DO YOU THINK YOUR NORWEGIAN ARBITRATION IS CONFIDENTIAL?

In our experience many commercial players seem to mistakenly assume that their Norwegian arbitration is confidential, if they have agreed that the commercial contract shall be kept confidential, or even if the arbitration clause itself states that any proceedings are confidential. Unfortunately, that may not be the case under Norwegian law.

Norwegian Arbitration Act

Section 5 of the Norwegian Arbitration Act (the "Act") provides that arbitration proceedings and awards are *not* confidential unless the parties have explicitly agreed that the proceedings and/or the award are subject to confidentiality. The starting point is that both the proceedings and the award may be made public. However, third parties are, as a general rule, not allowed to the hearing itself [1].

BY BENEDICTE HAAVIK URRANG

According to the principle of party autonomy, the parties are free to agree that the proceedings and/or award are to be kept confidential. The question is really when and how the parties may agree that their arbitration and subsequent award are confidential.

The wording of Section 5 requires that the confidentiality agreement is entered into for the *specific proceedings*. A plain reading of the Act requires the parties to agree to confidentiality after arbitration proceedings have been commenced or at the very outset of such proceedings.

The preparatory works also support this interpretation and suggest that this approach allows the parties to model the duty of confidentiality to suit their needs and the specific dispute. Furthermore, the preparatory works also state that a mere reference to a confidentiality clause in the parties' commercial contract is insufficient, but no specific reasoning is presented to support this statement.

It is thus certain that a general confidentiality clause contained in the parties' commercial agreement – without any reference to arbitration proceedings – is insufficient to establish an obligation to keep the arbitration confidential. This may come as a

1 The Norwegian Arbitration Act section 5 para. 2.

surprise but is undisputable based on the wording of the Act and its preparatory notes.

Academic Opinion

However, legal scholars[2] disagree on whether the wording of the Act and the preparatory works are to be read stringently; requiring the parties to agree to confidentiality after the proceedings have been initiated, or if a duty of confidentiality in the arbitration clause itself is sufficient. The latter opinion is perhaps a more practical and commercial approach. Some scholars fear that the parties may have divergent interests when it comes to confidentiality after a dispute has risen, and that one party may use this as leverage in the on-going proceedings. It is, nonetheless, not a strong argument against deviating from the plain reading of the wording of the Act and the preparatory works.

Another similar question to consider is the effect of referring to institutional arbitration rules in the arbitration clause, which may include a general duty of confidentiality. If the stricter approach is adopted, such a reference in the arbitration clause is obviously to no effect. The duty of confidentiality has not been agreed upon after the commencement of proceedings. On the other hand, if the more practical and commercial view should apply, it is still uncertain whether a general duty of confidentiality contained in such rules would be binding upon the parties, if the arbitration clause only makes a reference to the rules. Arbitration rules contain a various set of rules, and the duty of confidentiality is just one out of many. Thus, it may be argued that Section 5, as a minimum, requires the parties to specifically agree on the issue of confidentiality. However, if the adoption of the institutional arbitration rules comes after or at the time of instituting proceedings, then the parties are more likely to have complied with the requirements of section 5 by agreeing to a set of rules, which includes confidentiality, after proceedings have been commenced.

To summarise, it is at best an open question whether an agreement on confidentiality can be made before the proceedings have been initiated, i.e., in the dispute resolution clause contained in the parties' agreement[3], or if confidentiality must be agreed upon after the proceedings have been initiated. If confidentiality is key, then the safest approach would be to both include the confidentiality obligation in the arbitration clause, as well as repeating it, if and when proceedings are being initiated.

As a final remark, commercial players may rest assured that arbitrations governed by English law are confidential, as confidentiality is an implied term covering both the parties and the arbitral tribunal under English law.

2 See Geir Woxholth, Taushetsplikt og offentlighet i voldgiftsprosessen, Festskrift til Erik Magnus Boe 2013 s. 382-404 and Helge Jakob Kolrud mfl., Voldgiftsloven. Lovkommentar, § 5. Taushetsplikt og offentlighet, Juridika, Borgar Høgetveit Berg mfl., Voldgiftsloven med kommentarer, Oslo 2006, s. 96, and Ristvedt and Nisja, Voldgiftsloven og tvister i forretningsforhold Tidsskrift for forretningsjus 2005 s 3-36 – (TFF-2005-3) s. 34.

3 Alternatively, by a general reference to institutional arbitration rules containing a duty of confidentiality.

GLENCORE SINGAPORE'S BUNKERING LICENSE SUSPENDED

The Maritime and Port Authority of Singapore ("MPA") issued a press release on 3 August 2022, advising that it was suspending Glencore Singapore Pte Ltd's ("Glencore") bunkering licence for two months, due to Glencore's part in the well-publicised spate of off-spec bunkers claims which arose out of supplies of HSFO at Singapore in March & April this year. The full press release can be accessed here: MPA completes its investigations into bunker fuel contamination in Singapore port | Maritime and Port Authority of Singapore.

The MPA reportedly considered such enforcement action necessary, after its investigations showed that Glencore had continued supplying fuel from the batch in question for a number of days after analysis results had revealed high concentrations of Chlorinated Organic Compounds ("COCs") in the fuel.

BY CATHERINE O'CONNOR

Interestingly, whilst PetroChina International (Singapore) Pte Ltd ("PetroChina") was also in possession of fuel from the same batch of HSFO, the MPA found that PetroChina had stopped delivering the fuel after its own test results had indicated a problem. As such, the MPA concluded that no enforcement action was necessary against PetroChina.

Press reports suggest that in total more than 60 Vessels received supplies of the HSFO in question, including a number of Nordisk Members. It is understood that in some cases the consequences of consuming the fuel were extremely serious, including several reports of "dead ships", potentially resulting in significant claims.

The above issues are clearly extremely concerning for shipowners & charterers, particularly as they suggest that the notorious spate of Houston bunker claims back in 2018 may not have been an isolated incident.

Going forwards, Members are therefore advise to continue taking a robust approach to claims prevention, including putting in place your own fuel testing programmes.

In addition, Members need to remain mindful of potential claims when agreeing the terms for any

bunker supply contracts. Typically, bunker suppliers will favour incorporation of their own general terms and conditions, which often include (amongst other things) very strict time bar provisions and wide ranging exclusions from liability. Clearly, it will be in Members' interests to try to negotiate the incorporation of more balanced terms, such as the BIMCO Bunker Terms 2018.

As ever, in the event that Members do encounter FD&D claims arising from the supply of off-spec fuel, Nordisk will be more than happy to assist.

NEW RECRUITMENTS TO THE TEAM

Helen Vickers joins Nordisk Singapore

We are pleased to announce that Helen Vickers joined the growing Nordisk team in Singapore.

Helen joins us from the Singapore office of international law firm Squire Patton Boggs, where she worked for two years specialising in FD&D and maritime disputes. Prior to moving to Singapore, Helen spent five years working as a shipping lawyer at DLA Piper in London, where she qualified as a solicitor in 2016 following two years of training.

Helen was educated at the University of Oxford and the The University of Law in London.

Welcome to the Nordisk team, Helen.

Andrew Meadows joins Nordisk Oslo

We are pleased to announce that Andrew Meadows is joining the Nordisk team in Oslo.

Andrew has 14 years of maritime law and FD&D experience from the UK, China and Hong Kong. This includes close to four years at Stephenson Harwood LLP and three at Mills & Co Solicitors. He comes to us from Skuld's Hong Kong office, where he was head of the FD&D team.

He has lived in Hong Kong for the past five years and has previously worked in Shanghai for two years. Andrew speaks Mandarin fluently.

Andrew has a BA (Hons) from the University of Oxford (2002 - Oriental Studies), Chinese language studies at Chengchi University in Taiwan (2004) and his legal qualifications are from Bristol UWE in 2007.

Welcome to the Nordisk team, Andrew.