CHAPTER 11

Dispute Resolution by 'Expert Decisions': Illustrated by the Norwegian Expert Procedure and the SCC Express

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§11.01 INTRODUCTION

Arbitration is the preferred dispute resolution mechanism for disputes in international contracts. The typical feature of alternative methods for dispute resolution is that they aim to enable the parties to resolve their dispute faster and in a more cost-efficient manner.

Swift dispute resolution may be vital in certain contracts, typically in long-term contracts where a pending dispute may complicate or even undermine the essential spirit of cooperation. For example, disputed variation orders (DVOs) between a Contractor and its client may disrupt their cooperation and strain the liquidity of the Contractor. Similarly, disputes between the parties to a joint venture agreement may cause a deadlock, which again may lead to a most unfortunate outcome where the joint venture cannot fulfil its obligations to the end client.[1] A full-scale arbitration process is rarely cost-efficient and proportional in minor disputes.

For these reasons, *inter alia,* the Norwegian standard contract for offshore construction introduced a so-called expert procedure back in 1987.[2] A key feature of the

1. A recurring situation is that the participants to a joint venture disagree on cash-calls required to ensure the proper working capital to execute a project, typically in a situation with massive delays and cost overruns.
2. In the Norwegian Fabrication Contract of 1987 (NF 87). Another reason to introduce the expert procedure was to balance the Company's unilateral right to instruct the Contractor to carry out specific work, by providing the Contractor with a simplified path to a claim for additional compensation. *See* Kaasen, Tilvirkningskontrakter, 2018, p. 492.

expert procedure is that one or both of the parties to the contract are entitled to request an expert to decide provisionally: (i) whether the Variation Order Request (VOR) was submitted by the Contractor on a timely basis, and (ii) whether the work covered by a DVO is a part of the scope of work.[3]

Over the years, a number of such expert decisions have been provided in offshore construction projects concerning the Norwegian Continental Shelf.[4] In recent years a similar expert system has also been used in large (onshore) infrastructure projects involving international contractors.

The Norwegian offshore contracts also contain another alternative dispute resolution method to arbitration; the so-called Project Integrated Mediations (PRIME). This is a kind of permanent board created to assist the parties in amicably resolving disputes throughout (significant) projects.[5]

In 2021, for similar reasons, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) launched the 'SCC Express'. The scope and framework for this is set out in the SCC Rules for Express Dispute Assessment of May 2021 (the 'SCC Express Rules'), which are accompanied by the Guidelines to the SCC Rules for Express Dispute Assessment of May 2021 (the 'SCC Express Guidelines'). The SCC Express is a process based on consent and confidentiality, under which the parties receive a legal assessment of the dispute within twenty-one days, for a fixed fee (EUR 29,000).[6] The expert (the 'Neutral') must be neutral and shall provide a reasoned assessment of the disputed matters presented by the parties. The parties can agree to make the Neutral's assessment contractually binding or can instead choose to use the (non-binding) findings to guide settlement discussions or other ways forward.[7]

The SCC Express is not limited to certain issues in construction contracts.[8] Subject to either prior agreement or consent after the dispute has arisen,[9] it is available to parties willing to accept a more concentrated dispute resolution process with the benefit of greater time and cost-efficiency, who want to know (approximately) how a would-be-arbitrator might decide the case, or who trust each other to accept the outcome of the proceedings, without the need for legal enforcement of an arbitral

3. *See*, for example, the Norwegian Total Contract 2015 (NTK 15), Art. 16.3. In practice, only the Contractor will be interested in determining item (ii), whereas both parties may be interested in determining item (i).
4. The oil and gas activities on the Norwegian Continental Shelf have included some of the largest construction projects in the world and have led to significant domestic and international disputes. Some of the Expert Decisions have been published by the Scandinavian Institute for Maritime Law in the journal PetrIus.
5. *See*, for example, NTK 2015 Art. 37.
6. SCC Express Rules Art. 11 (of which EUR 25,000 is the fee of the Neutral).
7. SCC Express Rules Art. 2(4).
8. The SCC Express Guidelines' comments to Art. 2(1), however, indicate that the SCC Express is designed to, *inter alia*, address disputes arising '… in the context of a long-term contractual relationship between the parties, e.g. between a company and its key suppliers, or in ongoing projects …'.
9. SCC Express Rules Art. 2(2).

award.[10] The SCC Express is also available for parties who have not agreed to arbitrate under the rules of the SCC (or elsewhere).[11]

SCC Express was launched to fill a gap in the dispute resolution spectrum. Some features are derived from arbitration and mediation, while others are unique. Compared to mediation, the outcome of the SCC Express is a legal assessment, rather than a mutually acceptable compromise. Compared to an Arbitral Tribunal, the Neutral may play a more active and inquisitorial role, actively engaging with the parties and providing directions as to facts and issues to be addressed by them.[12]

In the following, I will address certain selected questions concerning expert decisions and share my experience on some recurring issues.

§11.02 THE PROCEDURES FOR COMMENCEMENT AND APPOINTMENT

As indicated, the Norwegian expert procedure in NTK 15 is not available until the Company has responded to a VOR by way of a DVO. The Company shall respond to a VOR by way of a Variation Order or a DVO within twenty-one days after receiving the VOR. However, if the Company has not responded in this manner within twenty-one days, a DVO shall be 'deemed' issued.[13] Hence, the Contractor will be able to trigger the Expert Procedure twenty-one days after having submitted the VOR, even if the Company does not respond to the VOR. These twenty-one days serve as a kind of grace period during which the Contractor cannot trigger the Expert Procedure, during which the parties can try to find an amicable solution.

One of the issues that may delay an arbitration process – in particular in ad hoc cases, which are still predominant in Norway[14] – is when the parties are not able to agree on the composition of the Arbitral Tribunal. Because the expert is required to render its decision within thirty days from its appointment,[15] time is of the essence. Therefore, the Norwegian expert procedure has traditionally provided for a particular approach to ensure the swift appointment of a neutral expert, namely a pre-agreed list of experts in prioritised order.[16] Such lists have traditionally been limited to highly regarded practitioners and law professors, being experienced arbitrators.

The SCC Express is, as indicated above, available at any time. The Neutral shall be appointed by the Board of the SCC.[17] The SCC Express Rules do not state that the parties are free to agree on a Neutral, but Article 6 (1) requires the Board to 'take into

10. SCC Express Guidelines s. 1. However, the parties may agree that the Neutral shall set out the findings in the form of an arbitral award; *see* below in section §11.04.
11. SCC Express Rules Art. 2(3).
12. SCC Express Guidelines s. 3.
13. NTK 15 Art. 16.2 first paragraph.
14. Arbitration in Norway is, however, in transitioning. *See* Tørum, Transitioning from Local Customs to International Best Practices in Norwegian and Nordic Arbitration, Festschrift to Henry John Mæland, 2019, pp. 433–446.
15. NTK 15 Art. 16.3 second paragraph.
16. In NTK 15, the list is set out in Appendix D. *See* more detail on the appointment procedure in Kaasen, Tilvirkningskontrakter, 2018, pp. 494–495.
17. SCC Express Rules Art. 2(1): 'Any party to a dispute may *request that the Board appoint* a neutral assessor (the "Neutral") …' (my emphasis).

consideration' proposals made by the parties. Due to the consensual nature of the SCC Express, the Board of the SCC will presumably accept a Neutral jointly suggested by the parties. The SCC Express Rules also provide for an appointment challenge procedure, with a tight preclusive deadline of forty-eight hours.[18]

Being a sole arbitrator may sometimes be a challenging task, but being (sole) expert under such a tight time schedule could be even more demanding. The latter explains why it may, in my opinion, be essential to select an expert with the following skills and experience (in the following order): (i) experience in managing disputes and experience in writing awards, (ii) up-to-date expertise in the relevant (standard) contracts and applicable law, (iii) a basic understanding of the relevant industry, (iv) a proper understanding of the technical aspects of the case, and (v) time to prioritise the case within the tight schedule.

The tight schedule does not normally allow the parties time to 'educate' the expert on all of the said qualifications. If the candidate is not an 'insider' in terms of items (i)–(iv), an appointment may eventually turn out to be an 'extreme sport' for both the expert and the parties. In practice, it may be necessary to compromise on some of the qualifications, typically because the candidates having the capabilities set out in items (i)–(iv) may be too busy to comply with item (v) on such short notice. My experience from Norway is, however, that the parties may be able to secure their preferred expert by postponing the deadline for providing the expert decision by a few weeks.

§11.03 CHALLENGES WITH A TIGHT SCHEDULE AND A WRITTEN PROCESS

The Norwegian expert procedures are, as a clear starting point, based on a purely written process. Each of the parties shall submit their pleading and the relevant documentation within seven days of the appointment of the expert, and they are entitled to make a second submission within seven days following their first submission.[19]

The tight schedule, combined with the written process, explains the narrow scope of the Norwegian expert procedure. Under NTK 15 Article 16.3, the expert can merely decide on two matters: (i) whether the VOR was submitted by the Contractor on a timely basis, and (ii) whether the work covered by a DVO is part of the scope of work. The expert cannot decide on the legal effects *if* he considers the disputed work to constitute a variation to the scope of work, for example, by determining the Contractor's claim for additional time and/or compensation.[20]

The written process is well adapted for determining whether the Contractor submitted a VOR on a timely basis within the preclusive deadline (twenty-one days) in Article 16.1. To determine when the deadline started to run is essentially a legal

18. SCC Express Rules Art. 6(4).
19. *See*, for example, NTK 15 Art. 16.3 second paragraph.
20. Kaasen, Tilvirkningskontrakter, 2018, p. 493.

question, and it is rarely necessary to present massive amounts of evidence and hearing witnesses in order to properly determine this issue.

Normally, the written process is also appropriate for deciding whether the work covered by a DVO is part of the scope of work, typically where the parties fundamentally disagree on the interpretation of the wording of the scope of work. In such cases, the expert may essentially apply the principles for interpretation of contracts.

There are, however, several examples in my practice where the assessment of the scope of work has turned out to be highly dependent on a complex factual matrix. For example, the parties may disagree on whether and to what extent the Company shared certain information with the Contractor before they both entered into the contract. This is a recurring issue in disputes concerning (alleged) unforeseen risks, unforeseen events, and incorrect or incomplete information concerning soil conditions etc.[21]

It might therefore be difficult for the expert to form a well-reasoned opinion on such matters based only on the parties' pleadings, without hearing witnesses etc. For this reason, it may sometimes be appropriate for the requested expert to ask for a video conference to learn more about the case before accepting an appointment to a case that might appear too complex to be (properly) resolved based merely on a written process within such a tight schedule. For the same reason, I sometimes reserve the right in the first case management conference to request further pleadings or a 'micro-hearing' via video conference to clarify certain topics if that should turn out to be necessary after considering the pleadings submitted by each of the parties.[22] In practice, however, it may be sufficient to schedule a second case management conference shortly after the parties' first submissions, in which the expert request the parties to clarify the topics in their second submissions.

Even though NTK 15 Article 16.3 does not state that the parties are required to submit their two submissions on the same date, this is how many parties seem to interpret the provision. In my opinion, the wording does not require such interpretation, and it is, in any case, an unfortunate interpretation. By not allowing the 'defendant', typically the Company, to comment on the first submission from the Contractor in its first submission, the precise scope and basis of the disagreement may not be as crystallised as it could and should have been; a step which could have clarified the case and benefitted the parties' rebuttals in their second submission.

As noted, the scope of the SCC Express is not limited to construction contracts and DVOs etc. The broad scope of the SCC Express means that it may include more complex disputes than the Norwegian expert procedure. At the same time, the SCC Express provides a more flexible procedural framework. For example, it does not limit

21. The other reason that such issues may be covered by the scope of the Norwegian expert procedure is that the preclusive variation order system in NTK 15 Art. 16.1 also applies, *inter alia*, to incorrect information from the company (Art. 6.4), force majeure (Art. 18.6) and the company's breach (Art. 27). *See*, more generally, Kaasen, Tilvirkningskontrakter, 2018, pp. 309–372, and Tørum, Sammenlignende analyser av fabrikasjon og entreprise: illustrert med endrings- og varslingsreglene og arbeidsplikten, Tidsskrift for Forretningsjuss, 2010, pp. 147–195.
22. NTK 15 does not, however, provide a right for the expert to request such a 'micro-hearing', *see* Kaasen, Tilvirkningskontrakter, 2018, p. 495, note 57.

the number of pleadings, and it is not necessarily an entirely written process. The Neutral shall, however, consider 'restricting the use of oral testimony and witness statements'.[23]

In this respect, the SCC Express differs significantly from the Norwegian expert procedure: Unless otherwise agreed, it is, as a clear starting point, a purely written process limited to two pleadings for each of the parties.

Furthermore, under the SCC Express, the Neutral shall consider 'limiting the scope and length of written submissions',[24] which may be useful for concentrating the case. By comparison, the Norwegian expert procedure does not provide for any limitations in this respect; however, it is rarely a problem that the pleadings are too extensive.

Under the SCC Express, the Neutral shall also consider taking on an active role by 'providing directions to the parties on facts and other issues they should address in their submissions'.[25] Under the Norwegian expert procedure, the expert should consider taking the same active approach, even if not set out in the contract.[26] In practice, it might, however, be difficult for the Neutral to provide appropriate directions in the initial phase, simply because proper directions often require a deeper understanding of the merits of the case that is rarely achieved before the parties have submitted their first submissions.

§11.04 BINDING DECISION

Under the SCC Express, the findings of the Neutral are not binding unless the parties agree otherwise.[27] There are two alternatives: The parties may (i) *ex ante* 'agree to make the findings of the Neutral contractually binding', or (ii) *ex post* agree to appoint the Neutral 'as an arbitrator to confirm the findings in an arbitral award'.

Essentially, the legal effect of choosing an alternative (i) or (ii) concerns recognition and enforcement. Alternative (i) is equivalent to an amicable (out-of-court) settlement, which cannot as such serve as a basis for enforcement.[28] By contrast, alternative (ii) entails the Neutral's findings being 'confirmed' in an arbitral award, making it recognisable and enforceable under, for example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[29]

23. SCC Express Rules Art. 7(5)(iii).
24. SCC Express Rules Art. 7(5)(ii).
25. SCC Express Rules Art. 7(5)(i).
26. Kaasen, Tilvirkningskontrakter, 2018, p. 495.
27. SCC Express Art. 2(4).
28. Unless the agreement can be considered as resulting from 'Mediation' and the parties belong to countries having ratified the United Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention on Mediation').
29. Provided that the process leading up to the Neutral's findings complied with the minimum requirements of an arbitral process under the New York Convention regarding 'due process' etc. The process set out in the SCC Express will presumably fulfil the minimum requirements set out in the New York Convention Art. V(1) if it is carried out according to the procedural requirements set out in SCC Express Art. 7 and the Neutral's (in this respect: the sole arbitrator's) findings are properly reasoned according to Art. 9(3). The most important ground

The Norwegian expert procedure provides a different approach. The provisional expert decision 'shall become final' if the decision has not been submitted to arbitration within six months following the date of the 'provisional' decision.[30] The Norwegian expert procedure does not explicitly set out whether such a 'binding' decision is merely contractually binding or does constitute an arbitral award.[31] However, in the absence of clear indications that the provision in NTK 15 Article 16.4 third paragraph constitutes an arbitration agreement,[32] it hardly qualifies as such.[33] The latter also seems to follow the approach of Article 16.4, under which the party not having succeeded under the expert decision – in order to prevent the expert decision from becoming binding – can commence arbitration proceedings. It would be awkward and circular if the parties had intended to agree to an expert decision to be an arbitral award – unless challenged by arbitration proceedings.

Even though a party may prevent the expert decision from becoming binding by commencing arbitration proceedings, the Norwegian experience is that the unsuccessful party does nevertheless accept the expert decision.[34] An important reason may be that until the losing party has been able to turn around the expert decision by way of arbitration proceedings, the other party will normally have the upper hand in the negotiations for an amicable solution,[35] in particular where a highly regarded expert provided a well-reasoned decision. Furthermore, unless the expert decision concerns a major part of the final settlement of the project, it will often be 'closed' as an integrated part of a 'global' settlement.

§11.05 CONCLUDING REMARKS

The Norwegian expert procedure serves as a swift and cost-efficient alternative to dispute resolution of certain recurring questions in construction contracts. There is, however, no reason to limit such a device to certain issues in construction contracts. The SCC Express, therefore, fills a gap in the dispute resolution spectrum. It is a

for refusal under the New York Convention is Art. V(1)(b), but its minimum requirements are not that strict; *see* Redfern/Hunter, International Arbitration, 2015, pp. 627–629.

30. NTK 15 Art. 16.4 third paragraph.
31. Even if the expert decision were to be considered an arbitral award, there would be nothing to *enforce* because the expert has no mandate under Art. 16 to determine the legal effects of a variation; Kaasen, Tilvirkningskontrakter, 2018, p. 500.
32. The Norwegian Arbitration Act s. 10 does not require a written arbitration agreement, but nevertheless requires certain clarity on what the parties have agreed to arbitrate, *see* Høgetveit Berg, Voldgiftsloven, 2006, pp. 130–131. By contrast, the New York Convention Art. II requires the arbitration agreement to be set out in writing; *see* Redfern/Hunter, International Arbitration, 2015, pp. 12–15.
33. Similarly Kaasen, Tilvirkningskontrakter, 2018, pp. 499–500, who states that a binding expert decision shall be considered a contractually binding agreement (p. 499 i.f.), and that the expert procedure, due to its simplicity and speed, will rarely fulfil the procedural requirements necessary to qualify as an arbitration process (p. 500).
34. I am not aware of statistics in this respect, but my understanding from Norwegian (offshore and onshore) projects is that there are very few examples (if any) that expert decisions under NF/NTK/NS have been set aside by way of subsequent court proceedings or arbitration awards.
35. Tørum, Sammenlignende analyser av fabrikasjon og entreprise: illustrert med endrings- og varslingsreglene og arbeidsplikten, Tidsskrift for Forretningsjuss, 2010, p. 163.

much-welcomed supplement to expedited arbitration, typically, where time is of the essence and the parties cannot agree on or wait for an expedited arbitration process.[36] A typical reason for the parties not being able to agree on an expedited arbitration process after a dispute has arisen is that they are not ready to accept a final arbitral award based merely on a 'quick and superficial' fast-track process.

At the same time, it is important to bear in mind the expert's evident challenges in providing a well-reasoned decision within such a tight schedule. The selection of the expert must therefore be tailor-made for the specific dispute. Swift expert decisions are most appropriate for less complex disputes that can be properly clarified in writing within the tight schedule.

36. Under the SCC Rules for Expedited Arbitration Art. 43, the final award shall be made no later than three months from the date the case was referred to the Arbitrator.