



THE ARBITRATION TRIBUNAL'S RIGHT TO ENCOURAGE A PARTY TO TAKE A POSITION ON FACTUAL AND LEGAL ISSUES

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Supreme Court Justice Borgar Høgetveit Berg

THE DILEMMA (AND THE SOLUTION)

- **The problem**

- The background
- The dilemma

The arbitration tribunal's right (or duty) to encourage a party to take a position on factual and legal issues

- The solution

- **Terminology**

- «Guidance» / «Procedural guidance»
- «Encouragement» / «Material guidance»

THE NORWEGIAN ARBITRATION ACT

Section 13. Appointment of arbitrators

The arbitrators shall be impartial and independent of the parties, and shall be qualified for such office.

Section 20. *Equal treatment of the parties*

The parties shall be treated equally at all stages of the arbitral proceedings and each party shall be given a full opportunity to present his case.

Section 43. *Grounds for invalidity*

An arbitral award may only be set aside by the courts if ...

- d) the composition of the arbitral tribunal was incorrect, or
- e) the arbitral procedure was contrary to law or the agreement of the parties, and it is obvious that this may have impacted on the decision.

Section 46. *Circumstances preventing recognition and enforcement*

Recognition or enforcement of an arbitral award may only be refused if ...

- d) the composition of the arbitral tribunal was incorrect,
- e) the arbitral procedure was contrary to the law of the place of arbitration or the agreement of the parties, and it is obvious that this may have impacted on the decision,

THE DISPUTE ACT. SECTION 11-5. *THE COURT'S DUTY TO PROVIDE GUIDANCE*

- (1) The court shall give the parties such guidance on procedural rules and routines and other formalities as is necessary to enable them to safeguard their interests in the case. The court shall seek to prevent errors and shall provide such guidance as is necessary to enable errors to be rectified. Section 16-5 shall apply to the right to rectify errors.
- (2) The court shall, in accordance with subsections (3) to (7), provide guidance that contributes to a correct ruling in the case based on the facts and the applicable rules.
- (3) The court shall endeavour to clarify disputed issues and ensure that the parties' prayers for relief and their positions regarding factual and legal issues are clarified.
- (4) The court **may encourage** a party to take a position on factual and legal issues that appear to be important to the case.
- (5) The court **may encourage** a party to present evidence.
- (6) During the proceedings, the court shall show particular consideration to the need for guidance of parties not represented by counsel.
- (7) The court shall provide its guidance in a manner that is not liable to impair confidence in its impartiality. The court shall not advise the parties on the position they should take on disputed issues in the case or on procedural actions they should take.

GUIDANCE VS. ENCOURAGEMENT IN ARBITRATION

- **The Norwegian Approach**
 - UNCITRAL Model Law
 - The Arbitration Act
 - The Dispute Act
 - International Best Practice

GUIDANCE VS. ENCOURAGEMENT IN ARBITRATION

- **International Best Practice**
 - Guidance or Encouragement?
 - Procedural ideology
 - Purpose of arbitration
 - Equal treatment
 - Party autonomy
 - Conclusion

GUIDANCE VS. ENCOURAGEMENT IN ARBITRATION

- **Possible objections?**
 - One shot
 - *Audi alteram partem*
 - The principle in the Dispute Act section 11-5 subsection 7
 - *Due process paranoia*

GUIDANCE VS. ENCOURAGEMENT IN ARBITRATION

International Law Association Resolution No. 6/2008:

«In general [...] arbitrators should not introduce legal issues –propositions of law that may bear on the outcome of the dispute –that the parties have not raised»

Heumann: Skiljemannarätt (1999) s. 385–386:

«Ser man till effekterna av processledningen och kravet på att skiljemännen skall vara strikt neutrala kan man inte godta att de lämnar anvisningar till en part enbart därför att det gjorts i en vag form. ... Om man bortser från frågor om bevisningen och rättsregler får processledning bedrivas för att få en part att precisera yrkanden och grunder. Det anses att skiljemännen i övrigt bör inskränka sig till att ställa frågor beträffande sådana punkter där parterna är otydliga eller ofullständiga.

Om yrkandena och grunderna är klart och tydligt formulerade bör sålunda skiljemännen inte bedriva materiell rådgivning och genom frågor till en part antyda att han kan stärka sin talan genom att åberopa en alternativ grund eller genom att kräva högre ersättning eller en annan påföljd än den yrkade.»