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Lessons learned – Time and Cost Efficiency in NOMA Arbitration

The Nordic Offshore & Maritime Arbitration Association (NOMA) was established in 2017 on the initiative of the Danish, Finnish, Norwegian, and Swedish Maritime Law Associations. NOMA builds on years of pragmatic dispute resolution culture in the Nordics and was created to codify the 'Nordic way' of resolving disputes in arbitration. Part of the aim with NOMA was to attract cases that are often referred to arbitration in London.

London Maritime Arbitrators Association (LMAA) arbitration is by far the preferred choice for alternative dispute resolution in the shipping, trade, and offshore industries. The statistics are certainly impressive and LMAA has reported a strong set of caseload statistics for 2023[1]:

- Arbitrators reported 3,268 new appointments under the LMAA Terms and Procedures in an estimated 1,845 newly commenced arbitration cases;
- Arbitrators published 436 awards;
- Only 69 awards were made after oral hearings.

Hafnia Law Firm has a constant portfolio of LMAA arbitration cases acting as counsel (i.e. solicitor) working with London barristers for Danish and international clients.

It is our experience that parties in LMAA arbitration cases very often find themselves bugged down by costs even in smaller cases. The LMAA Small Claims Procedure offers a truly efficient form of dispute resolution, but precisely for that reason the procedure is highly limited and tailored to simple disputes with a claim value of less than USD 100,000[2].

Outside the scope of the LMAA Small Claims Procedure, it is our experience that the cost factor alone drives parties to settle. Even when substantial claims are being pursued in LMAA arbitration, costs quickly become an issue. By way of example, we often experience that the parties are not interested in paying the added expense of having an oral hearing and opt for a decision 'on paper' in LMAA arbitration, i.e. a decision without oral hearing. That is a shame given there are obvious benefits of hearing witnesses 'live' and having the opportunity to present arguments orally and have the arbitrator ask questions to the parties and witnesses on key issues.

[1] London Retains its Crown in International Maritime Arbitration – LMAA.

[2] The LMAA Small Claims Procedure only really work if the parties are minded proceeding without an oral hearing based on written pleadings with only one or two witness statements and without expert evidence nor any document produce (termed disclosure in the English adversarial system).

A further factor leading to escalation of costs in LMAA arbitration is the dual-legal representation where English Solicitors assist in the preparation of the case working with barristers. This is made simpler in the Nordic countries where each party has one counsel to prepare and plead the case.

The way that arbitration is conducted in the UK also drives costs upward and tends to delay the proceedings in LMAA arbitration compared to arbitration in the Nordic region. The issue is the traditional English style (sometimes called 'Pleading Style'[3]) where the arbitration is chopped up into separate stages: First, a pleading stage where each party serves a set of pleadings; then follows the stage of obtaining evidence, disclosing documents, and adducing written witness evidence and/or expert evidence; thereafter, the arbitration will proceed on written closing submissions (or a skeleton argument served prior to the oral hearing if there will be a hearing[4]).

This fundamentally differs from the approach adopted in the Nordic region where documentary evidence, witness evidence, and expert reports are to be served along with the written submissions (pleadings). Arbitration in the Nordic region is front-loaded, and often the traditional style of hearing witnesses 'live' before the arbitrators (direct examination followed by cross-Xx). This approach is more cost-efficient than adducing written witness statements, even if the use of written witness statements bears other advantages.

The authors, Anders Amstrup Fournais and Kristine Emanuel Sørensen, have in the last few years acted as counsel in a number of NOMA arbitration cases. The lessons learned are overwhelmingly positive in terms of speed and cost efficiency, and we wish to highlight these remarkable first-hand experiences with NOMA arbitration.

The five cases listed are cases where we have acted as counsel for one of the parties and where awards were issued. Two of the awards have been made public after anonymization.

	Notice of Arbitration	Arbitration Award	Days	Months	Fee to Arbitrator, DKK
1	30 September 2021	24 June 2022	267	9	40,000
2	19 October 2021	6 May 2022	199	7	123,000
3	3 June 2022	30 March 2023	300	10	96,000
4	3 June 2022	30 March 2023	300	10	86,000
5	13 April 2023	28 January 2024	290	10	150,000

[3] 'Pleading Style' and 'Memorial Style' are not terms of art but are used most frequently to describe the style of procedure embodied in common law countries vs civil law countries; see for instance Mika Savola, Procedural Order No. 1 – Trends and Practices, 41 ASA BULLETIN 4/2023 (DECEMBER), page 793.

[4] Skeleton Argument in English litigation and arbitration refers to a written summary of the arguments that the barrister intends to advance at the oral haring. If there is no oral hearing, i.e. a decision 'on paper', the procedure often ends with each party serving written Closing Submissions.

The Tribunal in those NOMA arbitration cases were sole arbitrators appointed by NOMA or jointly agreed by the parties. The sole arbitrators were either a judge from the Danish Maritime and Commercial High Court in Copenhagen or a lawyer specializing in shipping and dispute resolution.

We have the benefit of experience in our practice with LMAA and NOMA arbitration, and we have never been involved in any 'full term' LMAA arbitration that finalised in only 9 months with an arbitrator's fee of less than DKK 100,000.

In comparison, it is remarkable that in the five cases where the authors have acted as counsel the sole arbitrator's average fee was DKK 99,000. An oral hearing was held in all five cases and the parties had the benefit of a 'full' arbitration hearing being afforded the opportunity to serve as many pleadings as they wanted, relying on witness and expert evidence, document production (disclosure), and so forth.

Interestingly, the fee for a sole arbitrator under the LMAA Small Claims Procedure is currently fixed at GBP 5,000 (plus an administration fee currently fixed at GBP 450) whereas the average arbitrator's fee for the five NOMA arbitration cases listed in the table further above was DKK 99,000 (~ GBP 11,000).

It is a remarkable feature of NOMA arbitration in practice that parties have managed to get a 'full' arbitration by paying an average fee of (approximately) two times the amount of LMAA Small Claims Procedure fee. This is a significant selling point to commercial parties who will be happy to know that they can get the benefit of a 'full' arbitration hearing in the Nordic countries for approximately GBP 10,000 (plus the costs of their own counsel).

Time is always of the essence in arbitration. Commercial parties rarely understand why resolving disputes takes years. Institutional arbitration (such as DIA or the ICC Rules) offer expedited proceedings that can bring the time frame below one year, however, in a 'full term' LMAA arbitration it is virtually impossible to finalise an arbitration in less than one year. We are therefore pleased to announce that we have a track-record of five NOMA arbitration cases with an average process time of only 9 months from commencement of arbitration (counted from the day that Notice of Arbitration was tendered until the day on which the award was issued). Given that LMAA arbitration cases follow the 'Pleading' style approach with separate stages for pleadings, disclosure, and evidence it is practically impossible to expedite a 'full' LMAA arbitration case in only 9 months.

To conclude, the lessons learned in terms of cost and time efficiency are overwhelmingly positive having acted as counsel in a number of NOMA arbitration cases. It should not be difficult to 'pitch' NOMA arbitration to more users and adopt NOMA arbitration clauses in more contracts knowing that the average arbitrator's fee can be less than DKK 100,000 with a lead time of approximately 9 months from Notice of Arbitration until the parties hold the award in hand.

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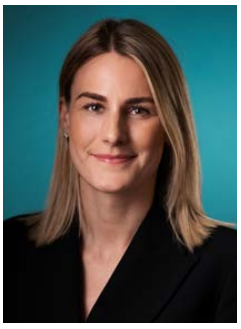

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