The Scope of Arbitration Agreements
Is it Time for a New Approach to the Interpretation of Arbitration Clauses?

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The scope of arbitration agreements may give rise to doubts, for example with regard to claims based on tort law. The Danish approach for interpreting such clauses seems to have changed over the last decade. Based on an analysis of Danish and international legal practices, the authors recommend a new approach to the interpretation of arbitration clauses in Danish law.

1 The Problem

Contracts that contain arbitration clauses are concluded every single day. Such clauses often raise doubts as to whether they have been properly *adopted* (agreed upon) between the parties, how they are to *be interpreted*, and whether they may *be set aside* as void or ineffective. The present article will only focus on the issue of interpretation. We assume that the parties have signed a valid arbitration agreement. We also assume that the dispute is "arbitrable", i.e. capable of settlement by arbitration, cf. the Danish Arbitration Act (hereinafter the DAA) section 6.

The question we want to examine is whether the arbitration clause covers the dispute between the parties, in other words, the scope of the arbitration clause.

Whether the dispute should be arbitrated or decided by state courts is determined by the agreement between the parties and shall be decided by the forum that hears the case, be it a state court or an arbitral tribunal.[1] According to the first recital of section 8, subsection 1, first sentence, of the DAA "Legal proceedings regarding disputes which, according to agreement between the parties, should be settled by arbitration, are rejected by the courts". A defendant who appears before a state court without disputing its competence to hear the case will normally be understood to have accepted its competence. Similarly, if arbitration proceedings are initiated and the defendant does not move for a dismissal,[2] cf. the DAA section 16, subsection 2, he will usually be understood to have agreed that the case should be arbitrated. This principle has been applied in several reported Danish cases, e.g. KFE ("Kendelser om Fast Ejendom") 1993.170 VBA and UfR ("Ugeskrift for Retsvæsen") 2004.2389 H.

Our analysis is based on a case initiated before a state court. The reason why we do not discuss how Danish arbitral tribunals would consider the issues concerned, is that only a few Danish arbitral awards on the interpretation of arbitration clauses have been reported, although many such cases undoubtedly exist.[3]

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1 A decision from an arbitration tribunal can, however, be subject to a judicial review, cf. the DAA section 16, subsections 3 and 4, section 37, subsection 1, (1) (c) and section 39, subsection 1, (1) (c) 1.

2 If the respondent disputes the competence of the arbitral tribunal, the tribunal will first have to decide on its jurisdiction, cf. the DAA section 16, subsection 1, which states the *Kompetenz-Kompetenz* doctrine. A decision whereby an arbitral tribunal considers itself to be competent may, however, be subject to a judicial review, cf. the DAA section 16, subsections 3 and 4, section 37, subsection 1, 2 (c) and section 39, subsection 1, 1 (c) 2.

3 Arbitration awards may become known if they are subject to subsequent judicial review, because the defendant refers part of a ruling in which the tribunal has confirmed its

2 The Choice Between State Court and Arbitration Proceedings

The traditional Danish approach to arbitration has its origins in the 1966 government report which led to the first Danish Arbitration Act of 1972: By agreeing to arbitrate, the parties have "… waived the guarantees of objectivity and impartiality, which the courts offer … ".[4] For that very reason, arbitration agreements should be interpreted restrictively because "... it is in the parties' own interest that there is doubt as to the scope and content of the agreement...".[5]

There is no doubt that this statement expressed the current legal conception as it applied in 1966 and for many years to come. The same position is articulated by *Bernt Hjejle* in his renowned treatise "Voldgift" (Arbitration), 3rd edition (1987), p. 58 as follows: " ... nothing general can hardly be said about the interpretation of the arbitration agreement, except from the fact that it should be interpreted restrictively". See also *Bernhard Gomard* in his concise handbook from 1979 "Voldgift i Danmark" (Arbitration in Denmark), p. 21: "an arbitration agreement is generally interpreted in such a way that it only covers the disputes which without any doubt come under the agreement...". As late as 2008, *Jakob Juul and Peter Fauerholdt Thommesen* in their major treatise "Voldgiftsret" (The Law of Arbitration), 2nd edition (2008), p. 108, restated the legal position in Denmark to the effect that arbitration agreements "are interpreted restrictively …".

In UfR 2008 B pp. 411-418, two young Danish lawyers, *Henrik Beckmann and Jakob Nolsø*, challenged this prevailing view. They argued that a "neutral interpretation" of arbitration agreements should be applied, according to which *the wording* of the arbitration agreement should be the main factor in deciding whether the dispute should be arbitrated or not.

In our opinion this challenge to the hitherto unchallenged viewpoint has been an important step towards a modern approach to the interpretation of arbitration clauses. But in our view, the time is now ripe for bringing the current legal conception even further: Not only should the scope of arbitration agreements in our opinion primarily be determined by the wording of the arbitration agreement; but more emphasis should be placed on the parties' *shared intention* behind the arbitration agreement and on *the purpose* of this agreement. In many cases this may lead to an *expansive interpretation*.

Such an expansive interpretation would keep pace with the development in major arbitration jurisdictions like e.g. the U.S., Germany, France, Switzerland and, more recently, England. And it would cater to the practical needs created by ever-increasing global commerce.

Unlike a choice of law agreement, an arbitration agreement includes two elements. Firstly, a prorogating agreement which bestows decision-making

competence to the courts. Such decisions, however, will often remain unpublished, cf. the ruling by the Danish Court of Lyngby of 1 March 2012 (case BS 159-2273/ 2011) and the ruling from the Copenhagen City Court of 30 November, 2012 (case no. BS 23A-3576/2012).

4 Cf. Report no. 414/1966 p. 25.

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powers upon the arbitral tribunal. Secondly a derogating agreement that removes these very same powers from the otherwise competent state courts. In consequence hereof, and with the exception of certain special areas of law, the arbitration agreement makes the arbitration tribunal competent, and the state courts incompetent to hear the dispute. Arbitration only makes sense as an *alternative* – not as a *supplement* to judicial review.[6]

The Danish Arbitration Act applies to both international and domestic cases. In some jurisdictions, such as the U.S. and Switzerland, two separate acts apply for international and domestic arbitrations, respectively. Although the DAA does not contain a provision on its "international" interpretation (like e.g. the provision in Article 7 of the CISG), the courts, when dealing with international cases, will take into account the fact that the Act is based on the UNCITRAL Model Law on International Commercial Arbitration from 1985 (as amended in 2006).

Since Danish law makes no distinction between domestic and international arbitration, arbitration agreements are interpreted in a uniform way, at least as a theoretical starting point. However, in its practical interpretation of an arbitration agreement, a Danish court will take into account *the consequences* of its interpretation. If an arbitration agreement between two *Danish parties* is interpreted too narrowly, resulting in the case unintentionally becoming subject to state court proceedings instead of arbitration proceedings, this consequence may be easy for the losing party to cope with because, after all, the case is decided by judges of his own nationality. These judges will be second to none when it comes to objectivity, competence, impartiality and integrity, and they will effectively render a decision that will subsequently be enforceable in Denmark. If the case involves a third party (C) who could easily be part of the litigation between A and B, substantial costs could even be saved by ensuring joint legal proceedings in litigation, rather than splitting the dispute resolution between state court litigation between A and B and arbitration proceedings between B and C.

On the other hand, if you interpret an arbitration agreement between *a Danish and a foreign party* too narrowly, the consequences may be unpredictable or even catastrophic: Instead of having the case decided by an arbitral tribunal, the dispute might end up in a court at a remote location that does not meet our high domestic standards of professionalism and impartiality. And even if the case should be decided correctly, the successful claimant may face difficulties in enforcing the verdict. These considerations speak in favour of interpreting arbitration agreements in international commercial contracts in a way that takes into account the parties' wish for arbitration proceedings *to the widest possible extent* and even though the arbitration clause has unintentionally raised doubts regarding its scope.

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6 The arbitration agreement can leave it up to one of the parties to choose between arbitration and judicial review. In France, *the Cour de Cassation* by the Ministerial n° 983 26 septembre 2012 (11-26,022 , *Rothschild* case) has disregarded such an unilateral arbitration as invalid. The rejection was justified by the doctrine of *potestativité*, according to which an agreement in which one party has the complete power to decide to put into force or remain ineffective, is invalid.

3 The Legal Framework

Section 7, subsection 1, of the DAA, is based upon the UNCITRAL model law with very few deviations. The provision sets forth the contract autonomy principle in the law of arbitration: Parties may agree to arbitration (among other things) for "future disputes arising *in respect of a defined legal relationship, whether contractual or not*".

The wording of this provision allows for arbitration agreements on non-contractual disputes.[7] It does not aim to set limits to what the parties may agree to submit to arbitration. Such limits may e.g. follow from section 6 of the DAA on *arbitrability* (as shortly mentioned above) and the DAA section 7, paragraph 2, on *consumer disputes* (stating that in such contracts an arbitration agreement concluded before the dispute arose shall not be binding for the consumer).

Section 7, subsection 1, ensures a certain minimum of *clarity, safety and predetermination* for the parties. They cannot agree that *any* future dispute, which may arise between them, regardless of the reason and the context, will be subject to arbitration. Such an agreement would be considered to be so immense and vague and its scope so uncertain at the time of its conclusion that the contracts would most likely be held as invalid and unreasonable under Section 36 of the Danish Contracts Act.

4 The Arbitration Clause

It follows from the main principle, that we have indicated above, that the interpretation of an arbitration clause must be based on the words actually used in the agreement, and the context in which these words occur.

It must be assumed that parties who *have* agreed on an arbitration clause have a preference for this method of dispute resolution, regardless of whether the actual text has been drafted more or less fortunately.[8] Unless the circumstances of the contractual situation clearly indicate otherwise, it seems safe to conclude that the commercial parties to the contract must have a mutual understanding that all disputes arising *in connection with* the contract should to be subject to arbitration. For that reason, the unfortunate wording should not make the provision inapplicable or even invalid, cf. the maxim *falsa demonstratio non nocet* and *Mads Bryde Andersen*: "Grundlæggende aftaleret" (Basic contract law), 4th edition (2013), p. 309 et seq.

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7 The history of the provision clearly points in the same direction. The model act is to a wide extent based on the New York Convention of 1958, which again is a further development of the Geneva Convention from 1927 on the enforcement of foreign arbitral awards. While the latter required that the dispute was related to »a contract", the New York Convention *does not* require such a relation, cf. the wording »whether contractual or not", cf. *Finn Madsen* SvJT ("Svensk Juristtidning") 2013 p. 746.

8 Unless the agreement is *so ambiguous*, that the parties *cannot* be considered to have entered into an agreement to arbitrate, e.g. if they have agreed on "arbitration by the Copenhagen City Court".

An arbitration clause according to which "disputes regarding the interpretation of the present agreement" are subject to arbitration may, if interpreted neutrally, result in a bifurcation of the dispute so that questions of *breach and the legal effects hereof* should be decided by state courts (falling outside the scope of the arbitration clause), whereas particular issues of *interpretation* should be arbitrated. This was indeed the result in the Supreme Court decision reported in UfR 1986.318 H: In a dispute between an employer and an employee (a manager), the employer did not succeed in his claim to have the dispute arbitrated since the relevant clause in the employment agreement only referred disputes on the "understanding and interpretation" of the agreement to arbitrate, whereas the main issue of the dispute was whether the employer's termination of the agreement was wrongful or not.

In our opinion such a "literal interpretation" is most unfortunate because of the division of competences between arbitration and legal proceedings that it leads to: *First*, the parties will have to arbitrate those parts of their dispute that relate to the correct understanding of the agreement. Having done so, they will *then* have to start all over again and litigate in the state courts to determine the consequences of a possible breach of the agreement. It is hard to imagine that parties in their right mind would wish for such a complicated way to resolve their disputes. Therefore, if instead emphasis is put on the *purpose* of the provision, it would not only include disputes relating to the understanding of the agreement but also to the consequences of any breach hereof. In that case it would make perfect sense to have the whole dispute decided in one round of proceedings.

Therefore, convincing arguments speak in favour of applying an expansive interpretation – contrary to the result in UfR1986.318 H (which may not have been unaffected by the fact that the contract in question was one of employment). This is why we claim that *the purpose* of the arbitration clause should be given more weight than its *wording*. It is reasonable to conclude that the parties' common intention has *not* been to divide the dispute resolution, thereby effectively making it more lengthy, difficult and costly. The advantages of arbitration are often pointed out to be speed,[9] flexibility, expertise, and cost effectiveness, and regardless of their weight in any specific situation all these advantages are definitely lost if the parties must conduct court *as well as* arbitration proceedings. [10]

Below, we will only deal with clauses which in general are considered to be clear and unambiguous. They may include e.g. the following wordings:

a) "any dispute that may arise in connection with this contract",[11]

b) "any dispute that may arise in connection with this agreement, including any disputes regarding the existence or validity", or

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9 This is e.g. highlighted by the High Court in the grounds for UfR 2003.2412 ETC.

10 The purpose is emphasised strongly by *Gary B. Born:* International Commercial Arbitration, Vol. II, 2nd edition (2014), p. 1343.

11 In our opinion, the words 'this contract" will catch both *previous* and *subsequent* agreements relating to the contract in question - unless those previous or subsequent agreements contain deviating dispute resolution clauses, see similar *Gary B. Born:* op. cit. p. 1345 by note 145.

c) "any dispute that may arise in connection with this contract, and which may lawfully be subject to arbitration, including questions regarding its existence, validity, interpretation or breach of contract and about any other matter relating to the agreement, and changes or additions thereto, regardless of whether the dispute relates to conditions, which are considered to relate to public or private law, and regardless of whether views on contract, tort or restitution (enrichment) are invoked".

Wording (a) is often used in practice.

Wording (b) is recommended by the Danish Institute of Arbitration. The prepositional phrase "in connection with" is very similar to the wording in section 7 of the DAA: "in respect of".

Wording (c) is a hypothetical formulation which aims at taking all factors into account. Like other formulations, which seek to cover (too) much, it is fairly complicated. The many examples may invite to (incorrect) *e contrario* deductions, and the wording may likely be met with various other objections.

Parts of the wordings may vary. Instead of "which may occur in connection with" expressions such as "which may arise from" or "which is related to" are sometimes used. Compilations also occur, like "Any dispute arising out of or in connection with this contract".[12] In addition to the words "existence and validity" some will include the word "termination"[13] even though it must be clear from the outset that a dispute concerning termination is encompassed by the clause.

In our opinion it is fair to assume that all of these clauses have the same aim and should therefore be given the same scope. It is of no importance whether the clause states that "any dispute", "all disputes" or "disputes" must be settled by arbitration, although from a purely linguistic standpoint, the former terms go further than the last one: The difference is not significant, and because the clauses are standard and applied indiscriminately in practice, one should not attach substantive importance to differences of this kind.[14] If there is no special information on the background, there is no reason to believe that the parties have negotiated their exact wording or even bothered to decide between one wording or another. Or, as the Court of Appeals puts it in the *Fiona Trust case*[15]*:*

12 Such compilations are recommended by the ICC and the LCIA (»Any dispute arising out of or in connection with this contract..."). In *legal English* there also seems to be a long and venerable tradition of repeating things multiple times rather than to express things concisely – a tradition which is also known in certain areas of Danish contract law, e.g. in relation to the sale of real property.

13 Thus, the formulation recommended by the LCIA: »… including any question regarding its existence, validity or *termination…*" (emphasised here).

14 Accord *Gary B. Born:* International Commercial Arbitration, Volume II, 2nd ed. (2014), p. 1347 et seq.

15 [2007] All ER (Comm) 891 (on p. 900).

> "… ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words…"[16]

Therefore, one should exercise great caution when making *e contrario* deductions from arbitration clauses if such deductions would lead the parties into procedural difficulties. The fact that one wording points to an issue that was brought into question in relation to another wording, does not in itself prove that this other wording was unclear or even that it should cause genuine doubt.

Neither should one make *e contrario* deductions from the formulation "disputes relating to the interpretation of the present agreement", with the result that the arbitration tribunal should have no jurisdiction to decide questions of contractual breach. If the parties had really intended such other questions to be decided by state courts, they could easily have said so in the text.[17]. None of us have encountered such express provisions in practice. For all practical purposes, the wording "disputes relating to the interpretation of the present agreement" may thus be read as meaning "disputes relating to ... the present agreement", i.e. all disputes *relating to* the present agreement. At the end of the day, almost every question regarding a given contract may be claimed to be a question of interpretation.

It can be discussed whether the interpretation which we propagate here is best described as an attempt to identify the parties' real intentions (see, cf. the German Civil Code (BGB) Section 133: "Bei der Auslegung ist … der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften"), as a *purposive construction* or *teleological interpretation* (see *Mads Bryde Andersen:* "Grundlæggende aftaleret" (Basic contract law), 4th edition. (2013), p. 313 et seq.), as an especially arbitration-friendly interpretation (see under 5 on the international trends), or simply as a kind of *neutral* interpretation.

In our opinion the traditional Danish starting point should be turned around:

If the parties have agreed to have "disputes" arbitrated, any ambiguity in such a clause should lead to the conclusion that *all related disputes* (which are arbitrable) should go to arbitration. The fall back rule should be opposite the one set forth in government report no. 414/1966: If in doubt, one should interpret *expansively* rather than restrictively. It does not make sense to decide questions regarding "interpretation" by arbitration, and questions regarding "breach" by state courts. The emphasis must instead be on how the parties would have perceived the situation when they made the arbitration agreement. Any interest in obstructing its counterpart's legal moves *after the dispute* has arisen, is obviously without merits when interpreting the agreement.

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16 The statement has been expressly endorsed by the *House of Lords* in its decision to reject an appeal, see [2007] UKHL 40.

17 Cf. *House of Lords* in the Fiona Trust decision, [2007] UKHL 40 (section 26).

5 International Trends

In general, the international winds blow in the direction of a wide interpretation and away from attaching too much importance to textual details. It is generally held to be of no relevance whether the words used in the arbitration clause are "disputes", "all disputes" or "any disputes". It is also of no significance whether questions regarding invalidity or termination are mentioned explicitly. Neither is it important whether a claim for damages is based on contract or on tort, as long as it is connected with the contract. The general trend is to look at the parties' common objectives and aims at the time of entering the agreement ("effective interpretation"[18]). In this way, a party is prevented from subsequently sabotaging the arbitration proceedings by introducing legal arguments, which any unbiased observer would correctly dismiss as "hair-splitting" or "legal nitty-gritty".

For a number of years, the U.S. has especially stood out from the crowd by being *pro arbitration,* also when it comes to the interpretation of arbitration clauses. *Gary B. Born:* International Commercial Arbitration, 2nd edition (2014) supports this trend, and on p. 1344 of his book, among other things, he states that:

> "A "pro-arbitration" presumption is particular – but not only – appropriate where the parties have agreed to arbitrate their disputes under a contract and the question is whether noncontractual disputes related to the same contract also fall within the scope of the arbitration clause. In these circumstances, very few business men or women would conceive that different forums should decide different parts of their dispute, with the ensuing duplication of effort, expense and possibility of inconsistent results".

An example from the American legal practice deserves to be mentioned here, viz. *the Mc Donell-Douglas Corp. vs. Kingdom of Denmark,*[19]case. This case held that the Kingdom of Denmark was entitled to arbitrate a claim for damages resulting from the damages caused by a *Harpoon missile* running wild in the northern part of Zealand, Denmark. The Danish state had compensated the owners of the damaged property and now sought to reclaim these costs from the U.S. seller of the missile. The arbitration clause stated that "Any dispute or difference arising between the parties, *relating to the terms of this contract* … shall be finally settled by an arbitral tribunal …" (emphasized here).

Under English law it was previously assumed that "arising out of this contract" had a wider meaning than "arising under this contract".[20] Today such clauses are assumed to have the same – comprehensive – scope.[21] The above-

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18 Cf. *Jesper Lett:* Erhvervsjuridisk Tidsskrift 2013 p. 196 (with further references).

19 U.S. District Court, 607 F. Add. (E. D. Mo. 1985), quoted according to *Joseph Lookofsky & Ketilbjørn Hertz:* Transnational Litigation and Commercial Arbitration, 3rd Ed. (2011), p. 871 et seq.

20 Cf. *Jens-Peter Lachmann:* op. cit. p. 132 (margin no.) 474.

21 Cf. *Gary B. Born:* op. cit. p. 1352 and *Woxholth:* Voldgift (Arbitration), (2013), p. 304.

mentioned decision (see section 4) in *the Fiona Trust case* marks, in its own words, "a fresh start"[22] (however, with the addition of: "… at any rate for cases arising in an international commercial context"). *The House of Lords* dismissed an appeal, and, in this connection, *Lord Hoffmann* among other things stated the following:

> "… the construction of an arbitration clause should start from the presumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal".[23]

In English legal literature there is approval for this line, see for example *Blackaby & Partasides et al.:* Redfern & Hunter on International Arbitration, 5th ed. (2009), p. 108 (margin no. 2.58**).

In German legal literature *Lachmann:* Handbuch für die Schiedsgerichtspraxis, 3rd ed. (2008) states:

> "Schiedsvereinbarungen sind nach allgemein gängiger – nationaler wie internationaler – Praxis weit auszulegen" (emphasis removed).[24]

As regards claims for compensation in connection with criminal offences, the crucial test has been suggested to be whether the claim is based on the actual circumstances which may constitute a breach – and not on whether it is submitted as a claim for non-contractual damages.[25]

Trittmann/Hanefeld in Karl-Heinz Böeckstiegel et al. (eds.): Arbitration in Germany – the Model Law in Practice (2007) p. 106, state that:

> "… German courts tend to interpret arbitration agreements broadly arguing that, in case of doubt, it is in the parties' interest to submit all questions to arbitration in order to avoid a split into different proceedings".

Contrary to the Danish Supreme Court's decision in UfR 1986.318 (mentioned above) the Norwegian Supreme Court (Høyesterett), already in Rt. 1932.98, established a more expansive interpretation. Høyesterett held that a clause on "tvistigheder om forstaaelsen av kontrakten" ("disputes concerning the understanding of the contract") not only prescribed arbitration of a dispute regarding the interpretation of the provisions of the contract, but also of any dispute concerning legal claims arising from the contract. The dictum of the court was written by Judge *Næss* with whom the six other judges agreed "i det vesentlige og i resultatet" ("concerning the main points and the result). Judge *Næss* argued for a subjective interpretation of the agreement. He noted, among other things:

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22 [2007] In All ER (Comm) 891 (p. 900).

23 [2007] UHKL 40 (paragraph 13).

24 Cf. *Jens-Peter Lachmann:* Handbuch für die Schiedsgerichtspraxis, ed. 3. (2008), p. 131 (margin no. 472).

25 Cf. *Jens-Peter Lachmann:* op. cit. p. 133 (margin no. 480).

> "... I hold that it has been the intention of the parties that the case in its entirety should be decided by one and the same forum" (p. 100).

Long before the Model Law was implemented in Norway, *Henry John Mæland:* "Voldgift" (Arbitration) (1988) established that no principle of restrictive interpretation applied. *Mæland* emphasized that the decisive factor should be what the parties had *contemplated*.

> "However, in the absence of proof of the contrary, there must be a *presumption* in favour of the interpretation that all disputes between the parties in connection with the contract should be decided by arbitration including questions regarding the validity of the contract" (emphasised in original).

In support of this rule of presumption, reference is made partly to the parties' typical intentions, and partly to a desire to streamline the arbitration process.

Geir Woxholth: "Voldgift" (Arbitration) (2013), p. 299 f., states that restrictive interpretation is of "little or no importance in itself. There is no evidence of it in legal practice".

In Norway and probably also in Sweden the same applies for an arbitration clause which only mentions "interpretation of the agreement between the parties". [26] As stated by *Stefan Lindskog*: "Skiljeförfarande" (The Law of Arbitration), 2:a uppl. (2012), p. 186 et seq. and *Finn Madsen* SvJT 2013 pp. 730-750, Swedish law has traditionally worked with a so-called *påståendedoktrin*, a "legal claims doctrine": According to this doctrine, in order to determine whether the dispute falls within or outside of the scope of the arbitration clause, one should focus on the *legal arguments* alleged by the claimant. The doctrine was introduced by *Lars Welamson* in SvJT 1964 p. 278 et seq. in response to the "causation theory", which *P.O. Bolding:* "Skiljedom" (Voldgift) (1962) p. 99 had propagated, according to which it is decisive whether the *incidents* that give rise to the action would not have taken place without the agreement. Påståendedoktrinen ("the legal claim theory") has since received support by the Swedish Supreme Court in NJA ("Nytt Juridiskt Arkiv") 2008.408.

Finn Madsen now argues that according to the Swedish Supreme Court decisions in NJA 2007.475 and NJA 2008.120 an *anknytningsdoktrin* ("connectivity doctrine") applies. Here, the deciding factor should be whether the dispute is in some way *connected* to the contract in which the arbitration clause is laid down (or referred to). Thus, the legal claims and the arguments upon which the claim are based, do not have to be regulated by the agreement. In NJA 2007.475, the Swedish Supreme Court found that an arbitration clause in an agreement on the right of use also included a tort claim on the grounds that the claimed facts of the case had "direct reference" to the contractual relationship. The clause read: "Eventualla tvister avgörs enligt lag om skiljedom" ("possible disputes should settled according to the arbitration act"). Also in NJA 2008.120, the Swedish Supreme Court found an arbitral tribunal competent under an arbitration clause in an investment agreement, even though

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26 Cf. *Stefan Lindskog:* Skiljedomsförfarande, 2nd ed. (2012), p. 194 et seq.

the claimant did not refer to the terms and conditions as the basis for its claim, but relied on public law principles.

Already in his book "Skiljemannarätt" (The law of arbitrators) (1999), p. 71 ff. *Lars Heuman* relied on the very same argument in support of an "extensive" interpretation of arbitration clauses. He argued that the parties have, in any event, contracted themselves out of the procedural protection of court proceedings, when parts of the legal relationship between them are referred to arbitration by agreement. If cases were to be tried partly by state courts and partly by arbitral tribunals, the parties would end up in a costly divided process. *Heuman* also presumed that parties want to allocate an "extensive competence" to the arbitral tribunal. The two Swedish Supreme Court decisions cited above seem to attach importance to this point of view.

6 Danish Legal and Arbitration Practices

As already indicated, the predominant view in Denmark has been quite different from the above picture. There are numerous examples in Danish case law where parties have been allowed to bring a case before a state court regardless of an arbitration clause, if the claim was based upon other legal arguments than the contract, for example on the law of torts, on neglect of good marketing practices or on disregard of legal provisions in general.

This practice is consistent with the statements in the government report no. 414/1966, according to which there is a "clear tendency to interpret arbitration agreements restrictively". This practice may also be claimed to conform to a so-called "neutral interpretation".[27]

This restrictive practice dates back to the time before 1972 when Denmark enacted its first Arbitration Act, which was indeed a rather rudimentary one. The situation is markedly different today. Firstly, Denmark now has a modern UNCITRAL modelled Arbitration Act. Secondly, arbitration has become the preferred means for dispute resolution in the international business community. Thirdly, partly as a result of the work performed by national and international arbitration institutes and associations, generally accepted notions and principles on how to design the arbitration process have been established. Fourthly and finally, according to the DAA section 7, subsection, consumers are expressly protected against prior arbitration agreements.

The restrictive legal practice mentioned above must now be investigated in more detail. We have selected seven decisions, which we see as representative of the restrictive practice which was followed until the Supreme Court ushered in a new epoch with the decisions in 2013 and 2014.

There are other decisions regarding the scope of arbitration clauses than the seven referred to below, including the following, where the dispute was found to be *covered* by the clause: UfR 1957.546 H (a dispute about a possible waiver of rental fees was covered by an arbitration clause contained in an expired

27 Cf. *Beckmann and Nolsø* in UfR 2008 B p. 416, where UfR 2000.897 H (regarding IKEA's baby diaper changing mat) is said to be very difficult to classify under "neutral interpretation".

charter-party), UfR 1997.751 H (an arbitral tribunal established by the pork industry to hear all kinds of claims relating to certain kinds of pork diseases was competent to hear claims for damages in connection with another kind of pork disease), UfR 2003.885 SH (a dispute on the scrapping of a vessel was covered by the arbitration clause in the investment agreement) and UfR 2007.1378 H (a dispute on the carriage of goods was subject to the arbitration clause in the charter party, even though the goods had been handed out). In the following decisions the dispute was not regarded as being covered by the arbitration clause: UfR 1992.4 V (a terminated partner was not bound by an arbitration clause "of general character" in a partnership agreement), UfR 1997.568 HK (an arbitration clause in an administration agreement did not include disputes arising in connection with previous agreements), UfR 2002.2336 VLK (an arbitration clause in an agricultural lease could not "with the certainty required" be found to cover any dispute as to the value of a milk quota) and UfR 2012.2816 ØLK (an arbitration clause in a distribution agreement was not found "with certainty" to include disputes originating from two parallel marketing and investment agreements, which did not contain any arbitration clauses).

In UfR 1971.722 Ø, the High court of the Eastern Circuit (Østre Landsret) found that an arbitration clause regarding "possible disputes which may arise between the parties arising from their unsettled matters according to this contract..." did not cover a claim for damages based on the rules on *product liability*, "as the arbitration clause … neither according to its wording nor the information available on its creation can be assumed to be applicable to such a responsibility". In consequence, the arbitration award was set aside, and the claimant was only awarded a minor compensation for increased control expenses and the reduction in value of his property.

A similar case should definitely not have the same outcome today. Parties concluding arbitration agreements are unlikely to consider how product liability is correctly placed within the legal system. In any case, to deal with one part of the contractual relationship in one forum and the rest of the contract in another forum would complicate the dispute resolution process dramatically.

The unpublished decision of 22 December 1994 (case no. 206/1994) from the Danish Supreme Court's Complaint and Appeals Committee[28] had its genesis in a case in which contractor C had caused fire damage to employer E's property during construction work. E's insurance company IC paid damages and brought a case against contractor C, who claimed dismissal with reference to the "*AB 72*" standard terms of the Danish construction industry (now "AB 92"), the arbitration clause of which makes reference to " ... disputes arising out of the work ...". The Supreme Court endorsed the findings of the High Court according to which "[IC] by paying compensation for the fire damage had subrogated in the employer's ... possible claims for damages against [C] under the Danish Liability for Damages Act, section 22, subsection 1, ... and that this subrogation was not based on claims under the construction contract, which the company has

28 The ruling is discussed by *Jakob Juul and Peter Fauerholdt Thommesen:* Voldgiftsret (Arbitration Law), 2nd ed. (2008), p. 107.

not accepted". Consequently, the insurance company was not considered bound by the arbitration agreement contained in AB 72.

On the face of it, this decision only concerns subrogation in an arbitration agreement. However, it can only be correct if E *itself was not left* to pursue its claim by arbitration, too. This was, however, precisely the case: E had concluded a contract with C which stated that "... disputes arising in connection with the work ..." should be settled by arbitration. This was a dispute, and it arose in connection with the work. Thus, the dispute should have been referred to arbitration. In addition, the decision must now be regarded as overruled by UfR 2014.2042 H, as described below.

UfR 2000.897 HK dealt with a claim based on the Danish Marketing Practices Act: In 1997, the furniture retailer IKEA had ceased to buy baby diaper changing pads from their previous supplier, D. D now initiated court proceedings against IKEA to establish that IKEA had marketed a counterfeit product in violation of the Act and that, consequently, IKEA should be ordered to pay compensation to D. IKEA claimed that the case should be rejected by the state courts because, in 1994, D had agreed to IKEA's purchasing conditions, according to which *"[d]isputes with regard to an agreement with application of these purchasing conditions or matters of law arising therefrom shall be resolved in agreement with the rules of the International Chamber of Commerce on arbitration procedure…"*. The Supreme Court found that the dispute was not covered, "with the certainty required" by this arbitration clause, and that IKEA's claim for rejection should therefore not be upheld.

A similar case should definitely not have the same outcome today. The parties had agreed on an arbitration clause which did not lay the groundwork for any *e contrario* deductions, cf. the words *"… or matters of law arising therefrom"*.

UfR 2001.2392 VLK concerned a claim against a contractor (C), who had been in charge of a residential construction for the cooperative association F. C had signed an agreement with architect A on technical advice and assistance relating to the project. The contract made reference to "ABR 89" (the Danish General Conditions for Consulting Services), of which item 9.0.1 states as follows:

> "Disputes between the client and the adviser in connection with performance of the task must be settled finally and conclusively and with binding effect by the arbitration tribunal provided for in the General Conditions for Works and Supplies (AB 72), section 31 in accordance with the rules established for the arbitration tribunal".

After completion of the construction work, a landslide caused damage to the buildings. C went bankrupt, and the Danish Building Damage Fund, B, which recognised that the damage was covered by the insurance, subrogated into F's legal position. In June 1999 B initiated arbitration proceedings against A, and three other technical advisors H, I and J, but subsequently B had to give up the arbitration proceedings against H, I and J, since these three parties had not signed any arbitration agreement. On 11 September 2000, B then brought *legal proceedings* in state courts against A, H, I and J with a claim for damages. A claimed that the case be rejected from the courts on the grounds that A's dispute

with B (who had subrogated into F's position) should be settled by arbitration. In its reasoning, the High Court *inter alia* pointed to the fact *that* the defendants, i.e. the technical advisors, individually or jointly, could be considered to be responsible for the damage, *that* it was essential that the case was decided by one and the same forum to assess and possibly divide the responsibility, *and that* process-related and financial considerations supported a joint handling of all parties in one case. Hereafter, the High Court found that B, on the basis of an allegation *of non-contractual liability* (tort based liability) was also entitled to raise a claim against A before the Danish state courts. A's plea for rejection was therefore unsuccessful.

This case differs from the above cases due to the fact that the main proceedings (viz. those against H, I and J) undoubtedly had to be carried out before state courts. Therefore, at least in part, the outcome of this case makes sense in its wish to avoid an inappropriate splitting up of the same case. Nevertheless, there is no legal basis for ignoring arbitration clauses for reasons of procedural economy. Any given dispute is either covered by an arbitration agreement, or it is not. The courts cannot censor an agreement in the light of what is most appropriate.[29] For that reason, the outcome of the decision should not be maintained today.

UfR 2006.1638 V concerned a farmer (F)[30] who had entered into an agreement with turnkey contractor TC on the construction of a piggery. F brought a direct claim ("recourse against a prior party") against sub-contractor SC and sub-supplier SS before the state courts, alleging that SC and SS were liable due to the collapse of the construction. The High Court of the Western Circuit (Vestre Landsret) held that the arbitration clause in ABT 93 (the standard terms for turnkey projects) had been agreed by F and TC, and that F was, as a result, prevented from bringing legal action against TC before state courts without TC's acceptance. The High Court also held that F had not entered into any agreement with SC and SS, and that no arbitration was therefore agreed with them. In accordance with the provisions of ABT 93, section 47, subsection 8, F could involve SC and SS in arbitration proceedings against TC. However, the High Court found no basis for determining that F was *obliged* to make recourse to a prior party by means of arbitration on the grounds that SC and SS were responsible on an independent basis. Therefore, F was not prevented from litigating in state courts against these defendants.

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29 There is *no* conflict between this point of view, and e.g. the point of view that parties who have agreed to an arbitration clause on »the understanding of an agreement", are considered to have agreed that all disputes relating to the agreement as such should be subject to arbitration, because they could reasonably not have wanted to carry out both arbitration and court proceedings. In this case litigation costs are only taken into account as an element in the interpretation of the parties' (unclear) agreement. In UfR 2001.2392 V there was a clear agreement between A and F to arbitrate, and this agreement was set aside by the courts. In addition, there is a difference between establishing the legal effect *inter partes*, in order to ensure that there is only one set of proceedings between the parties, and to set aside an agreement in order to achieve a consolidation of cases involving one or more *third parties.*

30 In the summary of judgment other abbreviations for the involved parties are used: BH = P, TC = B, SC = T and SS = S.

This judgment focuses on the qualification of F's claims against SC and SS ("… responsible on an independent basis ...", i.e. a claim for non-contractual damages, a claim based on tort law). F was allowed to get around the arbitration clauses, partly because he had no agreement with SC and SS which obliged him to bring the matter before an arbitration tribunal (but only offered him a right to do so), partly because his claim was not contractual. The decision cannot be maintained after UfR 2014.2042 H (see below).

UfR 2008.2441 SHK concerned a shareholders' agreement, according to which "all disputes arising out of this agreement" should be settled by arbitration. A shareholder instituted legal proceedings against the two other shareholders with a claim for damages. The Maritime and Commercial Court of Copenhagen found that the arbitration agreement did not exclude state court litigation for damages based on a provision on managerial liability contained in the Swiss Companies Act: "The decisive factor for this is that the claim is based on the provision mentioned, and thus concerns non-contractual damages. Such an action is not covered by the arbitration clause, unless special circumstances exist ...".

A similar case should definitely not have the same outcome today. The decisive factor is whether "the dispute" is covered by the arbitration agreement or not – not which legal arguments the plaintiff chooses (or chooses not) to assert. Without the agreement and the joint investment in the private limited company there would have been no dispute. In that way the dispute originated from and was related to that agreement.

UfR 2013.1195 Ø concerned a claim for damages against a consulting engineer R, who had accepted paying damages for harming a neighbouring property in connection with a construction project. The employer (E) and R had agreed to ABR 89 and the arbitration clause contained therein (see above under UfR 2001.2392 V). E's insurance company IC paid damages and brought action against R. In this case IC claimed that R's liability to pay damages for the harm inflicted upon the neighbouring property was based on tort law. R requested a dismissal of the action with reference to the arbitration clause contained in ABR 89. The High Court found that "since [IC's] entry and requirements according to the allegations made were not based on claims under the consultancy agreement between [E and R], then [IC], in the present case, is not obliged to have the case decided by arbitration".

This decision was changed by the Supreme Court judgment of 11 April 2014 in case 217/2013 (see below).

The above practice seems to be based upon a restrictive interpretation of arbitration clauses, the underlying reasoning being that arbitration clauses only relate to "the contract", and claims based hereupon – not to claims based on "general provisions" of law (such as e.g. tort law). However, whether the claim is based on contract, tort, restitution or other legal arguments is without any relevance, if only the dispute relates to (has "connectivity" to cf. the Swedish terminology) the legal matter in question.

As already mentioned, the restrictive line taken by the courts so far may recently have been overruled by three decisions from the Danish Supreme Court: UfR 2013.2338, UfR 2014.2042, and the judgment in case 217/2013:

UfR 2013.2338 H arose from a bank collapse during the 2008 financial crisis. The state-owned "clean-up company", Finansiel Stabilitet (FS), had taken over several banks, among them "ebh bank" (E). FS had initiated state court proceedings for damages against, among others, two former assistant directors, A and B, on the grounds that A and B had acted negligently towards E prior to E's collapse. Between A and B on the one hand and E on the other, an arbitration agreement was part of both the original *employment contracts* and of the *severance agreements* (the latter being concluded during the weekend in which E definitively collapsed). According to the arbitration clause "disagreements between the parties to the agreement including any disputes concerning the interpretation and understanding of the agreement" should be resolved by arbitration.

A and B argued that the dispute was covered by the wording and that a distinction between claims for damages within and outside the contract did not make sense. Claims for damages had "such a connection with the employment that the claim for damages undoubtedly had to be considered as a claim which directly related to the employment with the bank". In support of the admittance of the action FS claimed that the severance agreements only covered disputes related to "the defendant's usual employment conditions", and added: "The claim for damages, which is covered by this case, cannot be placed on an equal footing with this, but has been made on the basis of entirely other aspects than the aspects which are intended to be covered by the arbitration agreement".

The High Court for the Western Circuit held that FS "regardless of the wording" was entitled to raise the claim before state courts, as the claim was completely outside the scope of the assumptions of the parties at the time of conclusion of the agreement. The Supreme Court, however, found that the arbitration clause contained in the severance agreements, according to its wording, included the action for damages which FS had brought against A and B. The Supreme Court further held that the arguments regarding the parties' common assumptions could not justify a different result.

Cost arguments clearly spoke in favour of the result reached by the High Court: The case against the managing director and the board of directors was to be handled by the state courts, and it would be both expedient and convenient if the litigation against the assistant directors could be processed at the same time. However, as stated above[31], although arguments related to procedural economy may affect the *interpretation* of an arbitration agreement, they are not in isolation a sufficient argument for setting aside an arbitration clause.[32]

The Supreme Court attaches importance to "*the wording"* of the severance agreements. The result of the Supreme Court's interpretation falls within the textual boundary of the clause:[33] The decisive factor is whether the parties have "agreed" on arbitration or court proceedings – and not whether they "with

31 Cf. *Gary B. Born:* op. cit. p. and Finn Madsen SvJT 2013 p. 749, e.g., see p. 745 et seq.

32 Cf. Finn Madsen in SvJT 2013 p. 749. Further *Jakob Juul and Peter Fauerholdt Thommesen:* Voldgiftsret (Arbitration tribunal), 2nd ed. (2008), p. 115.

33 Involvement of the parties' shared perception or considerations regarding the purpose was thus not necessary.

certainty" have agreed on an arbitration clause. The judgment must also be understood to mean that the parties' agreement is decisive: It establishes that the distinction between compensation *in* and *outside* the contract (contract law and tort law), is not decisive in the interpretation of arbitration clauses: Non-contractual claims for damages may just as well as contractual claims for damages be covered by an arbitration clause.

UfR 2014.2042 H (case 216/2013)[34] and the Supreme Court judgment in case 217/2013, [35] both delivered on 11 April 2014, arose from almost identical cases: [36] During the performance of a construction project a neighbouring property was damaged. The employer E's insurance company, IC, as third-party insurer, paid compensation to the neighbour. The cases concerned the recourse claim that IC subsequently raised against the allegedly liable consultant. The consultancy agreements referred to ABR 89, which, as is commonly known, contains an arbitration clause (see above at the discussion of UfR 2001.2392 VLK).

Case 217/2013 deals with IC's claim against the full-service consultant (C) which E had contracted with. The decision, as already mentioned, changed the appealed decision published in UfR 2013.1195 Ø. Initially, the Supreme Court ruled that IC subrogated into E's legal status and that the decisive factor subsequently was "whether the employer should submit his claim against the technical advisor before the state courts or an arbitration tribunal". The Supreme Court stated that the claim arose from a dispute about the technical advisor's performance of his professional task. It was therefore covered by the arbitration clause, and the fact that the neighbour, after having his loss compensated by IC, had assigned his claim against E and C to IC, could not lead to a different result.

Case 216/2013, published in UfR 2014.2042, deals with IC's claim against a sub-consultant (SC), which E had not entered into any agreement with. (The agreement with SC was concluded by E's full-service consultant in the case). The Supreme Court made the same statement as in case 217/2013 and added: "In a case as the present, where an arbitration clause exists in both consultancy agreements, the Supreme Court finds that [E] as the employer would have been bound by the arbitration clause, if [E] after having paid compensation raised a claim directly against [SC] to be discharged from the loss". The Supreme Court subsequently found that IC, too, was bound by the arbitration clause.

These two decisions seem to deviate from the court practice criticised above. It is now clear that a third party liability insurance company, which makes a recourse claim, subrogates in the legal status of the insured party, also with respect to an arbitration agreement. The conception expressed in the Supreme Court's Complaint and Appeals Committee's decision of 22 December 1994, has thus been abandoned. Moreover, it is made crystal clear that an employer cannot circumvent arbitration clauses merely by submitting a direct claim. The conception expressed in UfR 2006.1638 V is thus also abandoned.

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34 The High Court's judgment in this case does not seem to have been published.

35 The High Court's judgment in this case is published in UfR 2013.1195 (mentioned above).

36 The insurance company was the same in both cases, but the buildings involved are not identical (different employers, turnkey consultants, etc.).

7 Other Cases

Arbitration clauses in contractual relationships with many levels of cooperation, may in particular give rise to doubts as to whether a claim is covered by an arbitration agreement or not. Previous restrictive practice in such cases may be understood in the light of the so-called *subjective assessment principle* as suggested by *Bernt Hjejle* in his thesis "Foreningsvoldgift" (Arbitration within private societies) (1941) p. 33 et seq. This principle suggests that the validity of a promise to some degree may depend on the party's possibility to assess the possible outcomes when the promise was made.[37]

The principle was already criticised in its time, see *Hurwitz* in UfR 1941 B pp. 120-121, and as we have discussed in section 2 above, it can no longer justify a restrictive interpretation of arbitration agreements. The judgment in UfR 1992.4 V, which held an arbitration clause in a partnership agreement to be of such a "general nature", that it did not bind an excluded partner, does not reflect the current legal conception today.

A partnership serves as a good illustration of some of the uncertainties that may occur regarding the scope of arbitration clauses: If, for example, a partner brings action against a co-partner on grounds that the co-partner has acted in a violent or defamatory way, a dispute as to whether the act of violence or defamation triggers remedies for breach must be subject to arbitration. It must also be assumed that a claim for damages for a dental injury, which allegedly resulted from acts of violence, or a claim for damages in tort arising from the defamation, are covered by the clause. It speaks in favour of this conclusion that arbitration proceedings ensure the confidentiality of the dispute, which the parties also must be assumed to wish for in such a situation. The fact that the parties did not have this specific type of case in their minds when they drafted their arbitration agreement should not justify a restrictive interpretation. This conclusion is supported by UfR 2013.2338 H, as discussed in section 6. Nor should it be of importance whether the alleged violence arises from a disagreement between the parties about the operation of the partnership or any other conditions or other discrepancies, e.g. the fact that one partner has had an affair with the co-partner's wife.[38]

In an arbitral context, acts of violence and defamatory statements rarely form the basis for claims. In KFE 1993.170 VBA, however, a contractor terminated the agreement with an employer on the grounds that the employer had acted violently towards a workman and had threatened others on several occasions. The arbitral tribunal considered the termination to be justified. As the tribunal's jurisdiction was not contested during the case, however, this case shows nothing further in this respect.

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37 See also *Hjejle* in Nordisk Gjenklang (Festskrift til Carl Jacob Arnholm) (1969), p. 475 et seq.

38 In principle, the clause must be interpreted in the same way, regardless of who initiates the case, but if the offender has already been convicted of violence in a criminal case on the matter, he may not be able to insist that a case for compensation for personal injury should be settled by arbitration, if the victim objects. This is a validity assessment, cf. Sections 33 and 36 of the Danish Contracts Act.

In conclusion, the decisions of the Danish Supreme Court in UfR 2013.2338, UfR 2014.2042 and case 217/2013 have laid the groundwork for a farewell to the last bit of the restrictive interpretation of arbitration clauses in Danish law. The neutral interpretation that can be read out of this recent case law is an important step in the right direction, but the time is now ripe for an expansive interpretation in light of the parties' intentions and the purpose of the agreement. Expansive interpretation is particularly indicated in international cases. By acting in this way, Danish law will be brought into line with the legal development in commercially leading states. Although it may not be necessary to go that far in domestic cases, the "with certainty"-criterion must now be abandoned for good in relation to arbitration clauses in international commercial contracts.