The Nordic Offshore and Maritime Arbitration Association – an update

By: Mathias Steinø

Hafnia Law Firm, Denmark

Introduction

Why would anyone attempt to have offshore or maritime disputes determined under any other rules than the LMAA? The LMAA has existed for more than 50 years and is a well-tested system. As it is stated on the LMAA website, the roots and traditions of the LMAA "*stretch back more than 300 years over the history of the Baltic Exchange*".

More cases are referred to LMAA adjudication than under any other set of arbitration rules in the world. There is a group of very experienced arbitrators and counsel. Having England as *lex arbitri* provides a solid basis for arbitration except perhaps for the idiosyncrasy of permitting cases for court review under section 69 of the 1996 Act whereby a party may appeal an arbitration award for errors of law that are so obvious that the courts have to correct them.

So, again, why would anyone choose another dispute adjudication method for maritime disputes? This paper seeks – perhaps in a somewhat provocative way – to shed light on why the LMAA may be challenged by other arbitration rules and why the arbitration community should embrace new developments which cater to a variety of needs in the industry.

Is the LMAA modern, transparent and attractive?

For those involved in LMAA cases, the system is probably entirely transparent, well-functioning and modern. And perhaps it only needs to be fully understandable by those who work within the system.

We are usually perfectly happy to leave a surgeon to understand the mechanics of an operation on the human body. The user of surgical services does not need to know how it works as long as it works. You might say the same about LMAA arbitration. Do the users really need to know what is going on in these LMAA cases as long as they deliver a result that is perceived by the users to be a fair outcome?

When it comes to arbitration, arguably, it is a benefit that the parties and their lawyers are familiar with the process. Becoming familiar with an arbitral system requires something from the lawyers seeking to learn the system, but it also requires that the arbitral process is designed and conducted in a modern and genuinely international manner to make it easily recognizable for industry players. If LMAA arbitration differs significantly from other international commercial arbitration systems, it might deter foreign parties from engaging in LMAA

arbitrations. An unusual arbitration process will inevitably alienate the foreign lawyers and their local clients from the process.

To those who have gained their arbitral experience from ordinary international commercial arbitration, the LMAA system is generally different and operates with some very English rather than international principles resembling what goes on in the English courts.

The exchange of briefs usually follows an English tradition of accepting or denying various paragraphs of the opponent's pleadings and amending pleadings in a trackable manner. That is not common in international arbitration where pleadings tend to form a "standalone" narrative that can be read and easily understood. The LMAA style requires the reader to print all the pleadings and review them back-to-back to get an understanding of the dispute. Such a method is not customary internationally and is rarely seen outside the context of English courts or LMAA proceedings. It may very well be that those involved in LMAA arbitrations find it to be a superior method of exchanging pleadings but it is a rarity and it makes LMAA arbitration less accessible to many of its users which do not work with LMAA arbitration on a daily basis.

In LMAA arbitration, practitioners often import traditions from the English court system. During cross-examination you often see notoriously English principles from the court system being employed such as using the phrase "I put it to you" when trying to show to the arbitrators that a witness is lying. The truth has to be put expressly to the witness for the witness to comment. This manner of putting something to a witness is a distinctly English rooted method of examining a witness and nothing otherwise known in international commercial arbitration. It seems very formalistic for outsiders, but English barristers will apply this method both in court and in LMAA hearings.

Is it beneficial for an international arbitration system to operate under rules which are significantly different from what is used outside that system? What drives the LMAA process in this direction other than the fact that it is mainly driven by English practitioners and rooted in English tradition? Arguably, the LMAA way of resolving disputes is not very international but rather just English.

To those who are common users of the LMAA you might say it is not a problem at all that the system is different from other international arbitrations, but for foreign companies and their counsel this system is not transparent and it does not reflect anything they are used to. Perhaps that is one of the reasons that initiatives have been taken to compete with LMAA.

International arbitration practitioners pride themselves of operating purely within the international arena with no particular attachment to local procedural law. Any arbitrator who relies on principles from the local Administration of Justice Act when exercising his or her arbitral mandate would ordinarily be scolded for doing so and be deemed not to have accepted that arbitration is something completely different from local procedural law and distinct in its international character. In English arbitration one might get this Dickens-ish feeling that the participants in the arena take pride in being very English and very different from other places

and finding that system to be superior to other systems. These are likely also factors that have contributed to new initiatives being taken outside England.

Another challenge with LMAA arbitrations which is not found in ordinary institutional arbitrations is the lack of remedies to ensure that arbitrators hand down decisions expeditiously. In one recent (and still pending) example final written exchange of proceedings were completed in January and as of October no award has been issued yet. There are very limited options to address this inefficiency and the parties to a large extent simply have to accept the delay. Such challenges may also have led parties to take initiatives to set up competing judicial systems such as the NOMA.

Why is LMAA arbitration still the most popular dispute resolution?
"I put it to you" that the LMAA is more popular than ever solely because of tradition and being the standard choice in many preprinted shipping contracts. It also plays a role that dispute resolution clauses are rarely the midpoint of negotiations when entering maritime contracts.

"I also put it to you" that no overseas ship owner or any Nordic player in the maritime industry would choose LMAA if they had to choose an arbitration system after the dispute arose. So those who pride themselves of thinking that the LMAA is popular because it is good, might want to revisit their reasons for that deduction.

Those inside praise it and find it just great, but those on the outside are much less attracted to it. I am writing this with the benefit of acting for parties on LMAA and non-LMAA cases, having both perspectives.

The London-based counsel and the primarily London-based pool of arbitrators consider the LMAA to be a wonderful system for adjudication of disputes, but it may be questioned whether those on the inside who make a living from the entire LMAA system are the right people to assess whether their own system works well. Interestingly, Nordic Arbitration (NOMA) was invented because the shipping industry voiced a need for alternative dispute resolution – it is the *industry* that wanted something new.

Lawyers outside England are no less self-interest driven than those in England. That means that lawyers outside London who find that the LMAA system has monopolized dispute resolution within the maritime arena are keen to get their share of the pie. English lawyers would automatically recommend the LMAA for any maritime dispute, that is not the case for lawyers outside England. Lawyers in Copenhagen or Singapore are not automatically incentivized to promote the LMAA above other dispute resolution centers. The drive away from London is obviously accelerated if non-English lawyers find that the LMAA is a closed system centered on itself and driven by a closely knit group of people.

Lawyers outside the LMAA system are likely to prefer other dispute resolution mechanisms and the main hurdle for moving away from LMAA is BIMCO and the spinal tradition for choosing the LMAA. The LMAA will certainly continue to exist for many years ahead and will likely also

continue to be the most popular dispute resolution system within maritime disputes, but it is questionable whether that is for the right reasons. Is it superior to other dispute resolution systems and does it add value to the parties compared to other means of dispute resolution? Perhaps the near monopoly is driven by factors detached from the quality of the resolution mechanism and the interests of the parties.

The Nordic Offshore and Maritime Arbitration Association (NOMA) and its value proposition

The present paper is not intended to be an indictment against the LMAA even if the above provocative observations may appear as such. The angle adopted in this paper emanates from the facts that NOMA is linked to the existence of the LMAA.

For many years, Nordic companies involved in offshore and maritime activities had to refer their disputes to international arbitration hubs like London. Maritime lawyers in the Nordic could see their clients' disputes being adjudicated mainly in London. Even domestic disputes between companies in e.g. Norway would be adjudicated in London which would in no way represent an obvious or desired dispute resolution mechanism for the involved parties. For instance, when OW Bunker when bankrupt in 2014, many disputes between the local bunker subsidiary in Norway, and its local customers were resolved in LMAA proceedings despite all parties to the contracts in dispute being Norwegian companies operating out of Bergen.

This ignited a discussion between Nordic maritime lawyers to draw back Nordic disputes to the Nordics. Surely that was in the lawyers' interest and quite possibly the initiative to start NOMA was hardly made for altruistic reasons or in a desire to increase access to justice. It may very well be that it was simply created out of self-interest and greed. But nonetheless there was a clear value proposition behind the initiative since otherwise it would hardly have been possible to attract any interest in the project. One might say that the value proposition in NOMA is simply being an alternative to the LMAA with all the benefits the parties will enjoy resolving their disputes outside the LMAA system.

A. *Proximity*

   Any party would instinctively prefer its dispute to be decided in a venue close to itself. The proximity not only reduces the time and cost associated with travel but also allows parties to participate more actively in the arbitration process. Face-to-face interactions can be invaluable in fostering better understanding and communication between disputing parties and their legal teams.

   But, perhaps more importantly, proximity is not only a geographical notion but reflects upon cultural references and understanding processes. A local judicial process would instinctively be easier to understand than a foreign process. If only for the diction of the involved people when speaking English, their way of thinking or assessing how they address disputes and their level of appetite for aggressive procedural strategies.

   A party to a NOMA arbitration and its attorneys would be able to employ a more standard international arbitration process with exchange of pleadings which mirror

practices from modern international arbitration as opposed to the more English-type process with amended pleadings and accepting or denying each paragraph of the other party's pleadings.

A NOMA arbitration process would also be clean of distinct English principles of cross-examination and you would not need to understand the concept of putting something to your witness or any similar notions of English procedural law. Evidence in the form of both documents and witnesses would typically be handled by the IBA rules on the taking of evidence or follow similar principles. Also in that regard NOMA arbitration would be closer to international arbitration as it is understood in the Nordic region and it would be removed from common law traditions surrounding LMAA arbitrations which are different from what Nordic parties are used to.

Differences in culture is also reflected in the degree to which counsel exercise procedural behavior and apply pragmatism. Nordic practitioners tend to view the LMAA process as more adversarial than similar processes in the Nordic countries. That is perhaps partly because the advisors are further away from the clients compared to local attorneys who have worked with clients for years or even decades. Based on experience, London counsel will be less keen to pick up the phone and speak to their opponents to solve non key elements of a dispute. Very often in the Nordic, procedural points or other small disputes within the dispute is solved without involving the arbitrators, and settlements are very often reached in the early. Whether it is warranted or not, the experience among Nordic lawyers tend to be that settlements often are reached very late in an LMAA process.

By way of example, we have a case at the firm arising from a sale and purchase transaction that was terminated for breach and were the parties have recently settled after fighting in LMAA arbitration for several years. The costs have become twice the amount of the claim, but the opposing party has been unwilling to consider any settlement. A settlement was achieved only after the opponents have lost in arbitration. With the caveat that such comparisons express an hypothesis, had the case proceeded in NOMA arbitration, the lawyers acting for the parties would have scoped out a mutually agreeable settlement much earlier not allowing the costs to spin out of control.

B. Cost efficiency

LMAA practitioners often pride the LMAA system for being very cost efficient. That impression is not reciprocated by any non-English users of the system that I have ever spoken to. A Nordic party will almost invariably find an English arbitration process to be immensely costly. That is partly due to the fact that the English solicitors are often perceived to be more confrontative and ready to fight all possible points in a dispute whereas the Nordic tradition is arguably more focused on settling disputes at an early stage.

In a number of LMAA matters, local parties would often prefer to have their own local Nordic attorneys, whom they know well, drive the process, which basically adds an extra layer of legal costs, compared to situations where the local lawyers handle the arbitration without involving foreign counsel. Moving a dispute from the LMAA to NOMA is consequently designed to eliminate one layer of costly legal assistance which represents a cost improvement to the parties in dispute.

C. *Speed and motivation*

A new arbitration system, such as NOMA, emerges out of motivated industry practitioners and lawyers who are keen to show that their new initiative is great. They want to prove the benefits of the system. This means that arbitrators appointed under NOMA will have extra motivation to showcase that NOMA works and is time and cost efficient. Consequently, arbitrators and lawyers in this system will be on their toes to make sure the system works as intended. That extra energy is beneficial for any process. It is simply a question of adding vitamins into the process which ought to be possible for any arbitration system, but it is more prone to permeate a newly established dispute resolution system than an old one.

The Nordic regional community of maritime lawyers is very active in promoting NOMA as a dispute resolution alternative to the LMAA. The Nordic maritime law associations host seminars on the rules to generate knowledge of the system and recently the first NOMA arbitration day was held in Gothenburg and was attended by an impressive number of local maritime lawyers from the Nordic region as well as commercial players.

While the LMAA has historically dominated the maritime arbitration landscape, the absence of direct competition over the years has potentially hindered its drive for innovation and competitiveness. In a marketplace without competitors, there may be a lack of urgency to adapt and evolve.

The emergence of new and competing dispute resolution systems such as NOMA presents a dynamic shift. Up-and-coming institutions are highly motivated to distinguish themselves and appeal to users. As a result, the increased competition may be expected to foster a culture of continued improvement and innovation within the field of maritime arbitration.

In response to this new competitive landscape, established institutions like LMAA may also be compelled to enhance their services and responsiveness, ensuring that users receive the utmost benefit. The user-centric nature of these developments ultimately promises a more efficient and effective dispute resolution process for all parties involved.

D. *No appeal whatsoever in the Nordics*

The English legal system allows for appeals to the courts of arbitration awards under Section 69 of the 1996 Act. Although the room for appeal is, it does introduce an

element of appealability, which dilutes the concept of arbitration as an exclusive dispute resolution mechanism. One of the hallmarks of arbitration proceedings is the finality and non-appealability of awards, which is a pivotal factor contributing to the efficiency and expeditiousness of the process, from the initiation of arbitration to the enforcement of the award.

In contrast, arbitration proceedings in Nordic countries are governed by Model Law systems of law, which significantly restricts the grounds for challenging an award. This approach removes any opportunity to appeal on the grounds of an erroneous application of law, aligning closely with the core principles of arbitration as a one stop shop for resolving disputes. In the Nordic countries, the only basis on which to challenge an award would be those situations governed by the Model Law Articles 34 and 35.

Despite the limited scope for appeal in the English Arbitration Act, Section 69, the existence of such an opportunity casts a shadow over the perception of arbitration as a truly no-appeal process. The mere possibility that a party may attempt to challenge an award is often viewed as a less attractive aspect of the system by most users. Similarly, it represents an attractive feature for NOMA arbitrations seated in a Nordic country.

E. Document production

The LMAA rules incorporate a doctrine of disclosure similar to that applied in the courts. In large-scale disputes proceedings under the LMAA Rules, parties are often drowned in endless material which often adds very little meaning to the dispute resolution process and is used as a means by a party to derail the process rather than to assist it. This method of disclosure also deviates from the usual handling of documentary evidence in international commercial arbitrations which is ordinarily based on a Redfern Schedule type of disclosure. The LMAA insiders often argue it is an efficient system because parties cannot lie and rarely succeed in hiding documents, however, the costs of dealing with disclosure are significant. By comparison, In NOMA arbitration, documents are produced (a) by a party's own volition or (b) in response to specific document requests advanced by the other party. A party faced with a request for document production may decide not to produce the document, enabling the arbitrators to draw an adverse inference. A lighter and cheaper approach to dispute resolution than under the LMAA Rules.

The uptake of NOMA

It is still early days to fully evaluate the uptake of NOMA governed arbitrations. Only a very limited number of publicly available awards exist. Naturally, awards are confidential and publication can only take place with the permission of the involved parties.

A few examples of disputes settled under the NOMA rules are set out below primarily to display that the rules have been applied in several cases in which none of the parties were from the Nordic region.

Hull and machinery coverage dispute
The first example concerns a coverage dispute under a hull and machinery insurance between an Italian ship owner and a German insurance carrier. The matter emanated from an insurance policy subject of the Nordic Marine Insurance Plan (Nordic Plan) which has adopted NOMA as dispute resolution mechanism. The main issue in dispute was whether the insurer, pursuant to Norwegian law, was entitled to deposit payments in the event of a dispute between co-insureds.

Upon introducing NOMA as the dispute resolution vehicle under the Nordic Plan, the Revision Committee of the Nordic Plan explained that it was convenient to choose the NOMA-regime as it has "developed arbitration regulation and best practice guidelines to fit Nordic legal tradition and culture." It is one of the examples of how Nordic parties have greater interest in their disputes being determined locally than in London under the LMAA.

Payment for marine fuels
Another publicly available NOMA award has been rendered in a dispute between an Estonian-registered bunker trading company and a Singaporean-registered ship manager concerning payment for bunkers supplied in accordance with a bunker supply contract. The respondent party was the Singapore-based ship manager who ordered marine fuel as agent to the owners. The Estonian-based bunker supplier had incorporated NOMA into its general terms and conditions.

The contract in question was subject to Danish Law and NOMA arbitration pursuant to the NOMA Rules applicable in 2021. The place of arbitration was Copenhagen. The sole arbitrator concluded that, although the contract was subject to the supplier's terms and conditions, the respondent ship manager was neither a party to the contract, nor a party to the arbitration clause as it fell outside the definition of "buyers" therein.

Taxation in bunkering
The third cited matter concerned a dispute between an international bunker trading company and a European oil trading company regarding taxation of bunkers provided by a local Brazilian supplier to a vessel arriving and partly discharging in Brazil after taking cargo on board in Murmansk, Russia. The main questions in dispute were whether a taxable event took place in Brazil when the vessel shifted between two local Brazilian ports (alleged cabotage trip), and whether the claimant was entitled to reimbursement from the defendant for the tax amount that the claimant had paid to the local bunker supplier.

The bunker supply contract was subject to Danish Law and NOMA arbitration pursuant to the NOMA Rules applicable in 2021. The place of arbitration was Copenhagen.

These cases show that even if NOMA was not necessarily expected to be applied in disputes involving non-Nordic parties that has actually happened and shows that the rules does have a place in the international dispute arena.

Conclusion

NOMA represents an attractive alternative for dispute resolution in maritime and offshore disputes. Its obvious appeal lies naturally in catering for intra-Nordic disputes or domestic disputes between parties domiciled in a Nordic country. The initiative is not expected to gain wider ground outside the Nordics at an initial stage although the examples above show that NOMA is also being applied in disputes with no Nordic link. Obviously, any party would be free to choose NOMA as a means of dispute resolution.

NOMA is international and NOMA decisions are expected to involve arbitrators from around the world. As a newly introduced system, there are no pre-set expectations or structural hindrances to arbitrators making themselves available for NOMA arbitrations. Arbitrators with LMAA experience may very well be appointed in NOMA arbitrations and the pool of arbitrators in NOMA arbitrations will only be strengthened by having a great variety of arbitrators involved in arbitrations. Similarly, the LMAA may strengthen itself by promoting arbitrators from other areas of the world and possibly working to become less of an English dispute resolution mechanism and more of a truly international body.

It remains to early to evaluate the overall success of NOMA. Arbitration rules must be expected to take some time to mature in the market and disputes often only emerge some time after contracts are entered into.

Particularly in Norway, where there is no existing tradition for arbitrations governed by institutions or institutional rules, the NOMA rules are being adopted by parties as an alternative to ad hoc disputes.

Arbitrations have already been conducted and certain industry players have designated NOMA in their standard terms and conditions. There is a genuine interest in promoting the NOMA rules in the legal community and events are being tailored around the rules.

As NOMA continues to evolve, it is likely to play an increasing role in the future of Nordic maritime and offshore dispute resolution. It is already a success story in the sense that the rules are being used and decisions have been successfully handed down under the rules. NOMA also follows in the tail of a growing trend of specialized regional arbitration institutions.

In this globalized world, having a local touch remains invaluable, enabling parties to resolve disputes with efficiency and confidence. NOMA is a commitment to innovation, efficiency, and progress, ensuring that local players have the tools they need to navigate the complex waters of the maritime and offshore industry.