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Introduction

- **My topic: "Joint appointment" of the tribunal - the Norwegian experience**
  - A jointly appointed arbitration tribunal is one in which all members of the tribunal are selected by mutual agreement between the disputing parties, rather than each party unilaterally appointing its own arbitrator
  - This stands in contrast to the more common three-member panel model, where each party appoints one arbitrator and the two party-appointed arbitrators then appoint a presiding arbitrator (or chair)
- **The backdrop – key features of arbitration in Norway**
  - Predominantly *ad hoc*
  - Large and complex disputes related to oil & gas and shipping
  - The pool of arbitrators
  - Diversity
- **The structure of my presentation**
  - The Norwegian regulation of "joint appointments"
  - Pros and cons, illustrated by the Norwegian experience

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The Norwegian regulation of "joint appointment"

- **The regulation prior to our Arbitration Act: party-appointment**
- **The regulation in the Arbitration Act of 2004 Section 13:**

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

  *The parties shall **if possible** appoint the arbitrators **jointly**.*

  *If the arbitral tribunal is to comprise three arbitrators and the **parties fail to agree on its composition**, each party shall appoint one arbitrator. The time-limit for making the appointment shall be one month after the party received the request to appoint an arbitrator. The two arbitrators thus appointed shall within one month jointly appoint the third arbitrator who shall act as chairman of the arbitral tribunal"*

- **The reasoning in the preparatory work**
  - *«In terms of impartiality, it is beneficial if the parties may agree on the whole Tribunal»*
  - Surprisingly, no debate back in 2004

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Benefits

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Benefit 1: Enhanced independence and impartiality

- **Context – how is the Tribunal jointly appointed?**
  - Not governed in the Arbitration Act
  - **Best practice in Norway**
    - No contact between the parties/counsel and the candidates
    - Joint letter from both counsel to the whole tribunal or to each arbitrator
- **Hence, arbitrators do not know who appointed them**
  - None of them can be suspected of being a "party champion"
- **Enhances independence and impartiality – and reduces arbitrator bias**
  - Removes a persistent criticism of the party-appointed arbitrator model:
  - Party-appointed arbitrators may consciously or unconsciously favour the party that appointed them
  - A jointly appointed tribunal therefore carries greater legitimacy in the eyes of both parties and any enforcement court.

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Benefit 2: Significantly redused risk of challenges

- **International arbitration is increasingly haunted by challenges**
  - Challenges to arbitrators are one of the most disruptive procedural issues in "modern" international arbitration
  - It is indeed also one of the most costly (read; postponed hearing etc.)
- **A jointly appointed panel = lower risk of successful challenges**
  - As a part of a joint appointment, the parties will normally have considered matters that may affect the independence and impartiality of the candidates
  - The latter may explain why jointly appointed arbitrators are rarely challenged
  - It basically presupposes that any of the arbitrators has not complied with their duties of disclosure

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Benefit 3: Complementary expertise tailored to the dispute

- **Joint appointment enable the parties to compose a tribunal having complementary skills**
  - Hence, the total expertise of the Tribunal is likely to be higher, increasing the likelihood for a correct award
  - For example, co-arbitrators with expertise on construction law or accounting
  - More importantly, party-appointment enables the parties to "control" the appointment of the chair
    - May be extremely important in heated cases with high stakes
- **The contrast to party-appointment; "2x"**
  - (The belief that the party-appointed candidate will favour a particular outcome)
  - No influence on the other party's candidate (and the other party's candidate is often unknown for claimant)
  - Hence, the party-appointed candidate must possess unrealistic capabilities
  - A massive "bet": No (or limited) influence on the appointment of the far most important arbitrator: the chairperson
  - The party-appointed arbitrators might not agree on the chair
  - The parties will not necessarily be happy with the chair appointed by an institute

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Benefit 4: Facilitates diversity

- **Party-appointments often favours very experienced arbitrators**
  - The logic: The candidate must be able to "match" the arbitrator appointed by the opposing party
  - In particular, in large and heated cases
- **The same applies where the chair is appointed by an institute**
- **Joint appointment provides far more flexibility**
  - The logic of complementary skills:
  - The parties may agree to include a less experienced candidate
  - Typically, as co-arbitrator
  - In Norway, many arbitrators were first time appointed as the "teenager among two old men"

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Benfit 4: Greater collegiate dynamics

- **Clarifies the overall task for the Tribunal**
  - *"We are appointed to solve the contested matters in an objective, sensible and swift manner – not to convince the chairperson"*
- **Facilitates efficient commencement of the arbitration**
  - Disagreements between counsel in CMC1 are not transformed into the Tribunal, which may ensure a swift PO1/timetable
  - Same with procedural issues ending up in Procedural Orders
- **Facilitates open discussions during deliberations**
  - No underlying dynamic of "two against one" along party lines, which might distort the reasoning process in party-appointed panels
  - Jointly appointed arbitrators presumably more inclined to approach deliberations in a collaborative and objective manner
- **Facilitates true team-work within the Tribunal**
  - Easier for the chair to distribute the work in terms of drafting procedural orders and awards

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Possible disadvantages

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Loss of party influence?

- **The traditional thinking**
  - In the party-appointment model, each party has a direct influence over at least one member of the tribunal
  - This provides parties with a degree of assurance that their perspective on the case, the applicable law, or the industry context will be represented in the deliberative process
- **But the same is ensured – even better – by a joint appointment?**
  - The experience and expertise of the candidates will normally guide the joint appointment
  - More importantly, joint appointment may ensure that the tribunal has complementary skills
  - And most importantly, the parties do not lose «control» over the selection of the most important arbitrator: the chair
- **And if the parties cannot agree, the fallback is still party-appointment**

Risk of "Least Common Denominator" Selection?

- **Gravity towards candidates who are merely acceptable?**
  - When both parties must agree on each arbitrator, there is a risk that the appointment process gravitates towards candidates who are merely acceptable to both parties rather than those who are objectively the best qualified
  - Parties may veto strong candidates proposed by the other side for strategic or tactical reasons, resulting in a tribunal composed of individuals who are "safe" choices rather than the most suitable experts
- **Does the latter outweigh the benefit of «controlling» the chair? Hardly**
- **And again, the parties must not agree**

Practical Difficulties in Reaching Agreement?

- **Parties who are already in dispute must agree on the composition of the tribunal**
  - This can be extremely difficult in practice
  - Parties may have sharply divergent views on the appropriate profile of the arbitrator(s), prior connections of candidates, or simply distrust any candidate proposed by the other side
  - Protracted negotiations over appointment can delay the commencement of proceedings and generate additional conflict at a stage when the parties are already at odds
- **On the other hand**
  - Counsel is normally highly professional
  - And if the parties cannot agree, party-appointment is still the fallback
  - Under the Norwegian Arbitration Act, they will not, in any case, be delayed with more than 1 month

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Risk of deadlock and third-party intervention if the parties cannot agree?

- If so, it is typically necessary for an appointing authority — such as an arbitral institution or a national court — to step in and make the appointment
- But the same applies if the party-appointed arbitrators cannot agree, which is a recurring issue

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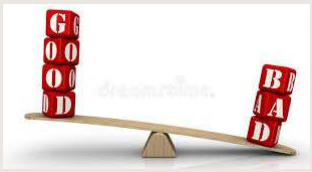
Summary: Do the benefits outweigh the cons?

- **The question is wrong**
  - Not a binary question: the parties may "opt out" by not agreeing on the whole tribunal
- **In general, the Norwegian experience is very good**
  - The parties are normally able to agree on the whole tribunal in more than 9 of 10 cases
  - And if they struggle to agree, they tend to eventually agree, simply because they prefer to "control" the appointment of the chair
    - The latter logic is also, increasingly, embraced outside of Norway
  - Relatively (very) few challenges, despite many very large cases



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