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Denmark

INTERNATIONAL ARBITRATION

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Denmark.

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DENMARK
INTERNATIONAL ARBITRATION

1. What legislation applies to arbitration in your country? Are there any mandatory laws?

Arbitration in Denmark is governed by procedural rules dictating how the dispute resolution process will unfold. The current Danish Arbitration Act (the Arbitration Act, in Danish "Voldgiftsloven" – act. no. 553/2005) is dated from 2005 and is based on the UNCITRAL Model Law of 1985, ensuring international compatibility.

The Arbitration Act applies to both domestic and international arbitration as long as the arbitration proceedings take place in Denmark, unless the disputes are to be solved by labour arbitration or specialized arbitral tribunals established by statute.

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Denmark became a party of the New York Convention in 1972 and has not made any reservations to the Convention.

3. What other arbitration-related treaties and conventions is your country a party to?

In addition to the New York Convention, Denmark has acceded the Geneva Convention, Hauge Convention other international agreements in order to promote global trade and commercial cooperations.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

The Arbitration Act of 2005 is based on the UNCITRAL Model Law with some differences. For example, there are no formal requirements to an arbitration agreement in section 7 of the Arbitration Act.

Further, note that the Arbitration Act was adopted a year before the 2006 UNCITRAL amendments, so these do not apply.

5. Are there any impending plans to reform the arbitration laws in your country?

Updating the Arbitration Act has previously been discussed and a report was made in 2017 with suggestions to amend the existing the Arbitration Act. The suggestions mainly concerned interim measured, such as:

– allowing interim measures issued by the tribunal to be enforceable

– recognition and enforceability of interim measures issued by foreign courts.

However, these suggestions were not adopted.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

Denmark has two arbitration institutions; The Danish Institute of Arbitration (DIA) and the Danish Building and Construction Arbitration Board (The Arbitration Board).

DIA was established in 1981 as a non-profit organization, and offers dispute resolution in multiple national fields as well as in international arbitration cases. Unless otherwise agreed, the proceedings at the DIA are regulated by DIA's Rules of Arbitration (DIA Rules), which were renewed in April 2021.

The Arbitration Board is an specialised arbitration institute, which offers dispute resolution in the field of building and construction if agreed. Most commonly, this

is done by entering one of the Danish agreed documents, which are a set of rules made to make contracting phase easier when entering into constructing contracts documents.

Further note that the Arbitration Board has adopted its own procedural rules, Rules of arbitration procedure for disputes relating to building and construction (VBA Rules). These rules are applied in the consideration of cases, and the parties cannot agree on different procedures without the approval of the arbitral tribunal. In addition, the Arbitration Board must comply with Danish legislation, including the Danish Arbitration Act.

7. Is there a specialist arbitration court in your country?

In addition the arbitration board, cf. above question 6, Denmark has a number of other small specialized institutes and arbitration rules laid down by law or in the article of association of professional organisations. One example is the labour arbitration system dealing with disputes between the parties on the labour market, which are not covered by the Arbitration Act.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

In Denmark, there are no formal or legal requirements for contract formation, and both an oral and written agreement is thus binding. This also applies to subsequent amendments to a contract. For evidentiary purposes, however, the written form will take precedence absent evidence to the contrary.

There are hence not any requirements for arbitration agreements. The parties may enter into an arbitration agreement both before and after a dispute has arisen and they are free to decide which type of arbitration they would prefer (ad hoc vs. institutional arbitration procedure). For the parties that have chosen ad hoc arbitration rather than choosing institutional arbitration, the Arbitration Act will apply with its gap-filling rules. If the parties have decided on an institution, for example, DIA, arbitration will be conducted following the procedural rules of said institution.

In matters relating to consumers, the arbitration agreement can only be made after the dispute has arisen.

9. Are arbitration clauses considered separable from the main contract?

The doctrine of severability also exists in Danish law, meaning that an arbitration agreement is not, for instance, affected by the invalidity of the main contract establishing the legal relationship between the parties. An arbitration agreement is thus separable from the main contract.

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

Danish courts will ex officio examine and ensure that the claim has been filed in a manner which will allow a judgement to be issued on the basis of it.

Further to this, Danish courts will ex officio examine and ensure that a claim cannot lead to a ruling contrary to ordre public.

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

The Arbitration Act does not address multi-party arbitration agreements. However, it is in arbitration proceedings possible to bring all parties together in one case and to settle all disputes together, provided that all the parties have agreed thereto.

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

A third party is, in principle, only bound by an arbitration agreement if such party has accepted to be bound. However, a third party can also be bound by an arbitration agreement if the subject matter of the agreement is transferred to such third party (subrogation).

There are few court decisions regarding this issue. One of them is a decision from 2014 from the Danish Supreme Court [U.2014.2042H], which concluded that an insurance company, who subrogated into its insured position (employer) was bound by the arbitration

agreement agreed between the employer and his contractors.

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

Pursuant to the Arbitration Act, section 6, disputes about legal matters over which the parties are free to decide can be decided by arbitration, unless otherwise is provided under other legislation or agreements.

Accordingly, cases where the parties do not have a right of disposition of the case, such as cases concerning divorce, adoption, paternity cases etc., are considered non-arbitrable, and must be decided by the courts.

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

Not to our knowledge.

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

Pursuant to the Arbitration Act, section 28 (1) the tribunal shall decide the dispute in accordance with such rules of law as chosen by the parties as applicable to the substance of the dispute. In the absence of such agreement between the parties, the tribunal shall apply the law determined by the conflict of laws rules which is considered applicable, cf. section 28(2).

In such case, the tribunal will look into factors as where the parties are resident, the place of their businesses, the subject of the business and where arbitration takes place.

16. In your country, are there any restrictions in the appointment of arbitrators?

Arbitrators must be impartial and independent from the parties and qualified for the task. Hence, before undertaking the assignment, each arbitrator must inform the parties of any circumstances which may question his or her impartiality or independence, cf. the Arbitration Act, section 12 (1). Within these requirements, the parties are free to choose and nominate arbitrators.

In relation to personal qualifications, there are no requirements for an arbitrator to have any specific qualifications, unless otherwise is agreed by the parties.

Note that the procedures are different in arbitrations proceedings handled by the Arbitration Board, where the tribunal is set up in accordance with the VBA Rules.

17. Are there any default requirements as to the selection of a tribunal?

As a general rule, the parties are free to agree on the qualifications and number of arbitrators, including the procedure for appointment of arbitrators. If the parties agree on a sole arbitrator, the parties must, to the extent possible, appoint the arbitrator jointly.

If the parties fails to make such agreement, the tribunal will contain of three arbitrators and each party will nominate one arbitrator within one month of the other party’s request. The nominated arbitrators will then jointly appoint a chair.

For arbitration proceedings handled by the Arbitration Board, please see VBA Rules chapter 4. Such tribunals generally contains of three members; one legal arbitrator and two technical arbitrators, cf. section 2. The technical arbitrators are appointed by the Arbitration Board, whereas the legal arbitrators are appointed by the chair of the Arbitration Board Presidium after consulting the parties.

18. Can the local courts intervene in the selection of arbitrators? If so, how?

The parties may request assistance from the courts if they cannot agree on the nomination of one or more arbitrators, cf. the Arbitration Act, section 11 (3).

19. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

The appointment of an arbitrator can be challenged, if there are circumstances that questions the arbitrators impartiality, independence or qualifications, cf. the Arbitration Act, section 12 (2).

Pursuant to the Arbitration Act, section 13(1), the parties are free to agree a procedure for challenging an arbitrators impartibility and independence. If such

agreement is not made, the parties shall use the procedure in section 13, where following is stated:

- A party must make a reasoned challenge to an arbitrator in writing to the tribunal within 15 days after becoming aware of the appointment and the circumstances on which the challenge is based.
- If a challenge under any procedure agreed upon by the parties is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the courts to decide on the challenge.

While such request is pending, the tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

For arbitration proceedings at the Arbitration Board, please see VBA Rules, section 6.

20. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

Not to our knowledge.

21. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

The tribunal (including the challenged arbitrator) may continue the proceedings even if there is a pending challenge regarding one of the arbitrators.

However, if an arbitrator withdraws from office for any other reason, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced, cf. Arbitration Act, section 15.

22. Are arbitrators immune from liability?

The Arbitration Act does not contain rules regarding liability nor immunity of arbitrators. Due to this, an arbitrator can as an outset be held liable for acts or omissions in the discharge or purported discharge of his/her function as arbitrator, if the general liability requirements are met.

However, for arbitration proceedings taking place before the Arbitration Board, it follows from the VBA Rules, section 42, that neither the arbitrators nor the Arbitration Board itself and the employees can be held liable for an act or omission in relation to the proceedings or the outcome of them.

A similar rule is contained in the DIA rules, section 51, where it is stated that all members of the tribunal the secretary of the tribunal and or other persons appointed by the DIA or the tribunal and all their employees in general cannot be held liable for an act or an omission in relation to the proceedings or the outcome of them, except to the extent such limitation of liability is prohibited by applicable law. Please note that the DIA rules applies for proceedings at the DIA, unless otherwise is agreed.

23. Is the principle of competence-competence recognized in your country?

The Arbitration Act is based on the principle of competence-competence. Thus the arbitral tribunal rules on its own jurisdiction, and the ordinary courts act with limited assistance and control during the arbitral proceedings.

24. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

Pursuant to the Arbitration Act, section 8 (1) the local court shall, if one of the parties requests it, refer the case to arbitration unless the local court finds the arbitration agreement to be null and void, inoperative or incapable of being performed.

25. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

The courts do not have any jurisdiction over disputes which are covered by an arbitration agreement, cf. the Arbitration Act, section 4.

It is stated in the Arbitration Act, section 25, that if one of the parties fails to respond, to appear at a hearing or to produce documentary evidence, without showing sufficient cause, the tribunal may continue the proceedings and make the award. A similar rule is contained in both the VBA Rules and the DIA Rules.

However, an arbitral award can be set aside if the party seeking to have it set aside can show that they were not

given proper notice of the appointment of an arbitrator or of the arbitration proceedings or were otherwise unable to present their case., cf. section 37 (2)(1)(b) of the Arbitration Act.

This right emanates from fundamental principle of law, giving the right to be informed of case made against one self, and to contradict claims and arguments made by another party, as also expressed in section 18.

26. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

A third party can only join the arbitration proceedings if it is agreed by the parties involved in the arbitration case and allowed by the tribunal.

27. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

Pursuant to the Arbitration Act, section 9, the courts may, at the request of a party, grant an order for an interim measure of protection or for enforcement even if the parties have agreed to submit the dispute to arbitration. The court will then, if the conditions for doing so are fulfilled, issue the interim measures according to the rules in the Danish Administration of Justice Act.

Pursuant to the Arbitration Act, section 17, a party is also entitled to request the tribunal to grant an order for interim measures.

28. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

Under Danish law, anti-suit injunctions are not available as an interim measure.

29. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

The choice of using arbitration in Denmark is often also a choice not to use the usual Danish procedural law and the civil procedure norm of the Danish courts. The court are thus as a general rule not involved.

On 28 October 2010 the Danish Arbitration Association adopted the IBA Rules on the Taking of Evidence in Arbitration. Often the parties will include the IBA rules in their arbitral procedural agreement, and accordingly the arbitration will be conducted pursuant to these rules. If failing to include the rules in the procedural agreement, it is assumed that the IBA rules will be implied where it is found necessary to do so.

However, pursuant to the Arbitration Act, section 27, the Tribunal or the parties (with the accept of the Tribunal) may also ask the courts for assistance in some situations, for example, when a third party is required to disclose documents or make a witness statement.

30. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

Danish Arbitration law does not provide for ethical codes or other professional standards that would apply to counsel and arbitrators conducting proceedings.

Counsel and arbitrators are therefore only bound by the ethical codes or other professional standards applicable in their respective jurisdictions or bars.

31. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

The Danish Arbitration Act does not contain specific provisions about confidentiality, and confidentiality must thus be agreed upon between the parties.

However, proceedings at the arbitration board are confidential (except for the award), which VBA can choose to publish in anonymous form if the parties do not object thereto, see Section 43 of the VBA Rules.

Further to this, according to art. 28(4) in the DIA rules, at the request of a party, the Tribunal may make decisions regarding the confidentiality of the arbitration proceedings. Art. 50 in the DIA rules set out that members and the secretary of Arbitral Tribunal, shall treat all matters relating to the arbitration as confidential.

32. How are the costs of arbitration proceedings estimated and allocated?

Pursuant to the Arbitration Act, section 34 and 35, the tribunal determines the allocation of the costs between the parties. The general rule is that the unsuccessful party who bears the costs.

The cost of the arbitration case can consist of the following;

- The arbitrator's fee. The arbitration act does not contain detailed rules for calculating their fee. However, it is assumed that the fee is set in accordance with what is customary and reasonable, unless the parties have agreed on using the DIA Rules. In such case the arbitrators fees and DIA's charges will be set in line with Schedule of Fees and Charges of the DIA.
- Reimbursement of the arbitrators expenses

Further, the tribunal can require one of the parties to pay all or part of the costs which the other party has incurred as a result of the arbitration proceedings, including;

- legal costs for advocates and legal representatives
- other costs may include costs necessary for the proper conduct of the case, having expert appraisals made, expert witness statements, payment of reasonable travel and accommodation expenses of witnesses, translations etc.

33. Can pre- and post-award interest be included on the principal claim and costs incurred?

Question answered above.

34. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

Recognition and enforcement of a decision made by a tribunal requires that the decision is made in the form of an arbitral award. The general requirements for an arbitral award are stated in the Arbitration Act, section 31, from which it follows that the award must be dated, signed by the arbitrators (at least 2 of these if the tribunal contains of 3 arbitrators) and indicate where the arbitration took place. Unless otherwise agreed by the parties, the award must also state the reasons on which it is based.

Further to this, the party relying on an award or applying for its enforcement, shall supply a duly certified copy of the award, and of the arbitration agreement if it is in writing. The documents shall, if necessary, be accompanied by a duly certified translation into Danish.

35. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

The estimated timeframe for the recognition of an award can vary from few weeks to months. The timeframe for enforcement can be similar, but the enforcement procedure may vary depending on what kind of asset the enforcement is related to and the time the courts takes to handle the case. Interim measures can be applied (question 27 above).

36. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

The Arbitration Act, section 38, states that, irrespective of whether the award has been issued in Denmark or abroad, the award is binding in Denmark and can be enforced pursuant to the provisions relating to enforcement of judgments in the Danish Administration of Justice Act.

37. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

As a rule, the Danish arbitration law does not impose limits on the available remedies. However, an award may be deemed as un-enforceable in certain instances.

38. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

An arbitration award is final and cannot be appealed. It can however be challenged on the grounds stated in the

Arbitration Act, section 37, which requires that the party making the application furnishes proof that, for example:

- the arbitration agreement is not valid
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case,
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration,
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

An award can also be set aside if the courts finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration, or
- the award is manifestly contrary to ordre public.

An application for setting aside the award must be submitted within 3 months from the date on which the party making that application received the award.

39. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

The parties are not allowed to agree on using appeal nor give up their rights to set aside the award.

40. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

The arbitral tribunal generally does not have competency to assume jurisdiction over third parties that have not signed or entered into the arbitration agreement. However, third parties may sometimes be assimilated to a party bound by the arbitration agreement, such as in cases of legal succession.

Thirds parties are not allowed to challenge an award.

41. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

Third party funding is relatively new in Denmark and the Danish Arbitration Act does not address the issue of third-party funding. We have no knowledge of recent court decisions considering third party funding in connection with arbitration proceedings.

42. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

DIA Rules, Appendix 3, contains special rules on the appointment of an emergency arbitrator with powers to decide on interim measures prior to the commencement of the arbitration proceedings. The parties are bound by decisions made by the emergency arbitrator.

43. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

The Danish Arbitration Act has no special regulations for small claims.

The Arbitration Board has however adopted the system of simplified arbitration, cf. VBA Rules, chapter 8, which can be applied for disputes with a maximum value of DKK 1 million, if agreed by the parties. The procedure grant the parties a possibility to have their dispute resolved quickly. It is however up to the parties to decide whether they wish to avail of this option.

A similar procedure is available pursuant to the DIA regime. As a general rule, the system can be used for dispute resolution of claims regardless of the value.

44. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

Both arbitration institutes aims to create diversity when appointing arbitrators. Especially DIA has aimed to increase the percentage of appointed female arbitrators by for example suggesting female candidates for arbitrator appointments.

Please note that gender is not the only form of diversity in focus, but it has been the dominant focus of especially DIA.

45. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

Not to our knowledge. Based on the amount of published decisions and its content however, it is generally assumed that something extraordinary is required before the courts will set aside an arbitration award.

46. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

Not to our knowledge.

However, please note that Denmark provides a welcoming environment for arbitration. Its legislation and judgments are supportive of this type of dispute resolution and its legal approach bridges common and civil law. Further, it is generally well known that the DIA delivers succinct and cost-effective means of resolving disputes. Additionally, Denmark is globally ranked highly when regarding the rule of law, sustainability and lack of corruption.

47. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

In April 2021 DIA revised its set of Rules after which almost all communication and exchanges between the parties, the arbitral tribunals and the DIA is handled electronically.

48. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

The revise of the DIA Rules in 2021 were, among other things, made in order to ensure use of a more digitalised process.

49. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

Cases concerning human rights and climate change matters are regularly heard in the ordinary courts.

In continuance of this, there is an expectation that we will be seeing more claims related to ESG, including environmental claims, in the years ahead.

50. Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent decisions in your country considering the impact of sanctions on international arbitration proceedings?

No, not to our knowledge

51. Has your country implemented any rules or regulations regarding the use of artificial intelligence, generative artificial intelligence or large language models in the context of international arbitration?

No, not to our knowledge

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