The European Arbitration Review

2019

Norway

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The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

Norway

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Summary

Norway has established itself as a source of high-quality counsel and arbitrators for international disputes, in particular in the petroleum and shipping industries. The Norwegian Oil and Energy Arbitration Association aims to make this competence visible and available worldwide. Norwegian arbitration law also has some unique features that may prove attractive for those seeking arbitrators with highly specific fields of competence. Historically and today, ad hoc arbitration was the norm in Norway. The Oslo Chamber of Commerce (OCC) aims to increase the popularity of institutional arbitration with new, modern rules. Similarly, the newly established Nordic Offshore and Maritime Arbitration Association (NOMA) offers institutional arbitration with a light touch, as well as best practice guidelines for those who still prefer ad hoc arrangements.

NORWEGIAN EXCELLENCE IN OIL AND GAS DISPUTES

Since 2013, lawyers from Norwegian law firm Wikborg Rein (including one of these authors) have made a mark on the pages of *GAR* with the successful representation of European buyers of natural gas,[1] most remarkably as lead counsel to Ukrainian Naftogaz in their multibillion-dollar disputes with Gazprom. The observant reader may have wondered why a Norwegian law firm represents a Ukrainian company in disputes with no relation to Norway; the parties are Ukrainian and Russian, the governing law and arbitration venue are Swedish, and the goods and services traded originate in Central Asia, Russia and Ukraine. Equally, other observers of the global oil and gas industry may have wondered why another Norwegian law firm played a key role in negotiating an agreement on oil processing and transportation between Sudan and South Sudan in 2012.[2]

The answer is found in Norway's development as a major producer of oil and gas since the early 1960s. As late as February 1958, Norway's Geological Survey reported that '[o]ne can exclude the possibility of finding coal, oil or sulphur on the continental shelf bordering the Norwegian coastline'.[3] A more amusing, but possibly mythical, twist on the same theme is the story about the head geologist of a major oil company who, in the mid-1960s, quipped that he would drink all the oil that would be found on the Norwegian continental shelf.-[4] However, that pessimistic view on North Sea geology started to change with the 1959 discovery of the Groningen gas field in the Netherlands, and in 1962 Phillips Petroleum Company requested exploration rights from the Norwegian government.[5]

The government immediately went about to establish a legal basis for the administration of the (potential) petroleum resources on the Norwegian Continental Shelf, starting with a 1963 Royal Decree, and the rest is, as they say, history. Today, Norway is the eighth-largest producer of oil and the third-largest producer of gas in the world.[6]

Norway was also a wealthy, democratic and highly developed industrial country even before it became a producer of oil and gas. Norway's well-established shipping and ship-building industry took advantage of the opportunities provided by the exploration and production of the new-found natural resources, and branched out into the oil and gas service and supply industry. Norway's service and supply industry has also developed cutting-edge expertise and is internationally competitive.[7]

And like the 'nuts and bolts' part of the Norwegian oil and gas service industry, its lawyers could also benefit from their colleagues in the shipping industry, who had led the way in the internationalisation of the Norwegian legal profession. For example, Wikborg Rein

established the first foreign office of any Norwegian law firm in New York City in 1956, serving Norwegian insurers and shipowners.[8]

Finally, the development of the Norwegian oil and gas industry went in parallel with developments in the public international law of the sea and natural resources, where Norway's geography and maritime resources led it (and its lawyers) to play a central role. Many readers may, for example, be familiar with the 1993 International Court of Justice judgment on maritime delimitation between Jan Mayen (Norway) and Greenland (Denmark), or the 1976 Norway–UK treaty on cross-border unitisation of the Frigg Field.

Against this background of more than 50 years of building oil and gas industry competence on the back of a well-established maritime industry, it is probably unsurprising to see Norwegian lawyers retained in international oil and gas disputes for their cutting-edge expertise, rather than due to a need for local counsel.

THE NORWEGIAN OIL AND ENERGY ARBITRATION ASSOCIATION

In November 2013, a group of Norwegian lawyers with extensive experience in dispute resolution established the Norwegian Oil and Energy Arbitration Association (NOEAA). The NOEAA is not an arbitration institute, but rather a professional organisation which aims to promote the expertise of Norwegian oil and gas lawyers as arbitrators, mediators and counsel in disputes worldwide, as well as Norway as a venue for arbitration.[9]

Membership in the NOEAA is subject to certain minimum requirements in respect of expertise and experience. Information about the members' qualifications are available at NOEAA's website.

NORWAY AS A VENUE FOR ARBITRATION AND ENFORCEMENT

Norway is a politically stable, democratic and transparent society that shares a third place with Finland and Switzerland on Transparency International's Corruption Perceptions Index 2017.[10] Interrupted only by the occupation in 1940–45, Norway has been a parliamentary democracy since 1884 with universal suffrage since 1913. The courts are and are perceived to be independent and foreign players can successfully challenge the 'national champions', as shown for example by China Oil Field Services Limited's recent victory against Statoil (now Equinor) in a rig contract termination dispute in Oslo City Court.[11]

Norwegian law can be described as based on civil law with strong common law influences.-[12] The Norwegian Arbitration Act from 2004[13] (the NAA) is based on the 1985 UNCITRAL Model Law. Norway ratified the 1958 New York Convention in 1961, and arbitral awards may generally be enforced in the same manner as domestic judgments, in practice regardless of where they have been handed down.[14]

Practically all Norwegians with higher education are fluent in English. An arbitral award that has been rendered in English, Danish or Swedish does not have to be translated for the court to recognise and enforce it.

JOINT APPOINTMENT OF ARBITRAL TRIBUNALS AS THE DEFAULT RULE

In addition to the generally 'arbitration-friendly' features described above, Norwegian arbitration law has a particular feature that may be of particular interest for parties seeking arbitrators with highly specific competence, namely the joint appointment of arbitral tribunals.

Pursuant to section 13, second paragraph of the NAA, '[t]he parties shall appoint the arbitrators jointly, if possible'. The NAA provides for a procedure where each party appoints one arbitrator only if the parties fail to do so. Both procedures may be deviated from by agreement.

This procedure seems to be a specifically Norwegian invention. Joint appointment of arbitrators is not found in the UNCITRAL Model Law, in the Swedish or Danish Arbitration Acts, the German Code of Civil Procedure, the 1996 Arbitration Act for England, Wales & Northern Ireland, or any institutional rules the authors are familiar with, other than the Rules of the Arbitration and Dispute Resolution Institute of the OCC (since 2005) and the 2017 Rules of the Nordic Offshore & Maritime Arbitration Association.

Internationally, the default rule appears to be that each party appoints one arbitrator, and that the arbitrators so appointed, or the arbitral institution, appoints the chairperson. That was also the rule in Norway prior to the NAA in 2004.

The reason for the rule on joint appointment of arbitrators in section 13 NAA is simple and attractive:

> It is advantageous if the parties can agree on the arbitral tribunal in its entirety. The tribunal then gets generally less attached to the parties and a stronger character of independence than when the parties appoint one arbitrator each.-[15]

The arrangement has been well received in practice, and parties increasingly appoint all arbitrators jointly in Norwegian-based arbitrations.[16] The adoption of the rule by NOMA also seems to attest to its success.

In an international context, the importance of this salient feature of Norwegian (and perhaps Nordic maritime) arbitration is that it proposes a possible solution to the 'repeat appointment' problem within highly specialised fields of law.[17]

Most legal systems, rightly, appreciate that repeated appointments by the same party, counsel or law firm of the same person as arbitrator may create doubts concerning that person's impartiality and independence. In the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2014) this rule has been codified in sections II, 3.1.3 and 3.3.8, concerning party and counsel appointments respectively.

Numerous and frequent appointments by one party of one person may reasonably create the impression that the person appointed has some kind of special sympathy for the appointing party. If arbitrator fees from one party, or channelled through one counsel or law firm, constitute a significant share of a person's income, that person's independence may be at risk. The flip side of that coin is that highly qualified arbitrators within highly specialised areas of law with a small number of actors risk becoming victims of their own success, and risk being excluded from the field just as they have accumulated the experience necessary to solve seemingly complex disputes correctly and efficiently.

At least to some extent, the consistently joint appointment of arbitral tribunals envisaged by section 13 NAA (and equivalent provisions in the OCC and NOMA Rules) may resolve the above dilemma. The point is that, if handled appropriately, a joint appointment should

seriously reduce the risks concerning arbitrators' impartiality or independence outlined above.

The Stockholm Court of Appeal, which handles all challenges of awards rendered in Stockholm-seated arbitrations,[18] has reasoned that even if the parties are given a measure of influence on the selection of the chairperson, because the party-appointed arbitrators usually consult with 'their' appointing party or counsel during the process, such appointments as chairperson shall not count as party appointments for the purpose of assessing the arbitrator's impartiality and independence.[19] That reasoning should hold true also for a jointly appointed tribunal.

THE AD HOC TRADITION AND THE SHIFT TOWARDS MORE INSTITUTIONAL ARBITRATION

Traditionally, most arbitrations in Norway have been ad hoc, in the sense that no arbitration institute is involved. The tribunal will base itself on the NAA, which leaves quite a bit of discretion with the tribunal. This ad hoc tradition has worked well, but has at the same time been unfamiliar with international players present in Norway. For anyone not knowing the Norwegian arbitration market well, ad hoc arbitration can be perceived as something of a 'black box'.

Thus, one shift seen in Norway is that international arbitration institutions, such as the International Chamber of Commerce (ICC), the London Court of International Arbitration, the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Centre and the China International Economic and Trade Arbitration Commission, are seen more often. Along with the general trend that these institutions have modernised themselves and their rules, the common view among the leading dispute lawyers is no longer that such institutes are necessarily slow and expensive. For instance, quite to the contrary, the ICC and SCC's scrutiny of costs are viewed as very positive by the users of arbitration.

Based on this general trend, it would have been surprising if one wouldn't see growth and development of institutional arbitration in Norway.

THE NEW RULES OF THE OSLO CHAMBER OF COMMERCE

The only truly Norwegian arbitration institute is the Arbitration and Dispute Resolution Institute of the OCC. The OCC's new rules for arbitration and mediation came into force from 1 January 2017.[20] With modern regulation such as a cap on costs, joint appointment and a very accessible form of fast-track arbitration, the institute has taken a step up in the international arbitration community. The rules give a good basis for sleek and cost-effective arbitrations, and have been very positively received within the dispute resolution community.

THE NOMA RULES

Norway and the Nordic countries have strong traditions within the maritime and offshore oil and gas industries. These industries have, however, always had a strong link to London, including when it comes to resolving disputes through arbitration. The Nordic countries have long traditions for settling disputes within the maritime and offshore industry by arbitration. In the globalised shipping and offshore oil and gas industry, the Nordic industry and the Nordic legal community recognised that it would be useful to develop an even more common approach to Nordic arbitration. In this context, the Nordic Maritime Law Associations together with the industry has developed the Rules of the Nordic Offshore

and Maritime Arbitration Association, in order to promote transparent and cost-efficient arbitrations.

The project, where lawyers from Norway, Sweden, Finland and Denmark decided to sit down and develop one Nordic set of arbitration rules to be used throughout the Nordic countries was ambitious. But they made it. The Nordic Offshore and Maritime Arbitration Association was established 28 November 2017 on the initiative of the Danish, Finnish, Norwegian and Swedish Maritime Law Associations.

A high-quality set of rules[21] has been developed and is already in use. Today, NOMA can be described as semi-institutional, but given its increasing popularity, it appears likely that a secretariat will be established at some point.

The NOMA Rules emphasise speed and simplicity, and take a light touch approach to institutional arbitration.

In terms of speed and efficiency, the NOMA Rules have shorter time-limits and omits certain procedural steps compared to the UNCITRAL Arbitration Rules on which they are based. For example, the deadlines for appointing arbitrators are shorter, and there is no requirement for a response to the notice of arbitration.

Further, the possibility to request an interpretation of an award from the tribunal has been removed, eliminating another possibility for delays. Obviously, this also requires the parties to present clearly formulated requests for relief, and the tribunal to draft the award succinctly and clearly, and hence front-loads possible clarification issues to the arbitral proceedings as such.

The NOMA Rules also lack an explicit provision on tribunal-appointed experts. This reflects the adversarial tradition in Nordic dispute resolution, where it is for the parties to adduce the evidence, and may also save on time and costs by avoiding debates over the need to appoint such experts and their potential terms of reference.

A final point where the NOMA Rules take a light touch approach to institutional arbitration and goes against the international trend towards ever-increasing powers for arbitral institutes, is the lack of explicit provisions on consolidation. To many, this may be a welcome deference to party autonomy.

In addition to the arbitration rules as such, NOMA has developed three further documents aimed at promoting efficiency:

- the NOMA Best Practice Guidelines (the Guidelines);
- the NOMA Matrix (the Matrix); and
- the NOMA Rules on the Taking of Evidence (the Rules).

The Guidelines are attached to the Rules, which provide that the tribunal and the parties shall perform the arbitration taking into account the Guidelines. However, the Guidelines may also be used on a stand-alone basis, as an expression of commonly accepted practice in Nordic-seated arbitrations.

The Guidelines are intended to assist tribunals and parties on certain procedural points. For example, the Guidelines list issues to be considered in relation to or at the case management conference. These include whether:

- time should be allocated for settlement discussions;
- a written procedure is possible; and
- written witness statements or expert reports are necessary.

The Guidelines also contain default procedural deadlines and a default structure for the oral hearing.

The Matrix is a more detailed, tabular checklist of matters to be discussed and agreed at the case management conference. For each matter, the Matrix indicates the best practice and, for some matters also practical recommendations.

The Rules are simpler than the International Bar Association Rules on the Taking of Evidence in International Arbitration. This reflects the Nordic tradition of immediacy and emphasis on oral evidence, and scepticism to discovery procedures. Notably, the default rule is that written witness statements shall not be used. Also, while there is a possibility to request documents from the other party, the tribunal may not order document production unless the parties agree or the tribunal decides otherwise.

In the authors' experience, the NOMA Rules are already finding their way into numerous contracts in the Nordic shipping and offshore oil and gas industry. This is not least due to the involvement of the Nordic Maritime Law Associations in the development of the Rules and the support of the industry itself. For example, both the Norwegian[22] and Danish[23] shipowners' associations have welcomed the launching of the Rules.

Whether the Guidelines, Matrix and Rules will find their way into the toolbox of counsel and arbitrators as sources of best practice beyond proceedings under the NOMA Rules and the Nordic shipping and offshore oil and gas industry remains to be seen. Based on the widespread adoption of similar instruments like the International Bar Association's various rules and guidelines by the arbitration community, our expectation is that they will do so.

Notes

[1] https://globalarbitrationreview.com/article/1032473/icc-panel-revises-gazprom-export-price-formula ; https://globalarbitrationreview.com/article/1142219/naftogaz-declares-win-against-gazprom ; https://globalarbitrationreview.com/article/1166220/naftogaz-claims-victory-in-gas-transit-dispute ; https://globalarbitrationreview.com/article/1171538/naftogaz-files-new-tariff-claim-against-gazprom.

[2] www.adeb.no/en/news/references/sudan-and-south-sudan-have-signed-oil-deal--mediation-by-arntzen-de-besche/.

[3] Farouk Al-Kasim, *Managing Petroleum Resources: The 'Norwegian Model' in a broad perspective*, Oxford Institute for Energy Studies, 2006, p 8.

[4] Stig S Kvendseth, *Giant Discovery: A History of Ekofisk through the First 20 years*, Phillips Petroleum Company Norway on behalf of the Phillips Norway Group, 1988, pp 12 and 13.

[5] www.regjeringen.no/en/topics/energy/oil-and-gas/norways-oil-history-in-5-minutes/id440538/.

[6] www.regjeringen.no/en/topics/energy/oil-and-gas/id1003/.

[7] www.regjeringen.no/en/topics/energy/oil-and-gas/leverandorindustrien/id2001283/.

[8] Lars A Christensen, Wikborg Rein, *A remarkable firm history*, 2012, pp 23 and 24.

[9] http://noeaa.no/about-us/.

[10] www.transparency.org/news/feature/corruption_perceptions_index_2017#table.

[11] www.epmag.com/statoil-ordered-pay-cosl-cancelled-rig-contract-following-fatal-accident-1701531.

[12] http://noeaa.no/about-us/.
[13] An unofficial translation to English is made available by the Oslo Chamber of Commerce at www.chamber.no/wp-content/uploads/2014/02/Norwegian_Arbitration_Act.pdf.
[14] NAA, section 43.
[15] Ot prp (white paper) nr. 27 (2003–2004) section 93, author's translation.
[16] Geir Woxholth, Voldgift (arbitration), 2013, p 391.
[17] Dag Mjaaland and Aadne M Haga, Voldgiftsloven paragraf 13 annet ledd. Gjentatte oppnevnelser og voldgiftsdommeres habilitet i internasjonale forhold (Norwegian Arbitration Act Section 13, second paragraph. Repeat appointments and the impartiality and independence of arbitrators in an international context), in Avtalt Prosess, voldgift i praksis (Agreed Procedure, arbitration in practice), Universitetsforlaget, 2015.
Section 43, Swedish Arbitration Act.
[18] Mål T 10321-06. The judgment is available in an unofficial translation to English at
[19] www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/Court-of-Appeal/Court-of-Appeal/Court-of-Appeal/d_952259-decision-of-the-svea-court-of-appeal-10-december-2008-case-no.-t-10321-06?search=korsn%C3%A4s.
[20] https://en.chamber.no/tjenester/tvistelosning/regelverk/.
[21] http://nordicarbitration.dk/statuses.html.
[22] www.rederi.no/aktuelt/2017/nytt-nordisk-voldgiftsinstitutt--noma/.
[23] www.danishshipping.dk/presse/nyheder/nordisk-voldgiftsinstitut-sat-i-soeen/.

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