

Appointment of Arbitrators: The Norwegian Approach

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1 Introduction

The Norwegian Arbitration Act of 2004 ("The Act") Section 13 reads:

Section 13. Appointment of the arbitral tribunal

- (1) The arbitrators shall be impartial and independent of the parties, and be qualified for the task.
- (2) The parties shall, to the extent possible, jointly appoint the arbitral tribunal.
- (3) If the arbitral tribunal shall consist of three arbitrators and the parties are unable to agree on who should be appointed, each party appoints one arbitrator. The time limit is one month from the party's receipt of a request to do so. These arbitrators shall together appoint the presiding arbitrator within one month.
- (4) If the arbitral tribunal cannot be constituted in accordance with the arbitration agreement or pursuant to Subsections 2 and 3, each of the parties may request that the court appoints the missing arbitrator(s). The appointment cannot be appealed.
- (5) Subsections 1-3 may be derogated from by agreement.

The Act Section 13 Subsection 1 make requirements to the impartiality and qualifications of the arbitrators, while Subsections 2 to 4 determines how the arbitral tribunal shall be appointed. The provision adopts elements from the UNCITRAL Model Law Article 11 both in terms of requirements for arbitrators and the procedure for appointing arbitrators. The provision differs considerably in terms of content and level of detail from earlier Norwegian rules with regards to requirements for arbitrators and the appointment of these. The main emphasis of this article is the actual appointment process – and in particular the primary provision in Subsection 2 on joint appointment of all arbitrators (parts 3 and 4). But we will first take a brief look at the Norwegian foundation for the impartiality assessment (part 2).

2 The Impartiality and Independence Requirements

The Act Section 13 Subsection 1 establishes the requirement to the arbitrators' impartiality: The arbitrators shall be impartial and independent of the parties. The impartiality requirement is in the Act Section 14 Subsection 2 clarified to mean that there can be no conditions present that creates "justifiable doubts" regarding the impartiality and independence of the person(s) concerned. Further, there is a requirement that the arbitrators must be qualified for the task.

The requirement for impartial and independent arbitrators – and the general qualification requirement – will in practice primarily have an impact where the parties haven't agreed on anything else. The requirements will then serve as guidelines for appointment according to Subsections 3 and 4. Secondly, the impartiality requirement, but in principle not the general qualification requirement, would be decisive for any challenges of an arbitrator, cf. the Act Section 14 Subsection 2. The preparatory works of the Act contains no further

explanation regarding the impartiality and independence requirement for arbitrators. The Civil Procedure Commission held that the terms should not be defined more precisely in the Act, as this would give rise to further questions of interpretation – and the Department of Justice agreed.¹ The Civil Procedure Commission's only hint is a statement saying that an indication of the type of cases in the Act will not contribute significantly to clarify the content beyond what follows from an innate linguistic understanding.² A detailed consideration of this condition falls outside the scope of this article.³

However, the parties are free to agree to what requirements are made regarding arbitrators, cf. the Act Section 13 Subsection 5. Compared to the arrangement pursuant to Section 13 Subsection 1, this implies that that parties in principle can agree on arbitrators who would not be considered to be impartial and independent.⁴ This opportunity to waive the impartiality and independence requirement by agreement, is weakly justified. The Model Law does not contain any provision equivalent to Section 13 Subsection 2 of the Act. The impartiality requirement transpire from Article 12 on "Grounds for challenge" – equivalent to Act Section 14 – which does not grant the parties access to waive the requirement for impartiality and independence. The requirement of the Model Law that an arbitrator must be independent and impartial is considered to be a mandatory provision from which the parties may not derogate, although the parties are free to agree that a specific disclosed relationship between an arbitrator and a party is not considered as sufficiently substantial as to disqualify the person concerned.⁵ It is therefore noteworthy that the question is not subject to any principled evaluation in the preparatory works of the Act. The Civil Procedure Commission expressed that it must be required that arbitrators are impartial and independent,⁶ while the Ministry of Justice stated that there should not be any constraints to the freedom to contract.⁷ This contractual freedom must, in my view, at least have limited impact in relation to the fundamental condition of the arbitration: It must concern a *decision* rendered by an outsider – presumably independent – third party. There must at least be one impartial arbitrator (the presiding arbitrator).⁸

1 NOU 2001: 33 p. 66, Ot.prp. nr. 27 (2003-2004) p. 53.

2 NOU 2001: 33 p. 66.

3 See Berg, Borgar Høgetveit, (ed.): *Voldgiftsloven*, Gyldendal, Oslo 2006, p. 158-171, Woxholth, Geir,: *Voldgift*, Gyldendal, Oslo 2013, p. 433-474 and Ristvedt, Per Magne, and Falch, Ingvald, in Berg, Borgar Høgetveit, and Nisja, Ola Ø, (ed.) *Avtalt prosess*, Universitetsforlaget, Oslo 2015, p. 306-319.

4 Ot.prp. nr. 27 (2003-2004) p. 53.

5 Redfern, Alan and Hunter, Martin, with Blackaby, Nigel, and Partasides, Constantine: *Law and Practice of International Commercial Arbitration*, Oxford, London 2004 (fourth edition), p. 201.

6 NOU 2001: 33 p. 66.

7 Ot.prp. nr. 27 (2003-2004) p. 53.

8 Berg (ed.) p. 157, Woxholth p. 430-433.

3 The Principal Approach: Joint Appointment of the Arbitrators

The Act Section 13 Subsection 2 establishes the principles of appointing the arbitration tribunal: The Parties shall, if possible, appoint the arbitrators *jointly*. The provision is new compared to older law, and the Model Law does not encompass an equivalent provision. However, the provision has a tradition in Norwegian contract law, especially in standard shipbuilding contacts.⁹

The Act Section 13 Subsection 2 is justified by the argument that it is considered an advantage if the parties can agree on the composition of the arbitration panel in its entirety. The tribunal will then generally have a weaker party affiliation and a more independent character than if the parties each appoint one arbitrator.¹⁰ A joint appointment avoids the polarization of the arbitral tribunal which (earlier) ordinary pattern for appointment could lead to.¹¹ For the members of the tribunal, Subsection 2 ensures a higher degree of assurance that both parties have faith in all three arbitrators – and have entrusted all three of them the task of handing down the judgment. Normally, this will lead the arbitrators to strive to treat the parties equal in all procedural matters and ultimately being as objective as possible when handing down the award.¹²

Even if there is no available statistics, it seems like the provision has been received positively. It appears that the parties are now more likely to appoint all arbitrators jointly.¹³

The wording in the Act Section 13 Subsection 2 – "if possible" – raises the questions on the extent of the regulation. Does this involve an obligation for the parties to make a real effort to reach an agreement before moving on to the appointment procedures set out in Section 13 Subsections 3 and 4? The question also impacts how quickly one party may trigger the time limit pursuant to Section 13 Subsection 3 second sentence. There are good arguments for a party being entitled to demand that the opposing party makes a *loyal and genuine* effort to reach an agreement, for example that one at least should require both parties to contribute by exchanging suggestions for candidates to the appointment of arbitrators. Such a duty to negotiate is found in the wording "unable to agree" in Section 13 Subsection 3 – and can also be derived from the purpose of the provision.¹⁴

9 Brækhus, Sjur, in Lov og rett 1999 p. 265-266.

10 NOU 2001: 33 s. 65.

11 Brækhus p. 264-266, Mæland, Henry John,; *Voldgift*, Universitetsforlaget, Bergen 1988, p. 112-113 and Michelsen, Hans, in Jussens Venner 1971 p. 79-80.

12 Woxholth p. 391.

13 Woxholth p. 391. In my own earlier practice, both as counsel and arbitrator since the Act took effect 1st January 2005, a joint appointment of all three arbitrators is accomplished in a clear majority of the cases.

14 Berg (ed.) p. 172, Woxholth p. 391.

4 Default Remedies

4.1 The Traditional Solution

The Act Section 13 Subsection 3 regulates situations where the arbitral tribunal must have three members and the parties fail to appoint them jointly. The provision mandates the traditional solution: Each of the parties appoint one arbitrator who then jointly appoints the third member who becomes the presiding arbitrator. This is in line with the Model Law Article 11.

4.2 Deadlines

Pursuant to the Act Section 13 Subsection 3 second sentence each party has a time limit of one month to appoint a member. The time limit starts when the party has received a specific request to make an appointment, not from the earlier date when the plaintiff has put forward the demand that the dispute shall be referred to arbitration, cf. the Act Section 23. It could, in practice, happen that an appointment request is set forth in the plaintiff's notice pursuant to Section 23 concerning the initiation of the arbitration. However, this does not necessarily trigger the defendant's time limit to make an appointment, ref. Section 13 Subsection 2 regarding the parties duty to first attempt to reach an agreement regarding the appointments.¹⁵

When a party puts forth such a request, this would, if one considers the law verbatim, not trigger any equivalent deadline for this party. The party making the request should, pursuant to the wording, be able to wait until he or she receives a request for appointment from the counterparty. There are good reasons, however, that when a party submits a request for the appointment of arbitrators and it triggers the one-month time limit for the counterparty, that the same time limit should apply to the party making the request. The considerations behind the rule – to ensure an efficient progress of the arbitration process, indicates that the party who has initiated the appointment process towards the opposite party cannot wait out his counterpart.¹⁶ But there is no requirement that the party submitting such a request at that time himself must have appointed an arbitrator in order to trigger the effectiveness of the time limit for the other party, like its done, for example, pursuant to the Swedish Arbitration Act Section 14.

Moreover, pursuant to the Act Section 13 Subsection 3 third sentence a one month time limit also applies for the appointment of the third arbitrator by the two party appointed arbitrators. This time limit must be assumed to start running when the last of the two is appointed.¹⁷

The consequence of an appointment after the expiry of the time limits, is discussed in 4.5 *in fine* below.

15 Berg (ed.) p. 173, Woxholth p. 392.

16 Berg (ed.) p. 173, Woxholth p. 392-393.

17 Berg (ed.) p. 173, Woxholth p. 393.

4.3 *Communication Between a Party Appointed Arbitrator and a Party Regarding the Choice of Person for the Presiding Arbitrator*

When the two party appointed arbitrators appoint the third member, they are assumed to act completely autonomous and independent from "their" respective parties. There are different opinions regarding the extent to which party-appointed arbitrators may communicate with their party regarding the choice of presiding arbitrator. Closed communication between these two, which gives the party an opportunity to influence the choice of the third arbitrator without this being made known to the other party, is unacceptable. On the other hand, it is important that both parties have full confidence in the person elected as the presiding arbitrator. It is the responsibility of the two party-appointed arbitrators to ensure that the person who is chosen not only have their, but also the parties, full trust. If this happens openly both in terms of the other party's process of appointment of arbitrator and in relation to the other party, it must be in order that a party-appointed arbitrator obtains that party's view on potential candidates. However, it is most in line with the principle of each and every arbitrator's independent relationship to both parties that all communication with the parties in relation to the appointment of the third member happens on behalf of both the party-appointed arbitrators and simultaneously to both parties.¹⁸ Disqualification of an arbitrator on the grounds that there has been such closed communication prior to him or her being appointed, is not likely.

It will often be appropriate that both parties are asked about what specific qualifications they think the third arbitrator should have, if the person should be a specialist in a particular area, the nationality (in international cases) etc. It is assumed of the parties that they prior to the appointment have considered the candidate's information regarding matters which may be relevant for the assessment of their impartiality, cf. Section 14, with the opportunity to comment on this. The parties should normally also have been given the opportunity to suggest candidates. This is not uncommon in Norway, and it can often be an advantageous procedure that the two party-appointed arbitrators simultaneously encourage the parties to come up with suggestions for mutually agreed candidates.

4.4 *Multi Party Proceedings*

Situations where the arbitration tribunal does not consist of three members is not regulated in Subsection 3. This must presumably imply – in the absence of an agreement between the parties – that the parties must jointly appoint the arbitral tribunal, cf. Subsection 2, or require a court to do so if they disagree, cf.

¹⁸ Berg (ed.) p. 173, Woxholth p. 394-395 (somewhat more liberal), Mæland p. 120. See also IBA Rules Article 5.2 and 5.3. Cf. also IBA Guidelines Green List Section 4.5.1 which normally allows that an arbitrator "initial contact" with a party (or his legal representative) also applies to names of possible candidates for the presiding arbitrator as long as one does not touch upon the merits or proceedings of the case.

Subsection 4. A sensible solution between the parties would be to apply the procedure in the Subsection 3 accordingly so that each party appoints an equal number of arbitrators.¹⁹ Regardless, equal treatment of the parties is required pursuant to Section 20.

4.5 Assistance from the District Court

The Act Section 13 Subsection 4 governs for one thing cases where the parties pursuant to the arbitration agreement or pursuant to Subsections 3 and 4 shall appoint one or more members to the arbitration panel but fail to do so within the set time limit. Subsection 4 first sentence stipulates that each of the parties may then require that the District Court appoints the arbitrator or arbitrators that are lacking. The parties may assign the appointment to District Courts in cases where the two party-appointed members of the arbitration panel fail to reach an agreement concerning the appointment of the third member. The District Court shall only appoint the missing arbitrator or arbitrators. If it is one of the parties who have failed to appointed an arbitrator the District Court shall only appoint this member, not the entire arbitration panel.

The preparatory works specify that when the District Court appoints arbitrators it must give the parties an opportunity to make suggestions.²⁰ The District Court may also seek suggestions from the parties. The District Court is assumed to have relayed a requested candidate's information regarding matters which may affect the assessment of the candidate's impartiality to the parties prior to the appointment, cf. Section 14.²¹ It is nonetheless the District Court's duty to ensure that the requirements concerning an arbitrators impartiality and independence are met, cf. Model Law Article 11(5).

Appointments done by the District Court cannot be appealed, cf. Subsection 4 sentence 2. Challenge of the arbitrators appointed by the District Court may, however, be invoked pursuant to the general rules regulating this in the Act Section 14 and 15 after the arbitral tribunal is established. The fact that the District Court's appointment –the choice of person – cannot be appealed does not imply that the decision cannot be appealed because of procedural error or improper application of the law. However, improper application of the law directly related to the choice of person – such as the application of the Act's or the agreement's impartiality or qualification requirements (cf. Section 2 above) – cannot provide basis for an appeal. Such challenges must be made in accordance with Section 14 and 15. If the District Court rejects a petition regarding appointment, then such a decision may be appealed.

19 Berg (ed.) p. 174, Woxholth p. 393.

20 NOU 2001: 33 p. 92.

21 The Oslo District Court will normally appoint one of this court's own judges as arbitrator, cf. letter from Oslo District Court 20 May 2015 (case 15-078558). This will normally clarify, at the time of the appointment, that there are no matters governed by the Act Section 14.

The District Court must make a preliminary ruling if a party has omitted to appoint an arbitrator claiming that the dispute is not subject to arbitration. The same applies in cases where a party alleges that the arbitration should not take place in Norway. If it is obvious that there are no grounds for arbitration the court must refrain from appointing an arbitrator, but if there is reasonable doubt the court must be able to appoint arbitrators without further consideration of the question regarding validity of the arbitration agreement, etc. The court's stance regarding the question will neither be binding for the arbitral tribunal nor later in a case concerning the validity of the arbitration award.²²

The provision in Subsection 4 applies where the arbitral tribunal "cannot be established" pursuant to the agreement or Subsections 2 or 3. Questions can be raised whether this also includes cases where the "outstanding" member of the arbitral tribunal has been appointed, but only after the expiry of the time limit pursuant to Subsection 3. It has here been proven that it is "possible to establish" a complete arbitral tribunal, but not fully "pursuant to ... Subsection 3" in so far as the time limit is not adhered to. The question is not discussed in the preparatory works. However, it cannot be assumed that the time limit pursuant to Subsection 3 automatically blocks a delayed appointment: An appointment must be accepted if it is made after the expiry of the time limit, but before a petition pursuant to Subsection 4 has been made. The purpose of the provision in Subsection 4 – to ensure efficient arbitration, does not suggest that one ignores a delayed appointment, rather the contrary. There are questions regarding whether one based on this purpose of the provision also must accept an appointment which is made after a petition pursuant to Subsection 4 has been submitted to the District Court, but before the District Court has started hearing on the merits of this and possibly until the District Court has made an appointment. In practice this could be resolved if the District Court appoints the person, cf. what is stated below regarding the District Court having to consult the parties prior to the appointment. However, if the question arises, it seems uncertain where the intersection lies for where one must consider a delayed appointment which the other party opposes.²³

4.6 *The Act Ensures that the Arbitral Tribunal Always Will be Appointed*

If the selection of arbitrators is made to be dependent on the complete agreement between the parties, and such agreement is not reached, the arbitration agreement pursuant to older law would lapse.²⁴ This could lead a party to act disloyally in order to avoid arbitration.²⁵ The Act Section 13 Subsection 4 now ensures that

22 Rt. 1989 p. 1256.

23 Berg (ed.) p. 176, Woxholth p. 399.

24 Tvistemålsloven § 468 first subsection nr. 1.

25 See ruling from Frostating Court of Appeals 27 February 2004 where the court held that one party had not fulfilled its duty to participate in the composition, and that the arbitration agreement therefore was not lapsed. See also the ruling from Gulating Court of Appeals 9

the arbitral tribunal always will be appointed. It is still possible to agree that complete agreement regarding the appointment is a condition for arbitration, cf. below, but it must in that case be stated explicitly that this is a condition for arbitration and not (just) an appointment condition.

Subsection 4 also applies where it has not yet been possible to establish the arbitral tribunal because the parties have agreed that it shall be appointed by a person or entity who cannot or will not do so, for example if the arbitration agreement refers to an appointing authority which no longer exists. This has earlier made relevant the question regarding whether the arbitration agreement was lapsed because it could not be carried out according to its content.²⁶ Such cases are now solved by Subsection 4. The provision will then – somewhat on the side of its purpose – serve as a tool to repair a defect in the arbitration agreement itself as it from the start was not, or risked to be, feasible. As a result of the provision in Subsection 4 the situation in such cases is no longer that the arbitration cannot be carried out, cf. Section 7 Subsection 1 second sentence and Subsection 2.

An unusual situation is present when the parties already in the arbitration agreement have decided on who the arbitrators will be and one or more of these either cannot or will not undertake the task. The provision in Subsection 4 also applies in such cases. However, such situations give rise to questions regarding the validity of the arbitration agreement as the commitment to arbitration has been contingent on the agreed upon composition of the arbitral tribunal. Pursuant to older law the arbitration agreement lapses unless otherwise agreed.²⁷ The Act does not contain any similar provisions – and Section 13 Subsection 4 does not solve the question. The answer depends on both an interpretation of the arbitration agreement and whether the agreed upon composition of the arbitral tribunal has been a deciding factor for entering into the arbitration agreement. If the parties have agreed that the dispute shall be decided upon by a specific person as sole arbitrator the arbitration agreement must be considered lapsed if he/she cannot or will not take on this appointment unless one has clear evidence that the choice of person has not been a deciding factor in the decision to resolve the dispute through arbitration. When discussing an arbitral tribunal with three designated members it can easily be imagined that the agreed composition of the tribunal has not been as much of a factor when agreeing to arbitration as it is in cases with sole arbitrators. But the arbitration agreement could even in such cases be considered void if one or more of the designated arbitrators cannot be appointed (or later resigns).²⁸ The parties will then face a situation as defined in the Act Section 7 Subsection 1 second sentence and Subsection 2 that arbitration "for other reasons cannot be implemented".²⁹

May 2003 where one of the questions concerned whether the arbitration provision had to be understood so that it presumed consensus regarding the appointment.

26 See e.g. Borgarting Court of Appeals 16 May 1997.

27 Tvistemålsloven § 458 nr. 2.

28 Mæland p. 97, Berg (ed.) p. 177, Woxholth p. 398-399.

29 Ot.prp. nr. 27 (2003-2004) p. 90.

The provisions of the Subsections 2 to 4, regarding the appointment of the arbitral tribunal, also applies to joinder of parties and combination of cases. If the arbitral tribunal is to be appointed with a sole arbitrator, and the parties do not agree, they can each ask a court to appoint the arbitrator. If the arbitral tribunal is to be appointed with three arbitrators, their interests must be coordinated. The parties are consolidated as pursuant to the arbitration agreement. If the parties have not agreed one must look at which of the parties have common interests and naturally make up one side of the matter. One arbitrator is appointed from each side with common interest, after which those two together appoint the third person. If one of the sides fail to reach an agreement, the court must appoint an arbitrator from this side, cf. Subsection 4. If it is not possible to consolidate the parties into two sides, the court must appoint all the arbitrators.³⁰

The provision in the Act Section 13 Subsection 4 cannot be waived by agreement, cf. Subsection 5. This ensures that the arbitral tribunal will always be appointed, which is a valuable innovation.

30 Mæland p. 97, Berg (ed.) p. 177-178.