Case Management i International Voldgift
Oslo Chamber of Commerce
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独 立 仲 裁 员
ARBITRATION CHAMBERS
HONG KONG · LONDON

Niels Schiersing, FCIArb, Chartered Arbitrator

Advokat (Denmark)
Solicitor (England & Wales)

Hong Kong - London
Copenhagen

Kort præsentation

Advokat (Danmark)

Solicitor (England & Wales)

FCIArb & Chartered Arbitrator (C.Arb)

Member, Copenhagen Chambers 2015 - 2017

Member, Arbitration Chambers Hong Kong & London 2017 –

Kort præsentation - fortsat

Indtil nu voldgiftsdommer ved følgende voldgiftsinstitutter:

ICC (International Chamber of Commerce)
LCIA (London Court of International Arbitration)
SIAC (Singapore International Arbitration Centre)
SCC (Stockholm Chamber of Commerce)
DIAC (Dubai International Arbitration Centre)
FAI (Finland Arbitration Institute)
DIA (Danish Institute of Arbitration/Voldgiftsinstituttet)

Disposition (1)

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Disposition (2)

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A good arbitrator:

- Proficient in arbitration law …
- A great ”legal” mind …
- Conducive to a collaborative spirit … between the parties and within the tribunal
- Emotionally intelligent … work with other people
- Not rigid but flexible yet firm and consistent …
- A degree of pragmatism and common sense
- Not ”showboat” and ”grandstander” … the case is not about him/her
- Understands the service element of the tribunal’s function

- <u>All important attributes as regards Case Management</u>

1.1
Betydningen af Case Management – Den retlige ramme

Voldgiftsloven § 20

Likebehandling af partene

Partene skal gis like behandling på ethvert trinn av voldgiftsbehandlingen og ha full anledning til å fremføre sin sak

”Full” betyder rimelig/reasonable: Niels Schiersing i ET2011.231

ICC Arbitration Rules

Article 22: Conduct of the Arbitration

(1)

The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an **expeditious and cost-effective** manner, having regard to the complexity and value of the dispute.

(2)

In order to ensure **effective case management**, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

(4)

In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a **reasonable opportunity** to present its case.

LCIA Arbitration Rules

Article 14 Conduct of Proceedings

14.4

Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include:

(i) a duty to act **fairly and impartially** as between all parties, giving each a **reasonable opportunity of putting its case and dealing with that of its opponent(s)**; and

(ii) a duty to **adopt procedures** suitable to the circumstances of the arbitration, **avoiding unnecessary delay and expense**, so as to provide a fair, **efficient** and **expeditious** means for the final resolution of the parties' dispute.

LCIA Arbitration Rules

Article 14 Conduct of Proceedings

14.5

The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the **fair, efficient and expeditious** conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.

OCC Arbitration Rules

Article 9.2:

The arbitration shall be conducted in an **impartial** and **efficient** manner. The parties shall be treated **equally** at all stages of the arbitral proceedings and shall be given **full opportunity** to present their case.

SCC Arbitration Rules

Article 23 Conduct of the arbitration by the Arbitral Tribunal

The Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties.

In all cases, the Arbitral Tribunal shall conduct the arbitration in an **impartial**, **efficient and expeditious manner**, giving each party an **equal** and **reasonable opportunity** to present its case.

Friktion

Latent eller aktuel friktion mellem på den ene side:

”expeditious” … ”cost effective” … ”efficient”

Og på den anden side:

”equal treatment” … ”full/reasonable opportunity to present case”

Case Management: Håndtering af den friktion …

1.2
Betydningen af CM – under sagen

Under voldgiftssagens forløb

Kontraktretlig forpligtelse til en effektiv afgørelse af tvisten – naturalia negotii

Manglende effektivitet

Forøgelse af omkostninger
Forsinkelser
Honorarreduktion af et voldgiftsinstitut
- ICC Rules 38(2) + App II Art 2(2)/OCC Rules Art 33?
Afsætning af voldgiftsdommer - VL § 16

Ophævelse af/træde tilbage fra voldgiftsaftalen
U 2003.2412 V
Rt-1918-268:

«... det vistnok i mangel av anden avtale maa antages at være en stiltiende kontraktsforutsætning ved enhver voldgiftskontrakt, at voldgiftsbehandlingen ikke maa trække i langdrag ut over alle rimelighetens og tilbørlighetens grænser, og at enhver av kontrahenterne, hvis saa maatte ske, skal være berettiget til at anse sig ubunden av voldgiftskontrakten ...»

1.3
Betydningen af CM – efter voldgiftskendelsen

Efter voldgiftskendelsen

Tilsidesættelse af voldgiftskendelsen/voldgiftsdommen VL §§ 42 - 44

Manglende fuldbyrdelse af voldgiftskendelsen/ voldgiftsdommen VL §§ 46

Honorarreduktion ved domstolene VL § 39

”Due Process Paranoia”

2013 International Arbitration Survey (Queen Mary University of London and White & Case):

”reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having the chance the chance to present its case fully”

”Due Process Paranoia”

Reyes: Due Process Paranoia (Asian Dispute Review, October 2017)

”International arbitrators are paradoxically afraid to do what they are paid to do. They are afraid to decide. Instead, they put off decisions on procedural or interlocutary applications for as long as possible, for fear of being accused later of not having given a party (usually the respondent) a fair chance to present its case … To a greater or lesser extent all arbitrators suffer from due process paranoia”

Due Process Paranoia

Kodeord:

- Kontradiktion
- Ligebehandling

VL § 20:

… like behandling på ethvert trinn av voldgiftsbehandlingen

…ha full (i.e. rimelig) anledning til å fremføre sin sak

2.
Den første del af voldgiftsprocessen

2.1
Voldgiftsretten og parterne

Voldgiftsloven

§ 20

Regler for saksbehandlingen

*Innenfor **rammen av partenes avtale** og **loven her** skal voldgiftsretten behandle saken på den måde den finner **hensiktsmessig**. Straks voldgiftsretten er oppnevnt skal den eller dens leder etter drøfting med partene fastlegge en plan for den videre behandlingen, hvis ikke annet er avtalt.*

OCC Rules

Article 9.1:

The arbitral tribunal shall conduct the arbitral proceedings in such manner as it considers appropriate, within the **framework** of the **agreement between the parties** and the **Arbitration Rules**.

Partsautonomi

Partsautonomi er trumf

Voldgiftsretten bør søge at få parterne til at enes

Forberedende møde (”CMC”/ Case Management Conference) bør altid finde sted

- Telefonkonference eller personligt møde
- Alle dommere bør deltage

Eksempel mødeindkaldelse (1)

The provisional agenda for the preparatory telephone conference-call will include:

1. *Number of* ***written submissions*** *and the time limits pertaining thereto*

2. ***Documentary evidence****, including* ***document production****, if any, including applicable principles and procedure for requests and time limits pertaining thereto*

3. ***Witness statements****, if any, including applicable principles and time limits pertaining thereto*

4. ***Expert witnesses****, if any, including applicable principles and time limits pertaining thereto*

5. ***Cut-off date*** *and Responsive Cut-off date*

6. ***Hearing****, including venue, format, dates and length*

7. ***Pre-hearing memorials*** *(skeleton arguments), if any, including applicable principles for exchange, possible limitations as to scope and/or length thereof*

8. ***Reporting/transcription*** *and* ***interpretation***

9. ***Post-hearing memorials****, if any, including applicable principles for exchange, possible limitations as to scope and/or length thereof*

Eksempel mødeindkaldelse (2)

*The Tribunal invites Claimant to **consult** with Respondent to determine whether the parties might be in a position to make a **joint proposal** for procedural directions and further invites Claimant report to the Tribunal no later than two business days prior to the CMC.*

Enten:

***Absent a** joint proposal, the tribunal will submit a **draft procedural order** for the parties to consider and that draft will then serve as a basis for the discussions during the CMC.*

Eller:

For the sake of convenience, the Tribunal attaches to this email a draft Procedural Order No 1 which the parties are invited to use as a basis for these discussions.

Procedural Order No. 1

Typiske emner:
Kommunikation
Tidsfrister (sædelandets tidszone) – COB/End of Day
Skriftveksling
Dokumentbevis
Vidner og Eksperter
Document Production
Cut-off date
Mundtlig forhandling
Pre-hearing/post-hearing briefs
Omkostninger
Sagens afslutning
Ændringer
Immunities

Begrænse voldgiftsdommernes involvering – Eksempel fra PO1

*The Parties shall **strictly comply** with the **time limits** set by the Tribunal. For any extension, a reasoned request shall be made promptly after the need for an extension of time arises, and, in any event, before the date of expiration of the time limit.*

The Parties may also grant between themselves short extensions of time on the basis of mutual courtesy and collegial accommodation as long as they do not materially affect the timetable and provided that the Tribunal is informed.

Begrænse voldgiftsdommernes involvering – Eksempel fra PO1 (2)

*The Parties are **invited** not to copy the Tribunal on all their correspondence and to send to the Tribunal only those documents which the Parties intend the Tribunal to **read and act upon accordingly** or which the Tribunal for other reasons must be made aware of.*

Eksempel på follow-up

Dear colleagues,

I refer to the preliminary meeting of yesterday's date and, first of all, I thank and commend you for the collegial and collaborative spirit displayed.

As foreshadowed, I attach the Tribunal's draft Procedural Order No. 1 with Procedural Timetable and I invite the parties' comments on the drafts on or before ***.

2.2
Dokumentbevis

Dokumentbevis

C-1 - *
R-1 - *
Med hvert indlæg

CL-1 - *
RL-1 - *

Document Requests
Hvornår?
Samlet eller med hvert indlæg?
Redfern Schedule
Adverse inference

Redfern Schedule
Eksempel fra PO1

6.7 **On or before 5 September 2017**, the Parties shall prepare a **joint submission** in tabular form (usually called the "Redfern Schedule" but organized **horizontally** cf. below) concerning the Disputed Documents with two sections:

(i) Claimant's request(s) for the production of documents

(ii) Respondent's request(s) for the production of documents.

The joint submission for each request shall be presented in a five horizontal rows (not vertical columns) as follows:

(i) First (top) row: **identification** of the document(s) or categories of documents that have been requested;

(ii) Second row: short **presentation** of the **reasons** for each request;

(iii) Third row: a summary of the **objections** by the other Party to the production of the document(s) requested;

(iv) Fourth row: a **reply** of the requesting Party (UDELADES OFTE)

(v) Fifth (bottom) row: left blank for the **decision of the Tribunal**.

Redfern Schedule (tidspres)

6.6 **On or before 10 January 2018**, a party ("requesting party") may request documents from the other party by **submitting a Redfern Schedule** with a lay-out as described in paragraph 6.5 and with **the first two rows filled out by the requesting party.**

6.7 **On or before 17 January 2018**, the party, to whom a request in accordance with paragraph 6.6 is directed, must **either** indicate its **willingness to produce** the requested documents or submit a **reasoned objection** to production of the requested documents **("Disputed Documents")** by filling out **the third row** of the Redfern Schedule received from requesting party cf. paragraph 6.6 and submitting the Redfern Schedule.

6.8 **On 24 January 2018,** the Tribunal shall decide on the question of production of Disputed Documents by **completing row number four** of the Redfern Schedules received by the parties and making a **Procedural Order** containing its decision concerning whether to grant or dismiss the requests for production of Disputed Documents.

Redfern Schedule
Eksempel fra PO1

6.8 *For its decision, the Tribunal considers that the following standards should guide its reasoning:*

(i) There will be ***no general discovery or disclosure*** *of documents.*

(ii) The ***request*** *must* ***establish*** *the* ***relevance and prima facie materiality*** *to the resolution of the dispute of each document or of each specific category of documents sought in such a way that the other Party and the Tribunal are able to refer to factual allegations in the submissions filed by the Parties to date. …*

(iii) The Tribunal will ***only order*** *the production of documents or category of documents if they exist and are within the* ***possession, power, custody or control*** *of the other Party and* ***not, reasonably****, at the same time within the possession, power, custody or control of the requesting Party. …*

Redfern Schedule
Eksempel fra PO1

*(iv) If necessary, the Tribunal shall also **balance the request** for production against the **legitimate interests** of the other Party, including any applicable **privileges**, the extent to which the request places an **unreasonable burden** on the other Party and the need to safeguard **confidentiality**, taking into account all the surrounding circumstances. Before making the decision, the Tribunal may exercise its discretion, at the request of a Party, to hear oral submissions.*

*(v) The Tribunal may, in all matters pertaining to evidence, **seek guidance** by the **IBA Rules on the Taking of Evidence** in International Arbitration (adopted by a resolution of the IBA Council of 29 May 2010) (the "IBA Rules") to the extent considered appropriate by the Tribunal in the exercise of its overall procedural discretion. For the avoidance of doubt it is noted, the IBA Rules are **not** deemed to be **binding** on the Tribunal.*

Redfern Schedule

6.11 If documentary evidence which a Party is directed by the Tribunal to produce or file contains **privileged or proprietary information or trade secrets**, that Party shall indicate to the Tribunal and to the other Party what the nature of the privilege or the proprietary information is, and with respect to privilege by which law it is governed and who the parties/persons are who are affected by it. In that case, the **Tribunal shall determine**, after consultation with the Parties, the **appropriate measures** to be implemented in order to respect the **proprietary or privileged nature** of the information or the trade secret(s) while, to the extent possible, allowing the production of such evidence for the purpose of these arbitral proceedings.

6.12 Insofar as documents ordered are not produced or not produced as directed by the Tribunal, the Tribunal may take this into account in its evaluation of the respective factual allegations and evidence including an inference against the Party refusing production **(adverse inference)**.

”Privilege log”

Type of document, i.e., memorandum, email, letter, etc.

Name of the document author.

Names of the document recipients.

Document date.

Title or description of the document.

Subject matter of the document.

The privilege claimed, i.e., “attorney work product,” “attorney client communication,” “Trade secret”

Eksempel

Sædvanligvis skabelonagtig sprogbrug

Request 47:

The Tribunal orders production of the documents requested in (b) and (c) but rejects ordering production of the documents requested in (d) as **insufficiently material** to the outcome of the proceedings and/or **insufficiently specific**, **overly broad** and **overly burdensome**.

Request 48:

The Tribunal rejects ordering production of the documents requested in (b) as **insufficiently material** to the outcome of the proceedings and/or **insufficiently specific**, **overly broad** and **overly burdensome**.

Request 49:

The Tribunal orders production of the documents requested.

2.3
Vidner

Witness Statements v. Oral Examination in Chief

Witness Statements (WSs) or Oral Examination in Chief

- WSs ”frontload” the arbitration – pro … ”what case does each party have to meet”
- WSs sparer tid - pro
- WSs koncentrerer vidneforklaringen til det essentielle - pro
- WSs er ofte formuleret helt eller delvis af partsadvokaterne - con
- WSs gør det vanskeligere at få indtryk af vidnet – con
- (No chance for counsel to conduct a powerful examination-in-chief) – (con)

Hvornår?
Med hvert skriftlig indlæg eller senere
Samtidigt eller konsekutivt –
Pleading based eller Memorial based arbitration
Responsive WS

Eksempel fra PO1

5.1 The written statements shall be accompanied by the documentary evidence relied upon by the relevant Party and the legal authorities relied upon by it.

6.1 If a Party wishes to adduce testimonial evidence in respect of its allegations, it shall so indicate in its submissions and submit written witness statements **on or before 11 August 2015**. Responsive Witness Statements must be submitted **on or before on or before 15 September 2015**. Testimony of witnesses that is not produced within the time limits shall not be admissible absent a demonstration of reasonable cause for the omission, as determined by the Tribunal.

Eksempel fra PO1 (1)

Each witness statement shall:

- *contain the name and address of the witness and his or her relation to any of the Parties;*
- *state the basis of the witness's evidence (own perception or, if on information received, from whom and how);*
- ***be in sufficient detail so as to stand as the direct evidence of the witness at the Hearing;***
- *contain a statement of truth;*
- *contain copies of all documents relied on or reference to such documents as indexed in accordance with paragraph *.* above*
- *be signed by the witness and give the date and place of signature; and*
- *contain a confirmation that the witness is able and willing to give oral evidence at the Hearing if so required.*

Eksempel fra PO1 (2)

*Latest on ***, the Parties shall **inform** each other of the witnesses they require to be available for **cross-examination** at the Final Hearing. If such a witness fails to be available, the Tribunal may, in its discretion, disregard the witness statement(s) or attach such weight as the Tribunal deems appropriate.* ***If a Party chooses not to request the attendance of a witness for cross-examination, that Party shall not be deemed to have agreed to the correctness of the witness statement(s) of that witness.***

2.4
Eksperter

Eksperter

Party appointed/Tribunal appointed experts:
Hver part udpeger egne eksperter
Voldgiftsretten udpeger eksperter

Fordele/ulemper:
Hired guns
Idiosynkrasier

Ekspert rapporter

Individuelle rapporter
Fælles rapporter – joint reports

”Hot tubbing”

”Afhjemling” – eksperter
Eksempel fra PO1

The expert evidence at an oral hearing will proceed as follows:

- oral expert evidence will be grouped by area of expertise, with experts within each area giving evidence concurrently;
- the written expert reports shall stand as the evidence-in-chief of an expert;
- prior to cross examination, each expert may deliver an introductory presentation to place their evidence in context and identify key outstanding issues of disagreement;
- following cross examination, each expert may ask questions of the other experts in their area of expertise; and
- the Tribunal shall be permitted to ask questions at any time.

2.5
Forberedelsens afslutning

Formål

Tilskæring af sagen

Endelig angivelse af:
Påstande
Anbringender
Bevisførelse

Afskære yderligere:
Påstande
Anbringender
Bevisførelse

Cut-off date

FAI Arbitration Rules Art. 33.3

The arbitral tribunal may, after consulting with the parties, set a cut-off date prior to the commencement of any hearing referred to in Article 34 and order that after the cut-off date, the parties will not be allowed to present any new claims, arguments or documentary evidence on the merits of the dispute, or to invoke any new witnesses not previously nominated, unless the arbitral tribunal in exceptional circumstances decides otherwise

Cut-off Date

Formålet med en cut-off date

Give parterne en rimelig mulighed for at føre deres sag – herunder kontradiktion

Each party knows the case it has to meet …

Undgå forsinkelse

Timing

- Ikke for tidligt
- Ikke for sent

Responsive Cut-off date

Give parterne mulighed for at svare på og fremlægge materiale (”responsive material”) på materiale der er indkommet umiddelbart før cut-off date (”late material”)

Udfordringer:

- Er der tale om ”late material”?
- Er der tale om ”responsive material”?

Eksempel 1fra PO1

9. Cut-off date

9.1 *The Cut-off date cf. art. 33.3 of the Rules shall be **28 April 2017**. After the Cut-off date, the parties will not be allowed to present any new claims, arguments or documentary evidence, or to invoke any new witnesses not previously nominated, unless the arbitral tribunal in exceptional circumstances decides otherwise or if in accordance with paragraph 9.2.*

Eksempel 1 fra PO1 (cont.)

Cut-off date (cont.)

*9.2 In the **event** that a Party introduces new claims, arguments or documentary evidence into the arbitration just before the Cut-off date or a Party **just before the Cut-off date** invokes new witnesses not previously nominated to appear and give evidence at the Hearing, **("Late Procedural Material"),** the other Party may **on or before 5 May 2017 ("Responsive Cut-off date")** respond to the Late Procedural Material by submitting new **responsive** claims, submit additional **responsive** documentary evidence and/or call further **responsive** witnesses but the rights of a Party shall be limited to providing such a response **("Responsive Material")** to any Late Procedural Material. …*

Eksempel 2 fra PO1

Cut-off Date

5.1 The Cut-off date shall be **7 June 2017**. After the Cut-off date, the Parties will **not be allowed to present any new** claims, arguments or documentary evidence, **unless** the arbitral tribunal in exceptional circumstances decides otherwise, **e.g.** in order for a Party to introduce **exclusively responsive material** to claims, arguments or evidence introduced by another Party just before the Cut-off date.

2.6
Mediation
– hvornår?

Mediation

Step-clauses …

Baseret på et stadigt stigende konfliktniveau

Med-Arb

Arb-Med

Reverse step-clause …

Foreskrive mediation på et passende tidspunkt forud for den mundtlige forhandling

PO1

3.
Bifurcation

To bifurcate – or not to bifurcate

Formål:

Spare omkostninger og tid

Afgøre separate spørgsmål, der eventuelt kan afslutte sagen eller fremme et senere forlig:

- Voldgiftsrettens kompetence
- Forældelse
- Ansvarsgrundlag ctr. Erstatningsudmåling

Anvendes med forsigtighed

4.
Den sidste del af voldgiften

4.1
Pre-Hearing Conference

Pre-Hearing Conference – Eksempel fra PO1

The Parties will hold a pre-hearing conference call with the presiding arbitrator to deal with any procedural matters that require resolution in advance of the Final Hearing and to establish the timetable for the Final Hearing.

Tidsplan

Rækkefølge af vidner

Housekeeping – er alle aftaler indgået?

Equal allocation of time

Chess clock

Equal time – Eksempel fra PO1

The principle of **equal time for each Party** at the hearing will be adopted albeit in a **flexible manner** to accommodate and reflect any material **difference** e.g. in the **number** of **factual witnesses** presented by each Party respectively. If a dispute arises between the Parties as to the allocated fixed time of any of the hearings, the Tribunal shall have full discretion to determine any such dispute.

4.2
Mundtlig forhandling

Overvejelser

Skeleton Arguments – Pre-hearing briefs

Stå som gengivelse af parternes argumentation i kendelsen

Forelæggelse eller opening statements

Afhøring af vidner

Vidner – når WS (1) PO1

(i) Each witness shall first be invited to confirm or deny his or her written statement.

(ii) The party presenting the witness will have the right to introduce the witness and to make a **short examination** in chief that summarizes the **main points** of the testimony and/or examine the witness on **new facts or developments**, if any, which have taken place since the date of filing of his or her last witness statement. Such examination should not exceed **approx. 10 minutes**.

(iii) The opposing party shall then proceed to **cross-examine** the witness, followed by a **re-direct examination** by the first party. The scope of the re-direct examination shall be limited to matters that have arisen in the cross-examination. There will not be any **re-cross examination** unless authorized by the Tribunal.

Videafhøring – når WS (2) PO1

(iv) The **Tribunal** shall have the right to examine the witnesses and to **interject questions** during the examination by counsel. It shall ensure that each Party has the opportunity to re-examine a witness with respect to questions raised by the Tribunal.

(v) The Tribunal shall at all times have **complete control** over the procedure in relation to a witness giving oral evidence, including the right to limit or exclude any question when it considers that the particular question is irrelevant or unnecessarily burdensome or duplicative.

Vidner – hvis ingen WS (1) PO1

T*he procedure for examining witnesses at the witness Hearing shall be the following:*

The Party presenting the witness will conduct an examination in chief of the witness.

The opposing Party shall then ***proceed to cross-examine*** *the witness, followed by a re-direct examination by the first Party. The scope of the* ***re-direct examination*** *shall be limited to matters that have arisen in the cross-examination.*

4.3 – 4.4
Submissions

- Opening Statement
  - Time limit
- Closing Arguments
  - Time limit
  - Scope
- Post-hearing briefs/memorials
  - Simultaneously or consecutively
  - 1 or 2 rounds
  - Page limits
  - Scope

5. Procesledelse

Jura novit curia og forhandlingsmaksimen

Danmark: U2016.1558H

"Højesteret finder det ikke godtgjort, at voldgiftsrettens fortolkning af distributions-aftalen ligger uden for rammerne af de påstande og anbringender, som AH Industries havde fremført."

Jura novit curia og forhandlingsmaksimen

Norge: LB-2008-136865

Voldgiftsloven § 32 første ledd annet punktum siste del sier at »retten kan bare bygge på de **påstandsgrunnlag** som er påberopt«. Påstandsgrunnlag er de **rettsstiftende faktiske forhold** en påstand bygges på …. Når det gjelder **rettsregler og rettsanvendelse**, er det ikke et tilsvarende krav til påberopelse …. Lagmannsretten finner at prinsippene for avtaletolkning og løsning av spørsmål slik [honourable engagement] foreskriver, er rettsanvendelse og ikke påstandsgrunnlag. Noe uttrykkelig krav om påberopelse foreligger da ikke.

Jura Novit Curia og forhandlingsmaksimen

Men også i forbindelse med rettsregler og rettsanvendelse gjelder at retten bare kan bygge på det faktiske grunnlaget som er påberopt. Partene må også ha hatt rimelig anledning til å uttale seg. Dette har nær sammenheng med **kontradiksjonsprinsippet**. Det fjerde grunnlaget Trygg-Hansa har påberopt seg for ugyldighet, er at voldgiftsretten har tilsidesatt kravet til kontradiksjon ved at partene ikke har fått uttale seg om anvendelsen av SOOC art. XVI annet ledd på lukningsavtalene. ...

Kontradiksjon er et grunnleggende prinsipp i norsk prosessrett, som også gjelder for voldgiftsretter. Domstoler kan ikke bygge på en begrunnelse eller komme til et resultat som partene ikke har hatt rimelig anledning til å uttale seg om, se bl.a. Rt-1990-8 og Rt-2005-1590.

Jura Novit Curia og forhandlingsmaksimen

Lagmannsretten kan ikke se at noen av partene kommenterte eller påberopte SOOC art. XVI annet ledd direkte i forbindelse med lukkingsavtalene. Lagmannsretten legger til grunn at de faktiske forhold voldgiftsretten bygget på ved anvendelse av SOOC art. XVI annet ledd, var påberopt av partene i voldgiftssaken.

Lagmannsretten bemerker at ettersom SOOC art. XVI annet ledd ikke ble nevnt i forbindelse med spørsmålet om åpning av lukkede forsikringsårganger, fikk partene ikke kommentert direkte de faktiske forholds betydning for rimeligheten i denne sammenhengen. Men **bestemmelsen var vist til og kommentert generelt**, og det relevante **faktum var gjort rede for av partene**, og **voldgiftsdommerne hadde særlig kompetanse** på området. Lagmannsretten legger vekt på at bestemmelsen dreier seg om **rettsanvendelse** og kan ikke se at denne innvendingen er av avgjørende betydning i forhold til spørsmålet om hensynet til kontradiksjon er tilstrekelig ivaretatt.

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Sverige: T-4028-13 (februar 2015):

*»Hovrätten konstaterar inledningsvis att en skiljeman ska anses ha överskridit sitt uppdrag om han lagt en **omständighet** som **inte åberopats** av någon part till grund för sitt avgörande (se Lindskog, a.a. s. 872 f). Utgångspunkten är att skiljemannen är bunden att avgöra tvisten med stöd av de omständigheter (rättsfakta) som parterna åberopar till stöd för sin talan. Däremot har en skiljeman normalt **en rätt** (men även en **skyldighet**) att tillämpa en **icke åberopad rättsregel**.«*

National/International voldgift

SOU1994.81, s. 150 - 151

*«Anser skilljemännen att en **rättsregel** som inte har åberopats av parterna kann vara aktuell **bör de fästa parternas uppmärksomhet på regeln**.*

Inte minnst det förhållandet att tvisten** er **internationell** kan påverka sättet att leda processen. I en sådan tvist kan parterna t.ex. ha begränsat skiljemännens uppdrag på annat sätt än som följar av en analogi från rättegångsbalken. Skiljemännane kann t.ex. ha att hålla sig inte bara till de rättsfakta som parterne åberopat utan också vara bundna till de bevisfakta ocjh rättreglar som parterna angett. **Det är givet att skiljemännen i det senare fallet inte bör animera parterna att uttala sig om en rättsregel som skiljemännen anse tillämplig men som parterna inte har åberopat«

National/International voldgift

Schiersing: Voldgiftsloven m kommentarer (2016):

”Efter min opfattelse må det have formodningen imod sig, at der uden klar hjemmel hertil kan eller skal opereres med forskellige standarder for forhandlingsmaksimen i forskellige voldgiftssager alt efter om parterne har den ene eller anden nationalitet.”

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SOU 2015:37 s. 131:

»Utredningen har mött synpunkten att det inte borde vara en klandergrund att skiljenämnden dömt över ej åberopade omständigheter. Trots att det inte uttryckligen framgår vare sig av [den svenske voldgiftslov]eller modellagen måste dock enligt utredningens mening i princip gälla att ***skiljenämnden inte får döma över annat än vad parterna har hänfört sig till****. Annars skulle man* ***åsidosätta dispositionsprincipen****, som är grundläggande för ett skiljeförfarande. Det är emellertid inte tillfredsställande att detta inte framgår av lagens lydelse.»*

T 1968-16 – 9 Marts 2017
Svea Hovrätt

Om skiljemännen **överväger** att **tillämpa en rättsregel** som **inte någon av parterna** hänfört sig till kan det finnas anledning för skiljemännen att inom ramen för sin **materiella processledning uppmärksamma parterna** på detta i syfte att undvika **överraskningseffekter** (se a. prop. s. 120 och 146). Frågan om bristande processledning kan utgöra grund för klander har behandlats i doktrinen. Det har därvid gjorts gällande att **en part som överraskas till följd av brister i processledningen i aktuellt avseende bör kunna klandra skiljedomen på den grunden att det förekommit ett handläggningsfel** som, enligt 34 § första stycket 6 LSF, medför att skiljedomen ska upphävas om felet sannolikt inverkat på utgången i målet … För att skiljedomen ska upphävas bör dock krävas att den klandrande parten med fog kan hävda att **parten inte fått tillräcklig möjlighet att argumentera i frågan om den aktuella rättsregelns tillämplighet** …

T 1968-16 – 9 Marts 2017
Svea Hovrätt

Som anförts tidigare åberopade A till grund för sin talan i skiljeförfarandet att avtalet skulle fyllas ut på visst sätt. Av skiljedomen framgår att B inställning var att en sådan utfyllning inte kunde ske. Hovrätten konstaterar att B i skiljeförfarandet har haft möjlighet att argumentera för sin ståndpunkt i frågan om utfyllning av avtalet. Hovrätten konstaterar vidare att det är vanligt att utfyllning av ett avtal, när uttrycklig reglering i en viss fråga saknas i avtalet, sker genom tillämpning av dispositiva rättsregler (se t.ex. NJA 1999 s. 629). **Med hänsyn till detta kan det enligt hovrättens mening inte anses ha varit överraskande för Batt skiljemannen vid utfyllning av avtalet tillämpade kommissionslagens regler, även om A inte hade hänfört sig till de aktuella bestämmelserna.** Skiljemannen kan **därför** inte anses ha brustit i sin materiella processledning.

Jura novit curia og forhandlingsmaksimen

Schiersing: Voldgiftsloven m kommentarer (2016):

*Det er herudover et **ikke afklaret spørgsmål**, hvor grænsen går for voldgiftsrettens retlige subsumption af faktum under givne retsregler eller juridiske principper uden støtte i parternes anbringender. Dette må afgøres konkret baseret på den enkelt sags omstændigheder. Dette ændrer ikke på, at jo mere **frakoblet** voldgiftsrettens juridiske bedømmelse er – eller forekommer – fra parternes juridiske anbringender, jo mere grund er der for voldgiftsretten til varsomhed og i det **mindste** må det **klart anbefales**, at voldgiftsretten i sådanne tilfælde **anmoder parterne om kommentarer til sine eventuelle eller foreløbige overvejelser med henblik på at overholde det kontradiktoriske princip,***

SIAC 2016 Rules

Rule 27:

Unless otherwise agreed by the parties …, the Tribunal shall have the power to:

…

m.

decide, where appropriate, any **issue not expressly or impliedly raised** in the **submissions** of a party provided such issue has been **clearly** brought to the **notice** of the other party and that other party has been given **adequate opportunity** to **respond**.

Eksempel

…

G. Closing of Evidentiary Record – Jura Novit Curia

58. Following the hearing of the witnesses and once again after the Parties' delivery of their closing arguments, the Tribunal enquired whether any of the Parties were seeking leave to adduce further documentary evidence or leave to examine further witnesses. None of the Parties requested such leave and all Parties agreed that the evidentiary record was closed. **Furthermore, all parties agreed that the principle of jura novit curia applies to this arbitration.**

6.
Omkostninger

Endelig omkostningsfastsættelse

Omkostninger til voldgiftsretten
Sagsomkostninger

Hovedregel:
Costs follow the event
Each part its costs (no cost-shifting)
Success fees
Forligstilbud – Calderbank offers

Fravigelse:
Processuel adfærd m.v.

Voldgiftslovens § 40

Fordeling af sakskostnader

Voldgiftsretten skal etter begjæring fra en part fordele kostnadene til voldgiftsretten mellom partene slik den finner riktig.

Voldgiftsretten kan etter begjæring fra en part pålegge en annen part å dekke alle eller deler av partens kostnader med saken dersom den finner dette riktig.

Voldgiftsrettens fordeling av kostnadene tas inn i dommen eller i avgjørelsen som avslutter saken.Voldgiftsrettens fordeling av kostnader mellom partene er endelig.

Paragrafen kan fravikes ved avtale.

Sagsomkostninger OCC

Article 32.1 – 32.2:

Allocation of the costs between the parties

The arbitral tribunal shall, at the request of a party, allocate the **costs of the arbitral tribunal** between the parties as it sees fit.

The arbitral tribunal may, at the request of a party, order another party to cover all or part of the **parties' costs of arbitration** as it finds appropriate.

Sagsomkostninger - ICC

ICC Arbitration Rules Art 38(1):

"The costs of the arbitration shall include … the **reasonable** legal and other costs incurred by the parties for the arbitration.

ICC Arbitration Rules Art 38(5):

"In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it **considers relevant**, **including** the extent to which each **party** has **conducted the arbitration** in an expeditious and cost-effective manner".

Sagsomkostninger- LCIA

LCIA Rules Art 28.3:

"The Arbitral Tribunal shall also have the power to decide that all or part of the the legal or other expenses incurred by a party ("Legal Costs") be paid by another party. The Arbitra Tribunal shall decide such Legal Costs on such **reasonable** basis as it thinks appropriate" … .

LCIA Rules Art 28.4:

"The Arbitral Tribunal shall make its decisions … on the general principle that costs should **reflect** the parties' **relative success** and failure … except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be **inappropriate** … the Arbitral Tribunal may also take into account the parties' conduct in the arbitration, including any **co-operation** in facilitating the proceedings as to time and cost an any **non-cooperation** resulting in undue delay and unnecessary expense."

Sagsomkostninger - SCC

SCC Rules Art 50:

"Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award at the request of a party order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the ***outcome*** *of the case, each party's* ***contribution*** *to the* ***efficiency of the and expeditiousness*** *of the arbitration and any other relevant circumstances"*

Eksempel fra PO1

General Provisions

17.1 *The Parties and counsel shall conduct themselves in a manner consistent with the efficient use of time and resources and in accordance with the Rules.*

17.2 *When using its **discretion to allocate costs**, the Tribunal may take into account any **unreasonable behaviour** by a Party. Unreasonable behaviour may include the following:*

(i) *Exaggerated claims*
(ii) *Excessive **document requests***
(iii) *Excessive **production of documents***
(iv) *Excessive legal **argument***
(v) *Excessive presentation and examination of **witnesses and experts***
(vi) ***Dilatory tactics***
(vii) *Unjustified **interim applications***
(viii) *Failure to **comply** with procedural orders*
(ix) *Unjustified failure to meet the **deadlines** contained in this Procedural Order or subsequent rulings, orders and directions.*

Omkostningskategorier - sagsomkostninger

In-house counsel

Admin costs

Success fees

Third Party Funding

Eksempel fra PO1

As regards **in-house legal counsel**, time spent in connection with that counsel's own evidence as a **witness** in these proceedings will **not** be **recoverable**. The **reasonable** costs of in-house counsel will only be recoverable to the extent that the time spent and tasks undertaken are **recorded** by way of a **time sheet** and the work undertaken does not **duplicate** that undertaken by outside counsel.

If the Legal Costs of either Party include a **success fee** of outside counsel, then such success fee may only be recoverable from the other party if, in the opinion of the Tribunal, the total Legal Costs, including the success fee, are **reasonable** in all the circumstances.

If either party is **funding** its Legal Costs in these proceedings through the services of a **third party funder**, the existence of that arrangement should be disclosed to the Tribunal and the other party within 7 days of the date of this order.

Interim Costs Application

Interim Costs Application

Efter anmodning kan voldgiftsretten tage stilling til og tilkende foreløbige omkostninger knyttet til de enkelte processuelle skridt

- ”Pay as you go”

Formål at undgå eller begrænse unødvendige, overflødige eller chikanøse processkridt

Eksempel fra PO1:

33. The Tribunal will consider any application that a Party may make for interim costs orders in the course of the proceedings.

Eksempel fra Final Award

*289. The Tribunal sees **no reason to depart** from the principle of **"costs should follow the event"** as there is nothing in Claimant's conduct in this arbitration that **merits, suggests or even hints** at such a departure. In the opinion of the Tribunal, thus, there is no doubt that the **overall success** of the Claimant against Respondents must be **fully reflected** when determining the question of costs. However, in the Tribunal's opinion, **future anticipated costs** are not recoverable until actually incurred. Also, the Tribunal finds that the claimed **in-house costs of Claimant mainly constitute normal running administrative costs rarely compensable in international arbitration.***

Third Party Funding

ICCA and Queen Mary University of London:

"It is not appropriate for tribunals to award funding costs … as they are not procedural costs for the purpose of an arbitration."

Men:

Essar Oilfields Services v. Norscot Rig Management Pvt, [2016] EWHC 2361 (Comm): *"(A)s a matter of language, context and logic, … "other costs" can include the costs of obtaining litigation funding."*

Arbitration Act 1996 Section 59(1)(c): "Legal and other costs"

Eksempel fra PO1

Normalt efter Hearing og Post-Hearing memorials eller som en del af sidstnævnte:

13. Costs Submissions

13.1 **<u>On or before the 7 June 2017,</u>** the parties shall file costs submissions concerning the costs mentioned in art. 47.2(e) of the Rules. The costs shall be itemized and specified as directed by the Tribunal.

13.2 **<u>On or before the 12 June 2017,</u>** the parties may submit comments on the costs submissions filed by the other parties.

7.
Forlig

7.1
Forligsforhandlinger

Kan/Bør voldgiftsretten involvere sig i forligsforhandlinger?

- Eget initiativ
- Efter anmodning

- Prejudgment
- Waivers

Tak for opmærksomheden

niels.schiersing@arbchambers.com

www.arbchambers.com

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ARBITRATION CHAMBERS
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