



# Disclosure of Evidence - the cost issue

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# Introduction – the issue

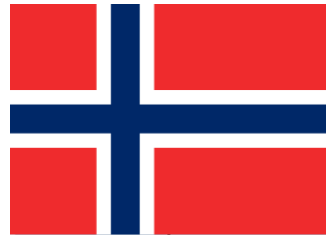
- The ultimate aim  Materially correct Awards
- The various legislations, rules, practice and guidelines on disclosure of evidence shall ensure this
- The flip side of the coin  The costs
- Hence the Scandinavian tradition does not permit US style Discovery
- But how is the relationship between costs and disclosure?



# The Cost Dimensions

- The impact of costs issues on Disclosure decisions by the Tribunals
  - The IBA Rules
  - Preamble no 1: "provide an (...) economical and fair process"
  - Art 3(a)(ii): "searching for such Documents in an ... economical manner"
  - The NOMA Rules Preamble 1
- Who are to carry the cost (in the long run) ?

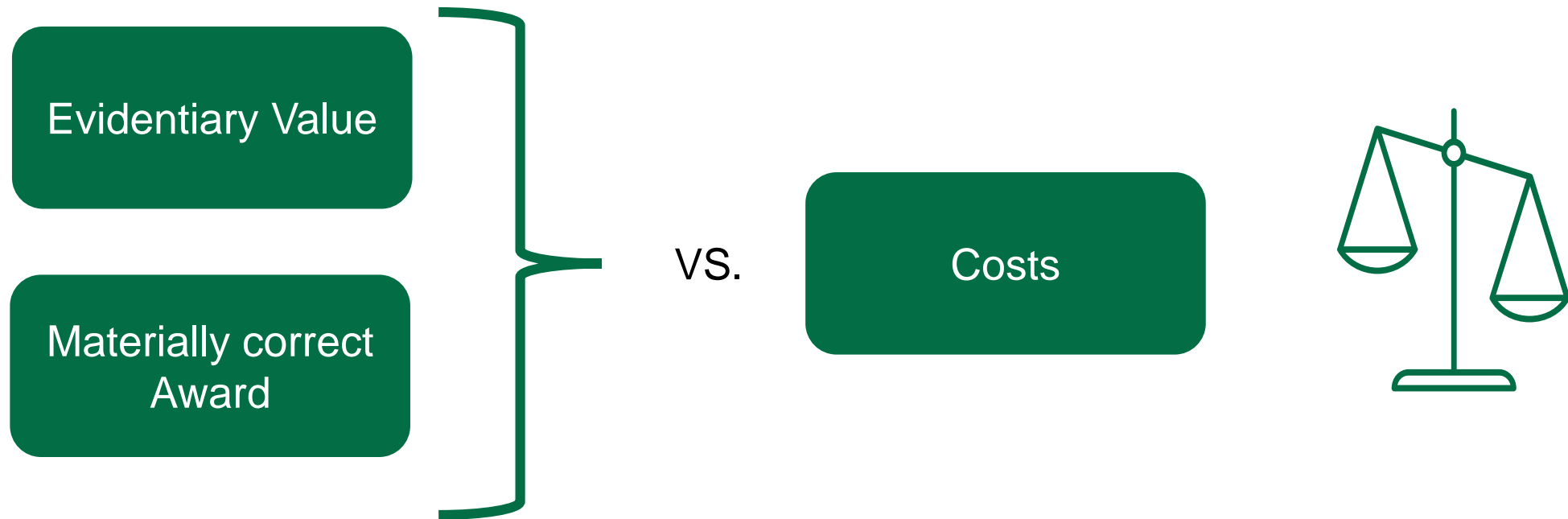




# The Norwegian Perspective – a fragmented picture

- **The Norwegian Arbitration Act of 2004**
  - Does not provide the Tribunal with competence to order evidence
  - However § 30
    - Very rarely used
    - A cost issue in itself
- **The OCC Rules of 2017**
  - Does not provide the Tribunal with competence to order evidence
  - Opposite SCC art 31(3)
- **The NOMA Rules and NOMA Rules on taking evidence**
- **The IBA Rules on the Taking of Evidence**
- **The Norwegian Civil Procedure Act of 2005**
  - Are the pre-trial provisions on disclosure of evidence applicable for disputes under arbitration clauses?

# Does costs really matter?



# Does costs really matter? Cont.

- In most cases – cost considerations not particularly weighty
- However, when the list of requested evidence becomes extreme, costs might matter
  - The Norwegian Supreme Court in HR-2019-997-A
  - Lengthy Redfern schedule exchanges with large amounts of requested documents and several disagreements also comes with a considerable cost



The smoking gun is  
seldom found.....  
however you never  
know

(Should arbitrators be careful in  
initiating lengthy disclosure  
proceedings? Cost benefit  
considerations)



# Uncertain terrain – the Norwegian rules on pre trial disclosure

- The Norwegian Civil Procedure Act of 2005 Chapter 28 (*Bevissikring utenfor rettssak*)
- A rather lethal and potentially very costly weapon in ordinary civil proceedings
- The Supreme Court has (most likely) limited the scope of such discovery, cf. HR-2019-997-A
- Could the Civil Procedure Provisions be used also for disputes under arbitration clauses ?
  - Very interesting consequences



# Uncertain terrain – the Norwegian rules on pre trial disclosure cont.

## • Pro

- The wording of the Civil Procedure Act is quite open ended
- Legal Doctrine – Woxholt, *Voldgift*, page 160
  - The Arbitration Act § 7
  - Danish Case Law
  - Judgement from Bergen city court (TBERG-2011-13681)

## • Contra

- The wording of the Civil Procedure Act compared with the Arbitration Act
- Gulating Appellate Court, case 11-092858ASK-GULA/AVD2
- System Considerations