CHAPTER 10

Fast Track Arbitration in the Nordics: Where Do We Go from Here?

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§10.01 INTRODUCTION

All the Nordic countries have their own well-established arbitral institutions. The SCC,[1] DIA,[2] FAI[3] and OCC[4] all offer fast track arbitration, as do many commonly used institutes outside the Nordics,[5] such as the ICC,[6] SIAC,[7] CIETAC,[8] SCAI[9] and DIS.[10] UNCITRAL's Working Group II has since its 69th session in February 2019 had

1. Arbitration Institute of the Stockholm Chamber of Commerce, cf. 2017 Rules for Expedited Arbitration, in force from 1 Jan. 2017.
2. The Danish Institute of Arbitration, cf. DIA Rules of Simplified Arbitration, in force from 1 May 2013.
3. The Arbitration Institute of the Finland Chamber of Commerce, cf. the 2020 FAI Expedited Arbitration Rules, in force from 1 Jan. 2020.
4. The Arbitration and Dispute Resolution institute of the Oslo Chamber of Commerce, cf. 2017 Arbitration and Fast-track Arbitration Rules Chapter VII, in force from 1 Jan. 2017.
5. Somewhat surprisingly, The Nordic Arbitration Centre of the Iceland Chamber of Commerce (NAC) does not offer a fast track system. From the international scene, neither does the London Court of International Arbitration (LCIA).
6. International Chamber of Commerce, cf. ICC Arbitration Rules Art. 30 and its Appendix VI ('Expedited Procedure Provisions'), in force from 1 Mar. 2017.
7. Singapore International Arbitration Centre, cf. SIAC Arbitration Rules 6th ed. section 5, in force from 1 Aug. 2016.
8. China International Economic and Trade Arbitration Commission, cf. CIETAC Arbitration Rules Chapter 6 ('Summary Procedure'), in force from 1 Jan. 2015.
9. Swiss Chambers' Arbitration Institution (SCAI), cf. Swiss Rules of International Arbitration Art. 42 ('Expedited Procedure'), in force from 1 Jun. 2012.
10. The German Arbitration Institute (DIS), cf. DIS Arbitration Rules Annex IV in force from 1 Mar. 2018.

expedited arbitration as one of its main topics for discussion.[11] The Nordic Offshore and Maritime Arbitration Association (NOMA) is working on its own rules on fast track arbitration. Bespoke fast track rules are readily available and provide robust, cost-effective alternatives to full-scale arbitration. Still, the use of fast track arbitration continues to be rather limited in the Nordics, generally speaking.

This chapter seeks to explore what characterizes fast track arbitration in the Nordics, why we need fast track arbitration and attempts to explain why fast track arbitration is not used more frequently. Finally, some thoughts are given as to what may make this – in the author's view – often highly adequate form of dispute resolution more recognized and thus more used.

§10.02 FAST TRACK ARBITRATION IN THE NORDICS

[A] General

'Fast track' (the OCC), 'expedited' (the SCC and FAI) or 'simplified' (the DIA) are all names on types of arbitration processes aimed at obtaining awards quicker and at a lower cost than through ordinary (full-scale) arbitration. This form of arbitration – when used – is typically chosen for lower value or less complicated disputes.

By way of example, the OCC states as follows in the Preface of its 2017 Rules:

> A simplified form of arbitration is Fast-track Arbitration, a method which is fast, more efficient and less costly.

The move towards an increased focus on fast track arbitration must be seen in conjunction with a general requirement for greater efficiency in arbitration, be it national or international, ad hoc or institutional. It is no longer necessarily the case that international arbitration is slow and costly compared to other ways of obtaining a final and enforceable decision from a third party. This is partly because parties (with assistance from their counsel) adopt more sophisticated approaches to arbitration. The institutions themselves have also modernized in many aspects, and to a much larger degree now require greater efficiency from parties and arbitrators than just ten to fifteen years ago.

Three specific characteristics shall be visited below: (1) the use of a sole arbitrator, (2) the appointment process and (3) specific adaptions with regards to the process in order to reduce time expenditure and cost.

[B] The Use of a Sole Arbitrator

Fast track regimes normally operate with *a sole arbitrator*. In many jurisdictions, the fall back rule is that unless the parties have agreed otherwise, three arbitrators should

11. *See* https://uncitral.un.org/en/working_groups/2/arbitration. The papers prepared by the Working Group contain a number of interesting discussions.

be appointed.[12] For smaller value and less complicated disputes, there is normally no need to have three arbitrators in order to ensure a correct decision. It will in such cases often be difficult to defend the costs of a three-arbitrator panel. Having three persons agree on an award (and procedural decisions) as opposed to one person making the decisions will also regularly imply more time passing with the exchange of drafts and discussions among the tribunal members.

[C] The Appointment Process

Since the goal with fast track arbitration is to offer a more efficient system than normal full-scale arbitration as it is practised throughout the Nordic countries, the sole arbitrator must be *expediently appointed by the institution* either where it is the institution who appoints the sole arbitrator at the outset or where the parties have the opportunity to agree but fails do to so within a given deadline.

Although the appointed sole arbitrator may be challenged due to lack of impartiality, independence or otherwise as the relevant institutional rules and the applicable procedural law sets out, the appointment processes chosen in the fast track regimes will in my experience regularly go much swifter than if the parties for instance first shall try to agree on a panel, and failing to do so need to have the institution make the appointment in whole or in part.[13] Some party autonomy or at least flexibility can thus arguably be said to be lost; however, less time is used – normally also reduced cost to external counsel typically handling such processes. Party autonomy can in any case arguably be said to have been respected since it is the parties themselves who have chosen a system for resolving their disputes which involves fast track arbitration.

For disputes that especially fit for fast track proceedings (smaller and less complex), this balance should be acceptable provided that one can trust that the institutions will do an adequate job finding the right arbitrator prior to appointment, which the users in my experience can trust when it comes to the Nordic institutions.

[D] Specific Adaptions with Regards to the Process in Order to Save Time and Cost

A final characteristic is that the rules in the different manners have regulation in order to decrease time and cost spent in the period after appointment and until award compared to full-scale processes, for instance, that the *time available for the tribunal to issue its award* is shorter, that the *time allowed for an oral hearing* (if any) and not least the *number and length of the pleadings*, as well as limitations relating to *what evidence should be presented.*

A number of such adaptions can of course be accommodated for by the parties and the tribunal in a full-scale arbitration in a Procedural Order No. 1 or similar procedural documents set out typically after having conducted a Case Management

12. An example is the Norwegian Arbitration Act 2004 section 12 second sentence.
13. As would for instance be the situation under the OCC, cf. the OCC Rules Art. 8.

Conference. However, in my experience, this is often easier said than done since the parties may not necessarily be so inclined to agree at this point in the dispute, and that the tribunal in these situations may be less inclined to set out, for instance, an aggressive schedule for pleadings and timing for an oral hearing that at least one party communicates that it does not want in order to ensure due process (or rather accommodate for due process paranoia). The potential for conducting full-scale arbitrations in a more efficient manner is in my experience thus not a strong argument against choosing fast track arbitration for smaller disputes.

§10.03 THE NEED FOR FAST TRACK ARBITRATION

In my mind at least, there can be little doubt that there is a need for quicker and more cost-effective arbitration processes than what one normally sees in a full-scale arbitration for a rather huge number of cases. I also firmly believe that fast track arbitration is the best solution when it comes to smaller value and less complicated disputes. Thus, there is, in my view, a clear need for fast track arbitration, and it should be used more frequently.

One can however take on an even broader perspective. There is in my view a need for the legal community – also in the Nordics – to adopt a more dynamic and modern approach to dispute resolution. Too many disputes within the domestic court systems proceed through several layers of courts (more often than not the possibility to appeal is used to its full extent in my experience) and full-scale arbitrations are embarked upon, without sufficient consideration being given to the most *appropriate* way of resolving the dispute. Many disputes neither require nor deserve full-scale procedures. Too few cases are negotiated to settlement, mediated or resolved by other means such as early neutral evaluation or minitrials. And too few cases are resolved through fast track arbitration (which, as opposed to the other means just mentioned, also has the clear benefit of providing a binding and enforceable third party decision).

Choosing fast track arbitration usually involves obtaining a final award more quickly, with reduced legal costs (counsel, experts and arbitrators). As demonstrated under section §10.02, the process is simpler, or in more positive terms: leaner. The case can, in my view, be made that legal processes in the Nordics are in general often leaner, more straightforward and efficient than in many jurisdictions outside the Nordics. Thus, one could say that fast track arbitration encompasses a somewhat Nordic spirit where we try not to make things more complicated than they need to be. Fast track arbitration is indeed well-suited to handle a large number of the disputes which today go to full-scale arbitration and domestic courts in a more appropriate manner. With a leaner process, the internal resources used by the parties can also be reduced significantly. In my experience such internal resources can often be a bigger cost than counsel and tribunals.

Certainly a case can be made, as discussed both above and reverted to below, that there is a price to be paid by choosing fast track arbitration since the risk of wrong decisions may increase as the level of thoroughness and detail inevitably decreases.

First of all, this risk needs to be balanced against the importance of the dispute. In commercial disputes, the importance and complexity will often – but not always – reflect the value. For lower value disputes, it can thus often be accepted – and it is in accordance with many domestic court systems to accept – that simpler procedures are employed. When it comes to fast track arbitration this risk is also significantly reduced by the usually ample opportunities to make a case for a more thorough process if that proves to the appropriate way of resolving the dispute. Fast track arbitration is not a quick and dirty process, but a more efficient and lean way of resolving disputes which do not need or deserve a full-scale arbitration. A good fast track arbitration system strikes the balance between due process and efficiency.

My conclusion is that there is a true need for fast track arbitration, and that this need is not covered by other forms of dispute resolution.

§10.04 USE OF FAST TRACK ARBITRATION IN THE NORDICS

Using the reported case load from the SCC, DIA, FAI and OCC, Marie Nesvik has summarized the use of fast track arbitration in the Nordics.[14] Taking the four major general institutions and the reported numbers over the last three years,[15] approximately 15% of the handled cases were handled under a fast track procedure. However, when removing the SCC with its average of almost 33%, the portion of fast track arbitrations at the remaining three institutions is reduced to less than 8%. It would be interesting to see an analysis of why we see such a difference. SCC has obviously done something right. The following comment from Anja Havedal Ipp relating to fast track arbitration at the SCC is worth noting:

> In agreeing to arbitrate under the [SCC] Expedited Rules, arbitration users are aware of the limited scope of the procedure; in a sense, they are agreeing to resolve their disputes in the same spirit as the merchants in Redfern & Hunter's historical retrospect on arbitration. Perhaps this procedural simplicity is precisely what has made expedited arbitration an increasingly attractive dispute resolution method.[16]

Again using Norway as an example, where the vast proportion of arbitration cases still are ad hoc, the percentage of arbitrations being conducted on a fast track basis is insignificant. The Norwegian Arbitration Act 2004 has as its default rule that three arbitrators shall be appointed.[17] Thus, unless the parties agree otherwise (often challenging when a dispute has arisen), the matter will be decided by three arbitrators, which certainly involves a higher cost than with a sole arbitrator. For a number of

14. Marie Nesvik, *Fast Track Arbitration: Efficiency vs. Due Process*, Norwegian Arbitration Day, 2020. An article based on the speech will be published in a Norwegian Arbitration Day, 2020 edition of *MarIus*.
15. For the FAI, SCC and DIA, Nesvik used 2016–2018, and for the OCC she used 2019. The percentages above are calculated based on the statistics presented by Nesvik.
16. Anja Havedal Ipp, *Expedited Arbitration at the SCC: One Year with the 2017 Rules*, available at the Kluwer Arbitration Blog.
17. Norwegian Arbitration Act 2004 section 12. This is in contrast to, for example, Art. 12(2) of the ICC Rules, which starts from the premise that, where the parties have not agreed upon the number of arbitrators, the ICC Court shall appoint a sole arbitrator.

typical cases where there is an arbitration clause in the contract, the costs of external counsel and arbitrators are likely to exceed the amount in dispute. Although such disputes will concern minor amounts in terms of international arbitration, few Nordic companies will be happy to abandon claims of hundreds of thousands of NOK, or even a million or two, due to disproportionally high legal costs. Opting for fast track arbitration with a sole arbitrator will thus significantly reduce one part of the costs, and with the simplified process it is of course also the purpose to reduce costs to external counsel. In my experience, also the latter is regularly the case. Knowing that far from all disputes are high value, it is difficult to find good reasons for not using fast track arbitration more.

§10.05 EXPLAINING THE LIMITED USAGE

[A] General

If one asks why we do not see more fast track arbitration, one may get all sorts of responses from lawyers. Some may refer to an alleged lack of due process (*see* section §10.03 above). Others may argue that certain players in the legal community see full-scale arbitration as a good line of business, and that fast track arbitration normally will entail less work for such players and thus they may lack the necessary inclination to advice their clients to include fast track regimes in the contract. For my part, I have too much faith in the legal market to accept the latter reasoning, at least for the clear majority of advisors and decision makers.

In this section I will rather raise some other potential explanations: First I will discuss whether the regulatory frameworks (the institutional rules) are sufficient (section §10.05[B]) and whether the potential upside presented above is too limited (section §10.05[C]). Then I raise the question as to whether we lack the right arbitrators (section §10.05[D]). Finally, I will present what in my opinion is the main reason why we do not see more fast track arbitration – lack of knowledge (section §10.05[E]), and finally the quick fix: adaption of arbitration clauses (section §10.05[F]).

[B] Are the Regulatory Frameworks (The Institutional Rules) Sufficient?

Arbitration institutions always work on their rules in order to adapt and optimize. This is also the case for the fast track rules adopted by the four major Nordic institutions. However, in general, the institutional rules on fast track arbitration in the Nordics are well written and in my experience work adequately. The different rules all have their pros and cons, as do all such rules, but I fail to see that a perceived insufficiency in relation to the arbitral rules contributes to the lack of fast track arbitration cases in any significant way. That is not to say that the rules cannot be further enhanced, *see* section §10.06 below.

[C] Is the Potential Upside Too Limited?

A more relevant question is what the parties win by accepting to have certain or all disputes handled under the fast track regimes. Indeed, it is not that uncommon for fast track arbitrations to be converted to full-scale procedures, where necessary or appropriate. As the number of disclosure requests increases, along with the potential procedural orders, the pleadings expand, and the volume of evidence grows, parties may from time to time be struck by a (perhaps irrational, but all the same real) fear of the process becoming too simplistic for a dispute which – as in so many cases – turns out to be wider in ambit than was initially envisaged.

The solution opted for in these situations will often be to try to persuade the other party to convert to full-scale proceedings. Although reaching consensus on such issues between the parties may be difficult once a dispute has arisen, such conversion is not necessarily controversial. Why not? The other side has been struck by the same fear.

Whether or not the tribunal is bound by such a joint request from the parties, or has the competence to accept a request from just one party, will depend on the interpretation of the institutional rules and the applicable procedural law. In the situation described, the tribunal – which may at this point have caught on a mild due process paranoia related to how the matter has evolved – will in my experience often be inclined to accept such conversion or accept adaptations to the process provided that this is not contrary to the institutional rules and applicable procedural law, notwithstanding the fact that this will regularly increase cost and time expenditure.

There can however be no question that with a well-administered fast track arbitration – where the key often will be to *keep* the case on the fast track – the award will be issued faster and at a significantly reduced cost, the latter particularly being ensured by the tribunal regularly being constituted by a sole arbitrator and with clear limitations on the number and scope of pleadings. Thus, the upside is there, and if it no longer is – there is normally potential to make adaptations and in some cases even convert to full scale. In my view, a lack of potential upside cannot explain why we do not see more fast track arbitration cases in the Nordics.

[D] Do We Lack the Right Arbitrators?

The arbitral community in the Nordics is still rather small. Although the pool of candidates for appointment is increasing, more work needs to be carried out to ensure that a new generation of arbitrators is properly educated and trained. Some frequently used arbitrators may also benefit from training on how to conduct a fast track arbitration process – a great and practical topic for many of the arbitration seminars being organized in the Nordics these days. Competence and experience should be shared. More focus and higher degree of knowledge will bring us a good step further.

This being said, there is a massive talent pool of potential arbitrators available, and a dispute resolution community continuously recruiting new talent with able and willing younger lawyers with a keen interest in arbitration. Thus, a lack of right arbitrators – had it been a true problem at all – would only need to be temporary.

[E] Lack of Knowledge of the Alternative (and More Adequate) Route

Having discussed a number of views that could have been – but is not – sufficient to adequately explain and substantiate the still limited use of fast track arbitration we can turn to what in my view is the main reason why we do not see more fast track arbitration cases: lack of knowledge and understanding of the adequacy of fast track arbitration.

The parties and counsel regularly working with institutional arbitration, particularly international arbitration, have for years been acquainted with fast track arbitration as a concept. However, beyond the sometimes narrow confines of the arbitral community itself, there is still a need to hear more about fast track arbitration and learn more of the advantages in order to increase use. Very often it is not the same lawyers (or client representatives) who work with disputes and who draft the dispute resolution clauses in bespoke contracts.

At a first glance, this may appear to be a simplistic explanation. However, given the premises that a number of disputes do not need or deserve handling through full-scale arbitration and that fast track arbitration is a proper and sound form of dispute resolution which entails both less time consumed and lower cost, there really is no other valid reason. This is also my personal experience: When fast track arbitration is explained to clients and lawyers outside the disputes sphere, the result is often implementation of layered clauses in future contracts.

[F] Fast Track Arbitration Needs to Be Included in the Dispute Resolution Clauses

Although it happens from time to time, it is generally being too optimistic to hope that parties in dispute will agree on using fast track arbitration, where the arbitration clause envisages a conventional, full-scale procedure. In practice, if we are to increase the number of cases being handled under the fast track regimes, that option should be set out in the dispute resolution clause in the contract. If arbitration clauses routinely gave parties the option to adopt expedited procedures, those procedures could be more widely used. However, the best and clearly most effective solution is in my view to use layered clauses, where certain disputes are channelled into a fast track, i.e., that the parties are not just reminded of the option, but agree that certain disputes should be handled under a fast track regime when entering into the contract.

The OCC model clause can be used as an example a straightforward layered clause:

> Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules of the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce in force at any time.
>
> The rules for fast-track arbitration shall apply where the amount in dispute does not exceed NOK […]. The amount in dispute includes the claims made in the

request for arbitration and any counterclaims made in the response to the request for arbitration.

Where the threshold should be set can be discussed, but EUR 500,000 can easily be justified,[18] in many contracts even higher. If such multi-layered clauses are included in contracts, more cases will of course go to fast track arbitration and thus be resolved using less time and money. This will again create more fast track practice and certainly increase knowledge – a positive spiral for parties to arbitration processes and the legal community.

§10.06 LOOK TO SWEDEN AND BEYOND: THE NORDICS

Fast track arbitration is Nordic in its essence. It is quick (as are the Nordic courts), less costly (as are often legal costs in the Nordics) and unbureaucratic – as the Nordic countries are when compared to many other countries. Thus, there is, in my view, potential for the Nordics being front runners internationally when it comes to fast track arbitration.

We are living in a very exciting time for arbitration. From having been something of a gentlemen's club with numerous esoteric unwritten rules arbitration – both international and domestic – arbitration has undergone a significant process of modernization over the past few years. There is much more transparency, much more diversity and all in all higher quality today. Processes and institutions that used to be considered slow and old fashioned are now leading the way as dynamic and forward-thinking players in the legal market.

At the same time, costs to resolve a dispute continue to increase, be it counsel, arbitrators, experts or venue. The parties – at least one of them – will eventually pick up the bill. Parties to arbitration processes have required and will continue to require the legal community to adopt proactive measures in order to reduce costs and time spent. Fast track arbitrations for the relatively smaller cases is a very good response: Fast track the disputes which neither need nor deserve a full-scale arbitration.

One way to further increase knowledge and quality of fast track arbitration could be for the Nordic institutions to develop fast track arbitration together. This could entail more innovation, more practice and more research on what works and what does not in a fast track process. The result does not need to be (and probably will not be) uniform the rules across the Nordics. The differences in the procedural law of the Nordic countries cannot be overcome by the four institutions alone. A uniform Nordic arbitration code is not likely in the near future. Furthermore, a joint set of rules may reduce the flexibility, and thus a main edge, of the individual institutions who know their domestic markets well and need to be able to differentiate their services and adapt swiftly in order to stay attractive as dispute resolution centres.

This is not to say that there is no room for more cooperation in order to improve the arbitration products offered. Cooperation between the Nordic institutions should,

18. By way of example, the ICC Expedited Procedure Provisions apply if the amount in dispute does not exceed USD 2 million.

in my view, rather be through establishing fora for exchange of experience and knowledge through workshops and seminars. A joint fast track arbitration forum or workshop where members of the Nordic arbitration community are invited would be a good start. We also need more research on fast track arbitration, and here the leading research centres have an important part to play.