

# Arbitration and Domestic Courts in Norway: Sibling Rivalry

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## 1 The Nature of Arbitration

Arbitration is a natural consequence of the fundamental principle of freedom of contract.<sup>1</sup> If parties are free to commercially agree on what they want (with some limited exceptions), they should also be free to agree that certain third parties will resolve any disputes between them, as well as dictate, how such third parties shall resolve a dispute.

Arbitration is a form of alternative dispute resolution, insofar as alternative dispute resolution is defined as alternatives to having a dispute decided by a domestic court by way of a binding court decision.<sup>2</sup> However, as an alternative method for resolving disputes, arbitration differs from other dispute resolution mechanisms such as negotiations and mediation in that its primary objective is not to resolve a dispute amicably. The term alternative then fits very well: Arbitration is an alternative way of obtaining a final decision, normally a written judgment. Thus, the two methods – either obtaining an arbitral award or a binding court decision – can be seen as siblings. And as everyone knows, siblings will regularly resemble each other, but they can nevertheless be very different.

Arbitration has a long historic tradition in Norway. There has been legislation in place regulating arbitration for almost 350 years. The principle of finality of arbitral awards was clearly established in the Danish King Christian the Fifth's Act for Norway of 15 April 1687 First Book, 6<sup>th</sup> Chapter, Article 1.<sup>3</sup> The fact that there are only very limited possibilities for challenging an arbitration award is an important characteristic of arbitration.

In 2014 Norway celebrated the 200<sup>th</sup> anniversary of its Constitution of 17 May 1814. One of the most important drafts regulated arbitration.<sup>4</sup> Key characteristics such as the freedom and right to arbitrate in “private matters”, legal effect and finality (no appeal unless agreed) were covered. In the end, the adopted text did not regulate arbitration, but the fact that it was seriously discussed to include such a provision in the Constitution says quite a bit of the position arbitration has had in Norway for a long time.

Former Chief Justice of the Supreme Court of Norway Carsten Smith has stated that arbitration reflects the principle of the free society in that the state does not have a monopoly for handing down legal decisions from its own domestic courts, but rather has preserved the traditional choice for parties to have

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1 This is for instance pointed out in Ot.prp. no. 27 (2003-2004) p. 9 and Innst. O. no. 51 (2003-2004) p. 10 (preparatory works of the Arbitration Act 2004).

2 See Ristvedt, Per M. and Nisja, Ola Ø., *Alternativ tvisteløsning*, Oslo 2008 p. 52 and 507.

3 “Dersom partene voldgive deris Sag og Tvistighed paa Dannemænd, enten med Opmand, eller uden, da hva de sig kiende, saa vit deris fuldmagt dennem tillader at gjøre, det staar fast, og kand ej for nogen Ret til Underkiendelse indstævnis, dog Kongen sin sag forbeholden.”. The principle did not apply for the king himself.

4 J. G. Adler and C. M. Falsen, *Udkast til en Constitution for Kongeriget Norge*, p. 66, section 173: “I private Sager have Parterne Ret til at lade Voldgiftsmænd dømme dem imellem, og deres Dom, som har fuldkommen Retsvirkning, existerer ingen Appel, med mindre Parterne have gjensidigen forbeholde sig denne til en vis og bestemt Overret.”.

their disputes decided by a private third party.<sup>5</sup> There is a general discussion as to whether arbitration predates domestic courts, or whether it is rather the opposite way around.<sup>6</sup> The opinion in Norway seems to be that arbitration as a method of resolving disputes is older than domestic courts.<sup>7</sup>

The modern form of arbitration in Norway developed because craft unions and industries wanted experts within their specific fields of business to decide their disputes. This reason for choosing arbitration also remains relevant today to a significant degree.<sup>8</sup> In 2016, arbitration is sought by hard headed business people, for example within the construction industry, the oil and gas sector, or parties to mergers and acquisitions and other forms of financial transactions. The popularity of arbitration is increasing in Norway.

As it appears, Norway has long traditions for arbitration. Today the legal community is experiencing a continuing increased popularity of arbitration with a – at least to some extent – decrease of similar cases before the domestic courts. The main topic of this article is the formal relationship between the rules governing disputes being litigated before the Norwegian courts and the rules governing arbitration in Norway. First of all, it is necessary to give an overview of the legal framework for handling such disputes.

## 2 Legal Framework

Arbitration in Norway is regulated today by the Arbitration Act of 14 May 2004 (in force from 1 January 2005).<sup>9</sup> Court resolution of disputes is governed by the Mediation and Court Proceedings in Civil Matters Act of 17 June 2005 (in force from 1 January 2008).<sup>10</sup>

Both acts are the result of a complete review of the rules for resolving disputes in civil matters in Norway. The foundations for the two acts were laid down by the Disputes Committee (“Tvistemålsutvalget”), led by now former Chief Justice of the Supreme Court Tore Schei, along with a highly competent panel of experts. The work of the Disputes Committee resulted in two Official Norwegian Reports (NOUs), which form an important part of the preparatory works for this

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5 Smith, Carsten, *Voldgift – Domstolenes konkurrent og hjelper*, Tidsskrift for Rettsvitenskap 1993, p. 477.

6 See Roberts, Simon and Palmer, Michael, *Dispute Processes – ADR and the Primary Forms of Decision-Making*, London 2005 p. 222.

7 NOU 2001: 33 p. 32 (preparatory works of the Arbitration Act 2004). For a different opinion, see Haug, Bjørn, *Internasjonal kommersiell voldgift – noen utviklingslinjer og aktuelle problemer*, in *Rett og rettsal – Et festskrift til Rolv Ryssdal*, Oslo 1984, p. 603.

8 See Nisja, Ola Ø., *En temperaturmåling på voldgift i Norge*, in Berg, Borgar Høgetveit and Nisja, Ola Ø., *Avtalt prosess*, Oslo 2015, p. 261 and section 3 below.

9 Hereinafter referred to as the Arbitration Act 2004. In Norwegian, the act is referred to as “voldgiftsloven”.

10 Hereinafter referred to as the Disputes Act 2005. In Norwegian, the act is referred to as “tvisteloven”.

legislation, and these remain a legal source often referred to in questions of interpretation under Norwegian law.

The arbitration act has now been in force over 12 years was based on the UNCITRAL Model Law on International Commercial Arbitration. It contains 50 sections, whereas the Disputes Act 2005 has 349. Thus, the Disputes Act 2005 is far more detailed. Although a number of the sections are irrelevant for arbitration, other parts of the act are highly relevant – at least for inspiration since they regulate important practical issues such as awarding of costs, taking of evidence and in general details on a number of procedural issues. The Disputes Act is a high quality piece of legislation in a very accessible format.<sup>11</sup>

Before the new regime came into force, both arbitration and court resolution were regulated by the Court Practice and Procedure for Civil Disputes Act of 13 August 1915 no. 6.<sup>12</sup>

It is thus fair to say that arbitration and the use of domestic courts for handing down judgments are closely related, also from a formal perspective. Under the previous set of rules, they were even regulated by the same piece of legislation and body of rules. Today, the Arbitration Act 2004 is in many ways a little brother – far less detailed but indeed following the same principles of the more comprehensive, but younger, big sister – the Disputes Act 2005.

### **3 The Popularity of Arbitration and Domestic Courts in Norway**

Although the popularity of arbitration in Norway has increased over the last years, dispute resolution through the domestic courts continues to be a very common choice in commercial contracts in Norway. A recent survey concluded that arbitration and domestic courts were equally popular.<sup>13</sup> This is quite different from Denmark and in particular Sweden and Finland where arbitration is (clearly) more popular.<sup>14</sup>

There is little empirical research on why parties choose as they do when it comes to dispute resolution in Norway. An informal survey was carried out in 2013 in an effort to understand why parties choose arbitration.<sup>15</sup> The most interesting result was that the number one reason for choosing arbitration was legal competence. That is not to say that judges in the domestic courts in Norway are not highly competent. They are. There has probably never been more competition for the position of judge than what there is today. Thus the survey result demonstrates that parties in commercial disputes crave highly specialised

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11 A translation of the act is available online (“[app.uio.no/ub/ujur/oversatte-lover/english.shtml](http://app.uio.no/ub/ujur/oversatte-lover/english.shtml)”).

12 Hereinafter referred to as the Civil Disputes Act 1915. Arbitration was regulated by chapter 32. In Norwegian, the act is referred to as “tvistemålsloven”.

13 Roschier Disputes Index 2016 p. 11.

14 Roschier Disputes Index 2016 p. 11.

15 See Nisja, p. 261.

lawyers to decide their cases. Time and costs are no longer seen as major advantages of arbitration.

#### 4 General Supplementation of the Arbitration Act 2004?

The dual track system suggested by the Civil Disputes Committee was adopted by the legislator, which in turn led to Norway having two separate acts for court litigation and arbitration as from 1 January 2005. This meant that in 2005-2007, the new Arbitration Act 2004 existed alongside the Civil Disputes Act 1915, with Chapter 32 (which regulated arbitration) of the latter repealed.

The Arbitration Act 2004 does not imply that it should be generally supplemented by either the Civil Disputes Act 1915 or the Disputes Act 2005. This is also made clear in the preparatory works.<sup>16</sup> However, the preparatory works still state, both generally and specifically, that the regulations set out in the Disputes Act 2005 may to a great extent serve as a model for arbitral proceedings.<sup>17</sup> The preparatory works also state that the tribunals need to base themselves on “*basic principles of general dispute resolution*” in addition to the rules set out within the act itself.<sup>18</sup>

Legal doctrine has pointed out the quite widespread misunderstanding that the rules on resolving disputes before the ordinary courts supplement the rules set out in the Arbitration Act 2004.<sup>19</sup> Although some authors may be interpreted differently,<sup>20</sup> in general there does not appear to be any legal doctrine today which purports to justify that there is a legal basis for supplementing the Arbitration Act 2004 with the Disputes Act 2005 unless it has been explicitly agreed upon by the parties, which happens very rarely if at all in practice.<sup>21</sup> However, should a tribunal come to the conclusion that there is such an agreement, the tribunal will be bound by the rules of the Disputes Act 2005,<sup>22</sup> but only insofar as such rules can be adapted to arbitration.

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16 NOU 2001: 33 p. 20, 25-26 and 68.

17 NOU 2001: 33 p. 25-26, 69 and 98-99.

18 Ot.prp. no. 27 (2003-2004) p. 57. See also Innst. O. no. 51 (2003-2004) p. 11.

19 Berg, Borgar Høgetveit (ed.), *Voldgiftsloven med kommentarer*, Oslo 2006 p. 33, who holds that this is not explicitly stated in the preparatory works (cf. p. 213 where a reference to the NOU 2001: 33 p. 39 is included, which concerns the governing law prior to adoption of the Arbitration Act 2004). However, as can be seen by footnote 16, the Civil Disputes Committee was very clear on this point (and their NOU is clearly part of the Arbitration Act 2004's preparatory works), and there is no reason to think that the Ministry and Parliament saw it otherwise. See also Woxholth, Geir, *Voldgift*, Oslo 2013 p. 85.

20 Kolrud, Helge Jakob, Bjella, Kristin, Cordero-Moss, Giuditta and Ryssdal, Anders, *Voldgiftsloven – kommentarutgave*, Oslo 2006 p. 61 states that certain parts of the Civil Disputes Act 1915 (and when adopted the Disputes Act 2005) "will apply" to the extent appropriate. The use of the term "apply" ("komme til anvendelse") here is imprecise, as there is no legal basis for such application if that is what is actually meant.

21 Along the same lines, Berg (ed.) p. 215.

22 See also Berg (ed.) p. 215.

Analogies from specific rules may be relevant,<sup>23</sup> although it must be said that analogies giving rise to firm rules are difficult given that it is so clear from both the act itself and its legislative history that the Arbitration Act 2004 is not meant to be supplemented. In general, therefore, a more legally precise and interesting discussion concerns which rules in the Disputes Act 2005 that express basic principles of general dispute resolution, which are binding upon the tribunal, cf. the discussion above regarding the preparatory works.

Not surprisingly, there appears to be consensus in legal doctrine that there can be no *general* supplementation of the act.<sup>24</sup> At the same time, several scholars point out that there can be good reasons to follow the system before the domestic courts on several points and that this is also how arbitrations in Norway are conducted in practice.<sup>25</sup>

The two new acts did not bring about a new system on this point as opposed to the regime for arbitration under Chapter 32 of the Civil Disputes Act 1915. The Civil Dispute Act 1915 contained no requirement to follow the rules concerning the domestic courts also in arbitration.<sup>26</sup> Experience has shown that some practitioners may have held a different opinion. Written sources supporting such a view are however hard to find. To the contrary, there was in fact no such requirement,<sup>27</sup> but it was held that arbitral tribunals would often be on the safe side by following the rules applying to domestic court proceedings.<sup>28</sup> It was also held that if the parties had not agreed upon a specific procedural rule, it should often be concluded that the parties would want the tribunal to follow the rules applied by the domestic courts.<sup>29</sup> This was probably to go a bit too far, but such interpretations could of course be correct in specific circumstances.<sup>30</sup> Should that

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23 Woxholth p. 85.

24 Berg (ed.) p. 33 and 213, Ristvedt and Nisja p. 520, Woxholth p. 85 and Egeberg, Marius and Markeng, Kenneth Foyn, *Kan en voldgiftsdomstol beslutte stansing av saken mot den ene partens vilje?*, in Berg and Nisja p. 237-238.

25 Berg (ed.) p. 213-216, Kolrud et al p. 61, Ristvedt and Nisja p. 520 and 564 and Hov, Jo, *Rettergang I*, Oslo 2010 p. 579-580.

26 For sources prior to adoption, see Udkast til lov om rettergangsmaaden i tvistemaal med motiver. Avgivet af den ved kgl. resolution av 3dje januar 1891 nedsatte kommission p. 283 (preparatory works of the Civil Disputes Act 1915). See also Forhandlinger i Odelstinget 9 Juli 1915 p. 1578 (preparatory works of the Civil Disputes Act 1915).

27 See, e.g. Ot.prp. no. 28 (2003-2004) p. 11 and NOU 2001: 33 p. 39 (sections on the law prior to the new Act in the preparatory works for the Arbitration Act 2004) and Lindboe, Asbjørn, *Privat rettergang (voldgiftsprosessen)*, Oslo 1944 p. 84-85. The same is e.g. held by Schei, Tore, *Tvistemålsloven med kommentarer*, 2nd ed., Oslo 1998 p. 1155 and Berg, (ed.) p. 34. In the same direction, Hagerup, Francis, *Den norske civilproces*, 3rd ed., Kristiania 1918.

28 Ot.prp. no. 29 (1979-80) p. 25 (review by Supreme Court Justice Ernst Fredrik Eckhoff), Lindboe p. 100, Mæland, Henry John, *Voldgift*, Oslo 1988 p. 131 and Schei p. 1174. See also Michelsen, Hans M., *Sivilprosess*, Oslo 1999 p. 342 noting that arbitrators to a great extent followed the principles and rules set out in the Civil Disputes Act 1915.

29 Lindboe p. 84 (on voting) and 164 (more generally).

30 Similarly Mæland p. 131.

be the case, the tribunal would be bound by the Civil Disputes Act 1915,<sup>31</sup> but only insofar as such rules could be adapted to arbitration.

Although no one has done a complete review, most authors agreed that some of the rules and principles governing civil matters before the ordinary courts in the other chapters of the Civil Disputes Act 1915 would apply in arbitration. There is a lack of analysis as to whether this was for formal reasons or by way of the rules expressing a fundamental principle also applying in arbitration. The latter is in my opinion most precise given that no rule in chapter 32 (or elsewhere) stated that specific rules in the rest of the act – or the rest of the act in general – should apply in arbitration.

To summarize, there does not today appear to be any disagreement that fundamental principles of dispute resolution should apply also in arbitration,<sup>32</sup> and at the same time that the ordinary rules of civil procedure should not have general application. Although the legal situation is quite clear, the misunderstanding that the arbitration rules are to be supplemented by the rules governing the domestic courts remains persistent.

## 5 The Discretion Given to the Tribunal

The Arbitration Act 2004 is quite rudimentary, and as mentioned above, important aspects of any arbitration such as costs and taking of evidence, are only regulated to a very limited extent. If the act does not specify an issue of procedure, the answer is left to the tribunal, cf. section 21 first sentence: “*The arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate, subject to the limitations pursuant to the agreement of the parties and this Act.*”.

When deciding what would be an appropriate procedure, arbitrators tend to be inspired by the system well known from the domestic courts, and they have a legal basis for doing so under section 21.<sup>33</sup> However, this can be unsatisfactory, particularly in *ad hoc* arbitrations – by far the most popular way of conducting an arbitration in Norway – where there are no institutional rules to fill in the gaps in the Arbitration Act 2004. This creates a lack of predictability for the parties when it comes to procedural issues. The lack of detailed rules creates difficult and arguable unnecessary considerations for arbitral tribunals, contributing to the continuously increasing level of costs involved in arbitration. It also underlines the need for developing institutional arbitration in Norway, where the Oslo Chamber of Commerce is the most important initiative, having developed new rules in force from 1 January 2017.

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31 See also Mæland p. 131.

32 See, e.g. Eckhoff, E. F., *Kort om norsk voldgift*, Oslo 1987 p. 16 and Mæland, p. 131.

33 See above. For a discussion, see Woxholth p. 553-554.

## 6 Concluding Remarks

The analysis above demonstrates that the two tracks of rules – the siblings – remain as formally detached as they have been for at least 100 years. However, arbitral tribunals have found and will continue to find inspiration in the Disputes Act 2004, cf. the Arbitration Act section 21.

What remains to be considered as a matter of law, are what principles can be characterized as such fundamental principles of dispute resolution which need to be respected, and to what extent the law – including preparatory works, case law and doctrine – regarding litigation will be applied in order to give such principles a material content.<sup>34</sup> There is not much Norwegian case law which can assist here. However, the increasing popularity of arbitration – combined with increasing willingness to challenge the validity of arbitral awards – may well provide some answers in the coming years. By way of example, the Supreme Court has stated that the adversarial principle (*audi alteram partem*) must apply equally in arbitration as before the domestic courts.<sup>35</sup>

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34 See also Berg (ed.) p. 216.

35 Rt. 2005 p. 1590. The case was decided under the Civil Disputes Act 1915 chapter 32, but there is no reason to believe that the result would be different under the Arbitration Act 2004.