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Preface

This issue of MarIus contains papers submitted by a number of speakers at the seminar hosted by the Institute on 17 January 2019, entitled "Norwegian Arbitration Day". We are grateful to the authors for their contributions which, no doubt, offer valuable insight into the diversified topic of arbitration – and with a particular twist towards arbitration in Norway and the other Nordic countries.

Trond Solvang (editor)
Trine-Lise Wilhelmsen (co-editor)

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International arbitration in Norway

The Norwegian Arbitration Act

Knut Kaasen[1]

[1] Professor dr.juris, Scandinavian Institute of Maritime Law, UiO

1. Arbitration in Norway – overview

1.1 The Norwegian Arbitration Act 2004 (NAA)

Until the enactment of the Norwegian Arbitration Act (NAA) in 2004,[2] arbitration in Norway was regulated by a special chapter of the Norwegian Civil Procedure Act 1915[3] (ch. 32). The old regulation was rudimentary, and there was a need for more detailed rules on this specific type of dispute resolution process. The NAA is fairly comprehensive. It contains 50 sections, divided into 11 chapters dealing with i.a. the arbitration agreement, composition and jurisdiction of the arbitral tribunal, the conduct of the arbitral proceedings, determining the arbitration, the role of the ordinary courts of justice, costs, invalidity, recognition and enforcement.

The NAA governs all arbitrations taking place in Norway, irrespective of the parties' nationality and the type of dispute (large or small, professional or consumer parties, etc.).[4]

The Act is based on the UNCITRAL Model Law, and Norway is regarded as a "Model Law state".[5]

1.2 Practice

The total number of arbitrations conducted yearly in Norway is not known, despite the NAA's requirement that "The arbitral tribunal shall send one signed copy of the award to the local district court to be filed in the archives of the court."[6] However, in commercial disputes – involving Norwegian parties only or also non-Norwegian parties – arbitration is

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2 Act relating to arbitration, 14 May 2004 no. 25.

3 Civil Procedure Act 13 August 1915 no. 6, repealed by Act relating to mediation and procedure in civil disputes (The Dispute Act) 17 June 2005 no. 90 sect. 37-1 second para.

4 NAA Sect. 1.

5 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

6 NAA Sect. 36 5th para. As noted by the committee preparing the NAA, this rule is adhered to "only to a limited extent", ref. NOU 2001:33 Voldgift p. 38.

frequently used. In most cases, the arbitration is *ad hoc,* but there are also examples of institutionalized arbitrations, usually based on the rules of ICC[7] or OCC[8]. As we will see (item 4 below) there are indications that this balance is about to change somewhat.

A relatively large number of experienced arbitrators are available in Norway, comprising three main groups of lawyers: Practitioners, judges and academics covering various areas of commercial law.

The general rule under the NAA is that the "arbitral proceedings and the award are not deemed to be confidential unless otherwise agreed between the parties for each arbitration."[9] The parties usually agree to keep both the process and the award confidential. However, some awards are published,[10] whether anonymized or not, and some more are brought into the discussion in legal literature and thus made known despite the whole award not being published.

2. The NAA and the UNCITRAL Model Law

2.1 General

In preparing the NAA, importance was attached to Norway obtaining recognition as a Model Law state under the UNCITRAL regime.[11] One

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7 International Chamber of Commerce, see https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

8 Oslo Chamber of Commerce, see https://www.chamber.no/wp-content/uploads/2015/07/Rules-2017-Arbitration-English.pdf

9 NAA Sect. 5 first para. Thus, the agreement can not be made generally in the contract containing the arbitration clause – it has to be made specifically "for each arbitration".

10 At the website Lovdata.no (the Norwegian general legal information system, subject to payment) some 250 arbitral awards are available in full text. All of them have also been published in printed court report series (Rt., RG and ND).

11 NOU 2001:33 p. 131 (summary in English) and pp. 49–50 (discussion in Norwegian). The Ministry of justice supported these conclusions, see Ot.prp. nr. 27 (2003–2004) Om lov om voldgift p. 25 (in Norwegian).

of the arguments was that this will make it easier for foreign parties to relate to the act, resulting in foreign parties becomming more willing to accept arbitration in Norway.

The structure of NAA is therefore based on the Model Law,[12] as is most of the substance of the act.

However, the NAA also covers national and minor arbitrations, including consumer related disputes, not just international and major arbitrations. This has resulted in the act deviating to some extent from the Model Law. In addition, simply because less professional parties will benefit from more guidance, the act contains some detailed regulations that are not to be found in the Model Law.

These differences compared to the Model Law may appear unfamiliar to foreign parties. However, section 1 of the act reminds foreign parties of the reason for the differences: "This Act applies to arbitration … irrespective of whether the parties are Norwegian or foreign". Moreover, the legislator found comfort in the rule implying that all of the deviations from the Model Law can be "corrected" by the parties using their right to contract out of the relevant provisions. Thus, they are not compelled to operate under rules different from those of the Model Law.[13]

2.2 Specific modifications

(a) *Confidentiality.* The NAA Sect. 5 provides that "The arbitral proceedings and the award are not deemed to be confidential unless otherwise agreed between the parties for each arbitration". There is no parallel in the Model Law.

The parties normally want to keep confidential the final award as well as the fact that arbitration is at all taking place. The NAA gives them this option, but they have to agree on confidentiality "for each arbitration". A general pre-agreed clause to this effect, e.g. written into

[12] One example is that the right of the parties to contract out of the act is established in each of the relevant sections, not by a general provision allowing such deviations unless otherwise specifically stated. See Ot.prp. nr. 27 (2003–2004) p. 25 (in Norwegian).

[13] Ot.prp. nr. 27 (2003–2004) p. 25 (in Norwegian).

the arbitration clause of the parties' contract, will hence not suffice. On the other hand, the parties are free to agree on confidentiality at any stage of the arbitration process. However, at later stages, and definitively after the award, tactical considerations may prevent the parties from agreeing on this issue. It is therefore necessary to be aware of Sect. 5 of the NAA.

(b) *Arbitration Agreement.* The NAA Sect. 10 on the arbitration agreement does not require the agreement to be made in writing or in any specific form (ref. first para). It suffices that there is an "agreement" under Norwegian law. An oral agreement, or an agreement constituted by conduct, is in principle enough.[14] However, it may well amount to a practical problem to prove that an agreement exists on such basis, not the least in light of the fact that an agreement to arbitrate generally must be considered to be important and thus will require some firmness.

The Model Law originally required the agreement to be made in writing.[15] However, in the 2006 revision, this was softened up by introducing an optional definition of the arbitration agreement: " 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[16] This wording is parallel to that of the NAA.

The NAA Sect. 10 second para states that "Unless otherwise agreed between the parties in the arbitration agreement, the arbitration agreement shall be deemed to be assigned together with any assignment of the legal relationship to which the arbitration agreement relates." There is no similar rule in the Model Law, which therefore leaves open an issue of some practical importance. Again, the parties may contract out of the NAA regulation. And again it is important for the parties to identify the need to consider the issue. The existence of the provision in NAA may be a reminder – and the legal position it establishes would normally appear

[14] See the discussion in Ot.prp. nr. 27 (2003–2004) pp. 40–41 (in Norwegian).

[15] UNCITRAL Model Law 1985 Art. 7.

[16] UNCITRAL Model Law 1985 as adopted by the Commission at its thirty-ninth session in 2006, Art. 7 Option II.

to be the desirable one. Hence there seems to be little risk involved in the NAA differing from the Model Law on this issue.

Neither the NAA nor the Model Law contain provisions on the classic issue of "separability", i.e. the question of what happens to the arbitration agreement if the contract in which it is included is deemed invalid.

(c) *Consumer disputes.* The NAA Sect. 11 contains regulations dealing with arbitration in disputes involving a consumer, specifying i.a. conditions for the consumer to be bound by an agreement to arbitrate. The Model Law does not provide regulations on this issue, which is of no importance for the purpose we now discuss.

(d) *Evidence.* The NAA Sect. 28 on evidence empowers the arbitral tribunal to disallow or restrict presentation of evidence that is "obviously irrelevant" or "disproportionate to the importance of the dispute or the relevance of the evidence to the determination of the case". The provision is motivated by cost effectiveness.[17] There is no similar rule in the Model Law, and the parties are at liberty to contract out of the NAA provisions.

(e) *Conflict of law rules.* The NAA Sect. 31 on application of law provides that "Failing any designation by the parties, the arbitral tribunal shall apply Norwegian conflict of laws rules", while the Model Law states that "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".[18] The difference between the two texts – whether Norwegian conflict of laws rules are given absolute priority or the choice of rules has to be decided by the tribunal – is hardly a crucial issue: There appears to be a clear tendency that Norwegian conflict of laws rules do not deviate from the system under international private law.[19] Again, international parties referring disputes to arbitration in Norway should anyway be

17 See Ot.prp. nr. 27 (2003–2004) p. 61 (in Norwegian).

18 The Model Law Art. 28 (2).

19 See Norwegian Supreme Court case HR-2017-1297-A (English translation available at lovdata.no) para 86.

aware of the difference and contract out of the NAA on this point if need be.

(f) *Costs of tribunal.* The NAA chapter 8 contains provisions on the costs of the arbitral tribunal. The provisions deal with the determination of these costs, the allocation of the costs as between the parties, and the tribunal's right to order the parties to provide security for the costs as a condition for pursuing the arbitral proceedings.

There are no provisions on this in the Model Law, and the parties may contract out of all these provisions of the act.

2.4 Summing up

Based on this review of the differences between the NAA and the Model Law we may conclude that the act's deviations from the Model Law are immaterial.

The parties should keep an eye on the need to contract out of detailed provisions that are superfluous and potentially unsuitable in their arbitral process. However, it is hard to conceive that this issue can cause any major harm.

The same goes for provisions of the act substantially deviating from provisions of the Model Law. But here we have to make an exception for the provisions on confidentiality: Parties to an international arbitration taking place in Norway normally would not prefer to follow the act's non-mandatory rule of non-confidentiality, and they should thus consider to contract out of this provision at the proper stage of the process (see item (a) above).

3. Contract clauses: Practice in Norway, examples

3.1 Agreed standard contracts

Most arbitration processes in Norway are *ad hoc*, i.e. they are not set up and managed by any dispute handling institution, but merely by agreement between the parties and the arbitrators. The agreement to arbitrate may also be *ad hoc* in the sense that it is made only when the dispute is a fact. However, more often the agreement to arbitrate is contained in the contract forming the basis of the dispute.

For our purpose of getting an overview of practices in Norwegian arbitration, the interesting issue is to which extent standard contracts frequently in use in Norway (also in contractual relationships involving non-Norwegian parties) contain arbitration clauses.

Agreed standard contracts (as opposed to unilaterally developed standards, see 3.2 below) are dominating in two sectors in Norway: Onshore and offshore construction work. However, the dispute-solving mechanism is not the same in these two sets of standards.

In the offshore sector, all members of the 2015 version of "the NF-family" of contracts contain dispute resolution clauses implying *ad hoc* arbitration "unless the parties agree otherwise".[20] Interestingly, the previous versions of the NF standard (all the way from 1987 up to 2015) referred dispute resolution to courts of law.

The onshore construction standards direct the parties to "ordinary court proceedings unless it has been agreed that the dispute is to be settled

[20] Art. 38.2 first para of NF 15, NTK 15, NTK MOD and NTK 15 MOD&MOD (two versions). The exception is the Norwegian Conditions for Purchase 2016 (NIB 16), which is developed for use as a sub-contract for procurement where the main contract is based on NF/NTK. NIB 16 art. 38.2 prescribes that disputes under the contract "shall be settled by court proceedings unless the parties agree otherwise". – All these standards are available at https://www.norskindustri.no/dokumenter/leveringsbetingelser/nfntk-standardkontrakter/ in Norwegian and English parallel texts.

by arbitration."[21] However, disputes exceeding about 10 mill. NOK are referred to arbitration, unless the parties agree otherwise.[22] This may possibly illustrate some key factors in the choice between arbitration and court proceedings: The larger the disputes, the less important are the costs in settling and the more important is the option to choose expert judges. On the other hand, one might expect the need for a second try (i.e. taking the dispute to ordinary courts) to be stronger the larger the claims are.

Shipbuilding is a special type of construction work, also often governed by agreed standard contracts – the Norwegian Shipbuilding Contract 2000. The dispute solving mechanism of this standard is *ad hoc* arbitration.[23]

3.2 Unilateral standard contracts

The total number of unilaterally developed standard contracts is of course unknown, as is their choice of dispute settlement system. Consequently, it is hard to identify any prevailing tendency.

An interesting example is offered by the data contracts, governing the purchase of data services and hardware. A large buyer – the state – and an organization of suppliers – The Norwegian Computer Society – have each developed their own house-standards. While the state standards prescribe courts of law as the means for settling disputes,[24] the standards of the Computer Society contain an agreement to arbitrate *ad hoc*. However, if the client is a government agency, the client may request the dispute to be settled by ordinary courts of law.[25] Thus, it appears that the state prefers courts to arbitration.

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21 NS 8407 (design and build contracts) clause 50.4, NS 8405 (building and civil engineering) clause 43.3 (slightly different wording).

22 NS 8405 clause 43.4. The same does not apply to NS 8407.

23 Shipbuilding Contract 2000 art. XIX.2. The same applied to the predecessor dated 1981, see § 14.

24 SSA-T (governing the delivery of software that is developed or customised for the Customer) clause 16.6, and SSA-K 2018 (governing the purchase of software and equipment) clause 8.3.

25 PS2000 item 8.5.3 *i.f.*

3.3 Offshore joint operating agreements

From a commercial point of view, the joint operating agreements (JOA) in the Norwegian offshore sector handle the by far largest investments and economic operations in Norway. The JOA's govern the cooperation between the companies holding participating shares of production licenses on the Norwegian continental shelf. Since 1973 the JOA's have been drafted by the state, and it has been a condition for acquiring a share of a production license that the participants enter into the agreement. Over the years since 1965, the JOA's have taken different forms in the subsequent "licence-rounds", but in 2007 all then active JOA's were retroactively standardized. This means that the mechanism for solving disputes between partners in all licenses is the same. Until 1 February 2019 the mechanism was a*d hoc* arbitration unless the parties agreed to bring a dispute before the courts of law, but after this date the mechanism is the opposite.[26]

4. Institutions

Until now, arbitrations in Norway have mostly taken the form of *ad hoc* arbitrations rather than being organized under the rules and administration of an arbitration institute. This has so far also been the prevailing form of arbitration according to arbitration agreements contained in standard contracts. While *ad hoc* organizing may appear flexible and effective to parties acquainted with Norwegian culture in general and in relation to dispute resolution specifically, it may seem like a "black box" to parties outside of this frame of reference. In a business world that increasingly involves cross-border relations, this "black box syndrome"

[26] Standard JOA art. 29, see https://www.regjeringen.no/contentassets/133274c0e30f4ad7abd475b6d2d46e63/avtale-med-vedlegg---statlig-andel.pdf

calls for national arbitral systems that are recognizable in an international perspective.

Over the last few years, several initiatives have been taken in order to accommodate this need. So far only one of them, however, implies strengthening of institutionalized arbitration in Norway.

Effective 2017 The Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce (OCC) has revitalized its rules on arbitration and fast-track arbitration.[27] These rules are applicable to arbitration in all sectors, and they are harmonized with both the NAA 2004 and the UNCITRAL Model Law. The number of arbitrations handled by the Institute has grown since the introduction of the new rules.

In 2017, the Nordic Maritime Law Associations together with the industry established the Nordic Offshore and Maritime Arbitration Association (NOMA) "in order to promote transparent and cost-efficient arbitrations" in the Nordic countries.[28] The rules of NOMA are based on the UNCITRAL Arbitration Rules.[29] They aim specifically at disputes in the maritime and offshore sector, but may also – like the UNCITRAL rules – be applied to arbitrations in disputes in other sectors. As opposed to OCC arbitration, NOMA arbitration does not imply that the arbitration is institutionalized in the normal meaning.

The following seminar will include more detailed presentations of these developments.

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27 https://www.chamber.no/wp-content/uploads/2015/07/Rules-2017-Arbitration-English.pdf

28 https://www.nordicarbitration.org/

29 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html

Oil and gas – the use and benefit of arbitration in the cornerstone industry

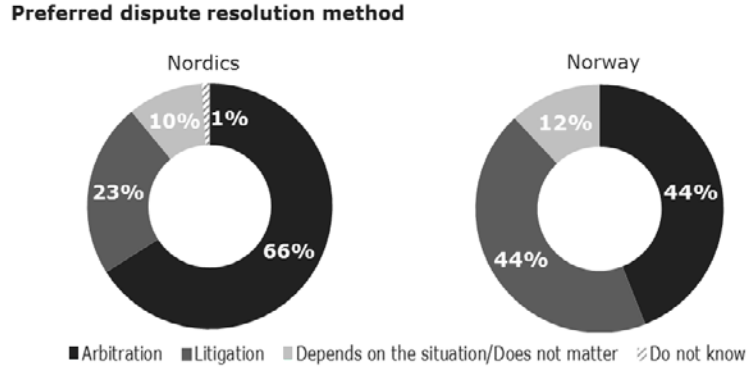
Thomas K. Svensen[1]

[1] Partner in Advokatfirmaet BAHR AS, Oslo

1. Introduction

Commercial disputes arise in all industries. There is no accurate statistics regarding commercial dispute resolution preferences in the Nordics or in Norway specifically. However, Roschier Disputes Index which is published every second year, provides valuable insight. For arbitration enthusiasts the findings are good news. In the Nordics, almost 2/3 of the respondents in the latest 2016 edition prefer arbitration to litigation as dispute resolution mechanism. This even represents a slight increase from the previous 2014 edition.

The Norwegian responses are included in the Nordic results. However, when analysing the Norwegian responses specifically it is evident that arbitration is not as prominent as in the other Nordic countries. Generally, the domestic courts are a popular choice for resolving commercial disputes in Norway. That said, arbitration still has a strong foothold, being at least equally preferred as litigation as dispute resolution mechanism.

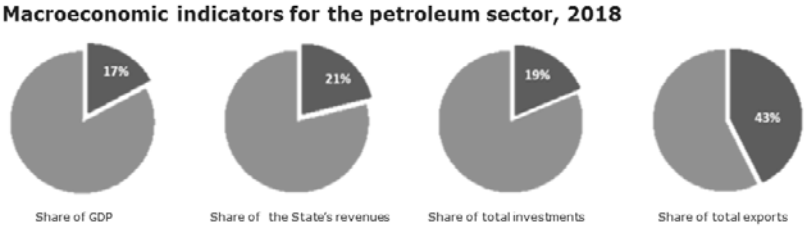


Source: Roschier Disutes Index 2016

2. Dispute resolution in the Norwegian oil and gas industry

2.1 Introduction

The petroleum or oil and gas industry is undoubtedly Norway's cornerstone industry. It is by far the largest industry in Norway representing almost 20% of both Norway's gross domestic product (GDP) and total investments, even excluding the service and supply segment of the industry. In absolute numbers, the industry is expected to represent investments and costs of almost NOK 2,500 million in 2019.



Source: Norwegian Petroleum, National Accounts, National Budget 2019, Norwegian Petroleum Directorate

The mere size of the oil and gas industry unavoidably implies a fair share of commercial disputes. Thus, the oil and gas industry is a very important part of the Norwegian dispute resolution scene and of paramount interest for dispute resolution practitioners. A core question in this respect is whether there are specific characteristics related to dispute resolution within this particular industry. Without jumping to conclusions, there are two features that are worth highlighting and which will be further explored below. The first feature is a predominantly Norwegian based dispute resolution in the sense that dispute resolution takes place in Norway (the choice of Norway as the agreed jurisdiction is in the following referred to as being Norwegian based). The second feature is a stronger than average foothold of arbitration as dispute resolution mechanism.

2.2 Norwegian based dispute resolution

The fact that the Norwegian oil and gas industry predominantly applies Norwegian based dispute resolution may at first glance seem natural. However, the strong foothold of Norwegian based dispute resolution should not be taken for granted in a small country hosting an industry which involves major international players often with an inherent different preference. The fact that the dispute resolution nevertheless is predominantly Norwegian based can be explained by historical reasons as well as governmental involvement.

The position of Norwegian based dispute resolution is to a large extent a result of the Norwegian Ministry of Petroleum and Energy imposing a license condition in the early 1980ies that Norwegian law and Norwegian contract tradition should be the basis for license operations on the Norwegian Continental Shelf (NCS). In the beginning of the Norwegian oil and gas industry era, particularly in the late 1960ies and the 1970ies, the contracts used were the standard form contracts of the international oil majors. These frequently applied non-Norwegian governing law and dispute resolution.

However, from the mid-1970ies, an increasing number of voices opposed the widespread use of such international contract standards. The Norwegian oil service industry was particularly dissatisfied with the use of the standard form contracts of the international oil majors which they believed where unbalanced and unnecessarily complex.[2] The sentiment is illustrated in the White Paper (St. meld. nr. 80 (1981–82) Om Kostnadsanalysen Norsk Kontinentalsokkel) stating as follows (unofficial translation):

> 18.2 General contract terms
> The contract standards that the operators in the North Sea present to the Norwegian industry today create significant challenges for parts of the industry. The reason is mainly that the offshore con-

[2] See also Mads Henry Andenæs, "Kontraktsvilkår", Oslo, 1989 pp. 216–217 and pp. 221–222.

> tracts applied in Norway often are based on Anglo-American contract law.
>
> The problems relate both to the form and substance of the contracts. Offshore contracts are generally extensive and so detailed that they are not easily accessible without access to the required expertise. Further, it is a common feature in these contracts that they create a clear imbalance between the parties. This has the effect that the parties' liabilities, obligations and rights do not correspond to their total financial interest in the project.

As a consequence of these viewpoints, the Ministry of Petroleum and Energy introduced a specific requirement in the licence award letter for the 7th licensing round in 1982 that contracts related to field developments were to be based on Norwegian law and Norwegian contract tradition. Later on, a similar requirement was included as a formal condition for licence awards in all subsequent licence rounds since the 8th licence round in 1984:[3]

> Any operations undertaken on the basis of this petroleum licence are to be governed by the at all times applicable Norwegian law and the Norwegian contract tradition.

This requirement is binding for all licensees being awarded an interest in a production licence on the NCS. The exact scope and substance of the requirement may be discussed, including which contracts that are covered and what "Norwegian contract tradition" really implies. Regardless of this, the effect in practise has been that most contracts within the oil and gas industry generally is governed by Norwegian law even if one of the parties is non-Norwegian.

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[3] See for instance the standard production licence form Article 7, published e.g. on the government's web sites; https://www.regjeringen.no/globalassets/upload/oed/pdf_filer_2/og/utvinningstillatelse.pdf. The wording reads in Norwegian: «All virksomhet som drives på bakgrunn av denne utvinningstillatelsen skal være regulert av den til enhver tid gjeldende norsk rett og bygge på norsk kontraktstradisjon».

There is no necessary link between the governing law being Norwegian law and Norwegian based dispute resolution. Notwithstanding this, Norwegian based dispute resolution will often be considered as a natural consequence of the contracts being governed by Norwegian law. From a practical perspective there are obvious challenges with hearing a matter based on Norwegian law before a tribunal or a court that does not have Norwegian law expertise, which again promotes Norwegian based dispute resolution.

2.3 Arbitration as preferred dispute resolution mechanism

Norwegian based dispute resolution may have the form of choosing either the Norwegian domestic courts or arbitration in Norway based on the Norwegian Arbitration Act 2004. As previously mentioned, the Norwegian domestic courts in general have a high standing and are a popular choice for resolving commercial disputes. Further, there is no evidence of a general preference of arbitration related to commercial disputes in Norway, contrary to the situation in the other Nordic countries.

Despite the position of the domestic courts, it is fair to say that there is a significant arbitration presence as dispute resolution mechanism in the oil and gas industry, and probably more prominent than in other Norwegian industry segments. It is fair to say that arbitration is even the preferred dispute resolution mechanism in the oil and gas industry, although there are some early signs that the use of the domestic court system may experience a revival at least in some contract types.

The position of arbitration in the oil and gas industry is illustrated by arbitration being the suggested dispute resolution mechanism in the most important standard contracts in the industry. The early development of Norwegian standard form contracts in the form of "model clauses" was initiated in the early 1980ies to establish an alternative to the standard form contracts of the international oil majors. Today we know that the Norwegian stakeholders' effort to develop a set of Norwegian standard form contracts succeeded. Although there is no legal requirement to

use these contracts, both The Federation of Norwegian Industries (Nw. Norsk Industri) and Norwegian Oil and Gas Association (Nw. Norsk Olje og Gass) recommend that these standard contracts are applied when contracting on the NCS. The result has been that these contracts, or variations of these contracts, are widely used in the oil and gas industry.

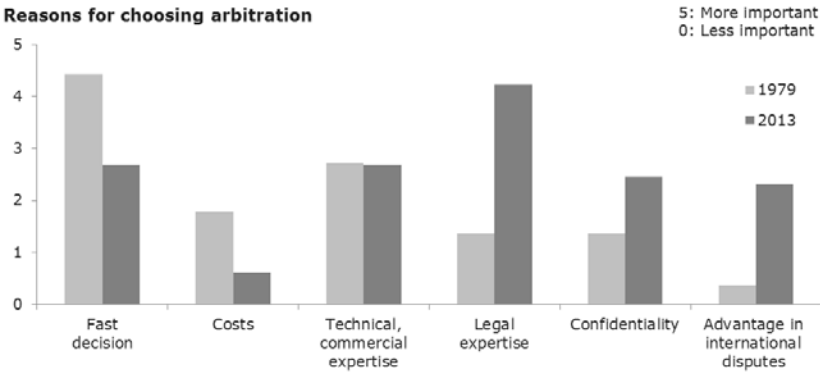
Contract	NF 15	NTK 15	NTK 15 Mod	NTK 15 Modul &Mod	NSC 05	NIB 16	JOA
Dispute resolution	Arbitration	Arbitration	Arbitration	Arbitration	Litigation	Litigation	Litigation*

*Arbitration until 1 February 2019

Only two agreed standard forms still refer to the domestic courts of Norway within the oil and gas industry, in addition to the joint operating agreement (JOA) which changed from arbitration to litigation with effect from February 2019. The first one is the Norwegian Subsea Contract (NSC 05), a set of standard conditions developed for contracting within the subsea segment on the NCS. The second is the Norwegian Conditions for Purchase 2016 (NIB 16), a set of standard conditions meant for contracts relating to procurement of components where the main contract is a pure NF/NTK contract. However, it is not uncommon that the dispute resolution in these contracts are changed to apply arbitration as dispute resolution mechanism, in particular when these contracts are used in combination with NF or NTK contracts.

The preference for arbitration in oil and gas disputes appears logical when assessing the nature of the industry and the reasons for why parties in some situations prefer arbitration. There is no accurate research as to when parties prefer arbitration. An indication may nevertheless be drawn from an informal survey which was carried out in 2013 in an effort to understand why parties choose arbitration.[4]

[4] Ola Ø. Nisja, En temperaturmåling på voldgift i Norge, in Berg, Borgar Høgetveit and Nisja, Ola Ø., Avtalt prosess, Oslo 2015, p. 261



Source: Avtalt prosess, 2015 – Berg and Nisja

In addition to present the results from the 2013 survey, the illustration also includes the relative change from the findings in another informal survey carried out in 1975.

From the 2013 survey it is clear that access to expertise – technical, commercial and legal – is the number one reason for choosing arbitration. This is not to be interpreted so that the domestic courts are not considered highly competent. It is more a reflection of the parties wanting to ensure involvement in and control of the appointment of arbitrators and other expert resources with specific legal and industry knowledge. With respect to access to legal expertise, the importance of this factor appears be increasing from 1979 to 2013.

In addition, the advantage of arbitration in international disputes is highlighted in the 2013 survey. Arbitral awards often have a benefit with respect to international enforcement. In addition, arbitration is in practise often the only Norwegian based dispute resolution mechanism that a non-Norwegian party is willing to accept.

Based on the above findings, the preference of arbitration in the oil and gas industry is no surprise. Disputes in the oil and gas industry will often be of high value and technically complex, which in turn highlights the importance of access to appropriate expertise, including the ability to hand-pick arbitrators. Further, the oil and gas industry has a significant

international exposure which involves many international contractors and providers. These elements support a preference of arbitration according to the above-mentioned 2013 survey. Thus, in light of the complex nature and international dimension of the oil and gas industry, arbitration is for many a natural choice.

3. A more sophisticated future?

Nothing is static. This applies even to dispute resolution regulation and preferences. If we look back, we see clear developments from the start of the Norwegian oil and gas era until today.

In the beginning, the standard form contracts of the international oil majors were widely used. There was no uniform dispute resolution regulation and no typical dispute resolution mechanism.

The beginning of the 1980ies represented a paradigm shift. The Ministry of Petroleum and Energy introduced in the 7th and 8th licence round in 1982 and 1984, respectively, the specific requirement that certain important contracts were to be based on Norwegian law and Norwegian contract tradition. Mainly as a result of this, a "Norwegian way" developed in the oil and gas industry over the next decades. The "Norwegian way" includes certain key elements. Firstly, Norwegian law was generally applied as the governing law. Secondly, Norwegian based dispute resolution was generally chosen. The latter included both the use of domestic courts and arbitration, although after a while arbitration

became, as mentioned above, the preferred choice. International arbitration was more seldom used.

A particular feature of Norwegian based arbitration is that it in practise is equivalent to ad-hoc arbitration. Essentially all Norwegian based arbitration is ad-hoc based. To a large extent this is likely to be a result of the absence of a prominent Norwegian arbitration institute. However, the preference of Norwegian based ad-hoc arbitration compared to the use of foreign based institutional arbitration, e.g., Stockholm Chamber of Commerce or other similar institutes, is noteworthy. This is due to the fact that ad-hoc arbitration so far has worked to all the involved parties' satisfaction.

What then about the future? Are there any signs that may indicate the future development of dispute resolution in the oil and gas industry? Two elements may be worth mentioning.

The first element relates to a more frequent use of litigation in the domestic courts as dispute resolution mechanism. Despite the strong foothold of arbitration for oil and gas disputes, there are as mentioned some early signs of a possible strengthened position of the ordinary domestic court system. The dispute resolution mechanism in the JOA and the associated Accounting Agreement, which are mandatory license agreements, illustrates this. These agreements are based on a standard format. Based on an industry initiative, the Ministry of Petroleum and Energy, effective 1 February 2019, amended the standard dispute resolution mechanism in these agreements to imply the use of the domestic courts as dispute resolution mechanism instead of arbitration. The shift from arbitration to domestic court proceedings ensures a more transparent and uniform interpretation of applicable provisions in the JOA. It is not possible to draw general development conclusions from the recent change in dispute resolution mechanism in the JOA and the associated agreements. These agreements have significant public interest and may be characterised as having a "quasi-public" nature, which is also evident by any changes to the standard format being subject to the Ministry of Petroleum and Energy approval. Thus, the underlying reason for the move away from arbitration does not necessarily apply to other

types of agreements. However, the change supports a view of early signs of a possible strengthened position of the domestic court system for oil and gas disputes. This trend is likely to continue; at least it is likely to be increasingly promoted by oil and gas companies.

The second element relates to the use of ad-hoc arbitration. So far ad-hoc arbitration has clearly been the dominating form of Norwegian based arbitration. This practise is under pressure. The expectations related to dispute resolution mechanisms are constantly rising. This is a result of increasing values at stake in many disputes, combined with higher expectations related to predictability and transparency. Particularly in international relationships the non-Norwegian parties struggle to get fully comfortable with the informal ad-hoc procedure which often is perceived by foreigners as a "black box". It may also be argued that ad-hoc arbitration awards are more exposed to invalidity claims and enforcement issues.

The increasing scepticism related to ad-hoc arbitration is partly the reason for the emergence or revitalisation of Norwegian institutional arbitration by the Arbitration and Dispute Resolution institute of the Oslo Chamber of Commerce (OCC).

In addition, the development of Nordic Offshore and Maritime Arbitration Association's (NOMA) rules and guidelines for arbitration also makes it possible to undertake ad-hoc arbitration in a more predictable and transparent manner. The emergence of these forms of Norwegian based arbitration is likely to prevent foreign arbitration to get a stronger foothold within the Norwegian oil and gas industry. Although time will show if these initiatives are sufficient to maintain the dominant position of Norwegian based arbitration.

My prediction is that Norwegian based arbitration – although probably in a more institutionalised or structured format – will be a key feature in the Norwegian oil and gas industry also in a more sophisticated future. A more bold ambition may even be that Norwegian based arbitration may be able to attract and become a natural choice for international energy related arbitration generally. Norway has a generally acknowledged leading position within the energy field. The significant legal and technical

expertise within the field also represents a competitive advantage which makes Norway well-positioned to have a role also in energy disputes where none of the parties are Norwegian entities. The latter is however an ambitious goal which as a minimum is dependent on the ability to develop a strong and prominent Norwegian arbitration institute with a critical mass.

International arbitration in Norway – offshore and onshore construction, including renewable energy

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1. Introduction

During the inaugural Norwegian Arbitration Day 2019, I was given the topic "International arbitration in Norway – Offshore and onshore construction, including renewable energy".

It was a great pleasure partaking at the conference and having the opportunity to introduce this sector for international arbitration in Norway. As the presentation was limited to ten minutes, I will in this article be able to elaborate further on the subjects presented at this great day for Arbitration in Norway.

The main part is in section 4, where I will present the key features for international construction arbitrations in Norway. With international arbitration I refer to arbitrations where at least one of the parties is non-Norwegian.

I will however start by giving an overview of offshore and onshore construction projects with international arbitrations in Norway in section 2, and in section 3, I will look closer at the contracts used in these projects and the kind of arbitration clauses often included as part of the standard forms used.

2. Overview of the sector

2.1 Offshore construction

2.1.1 Introduction

The offshore construction industry is a proud industry of Norway, not only supplying the Norwegian Continental Shelf (NCS), but also abroad. The offshore construction industry, together with other parts of

the service and supply industry, is Norway's second-largest industry in terms of turnover, only passed by the sale of oil and gas.[2]

The Norwegian-based service and supply industry consists of more than 1,100 companies, and had a total turnover of NOK 340 billion (ca. EUR 35 billion) in 2017, of which 29% in international markets.[3] Throughout more than 50 years of offshore petroleum activities, the Norwegian industry has developed cutting-edge technologies and leading expertise, making it internationally competitive.

Norway has several yards relating to the industry, and until 1982, we even had one large yard placed in the city centre of Oslo, which later became Aker Brygge, a modern shopping, office and restaurant area. Today, the largest yards in Norway are at the west coast of Norway, from Haugesund in the south to Verdal in the mid part of Norway. However, many of the key players in Norway within the offshore construction industry still have their main offices in and around Oslo.

2.1.2 Oil and gas

An important part of the offshore construction industry is the oil and gas platforms. The contracts for oil and gas platforms for the main contractors are normally in the region of EUR 1 billion for topsides alone, and involves several subcontractors. The largest offshore construction project being developed these days for the NCS is the Johan Sverdrup field, which is among the five largest oil fields in Norway.[4] The field will consist of five platforms with topsides and foundations once completed.

Offshore construction includes more than the oil and gas platforms. For example, it seems to have been an increase the last years in the use of Floating Production Storage and Offloading (FPSO), at least at the NCS. Another example is rig modifications, which are regularly done at

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2 From the web page, Norwegianpetroleum.no, run in cooperation by the Ministry of Petroleum and Energy and the Norwegian Petroleum Directorate: https://www.norskpetroleum.no/en/developments-and-operations/service-and-supply-industry/

3 https://www.norskpetroleum.no/en/developments-and-operations/service-and-supply-industry/

4 https://www.equinor.com/en/what-we-do/johan-sverdrup.html

Norwegian yards and constitute an important part of offshore construction in Norway, often with international clients.

Subsea installations are another crucial part of the offshore construction industry. Subsea processing, and gas compression in particular, is an important advance to develop fields in deep waters and harsh environments. Relatively smaller discoveries in mature areas are these days often developed through a tie-in to existing offshore infrastructure.

The magnitude of the subsea installations may be illustrated by the Åsgard subsea gas compression system at the Åsgard field. It was placed on 300 meter depth back in 2015, and its size is similar to a football field. It was the world's first subsea gas compression facility to commence operation,[5] and brought the industry another step closer to realising its vision of a subsea factory.

The Norwegian offshore construction market includes many international players. A majority of the disputes within offshore construction for oil and gas in Norway are solved through international arbitrations, and not through state court litigation.

2.1.3 Offshore wind

The renewable energy sector involves an increased amount of offshore construction, especially for offshore wind farms. Offshore wind farms appeared a decade ago and are currently in place outside of inter alia Denmark, Germany and the UK. So far, we do not have any commercial offshore wind farms at the coast of Norway. Due to the vast depths of the Norwegian coast, it generally requires floating turbines, and not fixed-bottom turbines. As the technology for floating turbines is more immature and more costly than fixed-bottom turbines, it is only one commercial offshore wind farm with floating turbines in the world in the beginning of 2019. That is Hywind Scotland, which was opened in 2017.

Even though there are no commercial wind farms at the NCS so far, that may change considerable the next coming years. In 2018, the seven partners at the oil and gas fields Gullfaks and Snorre on the NCS decided

[5] https://www.equinor.com/en/where-we-are/norway/asgard-subsea-gas-compression.html

to explore the possibilities of supplying the two fields with power from floating offshore wind. This could be the first time an offshore wind farm is directly connected to oil and gas platforms. The partners in the North Sea are working to mature the project towards a possible investment decision in 2019.

For the offshore construction industry, it is several similarities between oil and gas fields and offshore wind farms. As an example, offshore wind farms do not only include wind turbines with foundations, but may also include a convertor platform. These platforms convert electricity generated by the offshore wind farms – from alternating current (AC) into high-voltage direct current (HVDC) – ensuring more efficient and reliable transmission to the mainland.

This relatively new market, where you combine offshore and onshore construction experienced companies with new technology, has generated many international arbitration disputes.

2.2 Onshore construction

For international arbitrations within onshore construction projects in Norway, the backdrop changes compared to offshore construction. Firstly, the number of international players involved in onshore construction projects in Norway is significantly lower than for offshore construction projects.

Secondly, state courts are used more often for handling disputes, also international disputes, especially for infrastructure projects such as roads, railways and airports, with governmental builders (employers). In projects subject to public procurement regulations, the regulations normally prevent international contractors from requiring arbitration clauses to be included if the tender documentation requires state courts. However, in subcontracts with international contractors involved, we have seen an increasing number of arbitration clauses.

For onshore renewable energy, Norway has more than 100 years tradition of hydropower. Instead of gas supply in our homes, as many other European countries, electricity from hydropower supplies the clear

majority of power to Norwegian homes. There are still some hydropower plants under construction in Norway, but most of them were built decades ago. Nowadays, Norway is heavily investing in an upgrade of its electrical transmission lines all over the country with several large projects planned to be executed over the next decade. For all these type of contracts, arbitration clauses are seldom included, and combined with the low number of international contractors involved, it is rarely international construction arbitrations for these contracts.

Onshore wind farms have had a tremendous development the last decade in Norway. In January 2019, we have 32 onshore wind farms already in place and 12 new are under construction.[6] According to Haavind's experience with these projects, which includes both transactions and disputes, international players are often involved as builders (employers) and contractors. In these contracts, arbitration clauses are often included.

2.3 International construction arbitrations in Norway

In most of the construction arbitration cases with seat in Norway, a Norwegian element is involved. It is very often involvement of a Norwegian party. It may also be that the object of the dispute is a Norwegian project, typically an oil and gas project on NCS, with a dispute between an international offshore construction main contractor and an international subcontractor.

In the overview of the sector, an unsaid premise has been that most of the international construction arbitrations in Norway relate to a project onshore in Norway or for the NCS at the coast of Norway. That is the situation for the clear majority of the international construction arbitrations in Norway.

We have however also seen cases where the only Norwegian element is that Norwegian law governs the relevant contracts, especially for offshore wind farms disputes. We have experienced that non-Norwegian parties – typically with extensive experience from the NCS within oil and gas

[6] https://gis3.nve.no/link/?link=vindkraftverk

– choose Norwegian law as a neutral governing law and the Norwegian standard forms. The Norwegian standard forms for offshore construction contracts are well recognised also by international players. I have personal experiences with arbitrations regarding offshore wind farm projects situated in other countries than Norway with non-Norwegian parties, where the contracts are governed by Norwegian law, with the seat of arbitration in Norway.

3. Contracts used in offshore and onshore construction

3.1 Offshore construction

3.1.1 Requirement for Norwegian law in oil and gas projects on the NCS

For oil and gas projects on the NCS, there is a general requirement for a production licence from the Norwegian Ministry of Petroleum and Energy. A production licence is a concession that grants exclusive rights to conduct exploration drilling and production of oil and gas within a limited area on the NCS. Pursuant to the model production licence art. 7, all contracts based on the licence shall be governed by Norwegian law and be based on Norwegian contract tradition.[7] The latter does not imply a requirement to use Norwegian standard forms.[8]

[7] https://www.regjeringen.no/en/find-document/dep/OED/Laws-and-rules-2/Rules/konsesjonsverk/id748087/

[8] Knut Kaasen, «*Tilvirkningskontrakter – Med kommentarer til NTK 15 og NF 15*», Oslo 2018, page 901–902 and Amund Bjøranger Tørum in «*Petroleumsloven*», Oslo 2009, page 199.

3.1.2 Standard forms for offshore construction, including renewable energy

The standard forms mostly used for Norwegian offshore construction contracts are the Norwegian Fabrication Contract (NF) and the Norwegian Total Contracts (NTK).[9] Both the NF 15 and the different NTK 15 standard forms (EPC-variants) include arbitration clauses. It is only the older standard form Norwegian Subsea Contract (NSC) 05 and the new Norwegian Conditions for Purchase (NIB) 16 for subcontracting that contain litigation as its final dispute resolution mechanism.[10]

The use of the Norwegian standard forms rely on the parties' agreement. The main operator on the NCS, Equinor, is using these standard forms for all of its oil and gas projects on the NCS, whilst it differs between the other operators. Some of new companies on the NCS use standard forms, whilst the majors on the NCS often choose to use other contracts. Based on my experience, we rarely see international standard forms, e.g. the FIDIC[11] or LOGIC[12], used on the NCS when the Norwegian standard forms are not used, but rather company-developed contracts, mostly with arbitration clauses included.

The Norwegian standard forms for offshore construction have among others the following in common: they have been developed and negotiated in cooperation between the main operators in Norway and the main construction contractors since the 1980s. In the last revision round, the contracts were negotiated and agreed by the operator interests, represented by the Norwegian Oil and Gas Association, and the contractor interests, represented by the Federation of Norwegian Industries.

The arbitration clause in the above-mentioned standard forms is an ad hoc arbitration clause. The parties may, however, agree to deviate

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9 For an overview of the new standard forms on the NCS, Mikal Brøndmo "*Oil and gas projects in Norway: recent developments within offshore construction*" in Construction Law International 1/2018.

10 All these contracts may be downloaded free from here: https://www.norskindustri.no/dokumenter/leveringsbetingelser/nfntk-standardkontrakter/

11 The Fédération Internationale des Ingénieurs-Conseils.

12 LOGIC is a not-for-profit wholly owned subsidiary of Oil & Gas UK. For more, see: https://www.logic-oil.com/

from the standard and choose institutional arbitration or litigation at the state courts. While Equinor, the main operator on the NCS, prefers litigation at Norwegian state courts, the majority of the other operators choose arbitration with a mix of ad hoc and institutional, but often ad hoc as the default in the standard forms.

The arbitration clause included in the relatively new Norwegian standard forms NF 15 and NTK 15 have the following wording in article 38.2 in the official English version:

> "Disputes arising in connection with or as a result of the Contract, and which are not resolved by mutual agreement, shall be settled by arbitration unless the parties agree otherwise. Any arbitration proceedings shall take place in …….
>
> The arbitral tribunal shall consist of three arbitrators who the parties shall seek to jointly appoint.
>
> "Lov om voldgift" (lov av 14. mai 2004 nr. 25) (Act regarding procedural rules for Arbitration) shall apply.
>
> The parties agree that the arbitration proceedings and the arbitration decision shall not be public."

The clause is relatively short for an ad hoc arbitration clause and does not refer to any rules, e.g. the UNCITRALS rules for arbitration as you often see in international ad hoc arbitrations outside of Norway. It does only refer to the Norwegian Arbitration Act.

3.2 Standard forms for onshore construction, including renewable energy

The most common used standard forms for onshore construction projects in Norway are the so-called Norwegian Standard (NS)-contracts. These standard forms of contract are developed by a committee for onshore construction contracts, which consists of representatives from employers,

contractors and engineers. They do not generally include arbitration clauses, except for NS 8405, which is the standard form for complex projects where the builder (employer) is responsible for the engineering work. In NS 8405, arbitration is default when the disputed amount passes a threshold of approximately EUR 1 million.

The arbitration clause included in NS 8405:2008 art. 43.4 has the following wording in the official English version:[13]

> "Any dispute between the parties regarding the contractual relationship in which the claim or subject-matter of the dispute is equal to or more than 100 G shall be finally determined by arbitration proceedings unless the parties agree to allow the dispute to be resolved by ordinary court proceedings.
>
> The provision stated in clause 43.3, paragraph two, shall apply correspondingly.
>
> [Clause 43.3 paragraph two states: Unless otherwise agreed, in the case of ordinary court proceedings the place of the building or construction site's shall be the venue for any actions that arise from the contract.]"

This arbitration clause is even shorter than the ad hoc-clause included in the NF/NTK-contracts. It does not even state the number of arbitrators, the language of the arbitration, and certainly nothing about any rules to be applied.

As mentioned above, most of the standard forms developed for onshore construction projects do not include arbitration clauses. The development, especially for large infrastructure projects, has however been an increased use of the offshore construction standard forms also for onshore projects. Consequently, arbitration clauses are included in such contracts for onshore projects. Please note that when governmental employers are involved in these contracts, they generally deviate from the standard dispute mechanism, and require litigation at the state courts.

[13] The NS standard forms may be purchased here: https://www.standard.no/nettbutikk/juridiske-standarder/

For the Norwegian onshore oil and gas plants, the offshore construction standard forms, NF/NTK, have normally been used with their arbitration clauses.

As opposed to offshore construction contracts, the FIDIC contracts have become more often used in Norwegian onshore construction projects the last years, especially within renewable energy as onshore wind farms, but still plays a very minor part in Norway compared to many other countries.

4. Key features of international construction arbitrations in Norway

4.1 Introduction

In this section, I will present the key features in international construction arbitrations in Norway. The selection is based on my impressions and reflections of international arbitration cases with seat in Norway and international arbitration cases with seat outside of Norway.[14] It has not been possible to verify these impressions with any statistical data due to the lack of data in general for arbitration, and especially for arbitrations in Norway.

At the Norwegian Arbitration Day, time-constraints made it possible only to present six key features of international construction arbitrations in Norway. In addition to these six, I will in sections 4.4 and 4.8 below, present two more additional features.

[14] I'm highly grateful for having received input and comments from several leading Norwegian counsels and arbitrators within international construction arbitrations in Norway for this article. However, I am, by all means, solely responsible for the views and reflections in this article.

4.2 Mix of ad hoc and institutional arbitrations

One of the key features of international construction arbitrations in Norway is the mix of ad hoc and institutional arbitrations. We do not have any official statistics for the number of arbitration cases in Norway, and hence no statistics for the distribution between ad hoc and institutional arbitrations in Norway. Still, there is a general perception that the majority of domestic arbitration cases in Norway are ad hoc arbitrations.[15]

For international arbitration cases in Norway, and especially international construction cases, it seems to be more of a mix between ad hoc and institutional arbitrations. As we are lacking official statistics, it is difficult to make any estimates of the distribution between the two.

Outside of Norway, institutional arbitration is in clear majority of ad hoc in international arbitration cases.[16] Ad hoc is indeed so unusual in many countries that the Norwegian ad hoc tradition may come as a surprise.

One explanation for this mix in Norway is the lack of any predominant arbitration institution(s) with a significant caseload, contrary to many other countries. The Arbitration and Dispute Resolution institute at the Oslo Chamber of Commerce (OCC) was established in 1984. The new rules of OCC entered into force 1 January 2017.[17] Though the caseload for OCC has increased, especially for international arbitrations, since its new rules entered into force, the OCC is not a frequently used arbitration institution.

Another explanation when looking into international construction arbitrations in particular is the ad hoc default clauses in the standard forms for both offshore construction and onshore construction in Norway. Accordingly, the parties have to agree to deviate from the default in order to have the dispute handled by an arbitral institution. In my experience that

[15] Mikal Brøndmo: «Valg av voldgift – ad hoc eller institusjonell?» in Lov og Rett (2017 no. 6) page 309–330, at page 310 footnote 3 with further references.

[16] School of International Arbitration, Queen Mary University of London, "*International Arbitration Survey 2015*" page 17.

[17] For more about the new rules at the OCC: Mikal Brøndmo: «Valg av voldgift – ad hoc eller institusjonell?» in Lov og Rett (2017 no. 6) page 309–330, especially at page 325–327, Ola Ø. Nisja and Thomas K. Svensen: *"Oslo Chamber of Commerce (OCC): Institusjonell voldgift og mekling i Norge"* in Lov og Rett (2019 no. 1) page 38–47.

is more often done for international offshore construction contracts than for international onshore construction contracts, but also international offshore construction arbitrations in Norway may be ad hoc arbitrations.

There seems to be a development for more institutional arbitrations in Norway, also within international construction arbitrations. Many international parties seem to prefer having institutional arbitrations, rather than ad hoc arbitrations in accordance with the Norwegian Arbitration Act. Even though the Norwegian Arbitration Act is a UNCITRAL Model law act,[18] its regulations are – as for many countries' arbitration acts – quite rudimentary.

When comparing the Arbitration Act with rules from major arbitral institutions, there are far fewer procedural rules in the Act to be applied from the statement of claim to the award, including rules on the taking of evidence. The same applies when comparing the Arbitration Act with the Norwegian Dispute Act for state court cases, where the latter includes *inter alia* nine chapters with in total 69 articles regarding the taking on evidence, while the Norwegian Arbitration Act in comparison has only one article regarding the taking on evidence.

For international ad hoc construction cases with seat in Norway, the parties should consider to agree rules on the taking of evidence. The Norwegian Arbitration Act does not give much of guidance on the taking of evidence, while it may pivotal for the outcome of the construction case. Thus, this should be addressed by the parties and the arbitrators in the early stages of the arbitration proceedings.

The Norwegian ad hoc tradition is also part of the backdrop for the new Nordic Offshore and Maritime Arbitration Association (NOMA/Nordic Arbitration),[19] which was officially launched in 2018. It is questionable how accessible the ad hoc arbitration tradition in Norway is for international parties, as the norms often applied by ad hoc arbitrations, until recently, have not been incorporated into any rules or guidelines.

[18] Stephen Knudtzon "*Arbitration in Norway: Features of the Oslo Chamber of* Commerce" page 271–298 (page 272) in Giuditta Cordero-Moss (ed.) "*International commercial arbitration – Different Forms and their Features*" (Cambridge 2013) and Knut Kaasen «*The Norwegian Arbitration Act*" in this periodical.

[19] https://www.nordicarbitration.org/

In addition to its rules, NOMA has also developed best practise guidelines and rules on the taking on evidence.[20] The best practise guideline, including the Case Management Conference matrix and the rules on the taking on evidence, is quite comprehensive with 28 pages. The guidelines describe in many ways also best practise in Norway. When conducting international construction ad hoc arbitrations in Norway, the NOMA best practise guidelines may be agreed applied by the parties or be a reference document when the tribunal is making decisions within the framework of the Norwegian Arbitration Act.

4.3 Industry experienced arbitrators

Another key feature for international construction arbitrations in Norway is the access to experienced arbitrators within offshore and onshore construction. While many countries have access to industry experienced arbitrators for onshore construction, it is more seldom to have so many industry-experienced arbitrators within offshore construction as in Norway. In addition to understand the industry sector and its drivers, the Norwegian arbitrators are used to handle the significant document load and in particular, the technical issues involved in such cases.

4.4 Joint appointment of arbitrators

One of the main reasons for choosing arbitration over state courts is that it allows the parties to select the people, and the number of people, that shall determine the outcome of the dispute. Appointments of the arbitral tribunal in international arbitration is usually done by each party nominating one arbitrator,[21] and the third arbitrator is either nominated by those two or the arbitration institute in case of institutional arbitrations.

A key feature for international ad hoc construction arbitrations in Norway is that the parties appoint the arbitrators jointly, if possible, ref.

[20] Christian Hauge "*The NOMA/Nordic Arbitration initiative and rules*" in this periodical.

[21] Nigel Blackaby and Constatine Partasides, *"Redfern and Hunter on International arbitration"*, Oxford 2015, page 240.

the Norwegian Arbitration Act § 13 second paragraph. The parties may agree to deviate from this rule according to § 13 fourth paragraph, but such deviations are rarely seen. It may be surprising to see how often joint appointments are made between disputing parties in international construction arbitrations in Norway.

The legitimacy of the tribunal and the parties' trust when the arbitrators are appointed jointly cannot be underestimated. Taking into consideration the seemingly increasing numbers of challenges and the need for trust in international arbitrations, this Norwegian way of appointing tribunals should be of interest also for international construction arbitrations regardless of the choice made by the parties of ad hoc or institutional arbitration. In my experience it is also easier achieving a more diverse tribunal (sex, age, background etc.) when all members of the tribunal are appointed jointly.

For institutional arbitrations, the institute's rules often set out that each party shall nominate one arbitrator each, who together nominate the president of the tribunal. However, at several of the institutions it is possible for the parties to agree and jointly nominate and/or appoint the tribunal as long as the arbitrators fulfil the requirements to be arbitrators at that arbitration institute.[22] While it is the principle rule applied for international construction arbitrations in Norway, the opportunity is to my knowledge not as often used for international arbitrations outside of Norway.

4.5 The use of technology

It might be bold to argue that another key feature of international construction arbitrations in Norway is the use of technology. However, the backdrop is that since 2018 it has been mandatory to make all submissions in state court cases in Norway electronically through a specially developed portal. Further, the Norwegian state courts have for a long time used electronic binders – even the judges in the Norwegian Supreme Court

[22] Examples are the International Chamber of Commerce (ICC) Rules of Arbitration art. 11 no. 6 and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) rules art. 17 (1).

use tablets instead of hard copies these days. In the beginning of 2019 that is quite advanced compared to many other countries.

Based on the experiences, everything else than electronic filing of statements and pleadings, and the use of electronic binders during the hearing would be unusual for international arbitrations in Norway. That particularly applies to international construction arbitrations in Norway, where the document volume is normally much larger than in most other types of disputes. Norway is of course not alone when using electronic filing and electronic binders in 2019, but it is a key feature that this is best practise for international construction arbitrations in Norway.

Furthermore, the use of technology for presentation tools in hearings is also a key feature for international construction arbitrations in Norway. In international arbitrations, the use of technology is quite common and many international counsels are highly experienced with using technology in such a way. Still, I dare state that the Norwegian counsels and arbitrators are relatively advanced in using technology for presentation tools that influences international construction arbitrations taking place in Norway.

As an example we have several new construction projects in Norway where engineering is only done digital, e.g. by using Building Information Modelling (BIM) with a 3D model. When the engineering is presented for the tribunal, it is very difficult to print it as you did earlier with drawings. Digital presentation is therefore required, and a presentation tool we have seen used in cases in Norway is virtual reality (VR)-glasses in order to present the BIM from the project.

4.6 The absence of discovery

Discovery may in short be defined as entitling the parties to have access to all relevant documentation that the opponent has access to.[23] The rules of discovery has it background from common law systems and may be

[23] Nigel Blackaby and Constatine Partasides, *"Redfern and Hunter on International arbitration"*, Oxford 2015, page 35, and explaining the differences between civil law and common law on this matter at page 385.

agreed to be used in arbitrations, e.g. by agreeing to institutional rules entitling discovery, such as the LCIA[24] Arbitration Rules.[25]

Discovery normally implies considerable additional work for the parties and their counsels, which of course is costly and time-consuming. For international construction arbitrations in Norway, the absence of discovery is a key feature,[26] which may be particularly important for the large construction cases with enormous amount of documentation.

4.7 Witnesses

For witnesses, international best practise is that the parties submit written witness statements before the hearing, and that these statements replace direct examination of the witnesses, who are only cross-examined during the hearing.[27] The written witness statements in construction cases may be very lengthy and therefore time and cost consuming.

For international construction arbitrations in Norway the moderate use of written witness statements is a key feature.[28] The witnesses are often given the opportunity to present their statements orally, at least the main parts, before the cross takes over. For construction cases that might be even more enlightening for the tribunal considering all the technical issues in dispute.

4.8 The use of expert witnesses

The impression from international arbitrations with seat outside of Norway is that expert witnesses are used and relied on to a larger extent

[24] London Court of International Arbitration.

[25] Maxi Sherer, Lisa M. Richman and Remy Gerbay: «Arbitrating under the 2014 LCIA Rules» Alpen aan den Rijn 2015, page 249.

[26] Similarly, Amund Bjøranger Tørum: «*Best practice» i norsk og nordisk voldgift og NOMAs Guidelines*» in «Festskrift til Mads Bryde Andersen», København 2018 page 300.

[27] See e.g. Robin Oldenstam and Kristoffer Löf: "Best practise in International Arbitration" in Borgar Høgetveit Berg and Ola Nisja "Avtalt prosess – voldgift i praksis", Oslo 2015, page 298.

[28] Similarly, Amund Bjøranger Tørum: ««*Best practice» i norsk og nordisk voldgift og NOMAs Guidelines*» in «Festskrift til Mads Bryde Andersen», København 2018 page 300.

than for international construction arbitrations in Norway. I would say that the modest use of expert witnesses in international construction arbitrations in Norway is a key feature.

For international construction arbitrations in Norway, you might get the impression that the tribunals are more interested in hearing fact witnesses from the project than hearing the experts analysing the project in hindsight.

However, the development in Norway seems to be an increased use of expert witnesses. The parties no longer only the use of technical experts from leading scientific universities, but also e.g. schedule analysis experts and quantum experts from global consultant companies with lengthy experience as expert witnesses.

Further, it is not unusual to conduct hot-tubbing of experts also in Norway. Hot-tubbing is a procedure whereby the experts of both parties are questioned at the same time, in confrontation with each other, and with an aim to narrowing the points of difference.[29]

4.9 One hearing

It is also a key feature of international arbitrations in Norway that we normally conduct only one hearing, and not many hearings as we often see in other jurisdictions. Outside of Norway, many of the most famous lengthy international arbitration cases have the last decade been construction cases – normally with many hearings, instead of one hearing, spread over many years.

The arbitration hearing in Norway is however often more lengthy than outside of Norway, especially for construction arbitrations. The hearings in Norway normally include lengthy opening statements, where the relevant documentation for the relief sought is presented. For construction cases with large amounts of documents and difficult technical issues to be

[29] See e.g. *ICC Rules on the Taking of Evidence in International Arbitration art. 8.3 f)*, London 2010 and Nigel Blackaby and Constatine Partasides, *"Redfern and Hunter on International arbitration"*, Oxford 2015, page 407.

handled, a lengthened opening may give the opportunity to ensure that the arbitrators have not only read, but also understood the disputed issues.

It is normal to have only one hearing and that hearing may take up to four weeks, sometimes even up to six and eight weeks with hearings four days a week. For the most lengthy hearings you may from time to time experience that the parties/tribunal agree to split the hearing into separate parts where some claims are handled in the first part, e.g. the two first weeks, with opening statements, witnesses and closing arguments, before a new part starts. You may even see that the hearing is scheduled with weeks in between for breaks before a new part starts. This not only gives the parties and their counsels' time to prepare for the next session, but also allows the tribunal to start drafting the award for the claims handled in the last session.

By dividing the hearing into separate parts, the difference from having several hearings is reduced, but time-wise it would be huge difference from having a hearing with several parts taking place over two-three months rather than having the hearings taking place over two-three years.

Furthermore, we rarely have post-hearing briefs in international construction arbitrations in Norway, while it seems common in international arbitrations outside of Norway.[30] For cases in Norway, it is normal to have oral closing submissions at the end of the hearing. In order to facilitate the oral closing submission, there is often a short break, typically a day or a weekend between the end of witness statements and the oral closing submission.

[30] Nigel Blackaby and Constatine Partasides, *"Redfern and Hunter on International arbitration"*, Oxford 2015, page 409.

Post M&A disputes in a Norwegian context

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1. Introduction

An enterprise or a business may be acquired in different ways. Examples are transfer of the business wholly or partly or purchase of the shares of the company (or the holding company) in which the business is carried out. In broad terms, these may be referred to as acquisitions. Businesses may also be transferred through combinations of different businesses, which are assumed to fit one another. In a broad sense this may be referred to as a merger. Under Norwegian law, mergers and acquisitions (M&A) are governed by the agreement between the parties with the Norwegian Sales of Goods Act as background law but which is normally deviated from to the extent possible. Norwegian company law will also be in the background of such M&A transactions.

The price that is paid for a business is decided through negotiations between the parties and is based on a substantial amount of complex information, data and assumptions, inter alia expected future earnings calculated through discounted cash flow analysis and/or a normalised annual result times a multiple, the estimated net worth of the balance sheet, the ability and the probability of the enterprise obtaining such earnings and contract review. An important prerequisite is the correctness and completeness of historic information and data and the facts on which assumptions about the future are based. If any of these fail, the commercial balance of the deal may alter.

If the expectations of a buyer or the owner of a business into which the business is merged are not met, there may be a question whether the seller of the business could be liable for the information and data provided before the deal was entered into. This may end up in a dispute. Disputes arising after the merger or acquisition has been closed are commonly referred to as Post M&A disputes.

Major volumes have been written about this topic and the intention of my contribution to the Norwegian Arbitration Day 2019 is to give a brief overview of these disputes from a Norwegian perspective. As we are under the heading of international arbitration in Norway, a Norwe-

gian and an international connection is assumed. In a share purchase agreement for instance, we shall assume that at least the buyer, seller or target is Norwegian and that at least one of them is foreign. Moreover, the assumption is that the contract is governed by Norwegian law and the chosen dispute resolution mechanism is Norwegian arbitration, governed by the Norwegian Arbitration Act.

In M&A transactions with an international connection, the parties will normally prefer arbitration over litigation if there is a dispute. Arbitration provides the opportunity to choose a neutral venue. If there is Swedish seller and a Danish buyer, Norway may be preferred as the seat for any arbitration. Arbitration secures the parties' need for confidentiality, which often is preferred in case the parties ends up in a dispute in which amongst much else trade secrets and financials may be central to the case. Also, as arbitration encompasses one shot, the parties will, as the main rule, have the dispute settled after a final award which in many cases is valuable.

Hopefully, the participants will through my contribution realize that Norway as a venue for post M&A disputes offers much of the same solutions and has familiar concepts as in comparable jurisdictions.

2. The risk of expectations and assumptions

The price (or the value of the business as the case may be) is based on a set of expectations and assumptions which again are based on information the buyer has received from the seller. At the outset of the negotiations there is an information imbalance between the parties regarding the contents and details of the business. The seller knows the business and has the relevant information opposed to the buyer. Still, the buyer needs to understand the business and its prospects in order to determine a price. The buyer would typically seek protection for these assumptions and expectations in the agreement to the extent they are based on information

from the seller. The buyer would also typically seek protection to the effect that the seller has provided all information that is relevant.

To this effect, the seller represents and warrants to the buyer that the representations and warranties as set out in the agreement are true and correct at the signing and in Norwegian transactions often also on closing. The representations and warranties cover typically formal issues such as the seller's capacity to enter into and perform its obligations under the agreement, that the company is duly incorporated and that the seller has full and unrestricted title to the shares to be sold. They also typically cover historical facts such as the premises being leased under valid and binding agreements, full disclosure of the terms and conditions of the employment agreements and timely filing of tax returns and all taxes being paid when due and payable. The accounts, numbers and budgets of the business are important for the buyer. To this end, the seller represents and warrants that the accounts have been prepared in accordance with the relevant accounting principles and law and present, in all material respects, a true and fair view of the financial position and state of the affairs of the business at the date of the accounts and the profits and losses, assets and liabilities and the results of the operation of the company.

When it is set out in an agreement for instance that "each group company has filed on a timely basis all tax returns and such filings are in all material respects true, correct and complete", the seller has an obligation towards the buyer that this is correct. This is a contractual entitlement for the buyer which is also protected under Section 17 of the Norwegian Sale of Goods Act.

The seller is liable for any information provided during the negotiation. This is also in accordance with the principle laid down in Section 18 of the Norwegian Sale of Goods Act[2] which states: "The rules of non-conformity apply also when the goods are not in accordance with information which the seller, in his marketing or otherwise has furnished about the goods, their properties or use and which may presumably have influenced the sale". Moreover, the seller cannot withhold relevant information. This principle follows from Section 19(1)(b) of the Norwegian Sales of Goods

[2] The Norwegian Sale of Goods Act of 13 May 1988 No. 27

Act which states: "Even where the goods are sold «as they are,» or similar general reservation, they lack conformity when (b) the seller failed to furnish information about fundamental conditions of the goods or their use of which he could not have been unaware and which the buyer could reasonably expect to obtain, if the failure presumably influenced the sale".

The expectation to receive correct and complete information, which is also protected in the two provisions of the Norwegian Sales of Goods Act referred to in the preceding paragraph, is commonly regulated in the contract by a catch all provision. Information disclosed, typically in a data room, is warranted by the seller. An example of such a representation may be: "To the Seller's Knowledge, the Disclosed Information is in all material respects true and correct. No material information concerning group companies has, to the Sellers' Knowledge, been omitted from the Disclosed Information". Disclosed information is typically defined, in practice confined to information uploaded in a data room. The definition of Seller's knowledge is often limited to the information a defined (and small) circle of people, typical the management of the business, has or should have had. Other persons in the business may have additional information not being disclosed which could have been of interest to the buyer but which still is not relevant as long as the persons defined are not or should not have been aware of it.

If the buyer receives information outside the data room, for instance in negotiations, this may not be relevant according to the contract. On the one hand, the seller may not be liable for information given which is not encompassed by a warranty. On the other hand, the seller cannot escape liability by referring to information allegedly given somewhere else than in the data room (or other relevant arenas pursuant to the contract), for instance correcting information informally in a meeting without making sure to correct it in the relevant places (typically in a data room). A provision to this effect may therefore effectively set aside Section 20 of the Norwegian Sale of Goods Act which concerns information the buyer knew or could not have been unaware of.

In the above, there are references to the background law, in particular the Norwegian Sale of Goods Act. In the vast majority of share purchase

agreements and business combination agreements, the parties have inserted a so called entire agreement clause which endeavours to set aside rights and obligations in the background law which the parties have not inserted into the agreement itself. Under Norwegian law, the parties cannot entirely rely on such clauses as Norwegian courts tend not to accept that mandatory (and fundamental) principles in Norwegian contract law, as for instance the duty of loyalty between contractual parties as well as Section 36 of the Norwegian Contract Act, are completely ruled out by the agreement of the parties. The same may apply for circumstances not regulated on the agreement. That being said, Norwegian courts have in recent years expressly stated, in particular regarding contracts between professional parties and business contracts, that substantial weight will be assigned to the wording, leaving less room for reasonableness.

3. Remedies

If there is a breach of any of the warranties or representations, a typical M&A contract has a sole remedy clause, namely compensation. If this is the case, the buyer cannot terminate the agreement and instead must seek a payment for damages from the seller.

Pursuant to Section 40 of the Norwegian Sale of Goods Act, the buyer may claim damages for the loss he sustains as a consequence of the breach of a warranty or representation. The buyer is entitled to compensation that puts her in the same situation she would have been in if she had received correct and/or complete information.

With regards to historic losses, the calculation of the claim is pretty straight forward. For instance if the tax authorities claim payment of additional taxes for a tax year subsequent to closing of the relevant M&A contract because the business had not correctly filed a tax return prior to closing, the damage shall be calculated as to the cost of fixing the problem, i.e. payment of the additional tax bill with interest incurred, if any.

The challenge is future losses – how to calculate the reduction of expected future revenue streams and in particular its implication for the purchase price? If it can be established (and proven) that the buyer would only have agreed to buy the business for a lower price if correct or complete information had been provided, the buyer is entitled to damages for the difference. Difficult questions are raised in this regard, see section 4 below.

Under Norwegian law, you will also find the concept of price reduction as a particular remedy. Pursuant to Section 38 of the Norwegian Sale of Goods Act, a price reduction shall reflect to the ratio between the value with or without the contractual breach. Thus, the target of the contract – the business – will have to be valued. The price paid will normally reflect the market price without the contractual breach. The challenge is to find the market price with the contractual breach, for instance when the obtainable EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) is lower than what has been presented in an information memorandum or can reasonably be derived from other relevant material. The effect of the price reduction rule is that if the buyer has paid a premium, she will get a greater price reduction, while if she has bought the goods with a rebate, the price reduction will be less.

4. Calculation of damages

Calculation of damages is particularly challenging for future losses. If the contractual breach concerns increased cost or reduced earnings for the business, this may in turn impact the total value of the company. For example if the EBITDA for the last year has been overstated due to a mistake in the revenue recognition of the business, the buyer may have paid a higher price for the business than if correct information about the EBITDA had been provided. This only applies, however, if that particular

EBITDA was significant when the buyer calculated the offer to the seller and played a role in the negotiations.

Under Norwegian law a subjective approach is applied when damages are calculated: the actual situation shall be compared to a hypothetical – what would have been the outcome if the seller had not breached any representations or warranties. In M&A disputes, the relevant task is often to find the price for the business the parties had arrived at if the seller had disclosed and revealed complete and correct information in the first place. This is also the situation in other jurisdictions. In Lion Nathan Ltd. and Others v. CC Bottlers Ltd. and others [1996] 1 WLR 1438, a company was sold with a warranty that the sales figures would meet projected earnings. The purchaser successfully complained after the event that the figures were false and misleading. The proper measure of damages was at the level of what properly calculated projected earnings would have been.

This leads to the issue of burden of proof. The buyer needs to substantiate how the buyer arrived at the particular price. If the buyer in fact took the EBITDA and simply multiplied it by a relevant multiple, then the calculation of damages in principle may follow the same simple calculation. In practice, however, it never is as simple as that. Typically, various valuation methods have been applied and it may not be a single answer to the question of what impact a breach of warranty or representation may have had on the investment case. In addition, normally there are also other factors playing a role when reaching a price. For instance, a premium is often paid to obtain a strategic value and this premium does not disappear even if the relevant EBITDA is lower. This is also the case in other jurisdictions. In Senate Electrical v. STC, [1998] EWCA Civ 3534, where damages were to be awarded for breach of warranty on sale of goodwill, an assessment according to a price earnings ratio was appropriate only if used in the contract or agreed as appropriate based on the evidence. Accordingly, the buyer has the burden of proving that the level of damages claimed corresponds with what would have been the case if correct and complete information had been received from the outset.

In some cases, the buyer claims damages based on the agreed price divided by the incorrect EBITDA to arrive at an implied EBITDA multiple which then is multiplied by the correct EBITDA number. Unless this was in fact how the buyer arrived at the price, this simple calculation does not meet the burden of proof.

The calculation can be even more complex in business combination agreements where relative shareholding may be based on the agreed value of the two businesses to be combined. If it is later uncovered that the relevant numbers on which the valuation has been based are misstated, it may in practice be relevant to base loss calculation on the average EBITDA the parties applied in their negotiations. Typically, when calculating the average EBITDA an arbitral tribunal will take into account some of the previous years, the budget for the coming year and maybe projection for some future years, but not earnings in their entirety. In other words, the calculation will, to the extent possible, endeavour to mimic the parties negotiation, behaviour and agreed price by applying correct and complete information.

5. Methods of valuation

Valuation of businesses are often at the centre stage in post M&A disputes. Under Norwegian law, there are no absolute rules about the evidence that is admissible to establish the value of shares (or businesses as the case may be) and there is no absolute obligation to prove the value of shares by reference to a market valuation by experts. For instance, under Norwegian company law, redemption of shares, typically from a minority, triggers issues of valuation of the limited company. The norm is to find the true value of the shares. In relevant case law, various methods are deemed relevant by Norwegian courts and often a combination of several methods is applied. Consequently, familiar methods such as:

- net present value/discounted cash flow (the difference between the present value of cash inflows and the present value of cash outflows over a period of time),
- the intrinsic value (the perceived or calculated value of a company, including tangible and intangible factors, using fundamental analysis),
- the price-earnings ratio (P/E ratio) is the ratio for valuing a company that measures its current share price relative to its per-share earnings) and
- the application of relevant multiples

may be applied and references can be found in case law.

Because methods of valuation are at the core of the dispute, the parties provide expert witness statements. These are typically auditors or financial consultants. It is common in Norwegian arbitration to have party appointed experts. Rarely, in particular in post M&A disputes, will the arbitral tribunal appoints its own expert.

As valuation is relevant, not only in post M&A disputes, but also in matters regarding company law or tort law, Norwegian arbitrators and judges are familiar with the basic principles of valuation. Thus, parties choosing Norwegian arbitration as their dispute resolution mechanism can be confident that competent arbitrators will ultimately decide their disputes.

Nordic arbitration – the initiative and rules

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1. The birth of NOMA and Nordic arbitration

On 27 November 2017, the *Nordic Offshore and Maritime Arbitration Association* (NOMA) was incorporated. For all the participants in the Nordic working group, including myself[2], this was truly a red-letter day.

The idea was planted by Geir Gustavsson of BA-HR at the Nordic maritime law seminar in Sweden in August 2014, when he asked: Why cannot the Nordic countries, with their common legal tradition and maritime acts, establish a Nordic arbitration institute for maritime disputes?[3]

The answer, after three and a half years of hard work, luckily was: Yes, we can!

The birth of NOMA and Nordic Arbitration did not reach TradeWinds, nor any other papers. However, the Shipowners' associations in Norway and Denmark expressed satisfaction that a new alternative for settling maritime claims had been established. Danish Shipping said this on its homepage 29 November 2017[4]:

> *"Yesterday was a day of celebration for joint Nordic shipping collaboration. Danish forces have been working to establish Nordic arbitration for a while, and now the work bears fruit."*

The Norwegian Shipowners Association followed up on 12 December 2017[5]:

> *"A new Nordic arbitration institute tasked with settling offshore and maritime disputes has been established. 'It is very gratifying and will be welcomed by Norwegian shipping companies and other maritime businesses' […]"*

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2 The author participated as one of several Norwegian representatives in the Nordic working group that developed NOMA Rules and Best Practice Guidelines

3 MarIus 450

4 https://www.danishshipping.dk/presse/nyheder/nordisk-voldgiftsinstitut-sat-i-soeen/

5 https://rederi.no/aktuelt/2017/nytt-nordisk-voldgiftsinstitutt--noma/

Quite a few newsletters and articles have been written since. Links to these can be found on NOMA's website: nordicarbitration.org. However, the greatest achievement for NOMA since its inception is that the Nordic Marine Insurance Plan incorporated Nordic Arbitration into its arbitration clause in the 2019 Version of the plan.[6]

In the following, I will first address the question of why a *Nordic* Arbitration institute was established. Secondly, I will give a brief overview of NOMA's organisation and its board of directors, before providing a short overview of NOMA's Rules and Best Practice Guidelines.

2. Why a Nordic Arbitration Institute?

Each of the Nordic countries already have arbitration institutes, so the question which begs an answer is: Why a *Nordic* Arbitration Institute?

The first reason for establishing a Nordic Arbitration Institute was to preserve and codify the Nordic arbitration culture.

In the Nordic countries, and especially in Norway, ad-hoc arbitration has historically been the dominant choice in the maritime and offshore industry.[7] Seen from within, Norwegian/Nordic ad-hoc arbitration is based on long traditions and works well, and provides a flexible and pragmatic approach to the dispute at hand.

However, seen from "the outside", Norwegian/Nordic ad-hoc arbitration has been regarded as a black box. To "remove" this black box, it was important to introduce transparent rules and best practice guidelines that captured the Nordic way of conducting arbitrations.

Secondly, it is known that enforcement of ad-hoc arbitration awards can be difficult in some jurisdictions, compared to awards based on institutional rules. China is one example. It was thus a goal from the outset that Nordic Arbitration was going to be institutional arbitration,

6 Clause 1-4B, http://www.nordicplan.org/The-Plan/

7 E.g. NTK 15 cl. 38 and Skip 2000 art. XIX

but with as few "institutional elements" as possible. The solution, in short, is as follows:

a) there are no fees for using NOMA,
b) there is no administrative follow up of the process from NOMA – it is still led by the appointed panel, but
c) NOMA has the power to act in some situations upon the parties' request. The main situations where it can be relevant with involvement from NOMA, are:
    a. Appointment of arbitrators if the parties do not meet their obligations to appoint[8]
    b. Removal of arbitrators if he or she is unavailable[9], and
    c. "censoring" of the arbitration award if one of the parties is discontent with the legal costs ruling[10].

The third reason for establishing a Nordic Arbitration Institute was to establish a platform for making Nordic arbitration more attractive internationally.

Individually, the Nordic countries are small players on the international arbitration market. The "Nordics" is a much more powerful unit. With a Nordic platform that offers transparent, pragmatic and cost effective dispute resolution – the hope is to be able to compete with for instance the LMAA[11] in the long run.

In the well-known Queen Mary survey from 2018 regarding international arbitration[12], the respondents answered that the two worst characteristics of international arbitration are "Costs" (high costs) and "Lack of effective sanctions during the arbitral process" (another word for the "due process paranoia" of the tribunal). In fourth place, the survey respondents put "Lack of Speed". If Nordic Arbitration delivers on its

8 NOMA Rules Art. 6, 7 and 8

9 NOMA Rules Art. 7 and 11

10 NOMA Rules Art. 36

11 The London Maritime Arbitrators Association, see http://www.lmaa.london/

12 2018 International Arbitration Survey: The Evolution of International Arbitration, see http://www.arbitration.qmul.ac.uk/research/2018/

selling points, there should be room for attracting more arbitration cases on a general level.

An encouraging fact is the number of global maritime references to London each year – almost 1700[13]. We know that many players in the maritime market have expressed being discontent with London arbitration due to high costs and slow speed. If we are able to attract only a small percentage of this market, it will benefit the Nordic arbitration community. Due to "Brexit", the time for attacking the London market may never have been better. Even if the outcome of the "Brexit" process is uncertain, this uncertainty was one of the reasons why the revision committee of the Nordic Plan chose Nordic Arbitration in the 2019 version[14].

3. The organization of NOMA

We then turn to the organization of NOMA. The institute is organized as an association (Nw. 'forening') incorporated in Norway. The association has four members: the local maritime law associations of Denmark, Sweden and Finland, and a Norwegian foundation registered in Bergen.

These four members in turn have local members. In Norway, local membership is organized through a council (Nw. 'råd'). The Norwegian market's support of and interest to take part in the development of Nordic Arbitration has been fantastic. At the time of writing, eighteen Norwegian law firms have become members of the council[15], paid a fee to provide some start-up capital for NOMA, and joined one of the four working

[13] Homan Fenwick Willian: Shipping Insight: Who Rules the Waves, March 2018

[14] See the Commentary to the Nordic Plan Cl. 1-4B

[15] Arntzen De Besche, Grette, Haavind, Nordisk, Sands, Selmer, Simonsen VogtWiig, BAHR, Schjødt, Thommessen, Wiersholm, Wikborg Rein, Kluge, Kvale, CLP, Ræder, DLA Piper and Glittertind.

groups[16] set up to develop Nordic Arbitration. The door is, of course, still open to any other law firms that want to participate.

NOMA is led by a board of directors where Denmark and Norway each have four members, and Sweden and Finland each have two.

One important factor in Nordic Arbitration's quick success is the excellent board of NOMA that was established in June 2018. That NOMA has attracted former Norwegian chief justice Tore Schei and active Supreme Court justices from Sweden and Denmark, in addition to highly regarded professors like Trine-Lise Wilhelmsen at the Scandinavian Institute of Maritime Law, give Nordic Arbitration a legitimacy that the working group could only have dreamed of when starting this project.

4. Overivew of The NOMA Rules and Best practice guidelines

Finally, I will make some overall remarks regarding the NOMA Rules and Best Practice Guidelines.

The NOMA Rules are based on the UNCITRAL arbitration rules, and have only been changed when deemed necessary to capture the Nordic way of conducting arbitrations.

The Rules are intended to be used together with NOMA's Best Practice Guidelines. To this end, Rules' preamble refers to the Guidelines: "*The Tribunal and the Parties shall perform the arbitration proceedings taking into account the Best Practice Guidelines.*"

Similarly, the Best Practice Guidelines cl. 1.1 state that the arbitral tribunal shall "*take these Guidelines into consideration when exercising its*

[16] "Nordic Arbitration Mediation Guidelines", "Nordic Arbitration Small and Medium Claims Guidelines", "Nordic Arbitration electronic case management systems (and financing of NOMA)" & "Nordic Arbitration knowledge management and sharing of knowledge"

discretion." Thus, the arbitral tribunal is not bound by the Best Practice Guidelines, but deviating solutions must be well founded and explained.

The Best Practice Guidelines consist of three parts:

Firstly, the guidelines are a detailed codification of how a Nordic arbitration is normally conducted. There is a big overlap between the Rules and the Best Practice Guidelines. This is intentional to enable the guidelines to be a stand-alone document that may be agreed as basis in any arbitration. One of the success factors for Nordic Arbitration is that the NOMA Best Practice Guidelines can be used "ad hoc" in any arbitration. We have already seen several arbitrations where this has been done.

Secondly, the guidelines include an Appendix 1 – which is a Case Management Conference Matrix (CMC-matrix). This is a document designed to assist the arbitral tribunal and the parties in making sure that all details are handled in the first Case Management Conference. It also contains some practical tip based on experience.

Thirdly, Appendix 2 sets out in more detail the NOMA Rules on the Taking of Evidence. These rules are based on the IBA Rules on the Taking of Evidence in International Arbitration[17], but have been adapted on some points to reflect the Nordic tradition. This means that sources of law related to the IBA Rules may be relevant for the interpretation and understanding of NOMA's Rules on the taking of evidence. Due to this, there has been comments and questions from users on whether the Best Practice Guidelines reflect the Nordic tradition of disclosing documents – or whether they are more strict.

Luckily, NOMA has an excellent board of directors that has picked up on this, ref. information to the market on 6 December 2018[18]. In my view, this diligent and proactive approach by the board safeguards and secures that this one-year old arbitration institute will grow up, and become a sound and strong player in international arbitration.

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[17] https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC

[18] See nordicarbitration.org

Choice of Forum in the Nordic Marine Insurance Plan

– Regulation and Practice[1]

Trine-Lise Wilhelmsen[2]

[1] The article is the basis for a lecture given at Norwegian Arbitration Day, 1 January 2019.

[2] Professor, University of Oslo, Scandinavian institute of maritime law at the Faculty of Law.

1. Introduction and overview

The topic of this article is the regulation of choice of forum in the Nordic Marine Insurance Plan of 2013 (NP)[3] and the use of arbitration as a method of dispute solution in the marine insurance market.

The NP is a Nordic marine insurance contract containing insurance conditions for vessels and covering all relevant types of insurance, except for P&I[4] insurance. The NP covers hull, loss of hire, war and builders risk insurance, and also contains special clauses for offshore installations and fishing vessels. The NP was launched in 2013,[5] based on the previous Norwegian Marine Insurance Plan of 1996, Version 2010 (NMIP).[6] The earlier NMIP contained a jurisdiction and choice of law clause in § 1-4, which referred disputes to the courts in the venue where the Norwegian leading insurer's[7] head office was located. The clause was upheld with the introduction of the NP in 2013, apart from a change from "Norwegian" claims leader to "Nordic" claims leader, and from "Norwegian" venue to "Nordic" venue. There was no jurisdiction clause for insurance contracted with a non-Nordic claims leader.

Although the NP has until now referred disputes to the ordinary court system, many disputes have been decided by arbitration. Section 2 of this article analyzes the use of arbitration vs. the ordinary court system as a forum in marine insurance disputes, while Section 3 analyzes the role of arbitration awards in marine insurance, based on NMIP/NP conditions.

The NP 2013 was amended in 2019, and the new version includes an arbitration clause. The purpose of the amendment of forum was first and foremost to resolve the situation where there was a non-Nordic claims leader, and where the previous NP had no relevant regulation. However,

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3 http://nordicplan.org/The-Plan/.

4 "Protection and indemnity", which is liability insurance for vessels.

5 http://nordicplan.org/Archive/The-Nordic-Marine-Insurance-Plan-of-2013/.

6 http://nordicplan.org/Documents/Archive/Plan-2010/Norwegian%20Plan%20of%201996,%20Version%202010%20-%20English.pdf.

7 The leading insurer is the insurer acting on behalf of several co-insurers, according to the regulation given in NP ch. 9.

arbitration as forum may of course also be agreed for Nordic claims leaders. The new regulation is presented in Section 4 below.

2. Arbitration versus court

2.1 The number of arbitration cases in marine insurance

It is not possible to give an exact figure for the number of arbitration cases in Nordic marine insurance. However, a good illustration of the number and the relationship between arbitration and court as chosen forum can be made by looking at cases referred to in the main text books on hull and loss of hire insurance, based on the NMIP/NP. As the NP is based on the previous MNIP, the references are mainly to Norwegian cases.

It appears that the use of arbitration in hull insurance began in around 1940. In Håndbok i kaskoforsikring by Sjur Brækhus and Alex Rein from 1993, the authors refer to judgments from 1908, but according to the table of judgments the first arbitration decision referred to is from 1939.[8] A separate arbitration court was established during the Second World War to decide on the distinction between war perils and marine perils (VKS)[9], and 34 of the cases from this court are referred to in the book. In addition to this, Brækhus (1993) refers to 5 ordinary arbitration cases between 1940 and 1950. For the period from 1950 to 1991 the book refers to 17 published arbitration cases. This means that the book cites a

[8] Brækhus, Sjur and Rein, Alex. *Håndbok i kaskoforsikring*, Oslo: Bergens Skibsassuranseforening et al., 1993, Table of cases on p. 645, ND 1941 p. 168 NV (Bims).

[9] VKS was established with reference to NMIP 1930 § 34 nr. 2 second paragraph, which stated that attribution of liability between the war risk insurer and the marine risk insurer should be decided by arbitration according to Lov 13. august 1915 nr. 6 om rettergangsmåten for tvistemål ch. 32, cf. Nilsson, Rud. *Grænsetilfælde mellem sø- og krigsforsikring*, Copenhagen: Andr. Fred. Høst og Søn, 1945, Preface.

total of 56 published arbitration cases. The total number of Nordic cases referred to is ca. 210. The book also refers to 6 unpublished cases.

The newer and English version of Handbook on Hull Insurance cites in total 58 published court cases, of which 14 are arbitration cases.[10]

A text book on loss of hire insurance by Haakon Stang Lund refers to 10 cases, of which 3 are arbitration cases.[11]

Around 25 % of the cases mentioned are therefore arbitration awards. Although the main bulk of cases are court cases, it appears that arbitration also plays a significant role.

2.2 Why arbitration

There are many reasons to choose arbitration to solve a dispute. A famous Norwegian arbitration judge, Sjur Brækhus, listed the following 5 reasons: 1. Expertise, 2. Time efficiency, 3. Confidentiality, 4. Cost efficiency, 5. Internationality.[12]

In relation to marine insurance, expertise may be an important motive for choosing arbitration. Insurance in general, and marine insurance, in particular, is a highly complicated and technical topic. This is particularly relevant in Norway. Even if insurance is classified as special contract law, there are few connecting lines between general contract law and insurance/marine insurance. It is typical of this that the two main books in Norway on general contract law/law of obligations[13] do not list insurance in their index and the third[14] only has two references.

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10 Wilhelmsen, Trine-Lise and Bull, Hans Jacob. *Handbook on Hull Insurance*, 2nd ed., Oslo: Gyldendal Juridisk, 2017, Table on judgements and rulings, pp. 404–405.

11 Lund, Haakon Stang. *Handbook on Loss of Hire Insurance*, 2nd ed., Oslo: Gyldendal akademisk, 2008, Table of cases on p. 161.

12 Brækhus, Sjur. «Voldgiftspraksis som rettskilde», *Den urett som ikke rammer deg selv. Festskrift til Anders Bratholm*, Oslo: Universitetsforl., 1990, p. 451 ff. See also Falkanger, Thor, Bull, Hans Jacob and Brautaset, Lasse. *Scandinavian Maritime Law: the Norwegian Perspective*, 4th ed., Oslo: Universitetsforl., 2017, p. 44.

13 Hagstrøm, Viggo. *Obligasjonsrett*, 2nd ed., Oslo: Universitetsforl., 2011 and Hov, Jo and Høgberg, Alf Petter. *Obligasjonsrett*, 2nd ed., Oslo: Universitetsforl., 2016.

14 Lilleholt, Kaare. *Kontraktsrett og obligasjonsrett*, Oslo: Cappelen Damm akademisk, 2017, Index on p. 699.

The explanation for this is that the services provided in the insurance contract are different from most other services and that the regulation of both the negotiation of the contract and breach of contract also departs from, for example, purchase contracts. Insurance and marine insurance are selective topics under the Master of Law education at the University of Oslo, and the mandatory topic of contract law gives a limited basis for understanding insurance contracts. It is therefore not to be expected that the ordinary court system shall have the necessary expertise to handle insurance claims. It is also difficult to build up such competence in the ordinary court system. For land based insurance claims, the organizations in the insurance sector have established a Complaint Board system, with departments for personal insurance and casualty insurance.[15] The result of this system is that very few cases are tried before the court. This also means that the courts do not gain much experience on insurance law.

The position is different in Finland and Sweden. Under Finnish[16] and Swedish law[17] any disputes under marine insurance contracts must be placed before the official Finnish/Swedish adjuster, before the matter can be brought before a Finnish/Swedish court. Thus, in such disputes which are governed by Finnish/Swedish law, the official adjuster will be mandatory at first instance. As the adjuster is an expert on marine insurance law and settlements, expertise in the first instance is secured.

Under the 2019 NP amendment, it was agreed that expertise was an important argument for choosing arbitration, in particular for Norway and Denmark. The committee discussed whether the new arbitration clause should apply to fishing vessels where the ordinary court system

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15 Cf. further Bull, Hans Jacob. *Forsikringsrett*, Oslo: Universitetsforl., 2008, p. 47 ff. and Wilhelmsen, Trine-Lise and Hagland, Birgitte. *Om erstatningsrett: med utgangspunkt i tekster av Peter Lødrup*, Oslo: Gyldendal Juridisk, 2018, pp. 35–36.

16 Section 1 of the Finnish Act of 16. January 1953 relating to official adjusters and the Regulation of 6. March 1936 relating to the activities of the adjusters, see also Commentary to the Nordic Marine Insurance Plan of 2013 – Version 2019 (2019) p. 24 ff. to Cl. 1-4 and p. 188, http://nordicplan.org/Documents/Nordic%20Plan%202013/Commentary%20to%20the%20Nordic%20Marine%20Insurance%20Plan%20of%202013%20-%20Version%202019.pdf.

17 The Swedish Maritime Code (1994:1009) Chapter 17, Section 9 and Swedish Administration of Justice Act, Chapter 10, Section 17, cf. Commentary (2019) p. 188.

may offer a less costly alternative, at least if a decision from a lower court is accepted. It was, however, argued that the quality of these decisions varied and that arbitration should therefore be included as an alternative.

The question of expertise is connected to the time efficiency of court proceedings. In general, greater trust is placed in higher courts than in lower courts. If the case is tried in a lower court with little expertise in insurance matters, the losing party will often want to appeal. Arbitration is a one instance procedure where the decision is binding unless there are reasons for claiming that the decision is not valid.[18] In the ordinary court system there are three instances, and it takes a lot of time to go through all of them in order to get a binding decision.

Time efficiency will normally also result in cost efficiency, but this will depend on the cost of the arbitration panel. This was a key issue with regard to the new regulation in NP Version 2019. As mentioned above, Sweden and Finland have mandatory first instance treatment before the official average adjuster.[19]The Swedish and Finnish ship owners therefore did not want a general arbitration clause, because they wanted to keep the system with the average adjuster for cost reasons.

The international character of the dispute may also provide a motive for arbitration. It should be noted that the companies organized under the Nordic Association of Marine Insurers (Cefor) in the period between 2012 and 2017 have insured 35.2 % of the world fleet. This share has been gradually expanding since 1987.[20] 38 % of this fleet is insured on NP conditions.[21] There are no statistics on the number of contracts with non-Nordic assureds, co-insurers or claims-leaders, but the NP is increasingly popular in the world market. In such contracts, the reference to the Nordic court system is not always convenient.

This was also a central issue in the NP discussions, illustrated by the fact that the arbitration clause as a starting point only applies to non-Nor-

18 Falkanger (2017) pp. 44–45.

19 Commentary (2019) p. 26.

20 Cefor. *2017 Annual Report* (2017) p. 32, https://cefor.no/globalassets/documents/about-cefor/annual-report/cefor-annual-report-2017.pdf.

21 Cefor (2017) p. 31.

dic claims leaders. As mentioned, the jurisdiction issue for non-Nordic claims leaders were not regulated until 2019. The market therefore felt it was necessary to regulate jurisdiction in this situation.[22] Furthermore, the NP is also used internationally with non-Nordic assureds and co-insurers. In such situations, it is an advantage to have a standard arbitration clause that the parties can fall back on if they are not comfortable with referring disputes to the venue of a Nordic claims-leader.

The Brexit situation adds an additional complication to the international picture today, as it has created some uncertainty on the regulation on court jurisdiction and recognition and enforcement of judgments after Brexit.[23] The EU legislation on court jurisdiction and the recognition and enforcement of judgments in civil and commercial law is based on the revised Brussels I Regulation of 2012,[24] which is also applicable for Norway and Denmark through the Lugano Convention of 2007.[25] The UK is, however, not a signatory party to the Lugano Convention. Several EU States claimed that the Convention should be entered into as a "mixed agreement" with both EU and the member States as parties, but the EU Court of Justice rejected this approach.[26] It is thus uncertain to what extent agreements on jurisdiction will be respected in the UK, where there is a risk of parallel processes in the UK and an EU/EFTA State. It is, in addition, uncertain as to whether an English court decision will be recognized and enforced in the EU/EFTA States. It is also unclear what the legal basis for addressing this issue will be, once the UK is outside the scope of Brussel I Regulation and the Lugano Convention of 2007.

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22 Commentary (2019) pp. 24–25.

23 See to the following Commentary (2019) p. 25 and Fredriksen, Halvard Haukeland. "Brexit", *Tidsskrift for forretningsjus*, no. 1 (2016), pp. 3–9.

24 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Brussels I Regulation], https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215&from=EN.

25 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 and published in the Official Journal on 21 December 2007 (L339/3) [Lugano Convention of 2007].

26 Fredriksen (2016) p. 3.

This is primarily a problem when the insurance is effected with non-Nordic claims leaders, for whom jurisdiction in UK often is a natural choice, and it is uncertain to what extent an English court decision will be recognized and enforced in the EU and EFTA countries. This was one of the main reasons why the NP Version 2019 Cl. 1-4A sub-clause 2, cf. Cl. 1-4B refers disputes with non-Nordic claims leaders to arbitration, where recognition and enforcement is based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[27]

The Committee noted "that this may also be a problem for Nordic claims leaders in cases where there are co-insurers domiciled in UK, and the question will be enforcement of Nordic judgments against such co-insurers,"[28] but even so the Committee decided to keep ordinary court proceedings as the default rule in this situation.

The least relevant motive in marine insurance appears to be confidentiality. Confidentiality may be important for cases involving intellectual property and similar areas,[29] but this appears not to be an issue in marine insurance. It was not much discussed under the NP amendment, apart from pointing out the importance of publication of awards for future use as a legal source. The starting point, according to the Norwegian Arbitration Act § 5, is that the arbitration award is not confidential unless agreed,[30] and publication is generally a condition for it to have significance as a legal source. In particular, because the marine insurance expertise is limited and highly qualified lawyers are normally chosen as arbitration judges, it is important for the development of the contract that the awards are not made confidential. Confidentiality is therefore contradictory to

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27 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958 [New York Convention], https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf, cf. Commentary (2019) p. 25.

28 Commentary (2019) p. 25.

29 See on this issue in particular; Kaasen, Knut. "Voldgift og publisitet", *Tidsskrift for forretningsjus*, no. 2 (2016), pp. 139–151.

30 The Swedish and Danish Arbitration Acts do not contain a similar rule, cf. Lag om skiljeförfarande (1999:116) and Danish Act no. 553 of 24. June 2005 on Arbitration.

the way arbitration awards have been used in marine insurance text books and also to their use in the development of the NP, cf. below.

3. The role of arbitration awards in marine insurance

3.1 Some starting points

The general starting point in Norwegian legal methodology is that arbitration awards have little significance as a legal argument for interpretation.[31] It is however acknowledged that their significance can be substantial in areas regulated by standard agreements that include an arbitration clause. Examples given are shipbuilding contracts,[32] and to some extent onshore building contracts.[33]

The reference to shipbuilding contracts reflects the fact that arbitration in general is often used to resolve maritime law disputes. There are several reasons for this. First, it is often agreed, either before or after a dispute has arisen, that conflicts should be resolved through arbitration.[34] Second, many of the arbitration awards are published in "Nordiske Domme i Sjøfartsanliggende" (ND) (i.e. Scandinavian Maritime Decisions, published by Nordisk Defence Club).[35] This means that arbitration awards, similarly to ordinary court decisions, are published, and therefore easily accessible for future reference. Third, arbitration awards are frequently referred

[31] Eckhoff, Torstein. *Rettskildelære*, 5th ed. by Jan E. Helgesen, Oslo: Universitetsforl., 2001, p. 163.

[32] Eckhoff (2001) p. 163 and Brækhus, Sjur. "Rettslige problemer ved bygging av skip – belyst ved nyere voldgiftspraksis», *MarIus,* no. 54 (1980) pp. 1–23.

[33] Eckhoff (2001) p. 163 and Hagstrøm, Viggo and Bruserud, Hermann *Entrepriserett*, Oslo: Universitetsforl., 2014, p. 28.

[34] Falkanger (2017) pp. 35 and 43–44.

[35] Falkanger (2017) p. 35.

to in the text books on maritime law and marine insurance.[36] Brækhus argues that published arbitration practice should be given similar weight as judgments from the lower courts, that is to say, the city courts and appeal courts.[37]

In marine insurance regulated by the NP, it may however be argued that some arbitration awards have a much higher status. This is the case, even though there was no arbitration clause in the NP before 2019. The reason for this is the position of the Commentary and the extensive references in the Commentary to such awards. In rare cases, arbitration awards directly influence changes in the NP's wording. However, such awards are normally used to explain the interpretation of the wording. In the following, the position of the Commentary, as well as the significance of arbitration awards in supporting and defining this position is explained in 3.2. An example of direct influence from arbitration awards into the wording is given in 3.3, while examples of references to arbitration awards in the interpretation are provided in 3.4.

3.2 The position of the Commentary to the Nordic Plan

The NP is an agreed document based on more than 150 years of tradition and supplemented by an extensive published Commentary. The Plan and Commentary are continuously developed through a systematic negotiation process that takes place every third year.[38] The method of construction is more similar to legislation than to ordinary contracts, and the Commentary may be compared to preparatory documents to legislation. Norwegian preparatory documents are given significant weight as a legal source for interpretation of legislation.[39] Based on a comparison between the processes, it can be argued that similar weight

[36] See table of cases in Falkanger (2017) p. 703 ff., Brækhus (1993) p. 645 ff., Wilhelmsen (2017) pp. 404–405 and Stang Lund (2008) p. 161.

[37] Brækhus (1990) p. 459.

[38] See further Wilhelmsen (2017) p. 26 ff.

[39] Eckhoff (2001) p. 65 ff.

should be given to the Commentary.[40] This view is supported by the following remark in the Commentary itself:[41]

> "The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. … Nevertheless the Commentary shall still carry more weight as a legal source than is normally the case with the Traveau Preparatoire of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Nordic Revision Committee, and it must therefore be regarded as an integral component of the standard contract which the Plan constitutes".

The attitude stated in the Commentary has been accepted by the Norwegian Supreme Court.[42] This means that if the Commentary refers to arbitration cases for the interpretation of the conditions in the NP, the arbitration award is given the same weight as the Commentary itself, because the Plan Committee supports the award.

Another important element in giving the Commentary significance is that if the wording of a clause has caused interpretation problems when applied in practice, the Plan Committee has tried to solve this by providing explanations to the commentary, without changing its wording.[43] This approach may even result in an extension of the cover compared to the previous interpretation of the commentary, without any change in its wording. The approach was accepted in ND 2000 p. 442 NA (*Sitakathrine*):

> In this case, the question was whether *Sitakathrine's* liability for damage to the towage vessel *Bayan* was covered by *Sitakathrine*'s hull- or P&I-insurance. The hull insurer is according to Cl. 13-1 sub-clause 1 liable for "loss which is a result of liability imposed on

40 Brækhus (1993) p. 8 and Wilhelmsen (2017) p. 27.

41 Commentary (2019) p. 25 to Cl. 1-4.

42 ND 1998 p. 216 NSC (*Ocean Blessing*), ND 1990 p. 194 NSC (*Brødrenes Prøve),* ND 1969 p. 126 NSC (*Grethe Solheim*), ND 1956 p. 920 NSC (*Bandeirante*), ND 1956 p. 937 NSC (*Pan)*, cf. Wilhelmsen (2017) p. 27.

43 A list is given in the The Nordic Marine Insurance Plan of 2013 – Version 2016 (2016), Preface, http://archive.nordicplan.org/The-Plan/ and NP Version 2019, Preface.

> the assured due to collision or striking by the ship, its accessories, equipment or cargo, or by a tug used by the ship." The damage was sustained when *Sitakathrine* pulled *Bayan* so that *Bayan* was jammed between the towage and a port installation where a beam punctuated *Bayan's* side. The wording of Cl. 13-1 was identical to the wording in the previous NMIP 1964[44], but the Commentary was different. The hull insurer argued that the NMIP 1964 made a distinction between "striking" and "pulling" and that the hull insurer was not liable for damage caused by "pulling". Even though the Commentary stated that "To simplify matters between the hull insurer and the P&I insurer, however, the hull insurer should cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms",[45] this statement was too unclear and unscrutinised to be given any weight. The court concluded however, that the 1996 NMIP § 13-1 sub-clause 1, if read in light of comments in the Commentary, extended the scope of cover for the hull insurance compared to the 1964 NMIP and included damage to a towage vessel due to collision with a third party, even if this did not follow clearly from the wording of the clause.

In the later NP revision of 2003, this award was included in the Commentary to § 13-1 with the marked new words (the emphasis is provided in the NP and Commentary to signal new wording):[46]

> "To simplify matters between the hull insurer and the P&I insurer, however, the hull insurer **shall** cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms, **cf. ND 2000.442 NV SITAKATHRINE**. The wording "caused through collision or striking" must therefore also include liability for damage to the tug resulting from its collision with a third party."

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44 The Norwegian Marine Insurance Plan of 1964, http://www.nordicplan.org/Documents/Archive/Plan%201964/NMIP1964-eng.pdf.

45 Commentary to the Norwegian Marine Insurance Plan of 1996 – Version 1997 (1997), p. 203, http://nordicplan.org/Documents/Archive/Plan%201996/Commentary%20NMIP%201996%20-%20Version%201997.pdf.

46 Commentary to the Norwegian Marine Insurance Plan of 1996 -- Version 2003 (2003), p. 284, http://www.nordicplan.org/Documents/Archive/Plan-2003/PlanVer03EngMot(rev).pdf.

At this stage, the Committee only made a reference to the award. During the Nordic Plan amendment in 2013 however, the Committee found it necessary to provide a further explanation:[47]

> "The **Cl. 13-1** also includes the assured's liability towards the tug if the ship collides with it. **The** hull insurer shall, **therefore,** cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms. **In the 1996 version of the Commentary this intention was expressed in a way that caused practiconers to be unsure whether the previous practice really was to be abolished. Hence, the matter was tried before arbitrators,** cf. ND 2000.442 NV SITAKATHRINE. **The arbitrators decided unanimously that the Commentary in sufficiently clear terms bindingly determined that the previous practice should no longer be followed.** The wording "caused through collision or striking" means therefore **that the hull insurer shall also cover the insured vessel's** liability for damage to the tug resulting from its collision with a third party."

The process illustrates how new arbitration cases may be included in the Commentary in its next renewal after the award has been made, and are thus given significant weight in the future interpretation of the actual clause. It also means that the new explanation of the content of the wording in the Commentary is accepted, even if this departs from previous practice.

On the other hand, ND 1978 p. 139 NA *(Stolt Condor)* defined some limits to the relevance of the Commentary. The case concerned the concept of deliberation, according to the 1964 NMIP § 68.

> The arbitration judge states on p. 15 that the commentaries must be treated as binding for the interpretation to the extent that they concern specific solutions agreed upon by the Plan Committee, but which were difficult to incorporate in an express or precise manner in the text of the Plan. However, the commentaries cannot be inter-

[47] Commentary to the Nordic Marine Insurance Plan of 2013 – Version 2013 (2013), p. 306, http://www.nordicplan.org/Documents/Archive/Plan%202013/Commentary%20to%20the%20NMIP%20of%202013.pdf.

> preted in the same literal way if they concern more general reflections or interpretations. In such instances the commentaries can only be given weight to the extent that they seem persuasive to the person who is to make the interpretation. For instance, if the Commentary, when commenting upon a clause, instead of just repeating the text in the clause, refers to it by rewriting the clause, such rewriting cannot be interpreted as a legal text.[48]

3.3 Arbitration cases results in new wording in the Plan

Arbitration decisions may directly influence the development of the conditions set out in the Plan. A recent example is the amendment of the insurance for intervention by State power contained in the NP Version 2019. The regulation of State intervention in the previous NP was, in broad terms, that all State interventions were excluded from the insurance against marine perils in Cl. 2-8 (b), whereas "capture at sea, confiscation and other similar interventions by a foreign State power" were covered as a war risk peril by Cl. 2-9 sub-clause 1 (b). In the 2019 Version, the exclusion in Cl. 2-8 (b) is changed to "capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such intervention is made for the furtherance of an overriding national political objective", and the cover in Cl. 2-9 sub-clause 1 (b) is changed to "capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective". The condition "for the furtherance of an overriding national political objective" is based on four arbitration cases relating to the war risk cover for interventions by foreign State power under the NMIP 1964 and the NP 2013 Version 2016: the *Germa Lionel* award 11. June 1985 (unpublished), ND 1988 p. 275 NA (*Chemical Ruby*), a case that was settled (the *Wildrake* case), and ND 2016 p. 251 (*Sira*).[49]

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[48] Wilhelmsen (2017) pp. 28–29

[49] Commentary (2019) p. 58.

The interaction between the wording in the clause, the Commentary and arbitration awards is well illustrated by this process:

The starting point was the war risk cover for "capture at sea, condemnation in prize, confiscation, requisition for title or use and other similar measures taken by alien State authorities" in NMIP 1964 § 16 (b). There was no reference to political goals in the wording or Commentary, but the Commentary stated that interventions made to enforce police or customs regulations were outside the scope of the provision.[50]

This provision was interpreted in the *Germa Lionel* award 11. June 1985 (unpublished) and ND 1988 p. 275 NA (*Chemical Ruby*), where the court discussed the distinction between interventions to enforce police and customs regulation and interventions covered by NMIP 1964 § 16 (b). In *Germa Lionel*, the court found that the interventions went far beyond interventions as part of enforcing police and customs regulation.[51] In ND 1988 p. 275 NA (*Chemical Ruby*) the court stated that in order to be covered as a "similar intervention", the intervention must be motivated by an overriding political goal.[52]

In the *Wildrake* case,[53] the average adjuster discussed the concept of capture at sea, and found that the capture took place in a time of crisis, under war-like circumstances, and with a political goal. The capture, and the way in which it was performed, went far outside normal police and customs procedures and could therefore not be seen as an intervention for this purpose. The capture at sea therefore constituted a war peril.

Under the 1996 amendment to the NMIP, the wording of the war risk cover was basically upheld and the Commentary repeated that the cover for "other similar interventions" did not include interventions that were made as part of the enforcement of police and customs regulation.[54] The

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50 Commentary to the Norwegian Marine Insurance Plan of 1964 (1964), p. 19, http://www.nordicplan.org/Documents/Archive/Plan%201964/Plan1964Commentary.pdf.

51 Brækhus (1993) p. 74 and Wilhelmsen (2017) p. 97.

52 Brækhus (1993) pp. 74–75 and Wilhelmsen (2017) p. 97.

53 Brækhus (1993) p. 75 and Wilhelmsen (2017) p. 94.

54 Commentary to the Norwegian Marine Insurance Plan of 1996 – Version 1999 (1999) p. 30, http://www.nordicplan.org/Documents/Archive/Plan%201999/Commentary%20NMIP%201996,%20Version%201999%20-%20english.pdf.

Commentary thereafter discussed the difficult borderline that could arise and referred to the *Germa Lionel, Chemical Ruby* and *Wildrake* cases, as well as the discussion of these cases in Brækhus Rein.[55] It states that:

> "These decisions show that cover under the war-risk insurance is contingent on the shipowner being divested of the right of disposal of the ship, the authorities clearly exceeding the measures necessary in order to enforce police and customs legislation, and the intervention being motivated by overall political objectives."

The borderline between "measures necessary in order to enforce police and customs legislation", and the "intervention being motivated by overall political objectives", was then discussed in ND 2016 p. 251 (*Sira*).[56] This case concerned the vessel *Sira* which was detained in Lagos, Nigeria from 1. February to 31. March, and the question was whether this was covered by the war risk insurer. The arbitrator summarized the legal sources and concluded that (my translation):

> "For the intervention to be covered under the war risk insurance, the intervention must be made for the furtherance of overriding political goals. Such interventions are interventions typical for war and times of crises, and can often be explained by foreign policy considerations. The reason for the intervention may be a warranted or not warranted suspicion that the ship has breached rules to protect the security of the State involved. It is not decisive that the general political situation in the State involved has been contributory to the intervention.
>
> A State intervention which is tied to regulation or control of normal commerce and shipping is not covered by war risk insurance. Relevant interventions will first and foremost be tied to breach of or suspicion of breach of customs, currency, or police legislation. It is normally not decisive if such intervention due to its duration represents misuse of power. However, this can be different if the misuse of power takes the form of a regular police act or similar act, but in

[55] Commentary (1999) p. 30.

[56] Wilhelmsen (2017) pp. 98–99.

> reality is part of an action motivated primarily by overriding political objectives."

Most of the cases mentioned here, as well as the statements in the Commentary, concerned the expression "other similar interventions", but the *Sira* case held (obiter) that a similar requirement should also be applied for the specific interventions mentioned. The Plan Committee agreed that this was a natural solution, in particular because the cover under Cl. 2-8 (b) for interventions by own State power was widened substantially at the same time. However, to avoid uncertainty, this requirement is now expressed directly in the wording.

3.4 Arbitration Awards referred to in the Commentary as being relevant for its interpretation

The Commentary often refers to arbitration awards when explaining how certain clauses shall be interpreted. As a result of such reference, the award is given the same legal significance for the interpretation as the Commentary itself. Important cases are:

> According to Cl. 2-9 sub-clause 1 (c) the war risk insurance covers "sabotage", which according to the Commentary "presupposes that the action pursues a specific political, social or similar goal, see ND 1990.140 NV PETER WESSEL, where the court based its decision on the assumption that the costs of interrupting the ship's voyage etc. in connection with a bomb threat must be covered by the hull insurer against marine perils as costs of measures to avert or minimise the loss. The external circumstances of the threat clearly indicated that this was an act that had no background in political, social or similar circumstances".[57]

> Cl. 2-13 regulates combination of perils and states that if "the loss has been caused by a combination of different perils, and one or

[57] Commentary (2019) p. 60.

more of these perils are not covered by the insurance, the loss shall be apportioned over the individual perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss, and the insurer shall only be liable for that part of the loss which is attributable to the perils covered by the insurance". The Commentary here refers to case law concerning the rule of apportionment from 1930 until the revision of the NMIP in 1996 and how this is discussed in Brækhus, Sjur and Rein, Alex. Håndbok i kaskoforsikring (Handbook of Hull Insurance), Oslo: Bergens Skibsassuranseforening et al., 1993, pp. 262 et seq.[58] Brækhus (1993) analyses a vast number of cases, hereunder ca. 20 arbitration cases from the Second World War. The Commentary further states that "These criteria are still relevant" and refers in particular to ND 1942.360 VKS KARMØY II as an example of assigning a weight of 0% to one peril and a weight of 100% to another.[59] Further, the Commentary states that "If the loss is a result of a combination of two objective causes in a causal chain in the sense that a new cause interferes in the course of events after a casualty has occurred and results in a further loss, the first cause – i.e. the casualty – shall carry the most weight, cf. ND 1941.378 NV VESLEKARI…".[60]

Cl. 2-14 regulates the insurer's liability when there is a combination of marine perils and war perils, and states that the liability shall be attributed to the dominant cause. If none of the causes appears to be dominant, the loss shall be "deemed to have had equal influence on the occurrence and extent of the loss". The Commentary has the following comment on when to apply the first and second sentences respectively: "The use of the term "dominant cause" shows, however, that a relatively considerable predominance is required in order to characterize a peril as the "dominant cause". It is not sufficient to reach the conclusion – perhaps under doubt – that one peril is slightly more dominant than the other; it is precisely the arbitrary choice between two causes which carry approximately the same weight that should be avoided. On the other hand, a 60/40 apportionment should probably constitute the upper limit for an

58 Commentary (2019) p. 80 ff.
59 Commentary (2019) pp. 83–84.
60 Commentary (2019) p. 84.

equal distribution. If we get close to 66%, one of the groups of perils is after all considered twice as "heavy" as the other, cf. Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), pp. 269 et seq., which also reviews a number of judgments from World War II in relation to these guidelines".[61] In addition to several arbitration awards from the war, Brækhus (1993) includes two more recent arbitration awards, one being unpublished.[62]

Also, according to the Commentary, "an exception must, like the solution under the 1964 Plan, be made as regards the situation where there is a combination of several causes in a causal chain: as regards repair costs, only the perils that materialized before the casualty in question, and which have had a bearing on the physical damage sustained by the ship, shall be taken into consideration. By contrast, the increase in the cost of repairs caused by the war situation shall not be taken into consideration, regardless of whether the price increase was a fact at the time of the casualty or did not occur until later (cf. ND 1943.417 NV HAARFAGRE). Otherwise the war-risk insurer might be held liable to pay 50% of the repairs of a strictly marine casualty, provided that the increase in prices of repairs has been sufficient."[63]

Cl. 2-15 states that certain losses are deemed to be caused entirely by war perils, hereunder "loss arising when the vessel is damaged through the use of arms or other implements of war for war purposes". According to the Commentary, there "may sometimes be some doubt as to what constitutes an "implement of war", see, for example, ND 1946.225 NV ANNFIN (damage by collision with a submarine in action deemed to be "war damage" pursuant to the corresponding provision in Cl. 42 (2) of the 1930 Plan), ND 1944.33 NV VESTRA (damage caused by the paravane on the warship with which the ship collided, not deemed to be "war damage") and ND 1947.465 NV ROGALAND (damage resulting from the blowing up of explosives which another vessel was carrying to German fortifications, not deemed to be "war damage")."[64]

61 Commentary (2019) p. 86.

62 Award 30. June 1987 (*Nova – Magnum*) and ND 1989 p. 263 NV (*Scan Partner*).

63 Commentary (2019) p. 86.

64 Commentary (2019) pp. 87–88.

Cl. 4-7 regulates compensation of the costs of measures to avert or minimise loss. A major problem in applying these rules is distinguishing between the measures which are in the nature of measures to avert or minimise a loss for which the insurer is liable, and the measures which the assured must take for his own account as part of the general obligation to safeguard and preserve the object insured. The Commentary provides an outline of this distinction, and stateshereunder:

"(3) Only losses which the assured has suffered as a result of an intentional act by the assured or others will be recoverable as costs of measures to avert or minimise loss. ... However, at any rate for particular measures to avert or minimise loss, it must be sufficient that the intent comprises the actual action that caused the damage. It is thus not necessary that the person in question realized that the act entailed a risk of damage, nor that the intent comprised all or parts of the loss that occurred, cf. ND 1978.139 NV STOLT CONDOR and ND 1981.329 NV LINTIND."[65]

Cl. 10-1 sub-clause 1 defines the objects covered by hull insurance. Sub-clause 1 (a) and (b) distinguishes between "vessel", "equipment" and "spare parts". According to the Commentary, the "prerequisite for covering equipment and spare parts under the ship's hull insurance is nevertheless that they are normally on board, cf. the term "on board", which indicates that the object in question shall be on board for an indefinite or prolonged period of time. Objects brought on board while the ship is in port and taken ashore when the ship is leaving, such as a fork-lift truck to be used during loading and discharging, are therefore not covered whilst on board, cf. ND 1972.302 NV BALBLOM, notwithstanding the fact that the object is used only on board this one particular ship".[66] A similar reference to this award is made in regard to Cl. 10-2.[67]

Cl. 13-1 sub-clause 1 defines the hull insurer's liability for collision and striking, whereas exclusions are listed in sub-clause 2(a) – (h). Sub-clause 2 (h) excludes liability for loss caused by the vessel's use

65 Commentary (2019) p. 159.
66 Commentary (2019) p. 252.
67 Commentary (2019) p. 255.

of anchor, mooring lines, etc. If the casualty results partly in damage caused by striking which is covered, and partly in damage caused by the use of an object as mentioned in sub-clause 2 (h), the total damage must, according to the Commentary, be divided between the hull insurer and the P&I insurer. The Commentary further states that "If, however, striking damage is a direct result of the use of an object referred to in sub-clause 2 (h), the damage must be covered entirely by the P&I insurer, cf. ND 1976.263 NV MOSPRINCE/BIAKH.".[68] The Commentary also refers to this award in relation to the wording "by the ship's use of", and states that this "presupposes that the relevant object is used in accordance with its purpose. Mooring lines must be used to moor the ship, not e.g. to secure deck cargo. However, if the object has been used according to its purpose, it must be deemed to be in use from the time preparations for use commence and until the use is completed, cf. ND 1976.263 NV MOSPRINCE/BIAKH.".[69]

The Commentary also comments upon the relationship between the exclusion in (h) and using the mentioned objects in connection with measures to avert or minimise loss in the hull insurer's interest. This is outside the scope of (h): "In such cases, the rules in Cl. 4-7 et seq. will prevail, and liability will (wholly or in part, cf. the general average rules) have to be borne by the hull insurer. Thus, if the ship picks up a cable while using the anchor in order to avoid running aground, the hull insurer will be liable for covering the assured's liability, cf. ND 1981.329 NV LINTIND, in contrast to ND 1969.1 NV MIDNATSOL".[70]

Clause 15-11 regulates war risk insurance for intervention by a foreign State power and piracy. Sub-clause 2 states that the assured is entitled to total loss compensation if the ship is taken from him due to pirates or "similar unlawful interventions". According to the Commentary, this encompasses first and foremost mutiny and war-motivated theft, cf. ND 1945 p. 53 NV (IGLAND). Ordinary theft is covered by the marine perils insurer.[71]

68 Commentary (2019) p. 330.
69 Commentary (2019) p. 330.
70 Commentary (2019) p. 330.
71 Commentary (2019) p. 344.

Even though the NP has not previously contained an arbitration clause, these examples illustrate that several disputes has been resolved by arbitration and thereafter included in the Commentary as guiding lines for its interpretation. The references also illustrate the importance of publication in ND.[72]

4. The arbitration Clause in NP 2013 Version 2019

NP 2013 Version 2019 contains a clause on jurisdiction and choice of law in Cl. 1-4A and an arbitration clause in Cl. 1-4B. If insurance based on the NP is effected with a Nordic claims leader, the starting point is that legal proceedings may only be instituted before the courts in the venue where the head office of the claims leader is located, cf. Cl. 1-4A sub-clause 1. However, sub-clause 2 states that:

> If insurance based on this Plan is effected with a non-Nordic claims leader, it is agreed that Clause 1-4B on arbitration applies.

Therefore, for non-Nordic claims leaders, the main rule is that disputes are referred to arbitration. For Nordic claims leaders, a reference to this clause must be made in writing within the insurance contract. The arbitration clause in 1-4B has the following wording:

> If the parties have agreed in writing that disputes shall be referred to arbitration, the following applies instead of Cl. 1-4A:
>
> Any dispute arising out of or in connection with this insurance contract, including any disputes regarding the existence, breach,

[72] There are examples of references to unpublished cases, cf. above on Cl. 2-8 and 2-9 and Cl. 2-14, and also the reference to Arbitration Award 8. May 2009 (*Bulford Dolphin*) in regard to Cl. 15-16, see Commentary (2019) p. 349.

> termination or validity hereof, shall be finally settled by arbitration under the rules of arbitration procedure adopted by the Nordic Offshore and Maritime Arbitration Association (Nordic Arbitration) and in force at the time when such arbitration proceedings are commenced. Nordic Arbitration's Best Practice Guidelines shall be taken into account.
>
> If insurance based on this Plan is effected with a Nordic claims leader, the place of arbitration shall be the place where the head office of the claims leader is located at the time of the conclusion of the contract. The law of this place shall be applied exclusively.
>
> If insurance based on this Plan is effected with a non-Nordic claims leader, the place of arbitration shall be Oslo if another place is not agreed. Norwegian law shall be applied exclusively. If the parties have agreed to arbitration in another Nordic country, the law of the place of arbitration shall be applied exclusively. If the parties have agreed to arbitration in a non-Nordic country, Norwegian law shall be applied exclusively.
>
> Any changes in the terms of the agreement set out in sub-clauses 2, 3 and 4 must be in writing.

The question of arbitration was first raised in the Revision Committee in relation to non-Nordic claims leaders, where there was previously no rule on jurisdiction in the NP. As the parties were not always careful to regulate the issue in the individual contract, the issue was not clarified when disputes occurred. It was also agreed that the question of jurisdiction should take into consideration the uncertainty created by the pending Brexit discussions, cf. more on this above under Section 2.2. For non-Nordic claims leaders jurisdiction in UK is often a natural choice, and the Committee wished to avoid this uncertainty.

The question of arbitration is however also relevant for Nordic claims leaders, and many Nordic insurers operate with arbitration clauses in the individual insurance contracts. In particular in Norway, arbitration has also been used as a conflict solution method in many cases and for many years, cf. further above in Sections 2 and 3. Even so, it was agreed to keep

the ordinary court system as a main rule for Nordic claims leaders. The principal reasons were first, the Swedish and Finnish system with average adjustment as a first mandatory step in the conflict solution system, cf. above in Section 2.2, and secondly, that if the parties wanted to switch to arbitration it was easy to do so in the policy.

The arbitration cases referred to in Section 3 above are ad hoc arbitration, not tied to any arbitration institution, such as for instance the Oslo Chamber of Commerce,[73] the Swedish Chamber of Commerce Arbitration Institute[74] or the Danish Institute of Arbitration.[75] Since 2014, however, the Nordic maritime law market has strived to establish a Nordic arbitration association to solve conflicts within the maritime and offshore sectors. The main point was to offer an arbitration system that was based on Nordic procedural rules, legal culture and tradition, in order to compete with arbitration in London based on UK procedural rules and tradition. The initiative was hosted by the Nordic Maritime Law Associations and several law firms and ship owner companies, and it resulted in the Nordic Maritime and Offshore Arbitration Association being established in 2017.[76] The Committee felt it was convenient to refer arbitration to this association. Cl. 1-4B sub-clause 2 is therefore taken from the Nordic Offshore and Maritime Arbitration Association's (Nordic Arbitration) arbitration clause sub-clause 1 and 3. It should be noted that the NP, contrary to many other maritime law contracts, has rejected influence from the Anglo American market and has instead upheld traditional Nordic contract regulation on major marine insurance issues that are contrary to the dominant UK conditions. Thus, it is of utmost importance that the dispute resolution regime stems from the same legal background and culture.

It follows from sub-clause 3, that if insurance based on the NP is effected with a Nordic claims leader, the place of arbitration shall be the place where the head office of the claims leader is located at the time of the

[73] https://www.chamber.no/

[74] https://sccinstitute.com/

[75] https://voldgiftsinstituttet.dk/en/

[76] https://www.nordicarbitration.org/

conclusion of the contract, and, from sub-clause 4, that for a non-Nordic claims leader, the place of arbitration shall be Oslo, if another place is not agreed.

Cl. I-4B does not address the question of confidentiality. This was, as previously mentioned, not much discussed during the negotiations, apart from emphasizing the importance of publication. It follows from Section 3 above that publication is indeed very important for the development of the NP.

5. Summary and conclusion

This article has examined the use of arbitration in Norwegian/Nordic marine insurance and the importance of arbitration awards in the development of the NP. It demonstrates that arbitration is both an important method for dispute resolutions and a significant factor for interpretation of the NP and development of the regulation. It also illustrates the importance of publication of arbitration awards.

The establishment of the Nordic Maritime and Offshore Arbitration Association is an important added factor in the further development of a Nordic marine insurance contract and dispute resolution system. The NP has maintained the Nordic material regulation of marine insurance issues that, on many questions, depart from the dominant UK conditions, and the Nordic marine insurance contract is developed based on Nordic background law and with the Nordic Insurance Acts as background legislations. Seen in this context, it is important that the dispute resolution system is also in keeping with the traditional Nordic legal methodology and culture.

Nordic Arbitration in future – possibilities and challenges

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1. Introduction

Considering the future for Nordic Arbitration, it seems fair to assume that it, – at least to some extent, will be a reflection of the present.

The first initiative was taken as late as in 2015[2]. After several meetings and working sessions in 2016 and 2017, the association was formally established with a Nordic Board in the summer of 2018. The whole process has been, and still is, based on an extensive joint voluntary effort, or "dugnad" as we call it in Norway. Very competent and qualified lawyers have done a lot of free work.

As a result, by last year, a rather comprehensive set of Rules that both supplement and complement the various Nordic acts on ad hoc arbitration had been composed. Furthermore, a set of extensive and quite useful Guidelines on how these Rules may be applied was in place alongside an easy-to-follow matrix which cover the various issues to be discussed at a Case Management Conferences (CmC).

This work is, of course, not completed. The Rules and the Guidelines will certainly be revised and improved based on experiences made. Furthermore, proposals for new Guidelines regarding small claims as well as mediation are presently being prepared by two Norwegian working groups under the Association.

One result of these activities is that, as emphasized by Christian Hauge in his presentation,[3] the Rules of Nordic Arbitration, despite its young age, is already included in several contracts. Furthermore, the Guidelines have been accepted as the frame work for several arbitral proceedings which originally only referred to traditional Nordic ad hoc arbitration.

We do not yet have a representative feedback form these proceedings, but the general impression is that Nordic Arbitration is working rather well. Of course, some issues have been raised regarding the understanding of certain elements in the Rules and/or Guidelines, but that is to be

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2 Geir Gustavsson of BA-HR gave a presentation at the then 26th Nordic Maritime Law seminar titled "Nordic maritime and offshore arbitration", see Marius 450.

3 See Christian Hauge's article elsewhere in this periodical.

expected. I submit that Nordic Arbitration already has proven itself to be quite adequate and useful, and it stands out as an amazing achievement.

2. The Future of Nordic Arbitration

2.1 Core activities

Looking to the future, offshore and maritime issues, including marine insurance, are the core activities of Nordic Arbitration.[4]

Thomas Svenssen and Mikael Brøndmo have already, but more generally, covered relevant offshore activities.[5] Regarding marine insurance, reference is made to Trine-Lise Wilhelmsen's presentation.[6]

To me it is a fair assumption that the future of Nordic Arbitration will be influenced by major business companies and entities in these markets accepting and adopting Nordic Arbitration. Either as *the preferred,* or at least as *an alternative* contract-based dispute resolution method.

At this point the Norwegian standard contracts, Norwegian Fabrication Contract 2015 and Norwegian Total Contract 2015, NF 15 and NTK 15, plays an important part in the offshore market. They are a result of a joint standard contract board established by Norsk Industri[7] and Norsk Olje og Gass[8] in 2012. The mandate was to contribute to the development of standard contracts for the petroleum activities on the Norwegian continental shelf, with a purpose to achieve a more cost-ef-

4 It is typical that the initiative came during a Nordic Maritime Law seminar, se note 2 above.

5 See his article in the present periodical.

6 See his article in the present periodical.

7 The Federation of Norwegian Industries is part of NHO which is the overall Confederation of Norwegian Enterprises. It represents more than 2 400 members companies with approximately 126 500 employees.

8 The Norwegian Oil and Gas Association is also part of NHO, and is organised in two branches, one for oil companies and the other for supplier companies. Most companies are members.

fective project execution and resource management. NF 15 and NTK 15 are today generally considered to be *the* standard contracts regarding major hydrocarbon related projects both offshore and onshore, and they are also frequently used outside the Norwegian continental shelf.[9]

Article 38.2 of the NTK 15 states:

> *"Disputes arising in connection with or as a result of the Contract, and which are not solved by mutual agreement, shall be settled by arbitration unless the parties agree otherwise. Any arbitration proceedings shall take place in …..*
>
> *The Arbitral Tribunal shall consist of three arbitrators, who the parties shall seek to jointly appoint.*
>
> *"Lov om voldgift" (lov av 14. mai 2004 nr 25) (Act regarding procedure rules for Arbitration) shall apply.*
>
> *The parties agree that the arbitration proceedings and the arbitration decisions shall not be public."*

Thus, disputes are referred to Norwegian ad hoc arbitration based on "Lov om voldgift" (Act regarding procedure rules for Arbitration) of May 14th, 2004 nr 25. As pointed out by Knut Kaasen[10], this law is a short and somewhat rudimentary statutory regulation of the arbitral process. And as Christian Hauge has emphasized[11], Norwegian ad hoc arbitration is not easy to assess, and may seem more like a black box to a party with limited previous experience from and knowledge of Norwegian civil procedure.

Thus, it is quite evident that the dispute resolution prescribed in NF 15 and NTK 15 may benefit from being supplemented with an accessible, easy to understand and more detailed regulation of the arbitral process, which is exactly what Nordic Arbitration provides. It's Rules and the

9 For example, they have served as the contractual basis for the establishment of part of the major infrastructure for windfarms on the Dutch continental shelf.

10 See his article in the present periodical.

11 See his article in the present periodical – see also footnote 17 below.

subsequently various set of Guidelines might very well be accepted as a supplement to the relevant provisions of the standard contracts, either as part of NF 15 and NTK 15 itself, or by being applied in specific contracts.

The way to do this is quite simple, as one might just implement the standard Nordic Arbitration clause, which reads[12]:

> *"Any dispute arising out of or in connection with this agreement, including any disputes regarding the existence, pleads, termination of validity thereof, shall be finally settled by arbitration under the rules of arbitration procedure adopted by the Nordic Offshore and Maritime Arbitration Association ("Nordic Arbitration") in force at the time when such arbitration proceedings are commenced. Nordic Arbitration's best practice guideline shall be taken into account.*
>
> *The place of arbitration shall be [insert city and country] and the language of the arbitration shall be [insert a Nordic language or English).*
>
> *The arbitration tribunal shall be composed of three (3) arbitrators."*[13]

One quite major company in the offshore sector in Norway, is certainly Equinor.

The Equinor building and construction contracts are based on standard contracts NF 15 and NTK 15 including their arbitration clause. Disputes with other licensees are also to be arbitrated, based on Norwegian ad hoc arbitration, while the company maintains a preference for the ordinary Norwegian courts regarding other contracts. The stipulated forum has at least until now mainly been Stavanger tingrett

Among major Norwegian supplier companies in the same industry sector it is natural to mention Aibel, Aker and Kværner. Their contracts

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12 See how Maersk Oil Trading incorporated the standard clause in its general terms and conditions under footnote 15 below.

13 NTK Article 38.1states that «This Contract shall be governed by and interpreted in accordance with Norwegian law", while the Nordic Arbitration standard clause, of course because of its Nordic character only refers to *"This agreement shall be governed by and construed in accordance with [insert governing law]."*

are frequently based on NF 15 and NTK 15.[14], which as described above may be supplemented by the Nordic Arbitration standard clause.

Regarding marine insurance, it will have an impact if Gard, Skuld, Norwegian Hull Club, Sweedish Club and others embrace Nordic Arbitration the same way. To the extent their Contracts are based on the Nordic Marine Insurance Plan, they do, cf. Trine-Lise Wilhelmsen's article referred to above. But also, outside the Plan for example Norwegian Hull Club now applies the following standard clause related to arbitration:

> *"Any dispute arising out of or in connection with this insurance contract, including any disputes regarding the existence, breach, termination or validity hereof, shall be finally settled by arbitration under the rules of arbitration procedure adopted by the Nordic Offshore and Maritime Arbitration Association (Nordic Arbitration) and in force at the time when such arbitration proceedings are commenced...*
>
> *The place of arbitration shall be Bergen, Norway and Norwegian law shall be applied exclusively."*

Within the maritime industry, shipping companies may prefer Nordic Arbitration in for example bunker contracts as well as contract regarding vessels in operations. As one example, it might be noted that Maersk Oil Trading already in March 2018 adopted Nordic Arbitration as a part of their general terms and conditions for selling and delivering all marine bunker fuels.[15]

As to shipbuilding contracts, the Article XIX, item 2 of the Norwegian Standard Shipbuilding Contract of 2000 (SHIP 2000) reads:

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[14] Typically, Kværner in general use the standard clauses regarding arbitration in NF 15 and NTK 15.

[15] Maersk has adopted the main paragraph of the standard Nordic Arbitration clause quoted above as articles 18.2 and 18.3 in their general terms and conditions, while the place of arbitration in article 18.4 is specified to be Copenhagen and the language to English.

> *"2. Arbitration*
> *Any dispute between the parties concerning the Contract shall be settled with final and binding effect for both parties by Arbitration in .....……, Norway. The parties will jointly appoint three arbitrators of which at least one shall be a lawyer admitted to practice in Norway. If the parties fail to agree on the choice of arbitrators within 14 days from presentation by either party of a written demand for arbitration, each party shall appoint one arbitrator, and the two so appointed shall appoint a third arbitrator who shall act as the chairman of the arbitration panel. If a party fails to appoint an arbitrator within 14 days after he has been requested to do so by the other party, the Chief Justice of the Appeal Court in the district where the Builder has its venue shall at the request of either party appoint the arbitrator(s)."*

In his commentary to SHIP 2000 of 2019 Øystein Meland[16], i.a write that: "*Arbitration is by a wide margin the preferred method for conflict resolution in shipbuilding contracts." and "The arbitration described in Article IXX is ad hoc arbitration, which means that the arbitral tribunal is established to decide the specific case in question, as distinguished from institutional arbitration.*" Nordic Arbitration is then introduced and presented with a very appropriate description of the underlying rationale behind this alternative to traditional Norwegian and Nordic ad hoc arbitration: "*… the underlying idea was based on an assumption that it is possible to combine the principles and hence flexibility and freedom of the parties to agree as in ad hoc arbitration, with a set of Nordic rules and best-practice guidelines which would be easy for a non-Nordic party to study and understand.*"

Based on Meland's book it is reasonable to assume that at least some shipbuilding contracts will be based on the Nordic Arbitration Rules and Guidelines within a rather short time frame, illustrating the point Meland is making: Nordic Arbitration is transparent[17] and easy for *"a non-Nordic*

[16] SHIPBUILDING CONTRACTS – a commentary based on SHIP 2000, Bergen 2019, page 313

[17] Cf. Christian Hauge's article and his reference to traditional Nordic arbitration as a "black box", to some degree quite incomprehensible for anybody but Nordic parties used to the system.

party to study and understand", and as such more accessible than traditional ad hoc arbitration.

2.2 At the perimeter of the core activities

Looking beyond and to what we may call the perimeter of these core activities, we do find other industries and contracts where Nordic Arbitration might prove to be quite useful.

Mikael Brøndmo[18] focuses on renewable energy, with both onshore and offshore windmills and windfarms. These structures and installations include not only the mills, which may be formidable floating or bottom-based, but also and extensive and complex network of connecting cables, as well as booster and transformer stations for transmission of the electricity produced.[19]

The numbers of such windfarms for example in the North Sea is already substantial,[20] and the number is increasing by the year with similar installations being established all over the world.[21] All, or at least most of these installations are complex and difficult to construct and install, much like other offshore installations. Secondly, they need maintenance and attendance, as well as modifications made prudent by the relevant technical development which also in this field is fast and wide-ranging.

Nordic Arbitration represent quite clearly an adequate dispute resolution method for the disputes these activities may generate. The parties to

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18 See his article in the present periodical.

19 One point here is that the windfarms produce alternating current (AC), which highly vulnerable to a significant leakage of current. Thus, the AC is transformed to direct current (DC) before being transmitted onshore, and this requires quite large offshore transformer platforms which are complicated both to design, fabricate and install.

20 Between 2002 and 2017 around 40 windfarms were established in various parts of the North Sea with a total capacity of 10 000 MW and a cost between 35 and 40 billion EUR, some quite small, some with a capacity of more than 500 MW and a cost of more than 1 billion EUR.

21 In 2018 China was the third largest producer og electricity from offshore windfarms behind the UK and Germany. Other Non-European countries with a significant production from such windfarms are Japan, South Korea, Taiwain, Vietnam and the US. The United States is, furthermore, one of the very major producers of electricity from onshore based windfarms, as is China, India and Brazil.

contracts related to the construction, installation and running windmills and submarine infrastructure do need an agreed way of handling disputes in a qualified and cost-efficient way where the final decision will be legally enforceable. Nordic Arbitration meets these criteria. In addition, the Nordic countries have more than a sufficient number of highly qualified professionals that might serve as arbitrators with good and relevant knowledge of the possible legal and technical issues that might arise.

Another consideration to be made, is that the parties to such contracts quite often will be multinational or from different nations. When that is the case, either in the core or perimeter activities, it is an important point that Nordic Arbitration is transnational, and with a certain preference for tribunals where the arbitrators are not of the same nationality as one of the parties. Reference is here made to article 7, subitem 5 of the Rules regarding appointment of the arbitral tribunal.

> *"If the two arbitrators fail to appoint a third arbitrator within 21 days after the appoint of the second arbitrator, NOMA shall on request by one party appoint the third arbitrator who will act as the presiding arbitrator. In arbitrations where the parties are of different nationalities, NOMA shall, unless the parties agree otherwise not appoint an arbitrator of the same nationality as one of the parties".*

The same principle is laid down in article 8 of the Rules, subitem 4:

> *"In arbitrations where the parties are of different nationalities, NOMA shall unless the parties agree otherwise, or NOMA decides otherwise, seek to refrain from the pointing arbitrators of the same nationality as one other party".*

2.3 Even further way from the core activities

The activities discussed under section 2.2 above, are to some extent ocean and offshore based or related. However, there are onshore activities and industries with quite similar characteristics, – of a significant value and

complexity based on standard agreements with similarities to NF 15 and NTK 15.

The basic Norwegian standard contract regarding building and construction, NS 8405, in article 43 subitem 3 regulates that any disputes between the parties regarding the contract where the claim is less than 100 G[22], – as per May 1st, 2018 NOK 9 688 300, shall be decided by the ordinary courts unless the parties agree to leave the issue to an arbitral tribunal. If the claim is 100 G or above, the dispute is referred to ad hoc arbitration unless the parties agree to let the ordinary courts decide.

However, other standard contracts, for example NS 8406, which is a simplified version of NS 8405[23], as well as the general turnkey contract, standard NS 8407, state in articles 31 and 50.4 respectively that any dispute shall be decided by the ordinary courts. Thus, there is no general principle or room for arbitration under these standard contracts. Arbitration must accordingly be specified by the parties either entering into the contract or when a dispute arises.[24] We have seen examples of both, but generally it is fair to say that the standard contracts play such a predominant role, and there is generally quite limited focus on the choice of dispute resolution methods when the contracts are entered in to.

One element which may be of importance in this respect is that international companies are increasingly taking part in the Norwegian building and construction industry. As an example, a Chinese company[25] was a major supplier and builder of the steel structures of one of the largest bridges in northern Norway, Hålogalandsbrua, which was opened on 9 December 2018. Furthermore, several European construction companies[26] have established branches in Norway during the last decade and

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22 1 G is the basic amount in the Norwegian National Insurance scheme and is regulated by 1 May every year. The amount set at 1 May 2018 was NOK 96 883.

23 Albeit used i.a by the Norwegian Road Authorities (SVV) even for very large and complex contracts.

24 Cfr "Lov om voldgift" (lov av 14. mai 2004 nr 25) (Act regarding procedure rules for Arbitration) § 10

25 Sechuan Road and Bridge Group (SRBG). SRBG competed for the contract with several international companies i.a. from the US and Denmark.

26 For example, Implenia of Switzerland, Strabag of Austria.

are now engaged in various projects for example related to infrastructure. These companies are to quite an extent used to arbitration as the contractual dispute resolution method[27]. As the Norwegian government or government owned companies and entities quite often will be their customer or client, they might to some degree also be skeptical of national courts.

It is fair to assume that such international companies will continue to play a major part of the building and construction industry of Norway. One reason is of course Norway's membership of EFTA and corresponding obligations towards EU-based companies. Another element is the magnitude and volume of the future Norwegian infrastructure plans. For example, the projected bridges and tunnels for the main road E 39 from Trondheim to Kristiansand S, is by now estimated a cost of 340 billion NOK, and it will surely cost more than that. The point is that several of the relevant contracts will be so big that Norwegian companies will not be able to undertake them, at least not on their own.

The mere size and complexity of these contracts implies that there will be a corresponding possibility for disputes and conflicts, not the least because the Norwegian building and construction business is known for a relatively high level of disputes and conflicts. This was discussed in a conference in Oslo on 29 November 2018 where the CEO of NCC of Sweden, Thomas Carlsson, made a point based on his extensive experience that the dispute level in Norway is higher than in most countries in Europe.[28] Even though steps are taken to reduce the conflict level, it is fair to assume it will take time, and that the foreseeable future will include several large and complex legal disputes.

To summarize, the Norwegian building and construction industry will include large and complex contracts with a high potential for legal disputes between also international parties who are used to arbitration, but with limited experience and knowledge about Norwegian ad hoc

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27 For example, the widely used FIDIC rules states that disputes shall be arbitrated, albeit after a Dispute Avoidance/Adjudication Board (DAB) first has considered the issues at hand.

28 See www.bygg.no/article/1375470

arbitration. In this perspective I see a clear potential as well as an advantage of including Nordic Arbitration as part of the relevant contracts.

2.4 Adding and expanding elements of dispute resolution

Arbitration is to a large degree a *"one track system"*, starting with the appointment of the Arbitral Tribunal, Statement of Claims, Statement of Defense etc. and ending with an award where the arbitrators decide the issues that the parties have presented.

However, I believe it is quite fair to state that that most cases deserve to be trimmed down. Furthermore, some cases deserve to be settled all together.

It is my personal experience that counsels as well as the parties quite often are aware of this, but they feel locked in the dispute and are unable to find a way to initiate and carry out negotiations without what is perceived to be negative effects on the arbitral proceedings. At the same time the arbitrators have very little room to maneuver if they want to safeguard their impartiality and avoid an annulment action.

Nordic Arbitration opens for a very useful combination of arbitration and mediation. Reference is made to the Guidelines article 3 which concerns the Case Management Conference (CMC). Under subitem 3.5 there is a list of matters that should be discussed to be agreed upon during the first such conference. Item k) regards *"possible allocation of time during the case preparation for mediation, settlement discussions"*. The reasoning behind this provision is that based on experience there are usually two rather clear windows of opportunity for when settlement discussions or mediation may take place and be advisable: First, when both Statements of Claim and Statement of Defense have been submitted. Secondly, some time, for example two months, before the oral hearing. As it will not be possible for the arbitrators themselves to take part in any material discussions in this respect, item 1.13 of the Nordic Arbitration matrix for the Case Management Conferences involves the appointment of a mediator.

> *"It should be discussed whether a mediator shall be appointed by the arbitral tribunal to facilitate a settlement before the main hearing".*

The recommendation or the practical tip in this respect, is that:

> *"If the parties agree to appoint a mediator, the mediator may be appointed by the arbitral tribunal taking into account the nature of the dispute".*

The clear intention is that once a mediator is accepted by the parties, it will be possible for her or him to set aside time for possible mediation within the time windows outlined above, and which will follow from the time schedule for the arbitral proceedings to be decided in the CMC. The arbitral tribunal might then only have to raise the issue of a possible mediation with the parties and ask them if they agree or disagree with the appointed mediator being contacted to initiate mediation proceedings which the tribunal itself will take no part in.

Personally, I hope to see these best practice guidelines expanded in the report from the working group in charge of drafting the Nordic Arbitration mediation guidelines. This might for example also include the appointment and use of technical experts and others measures aiming at effectively contributing to trimming down cases and if possible, having them settled.

3. A short closing remark

Nordic Arbitration is *"the new kid on the block"*.

In all the Nordic countries there are other institutions and/or organizations already well engaged in this dispute resolution and arbitration. Nordic Arbitration include elements that make it a very useful supplement to these already established institutions. First, because it is Nordic and thus transnational. Second, because it has developed and established

sensible Rules and Guidelines based on best practice. Third, because it will be dynamic and agile. The Rules, Guidelines and matrix will be amended and revised based on experiences made.

Finally, I will add that Nordic Arbitration aims at a high level of transparency. One of the four working groups in Norway is focusing on knowledge management and sharing of knowledge. The idea is that it shall be easy for everybody to get an understanding of what Nordic Arbitration is and how its Rules and Guidelines are applied. This is not the least important for persons and companies from non-Nordic countries, who may be skeptical to both Nordic courts and Nordic ad hoc arbitration.

Enforcement – The New York Convention vs the Lugano/Brussels Conventions

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Introduction

One approach to the overall question of this session, namely whether arbitration may become a preferred alternative in a post Brexit world is to analyse the impact of Brexit on the recognition and enforcement of judgments between the UK, the EU27 and the EFTA states.[2]

Whereas the recognition and enforcement of foreign judgments are part of EU law, the recognition and enforcement of foreign arbitral awards are not. EU rules on dispute resolution do not extend to arbitration. With regard to recognition and enforcement of arbitration awards this is governed by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Arbitration Convention or simply as the New York Convention.

Hence, regardless of if and how the UK will eventually exit the EU, Brexit will have little immediate impact on arbitration as an area of dispute resolution. Whether the UK continues to be a member of the EU, embarks upon a so-called hard Brexit or enters into an intermediary phase with a withdrawal agreement the UK will continue to be a party to the New York Convention. Hence, the arbitration agreement's rules on jurisdiction, choice of law, recognition and enforcement of arbitration awards will apply post-Brexit. Given that arbitration, in principle, will not be affected by the UK vote to leave the EU businesses are expected to consider more carefully whether arbitration (if suitable) would provide greater certainty as a method of dispute resolution.

The reason why dispute resolution in the form of arbitration will not change with Brexit is due to the lack of harmonisation of EU law with national law in this field. EU law does not extend into the field of arbitration and the EU is not a party to the New York Convention.[3] The UK is already party to the New York Convention and membership or

[2] The term EFTA states is used despite not including Liechtenstein given that Liechtenstein has not signed the 2007 Lugano Convention, see further below.

[3] The EU is however party to the Lugano Convention and the Hague Convention, see further below. EU external competence to enter into the Lugano Convention was assessed by the CJEU in Opinion 1/03 [2006] ECR I-1145.

lack of membership in the EU does not alter UK's position as a party to the New York Convention.

On the issue of the recognition and enforcement of judgments, EU law provides a framework, which enables a judgment given in one member state to be registered and enforced in another member state, as if it were a judgment of that member state.[4] The same principle is extended to include the EFTA states[5] through the civil justice co-operation that presently exist between the EU and the EFTA.[6] This article will analyse the consequences of the UK no longer being bound by EU law on civil justice co-operation, discuss alternative solutions for the UK post Brexit and reflect on arbitration as an alternative solution for dispute resolution.

European Union/European Economic Area law on dispute resolution

Introduction

Having established that Brexit does not change the UK position as party to the New York Convention of 1958 regarding recognition and enforcement of arbitration awards we now turn to recognition and enforcement of judgments between the UK and the EU/EFTA states post Brexit. In order to analyse the effects of Brexit in this context we need to separate between 1) the system of reciprocal recognition and enforcement of judgments under Regulation 1215/2012, 2) the system of reciprocal recognition and enforcement of judgments between the EU and the EFTA states 3), the current position of the EU/EFTA states post Brexit and 4) the current

4 Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

5 Except Liechtenstein, see above.

6 The 2007 Lugano Convention.

position of UK post Brexit. Finally, the article provides some thought on the possible consequences for arbitration.

The system of civil justice co-operation is not governed by the same instruments in the EU and in the European Economic Area (EEA).[7] In short, the EEA does not include Regulation 1215/2012. Hence, this regulation applies between member states only. The civil justice co-operation between the EU and the EFTA states[8] is regulated through an international treaty, the 2007 Lugano Convention. For our purpose here the substantial differences between the regulation and the Convention are not analysed. The main structure remains the same and it suffices for the purpose here to refer to them as fairly similar in content. However, the fact that there is a separate treaty outside the system of the EEA Agreement provides an interesting and different possibility for the UK to remedy the issue of civil justice co-operation post Brexit. The same is certainly not the case for a range of other consequences of Brexit.

Before we enter into the analysis of the system of reciprocal recognition and enforcement of judgments a short presentation of the current status of the Brexit process is due.

Current status of the Brexit process

On 23 June 2016, the national referendum initiated by the British Prime Minister David Camron on whether the UK should leave or remain in the EU was held. More than 30 million people casted their votes with a 71.8 % turnout. There was a majority of 51.9 % in favour of the UK leaving the EU. Hence, 48.1 % voted to remain. On 29 March 2017, the UK government served formal notice under Article 50 of The Treaty on European Union to terminate the UK's membership of the EU.[9]

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7 The EEA Agreement extends the EU internal market rules with some modifications to Norway, Iceland and Liechtenstein.

8 Except Liechtenstein, see above.

9 See the decision 10 December 2018 by the CJEU on the interpretation of Article 50 TEU where it is made clear the UK can unilaterally withdraw its notification to leave the Union.

On 26 June 2018 the European Union Withdrawal Act 2018 came into force. This Act ends the supremacy of EU law on the day of exit and converts current EU law into UK law on that date. On the exit day the UK will also leave the EEA Agreement.[10]

Against this background the UK government and the EU27 have negotiated how the relationship between them will work following withdrawal, see The draft Agreement on the Withdrawal of the United Kingdom from the European Union, 14 November 2018. In parallel Norway has negotiated its relation with the UK following a withdrawal from the EEA Agreement.[11] The Withdrawal Agreement sets out what will happen on exit day. It also provides for a transition period that will begin on 30 March 2019 and last until 31 December 2020 with the possibility of extension. During the transition period the majority of current EU law will remain applicable to the UK. The Withdrawal Agreement has been ratified by the EU27 but has not been approved by the UK parliament. If the Withdrawal Agreement which involves approval both of the withdrawal terms and of a 'framework for the future relationship' is not ratified in some version, there will be no transition period. If that happens, EU law will stop applying to the UK on 30 March 2019 unless another solution is agreed.

Both the EU27 and the UK government are, therefore, also planning in parallel for the possibility that no agreement will be reached. This is known as the no-deal position papers. There is still much uncertainty regarding what the decision to leave actually means in relation to cross border disputes. In the following, this article will look at enforcement of

[10] See an article discussing this I Common market Law Review, Volume 55 (2018)/Issue 1 by Christoph Hillion, "Brexit Means Br(EEA)Xit: The UK withdrawal from the EU and its implications for the EEA.

[11] See the agreement reached 20 December 2018 in regard of citizens keeping their established rights and the position paper from the Ministry of Justice, "Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union".

foreign judgments in relation to the broader question of arbitration as a possible preferred alternative.

In the event that the UK leaves the EU with no form of agreement regarding the future relationship, the Recast Brussels Regulation and the Lugano Convention would cease to apply in the UK or in the EU or EFTA states as regards the UK.

In the absence of alternative solutions, the position would revert back to reliance on the domestic law on enforcement of jurisdiction clauses and foreign judgments. In the UK, there are common law rules on the enforcement of foreign judgments. These require an applicant to institute a debt claim in the UK courts and fresh proceedings must be issued by filing a claim form and particulars of claim. The foreign judgment forms part of the evidence in support of that action. The conditions for enforcement are, therefore, more rigorous and there are more procedural hurdles.

Despite these hurdles, the domestic law in relation to the enforcement of foreign judgments in the UK, and in each of the European jurisdictions, is well developed. Given this, and that within the EU the Recast Brussels Regulation and in the EFTA states the Lugano Convention will continue to apply between the remaining member states and the EFTA states[12], it is likely that jurisdiction clauses that are clearly drafted will continue to be recognised and applied in many cases, and that judgments of the English courts will continue to be enforced in member states and EFTA states (and vice-versa), albeit perhaps with additional procedural hurdles to cross, and therefore with greater expense and less speed.

The current system of reciprocal enforcement of judgments under EU law

In order to facilitate judicial cooperation between member states, EU law has laid down rules which apply to parties in member states litigating disputes with cross-border elements. The cross-border element may

[12] Except Liechtenstein, see above.

exist, for example, because the dispute arises between parties domiciled in different states, or because the subject matter of the dispute has a particular connection with a state, for example, because it is the place where contractual obligations are to be performed.

The four principal areas relevant to parties litigating disputes dealt with by EU rules concern:

- The courts which are to have jurisdiction over the dispute;
- The law which is to govern the parties' obligations (both contractual and non-contractual);
- The recognition and enforcement of court judgments; and
- The service of court documents and the taking of evidence.

Relevant here is the civil justice co-operation measures in relation to recognition and enforcement of judgments that presently exist between EU member states. This regime provides a degree of certainty on important issues that often arise between parties litigating disputes with a cross-border element.

Recognition and enforcement of judgments in civil and commercial cases were originally accomplished within the EC by the 1968 Brussels convention. The Brussels Convention was a treaty signed by the then six members of the EC.[13] This convention was amended on several occasions and has now been almost completely superseded by EU regulation.

The Brussels I Regulation of 2001 was the primary piece of legislation in the Brussels framework from 2002 until January 2015. It substantially replaced the 1968 Brussels Convention, and applied to all member states of the EU excluding Denmark, which has a full opt-out from implement-

[13] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

ing regulations under the area of freedom, security and justice.[14] The Brussels I regulation was replaced in 2012 by the Brussels II regulation.

The Recast Brussels Regulation[15] is a set of rules regulating which courts have jurisdiction in legal disputes of a civil or commercial nature between individuals resident in different member states of the EU. It has detailed rules assigning jurisdiction for the dispute to be heard and governs the recognition and enforcement of foreign judgments.

The Recast Brussels Regulation provides that:

"A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required".[16]

This includes the enforcement of "protective measures" such as freezing injunctions.[17]

For the purposes of enforcement in a member state of a judgment given in another member state, the applicant must provide the competent enforcement authority with:

"a.) a copy of the judgment...; and

b.) a certificate …, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest."[18]

Hence, on the issue of the recognition and enforcement of judgments, the EU rules provide a framework which enables a judgment given in one member state to be registered and enforced in another member state, as

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14 Denmark signed an international agreement in 2005 with the EU to apply the provisions of the 2001 Regulation. The 2005 agreement applies a modified form of the 2001 Regulation between Denmark and the rest of the EU. It also provides a procedure by which amendments to the regulation are to be implemented by Denmark. Should Denmark decide not to implement any change to the Regulation or its successor, then the Agreement ends automatically.

15 Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

16 See Article 39.

17 Article 40.

18 Article 42.

if it were a judgment of that member state. There are only very limited grounds on which registration and enforcement can be resisted.

Hence, the recast Brussels Regulation explicitly recognises that a UK judgment can be enforced in another member state's court and vice versa. After Brexit, the UK will cease to be a member state and will cease to be part of this regime and cease to be bound by the Regulation. If no alternative regime is put in place, companies will have to rely on domestic recognition regimes in the UK and the EU27. In the absence of an international treaty for the enforcement of UK judgments in the EU and vice versa the courts will apply national law. As already pointed to this will likely introduce additional procedural steps before a foreign judgment is recognised which would make enforcement more time-consuming and expensive.

Hence, Brexit will undermine that certainty although the extent of its impact will depend on the steps taken by the UK Government to address the position and the speed with which it is able to do so. The timing of the impact depends i.a. on whether the Withdrawal Agreement in some version will enter into force.

The current system of reciprocal enforcement of judgments between the EU and the EFTA states

In 1988, the then 12 member states of the EC signed a treaty, the Lugano Convention with the then six members of EFTA. The Lugano Convention extended the recognition regime to EFTA states who are not eligible to sign the Brussels Convention.

In 2007, the EU signed a treaty with Iceland, Switzerland, Norway and Denmark, the new Lugano Convention. The Convention is open to accession by other EFTA states as well as EU states acting on behalf of territories, that are not part of the EU. Other states may join subject to approval of the present parties to the treaty. This treaty was intended to replace both the old Lugano Convention of 1988 and the Brussels Convention. In 2010 the Convention was ratified by all EFTA member states (except Liechtenstein, Liechtenstein never signed the 1988 Convention),

but no EU member has yet acceded to the convention on behalf of its extra-EU territories.

In opinion 1/03 from the CJEU it was clarified that the 2007 Lugano Convention falls within the EU's exclusive competence. Hence, the UK is only bound by the Lugano Convention due to being a member of the EU.

The same is true for a number of other international treaties. However, there are also a number of international treaties where the UK is a party alongside the EU. The variation in different international instruments of the UK being a party alongside or simply through the EU is part of a complex debate of EU law on external relations. This is an evolving theme in EU law and in particular a hot debate with regard to EU exclusive external competence. This debate is, however, outside the current topic.

Suffice to mention briefly that the UK is a party to the EEA Agreement alongside the EU. Most people agree however that this is due to the Agreement dating back to 1992 and that today the EU has exclusive competence in relation to the EEA Agreement.[19]

The 2007 Convention is substantially the same as the Brussels I Regulation of 2001. The main difference being that the word *regulation* is replaced with the word *convention* in the text. The 2007 Lugano Convention is, however, not entirely adapted to the recast Brussels Regulation but these material differences are not discussed here, see explanation above.

As a consequence of leaving the EU 29 March 2019, the UK will no longer be bound by the Lugano Convention, which currently governs the enforcement of foreign judgments in litigations between private parties from EFTA states' and private parties from the UK.[20] The Lugano Convention explicitly recognises that a UK judgment can be enforced in another EFTA state's court and vice versa.

After Brexit, the UK will cease to be part of this regime and cease to be bound by the Lugano Convention. If no alternative regime is put in

[19] The UK being an individual member to the EEA Agreement has led some commentators to ask the question of whether the UK can continue to be part of the EEA after Brexit. However, the two pillar system gives no room for other participants in the EEA than EU member states and EFTA states. See also the reference to an Article by Hillion in CMLR above.

[20] Except Liechtenstein.

place, companies will have to rely on domestic recognition regimes in the UK and the EFTA states. In the absence of an international treaty for the enforcement of UK judgments in EFTA states and vice versa the courts will apply national law. As already pointed out this will probably introduce additional procedural steps before a foreign judgment is recognised, which would make enforcement more time-consuming and expensive.

As for the timing of this change, the transitional provisions of the Lugano Convention are not entirely clear. According to general international public law, it is likely that the Lugano Convention will continue to apply to the enforcement of judgments rendered on or before 29 March 2019. Still, the enforcement of judgments rendered after this date, even if claims were initiated before, will be solely governed by national law.

The UK has already announced that it will seek to remedy the lack of an international instrument for the enforcement of foreign judgments. One option is for the UK to ratify and re-enter the Lugano Convention. Becoming a party to the Lugano Convention would not only ensure civil judicial co-operation between the UK and the EFTA states but would also ensure such co-operation between the UK and EU27.

The ratification process, however, will require that the UK either gains the approval of all contracting states of the Lugano Convention, including the EU, or joins the EFTA. As a result, it is unlikely that the UK will re-enter the Lugano Convention any time soon.

The current position of the EU27 and the UK post Brexit

According to the Withdrawal Agreement, a distinction must be made between proceedings which are still ongoing after the end of the transition period and proceedings issued after the end of the transition period. The possibility of the UK participating in the Lugano Convention and/or the Hague Convention on Choice of Court Agreements must also be taken into account.

For those seeking to commence litigation with a European dimension, the current rules provide a relatively comprehensive framework setting out how issues relating to jurisdiction, recognition and enforcement of judgments, governing law, the service of documents and the taking of evidence will be dealt with by the courts of the member states. While Brexit will change this, the extent of the change is still unclear. However, provided that an agreement with the EU is reached, the current rules will remain in force for the present, during the transition period and after the end of the transition period for disputes in which proceedings have already been issued when the transition period expires.

The UK government presented a White Paper to Parliament on 12 July 2018 setting out its proposals to develop and agree the framework for the future relationship with the EU. The proposals in the White Paper on civil judicial cooperation are based on the "Framework for the UK-EU Partnership: Civil Judicial Co-operation published by the UK government in June 2018". Both the UK government and the EU have previously agreed that options should be explored for maintaining civil judicial co-operation. The UK government suggests that this should take the form of a new bilateral agreement covering which law applies to disputes, where cases are heard, ensuring contractual arrangements on where disputes are heard are respected, and ensuring there is cross border recognition and enforcement of judgments. In the White Paper the UK government says it will seek to participate in the Lugano Convention 2007 after exit, including a "no-deal" Brexit scenario (in which the Lugano Convention would be repealed and the UK would re-ratify it in its own right).

The possible participation by the UK in the 2007 Lugano Convention

In substance, the Lugano Convention is, as already pointed out similar to the Recast Brussels Regulation, but geographically it governs jurisdiction and enforcement of judgments extending to the EFTA states.[21] If the UK

[21] Except Liechtenstein, see above.

were to fully participate in the Lugano Convention, the subsequent re-ratification of the position in relation to jurisdiction and the enforcement of judgments would remain largely unchanged between the UK and the EU without taking further measures. In the Framework and the White Paper the UK government recognises this and states that it would like to go beyond existing precedent between the EU and the third countries and that this will take the form of a new bespoke bilateral agreement.

The September 2018 No-Deal Guidance also confirms that if there is a "no-deal" Brexit, the UK would seek to ratify in its own right the Hague Convention on Choice of Court Agreements, which provides a worldwide framework of rules in relation to exclusive jurisdiction clauses and the recognition and enforcement of those judgments based on such clauses in civil and commercial matters. The EU (along with Denmark, Mexico, Montenegro and Singapore) has ratified the Hague Convention. The UK government has published a draft Statutory Instrument in relation to the Hague Convention's effect post-exit in the event of a "no-deal" Brexit. However, this would only apply to agreements entered into on or after 1 April 2019 – the date on which the UK government anticipates that the Hague Convention will come back into force after the UK re-ratifies it – and there is no certainty as to the regime that would be applied to contracts signed before that date under either the Recast Brussels Regulation or under the Hague Convention itself (with EU being a signatory on behalf of the UK).

Final remarks

If the UK leaves the EU without a deal is reached, a number of procedural hurdles could be imposed on businesses wishing to enforce a UK judgment in an EU member state and vice versa. If a contract has commercial or operational ties to both the UK and the EU27 or the EFTA states, the jurisdiction clause needs to be drafted with the potential effects of Brexit in mind. Especially the party most likely to be in the position to bring

an action must consider the potential problem of enforcement of foreign judgements. It is against this background that it may be appropriate to consider whether litigation is the right dispute resolution method for the contract, or perhaps an alternative, such as arbitration, may give the parties greater certainty.

Ordre Public and arbitration in Norway

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1. Introduction

I was asked to enquire whether there are features in the Norwegian regime regarding *ordre public* (public policy) that can negatively affect the attractiveness of carrying out arbitral proceedings in Norway. The answer is that *ordre public* is not an obstacle to the efficiency of arbitration.

Arbitral awards are final and binding. Unless the parties specifically agree that the award may be appealed before a second arbitral tribunal (which happens very rarely, if at all), there will be no possibility to re-evaluate the merits of the decision. However, courts have the possibility to exercise control on arbitral awards, albeit to a restricted extent. In Norway, the conditions for challenging the validity of an award rendered in Norway or to refuse enforcement in Norway of an award are to be interpreted in the light of the UNCITRAL Model Law and of the New York Convention.

One of the most important principles in this regard is that court control is not a review of the merits of the award. The court is not allowed to review the arbitral tribunal's assessment of facts, evaluation of evidence or application of law.

The foregoing means that an award is final and binding, even though it contains errors of fact or errors of law. The ground for invalidity or refusing enforcement at issue here, violation of public policy, does not depart from this principle. Public policy is not violated simply because the award has wrongly applied the governing law. Even when the allegedly wrongly applied provisions are mandatory, there is no automatic effect on public policy. Public policy is affected only if the result of the award seriously infringes fundamental principles of the Norwegian socio-economic system. The socio-economic values that are fundamental in a certain system, constitute its *ordre public*. It is, in other words, not the technical content of a legal rule, that may constitute public policy, but the underlying principles. The foregoing corresponds to the regime laid down in the Model Law and in the New York Convention, and its application is fairly harmonized.

However, one area is debated: the intensity of the control the court may exercise when assessing whether an award infringes public policy. In this area, there are two approaches: the minimalist and the maximalist.

The typical example would be an award that raises issues of competition law or of corruption, areas that generally are deemed to have the character of public policy. If the arbitral tribunal considered those issues and concluded that public policy is not infringed, will the court be bound by this conclusion when it exercises it control? In other words, will the court be precluded from making its independent public policy evaluation? This is the minimalist approach. Or will the court have the power to independently make this determination? This is the maximalist approach.

In Norwegian law the question has not been discussed very extensively, but there is a fair basis to affirm that the maximalist approach applies. This is aligned with the approach of the Model Law and of the New York Convention.

Section 2 below introduces the applicable legal sources, in Norway and internationally; section 3 presents the issue of the intensity of the court's control; section 4 sets forth the effects of court control in respect of jurisdiction, for the purpose of setting a term of comparison; section 5 discusses court control in respect of public policy; section 6 analyses the two different approaches, the minimalist and the maximalist; section 7 explains the implications that EU law may have in this area; section 8 analyses the Norwegian approach, and section 9 contains some concluding remarks.

2. The sources

A court who controls the validity or the enforceability of an award derives its jurisdiction from the applicable law. In case of challenge to the award's validity, the applicable law is the arbitration law prevailing in the place

of arbitration. In case of the award's enforcement, the applicable law is, in the 159 countries who ratified it,[2] the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

In Norway, court control on arbitral awards is regulated in the 2004 Arbitration Act (the "AA"). The AA adopts the UNCITRAL Model Law on International Commercial Arbitration,[3] and is interpreted in its light. [4] It also implements the New York Convention.

The grounds for invalidity of arbitral awards rendered in Norway, regulated in § 43 of the AA, correspond to the grounds for annulment contained in article 34 of the Model Law. The grounds for refusing enforcement of awards (irrespective of where the awards are rendered), regulated in § 46 of the AA, correspond to the grounds for refusing enforcement contained in article V of the New York Convention and in article 36 of the Model Law. These two provisions, §§ 43 and 46 of the AA, contain similar grounds for invalidity and unenforceability. Literature and case law on validity are relevant also to enforcement, and vice versa.[5]

The applicable provisions make it clear that court control is not meant to be an appeal. Court control is not the same as a review of the award in the merits, neither in respect of the assessment of facts nor in respect of the application of law.[6] The direct consequence of this limitation of court control is that an award is final and binding, even if it contains errors of fact or errors of law. This is the basis upon which the system of arbitration, as we know it today, rests: international conventions, national laws, courts of law, legal doctrine and practitioners support the aim that arbitration

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2 For an updated status, *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

3 http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

4 The objective of harmonization of the AA with the Model Law and the New York Convention is confirmed, i.a., in the Ministerial proposal for the AA, Ot.prp. nr. 27 (2003-2004), 25.

5 The interchangeability (mutatis mutandis) is confirmed in Ot.prp. nr. 27 (2003–2004), 75 and 110. On the interchangeability of the international sources, see Gary Born, *International Commercial Arbitration* 2nd ed., Kluwer Law International 2014, 3186, 3340; Giuditta Cordero-Moss, *International Commercial Contracts,* Cambridge University Press 2014, 224.

6 See the Report by the Law Commission who drafted the AA: NOU 2001:33, para 8.11.

is to be an effective and efficient means of dispute resolution. To achieve this aim, they widely recognize that awards must be final and binding. Effectiveness and efficiency of arbitration are important principles of arbitration law, and at the origin of the widespread arbitration-friendly attitude that has characterized legislation and case law in the past decades.

The provisions regulating court control on arbitral awards represent the limit of tolerance that legal systems have in respect of arbitral awards. As seen above, an award containing errors of fact or errors of law shall be confirmed as valid and shall be enforced. However, an award rendered by an arbitral tribunal whose jurisdiction did not rest on a valid and binding arbitration agreement is not valid (§ 43 (1) (a) of the AA and article 34(2)(a)(i)of the Model Law) and not enforceable (§ 46 (1) (a) of the AA, article 36(1)(a)(i) of the Model Law and article V(1)(a) of the New York Convention); an award rendered as a result of a proceeding that did not give each of the parties the possibility to present its case is not valid (§ 43 (1) (b) of the AA and article 34(2)(a)(ii) of the Model Law) and not enforceable (§ 46 (1) (b) of the AA, article 36(1)(a)(ii) of the Model Law and article V(1)(b) of the New York Convention); an award rendered in excess of the jurisdiction granted on the arbitral tribunal is not valid (§ 43 (1) (c) of the AA and article 34(2)(a)(iii) of the Model Law) and not enforceable (§ 46 (1) (c) of the AA, article 36(1)(a)(iii) of the Model Law and article V(1)(c) of the New York Convention); an award rendered by an arbitral tribunal that was not constituted in accordance with the parties' agreement or the applicable law, or as a result of proceedings that did not comply with the parties' agreement or the applicable procedural rules is not valid (§ 43 (1) (d) and (e) of the AA and article 34(2)(a)(iv) of the Model Law) and not enforceable (§ 46 (1) (d) and (e) of the AA, article 36(1)(a)(iv) of the Model Law and article V(1)(d) of the New York Convention); an award rendered on a non-arbitrable object is not valid (§ 43 (2) (a) of the AA and article 34(2)(b)(i) of the Model Law) and not enforceable (§ 46 (2) (a) of the AA, article 36(1)(b)(i) of the Model Law and article V(2)(a) of the New York Convention); an award infringing fundamental principles (public policy) is not valid (§ 43 (2) (b) of the AA and article 34(2)(b)(ii) of the Model Law) and not enforceable (§ 46 (2)

(b) of the AA, article 36(1)(b)(ii) of the Model Law and article V(2)(b) of the New York Convention).

3. The intensity of court control

There is a certain tension between the principle that court control is not a review of the award on the merits, on one hand, and the courts' power to set aside an award or refuse its enforcement, on the other hand.

This becomes clear particularly when the court exercises control on a matter that already has been considered by the arbitral tribunal. As was seen above, there is an exhaustive list of issues the court may evaluate. If the tribunal has not considered those issues at all, the tension does not become evident: the court exercises its power and this does not interfere with an evaluation already made by the tribunal. It may interfere with the award if the outcome is that the award is set aside or not enforced. However, it does not interfere with the tribunal's evaluation of the particular issues regarding the validity of the arbitration agreement, the parties' legal capacity, the violation of public policy, etc., because the tribunal has not evaluated these issues.

All the above mentioned issues underlying the courts' power to control arbitral awards may, however, conceivably have been already evaluated by the arbitral tribunal. The Tribunal may have considered whether the arbitration agreement met the applicable form requirements or whether a party had legal capacity to enter into it, and it may have concluded in the affirmative, thus proceeding to solving the dispute in the merits and rendering an award. Yet the courts may have a different opinion of the same issues and may conclude that the award shall be set aside or refused enforcement. The same reasoning may be made in respect of the other grounds for setting aside or refusing enforcement: the tribunal may have considered its constitution, the procedure followed under the dispute, the scope of its power, the arbitrability of the disputed object,

or the conformity of the award with public policy; the tribunal may have concluded that there were no violations. Yet the court may have a different opinion, and it may exercise its power to set aside the award or refuse its enforcement.

The abovementioned tension between the principle of the award's finality and court control becomes, therefore, particularly evident in case of concurrent, and diverging, evaluations of the same issue carried out by the tribunal and by the court.

Internationally, the matter has been perhaps mostly discussed in connection with public policy. There seems to be an inconsistency in the answer to the question, depending on the context in which it arises. This will be addressed in the following sections. To give a term of comparison, I will start discussing, in section 4 below, another of the abovementioned issues: whether there is a valid and binding arbitration agreement.

4. Kompetenz-Kompetenz and court control

In connection with the existence and validity of the arbitration agreement, the doctrine of *Kompetenz-Kompetenz* was developed. According to this doctrine, an arbitral tribunal has the competence to decide on its own competence.[7] The main implication of this doctrine is that a tribunal does not have to suspend the proceeding in case the validity of the arbitration agreement is questioned. The arbitral tribunal has the power to make a decision on the existence and validity of the arbitration agreement and, if the decision is in the affirmative, the tribunal may proceed with the substantial aspects of the dispute.

[7] Born, *International Commercial Arbitration,* cit., paras 1046–1252; Christophe Seraglini and Jérôme Ortscheidt, *Droit de l'arbitrage interne et international,* Domat Montchrestien, 2013, paras 664f. See also John James Barcelo, "Kompetenz-Kompetenz and Its Negative Effect — A Comparative View", *Cornell Legal Studies Research Paper* No. 17-40, 11 September 2017, Available at SSRN: https://ssrn.com/abstract=3035485.

This principle has been affirmed, i.a., in article 16 of the Model Law and in § 18 of the AA. A system that even more clearly gives priority to the arbitral tribunal's evaluation of its competence is France, where the so-called *effet négatif de la compétence-compétence* was developed.[8] According to this doctrine, courts must refer the dispute to arbitration whenever they are seized with a dispute which is subject to an arbitration agreement. Also under the Model Law a court must refer the dispute to arbitration if there is an arbitration agreement. However, in the wording of article 8 of the Model Law and § 7 of the AA, the court refers to arbitration "unless it finds that the agreement is null and void, inoperative or incapable of being performed." This wording opens for a thorough examination by the court of the existence, validity and effectiveness of the arbitration agreement. The French Civil Code of Procedure goes further and restricts the court's examination.[9]The only possibility courts have at this stage, is to make a cursory review of the arbitration agreement. If the court is *prima facie* satisfied that the arbitration agreement exists and is valid, it shall refer the dispute to arbitration. The underlying idea is that it is for the arbitral tribunal to make a deeper evaluation of its competence.

What do the AA, the Model Law and the French *effet négatif de la compétence-compétence* provide as to the effects for the court of the tribunal's decision on its own competence?

The same issue of competence that was decided by the tribunal may be put forward for the purpose of challenging the validity of the award or of preventing its enforcement. Paragraph 43(1)(a) of the AA and article 34(2)(a)(i) of the Model Law say that the court may set aside an award if it finds that the arbitration agreement did not exist or was invalid, or that a party was under some incapacity. The same can be said for French law: article 1492 No 1 of the Civil Procedure Code gives the court the power

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8 Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration,* Kluwer Law 1999, paras 660, 671 ff.; Emmanuel Gaillard, "L'effet négatif de la compétence-compétence", in Jacques Haldy, Jean-Marc ´ Rapp and Phidias Ferrari (eds), *Etudes de procédure et d'arbitrage en l'honneur de Jean-François Poudret*, Faculté de droit de l'Université de Lausanne 1999, 387–402; Seraglini and Ortscheidt, *Droit de l'arbitrage interne et international,* cit., paras 664f.

9 French Code of Civil Procedure, article 1448.

to set aside the award if the arbitral tribunal did not have jurisdiction. The same say § 46(1)(a) of the AA, article 36(1)(a)(i) of the Model Law and article V(1)(a) of the New York Convention, in respect of enforcement. Neither the AA, the Model Law, the French Civil Procedure Code nor the New York Convention, however, explain the relationship between the tribunal's competence to decide on its own competence, and the court's power to control the award.

According to the prevailing doctrine, the court retains its power to determine the existence and validity of the arbitration agreement, or the parties' capacity to enter into it, even if the tribunal already has evaluated the matter.[10] This may result in a different outcome from the one to which the tribunal came and may lead to setting aside the award or refusing its enforcement. In practice, this means that the award has no preclusive effect and the mentioned issues ultimately are subject to the court's evaluation. This approach is supported also in France.[11] The theories of *Kompetenz-Kompetenz* and of *l'effet négatif de la compétence-compétence,* which were developed to enhance the autonomy and thus the efficiency of arbitration, do not go as far as to affirm that the tribunal's determination of the existence and validity of the arbitration agreement are final and the court owes deference to the tribunal's determination.

5. Public policy and court control

The rule on public policy is dealt with in the same provisions addressing annulment or non-enforcement due to lacking jurisdiction. The only difference suggests that conflict with public policy is considered to be a more serious defect of the award than the wrong determination by the tribunal of its competence: while the ground relating to existence or

[10] Gaillard and Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration,* cit., paras 658 and 688; Seraglini and Ortscheidt, *Droit de l'arbitrage interne et international,* cit., para 971.

[11] See references in footnote above.

validity of the arbitration agreement has to be raised by one party, the ground relating to public policy can be raised *ex officio* by the court.

By giving the court the power to consider the matter of public policy *ex officio,* the applicable sources show that it is not possible to delegate to the parties the decision of whether the issue of conformity with public policy shall be considered. It should be expected that neither should it be possible to delegate to the tribunal the determination of whether public policy was infringed. The logical consequence is that the court's power to exercise its control notwithstanding the arbitral tribunal's determination of the same issue is at least equally preserved in respect of public policy, as it is in respect of the tribunal's competence. As was seen in section 4 above, the award does not have preclusive effects in respect of the tribunal's determination of its own competence. Similarly, there should be no preclusive effects in respect of the tribunal's determination of conformity with public policy.

However, in connection with public policy there is no unitary approach to the effects for the court of the tribunal's determination. Two opposed doctrines were developed to define the degree of control that courts may exercise on the award's conformity with public policy. [12] The Paris Court of Appeal[13] developed the minimalist doctrine, according to which courts owe deference to the tribunal's evaluation. The Dutch Court of Appeal[14] developed the maximalist doctrine, according to which courts may independently evaluate whether *ordre public* is infringed. The maximalist approach has effects that are comparable with the effects recognized by the doctrine of *compétence-compétence* and of *l'effet négatif de la compétence-compétence*; according to this approach, the court may carry out its independent evaluation of the issue. The minimalist approach goes further in affirming the finality of arbitral awards, and assumes

[12] Luca Radicati di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23 *Am. Rev. Int'l Arb.* 49; Seraglini and Ortscheidt, *Droit de l'arbitrage interne et international,* cit., para 982.

[13] Cour d'appel Paris, 1e ch., 18.11.2004, Rev arb. 2005 751 (*Thalès Air Defence v. Euromissile*).

[14] Gerechtshof Haag, 24.3.2005, NJF 2005/239, TvA 2006/24 (Marketing Displays International Inc. v. VR Van Raalte Reclame B.V).

that the tribunal's determination of the public policy issue has preclusive effects for the court.

For both approaches, the starting point is that court control is not meant to re-open the dispute that was decided by the award. In particular, the court may not review the arbitral tribunal's assessment of facts, evaluation of evidence and application of law. When the court has to determine whether the award is compatible with public policy, however, the two approaches diverge.

According to the maximalist approach, the court may independently evaluate whether the award leads to a result that violates public policy, irrespective of whether the arbitral tribunal already has considered the same matter. This means that the court may independently evaluate the evidence that was already evaluated by the arbitral tribunal and may form its own opinion of the disputed facts. Furthermore, the court may independently evaluate how the law shall be applied. All this is done solely for the purpose of ascertaining whether the award violates public policy. This is not made for the purpose of reviewing whether the tribunal correctly interpreted the evidence or applied the law. This means that the court may not annul or refuse enforcement of an award simply because the law was applied wrongly. If the error has not seriously affected fundamental principles, the award must be affirmed and enforced.

The minimalist approach assumes that the court shall limit itself to verifying whether the arbitral tribunal has considered the matter. If the arbitral tribunal has concluded that public policy was not violated, the court has to accept this conclusion. Hence, according to the minimalist approach, the arbitral tribunal's evaluation of whether the award is compatible with public policy is binding on the court. The award has, therefore, preclusive effect.

The minimalist approach is particularly represented in France.[15] However, French case law recently seems to have embraced the maximalist approach, at least in areas such as corruption and money laundering.[16]

6. Minimalist or maximalist approach?

By postulating that the court owes deference to the evaluation that the tribunal made of the conformity of the award with public policy, the minimalist theory effectively delegates to the arbitral tribunal the assessment of this ground for annulment and for refusing enforcement.

The question is whether this delegation of power is compatible with the structure of arbitration as a means of dispute settlement. As was explained above, the grounds for annulment or for refusing enforcement may be seen as the limit of tolerance within which states find it acceptable to delegate their judicial powers to a private system of justice.

The exhaustive list of these grounds is the result of a balancing of two conflicting interests: on the one hand, the interest in rendering arbitration efficient – which may seem to suggest as large finality as possible for the arbitral awards and as little interference as possible by the courts. On the other hand, the interest in ensuring that parties are not deprived of their access to justice, that principles of due process are safeguarded, that

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15 Swiss decisions apply the minimalist approach to the fact finding, see Tribunal federal, 4A_532/2014, 4A_534/2014, 29.1.2015. In the US, parties may exclude court control on the award's decision on jurisdiction, but only if they "clearly and unmistakably" delegated the issue to the tribunal, which is deemed to be a very high threshold: First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995), confirmed in Henry Schein, Inc. v. Archer and White Sales, Inc., 585 U.S. __ (2019).

16 See, in the areas of corruption and money laundering: Cour d'appel de Paris, 4.11.2014, nr. 13/10256; Cour d'appel de Paris, 25.11.2014, nr. 13/1333; Cour d'appel de Paris, 7.4.2015, nr. 14/00480; Cour d'appel de Paris, 14.4.2015, nr. 14/07043; Cour d'appel de Paris, 21.2.2017, nr. 15/01650; Cour d'appel de Paris, 16.1.2018, nr. 15/21703. *Contra*, see Cour d'appel de Paris, 20.1.2015, nr. 13/20318; Cour d'appel de Paris, 24.2.2015, nr. 13/23404. In the area of procedural fairness, see Cour d'appel de Paris, 8.11.2016, nr. 13/12002.

fundamental principles are not infringed – which may seem to suggest as large court control as possible.

According to this balancing of interests, as was seen in section 4 above the award does not have preclusive effects for the court who controls the existence and validity of the arbitration agreement or the parties' capacity to enter into it. The grounds for annulment and refusing enforcement relating to the arbitral tribunal's competence are meant to make sure that a party has willingly and validly accepted the consequences of the arbitration agreement. The control that courts exercise on the arbitral tribunal's competence goes to the very basis of the admissibility of arbitration as a private method of dispute settlement. In the name of arbitration efficiency, court control has been restricted and priority has been given to the tribunal, in various degrees, in the phase preceding the arbitration or under the arbitration proceedings, as was seen in section 4 above. After the award has been rendered, however, court control is intact. As was seen above, it does not seem to be controversial that courts maintain the power to make a full examination of the matter.

Some commentators have earlier suggested that courts owe deference to the tribunal's determination on the existence or validity of the arbitration agreement,[17] but this did not represent the prevailing view and has anyway been superseded by legislation.[18] Even in France, where the autonomy of arbitration is supported more than in any other legal system, it is not suggested that the tribunal's determination of this issue is final.

When the matter at issue is the compatibility of the award with public policy, however, a different approach is supported by the minimalist theory.

The ground for annulment and refusal of enforcement relating to public policy is meant to protect the most important values of the legal system. It can be seen as a condition upon which a legal system accepts that disputes may be subject to arbitration and excluded from the juris-

[17] For reference to a diverging interpretation of the old regulation in Germany see John J. Barceló III, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective", *Cornell Law Faculty Publications* 2003, 508, https://scholarship.law.cornell.edu/facpub/508, 1114–1136, 1131.

[18] Ibid.

diction of its courts. A legal system accepts that disputes may be finally decided by a private tribunal, instead of being decided by courts, as long as it is possible to ensure that certain basic principles are also respected in arbitration.

These basic principles may be of a procedural character, such as the right to be heard, and they may be of a substantive character, such as the principle against corruption, principles protecting free competition or principles protecting creditors. If the principles are sufficiently fundamental, they will be deemed to be part of public policy. As long as the court has the possibility to verify that these fundamental principles have been respected, it will not interfere with arbitration.

The ability of the court to verify that fundamental principles have been respected, however, would be illusionary if the court were bound by the assessment that the arbitral tribunal made of that very matter. Court control would not have a real function if the court's only role were to accept the evaluation made by the arbitral tribunal. Assume, for example, an arbitral tribunal that reveals to one party the content of internal deliberations, thus favouring it over the other party. An award rendered under these circumstances would obviously violate public policy. Should the court be bound to accept the tribunal's own evaluation, i.e. that discriminating between the parties and breaching the duty of confidentiality do not infringe fundamental principles? The evident answer is that the court has to evaluate the matter independently. The arbitral tribunal may not give validity to a discriminatory conduct, simply by saying that the conduct is valid. If this applies to public policy concerns of a procedural nature, why should it not apply also to public policy concerns of a substantive nature?

An explanation may be found in the observation that the minimalist theory is often put forward in connection with matters of competition law.[19] As known, since the CJEU decision in *Eco Swiss*[20] competition law

[19] Luca Radicati di Brozolo, *Arbitration and Competition Law: The Position of the Courts and of Arbitrators,* Arbitration International, 2011, 1–25; Giuditta Cordero-Moss, "Inherent Powers and Competition Law", in Franco Ferrari and Friedrich Rosenfeld (eds), *Inherent Powers in International Adjudication*, Juris 2018, 297–325, 306 ff.

[20] Case C-126/97, *Eco Swiss China Time Ltd. v. Benneton Int'l NV*, 1999 E.C.R. I-3079.

has been deemed a matter of public policy in the context of arbitration. Thus, awards rendered in disputes with competition law implications may potentially infringe public policy. When the court controls the compatibility of an award with public policy, it cannot express an opinion until it has verified whether competition law has been infringed and whether the infringement is serious enough to justify setting aside the award or refusing its enforcement. Determining whether competition law is violated, however, often requires complicated inquiries, that go way beyond the simple examination of the award and the applicable law. Some competition law infringements may be assessed after a relatively straight forward examination of the award. This applies particularly to awards regarding agreements which have as their object the prevention, restriction or distortion of competition within the internal market.[21] Also agreements that do not have as their object to restrict competition, but have nevertheless an effect on competition, may violate competition law. Assessing the implications of competition law for these agreements, however, assumes extensive and complex evaluations, among others considering possible economic benefits, indispensability and other aspects of the economic context.[22]

It is probably the desire to avoid these extensive inquiries that is at the origin of the minimalist theory. It would be costly, time consuming and complicated if the court had to repeat the complicated inquiries that have been carried out by the tribunal. While reasons of efficiency suggest that such complicated inquiries shall not be duplicated, it is questionable that the solution lies in affirming that the court owes deference to the determination made by the tribunal.

A better route seems to be to rely on the narrow scope of the public policy rule, see section 9 below. If it is necessary to initiate a full-fledged inquiry to ascertain whether an award infringes competition law, it could be argued that the infringement is not so serious as to justify applying the

[21] These agreements are forbidden under article 101 of the TFEU. More extensively, Cordero-Moss, 'Inherent Powers and Competition Law', cit., 310 f.

[22] Commission Notice Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001 OJ (C 003) 2–30.

public policy ground. However, if, after having examined the award and the underlying evidence and documentation, the court finds reason to conclude that competition law was infringed, and that this infringement is so serious that it affects public policy, the award may be set aside or refused enforcement.

It has been suggested[23] that it should be possible to exercise court control by examining, in some detail, the reasoning of the award. Only in exceptional cases, such as when the award has no reasons, or the award did not consider the applicability of public policy rules, should the court be allowed to go further and examine the parties' pleadings or the evidence produced in the arbitral proceedings or, in extreme cases, to launch a full-fledged investigation. I can subscribe to this scale of court control's intensity, with one addition: in order to safeguard the efficacy of the public policy rule, I would add that the court may go further and examine the pleadings and the evidence also when the court does not find the award's reasoning convincing. With this addition, the intensity of court control corresponds to the criteria laid down by the maximalist theory.

The maximalist approach is not meant to give the court the power to review the tribunal's decision. As was seen above, public policy is not violated simply because the award has wrongly applied the governing law. Even when the allegedly incorrectly applied provisions are mandatory, there is no automatic effect on public policy. Public policy is affected only if the result of the award seriously infringes fundamental values in the socio-economic system. It is, in other words, not the technical content of a legal rule that may constitute public policy, but the underlying principles. The narrow scope of the public policy rule, therefore, prevents that court control becomes a review of the merits: an award may not be set aside simply because the tribunal did not accurately apply certain rules of law.

Also the minimalist theory developed from the desire to affirm the narrow scope of the public policy ground. The minimalist doctrine, as affirmed by the Paris Court of Appeal,[24] permits courts to set aside an

[23] Radicati di Brozolo, "Mandatory Rules and International Arbitration", cit., 63f.

[24] *Supra* footnote 12.

award or refuse its enforcement only if the violation of public policy is manifest, effective and concrete. As was seen above, these criteria have been interpreted so strictly that their application is equivalent to saying that the court owes deference to the determination made by the arbitral tribunal. It is only when the arbitral tribunal has not considered the matter, that the court may make an independent evaluation. This strict interpretation of the criteria, however, is not followed by the Paris Court of Appeal in respect of awards that deal with matters of corruption and of money laundering. [25] In these areas, the Court repeatedly carried out independent evaluations and concluded differently from the arbitral tribunal. Thus, the Paris Court of Appeal applies the maximalist approach in the context of corruption and money laundering. Moreover, the maximalist approach is applied also when existence and validity of the arbitration agreement are at issue, as was seen in section 4 above. As I argued above, in my opinion the maximalist approach is the preferable route also outside these areas.

7. EU-law

Even though the minimalist doctrine seems to be losing authority in its country of origin, France, it still enjoys wide support in the arbitration community because it accords with the traditional understanding that interference with party autonomy and the arbitral award shall be kept to a minimum.[26] The minimalist theory, however, may turn out to be detrimental to arbitration: as I will explain below, restricting the scope of court control creates the risk of reducing the scope of arbitrability.

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[25] *Supra* footnote 15.

[26] Radicati di Brozolo, "Arbitration and Competition Law", cit. Questioning that this is the prevailing opinion Seraglini and Ortscheidt, *Droit de l'arbitrage interne et international,* cit., para 983.

The close link between court control and arbitrability is apparent in some opinions by the CJEU Advocate General. In *CDC*, [27] AG Jääskinen argued for restricting arbitrability of matters relating to competition law, because arbitration does not ensure a uniform application of EU law. Similarly, in *Genentech*,[28] AG Wathelet pleaded for more extensive court control and criticised the minimalist approach, according to which court control may be exercised only in the case of manifest infringement of public policy, and only if the issue had not been examined in the arbitration proceeding. The requirement that only manifest infringements may trigger court control was criticised for making court control illusionary – because many restrictions of competition forbidden by EU law require complex evaluation and would escape review.[29] The requirement that the court owes deference to the decision made by the arbitral tribunal was criticised for being at odds with the system of review of compatibility with EU law.

In the view of the AG, as arbitral tribunals have no competence to refer to the CJEU questions for preliminary rulings, the responsibility for reviewing compliance with EU law must be placed with the courts and not with arbitral tribunals.[30] According to the AG opinion, the general principle of arbitration law, according to which a court may not independently review the substance of an award, does not prevent the court from considering the issue of compliance with competition law, even though the issue has already been considered by the arbitral tribunal – given that competition law is of fundamental importance in the EU legal order, and that the New York Convention permits to

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[27] Case C-352/13 *CDC Hydrogen Peroxide v. Evonik Degussa and Others* (ECLI:EU:C:2015:335), opinion of AG Jääskinen (ECLI:EU:C:2014:2443).

[28] Case C-567/14 *Genentech v. Hoechst and Sanofi-Aventis Deutschland* (ECLI:EU:C:2016:526), opinion of AG Wathelet (ECLI:EU:C:2016:177).

[29] Case C-567/14 (Genentech), AG Opinion, paras 64–67.

[30] Ivi, paras 59–62. The AG refers here to commercial arbitration. The same AG Wathelet expressed the opinion that in investment arbitration the arbitral tribunal is entitled to refer questions to the CJEU. This opinion, however, was not followed by the Court.

refuse enforcement for violation of public policy.[31] In its final judgment in the *Genentech* case, the CJEU ignored the matter and did not take a position on the scale from the AG's maximalist approach with automatic effects to the minimalist approach and the impossibility to evaluate the infringement's result under the specific circumstances. Therefore, there has not been any clarification on this point. Also in the first mentioned case, *CDC*, the CJEU chose not to decide these aspects, thus leaving open the question of whether the minimalist doctrine is compatible with EU law, or whether the maximalist doctrine shall be preferred.

The matter was touched upon in a later case, *Achmea*. [32] The case regarded the annulment proceeding of an investment award[33] and was based on a referral by the German Supreme Court (BGH). [34] One of the invoked annulment grounds was that the award was null because the dispute was not arbitrable: as arbitral tribunals are not bound by the EU duty to apply EU law in a uniform way, the effective application of EU law would be endangered if the dispute had been arbitrable. This line of thought resembles the situation prior to *Mitsubishi*.[35] Prior to this seminal decision, US courts excluded arbitrability whenever the issues in dispute assumed the accurate application of norms reflecting important policies, such as competition law.

With *Mitsubishi*, the so-called second look doctrine was introduced: issues relating to important policies such as competition law can be arbitrated, because courts have the possibility to exercise control on

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31 Ivi, paras 70–72. The AG seemed to assume that any and all violations of competition law would amount to a violation of EU *ordre public*. This is not a correct assumption as the CJEU has repeatedly stated that only serious violations lead to infringement of *ordre public,* see Cases C-38/98 (Renault) and C-68/13 (Diageo). More extensively, see Cordero-Moss, 'Inherent Powers and Competition Law', cit., 309f.

32 Case C- 284/16 *Slovak Republic v Achmea BV* (ECLI:EU: C:2018: 158).

33 Achmea B.V. (former Eureko B.V.) v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13, 7.12.2012.

34 Bundesgerichtshof, 3.3.2016, I ZB 2/1.

35 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).*

awards.[36] The BGH requested the CJEU to confirm that there is no basis to restrict the scope of arbitrability, as long as the courts may control the award's compatibility with fundamental principles of the forum. Thus, the BGH embraced the second look doctrine introduced by *Mitsubishi* and endorsed the maximalist theory. Advocate General Wathelet[37] concurred with this line of thought. The CJEU however, did not accept this approach, and concluded that investment disputes are not arbitrable. Following the CJEU decision, the BGH has set aside the award, thus confirming the maximalist approach.[38]

However, the CJEU distinguished between investment disputes and commercial disputes, and specified that its conclusion did not apply to commercial disputes.[39] Also this time, therefore, for commercial arbitration the CJEU did not clarify the extent of court control that it expects for it to permit arbitrability of matters related to EU-law. The CJEU, however, seemed to indirectly endorse, as an *obiter dictum*, the Advocate General's assumption that, in controlling commercial arbitral awards, courts should follow the maximalist approach.

Rather than excluding arbitration automatically and *a priori*, simply on the basis that the dispute regards an area regulated by laws that require accurate application,[40] it is better to permit arbitration and verify at the stage of challenge or enforcement whether the award is compatible

[36] For a more extensive reasoning see Giuditta Cordero-Moss, "Mitsubishi: balancing arbitrability and court control", Horatia Muir Watt, Lucia Bíziková. Agatha Brandão de Oliveira and Diego Fernández Arroyo (eds.), *Global Private International Law, Adjudication without Frontiers*, Elgar, forthcoming.

[37] Case C-281/16 (Achmea) Opinion of AG Wathelet, (ECLI:EU:C:2017:699), paras 70–72; ibid paras 251–60. The principal argument in the Opinion is that investment arbitral tribunals meet the criteria contained in article 267 TFEU. Therefore, they are permitted to request the CJEU to give a preliminary ruling and are required to apply EU law, see paras 84–135. Supporting this position, Jürgen Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) 32(4) *Journal of International Arbitration* 367. The CJEU, however, rejected this argument.

[38] BGH, 31 October 2018, ECLI:DE:BGH:2018:311018BIZB2.15.0

[39] For a criticism of the CJEU's reasoning see Giuditta Cordero-Moss, "Towards lean times for arbitrability?" Christoph Benicke, Stefan Huber (eds.), *Festschrift in honour of Herbert Kronke,* forthcoming.

[40] Radicati di Brozolo, "Arbitration and Competition Law", cit., at 58 casts doubt on the assumption that arbitration is not capable of an accurate application of the law.

with fundamental principles. This, however, assumes the maximalist approach. The minimalist theory runs the risk of depriving court control of any meaningful effect, thus encouraging a restrictive attitude towards arbitrability.[41]

8. The approach in Norway

In Norway, apart from my writings[42] there is no expressed position on the distinction between minimalist and maximalist approach. However, the Law Commission Report to the draft AA assumes that a court may independently review the arbitral tribunal's application of law, when this has implications of public policy. This appears in the course of the analysis of why the draft AA (and also the final version of the AA, see § 9(2)) explicitly confirms that the private law effects of competition law are arbitrable. The Law Commission makes the following observation (my translation):[43]

> "A consequence of the possibility to arbitrate the private law effects of competition law, is that arbitral awards may be rendered that are based on a wrong understanding of competition law. An arbitral award based on such a mistake may be set aside as invalid because it violates public policy (ordre public) pursuant to chapters 8 and 9 in the draft [§ 43 in the final version of the AA]. This was assumed in a European Court of Justice decision of 1999, the so-called Eco Swiss decision (C-126/97 Echo Swiss China Time Ltd. v. Benetton International N.V. (1999) ECR I-3055). It is fair to assume that invalidity on this basis only applies when violations of competition law are particularly serious."

41 More extensively, Cordero-Moss, «Mitsubishi», cit.

42 Giuditta Cordero-Moss (ed.), *Norsk ordre public som skranke for partsautonomi i internasjonale kontrakter og internasjonal tvisteløsning*, Universitetsforlaget 2018, at section 5.10.

43 NOU 2001:33, at section 8.5.3.

The Law Commission, therefore, assumes that the annulment court may find that an award violates public policy because the arbitral tribunal applied competition law wrongly. In order to come to this conclusion, the annulment court must have the possibility to independently evaluate the application of competition law in the particular case. This confirms that the Law Commission assumed the maximalist approach.

It should also be pointed out that §§ 43 (2) (b) and 46(2)(b) of the AA provide that the court shall on its own motion verify the compatibility of arbitral awards with public policy. This means that the AA does not delegate to the parties the decision on whether a public policy evaluation shall be made or not. Matters of public policy are so important, that not even the parties' agreement may prevent the court from considering them. This suggests that the AA does not support the minimalist approach, which delegates the evaluation of public policy matters to the arbitral tribunal.

Furthermore, under these provisions, the court does not have the discretion to decide whether to annul or refuse enforcement of an award or not, once it has established that the award infringes public policy: according to the AA, the court *shall* annul or refuse enforcement of an award that is against public policy. In this respect, the AA differs from the Model Law and the New York Convention. These instruments give courts the power to apply the *ordre public* exception *ex officio,* but they do not expressly state that courts are obliged to annul or refuse enforcement of an award whenever they conclude that the award infringes public policy. The provision in the AA creates for the court not only the power, but also an independent duty to verify the compatibility of arbitral awards with public policy and to act thereon. In practice, there is no significant difference between the AA and the Model Law or the New York Convention, because the public policy assessment is discretionary. If a Norwegian court does not consider it appropriate to annul or refuse enforcement of an award, it may refrain from concluding that the award infringed *ordre public*.

In Norwegian legal literature, the applicability of the public policy rule is discussed particularly in connection with the *Eco Swiss* decision. The matter, however, is discussed not from the point of view of whether

courts may or may not independently evaluate whether the award is valid (i.e., whether they should follow the maximalist approach or the minimalist). The matter is discussed from the point of view of the scope of the provision on *ordre public* (i.e., whether *any* breach of competition law may justify the application of provision, or whether only serious breaches may do so).[44] In short, the discussion is about the scope of *ordre public*, and not about the court's ability to independently evaluate whether public policy was violated.[45]

Legal literature explains that the way in which it can be avoided that the provision on public policy results in a review of the merits, is to ensure that the scope of *ordre public* is narrow.[46] Among examples of awards that may infringe public policy, legal literature mentions awards deciding on claims based on betting or on crimes, or awards the enforcement of which would result in crimes.[47] Furthermore, if an award orders to pay damages for the breach of contract clauses that were void because they violated competition law, it is said that, in extreme cases, the court may annul the award.[48] It is further said that awards based on incorrect interpretation of facts or incorrect interpretation of the law, can violate public policy.[49]

Briefly, legal literature assumes, as do also the preparatory works of the AA, that the court is not bound by the award's evaluation, when it ascertains whether the award violates public policy. It must be assumed that the arbitral tribunal has considered the award to be valid, when it rendered an award that decided a claim based on betting or on a crime, or ordering an action that would result in a crime, or ordering to pay

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44 Borgar Høgetveit Berg (ed.), *Voldgiftsloven,* Gyldendal 2006, 330; Mads Magnussen and Simen M. Klevstrand, «Ugyldighetssøksmål mot voldgiftsdommer som strider mot konkurransereglene», in Borgar Høgetveit Berg and Ola Ø. Nisja (eds.), *Avtalt prosess,* Universitetsforlaget 2015, 214–236, 224–227, 230, 232–3; Geir Woxholth, *Voldgift,* Gyldendal 2013, 897–8.

45 I am not taking into consideration my own scholarship or the publications made in the framework of my research projects.

46 Berg, *Voldgiftsloven,* cit., 312–313; 327; Woxholth, cit., 892–3.

47 Berg, *Voldgiftsloven,* cit., 328.

48 Magnussen and Klevstrand, «Ugyldighetssøksmål mot voldgiftsdommer», cit., 228.

49 Berg, *Voldgiftsloven,* cit., 329; Magnussen and Klevstrand, «Ugyldighetssøksmål mot voldgiftsdommer», cit., 229.

damages for the breach of contract clauses that violated competition law, or based on an incorrect interpretation of facts or of the law. Yet in all these situations, legal literature affirms that it is possible for the court to apply the rule on *ordre public* and annul the award.

It seems reasonable to conclude that legal literature assumes that the court was not bound by the arbitral tribunal's explicit or implicit opinion that the award was valid. Hence, the court could independently evaluate the compatibility of the award with public policy. This entails that the court may independently evaluate the evidence that already was evaluated by the arbitral tribunal, and may form its own opinion of the disputed facts. Furthermore, the court may independently evaluate how the law shall be applied. The evaluation, however, is limited to the sole purpose of verifying whether the award affects public policy.

As regards the merits of the dispute, the court shall not substitute its views to the views of the arbitral tribunal. Should the court find that public policy is not affected, therefore, the court has to affirm the award as valid or enforce it even though it disagreed with the tribunal's evaluation of evidence or application of law. [50] Should, however, the court find that affirming the award would violate fundamental principles, the court shall set aside the award or refuse its enforcement, even though the tribunal considered its own award to be valid.

9. The scope of public policy

It is generally recognized that the rule on public policy shall be exercised restrictively. This applies both internationally [51] and under Norwegian law.[52] Only fundamental principles qualify as principles of public policy,

[50] Cordero-Moss, *Norsk ordre public,* cit., section 5.3.

[51] Born, International Commercial Arbitration, cit., 3312, 3647; Cordero-Moss, International Commercial Contracts, cit., 246ff.

[52] See section 8 above. For further references see Cordero-Moss, *Norsk ordre public,* cit., section 5.

and only serious infringements of these principles justify setting aside an award or refusing its enforcement. Public policy is not deemed to be infringed whenever there is a discrepancy between the award and the result to which a court would have arrived.

In *Eco Swiss*, the CJEU established that competition law is based on fundamental principles, because it is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.[53]

The Court said that the importance of the provision in question (at the time it was article 85 of the EC Treaty) "led the framers of the Treaty to provide expressly, in article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void".[54]

A parallel may be drawn with other areas of law in Norway. There is no general principle according to which a contract is void when it violates mandatory rules of law.[55] However, according to Norwegian legal literature, contracts that violate rules of company law are automatically void.[56] Company law has significant importance for the integrity of the market, and serious infringements of its most important principles may have relevance to public policy.

Other situations in which serious breaches of the underlying principles may have public policy relevance are when third party interests or the reliance on the system are affected, such as in the field of property law or insolvency.[57] It is, however, important to emphasize that public policy is not infringed simply because certain mandatory rules were not applied accurately. It is only when the award significantly breaches important principles, that public policy may become relevant.

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53 C-126/97 (Eco Swiss), at para 36.

54 Ibid.

55 Cordero-Moss, *Norsk ordre public,* cit., section 5.5.1.

56 Mads H. Andenæs, Aksjeselskaper og allmennaksjeselskaper, 2016, s. 60; Mads H. Andenæs, Institutt for privatrettens skriftserie 175, 2009, s. 7–20, 7 ff.; Magnus Årbakke mfl., Aksjeloven og allmennaksjeloven, s. 331; Gudmund Knudsen, Institutt for privatrettens skriftserie 175, 2009, s. 37 Ibid., footnote 60.

57 For an extensive analysis see Cordero-Moss, *Norsk ordre public,* cit., chapter 8.

Furthermore, the public policy evaluation has to be made with regard to the specific case, and not merely on the abstract level of the rule. What is relevant is not violation of the principles, but the consequences that this may have in the specific case. It may be envisaged a situation where the underlying, fundamental principles are violated, but the consequences in the specific case are not unacceptable (for example, because the result is the same as if the rules had not been violated) – public policy would, in such situation, not be violated.

A question that can be raised is whether the result of an award may be deemed to be in contrast with public policy, when the only effect of the award is to order a party to pay reimbursement of damages, for example for breach of contract. Assume a contract that was not fulfilled by one party because it violated competition law. The defaulting party's defence is that fulfilling the contract would imply a violation of competition law. If the award orders that party to pay damages for breach of contract, is *ordre public* violated? Ordering a party to make a payment can hardly be seen to violate fundamental principles. Even where the order to pay is wrongful, there is no automatic relevance to fundamental principles. However, it must be considered that, by ordering payment, the award gives effect to the contract that was breached. If the contract violated fundamental principles, in the example, of competition law, the award is in practice giving effect to the violation of competition law. Where the tribunal's order to effect payment is based on the evaluation of an incidental question relating to fundamental principles, such as competition law, the effect of the award may go beyond the interests of the two disputing parties. The award may undermine the effectiveness of the regime of competition law, and thus affect fundamental principles.[58]

A similar reasoning is found in the field of Norwegian contract law and company law. Remedies for breach of invalid contracts are viewed as a substitute for contract performance and thus unlawful.[59] Similarly,

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[58] Giuditta Cordero-Moss, *Internasjonal privatrett på formuerettens område,* Universitetsforlaget 2014, 288–290; Cordero-Moss, *Norsk ordre public,* cit., section 5.4.

[59] Viggo Hagstrøm, *Obligasjonsrett,* 2nd ed., Universitetsforlaget 2011, 539.

liability for breach of a shareholders agreement may not be affirmed if implementing of the agreement violates company law.[60]

The CJEU made a similar reasoning, in respect of competition law, in the already mentioned *Eco Swiss* case. The issue for the arbitral tribunal had been whether a licensing agreement between two private parties had been lawfully terminated by one of the parties. The arbitral tribunal found that the early termination made by one of the parties was wrongful, and it ordered that party to pay damages to the other party. This award was challenged before the courts of the place of arbitration, the Netherlands. The Dutch Supreme Court referred to the CJEU a request for preliminary ruling on certain matters of procedural law and, more specifically, on whether EU competition law may be deemed to have public policy character. The CJEU, in its evaluation, went beyond the mere circumstance that the award regarded the early termination of a contract between two parties, and that the only effect of the award was to order one party to reimburse damages to the other party. The question of competition law was only incidental, and it had actually not even been raised before the arbitral tribunal. The award, therefore, was simply an award on contract matters. Nevertheless, the CJEU considered the award to be "in fact contrary to"[61] EU competition law. The Court observed that rules of competition law are fundamental principles of European law. On this basis, it found that an award that is in fact contrary to competition law, violates public policy in the sense of the New York Convention.[62]

The reasoning in *Eco Swiss*, therefore, supports the considerations that were made above: it should not be excluded that an award may have relevance to public policy, simply on the basis that the award only regards contractual matters and orders one party to pay a certain sum of money to the other party. Paying an amount of money to a contractual party, in itself, does not affect fundamental principles; but the award may have an impact on the effectiveness of rules that are meant to implement fundamental principles. The *Eco Swiss* decision is considered in the

60 Rt. 2007 s. 360 (Lyse Energi), para 62.

61 C-196/97 (Eco Swiss), para 41

62 Ivi, para 39.

preparatory works of the AA as representing the status of the law in Norway as regards application of the public policy rule.[63]

10. Conclusion

The provisions on *ordre public* laid down in the AA do not constitute an obstacle to the effectiveness of arbitration in Norway – at least not more than in many other countries generally considered to be favourable to arbitration. There is reason to assume that Norwegian courts will take the maximalist approach, and that they thus will independently evaluate whether *ordre public* is infringed or not, without being bound by the evaluation that the arbitral tribunal may have made of the same issue. This is aligned with the Model Law and the New York Convention.

The maximalist theory does not create a contradiction between the finality of the award and the court's control, because the rule on public policy has a narrow scope.

There is, undoubtedly, an overlapping: both the tribunal and the court evaluate the same issues. However, the court is not reviewing the merits of the award. Neither is the court acting as an appeal court on the issues underlying the grounds for annulment and for refusal of enforcement. The purpose of the court's review is not to ascertain whether the tribunal has accurately applied the law or has properly understood the evidence in respect of these issues. The court is carrying out its own, independent evaluation of these issues for the purpose of ascertaining whether the award is null or unenforceable. The court's review, therefore, is made according to the criteria and the standard applicable to annulment and enforcement. The threshold for annulling the award or refusing its enforcement is higher than the threshold a court would have if it was acting as an appeal court.

[63] NOU 2001:33, section 8.5.3.

The proper balance between the opposed interests of preserving effectiveness of arbitral awards on one hand, and ensuring respect of fundamental principles on the other, does not lie in restricting the court's ability to independently verify whether public policy was infringed. It lies in ensuring that the public policy rule has a narrow scope.

Norway as an attractive place to arbitrate

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This brief article is based on a speech I gave at the inaugural Norwegian Arbitration Day in Oslo on 17 January 2019.

I have been asked to ponder the question – or perhaps the proposition – of Norway as an attractive place to arbitrate; and, after pondering and reflecting, I have some good news, a bit of bad news and a couple of practical suggestions to offer in this respect.

As an introduction, I can refer you to the following "fruit salad" of acronyms: ICC, LCIA, SIAC, HKIAC, SCC, FAI, DIA, VIAC, SCAI, DIS, CAM, MCA, NAI, CEPANI, MCCI, ISTAC, IAC, DIAC, EMAC, DIFC-LCIA, ADCCAC, CRCICA, KCAC, QICCA, GCCCAC, CCAT, CCIT, KIAC, AFSA, NCIA, MARC, LACIAC, ICAMA, CIETAC, CMAC, BIAC, SHIAC, SCCIETAC, HIAC, JCAA, JIDRC, KCAB, AIAC.

Behind each acronym you will find a functioning arbitration Institute located or headquartered in Europe, Asia or Africa. The reason I mention this is the indisputable fact that the world is already rife with institutions in various jurisdictions offering their services as administrators of disputes to be resolved by arbitration. That is the bit of bad news I mentioned just above.

This in turn begs the question whether there is room for yet another jurisdiction, i.e. Norway, being successful in offering arbitration services to the business community? To me the question is "yes" which is the good news – or rather "yes, but…" or "yes, if …" which is where my practical suggestions come into play.

Overall, I consider that a distinction must be made when answering the question, and that distinction relates to the character of the arbitration being either

1. Domestic arbitration
2. International arbitration involving one or more Norwegian parties
3. International arbitration without Norwegian parties, i.e. Norway as a neutral venue for arbitration

In this speech I will not consider Norway as an attractive place for purely domestic arbitration, i.e. the first category mentioned above.

Concerning the second and the third category, i.e. international arbitrations, it is important to understand that different dynamics come into play when electing a place in Norway as the seat of arbitration. In case of the second category, i.e. if there is a Norwegian party involved in the arbitration agreement, that Norwegian party must typically be able to persuade the counterparties to elect a place in Norway as the seat of arbitration. If there is no Norwegian party, then the non-Norwegian parties themselves need to be able to agree to elect Norway – often as fall-back option if they cannot agree to arbitrate in either/any of the home jurisdiction of the contractual parties.

Despite the different dynamics, the requirements in my opinion remain the same (however more pronounced in the third category of arbitrations, i.e. when no Norwegian party is a party to the arbitration agreement). These requirements can be distilled to the following proposition: Norway needs to offer a structure which creates comfort and, thus, makes it easy to elect a place in Norway as the seat of arbitration.

Now what do I mean by "comfort"? To me, in this context, "comfort" involves and requires the perception by the parties of fairness, certainty and competence. This in turn entails three fundamental requirements:

Firstly, you need a good statutory framework in place. This requirement is fulfilled by Norway since Norway offers a contemporary arbitration act based on the UNCITRAL Model Law (1985). In my opinion, this is the "gold standard" of statutory framework, not because the UNCITRAL Model Law is the most ingenious or compelling legal instrument, or rather soft law instrument, ever created by man but because it is well known by practitioners and forms the basis for the arbitration acts of approx. 75 countries around the world.

Secondly, you need a judiciary not hostile to arbitration. This requirement, too, is fulfilled by Norway; the Norwegian case law regarding arbitration indicates sufficient arbitration friendliness on the part of the Norwegian courts.

Thirdly, you need to offer a well-reputed arbitration institute to administer arbitrations. This, in my opinion, is where it gets sticky when considering Norway as an attractive place to arbitrate. Tradition-

ally, Norway has favoured ad hoc arbitration and the reasons for this may be many and valid. Anecdotally, it is my understanding that the market for domestic arbitration is functioning rather well. However, in international arbitration – and especially when considering the third category of arbitrations, i.e. where no Norwegian parties are involved in the arbitration agreement – ad hoc arbitration does not cut the mustard. This is not a controversial statement as will have been demonstrated by the previous speakers here today; in Norway you talk about the "black box syndrome", i.e. the uncertainty as to procedural fairness which clouds many ad hoc arbitrations. I have personally spoken to quite a few non-Norwegian international arbitration lawyers with experience in conducting arbitrations in Norway, and more than one of them have confirmed the existence of the "black-box syndrome" in Norway for international parties and counsel. They did not sufficiently understand the procedures undertaken by arbitral tribunals in ad hoc arbitrations, or did not perceive them as fair.

Put differently and in the context of creating comfort as mentioned above, ad hoc arbitration equals uncertainty and uncertainty hampers the perception of procedural fairness, which in turn will make international parties lack comfort and, thus, shy away from Norway as a place to arbitrate their disputes.

In a nutshell, Norway needs a well-functioning arbitration institute.

It is my understanding, and listening to the other speeches today have bolstered that understanding, that the arbitration community in Norway is well aware of this, and the revitalization of the Oslo Chamber of Commerce ("OCC") as an arbitration institute clearly demonstrates that the arbitration community is working on a different offering in this respect.

I shall now turn to my understanding of the meaning of the adjective "well-functioning" in terms of the arbitration institute. Revisiting the keywords for creating comfort to international parties, the arbitration institute must provide competence and certainty and ensure procedural fairness of the arbitration. In my opinion, this requires the following:

Firstly, you need a contemporary set of arbitration rules providing for the efficient dispute resolution. To create the necessary comfort it is of importance that the rules look like the rules of the leading arbitration institutes.

In this respect, OCC has recently launched a new set of rules, which is commendable. These new rules are, however, rather minimalistic which was a conscious decision by the draughtsmen of the new rules. The reason for this is very well explained in an article by Ola Nisja and Thomas Svensen which has just appeared in Lov og Rett 1, 2019, pp 38–47 and, in short, it was considered important to keep the rules short since they were to compete with ad hoc arbitration clauses:

> *En innvending til OCCs regler kan være at de fremstår som mindre detaljerte sammenlignet med voldgiftsinstitutter som SCC, ICC, LCIA og Danish Institute of Arbitration (DIA), for å nevne noen. Antakelig er OCCs regler av de minst komplekse og omfangsrike man finner. At de nye reglene skulle bli slik, var ikke opplagt, men noe som ble grundig vurdert. Arbeidsgruppen som ble nedsatt for å lage nye regler, med tilslutning fra et enstemmig styre, falt ned på at det var ønskelig med et regelsett som er lett tilgjengelig og oversiktlig, og som samtidig ikke avviker for mye fra den norske ad hoc-tradisjonen. … Det skal imidlertid være mulig å forklare fordelene ved bruk av OCC sammenlignet med ad hoc voldgift, og for så vidt også sammenlignet med andre voldgiftsinstitutter i mange saker.*

I entirely accept this premise.

Furthermore, Nisja and Svensen suggest that the rules may be reconsidered after being in force for some time:

> *Det er … ikke gitt at det å ha et så vidt enkelt rammeverk blir riktig i tiden fremover. Når de nye reglene har fått virke en periode, bør de evalueres gjennom en bredere prosess hvor brukerne involveres.*

May I suggest that any committee vested with the task of rewriting the rules approaches the work by considering the recent changes to the rules

of some of the major arbitration institutes in the world, e.g. the ICC and the HKIAC, which very recently launched new rules.

Secondly, you need to be perceived as offering transparent and fair decision making. I can deal with this requirement in one short sentence: Norway is generally well-known for transparency and fairness, and there are no reasons for concern.

Thirdly, in order to create comfort, I consider it vitally important that the arbitration institute possesses the necessary skills in terms of case administration. Optimally, this will require employing a secretary general or a registrar as well as a secretariat with a legally trained staff administering the caseload. It is my understanding that the OCC presently does not have a registrar/secretary general and no legally trained staff to administer its arbitrations.

Fourthly, the arbitration institute will need to market its offerings to the international arbitration community. As regards marketing, a certain focus will be necessary. Here, Norway can focus on industries such as energy and offshore, where Norway offers second to none capabilities as well as shipping and maritime disputes and certain areas of production and trade. Similarly, a geographical focus can be employed, e.g. towards parties from the other Nordic countries or the North Sea region, especially regarding energy (including renewables), offshore etc.

Employment of the relevant members of staff and marketing efforts mentioned as the third and fourth requirements, respectively, will require funding, and in my opinion, this funding must be provided up-front. The notion that you can provide funding as and when the caseload starts building will likely not provide sufficient comfort to the international arbitration community.

Summing up: The competition for attracting international arbitrations to a given jurisdiction is fierce and many good places to arbitrate are currently available across the globe, not least in Europe. Therefore, Norway is rather "late to the party" emerging as yet another preferred arbitration seat – but in my opinion Norway is not in any way too late. As mentioned, Norway has a lot to offer international arbitration – not

least in the sphere of energy and offshore as well as maritime and related industries.

To me, it somehow boils down to the initial allocation of the necessary funds for a fully operational arbitration institute being of paramount importance if Norway shall be sustainably successful as an attractive place to arbitrate for international parties. I hope that the group of Norwegian professionals most interested in attracting international arbitration to Norway will find ways of providing this funding – and time is somewhat of the essence.

How we can make arbitration in Norway even better

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1. Introduction

Should arbitration in Norway progress in line with international best practice? Is there something which would be recognized as a "Nordic arbitration tradition"? Is the time for the traditional ad hoc arbitration over? These are all fundamental and important questions, but will not be answered in this article. Arbitration in Norway is at a crossroads as the arbitral community collectively decides how arbitration in Norway should progress. Whilst we wait for that to happen, there are changes which can be made to improve arbitration in Norway and make it even better.

In this article, I will discuss six general areas for improvement:

1. More fast track arbitration;
2. More diversity of judges – expand the community;
3. Improved case management;
4. Increased use of parallel mediation;
5. Evolve and use the relevant institutional alternatives already available; and
6. Taking advantage of the Disputes Act 2005 in arbitration.

None of these improvements require structural changes. They do not imply any revolution, but they are all readily available measures which could be used in order to improve an already well-functioning system to resolve disputes in a cost efficient and straightforward manner.

2. More fast track arbitration

Unless parties agree otherwise, the Norwegian Arbitration Act 2004 provides for an arbitral tribunal consisting of three arbitrators, cf. section 12. The expense of a three arbitrator tribunal does not always make sense

and can give rise to a conflict for the claiming party. For example, if the amount in dispute is NOK 500,000, the costs of an arbitration can be difficult to justify. The claim, however, may be too big for most creditors to walk away from.

The Oslo Chamber of Commerce (OCC) deals with this conflict in two ways. Firstly, the OCC can – if the parties have not reached agreement as to the number of arbitrators – decide that one arbitrator will suffice, cf. the OCC Rules section 8 first paragraph. More importantly, the OCC Rules provide for fast track arbitration, cf. the OCC Rules chapter VII. The fast track arbitration rules are built on the OCC's general rules, but provide a robust and far more cost-efficient way of resolving smaller disputes. The NOMA Rules do not, at present, have a similar provision.

So what should parties who could find themselves in this situation do? The key here is to draw up a proper arbitration clause which differentiates between disputes by the value in dispute. For instance, when the amount in dispute is less than say 5, 7 or even 10 million NOKs, the dispute could be resolved by fast-track arbitration (for instance under the OCC or ICC Arbitration Rules) and higher value disputes could continue to be referred to a three member arbitral tribunal. Examples of such arbitration clauses can be found on the websites of the leading arbitral institutions.

By adopting a fast track procedure, the parties can receive a high quality and enforceable decision at a cost which is in sensible proportion to the sums or the issues in dispute.

3. More diversity of arbitrators – expand the community

It is often said that international arbitration is "stale, pale and male". To a large extent, this is true and also true when it comes to arbitration in Norway.

First of all, it should be noted that with an increasing number of arbitrations within an expanding array of legal fields, the group of people sitting as arbitrators has naturally expanded. Still, there is no question that quite often the same arbitrators from a small group are being appointed over and over again – and being appointed repeatedly by the same parties and counsel!

As with many things, there can be no doubt that more diversity can be beneficial – as long as requirements of quality, independence and impartiality of the arbitrator are maintained. Parties and the arbitral community should be creative and think somewhat outside the box when appointing arbitrators. Do we need three Norwegian arbitrators? Should we appoint someone from Denmark, Sweden or even the UK? Or elsewhere? Are there scholars at the University, not among the "usual suspects", who could be fit for purpose? What about judges in the ordinary courts? Within Norway, perhaps we could even dare to look outside Oslo and the other major cities. As an example, the Young Arbitration Practitioners Norway group has a highly competent board and some very eager members, many of whom would love the opportunity to obtain more practical experience.

4. Improved case management

NOMA has developed a comprehensive set of Best Practice Guidelines. The OCC is in the process of developing its own set of guidelines alongside the OCC rules. No guidelines are ever perfect but, when drawn up for the purpose, they can improve the quality of the arbitration, increase foreseeability for foreign parties and even make the arbitration more cost-effective. These soft law guidelines provide a very good initiative which, if used properly, should improve case management and make it more efficient; again resulting in both lower tribunal and counsel costs.

When looking at best Norwegian practice, one should be inspired by international arbitration practice. Much thought and practice can be found when going outside Norway and the Nordics. However, I am not one of those who want Norwegian arbitration to merely copy international arbitration practice. Should we do so wholesale, we would indeed lose some of the very advantages of arbitration in Norway. Thus, implementing international best practice must be done with caution.

As I discuss later in section 7, there is a mass of high quality legal resource and experience of the Disputes Act 2005 which is available to users of arbitration in Norway. Thus, when gap filling and/or developing best practice case management guidelines, we can look to the domestic courts for inspiration. One good source can indeed be the new common guidelines set out for the district courts and court of appeals in Norway.

5. Increased use of parallel mediation

Not enough effort is put into settlement discussions and too many cases proceed to final determination through arbitration (or the courts, as the case may be). Even if effort is put in, the parties just aren't able to bridge the gap themselves.

Mediation in Norway has been a tremendous success much due to the offer of court-annexed mediation for matters being heard by the domestic courts. Use of mediation in arbitration, however, is underdeveloped and undervalued.

There is nothing preventing parties from conducting mediation in parallel with arbitral proceedings. There is no need to halt or even delay an arbitration if the mediation is set out properly. Parties need to start by appointing a competent mediator (more are needed, by the way!). As to the mediation procedure – there are no real boundaries and the parties are free to agree what suits them and the nature and size of the dispute.

For example, there could be one mediation session or several sessions, one mediator or two mediators, the mediation can concern the whole dispute or parts of the dispute, the mediator can be asked to evaluate the parties' positions or mediate in the true sense of the word, the mediation may benefit from the parties exchanging statements and documents before meeting or cost may negate doing so, and so on.

6. Evolve and use the relevant institutional (or semi-institutional) alternatives already available

Both the OCC and NOMA need more cases. In my view, we need them both. One is a general chamber of commerce alternative as can be found in many countries, whereas the other is sector specific alternative. They both contribute to improving the quality of arbitration in Norway and the Nordics respectively and give the parties very sound – and in most cases better – alternatives to ad hoc arbitration and/or arbitration in third countries. But the parties need to use these alternatives, and using in practice means implementing OCC or NOMA in the dispute resolution clauses.

7. Take advantage of the Disputes Act 2005 in arbitration

The topic of this article is how we can make arbitration in Norway even better. Which we can if we want to. And we should. But when doing so, we must not lose years of hard work and successful traditions on the way.

Both the domestic courts and Nordic arbitration have a very high degree of credibility in Norway.

The Disputes Act 2005 took the good parts of court based dispute resolution and made the courts take a quantum leap forward. I have yet to hear anyone argue that we should have kept the 1915 Act. The Disputes Act 2005 is a modern dispute resolution act adapted to Norwegian best practice within the courts.

There is no rule in the Arbitration Act 2004 stating that gaps should be filled with the Disputes Act 2005, although it has been a misunderstanding among some that this is the case. But when we have such a valuable and rich body of high quality legal resource available – the Act itself, the preparatory works, case law and literature – it makes no sense not to take advantage of this when it comes to developing best practice in arbitration in Norway.

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