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Denmark

LITIGATION

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

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1. What are the main methods of resolving commercial disputes?

The most common method of resolving commercial disputes in Denmark is through the court system. However, in reality not all disputes in commercial relationships end in court, since the involved parties often are motivated to solve their dispute through other venues, such as arbitration, mediation and conciliation. These methods are often faster compared to a lengthier court process. Particularly in respect to commercial disputes, the involved parties would often rather solve their dispute in private to avoid publicizing commercial matters and, therefore, prefer options such as arbitration.

Particularly commercial disputes pertaining to areas of construction use arbitration as the primary dispute resolution mechanism. The majority of Danish construction contracts incorporate the General Conditions for the Provision of Work and Supplies within Building and Engineering (In Danish: Almindelige Betingelser 18 (AB 18)) which provides for arbitration. Arbitration has been maintained as the primary dispute resolution method in AB 18 but it also introduces new dispute resolution mechanisms such as mediation and conciliation as well as dispute review board (DRB) or dispute adjudication board (DAB).

2. What are the main procedural rules governing commercial litigation?

The primary act governing litigation in Denmark, including commercial litigation, is the Administration of Justice Act which regulates the legal proceedings taking place at the courts. The Act is extensive and thoroughly sets out the steps for litigation procedure at the courts and determines questions such as when and how the parties are to exchange various pleadings, the legal effect if the parties do not adequately comply with the provisions etc. The act applies in civil disputes as well as in criminal cases before the courts.

If the parties have chosen arbitration in Denmark as their method of dispute resolution, the Danish Arbitration Act applies and determines the arbitration process. The Danish Arbitration Act was adopted in 2005 and is based on UNCITRAL Model Law on International Commercial Arbitration.

3. What is the structure and organisation of local courts dealing with commercial claims? What is the final court of appeal?

In Denmark the courts are structured in three levels. It is the principal rule that all cases initially are brought before one of the 24 District Courts (In Danish: byret) located in the various districts throughout Denmark. Further, there are two High Courts (In Danish: landsret) that function as appeal courts to the District Courts' decisions. The Supreme Court (In Danish: Højesteret) is the final court of appeal in Denmark and deals almost exclusively with cases of general public importance or cases where important legal principles are considered. A decision from a High Court cannot be appealed to the Supreme Court for a third-instance review unless permission is granted by the Appeals Permission Board (In Danish: Procesbevillingsnævnet). Such permission may be granted if the case concerns fundamental legal questions. Further, there is the Maritime and Commercial Court (MACC) (In Danish: Sø- og Handelsretten) whose subject-matter jurisdiction is limited to certain types of cases. Cases regarding EU-trademarks and EU-design must be brought before the MACC in the first instance. Unless otherwise agreed by the parties, other types of cases that are specified in the Administration of Justice Act can also be brought before the MACC. This includes, inter alia, cases where detailed knowledge of international commercial relations is of major importance. Decisions by the MACC can be appealed to a High Court or the Supreme Court. However, an appeal to the Supreme Court is only possible if the case is a matter of principle.

4. How long does it typically take from commencing proceedings to get to trial?

There is no general rule for the duration of litigation. Based on a general observation it on average takes one to two years from commencing proceedings to getting to trial. Among other things, it depends on the complexity of the case and whether expert evidence is to be obtained. As described further re question 23 below, the COVID-19 pandemic has generally prolonged to time for a case to get to trial which also follows from publications of the Danish courts stating that cases before the courts are slower compared to previous years. In respect to the general civil disputes before the district court and with oral hearing, the cases were concluded on average in 20,6 months in 2021 (it was 18,4 months in 2020).

Generally, arbitral proceedings are faster than proceedings before the courts. In 2021, arbitration cases initiated at the Danish Institute of Arbitration (DIA) and concluded by an award were completed in about 11 months for Danish cases and in about 15 months for international arbitration cases (both numbers are the median).

5. Are hearings held in public and are documents filed at court available to the public? Are there any exceptions?

Most preparatory hearings of civil cases are not held in public. The final hearing is held in public allowing anyone to appear and observe the hearing. Furthermore, viewers can report, orally or in writing form, from the final hearings. Additionally, as the primary rule, everyone has the right to access documents from court proceedings, including judgments and court orders. However, there are various exceptions to this primary rule. For instance, the courts can restrict this right of access in order to protect privacy or a trade secret. However, for the right to be restricted it is a condition that such access will severely damage the business and these interests cannot, instead, be protected through measures of anonymisation. Some judgments are published in summary in various law journals and the courts themselves additionally publish selected judgments on their websites. Additionally, in the beginning of 2022 a new public database (called Domsdatabasen) of judgments from the courts was launched. Currently, this database only contains some of the courts' judgments, but it is intended that more and more judgments gradually will become part of the database. In most instances of publication, the identities of the parties are anonymised. If a case is not published, access must be sought through the court directly and an administrative fee will then be charged.

6. What, if any, are the relevant limitation periods?

The Danish Limitation Act states as the main rule that a claim is statute-barred after 3 years, calculated from the earliest time that the creditor could demand the claim fulfilled. The 3-year limit can be put on hold if the creditor did not have knowledge, or should have known, of the claim or the debtor (may be relevant in tort cases). However, in any case, the absolute limit of a claim is 10 years. Longer limitation periods apply in special cases (e.g. personal injury cases). The limitation period can be suspended in various ways. One way is if the debtor acknowledges the debt to the creditor. A more common way to suspend the limitation period is to bring legal action against the debtor. If the limitation period is suspended a new limitation period then commences.

7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

As a main rule, there are no pre-action conduct requirements under Danish law. However, according to the Danish Debt Collection Act, it is a requirement prior to a creditor taking legal actions against a debtor that the debtor has received a letter of demand. The letter of demand shall state all information that is necessary for the debtor to assess the claim and give the debtor a minimum of 10 days to pay. Non-compliance may influence the court's order of costs.

8. How are commercial proceedings commenced? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

Commercial and civil legal proceedings are commenced by filing a writ of summons to the court. The writ of summons must include the information specified in the Administration of Justice Act, such as a presentation of the questions of fact and law. If the court assesses that the writ of summons is insufficient, the court dismisses the case. However, the court can also choose to ask the plaintiff to remedy the defects identified. Once the writ of summons is sufficiently detailed the defendant is served the writ. The court has the exclusive right to serve the writ of summons. However, under certain circumstances, service is valid even though the regular process has not been followed as long as the defendant has gained knowledge of the writ of summons. Today, a

writ of summons can be served digitally. After the writ of summons has been delivered to the defendant, the defendant has at least two weeks to file a statement of defence to the court.

9. How does the court determine whether it has jurisdiction over a claim?

"Jurisdiction" has two sides to it under the Danish Administration of Justice Act: Subject-matter jurisdiction and territorial jurisdiction. Subject-matter jurisdiction regards the type of court that the case should be brought before. That could be whether or not the Maritime and Commercial Court has competence to adjudicate the case. The court ex officio determines whether it has subject-matter jurisdiction and can consider this issue throughout the entire case as the scope of the case may alter during the preparations. Territorial jurisdiction determines if a case can be brought before a Danish court and, if so, which court. According to the Danish Administration of Justice Act, the court should ex officio determine its territorial competence. This rule applies in situations where the case is governed by the exclusive jurisdiction of the courts of another EU- /EFTA country. In practice, the main rule is different from the Act. In most cases, the court does not ex officio determine if the court is territorially competent, if the defendant participates in the proceedings with no objections regarding jurisdiction.

10. How does the court determine what law will apply to the claims?

In Danish private international law, there is a distinction between claims in contract, claims under the Sale of Goods Act, claims in tort and claims dealing with property rights. In contracts, the Rome Convention determines the applicable law. The Rome I Regulation replaces the Rome Convention. However, the Regulation does not apply for Denmark due to the opt-out on EU justice and home affairs. Therefore, only the Rome Convention should be applied in Denmark. According to both the Regulation and the Convention the parties have "freedom of choice" and can agree upon which law to govern the contract. Under the Rome Convention the law of the country which the contract has a closer connection to, should govern the contract if no agreement has been made. It is presumed that the contract is connected the most to the country where the party who executes the "characteristic performance" has its habitual residence at the time of the conclusion of the contract. The Rome Convention applies in every case, also in cases where one of the parties is a non-EU member state. In consumer lawsuits both the Rome Convention and the Rome I Regulation states that the law of the country of the consumer is to govern the case. However, the parties can agree upon the law applicable, but the consumer cannot be deprived of the protection afforded by the mandatory rules of the country in which they have habitual residence. In non-consumer sale of goods cases the Hague Convention applies. According to the Hague Convention, the parties have freedom of choice. In the absence of an agreement, the law applicable will be the law of the place where the seller has his habitual residence unless the seller has received the order in the country of the buyer. In that case, the buyer's habitual residence will determine the law applicable. Often CISG will govern the order, even if there is a reference to Danish law. In tort cases, the law of the country where the harmful action has taken place will apply as a main rule, "lex loci delicti". However, the courts do not apply the rule strictly, and it is questionable whether the place of action or the place of consequence determines the law. Further, other connecting factors may be considered. The Rome II Regulation does not apply in Denmark. In property cases, neither the Rome Convention nor Hague Convention applies. The general principle is based on connection, "lex rei sitae". The law applicable is determined by where the property is located.

11. In what circumstances, if any, can claims be disposed of without a full trial?

Should a plaintiff fail to appear in court or fail to submit pleadings when requested by the court, the case will be dismissed without a full trial. The plaintiff may resubmit the claim but will have to pay the awarded costs of the dismissed case. Should a defendant fail to appear or to submit pleadings when requested by the court, a judgment by default will be entered into. The judgment by default can be requested to continue within a short time limit (generally two weeks) after the judgment is issued.

12. What, if any, are the main types of interim remedies available?

As a main rule commencement of a trial will not have a suspensory effect although it is possible for the court to order interim measures. Necessary preliminary steps can further be ordered by a court of arbitration. The main types of interim remedies available are immediate execution, injunctions, arrest, and seizure of evidence.

13. After a claim has been commenced, what written documents must (or can) the parties submit and what is the usual timetable?

A claim is commenced with a writ of summons, which is followed by a statement of defence. These documents are the basis for the further progress of a claim at the courts. Furthermore, different types of submissions can be demanded by the court in preparation of the case schedule, including a reply and a rejoinder or documents related to specific questions. The court can order the parties to hand in a comprehensive case summary or a summary of claims prior to the hearing. In this document, the important elements and arguments of the case are set out in a summary form. It is very common for the courts to demand a reply and a rejoinder, and consequently, the plaintiff and the defendant will normally submit three pleadings each. A case normally finishes within a year or two, but there is no official maximum.

14. What, if any, are the rules for disclosure of documents? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

The rules for disclosure of documents and measures available to enforce production of documents vary according to whether a party or a third party is required to submit documents. If a party wants to refer to documents in the possession of another party to the case, the first party can request the court. Upon such a request the court may order the counterparty to submit the requested documents available unless submission of such documents would disclose circumstances that the counterparty is excluded or exempted from giving testimony about. The court may also decide that documents or parts of documents are without relevance. For a third party, the duty to disclosure documents will lapse in the same situations as for witnesses (see below, question 15). This includes professional secrecy and other duties of silence, and risk of damage for the third party or his/her next of kin. The Danish “style” differs from the “discovery-style” used in, for instance, the US. The Danish style is much less extensive than discovery.

15. How is witness evidence dealt with in commercial litigation (and, in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

In Denmark, witnesses give oral statements. In arbitration, the statements are more often in writing and potentially supplemented by oral testimony at the hearing. It is a general rule that everyone has an obligation to make a statement before the court. This includes a duty to refresh the particular knowledge of the case. The party who has requested the witness to be heard may begin the questioning, and hereafter the opponent may question the witness as well (cross). The crossexamination is not limited to the issues or questions raised/asked in the examination in chief. Subsequently, further questions can be asked if the need arises. Professional secrecy and other duties of silence can exclude the use of specific witnesses. Further, a witness can be exempted if a statement might damage the witness or his/her next of kin.

16. Is expert evidence permitted and how is it dealt with? Is the expert appointed by the court or the parties and what duties do they owe?

Court-appointed experts (In Danish: syn og skøn) are widely used particularly in disputes concerning construction, real estate, patents, or technical issues. The expert is appointed by the court and has the duty to investigate carefully. The parties may suggest one or several experts, but the court is not bound by the suggestions. The procedure of a court-appointed expert generally involves an expert’s inspection and production of an expert report based on questions formulated by the parties, and it is possible for the parties to comment on the report, subsequently to ask further questions. The expert can only investigate the facts and cannot make any legal evaluation. The expert may however express a view as to what customary practise is or for instance whether the goods are of reasonable quality or similar statements. Further, expert opinions, expert witnesses and appointment of technical judges are also a possibility in some cases.

17. Can final and interim decisions be appealed? If so, to which court(s) and within what timescale?

In Danish law, there is a distinction between appeal (In Danish: anke) and interlocutory appeal (In Danish: kære).

Appeal: A judgment in first instance can be appealed from the District Court to the High Court within four weeks, and from a High Court to the Supreme Court

within four weeks as well. The High Court may reject the case if there is no prospect that the case will have a different outcome, and if the case is not of principle character. Further, a case needs permission to be appealed to the High Court if the claim is less than 20,000 DKK (approximately euro 3,000).

Interlocutory appeal: Decisions and court orders can be appealed within two weeks. In principle, it is not possible to appeal these types rulings if it is made during the preparation of the case or during the main hearing when the ruling does not finalise the case. However, it is possible to apply to the Appeals Permission Board (In Danish: Procesbevillingsnævnet) for permission to appeal the ruling. Only special circumstances will grant permission. Thus, interim orders cannot always be appealed in transit but only when the final decision has been made. This depends on the nature of the decision and if it actually ends the case, for instance, a rejection.

18. What are the rules governing enforcement of foreign judgments?

If a judgment is from a court in a country outside the EU or the "Lugano" area, it is the main principle that it is only enforced if there is a treaty obligation. There is only one such further convention, namely the Nordic Judgment Convention, but that has lost its relevance due to the overlapping Brussels/Lugano Regulation. Jurisdiction agreements are generally accepted by Danish courts and a case instigated before a Danish court in violation of a jurisdiction agreement pointing to a foreign court will be dismissed. The Brussels I Regulation applies in cases where the plaintiff lives within an EU member state, and the Lugano Convention applies when the plaintiff lives in a Lugano Country. The legislation entails that every foreign judgment (from such a country) will be enforced. Foreign arbitral awards are enforced in Danish law due to the ratification of the New York Convention, and the Danish Arbitration Act does not contain any distinction between Danish and foreign awards.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side?

The court will as part of the judgment decide which party will bear the costs, which will normally be the losing party. If both parties can be said to have won or partly lost, each party will often have to bear its own costs. The costs awarded by the Danish courts are based on a schedule; however, they do not reflect the actual legal costs of the court proceedings. Therefore, the parties will bear a lot of their own expenses to legal aid. Further, the parties must bear the costs associated with procedural steps, but fees paid to the court and costs paid to experts appointed by the court will as a main rule be fully recovered. Also, attorneys and legal representatives can be ordered to pay costs caused by unlawful conduct if the counterparty claims so. It is extremely rare, but in principle possible and there are very few cases where it has been considered.

20. What, if any, are the collective redress (e.g. class action) mechanisms?

Two types of collective redress exist in Danish law: "optin" and "opt-out". Opt-in means that affected persons must actively opt in for the redress action, where opt-out results in automatic inclusion with the possibility of opting out. Only the Consumer Ombudsman can bring actions according to the opt-out model. So far class actions are rare in Denmark, but there is an increasing tendency.

21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings?

It is possible for each of the parties to bring claims against third parties during the proceedings. It is a requirement that the court has jurisdiction for all the claims in Denmark and that the same procedural rules apply. Additionally, third parties can intervene. This is possible if the third party files a submission, the third party's plea must have such a connection with the case that it should be dealt with in the case and if there is the necessary jurisdiction. The court can reject the third party's claim if the parties request it and the court finds that the requirements are not met.

22. Are third parties allowed to fund litigation? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

Third party funding is permitted, however, it may be questionable if made with an illegal purpose. It is a possibility for both the plaintiff and the defendant. Lately, foreign equity funds and insurance companies have been showing interest in funding litigation in Denmark – against a share of the possible outcome of

the case. This is a rare but growing phenomenon in Denmark, and is not prevented by law. Consequently, there is no minimum or maximum amount as to how much a third party will fund. We find it unlikely that third party funders would be held liable for the costs of the other party, but there is no legislation and no precedence.

In Denmark, litigation funding has mainly occurred in annulment cases (In Danish: omstødelsessager) in bankruptcy estates and liability claims in relation to company collapses.

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction (and in particular, have the courts adopted remote hearings and have there been any procedural delays)?

At the outbreak of COVID-19, the Danish courts initiated an emergency response plan meaning that the hearings of non-critical cases were suspended. It was ultimately up to each court to decide what cases were critical and what cases were non-critical, but commercial disputes were mainly considered noncritical. The critical cases concerning areas such as custody and urgent bankruptcy proceedings. After approximately 1.5 months the courts commenced a process of gradually reopening the courts. However, the reopening included some precautionary measures in order to minimise the risk of infection such as advising attorneys to bring as few people as possible to the hearings. While the courts have worked well to adapt to the situation the COVID-19 outbreak has inevitably caused an accumulative effect for the courts as the cases which were suspended during the emergency response plan had to be rescheduled. As of now, the Danish Courts function fairly normal, i.e., as before COVID-19, in respect to restrictions, etc.

COVID-19 generally instigated an increased use of digital tools, e.g., videoconferencing and virtual testimonies from experts and witnesses, although in-person testimonies remain the principal rule.

24. What, in your opinion, is the main advantage and the main disadvantage of litigating international commercial disputes?

The main advantage is financial costs, especially when compared to US/UK jurisdiction. The courts are independent and well-functioning, and the Maritime and Commercial Court offers a very professional team of judges who has intimate knowledge of the different industries. The disadvantage lies in the often lengthy court process, especially when complicated matters are concerned.

25. What, in your opinion, is the most likely growth area for disputes for the next five years?

In recent times, there has been a rapid increase in the prices of energy and of raw materials and other commodities. It is possible that will lead to a growth of disputes with suppliers who claim to be unable or are unwilling to deliver goods at a previously agreed, but now loss-making, purchase price.

26. What, in your opinion, will be the impact of technology on commercial litigation in the next five years?

The litigation in Danish courts has been digitalized recently, which also provides the clients with more insight into the procedure. This will impact the lawyer/client relation.

27. What, if any, will be the long –term impact of the COVID-19 pandemic on commercial litigation in your jurisdiction?

It is likely that one long-term impact of the COVID-19 pandemic on commercial litigation in Danish jurisdiction will manifest itself in the use of technology. As a result of the pandemic, including due to the travel restrictions imposed, lawyers and courts have been somewhat required to give further considerations to alternative methods than to meet physically and in person. Thus, it is a likely long-term impact of the COVID-19 pandemic that more meetings, etc., will conducted virtually. By way of example, the Danish Institute of Arbitration has now explicitly allowed for the tribunal to decide the hearing to be held virtually in their new Rules of Arbitration of 2021. However, the use of technology will expectedly not fully replace meeting in person and in our opinion, it is also most suitable for a hearing to be conducted physically.

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