Request for rejection of a lawsuit before ordinary courts due to an arbitration clause must be made in the defendant's first reply contesting the claim

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In a ruling 1 November 2023 by the Norwegian Supreme Court (HR-2023-2055-A), it was decided when and how a request for rejection of the lawsuit before the ordinary courts due to an arbitration clause must be submitted.

Pursuant to Section 7 of the Norwegian Arbitration Act, the courts shall dismiss an action concerning claims subject to arbitration if the party requests dismissal no later than at the same time as it enters into the merits of the case. In the case before the Supreme Court, the questions of what is required for the defendant to be considered having gone into the merits of the case and when the defendant can be considered having invoked a request for rejection due to an arbitration clause were tested. In addition, there was a question as to the significance of any failure to invoke a request for rejection due to an arbitration clause before the Conciliation Board when the matter continued before the District Court later on. In this respect, the Supreme Court considered whether the subsequent case before the District Court was a different lawsuit than the case before

the Conciliation Board, so that the party had a new opportunity to raise the request for rejection before the District Court.

The Supreme Court ruled that the merits of the case are addressed as soon as the claim is contested, even if it is not substantiated. The Supreme Court further concluded that it might not be necessary to file a motion to dismiss in order to invoke arbitration, at least not before the Conciliation Board, but that it had to be stated that the case was subject to arbitration and that the ordinary courts were not competent. The objection was therefore lost before the Conciliation Board in the particular case at hand. The Supreme Court finally concluded that it was too late to submit the request for rejection to the District Court, since the objection was not (also) submitted at the latest when the claim was contested before the Conciliation Board.

Earlier this fall, our litigation lawyers Ørjan Salvesen Haukaas and Mohsin Ramani argued in the article *"Will the Supreme Court repeal the Conciliation Board trap for arbitration objections?"* published in Rett24 that the lawsuit before the district court was a new lawsuit, and that the Arbitration Act should therefore provide a new opportunity to request rejection, even if it was not made before the Conciliation Board.

The Supreme Court is on the other hand of the opinion that the change in the effect of lis pendens from the previous Civil Disputes Act to the current Dispute Act does not affect the interpretation of Section 7 of the Arbitration Act and that procedural economy indicate that objections should already be submitted to the Conciliation Board.

We agree with the Supreme Court that the lis pendens effect in itself does not shed much light on how Section 7 of the Arbitration Act should be interpreted. It is not the lis pendens effect that determines whether or not the proceedings in the Conciliation Board have been concluded. The Supreme Court therefore, in our view, discusses the question of *"the proceedings"* in Section 7 of the Arbitration Act on the wrong premises, and only on the basis of one of several effects in the Dispute Act that shed light on whether a given action has been concluded.

The Supreme Court has previously held, inter alia in Rt. 2013 p. 1303, that the lawsuit in the Conciliation Board is concluded when it is discontinued. It has held that it falls under Section 18-3 of the Dispute Act, which states that *"the lawsuit [...] ends without judgment"*. The Supreme Court does not discuss this point explicitly in its ruling. If the lawsuit in the Conciliation Board has ended without a judgment, it is difficult to see that the lawsuit in the District Court can be the same lawsuit, even if it concerns the same legal issues. In any case, it is *"the same action"* in another sense, namely that it is an action that is so similar to the previous action that it would have been dismissed due to the lis pendens effect if it had still been pending.

In paragraph 61, the Supreme Court writes that there *"is nothing in the wording that speaks in favor of a system where each instance is assessed in isolation under section 7"*. We agree with this which is in line with the UNCITRAL Model Law Working Group's agreement that the failure to raise the request for rejection should (only) have effect for *"subsequent phases of the court proceedings"* (A/CN. 9/264 page 24). This implies that the deficiency has effect between the District Court, the Appeal Court and the Supreme Court, because the *"lawsuit"* does not end between each instance. This hardly has any transfer value to what applies after the Conciliation Board has concluded the lawsuit, as the Conciliation Board is then not an *"instance"* in the same sense as the other court instances. The difference from referral in the previous Civil Disputes Act to discontinuation in the current

Dispute Act was precisely that the former referred the case to the District Court for further proceedings, while the latter simply concludes the case.

That the lawsuit in the Conciliation Board is the same lawsuit as the one in the District Court within the meaning of the Arbitration Act may be correct, but the discussion of the question solely on the basis of whether or not lis pendens effect is retained is, in our opinion, not sufficient. In any event, we must of course consider that the Supreme Court has now ruled that the lawsuit in the District Court is the same one as in the Conciliation Board within the meaning of the Arbitration Act.

The Supreme Court probably attaches great importance to considerations of procedural economy. It will be a simple rule that the claim can continue before Norwegian ordinary courts if the objection is not invoked already before the Conciliation Board, instead of the claimant (unnecessarily) spending resources on filing a writ of summons to the District Court. It may also seem like a trap in terms of interruption of the statute of limitations if a defendant does not immediately request rejection due to an arbitration clause before the Conciliation Board, but instead waits until the case is brought before the District Court, which can take a long time.

However, the argument of procedural economy could have been weighted in the opposite direction, and it is not certain that considerations of procedural economy actually required a specific solution in the case before the Supreme Court. It is (unnecessarily) cost-driving that the parties must investigate and request rejection due to an arbitration clause already before the Conciliation Board in order to avoid losing them in the possible subsequent action before the District Court.

Settlement complaints are also not always formulated so precisely that it is easy to determine which claim is being asserted and what the basis for it is. Assessing whether the claim is then subject to arbitration is not necessarily easy. The fact that the claimant has brought the case before the Conciliation Board despite the arbitration clause also indicates that the issue will usually arise in the more doubtful situations, and that it will therefore be cost-driving to have to decide whether the claim is subject to arbitration or not.

Another question that the Supreme Court does not discuss, as it was not necessary for the result, is whether a request for rejection due to arbitration can now be precluded if it is not raised in the defense before the District Court, if it was timely invoked before the Conciliation Board. If it cannot be precluded, this would mean that the District Court case could be pending for a long time before the objection is raised again.

It is therefore not given that considerations of procedural economy will necessarily weigh in favor of requesting rejection due to an arbitration clause to the Conciliation Board.

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