Norwegian Maritime Day

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Danish Report
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Duty to disclose in the Arbitration Act

Art. 12(1) of the Danish Arbitration Act from 2005:

> "**(1)** When a person is approached in connection with a possible appointment as an arbitrator, that person shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of the appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by the arbitrator."

Modifications to the duty of disclosure?

Waiver from the Parties:

According to art. 2(2) of the Act, ”art. 12 ... may not be derogated from by agreement”.

Customs and pratices in the particular field?

Art. 28(4) of the Act, ”the arbitral tribunal shall decide [all cases] in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction”.

When can an arbitrator be challenged and what is the procedure?

Art. 12(2) and art. 13 of the Arbitration Act:

> ”Art. 12(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence [, or if the arbitrator does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him or her, or in whose appointment he or she has participated, only for reasons of which he or she becomes aware after the appointment has been made].”

When can an arbitrator be challenged and what is the procedure? – Art. 13

”Art 13 of the Arbitration Act:

(1) The parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal and of the circumstances on which the challenge is based, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of para. (2) is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the courts to decide on the challenge. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

(4) A challenge may not later be invoked in support of an application for setting aside or refusing recognition or enforcement of the arbitral award.”

The DIA Rules (2021): Duty to be independented and impartial

Art. 20(1) of the DIA Rules of Arbitration:

”Any person appointed arbitrator shall be ... impartial and independent.”

Duty of disclosure

Art. 20 (2)-(4) of the DIA Rules of Arbitration:

> ”**(2)** Before being confirmed as an arbitrator, the arbitrator shall sign the DIA’s Declaration of Acceptance, Impartiality and Independence etc., which he or she shall send to the Secretariat. At the same time, the arbitrator shall disclose in writing circumstances, which may give rise to justifiable doubts regarding the arbitrator’s availability, impartiality or independence. The arbitrator shall also provide information regarding his or her professional and educational background (CV/résumé). The Secretariat shall send the declaration and the CV/résumé to the parties and set a time limit for any comments.
> **(3)** During the arbitration the arbitrator shall immediately disclose in writing to the other arbitrators, the parties and the Secretariat circumstances that should have been disclosed, see par. (2), had they existed at the time.
> **(4)** A party must immediately inform in writing the Secretariat, the Arbitral Tribunal and the other parties of the identity of any third party, which has entered into an arrangement regarding funding of any costs in relation to the case and under which it has an economic interest in the outcome of the case.”

When can an arbitrator be challenged and what is the procedure?

Art. 21 of the DIA Rules of Arbitration:

”(1) A party may only challenge an arbitrator if it finds that circumstances exist, which give rise to justifiable doubts regarding the impartiality or independence of the arbitrator, or if the party finds that the arbitrator does not possess the qualifications agreed between the parties. A challenge shall be submitted in writing to the Secretariat within 15 calendar days of the party having become aware of the appointment of the arbitrator and the circumstances on which the challenge is based.
(2) The Secretariat shall notify the parties and the challenged arbitrator of its receipt of the challenge setting a time limit for any comments. A copy of the notification shall be sent to the other arbitrators, if any, at the same time.
(3) The Chair’s Committee shall decide on the challenge, unless the challenged arbitrator resigns or the parties agree that the arbitrator shall not be confirmed or that the arbitrator’s duties shall cease.

(4) Even in the absence of a challenge mentioned in par. (1), the Chair’s Committee may not confirm an arbitrator or may decide to revoke the arbitrator’s confirmation if the Chair’s Committee finds that there are justifiable doubts regarding the impartiality or independence of the arbitrator, or if it finds that the arbitrator does not possess the qualifications agreed between the parties.”

Danish Supreme Court case law

U 2005 611 H: An insurance company had in 2003 appointed an arbitrator [Mr. Rokison!] who until 1996 had acted as a lawyer and now had a significant number of appointments as arbitrator. The arbitrator had in 1992, 1996, 2001 and 2003 been appointed by the insurance company. One of these cases was still pending. Before 1996 the arbitrator has been instructed in one case by the insurance company. The Supreme Court found that these circumstances could not in itself be considered as justifiable doubts regarding the arbitrator's impartiality and independence and the Court rejected the challenge.

Mr. Rokison’s disclosures in the case

“I have been appointed on behalf of various Ace companies in a number of arbitrations over recent years, and although this has not represented a dominant part of my practice as an arbitrator and does not, in my view, affect in any way my independence or impartiality, it is something which I consider should be brought to the attention of the Respondents and their legal representatives at the outset, to give them an opportunity of objecting. I am sure that it is better for all cards to be on the table at this stage rather than risk some challenge to the tribunal or any award at a later stage.”

“In response to your request for me to provide »permitted details« of matters on which I have been appointed as arbitrator by ACE and CIGNA companies, it seems to me that details of arbitrations in which I have been appointed must be subject to a duty of confidentiality on my part.

However, without being in breach of that duty, I believe I can reveal that, according to my clerk's records, over the past ten years or so I have been appointed in five previous cases involving ACE or CIGNA as follows:

Disclosures, cont.

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(1) Appointed in December 1992 by an ACE company in relation to a claim by a US fertilizer company which culminated in an Award in February 1995 and a further Award in 1997.

(2) Appointed in August 1996 by an ACE company in relation to a claim by a major US motor manufacturer, which culminated in an Award in June 1999.

(3) Appointed in April 1998 (as) Third Arbitrator in an arbitration in which CIGNA was the Claimant. This arbitration did not proceed to an Award.

(4) Appointed in October 2001 by an ACE company as re-insurers in relation to a claim by »captive« insurers of a large US accountancy firm. The arbitration settled after a hearing in May 2003.

(5) Appointed in March 2003 by an ACE company and the assignee of another ACE company in relation to a claim concerning satellite telecommunications. My appointment was not confirmed by the Court of the ICC.

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Disclosures, cont.

…

Over the past ten years I have been a very busy international commercial arbitrator, especially since my retirement from practice as a barrister in 1996.

Currently, I have a pending »case load« of over 50 arbitrations. No single »client« or firm of solicitors forms or ever has formed a dominant part of my practice.

I remain wholly independent and do not believe that anyone fully aware of the relevant facts could have any reasonable doubt as to my impartiality.”

“The reason why records maintained by barristers' chambers do not contain details sufficient to respond to your specific requests is that, until very recently, no-one has seen fit to question the independence or impartiality of a practising barrister or a retired barrister practising as an arbitrator.

The Bar has, traditionally, been a profession of independent sole practitioners linked only by the sharing of expenses within the chambers in which we practice. So far as practice at the Bar is concerned, »conflicts« simply do not enter into it. Within specialist chambers, it is by no means unusual for the barristers instructed on opposing sides in a dispute to be members of the same chambers. Furthermore, it would be a breach of professional etiquette to decline instructions because the barrister concerned, or another member of the same chambers, had previously been instructed by *either* party to a dispute. It would only be inappropriate to accept instructions if, as a result of previous representation of the opposing party the barrister had acquired special knowledge e.g. of its business affairs, which could be used to its prejudice.

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Disclosures, cont.

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It is not therefore necessary for our clerks to maintain the sort of detailed records which would be necessary in, for example, a firm of solicitors.

I hope that the above may be of same assistance.

I note that my co-arbitrator has resigned in response to a challenge based on his previous relationships. I should of course be prepared to resign my appointment if both parties were to agree to my adopting this course, but I do not think it right to resign in the face of opposition to that course from my appointors, who in my view are entitled, subject to valid objection, to appoint the arbitrator of their choice.”

Case law, cont.

U2016 146H: The Supreme Court considered a question on (apparent) bias arising out of a Facebook connection between a judge and the victim of a violent action in a criminal case:

> “It follows from the Supreme Court's practice that the provision in art. 61 [of the Danish Administration of Justice Act] has a dual purpose, namely partly to avoid a real risk that the decision in the specific case is affected by irrelevant considerations, and partly to avoid distrust of the parties or the outside world to the judges that are involved in the case. The latter implies that a judge is biased if, due to the judge's connection to the case or the parties to the case, doubts can be raised regarding whether the judge is completely independent and impartial. In order to lead to successful challenge of the judge, the doubt must be reasonably justified in objective circumstances. In addition, art. 61 must be interpreted in the light of art. 6(1) of the European Convention on Human Rights, according to which everyone has the right to a trial before an independent and impartial tribunal, and the related case law of the European Court of Human Rights.”

What does it take to be biased?

Preparatory works of the Arbitration Act:

"…it depends on an assessment of whether there are circumstances which give rise to justified doubt as to the impartiality or independence of the arbitrator. Circumstances which would make a state court judge biased under the Administration of Justice Act § 60(1), or § 61, will normally always give rise to justified doubt about an arbitrator's impartiality or independence."[underlines by me]

Confidentiality

Art. 50 of the DIA Rules:

> "The members of the Arbitral Tribunal … shall treat all matters relating to the arbitration as confidential."

The Danish Arbitration Act does not contain a similar provision.

Repeat appointments by the same law firm etc.

Quote from the Declaration of independence and impartiality of the DIA:

"If you, during the past 5 years, have participated in one or more arbitration proceedings, where you are or have been appointed as an arbitrator by one the parties, their legal counsel, or law firm to the present case, you must for each appointment disclose the following:

a) Whether the case is pending or closed.
b) The year in which the appointment took place, and for closed cases the reason why the case was closed.
c) Who you are or were appointed by.
d) Whether you are or were appointed as co-arbitrator or as the presiding arbitrator.

In order to evaluate whether or not the number of appointments from the same law firm etc. may lead to justifiable doubt as to your independence and impartiality, it is relevant to disclose the total amount of cases in which you have been appointed arbitrator in the past 5 years."