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

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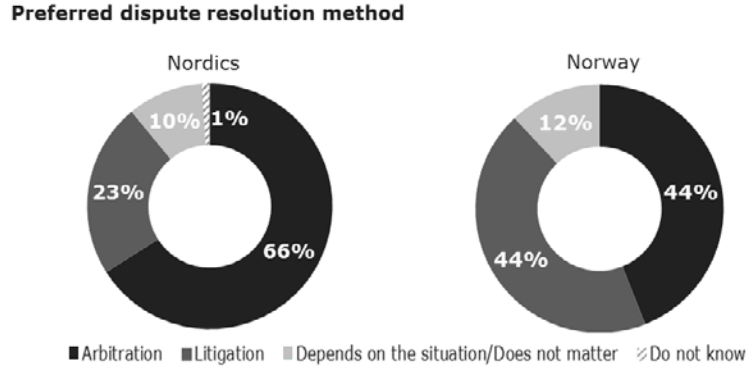
1. Introduction

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.

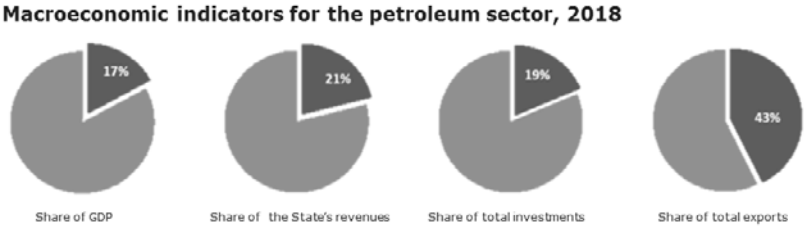


Source: Roschier Disutes Index 2016

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.
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> 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.

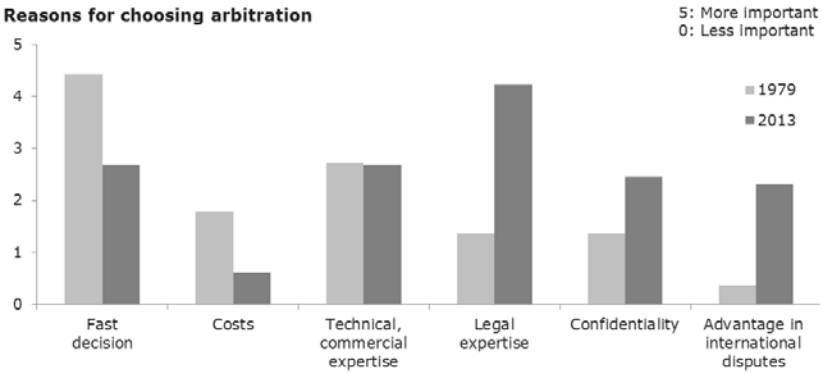
Contract	NF 15	NTK 15	NTK 15 Mod	NTK 15 Modul &Mod	NSC 05	NIB 16	JOA
Dispute resolution	Arbitration	Arbitration	Arbitration	Arbitration	Litigation	Litigation	Litigation*

*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.