International arbitration in Norway

The Norwegian Arbitration Act

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1. **Arbitration in Norway – overview**

1.1 **The Norwegian Arbitration Act 2004 (NAA)**

Until the enactment of the Norwegian Arbitration Act (NAA) in 2004, arbitration in Norway was regulated by a special chapter of the Norwegian Civil Procedure Act 1915 (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.).

The Act is based on the UNCITRAL Model Law, and Norway is regarded as a “Model Law state”.

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.” 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3 Civil Procedure Act 13 August 1915 no. 6, repealed by Act relating to mediation and procedure in civil disputes (The Dispute Act) 17 June 2005 no. 90 sect. 37-1 second para.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.
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/](https://iccwbo.org/dispute-resolution/services/arbitration/rules-of-arbitration/)


\(^9\) 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 becoming more willing to accept arbitration in Norway.

The structure of NAA is therefore based on the Model Law, 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.

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

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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).

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. 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. 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.” 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

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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

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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”.\(^\text{20}\) 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

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\(^{20}\) 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](https://www.norskindustri.no/dokumenter/leveringsbetingelser/nfntk-standardkontrakter) in Norwegian and English parallel texts.
by arbitration.” However, disputes exceeding about 10 mill. NOK are referred to arbitration, unless the parties agree otherwise. 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.

### 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, 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. 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 ad 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. 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. The rules of NOMA are based on the UNCITRAL Arbitration Rules. 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.

28 https://www.nordicarbitration.org/