CHAPTER 12

# The Subjective Scope of Arbitration Agreements under Norwegian and Danish Law

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## §12.01 INTRODUCTION

Privity of contract is recognized as a general doctrine across the Nordic countries. The doctrine limits the subjective scope of an agreement to the contracting parties. Accordingly, an agreement between A and B binds A and B; it does not bind C.

Arbitration agreements are subject to the doctrine as well.[1] If A and B have agreed to resolve their disputes arising out of X by arbitration, A may not initiate arbitration against C on the basis of A's agreement with B, and, vice versa, C may not initiate arbitration against A on that basis.

Reality is more complicated than the A-B-C example above. The subjective scope of agreements, including arbitration agreements, gives rise to frequent disputes, and the doctrine of privity does not always provide clear answers. Under some circumstances, C may be deemed a party to the agreement despite the fact that C did not initially sign and accept the agreement. Under other circumstances, the agreement is applicable to C even though C is not a party to the agreement.

1. On the subjective scope of agreements in general, *see* Oskar Mossberg, *Avtalets räckvidd I: Om avtals tredjemansverkningar, särskilt vid tredjemansavtal och direktkrav* (Iustus 2020); Vibe Ulfbeck, *Kontrakters relativitet—Det direkte ansvar i formueretten* (Gad Jura 2000). On the subjective scope of arbitration agreements, se Amund Bjøranger Tørum, *Voldgiftsavtalens subjektive grenser: Når kan den påberopes av eller overfor tredjemann?* in Ola Ø. Nisja and Borgar Høgetveit Berg (eds.), Avtalt prosess: Voldgift i praksis, 361 et seq. (Universitetsforlaget 2015).

The following sections aim at clarifying the subjective scope of arbitration agreements under Danish and Norwegian law. As explained, a party may transfer its rights under an arbitration agreement by way of assignment or subrogation, and the subjective scope of arbitration agreements may reach beyond the names on the signature page in a number of other specific situations too.

After having clarified the *general arguments and considerations* behind the rules and principles on the subjective scope of arbitration agreements (section §12.02) as well as the *modern Nordic approach to arbitration agreements* (section §12.03), the article will explain how the subjective scope of arbitration agreements may be effected by way of:

- succession by assignment or subrogation (section §12.04);
- universal succession (section §12.05);
- direct claims against prior parties (section §12.06);
- implied consent (section §12.07);
- relations to group companies (section §12.08); and
- certain other relations (section §12.09).

The article focuses on Norwegian and Danish law. These two legal systems are similar and comparable, both on a general level and within the specific areas of contract law and arbitration. Thus, the analysis is based on Danish and Norwegian legal sources, although a few Swedish legal sources are included as well.

## §12.02 GENERAL ARGUMENTS AND CONSIDERATIONS

The subjective scope of arbitration agreements may generally be affected in two ways. First, rights or obligations under the agreements may be *transferred*. Second, the agreements may be *interpreted* as to include a party who did not sign the agreement. Either way, the subjective scope of an arbitration agreement involves fundamental considerations about, *inter alia*, party autonomy, access to justice, due process, costs and efficiency.

Whereas national courts serve the interests of society as a whole and all of society's individual citizens and entities, arbitration serves the interests of parties who have decided to resolve their specific dispute by arbitration—simply speaking, at least. Courts are available for almost any dispute, as long as the claimant sues the right defendant and meets the fundamental requirements of right of action. Thus, the national court system constitutes a common institution being generally available to anybody. The system is available for a tax dispute between a public authority and a private citizen as well as a post M&A dispute between several different plaintiffs and defendants.

Arbitration, however, is not a commonly available institution. Each arbitration and arbitral tribunal is set up to resolve a specific dispute between specific parties consenting to submit their dispute, typically arising out of a specific contract, to that specific process.

This fundamental difference between litigation and arbitration reflects, and is a reflection of, the procedural rules and practices applicable to the two types of dispute resolution. A conflicted judge is obliged to withdraw on his or her own motion, whereas a conflicted arbitrator is only obliged to withdraw if his or her disclosure gives rise to a challenge. The court is constituted without any involvement by the parties, whereas arbitral tribunals are typically constituted under the direct influence of the parties. Decisions by a first-instance court are appealable, whereas arbitral awards are final.

The differences have a natural impact on the "access requirements" applicable to each system. You do not need a contract to go to court, but you need a contract to arbitrate. Not any party will be bound by an arbitration agreement,[2] and the right to join a third party to arbitral proceedings already pending or to enforce an arbitral award against a third party is very limited. For the same fundamental reasons, the subjective scope of arbitration agreements is typically limited to the individuals or entities on the signature page of the underlying contract.

Despite close contractual relation between A, B and C, it may have significant unforeseen consequences for C to be bound by an arbitration agreement between A and B, which would prevent C from having disputes with A or B resolved by the ordinary courts. Vice versa, it may have significant unforeseen consequences for A to be bound by the arbitration agreement with B in a dispute with C, despite the fact that A actually signed an arbitration agreement with B.

However, it may be unnecessarily burdensome and inefficient to prevent A, B and C from resolving their tripartite dispute or any bipartite dispute between two of them by arbitration if they have all de facto accepted to resolve disputes between each other by arbitration.[3] Accordingly, arbitration agreements may under certain circumstances entitle or bind parties who were not originally parties to the agreements.

## §12.03 THE MODERN NORDIC APPROACH TO ARBITRATION AGREEMENTS

Among Danish judges and scholars, the perception of arbitration agreements was rather skeptical compared to their perception of other commercial agreements until the mid-twentieth century. In 1937, a leading Danish practitioner described arbitration as unsafe ("*farlighed*") in his monograph on voluntary arbitration.[4]

2. For example, under s. 6(1) of the Swedish Arbitration Act, s. 11(1) of the Norwegian Arbitration Act and s. 7(2) of the Danish Arbitration Act, a consumer is not bound by an arbitration agreement made before the dispute arose.
3. As stated by the Supreme Court of Norway in its decision of November 3, 1994 (Rt. 1994-1489), there are compelling arguments in favor of deciding several disputes arising out of the same agreement jointly ("*There are compelling arguments* [sterke reelle hensyn] *that several disputes arising out of the contractual relation be subject to a joint process, which must be in line with the purpose behind the arbitration clause.*" (author's translation)).
4. Bernt Hjejle, *Frivillig Voldgift* (Levin & Munksgaard 1937), p. 69.

The Danish perception of arbitration is very different today.[5] Case law and literature from the latest decades reflects a widespread acceptance of arbitration as a due and fair dispute resolution system desired by many commercial parties.[6]

The perception does not only influence decisions on the conclusion and validity of arbitration agreements but also decisions on the interpretation and scope of arbitration agreements with respect to the issues and parties covered.[7]

Thus, as explained in the following sections, a variety of different grounds may make a court or tribunal deem an arbitration agreement signed by A and B applicable to C.

## §12.04 SUCCESSION BY ASSIGNMENT OR SUBROGATION

Arguably, assignment and subrogation are among the simplest and most common ways to transfer rights under an agreement to someone who was not originally a party to the agreement.

Under Nordic principles of contract law, B may *assign* its claim against A to C. The assignment of a claim against a debtor to an assignee does not require consent from the debtor, so B is generally free to assign its claim against A to C, but the assignment does not grant C any additional rights. The assignee, C, "receives" the assignor's, B's, rights and claims against the debtor.

The same principle applies to claims or rights under an arbitration clause. If B is replaced by C in a contract originally made by A and B, C may assert its right to arbitrate under that agreement against A, and A may assert its right to arbitrate under the agreement against C.[8]

As opposed to the assignment of a right or claim, which does not require consent from the debtor, the assignment of *liabilities* requires the *creditor's* consent. Following this general principle, B may not assign its liabilities toward A to C without A's consent. However, the principle does not prevent an arbitration agreement from binding A and

5. Morten Frank, *Fortolkning af voldgiftsaftaler* (Karnov Group 2018), 54 et seq.
6. Judgment of April 11, 2014 by the Supreme Court of Denmark ("Højesterets dom af 11. april 2014 i sag 216/2013"), Ugeskrift for Retsvæsen 2014, 2042 et seq., 2045; Judgment of April 11, 2014 by the Supreme Court of Denmark ("Højesterets dom af 11. april 2014 i sag 217/2013"), 2–3; Niels Schiersing, *Voldgiftsloven med kommentarer* (Jurist- og Økonomforbundets forlag 2016), 140 et seq.; Jakob Juul and Peter Fauerholdt Thommesen, *Voldgiftsret* (3rd ed., Karnov Group 2017), 79–80 (mentioning both Denmark, England, Sweden and Norway); Jens Edvin A. Skoghøy, *Voldgift: konkurrent eller supplement til det alminnelige domstolsapparatet?*, in Ola Ø. Nisja and Borgar Høgetveit Berg (eds), Avtalt prosess: Voldgift i praksis, 349 et seq. (Universitetsforlaget 2015).
7. Juul and Thommesen, *supra* note 6, 84 et seq.
8. The principle was applied in a judgment of June 21, 2002 by the High Court of Western Denmark (Vestre Landsrets dom af 21. juni 2002 i anke 7. afd. nr. B-0528-02), Tidsskrift for Bolig- og Byggeret 2002, 410 et seq. The court held that the buyer was bound by an arbitration agreement between the seller and the original owner ("[…] *as a general rule, a party's successors in the substantive relation to which an arbitration clause relates are bound by an arbitration agreement to the same extent as the assignor.*" (author's translation)).

C as a consequence of the assumption of debt. If C assumes B's liabilities toward A, the arbitration agreement between A and B will normally bind C and A toward each other.[9]

An assignor's right to assign rights and liabilities under an arbitration agreement to an assignee is set out by case law and legal doctrine under Danish, Norwegian and Swedish law.[10]

In Norway, this right became statutory when the current Norwegian Arbitration Act entered into force in 2005.[11] Section 10(2) of the Act provides that unless otherwise agreed between the parties, "*the arbitration agreement shall be deemed to be assigned together with any assignment of the legal relationship to which the arbitration agreement relates.*"[12] As explained in section §12.06 below, the scope of the provision is broader than merely covering assignment.

Similar to the *assignment* of a claim, C may *subrogate* B's claim against A. For example, a guarantor who paid the debtor's liabilities to the creditor may subrogate the creditor's claim against the debtor, and an insurer may subrogate the policyholder's claim against the debtor. Subrogation to a claim against a debtor does not require consent from the debtor either, and by subrogating to B's claim against A, C is entitled to invoke an arbitration agreement between A and B against A.

Accordingly, an arbitration agreement may be *assigned* to a party who was not originally a party to that agreement, and a party who was not originally a party to the agreement may *subrogate* the arbitration agreement.

In practice, arbitration agreements are never assigned or subrogated *in isolation*. An arbitration agreement typically forms part of a main contract or a set of contracts in which the arbitration agreement is included as a separate clause. When that main contract or contractual relationship is assigned, or when somebody subrogates it, the arbitration agreement is "part of the package."

The right to transfer rights and liabilities under an arbitration agreement by assignment or subrogation is rather uncontroversial. If B's rights and liabilities under a contract with A are transferred to C by assignment or subrogation, disputes between A and C falling within the arbitration agreement's *objective* scope will be subject to arbitration.

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9. In a judgment of September 22, 2014, the High Court of Western Denmark extended an arbitration agreement between a creditor, A, and an original debtor, B, to cover the relation between A and a new debtor, C, because C thereby succeeded in the rights and obligations of the original debtor. ("[the new debtor] *has accepted being payment debtor on the construction project. By the assumption of debt,* [the new debtor] *has subrogated to* [the original debtor's] *rights and obligations, and the presented evidence* […] *does not provide a basis for considering the agreement* […] *non-binding due to the assumption of debt.*" (author's translation)). *See* judgment of September 22, 2014 by the High Court of Western Denmark (Vestre Landsrets dom af 22. september 2014 i anke 6. afd. B-3301-12), Ugeskrift for Retsvæsen 2015, 209 et seq.
10. Judgment of October 15, 1997 by the Swedish Supreme Court (Högsta domstolens dom, 15. oktober 1997, målnummer Ö3174-95), Nytt Juridiskt Arkiv 1997, 866 et seq.; Stefan Lindskog, *Skiljeförfarande*, 150–151 (2nd ed., Norstedts Juridik 2012); Judgment of June 21, 2002 by the High Court of Western Denmark, *supra* note 9; Judgment of September 22, 2014 by the High Court of Western Denmark, *supra* note 10.
11. Act of May 14, 2004 No. 25 relating to Arbitration (Norwegian Arbitration Act).
12. "*Hvis ikke annet er avtalt mellom partene i voldgiftsavtalen, følger voldgiftsavtalen med ved overføring av det rettsforhold den omfatter.*"

## §12.05 UNIVERSAL SUCCESSION

Whereas singular succession implies an assignment or subrogation to single legal rights, universal succession implies an assignment and assumption of *all* rights and liabilities of a person or entity. Universal succession may be a consequence of, *inter alia*, bankruptcy, decease or a merger, and the succession implies a transfer of rights as well as liabilities.

In all Nordic countries, the universal succession of B's rights and liabilities to C would normally include the rights and liabilities under an arbitration agreement between A and B.[13] Accordingly, if B dies, any arbitration agreement between A and B may be upheld by A against B's estate, C. If the estate, C, brings a dispute covered by the agreement before the courts, the arbitration agreement will generally bar the jurisdiction of the court. Conversely, C may invoke the arbitration agreement against A.

The general right to transfer arbitration agreements by way of universal succession does not necessarily apply to bankruptcy cases. Disputes between the bankruptcy estate and the party to the arbitration agreement may involve significant public or third-party interests, and, thus, such disputes may be inarbitrable. For example, avoidance proceedings must be resolved before the courts despite any arbitration agreement with the bankrupt entity.[14] Nevertheless, the bankruptcy estate would normally be bound by the arbitration agreement if the issues covered by the agreement are independent of the bankruptcy and especially if the arbitration is initiated before the bankruptcy.[15]

## §12.06 DIRECT CLAIMS AGAINST PRIOR PARTIES

If A sells a non-conforming product to B, which B resells to C, C may under certain circumstances claim remedies for breach of contract against A despite the absence of a contract between A and C. Similarly a developer may claim remedies from a sub-contractor despite the existence of a general contractor between the developer and the contractor in the chain of contracts.

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13. SOU1994:81 (preparatory notes on the Swedish Arbitration Act), 93 ("*By universal succession, the arbitration agreement normally becomes applicable in relation to the succeeding party, e.g. an estate of a deceased person.*" (author's translation)).
14. Decision of April 7, 1986 by the Danish Supreme Court (Højesterets Kæremålsudvalgs kendelse af 7. april 1986 i sag 472/1985), Ugeskrift for Retsvæsen 1986, 440 et seq. ("*The lawsuit is* […] *commenced in the interest of the creditors and upon the probate court's accession. Accordingly, an arbitration and choice of court agreement between the parties cannot be invoked.*" (author's translation)).
15. *Ibid.* ("*The arbitral proceedings concerned issues that could be decided independent of the bankruptcy, and at least in the present case in which the proceedings are initiated before the bankruptcy, the estate must be bound by the arbitration agreement.*" (author's translation)); court order of April 25, 2013 by the High Court of Eastern Denmark (Østre Landsrets kendelse af 25. april 2013 i kære 16. afd. B-890-13) Ugeskrift for Retsvæsen 2013, 2238 et seq. ("*Because it was a customary clause of significant importance to the parties, and because the subject matter of the case merely concerns the justification of the claim, which is completely independent of the insolvency issues, the probate court does not find reason to deprive the arbitral tribunal from its competence to decide the present dispute.*" (author's translation)).

The right to claim remedies from a prior party is established by case law and legal doctrine. There is no general right to do so. The right depends on the prior party's negligence and C's opportunity to subrogate B's claim against A.

The main features of a direct contract claim are similar to the main features of subrogation; instead of directing a claim against B, who will re-direct the claim against A, C goes straight to A, who would otherwise have been met with a claim from B. In most instances, the creditor's right to invoke an arbitration agreement against a prior party, and vice versa, is subject to the same principles as assignment and subrogation, but as explained by Tørum, the right to invoke arbitration agreements in relation to direct claims, and the underlying considerations, vary depending on the specific constellation.[16]

As mentioned in section §12.04 above, section 10(2) of the Norwegian Arbitration Act provides that unless otherwise agreed between the parties, "*the arbitration agreement shall be deemed to be assigned together with any assignment of the legal relationship to which the arbitration agreement relates.*"[17] Literally, the provision merely concerns the transfer of arbitration agreements by "*assignment,*" but as explained by Tørum and Woxholth, the scope of the provision is arguably broader than that.[18] According to the *travaux*, the provision amends the law as set out by the Norwegian Supreme Court in Rt-1994-1024 concerning a *direct claim*.[19] Accordingly, the explanatory notes indicate that section 10(2) of the Norwegian Arbitration Act extends the subjective scope of arbitration agreements in relation to direct claims.

If C raises a direct claim against A, C may normally invoke an arbitration agreement between A and B against A, and A may normally invoke an arbitration agreement between A and B against C. However, if A raises a direct claim against C, A may not necessarily invoke an arbitration agreement between A and B against C.[20]

A contractual chain may involve more than three parties. If A has made a contract with B, who has made a contract with C, who has made a contract with D, one or more bipartite arbitration agreements may bind the other parties in the chain.

In a judgment of April 11, 2014, the Supreme Court of Denmark dismissed an insurer's lawsuit against a technical consultant by reference to (a) an arbitration agreement between the insured developer and the lead consultant and (b) an arbitration agreement between the developer and the consultant.[21]

A property developer, B, had assigned a lead consultant, C, to assist in the building of a school. The lead consultant had assigned a technical consultant, D, to

16. Tørum, *supra* note 1.
17. *"Hvis ikke annet er avtalt mellom partene i voldgiftsavtalen, følger voldgiftsavtalen med ved overføring av det rettsforhold den omfatter."*
18. Geir Woxholth, *Voldgift* (Gyldendal juridisk 2013), 342; Tørum, *supra* note 1, 367–369. On direct claims, *see* section §12.06 below.
19. NOU 2001: 33 ("*Utredning fra Tvistemålsutvalget oppnevnt ved kgl. res. 9. april 1999 avgitt til Justis- og politidepartementet 20. desember 2001*"), pp. 70–71.
20. The scenarios, requirements and considerations are not examined further in this chapter. For a thorough analysis, *see* Tørum, *supra* note 1, 369 et seq.
21. Judgment of April 11, 2014 by the Supreme Court of Denmark, *supra* note 8.

design the building's foundation. Due to an error in the foundation, a neighboring property was damaged. B's insurer, A, covered the damage and filed a lawsuit against D.

There were arbitration clauses in the agreements between B and C and between C and D. The insurer, A, who filed the lawsuit against D, had not signed any of these agreements, and the insured developer, B, had not signed any arbitration agreement with D. Nevertheless, the court accommodated D's request to dismiss the case by reference to the arbitration agreements between B and C and between C and D.[22]

The decision was based on two grounds. First, the court held that A, as B's insurer, had *subrogated* B's rights and obligations toward D. Second, the court considered whether the dispute would be subject to arbitration if it were a dispute between the developer, B, and the technical consultant, D, i.e., whether the developer would have been required to raise its claim against the technical consultant before the ordinary courts or before an arbitral tribunal.[23]

The court noted that the dispute fell within the objective scope of the arbitration agreement between B and C and the objective scope of the arbitration agreement between C and D. Under both of these agreements, disputes arising out of the performance of the project were subject to arbitration. The dispute at hand had arisen out of the performance of the project, so the court considered it covered by the general intent of the parties to arbitrate.[24]

For these reasons, the dispute between A, who had subrogated B's claims against C, and D were subject to arbitration despite the absence of arbitration agreements between A and B, between A and C, between A and D and between B and D.[25]

The right to invoke an arbitration agreement in relation to a direct claim will always depend on the circumstances in the specific case. Who invokes the agreement against whom? However, very simply speaking and as explained above, arbitration agreements are generally, but not always, "part of the package."

## §12.07 IMPLIED CONSENT

The identification of the parties to an arbitration agreement—or any other agreement—may imply an element of interpretation. Under most contracts, the subjective scope is clear, but other contracts leave the court or tribunal with an element of discretion. Even when the subjective scope *seems* clear, specific circumstances may prove that the subjective scope covers parties who are not explicitly mentioned on the signature page. In that case, A, B and C are all deemed parties to the agreement despite the fact that only A and B have signed the agreement.

22. *Ibid.*, 2045.
23. *Ibid.* ("[…] *it follows from general principles of obligations that a liability insurer who pays damages to an injured policyholder subrogates to the injured's (the developer's) rights and liabilities towards the technical consultant against whom the claim is made.* […] *Then, the decisive question is whether the developer would have to pursue its claim against the technical consultant before courts or by arbitration.*" (author's translation)).
24. *Ibid.*
25. *Ibid.*

A party may be bound to an agreement by virtue of implied consent. Simply speaking, an implied consent requires an obvious reason to react. The absence of a response to an offer does not constitute an implied consent under Norwegian or Danish law, but A may be bound by its implied consent, *inter alia*, if A's conduct and a common usage or practice between the parties makes it reasonable for B to assume that A has accepted the terms of the agreement.

If a party is bound by its implied consent, the arbitration agreement is not transferred to a third party but rather extended by way of interpretation. The party *is* a party to the arbitration agreement.[26]

## §12.08 RELATIONS TO GROUP COMPANIES

From a traditional legal perspective, the extension of the subjective scope of an arbitration agreement by way of *group affiliation* is rather controversial.

Nordic company law sets out a corporate veil between companies. Parent A and its subsidiary B are two different legal entities, both in terms of rights, liabilities, contracts, torts, procedural identity and enforcement. If parent A has made an arbitration agreement with C, the arbitration agreement does not bind A's subsidiary B. Accordingly, B cannot invoke the arbitration agreement against C, and C cannot invoke the arbitration agreement against B.

But this is merely the general rule because, under certain specific circumstances, an arbitration agreement may extend to a parent or subsidiary. The corporate veil is a necessary legal construction, but it is a construction after all. In reality, several companies in the same group may be involved in the same transactions, represented by the same directors, who attend the same meetings with the same counsel.[27]

If an arbitration agreement between a parent and C is de facto made by *the group* and C, it could be argued that other group members should be able to invoke the agreement against C, and that C should be able to invoke the agreement against other group members.

The arbitration agreement may be contained in a document that is only signed by the parent, A, and C, but if it clearly appears from the transaction history that group member B accepted to be bound, it could be argued that B is within the subjective scope of the agreement. Similarly, if it clearly appears from the transaction history that C accepted to be bound by an arbitration agreement with the non-signing group member, B, it could be argued that C is within the subjective scope of that agreement.

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26. *See* e.g., the reasoning in court order of April 8, 2002 by the Supreme Court of Norway (Høyesteretts kjæremålsutvalgs kjennelse av 8. april 2002 i sak nr. 84-2002), Rt-2002-370 (the Supreme Court noted that the issue was not whether the arbitration agreement be extended to a non-party but whether the defendant was a party to the arbitration agreement. The claimant, who was a supplier of bunker fuel, claimed payment for the supplies to ships owned by the defendant, but the arbitration agreement was made by the claimant and the defendant's mangers.).
27. *See* e.g., Judgment of April 21, 1982 by the Supreme Court of Sweden (Högsta domstolens dom, 21. april 1982, målnummer Ö36-80), Nytt Juridiskt Arkiv 1982, 244 et seq. (A parent was liable to pay for deliveries to the subsidiary due to the parent's conduct).

In a court order of December 3, 1996, the Supreme Court of Denmark refused to set aside an arbitral award arising out of an agreement made by a subsidiary of one of the parties, i.e., not the party itself. The Supreme Court thereby extended the arbitration agreement to cover the subsidiary's parent. The arbitral tribunal had deemed the parent bound by the clause, and by refusing to set the award aside, the Supreme Court indirectly affirmed the tribunal's decision.[28]

The Supreme Court does not elaborate on the details of the transaction in its reasoning, but the details are described in the Norwegian tribunal's reasoning, which is outlined and quoted in the case summary. It follows from the tribunal's reasoning that the parent had been closely engaged in the negotiation and effectuation of the contract. The parent had issued a declaration to be jointly liable together with the subsidiary for the performance of the contract, and the parent did not object to being involved in the process until the subsidiary appeared to have difficulties paying its liabilities.[29]

Interestingly, the tribunal emphasized the economic and practical consequences for the parent, noting that the parent would be economically unaffected by being a party to the arbitration due to its joint liability with the subsidiary.[30] The Supreme Court did not explicitly repeat the tribunal's considerations but held that there was no reason to set the tribunal's "*well-reasoned*" award aside.[31]

Nevertheless, the due process considerations explained in section §12.02 above may give rise to concern about the extension of arbitration agreements to group companies. If the non-signing group member becomes bound by the arbitration agreement, that group member forfeits its right to a trial under the applicable procedural rules, which may, from that party's perspective, entail necessary safeguards such as a right to appeal.

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28. Court order of December 3, 1996 by the Supreme Court of Denmark (Højesterets kendelse af 3. december 1996 i sag 325/1996), Ugeskrift for Retsvæsen 1997, 251 et seq.
29. *Ibid.*, 252 ("[…] *the handling of the case is conducted by* [the subsidiary] *and by* [the parent]. *The parent signs most of the contractual documents and appears as the main deliverer and source of resources to the other party to the contract. In its own declaration of 11.12.90, the parent has jointly backed the subsidiary's performance of the contract formally made between the subsidiary and* [the other party to the contract]. *It should further be noted that the Danish parent did not object to its role in the proceedings until the subsidiary's difficulties paying its liabilities came to light.*" (author's translation)).
30. *Ibid.* ("*The consideration above is also supported by arguments on procedural economy* ["*reelle, prosessøkonomiske hensyn*"], *because the final outcome of the case will, economically, remain the same to the parent regardless of the determination of the company's position in the arbitral proceedings. It is clear under Norwegian law that a guarantor* ["*selvskyldnerkausjonist*"] *is bound by an arbitration agreement between the creditor and the debtor* ["hovedmannen"] *if the arbitration agreement was already made before the guarantee. The same is deemed the case under Danish law* […]. *In the present case, the guarantee is derived from the subject matter, closely enough to naturally consider the declaration of guarantee an accession of or consent to the arbitration agreement by the guarantor.*" (author's translation)).
31. *Ibid.*, 253 ("*The Supreme Court finds that the appellees have not pointed to any circumstances* […] *providing a basis for setting aside the arbitral tribunal's well-reasoned decision, according to which* [the parent] *was deemed bound by the arbitration agreement in question, and according to which this company, thus, was deemed obliged to pay damages* […] *to the appellor jointly with* [the subsidiary]." (author's translation)).

The extension of arbitration agreements to group companies has given rise to a recent decision by the Supreme Court of Norway. As illustrated by that decision, which arguably reflects both Norwegian and Danish law, group companies may be bound, but only under specific circumstances. In order to extend an arbitration agreement to a non-signing group company, a court or tribunal will conduct a thorough analysis and assessment of the specific circumstances.

The case concerned two different contractual relationships, one of which concerned a subsidiary, its parent and a buyer. The arbitration agreement was signed by the parent and the buyer, and the question was whether the subsidiary was entitled to invoke the arbitration agreement against the buyer.

After a thorough assessment, the Supreme Court dismissed the claim by reference to the arbitration agreement, despite the fact that the defendant, who was the subsidiary, was not a signatory to the agreement. Accordingly, the subsidiary successfully invoked the arbitration agreement against the buyer.

In its reasoning, the court noted the wording of the arbitration clause covering "[a]*ny dispute* […] *relating to this Contract,"* which was, according to the court, "*general*" and without "*room for reading limitations into it.*"[32] Accordingly, the specific wording regarding the *objective* scope of the agreement appears to have influenced the court's determination of the subjective scope.

In determining whether the claims against the defendant would be subject to arbitration, the court assessed the relationship between the defendant and the agreement.[33] The court noted that there is a less strict standard for finding the requisite relationship with the agreement when the defendant is a member of the same corporate group as a signatory. In the court's view:

> the question here is not whether the Norwegian subsidiary can be identified with the parent company, but whether there are circumstances suggesting that [the subsidiary] must be deemed to have entered into the arbitration agreement. As emphasised by Woxholt, in corporate group cases, there may be reason to determine the agreement threshold on less strict terms than in other cases where the contractual party and the third party have no contractual obligations towards each other […] I share this view. I also share his view that in this context, it is not a question of identification or of a variant of the theory on lifting of the corporate veil under company law.[34]

The court concurred with Woxholth's view that a "*third party*" may be bound by an arbitration clause "*if there has been a three-party constellation from the start, and the third party has been aware of the arbitration agreement.*"[35]

32. Judgment of October 10, 2017 by the Supreme Court of Norway (Høyesteretts dom av 10. oktober 2017 i sak nr. 2017/136) Rt. 2017-1932-A ("Skaugen"), para. 83 (the arbitration clause read, "*This Contract shall be governed by the Laws of Denmark. Any dispute arising out of or relating to this Contract shall be finally settled by arbitration in accordance with the Rules of Procedure of the Copenhagen Court of Arbitration.*").
33. *Ibid.*, para. 102.
34. *Ibid.*
35. Woxholth, *supra* note 19, 342.

Furthermore, the court noted the fact that the defendant had played an "*ancillary role in the contract negotiations*" that led to the agreement.[36] The claims against the defendant were of the same nature as the claims against the parent who had signed the agreement.[37]

For these reasons, the court dismissed the claim by reference to the arbitration agreement despite the fact that the defendant was not a signatory to that agreement.[38]

As illustrated by the decision, the extension of the subjective scope of an arbitration agreement to a non-signing group company depends on the terms of the agreement and the specific circumstances in question. The court or tribunal considers a number of factors, including the wording of the arbitration clause, the transaction history, and the relation between the parties in the specific dispute.

Courts and tribunals must be careful when extending arbitration agreements to non-signing group companies. There are good reasons why the resolution of a dispute by arbitration requires a contractual basis.[39] Nevertheless, in cases such as the Skaugen case, a strict approach to the subjective scope of the arbitration agreement, which prevents the agreement from being invoked by or against the non-signing subsidiary, could give rise to uncertainty and inefficiency.

## §12.09 OTHER RELATIONS

When the subjective scope of an arbitration agreement extends to a group member, the extension is not merely a consequence of the corporate affiliation. Rather, the extension is a consequence of the overall relation between the parties and the transaction. When applying the same rationale to other relations, it could be argued that arbitration agreements may be extended to non-signing parties in several other situations.

For example, an arbitration agreement could be extended from covering only the shareholders of a company to covering the company itself.

Like the clear legal distinction between group companies, there is a clear legal distinction between the individual shareholders and the company. An agreement between shareholder A and shareholder B does not bind the company. Nevertheless, in a decision of October 28, 2013, the High Court of Western Denmark affirmed a decision

36. *Ibid*., para. 105.
37. *Ibid*., para. 104 (referring to the following premises in the High Court's decision: "*In the court of appeal's view, in our case there is a particularly close connection between the claim against the parent company, which is bound by the arbitration agreement, and the claim against the wholly-owned subsidiary, which has taken part in the negotiation of the contracts on behalf of the parent company. Although Skaugen contends that MTDN [MAN Norge] has committed independent tortious acts, the same legal basis and almost the same factual basis are, as the court of appeal sees it, asserted as basis for liability for MDT [MAN Germany] and MDTN [MAN Norge]. As concerns the claim in our case, MDTN must therefore also be bound by the arbitration clauses with regard to the purchase of the Hamburg engines and the two—stroke engines.*").
38. *Ibid*., para. 132.
39. *See* section §12.02 above.

to dismiss a case by reference to an arbitration agreement in a shareholders' agreement, thereby extending the arbitration clause to a shareholder's claim against the company.

The shareholders' agreement was concluded between a number of shareholders. These shareholders owned company A. One of the shareholders, A, brought a lawsuit against company A. There was no arbitration agreement between shareholder A and company A. Nevertheless, the High Court held that a shareholder's claim against company A for the dividend was subject to the arbitration provision.[40]

The High Court noted that the dispute was within the scope of the agreement at issue. The court stated that "*a shareholder's claim for dividend from the company naturally must be considered to be comprised by the subject-matter regulated by the shareholders' agreement.*"[41]

Next, the High Court addressed whether the claims against the company were subject to arbitration under the agreement, even though the company was not a party to the agreement. The High Court stated that "[b]*ased on an overall assessment of the shareholders' agreement it must also be taken as a fact that when concluding the shareholders' agreement, the shareholders assumed that a dispute such as this must also be settled by arbitration, although* [the shareholder's] *claim is not raised against the other shareholders directly, but against* [the company]."[42]

Thus, the court concluded that claims against the company, which was not a signatory to the agreement, were subject to arbitration under the agreement. The court reached its conclusion "[b]*ased on an overall assessment of the shareholders' agreement.*"[43]

As the decision illustrates, a company may be bound by an arbitration agreement made by the entire group of shareholders. The decision would arguably have been different if the arbitration agreement had been made by a few individual shareholders instead of the entire group.

Now that Pandora's Box is open, Nordic courts and tribunals may extend arbitration agreements to other types of non-signing parties such as sellers, suppliers, service providers, buyers, lenders etc., but this would require exceptional circumstances and be a tiny exception to the general doctrine of privity of contract.

Half of the *Skaugen* case, i.e., the one described in section §12.08 above, concerned group companies. The other half concerned an engine supply contract between a shipyard and a buyer. A third party sought to invoke the arbitration

40. Judgment of October 28, 2013 by the High Court of Western Denmark ("Vestre Landsrets dom af 28. oktober 2013 i sag 9. afd. V.L. B-0008-13), 2.
41. *Ibid.* ("*The High Court agrees* […] *that a shareholder's claim of dividend from the company must naturally be deemed covered by the issues regulated by the shareholders' agreement.*" (author's translation)).
42. *Ibid.* ("*Based on an overall assessment of the shareholders' agreement, the court assumes that the shareholders, when making this agreement, have assumed that a dispute as the present one must be resolved by arbitration despite the fact that* [the shareholder's] *claim is not put forward against the other shareholders but against* [the company].").
43. *Ibid.*

agreement against the buyer.[44] Once again, the court conducted a thorough assessment of the specific circumstances:

> [The third party] played a central role in the entry into of the contract between the Shipyard and [the buyer] for the supply of the Somargas engines. [The third party] instructed the Shipyard to enter into the contract with [the buyer], and it is set out in the complaint to the conciliation board that the negotiations of the purchase of engines to the relevant ships were mainly carried out with [the buyer's Norwegian subsidiary] where [the third party] was represented by its Norwegian management company. The complaint also states that the contracts for the purchase of engines were "formally" entered into with the Shipyard, but that [the third party] "was the legal and beneficial buyer of the engines."
>
> I am not disregarding the possibility that a third party also under Norwegian law may be bound by an arbitration clause by—like [the third party]—having actively participated in the contract negotiations. It seems natural that the party asserting its claim based on a contract between two third parties must at the same time respect any arbitration clause applicable between those parties.
>
> Nevertheless, I cannot see that this construction reaches as far as applying in a case such as ours, where [the third party] has not entered into the Shipyard's contract with [the buyer]. In this respect, I mention that the Shipyard has not incurred a loss due to [the third party's] increased fuel costs, and thus has no claim against [the buyer]. The Shipyard would only have had a claim if [the third party] first had directed its claim against the Shipyard, which in turn could have submitted a recourse claim against [the buyer]. But according to the contract between [the third party] and the Shipyard, the latter's liability for increased fuel costs is limited upwards to a discount of USD 200,000, which is only a small fraction of the loss, alternatively cancellation of the contract which was not an option when [the third party] submitted its claim. Thus, the claim submitted by [the third party] is a different claim than the claim the Shipyard could have submitted against [the buyer].

The court considered if the arbitration agreement could be extended to the third party by assignment, but "[a]*ccording to what I have now said, there is also no reason—as the case stands—to argue that there has been an "assignment" of the legal relationship between the Shipyard and* [the buyer]." In addition, the agreement was subject to a writing requirement. For that reason and due to the specific circumstances described above, the seller was not bound by the arbitration clause.[45]

As illustrated by the Supreme Court's reasoning, Pandora's Box is not wide open, but it is not fully closed either. Except for the relations dealt with in sections §12.04–§12.08 above, arbitration agreements are not extendable, unless the wording of the arbitration clause, the transaction history and the relation between the parties in the specific dispute makes extension the only reasonable solution in the specific case.

44. This third party was the subsidiary dealt with in the group company issue considered in the same case. *See* section §12.08 above.
45. Skaugen, *supra* note 33, para. 124.

## §12.10 CONCLUSION

Like other agreements, arbitration agreements bind their parties and only their parties. In practice, an arbitration agreement will usually bind the entities identified on the signature pages of the underlying contract and no one else.

But there are a few exceptions. The rights and liabilities under an arbitration agreement may be transferred by way of *assignment*, *subrogation* and *universal succession*, and arbitration agreements may be invoked against prior parties by way of *direct claims*. An arbitration agreement may also be *extended* to a non-signing person or entity if that person or entity is deemed bound by *implied consent*.

Under certain specific circumstances, an arbitration agreement may bind a company by virtue of the company's *corporate affiliation* with a party to the agreement. Accordingly, a parent's arbitration agreement with a third party may bind the parent's subsidiary, and a subsidiary's arbitration agreement with a third party may bind the subsidiary's parent.

In addition, the subjective scope of an arbitration agreement may extend to non-signing parties in other specific situations, but only if the wording of the arbitration agreement, as well as the transaction history and the relation between the parties in the specific dispute, makes an extension the only reasonable solution. The extension of the subjective scope of an arbitration agreement on grounds of the intrinsic nature of the specific case should be exceptional.