the tribunal. The pleadings are to be submitted within time limits fixed by the arbitral tribunal.[15] The latter rule is definitely best practice in all arbitrations, but is particularly important in a fast track process.

In Norway, there is a tradition for conducting what by international standards are rather long oral hearings both in arbitration process and domestic court cases. In an ordinary arbitration under the OCC Rules, a hearing is to be held unless the tribunal finds it unnecessary.[16] In fast track arbitration, this starting point is reversed. An oral hearing will only be held if the tribunal deems it necessary or if requested by one of the parties. Such oral hearing shall not exceed three days, unless the tribunal decides otherwise.[17]

An overall timeline, not overly ambitious, is also given. The arbitral award shall preferably be issued not later than four weeks after the closing of the arbitral proceedings, and not later than six months after the case was referred to the arbitral tribunal by the OCC.[18]

When it comes to the costs for the tribunal, the OCC fee structure will give the parties fare more predictability than in an *ad hoc* arbitration.

14 Section 21.

15 2017 OCC Rules Article 35 (3).

16 2017 OCC Rules Article 14 (1), cf. the Arbitration Act 2004 section 26 (1).

17 2017 OCC Rules Article 35 (4).

18 2017 OCC Rules Article 36.

4 Why aren't we seeing more fast track arbitration in Norway?

A properly handled fast track process involves a giant leap from two or even three levels of court, and also a quite substantial leap from the traditional *ad hoc* approach common in Norway, which has worked well for years mostly due to the nature and transparency of the arbitral community.[19]

One question is of course whether we have the right arbitrators in order to increase the number of fast track arbitrations. A lack of arbitrators with the necessary skillset could certainly militate against selecting fast track arbitration. The arbitral community in Norway is still rather small, and although the pool of candidates is increasing, a new generation of arbitrators needs to be educated and trained. Some frequently used arbitrators may also benefit from training on how to conduct fast track arbitration processes. This would be a great and practical topic for many of the arbitration seminars being organized these days. Competence and experience should be shared. More focus and higher degree of knowledge will bring us a good step further. There is certainly a massive talent pool of potential arbitrators available.

The question is also raised from time to time – as it can be when discussing early settlement and mediation – whether counsel are hesitant because fast track arbitration will mean less work. If that would prove to be the case, it would certainly be contrary to numerous ethical and other sets of rules. I for one refuse to accept that there can be substantial reality in such a contention.

The main driver for the insignificant number of fast track arbitration cases is almost certainly the lack of knowledge about such an alternative and what it involves. Outside the sometimes narrow confines of the arbitral community itself, users and lawyers still need to hear more about fast track arbitration and learn more of the advantages in order to

[19] See e.g. Nisja and Svensen p. 38 and Amund Bjøranger Tørum, Norsk ad hoc voldgift i en brytningstid, TfF 2017 p. 77-80.

increase use. This will in turn result in more fast track arbitration clauses included in contracts, which will inevitably increase the frequency of fast track arbitration.

5 Example: The OCC layered clause

The OCC model clause provides a straightforward layered regulation:

> "Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules of the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce in force at any time.
>
> The rules for fast-track arbitration shall apply where the amount in dispute does not exceed NOK […]. The amount in dispute includes the claims made in the request for arbitration and any counterclaims made in the response to the request for arbitration."

Where the threshold should be set can be discussed, but MNOK 5 can easily be justified,[20] in many contracts even higher.

[20] By way of example, the ICC Expedited Procedure Provisions apply if the amount in dispute does not exceed MUSD 2, approx. MNOK 20 at the time of publishing.

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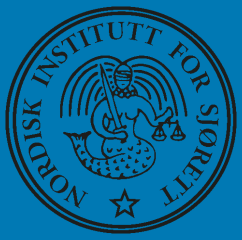

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