CHAPTER 8

The Accused Arbitrator: New Roles and Dilemmas in the Era of Arbitration Litigation

Mads Bryde Andersen

§8.01 A NEW TREND TO CHALLENGE ARBITRAL PROCEEDINGS?

The risk that arbitral awards are set aside or denied recognition or enforcement is a frequent topic for discussion among arbitrators. In the absence of formal statistics,[1] it is uncertain whether such litigation is actually on the rise. A short glance into the case portal serviced by the Stockholm Chamber of Commerce[2] displays a significant number of such cases from the Swedish *Svea Hovrätt*, of which some indeed come out successful. In *Denmark*, the number of such cases is lower, but still more frequent than before, if you look into the cases reported in Ugeskrift for Retsvæsen.[3] However, during

1. All the Nordic arbitration institutes—the Danish Institute of Arbitration (DIA), the Finnish Institute of Arbitration and the arbitration institute at the Stockholm Chamber of Commerce (SCC) produce statistical information on their own case handling, just as the ICC Court of Arbitration (ICC) and the London Court of International Arbitration (LCIA) do. But since those institutes may not even know of the litigation, because it involves other parties, they do not produce official statistics on challenge litigations. And even *if* such statistics was produced by the arbitration institutes, it would not show the full picture, since it would not include cases litigated as ad hoc arbitration.
2. https://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/start/. In SvJT 2023, pp. 108 ff., *Anne Kuttenkeuler & Anders Lundberg* has analyzed the examination of arbitral awards conducted by Swedish high courts in challenge litigations. The authors studied sixty-five such cases decided in the period from 2014 to May 2022 of which only a few came out successful for the plaintiffs. According to the overview in *SOU 2015/37*, at pp. 79-81, ten arbitral awards (equaling 6% of the total cases litigated on that issue) were set aside by Swedish courts in the previous period from 2004 to 2014.
3. That is, the Danish Weekly Law Report, section A of which reports case law, in the following abbreviated as "U." Under the subject title "Retspleje 28.5—Voldgiftskendelsers gyldighed" (the invalidity of arbitral awards) such cases may be retrieved.

the last many years, none of these (reported) cases have held arbitral awards invalid by Danish courts.

There may also be a trend to involve arbitrators personally in challenge litigations. In some cases, arbitrators have been called as witnesses (against their will) to testify on the *proceedings* and *deliberations* of the tribunal. In other cases, arbitrators are even claimed to be *liable* for their alleged wrongdoings.[4]

In such litigation, the defendant tribunal, arbitrator or arbitration institute "stands accused", directly or indirectly, for not having conducted the proceedings in accordance with due process principles, mandatory rules and the arbitrators' other duties. The same accusation is in the air when arbitrators are called as witnesses to testify.

Such litigation differs substantially from those disputes that may bring arbitral tribunals in contact with state courts as part of the proceedings, e.g., when under applicable *lex arbitri* rules disputes on conflicts of interest or arbitrator's fees are referred to state courts. Lawsuits that include claims to *set aside* arbitral awards are typically raised against the successful party in the arbitration. *Liability* litigation may either be raised against individual arbitrators, against the tribunal as such, and/or against an arbitration institute.

It is therefore unknown whether a possible increase in the number of court cases about setting aside awards is proportional to the increase in arbitration cases in total, or whether there *is* indeed a growing "trend" to challenge arbitral awards. It is also difficult to conclude whether challenge litigations are today raised against other types of *defendants,* and on the basis of other types of *allegations* than earlier. Furthermore, we do not know *what kinds* of awards are most often challenged. Are, for example, arbitral awards rendered after rudimentary procedures challenged more often than awards with no stone left unturned—or is it rather the other way around? And are arbitral awards in international cases more exposed to such litigation than awards in domestic arbitrations?

To start the discussion, I will introduce Danish arbitration as an example of how various arbitration cultures can develop with different traditions for challenging awards. On this basis, I will try to identify some factors here that may affect this possible trend.

§8.02 THE DIVERSE DANISH ARBITRATION LANDSCAPE

The term "arbitration" is broad. It usually refers to any *out of court* procedure aiming at a *final* and *legally binding* settlement of a dispute according to procedural rules that are agreed upon, or at least known to, the parties. Arbitration comprises *any* out-of-court dispute resolution procedure that leads to this result, i.e., both *rudimentary* procedures decided by non-lawyers after a few hours of case presentations and with a

4. *See* for an overview of this practice, *Sarah Schæffer*: Approaches to Arbitrators' Liability: Immunity or Liability (Printed as Chapter 14 of Stockholm Arbitration Yearbook 2020, pp. 249-271, and (in Danish) in Erhvervsretligt Tidsskrift 2020, pp. 45 ff.).

focus on technical inspections of a subject matter and what I will refer to as "*high-end* commercial arbitration," in which hundreds or even thousands of hours are spent on the case, both on the parties' side and on the tribunal's.

The *finality* of arbitration implies that the award may be enforced under the 1958 New York Convention. Mediation and conciliation are, due to their different scopes, beyond this topic.[5] The requirements for recognition and enforcement of awards listed in *Article V* of this convention have indeed motivated tribunals to provide due process.

In Denmark, the position of arbitration in the legal system has changed substantially over time. In the 1683 Code of Denmark (Article 1-6-1),[6] the competence of the arbitrator was based on a *proxy* theory, according to which parties to a dispute might leave it to "honorable men" ("*Dannemænd*") who would then be empowered to decide it, subject to any other decision made by the king. These umpires were regarded as someone to be *trusted*, regardless of what procedural safeguards they offered the disputing parties.

Up through the twentieth century, most Danish arbitration cases were conducted under the presidency of a *state court judge* who, to a large extent, would conduct the proceedings as if the Danish Administration of Justice Act applied (which it did not, unless specifically agreed by the disputing parties). Hearings would even take place in state court buildings against pre-fixed payment to the court administration. Apart from the fact that the co-arbitrators would typically not be state court judges, it was difficult from the outside to see the difference between such arbitration and state court proceedings.

Coming back to the topic of the present contribution, the presence of a state court judge as president of a panel of arbitrators may indeed have had a demotivating effect on parties considering initiating a court case on setting aside the award. Not only would his or her presence give the parties reason to presume that the arbitration was conducted under the same high procedural standards as in the judiciary system. The prospect that counsels might meet the judge in court later on in other cases might also make them reluctant to litigate against judges.[7]

In 2006, the Danish Court Procedures Act was amended so that a maximum on what state court judges could earn in addition to their ordinary salary came into force. After that, many "arbitration-popular" state court judges often had to decline nominations as presidents to arbitral tribunals to be replaced by prominent attorneys or law

5. *See* for a further discussion of this, *Andreas Ehlers:* Blaming the Unblameable? On the Liability of Mediators. Nordic Journal of Commercial Law Issue 2014#1, available at https://journals.aau.dk/index.php/NJCL/article/view/2887/2433).
6. "Dersom Parterne voldgive deris Sag og Tvistighed paa Danne-mænd, enten med Opmand, eller uden, da hvad de sige og kiende, saa vit deris Fuldmagt dennem tillader at giøre, det staar fast og kand ej for nogen Ret til Underkiendelse indstævnis, dog Kongen sin Sag forbeholden."
7. This trend also seems to have been predominant in England and Wales. In his book "The Fall of the Priests and the Rise of the Lawyers" (2016), p. 222, *Philip R. Wood KC* makes the point that in the twentieth century, commercial arbitration grew under inspiration from state courts as a "close cousin of justices—a kind of privatized judiciary": Just as it was presumed that a such judge would conduct the proceedings in the same way as in a state court, it would be unlikely to hold an arbitrator liable for his or her alleged misconduct, as it would be to hold a state court liable.

professors. More or less at the same time (i.e., around the turn of the century), international commercial arbitration came to Denmark, which—for various historical reasons[8]—happened much later than in Sweden.

Before that happened, a number of quite special arbitration systems had developed. Some of these special arbitration procedures still exist and have deep historical roots. They were—and are—"special" in many ways. First, because they only provide dispute resolution services to specific types of professional parties. Second, because they relied on procedural rules substantially different from what one would today perceive as "commercial arbitration."

An example hereof is the *Copenhagen Adjudication and Arbitration Committee for Grain and Feedstuff Trade,* which has performed its services for well over a hundred years.[9] According to its website (https://www.copenhagencontracts.dk), the committee consists of approximately thirty-five members (in addition to a President and three to six Vice Presidents), who all work in the Danish and Swedish grain and feedstuff sector and who all offer their expertise and time on a voluntary basis. It hears disputes in the grain and feedstuff trade, which may arise between seller and buyer in relation to the quality or condition of the goods or other issues, and where the parties have agreed on arbitration before it.

The procedure of this committee differs in many ways from what one would expect in contemporary arbitration: Under Clause 5(5), the parties are not informed in advance of which members of the committee will take part in the hearing of the case. Nevertheless, the system works. At least none of the challenge decisions reported by the Danish legal database ("Karnov") displays decisions from this committee.

Another predominant particularity of Danish arbitration is the *Building and Construction Arbitration Board,* which for almost a century has heard disputes arising from the commonly applied Danish standard contracts for building contracts, including presently the "AB18."[10] The procedural rules of such arbitration are also quite different from what one would expect in contemporary commercial arbitration. One special characteristic is the practice of appointing technical experts without a legal background as arbitrators.[11] Another is its widespread use of state court justices as presidents of tribunals, all selected from an existing list.[12] But also, this system seems to work. Apart

8. Among those reasons are (1) the Danish industrial culture which all through the twentieth century mainly consisted of small or medium-sized industries, (2) the fact that Sweden was seen as a neutral country, whereas Denmark much earlier than Sweden was part of both NATO and the EU.
9. *See*, *e.g.*, the Supreme Court decision reported in U 1907.586 H.
10. *See* for further references, https://voldgift.dk/?lang=en. The predecessor of the said arbitration board was an arbitration board which since 1927 had been operated by the Danish Association of Engineers and referred to in previous versions of "AB 18."
11. A challenge procedure on this particular point was decided in *U 2015.1192 V:* In this case the Danish High Court for the Western Circuit upheld such an award decided by an architect as sole arbitrator, since both parties had agreed to his appointment.
12. This practice, however, has made it easier for the parties to accept that the said tribunals also decide cases that involve multiple parties, e.g., a client, several contractors and subcontractors, as well as consultants. In doing that, all parties can be heard in one place at the same time on the basis of their agreement, and their disputes be resolved collectively.

from the 2015 decision mentioned in footnote 11, there is no reported case law claiming that such awards should be set aside.

A third, albeit less "commercial," Danish arbitration specialty has for over a century decided labor disputes in so-called industrial arbitration ("*faglig voldgift*") and under rules substantially different from other kinds of arbitration. The co-arbitrators of an industrial arbitration panel will typically be party representatives employed by the organizations that represent the parties to the dispute. Their presence as such is not seen as a conflict of interest. Not surprisingly, they often file dissenting opinions. Therefore, such awards are usually rendered by the president alone.[13]

§8.03 DANISH COURT PRACTICE ON CHALLENGE CLAIMS

These very different kinds of arbitration take place on a day-to-day basis and are considered relatively safe and reliable by the disputing parties, although they do not in all respects live up to the procedural standards of contemporary international commercial arbitration.[14] With a view to the present topic, it is noteworthy that challenge litigations are both rare and, when they occur, unsuccessful.

A likely explanation for this widespread willingness to deviate from predominant arbitration standards is that the applied procedural rules (and shortcomings) are fully transparent to the parties and, indeed, combined with other kinds of advantages: Legal costs remain modest considering that the tribunal possesses knowledge on both technical issues and business customs, and when much of this litigation can be put in the hands of in-house legal counsels.

None of the said characteristics apply to such types of arbitration that have been subject to the most recent Danish Supreme Court practice where arbitral awards have been challenged. Noteworthy, the two most recent cases decided by the Danish Supreme Court involved high-end international commercial arbitrations.

The first one was decided in 2022 (*U 2022.1117 H*). It concerned claims in the magnitude of EUR 20 million arising out of a contractual relationship for the delivery of ship engines from the respondent (Skaugen Marine) to the claimant (MAN Diesel). It transpires from the case that the reported challenge litigation was one among several challenge litigations pending between the parties related. The award was rendered by an international panel with an Italian president and co-arbitrators from Germany and Norway, and under the rules of the DIA. The unsuccessful respondent challenged the award on grounds of procedural errors for not having had a reasonable opportunity to present its case. A panel of nine Supreme Court justices found no such violation since all procedural orders had sufficient basis in the procedural rules applicable in the arbitration.

13. The 2005 Danish Arbitration Act exempted industrial arbitration of labor market from the act, cf. Art. 1(5), just like disputes decided by arbitration under other statutory rules were. They still operate outside the scope of the act.
14. *See* for a further discussion on this *Sylvie Cécile Cavaleri*: Danish construction arbitration: civil proceedings in disguise?, printed in Marianne Roth & Michael Geistlinger (eds.): Yearbook on International Arbitration and ADR (2019), pp. 99-117.

The same result was the outcome of the Supreme Court decision reported in *U 2016.1558 H* on a claim of MDKK 170 arising out of a contract for the delivery of windmill components.

As said, both cases fall into the category of high-end international commercial arbitration. The 2022 case was decided by an international panel of arbitrators. The 2016 case was also international but arbitrated by Danish counsels and decided by a panel of Danish arbitrators (the president being a well-esteemed law professor).

In both cases, the Supreme Court assumed a wide margin of appreciation to the tribunal, thus relying on the generally recognized ban against material revision (cf. Article 34 of the UNCITRAL Model law), which only leaves a narrow scope for setting aside arbitral awards. Subsequent high court practice has followed this path.

As said, and unlike the reported practice from *Svea Hovrätt*, no recent Danish Supreme Court decision has set aside an arbitral award for neither its content nor for the procedure provided by the tribunal's decisions. In the absence of such court practice, no monetary claims have been presented towards arbitrators or arbitration institutions.

§8.04 MONETARY CLAIMS AGAINST ARBITRATORS

A successful court case by which an arbitral award is set aside may in principle be succeeded by monetary claims presented towards the arbitral tribunal, individual arbitrators, and/or arbitration institutes. Such monetary claims may either take the form of claims for the reimbursement of arbitrator's fees or as professional liability claims for compensation for the parties' losses caused by undue arbitral proceedings.

It is clear that a failed arbitration may cause damage to the parties: If an award is set aside, new procedural costs arise in the retrial proceedings. Additional costs may also occur if an arbitrator with no legitimate cause resigns the day before the main hearing should take place, thus causing re-scheduling costs. The parties may also suffer losses if arbitrators reveal trade secrets. It may even be that the tribunals fail to identify (and thereby facilitate) corruptive practices and thereby cause various kinds of sanctions.[15]

Arbitrators are not immune to such liability: In a civilized society, everybody has—and should have—the privilege to take their legal complaints to courts or other competent bodies, e.g., to claim compensation. In general, the scope of such liability depends on the kind of mistake that gave rise to the claim. The more negligence the tribunal exercises, the more likely it is that it will be subject to liability.

The reported case law that I am aware of indeed seems to pertain to quite significant procedural errors.

In *Roulas v. Professor J Tepora* (decision of January 31, 2005), the Finnish Supreme Court held an arbitrator liable for having accepted appointment in a dispute

15. Article 24 of the Whistleblower Directive (2019/1937) establishes that its rights and remedies "… cannot be waived or limited by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement."

where he had provided an expert opinion to one of the parties prior to and during the arbitration proceedings without disclosing that to the other party. The claim for liability was raised after the Helsinki Court of Appeal had set the award aside. The Court found that Professor Tepora had not complied with the arbitrator's duty to disclose circumstances, which may give rise to justifiable doubts regarding the arbitrator's impartiality or independence. This lack of disclosure resulted in a monetary compensation of EUR 81,000 to the parties.

In a *Netherlands Supreme Court* judgment of September 30, 2016, in the matter "*The Qnow* case," an arbitrator was held liable for a procedural error (the president neglected to have the award signed by his fellow arbitrators). The ruling follows the principle set forth in a 2009 case (*Greenworld*), according to which liability might occur in relation to an annulled award if the arbitrator intentionally or knowingly acted recklessly or with a gross misjudgment in fulfilling his duties.

A judgment of February 15, 2015 of the *Spanish Supreme Court* (102/2017) in the *Puma* case set aside an award that had been conducted contrary to the principle of arbitral collegiality because one of the arbitrators had not participated in the final deliberation. The party could therefore recover arbitrator fees paid to two arbitrators.

As said, there is no reported Danish case law on arbitrators' liability. However, in a case from the Danish High Court for the Eastern Circuit, reported in *U 2011.2407 Ø*, an expert witness ("*syn- og skønsmand*") was held liable towards one of the parties for damages caused by his flawed conduct, including excess of his mandate. Damages were awarded on a discretionary basis to DKK 10,000.

In all the reported four cases, the arbitrators (respectively, the expert witness) had acted with more than simple negligence. So far, these cases might be seen as a support to a general assumption that arbitrator liability may only be relevant under *qualified* circumstances so that claims for *liability* are only relevant if the actions or omissions of the arbitrator qualify as gross negligence. In relation to claims for reimbursement of fees, a similar harsh standard should apply. At the same time, there is no basis for assuming that arbitrators, etc., are as such *immune* to liability or repayment claims—just as little as state court judges are.

This legal situation seems to be reflected in the legislation which has been adopted in those jurisdictions that have regulated arbitrator's liability.

One such example is *section 29 of the English Arbitration Act 1996,* which reads as follows (with emphasis added):

> Immunity of arbitrator.
> (1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator *unless the act or omission is shown to have been in bad faith*.
> (2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.
> (3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).

A similar bad faith reservation is included in section 21(1) of the Spanish Arbitration Act 2003, which reads as follows (again, with emphasis added):

> Liability of arbitrators and arbitral institutions. Provisioning funds
> 1. Acceptance requires arbitrators and, as appropriate, the arbitral institution, to comply with their commission in good faith. If they fail to do so, they will be liable for any damages resulting from *bad faith, recklessness or mens rea*. In arbitration commissioned from an institution, the damaged party may file suit directly against it, irrespective of any action for indemnity lodged against the arbitrators. Arbitrators or arbitral institutions on their behalf will be bound to take liability insurance or equivalent security for the amount established in the rules. Public entities and arbitral systems integrated in or under the aegis of governmental authorities are exempted from this obligation.

As I will discuss below in §8.06[B], similar provisions are adopted by a number of arbitration institutes.

A different attitude, and indeed one that seems more akin to what applies to state representatives under international law, is reflected in *section 21(a) of the ICSID Convention*. The provision provides that arbitrators "shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity." Furthermore, Rule 31 of the *ICSID Rules* (under the title "Waiver of Immunities") states that "the Secretary-General may waive the immunity of the Centre; (…) and the Chair may waive the immunity of the Tribunal" when immunity impedes the cause of justice and that such waiver would not prejudice the interest of the Centre. As said, this provision seems to be rooted in the law of diplomacy rather than in arbitration law.

An adverse reading of the quoted statutory acts seems to presume that arbitrators might in principle be held liable for substantial wrongdoings that have caused harm to the parties (or at least one of them). Such reservations are also reflected in the contractual practice that I will discuss below in §8.06[B].

Personally, I find such a rule quite reasonable. If it applies, arbitrators may not have anything to worry about.

But does it? Can we assume that the requirements for the arbitrator's liability remain as high as indicated by the quoted case law? The answer to this is not known until we have more practice in which arbitrators are claimed liable for less severe misconduct than what transpires from the said cases. Nothing can be excluded, and for parties that are prepared to pursue their claims at all costs, it may very well be that we will see more such litigation.

In §8.06 below, I will offer my views on some of the strategic considerations that this possible risk will present prospective arbitrators with before they accept nominations.

§8.05 WITNESS EXAMINATIONS OF ARBITRATORS

As said above in section 1, arbitrators may be summoned as a witness of fact to testify in challenge litigations on why and how the award was decided and procedural decisions made. Mindful that such witness examinations will take place in a public courtroom with the risk of compromising the arbitrator's duty of confidentiality, any arbitrator should be cautious against it unless both parties agree.

In Danish court practice, such witness examinations happen now and then, and apparently with no objections, neither from the parties to the dispute nor from the called arbitrators.

An example hereof is the Supreme Court decision reported in *U 2010.802 H* where the president of an arbitral tribunal (being a Supreme Court justice himself) testified as a witness of fact in a challenge litigation. In the aforementioned *U 2016.1558/2 H,* the president of the tribunal (a law professor) also testified.

Some of the reported Danish cases have dealt with whether court judges or arbitrators are obliged to appear as witnesses. In all circumstances, the obligation to do so resumes that there is a need to hear the said testimony.

This practice is illustrated by the following Danish cases:

> In the high court decision reported in *2013.687 ØLK* the testimony (to which both parties agreed) was held not to be "clearly" unimportant to the litigation. Therefore, the plaintiff's request to hear the president of an arbitral tribunal on whether the tribunal had considered certain legal allegations was allowed. The city court had denied this witness examination as unimportant to the outcome.

The result was otherwise in the high court decision reported in *U 2022.923 ØLK,* which held that the testimony of the president of an arbitral tribunal was unnecessary during enforcement proceedings during which the court found no basis for setting the award aside.

A similar result was reached in *U 2020.2413 ØLK,* where an assistant judge could not be called as a witness to comment upon a judgment he had rendered which was not under appeal.

I do not know of any Danish case law where arbitrators have been requested to appear as witnesses against their will in regard to cases handled by them. In its decision in the case of CZT v CZU [2023] SGHC(I) 11 of 28 June 2023, the Singapore International Commercial Court has explored the policy considerations behind keeping an arbitral tribunal's deliberations confidential in the context of a setting aside application. The court confirmed that it would "take a very compelling case" to overcome these underlying policy considerations. The Italian president of the tribunal who rendered the award that was challenged in the case reported in *U 2022.1117 H* (and discussed before on page 119) has informed me that he was asked by one of the disputing parties to appear as a witness at the Danish High Court for the Eastern Circuit when the litigation was prepared here. He refused, and the requesting party did not insist—perhaps so because the request was made when the COVID-19 crisis was on the rise in February-March 2020.

Therefore, Danish courts have not considered whether Article 169(1) of the Danish Administration of Justice Act might be applied in such a situation. That provision exempts "officials or other individuals acting in public or equivalent positions" from the obligation to testify. Since this provision might be applicable by analogy to arbitrators in relation to the tribunal's deliberations, unwilling arbitrators might

consider invoking it towards such witness requests should they be summoned to testify.[16]

§8.06 STRATEGIC ISSUES

[A] Choice of Law Issues

The above presentation has identified a number of points where arbitrators may face a risk of liability claims.

The likeliness of that risk depends on a number of factors, among which the prevailing court practice of setting aside arbitral awards is most important. Lawsuits challenging the validity of enforcement of awards may be raised in any jurisdiction in the world. Therefore, it will always be uncertain what level of invalidity will prevail in such litigations.

When it comes to the arbitrator's risk of facing liability, the law of the seat of the arbitration (the *lex arbitri*) will also be the law under which the claim for liability shall be decided. This choice of this jurisdiction is under the full control of the arbitrators when they accept appointments or agree to the terms of reference (or other procedural rules) applicable to the arbitration. When they accept appointment, they also accept this choice of jurisdiction. That choice therefore comprises the first and most fundamental strategic decision for prospective arbitrators who want to manage their risk of facing personal liability claims.

[B] Contractual Solutions

Having said that, the contractual framework for the arbitration is another crucial factor to rely on to manage the risk of claims for liability. It is thus the prevailing view in Nordic legal theory that the tribunal and the parties take part in a sui generis "procedural association" with its basis in the arbitration clause, i.e., a contractual phenomenon.[17]

16. The document that the DIA request prospective arbitrators to sign includes the following statement on the issue:

> Arbitrators have from time to time been summoned before the Danish courts to give witness testimony, for instance in cases about setting aside of the arbitral award. Usually, arbitrators have voluntarily accepted to give testimony in such cases. However, it is presently unclear under Danish law whether an arbitrator has a duty to give testimony (and to what extent) if the arbitrator does not voluntarily accept to give testimony.
>
> If a claim for damages is raised against an arbitrator, the arbitrator may be covered by the DIA's liability insurance for arbitrators. For more information, contact the Secretariat of the DIA.

17. *See, e.g.*, *Stefan Lindskog:* Skiljeförfarande. En kommentar, 3. upplagan (2020), p. 395, and *Jakob Juul & Peter Fauerholdt Thommesen:* Voldgiftsret, 3. udg. (2017), p. 203.

If you follow that theory, the basis for a claim raised by the parties to the dispute against the arbitrators must necessarily be contractual. On *one* side, this means that applicable standards of contractual negligence apply, which in turn will depend on the contractual provisions agreed. On the *other* side, the door will also be open for contractual provisions limiting or prescribing that liability.

Provisions of the latter kind have been applied by most arbitration institutes. Article 41 of the 2021 ICC Rules thus provides that the arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, *except to the extent such limitation of liability is prohibited by applicable law*.

Also, Article 51 of the 2021 DIA Rules provides that "The members of the Arbitral Tribunal, the secretary of the Arbitral Tribunal, or other persons appointed by the DIA or the Arbitral Tribunal, and the DIA, including the members of the Council of Representatives, the Board, the Chair's Committee, the Secretariat and the Secretary-General shall not be liable for any act or omission in connection with commencement of an arbitration, the processing of an arbitration or an award made by the Arbitral Tribunal, *except to the extent such limitation of liability is prohibited by applicable law*."

Article 52 of the 2017 SCC rules provides that neither the SCC, the arbitrator(s), the administrative secretary of the Arbitral Tribunal, nor any expert appointed by the Arbitral Tribunal is liable to any party for any act or omission in connection with the arbitration, *unless such act or omission constitutes willful misconduct or gross negligence*.

And finally, Article 31.1 of the 2014 LCIA rules provides that none of the LCIA (including its officers, members and employees), the LCIA Court, the LCIA Board, any arbitrator, any Emergency Arbitrator, any tribunal secretary and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be *prohibited by any applicable law*.

All these contractual disclaimers do not apply to accusations that may be characterized as recklessness or gross negligence or as a result of *bad faith*. This reservation is in line with Nordic court practice, under which wide and general contractual disclaimers are often held to be unfair and invalid in such situations.

It should be noted that Danish courts are more favorable towards contractual disclaimers that include caps on claims, e.g., maximized to the fee paid or to an insurance maximum. Such clauses thus stand a better chance against allegations of contractual invalidity. I have never seen such provisions used in arbitration practice. The arbitration institutes seem to favor the broader liability exclusions. But nothing should prevent such provisions, which are applied by a number of professions (e.g., technical consultants).

Another part of contractual framework that may play a role in the arbitrators' liability is the provisions agreed between the parties and the tribunal (and—where relevant—the arbitration institute) on the conduct of the arbitration. Clear and transparent rules on the tribunal's power to render procedural orders, etc., reduce the risk that a state court will set aside the award on the grounds of procedural misconduct.

Such rules must have a firm basis in the procedural agreements between the disputing parties and either the arbitral tribunal (in ad hoc arbitration) or the arbitration institute. The starting point of any arbitration is, of course, the agreement to arbitrate. But that very agreement will often lead to a number of other agreements made between the tribunal and the parties. Also, rooted in these agreements, the tribunal may render procedural decisions with a similar binding force. The Supreme Court decision in *U 2022.1117 H* relied on the fact that such procedural rules had been provided, in full accordance with the arbitration agreement.

[C] Insurance Issues

It is well known that many arbitration institutes have taken insurance to cover their possible liability for such claims. As stated above, section 21(1) of the Spanish Arbitration Act even obliges arbitrators or arbitral institutions on their behalf to take liability insurance or equivalent security for the amount established in the rules. Whether such insurance coverage also covers the possible liability of the tribunal is less known.

The presence of such insurance coverage may invite liability claims to be made because of the presumed "deep pockets." The prospects of this may be a good reason not to disclose the details of an insurance policy.

If there is insurance coverage, the next questions will occur: whether errors that lead to such liability claims should fall on the arbitrator, the tribunal (as such), and/or the arbitration institute? Those different parties may see the case quite differently, when it occurs, and for that reason have conflicting interests in its outcome and handling. For these reasons, it is not easy to blame arbitration institutes for not being more transparent on how arbitrators and secretaries, etc., are covered by insurance. As indicated above in footnote 16, the DIA informs prospective arbitrators that claims for damages raised against an arbitrator may be covered by the DIA's liability insurance for arbitrators and that more information on this may be provided by contact to the Secretariat of the DIA.

Another uncertain factor is what role the arbitration institute will take should liability claims be raised against the tribunal or individual arbitrators.

In the Danish challenge decision reported in *U 2015.1192 V* and referred to in footnote 11, the *Building and Construction Arbitration Board* stepped in to support the defendant in the challenge litigation.

That particular case is the only one I know of where arbitration institutes have taken sides with an arbitrator in challenge litigations. In general, arbitration institutes cannot be expected to do so unless they have compelling reasons.

[D] Other Strategic Issues in the Conduct of the Proceedings

There are many other strategic issues than those discussed in the foregoing that might be considered in order to reduce the risk of challenging litigation and liability claims.

One such issue is the prospective arbitrator's handling of conflict of interest disclosures (to the detriment of confidentiality protection). Here, one may argue that the risk of having the award set aside on grounds that an arbitrator was in a conflict of interest is reduced the more information the prospective arbitrator discloses. However, an overload of information on "possible" (albeit far from real) conflicts may, invite protests that may be used strategically.

Another practical consequence may be the tribunal's decisions on document production. The more documentation the tribunal allows, the less basis will the unsuccessful party have to challenge the award. However, a generous policy towards document disclosure requests may be viewed as biased to the detriment of the other party.

A third issue is the tribunal's efforts to streamline and shorten the procedure within the discretion allowed to the tribunal under the agreed rules for the arbitration procedure. The more time the tribunal allows for the main hearing, the less basis for challenging.

In addition, hereto, it may also be that the tribunal's willingness to have informal dialogues during hearing breaks, etc., may be affected. Under what circumstances may such dialogues be understood as a sign that the tribunal or any of its members have sided with one of the parties?

As these examples show, a tribunal that is eager to reduce any risk of facing challenge litigations should be careful on all these accounts. How "careful" a tribunal should be in those regards will obviously depend on the circumstances. In a high-end arbitration where the parties seek to have all stones turned, the level might be quite high. In such cases, the need for detailed procedural agreements and orders is similarly higher than in other and relatively more rudimentary arbitral proceedings. As always, the parties and the tribunal will have to strike a balance of what procedures provide the "best possible" procedural safeguards given the associated additional time and costs.

§8.07 CONCLUDING REMARKS

If there is an increasing trend to challenge arbitral awards (as might be the case in Sweden), I fail to see that this trend is rooted in a decline in the *quality* of arbitration.

Quite the contrary, there seems to be reason to assume that the increasing quality of arbitral proceedings has made it easier to identify details in the proceedings or the decisions that might be criticized and form the basis for challenging litigations and subsequent personal claims for liability.

The basis for accusations following such criticisms may be easy to identify by counsels who after hundreds of hours of work in the file know the factual as well as legal subject matter of the dispute in much more detail than the arbitrators.

This will typically be the case in high-end commercial arbitration conducted by large teams of counsels. It is likely that such arbitrations provide a lucrative business case from the counsel's perspective. Just like in M&A transactions, no stone is left unturned. Huge teams of lawyers focus on different aspects of the dispute, and with *clients* with deep pockets, there may be a similar incentive to pursue post-award claims in order to give the losing party a "second chance."

The roles are different in more simple disputes on legal matters where the court holds expertise and where the facts of the case are being established in the course of the main hearing.

If the trend to accuse tribunals of procedural failures, etc., in various forms increases, there may, therefore, be a particular need to reconsider the way high-end arbitrations are conducted.

One relevant issue to discuss is the use of so-called administrative secretaries in arbitral tribunals. Formally, the use of secretaries is restricted to administrative tasks. It is, however, difficult to understand why arbitrators should not be able to rely on (separately payable) *legal* assistance in the preparation of the case, just as judges in state courts do.

I am well aware that this idea is seen by many arbitration professionals as quite controversial. As said above in footnote 11, a Danish high court has accepted the use of a legal secretary in an arbitration conducted by the Danish *Building and Construction Arbitration Board* where the sole arbitrator had no legal background. Other cases outside Denmark have also touched upon the topic.[18] Although no final decision has been rendered in these cases, the jury is out on the issue, and the debate is thus ongoing.

Regardless of how this legal question is finally decided, discussions and viewpoints articulated within the arbitration community may play a role in its outcome.

So far, the arbitration community has not been open to such a practice, possibly because the arbitrator's task is still seen as a personal vocation and not a business. But perhaps the time is up to initiate such a debate.

I refer to "the arbitration community" because arbitrators as such are not in general seen as individuals that belong to an "arbitration profession." Both attorneys, academics, and judges are part of their own professions. But arbitrators are not, due to the simple fact that they are being recruited from these other, different professions.

This may explain why there has never been an ideological framework for what arbitrators do other than the framework applicable to each profession. When new

18. One example hereof is the decision of 24 April 2023 by Belgian Supreme Court in the case *European Commission v. Emek Inşaat Şti and WTE Wassertechnik* in which it was held that arbitral secretaries may draft arbitral awards, provided that arbitrators do not delegate their decision-making powers to them. Reference is made to https://arbitrationblog.kluwerarbitration.com/2023/08/08/green-light-for-secretaries-to-assist-in-drafting-arbitral-awards-so-long-as-tribunals-call-the-shots-nothing-new-under-the-belgian-sun/. Another example is the decision rendered by the Court of Appeal of The Hague in February 2020 in the *Yukos* case which held that there was no evidence that an administrative secretary to the tribunal had participated in the decision-making process. See for a further presentation of the case https://www.ibanet.org/article/B55CB7F1-01C6-4BDF-9383-90F567C17147.

debatable issues come up, they are only occasionally discussed, e.g., at the many conferences that are being held on arbitration issues. Indeed, some arbitration associations (e.g., the Swiss Institute and the Chartered Institute of Arbitrators) promote rule-making for arbitration. So does UNCITRAL. But not in their capacities of "professional" bodies. One notable example of an international professional body which—despite its name—does not exclusively organize members of the legal profession is the International Bar Association, whose 2014 *Guidelines on Conflicts of Interest in International Arbitration* is perhaps the best example of an attempt to self-regulate arbitration practitioners.[19]

Therefore, it is still hard to claim that arbitration is indeed "a" profession with its own values, ethics, and rulemaking, given the many different kinds of arbitration we have. Instead, emerging topics may be discussed in the many yearbooks, tribute books, and periodicals we have (like the present one) and at conferences on various arbitration issues.[20]

But perhaps the arbitration community, or at least some of the arbitration institutions, could agree on the viewpoint that arbitrators in high-end disputes should call for specific considerations and be seen as other high-end service providers. Such perception would make it easier to initiate discussions that would, for example, leave it open to the tribunal to use the same kind of setup as counsels in such cases. It would thus be adequate that the disputing parties and the arbitrators negotiate some of the issues I have raised above, including the basis for possible liability, insurance issues and the use of both administrative and legal secretaries.

Such negotiating and contracting practices may in all circumstances reduce the risks of disappointments in the arbitral procedure.

19. *See* for a further discussion on this point, *Luca G. Radicati di Brozolo and Flavia Ponzano:* The need for arbitration-specific rules on ethics: a plea for a collective effort. Printed in Mohamed S. Abdel Wahab et al. (eds.): "Leadership, Legitimacy, Legacy, A tribute to Alexis Mourre" (2022), pp. 105-119.
20. The thoughts that I share here, have already been made at my presentation in September 2022 on the *Copenhagen Arbitration Day*.