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**COUNTRY  
COMPARATIVE  
GUIDES 2021**

# The Legal 500 Country Comparative Guides

## Denmark

# INTERNATIONAL ARBITRATION

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## SKAU REIPURTH

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?

The primary act governing arbitration in Denmark is the Danish Arbitration Act 2005 (Act no. 553 of 24 June 2005 on Arbitration – the “Act”). With the exception of a few provisions, the Act is non-mandatory and can be dispensed with by agreement between the parties.

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

Denmark is party to the New York Convention. Denmark has made use of both the reciprocity and commercial reservations.

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

- Energy Charter Treaty.
- Geneva Protocol on Arbitration Clauses.
- Geneva Convention on the execution of Foreign Arbitral Awards.
- European Convention on International Commercial Arbitration.
- Furthermore, Denmark is party to a number of other international instruments aimed at facilitating judicial cooperation and international trade.

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

The Act is based on the UNCITRAL Model Law on International Commercial Arbitration. The Act does not contain provisions on the enforcement of interim

measures ordered by arbitral tribunals.

Unlike the Model Law, the Act also applies to national arbitration and to arbitration that is not commercial arbitration.

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

To our knowledge, there are currently no plans to amend the Act.

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

Various arbitral institutions exist in Denmark of which the following are perhaps the most notable:

- The Danish Institute of Arbitration (Its rules were last amended on 1 May 2013. No amendments are imminent.)
- The Danish Building and Construction Arbitration Board (Its rules were last amended in 2018. No amendments are imminent.)

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

As such, there is no specialist arbitration court in Denmark. However, some arbitration courts have become de facto specialized courts – particularly in relation to labour disputes.

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

As a general rule, there are no formal validity requirements for national arbitration agreements.

However, various types of disputes may not be subject to arbitration under Danish law.

The validity of the arbitration agreement is subject to general principles on the validity of agreements, including the provisions of the Danish Contracts Act.

To be valid, an arbitration agreement must be limited to a specific legal matter. The parties may not validly agree that any dispute which may ever arise between them, for whatever reason and in whatever context, shall be subject to arbitration.

Arbitration agreements entered into by consumers may be concluded only after the dispute has arisen.

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

An arbitration clause which forms part of a contract will be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void will not necessarily render the arbitration clause invalid.

### **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?**

As such, under Danish law the validation principle is not applied per se. The arbitral tribunal must determine the law applicable to the substance of the dispute in accordance with the rules of law chosen by the parties.

If the parties have not made any choice of law as to the contract, the arbitral tribunal must apply the rules of substance which follow from the choice of law provisions, which the tribunal deems applicable. Accordingly, based on the circumstances of the case, including factors such as the residence or place of business of the parties, the object of the dispute and the place of arbitration, the tribunal will decide on which choice of law provisions apply.

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

No specific provision of law deals specifically with multi-

party or multi-contract arbitration.

### **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?**

Other than a third party's consent (including implied consent) to be bound by the arbitration agreement, there are no express provisions that allow for a non-signatory to be bound by an arbitration agreement. To our knowledge, no recent court decisions exist on these issues.

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

The parties may agree on arbitration in cases where the parties may freely act with regard to all aspects of the case. Criminal cases, cases of custody and cases of paternity are examples of cases where the parties cannot freely act with regard to all aspects of the case, thus rendering such cases non-arbitrable.

There has not been any noteworthy evolution in this regard in recent years.

### **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?**

No.

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

The arbitral tribunal shall rule on the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Danish law recognizes a variety of choice of law rules,

including the Convention on the law applicable to contractual obligations (1980).

**16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?**

Parties in arbitration proceedings may decide that the e.g. *lex mercatoria*, Principles of European Contract Law and UNIDROIT Principles of International Commercial Contract Law should be the substantive law of the dispute.

The circumstances under which such principles have been applied have been specific to the various cases.

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

Any person who is appointed as arbitrator, shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of the appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by the arbitrator. A party may challenge an arbitrator, if circumstances exist that give rise to doubts as to the arbitrator's impartiality or independence. The party can only challenge an arbitrator appointed by the party, or in whose appointment the party has participated, if the party becomes aware of the arbitrator's impartiality or independence after the appointment has been made.

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

The parties are free to determine the number of arbitrators. Failing such determination, according to the Act, the number of arbitrators shall be three.

The parties are also free to agree on the procedure for appointing arbitrators. Failing such agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator within thirty days of a request to do so from the other party. The two arbitrators thus appointed shall, within thirty days of their appointment, appoint the third arbitrator, who shall act as presiding arbitrator.

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

The parties may request the courts to appoint the arbitrators, if the parties are not successful in appointing the arbitrators. When doing so, the courts shall have due regard for any qualifications required of the arbitrator by the agreement of the parties and for such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

**20. 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 may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess the qualifications agreed upon by the parties. A party may challenge an arbitrator appointed by him or her, or in whose appointment he or she has participated, only for reasons of which he or she becomes aware after the appointment has been made.

The parties are free to agree on the procedure for challenging an arbitrator. If the parties have not made such an agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal and of the circumstances on which the challenge is based, send a written statement listing the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

If a challenge under any procedure agreed upon by the parties is not successful, the challenging party may, within thirty days after having received notice of the decision rejecting the challenge, request the courts to decide on the challenge. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and issue an award. A challenge cannot later be invoked in support of an application for setting aside or refusing recognition or enforcement of the arbitral award.

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

In 2009, the Danish Supreme Court ruled that even though an arbitrator lacked the necessary professional

skills, the arbitral award was not invalid as the objection of impartiality was made too late.

In 2008, the High Court ruled that an arbitrator was eligible to act as arbitrator in the specific arbitration even though the arbitrator had previously publicly expressed his views of the legal issues relevant for the arbitration.

## **22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in Halliburton v Chubb?**

No.

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

With regard to arbitrations before the Danish Institute of Arbitration, if an arbitrator is replaced (e.g. due to the arbitrator not fulfilling his duties), the arbitral tribunal shall decide, after having invited the parties to comment, whether the procedural steps already taken in the case are to be repeated before the arbitral tribunal now composed. If an arbitrator is replaced at a stage of the arbitral proceedings where the oral hearing has been conducted, the Chairman's Committee may decide that the case is to be decided by the remaining arbitrators, after having invited the parties and the other arbitrators to comment.

## **24. Are arbitrators immune from liability?**

The question of arbitrators' civil liability is unresolved under Danish law. Often, arbitrations before the Danish Institute of Arbitration are subject to members of the arbitral tribunal being exempt from liability with respect to e.g. the award except to the extent such limitation of liability is prohibited by applicable law.

## **25. Is the principle of competence-competence recognized in your country?**

Yes. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

## **26. What is the approach of local courts**

## **towards a party commencing litigation in apparent breach of an arbitration agreement?**

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests, dismiss the action unless it finds that the arbitration agreement is null and void or that the arbitration may not for other reasons be conducted. However, if the action has been brought before the court after the commencement of arbitral proceedings, the court shall have jurisdiction to rule on the jurisdiction of the arbitral tribunal only in respect of whether the subject-matter of the dispute may be settled by way of arbitration.

## **27. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?**

Unless otherwise agreed by the parties, the arbitral proceedings commence on the date on which a written request for arbitration is received by the respondent. With regard to arbitrations before DIA, the date on which DIA receives the Statement of Claim shall in all respects be considered the date on which the arbitration case commenced.

## **28. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?**

The Danish state may enter into arbitration agreements when acting as part of a private legal relationship e.g. purchase of goods. Cases concerning the exercise of state power cannot be determined by way of arbitration.

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

If the respondent fails to participate in the arbitration (e.g. by not paying the agreed security for costs), the claimant may terminate the arbitration agreement arguing that the respondent is in material breach of the arbitration agreement and initiate proceedings before the ordinary courts.

The claimant may also pay the respondent's share of

these costs in which case the arbitration proceedings may continue.

If the respondent fails to submit its Statement of Defence without proper cause, the arbitral tribunal may continue the arbitration and render its award based on the evidence before it.

Local courts may not compel participation.

**30. 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?**

Third parties may only join already pending arbitration proceedings provided that the parties consent hereto.

If all parties agree to the intervention, the tribunal will as a general rule decide on the request for intervention taking into account all relevant circumstances, including the mutual connection between such third party/parties and the parties to the pending case and the progress already made in the pending case. Accordingly, the tribunal is not per se bound by the agreement of the parties.

If all parties do not agree to the intervention, as a clear starting point, the arbitral tribunal may not allow for it.

**31. Can local courts order third parties to participate in arbitration proceedings in your country?**

No, local courts cannot order third parties to participate in arbitration proceedings.

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

The courts may, at the request of a party, issue interim measures even if the parties have agreed to submitting the dispute to arbitration. The party can request that the court issue interim measures such as attachment, injunctions, etc.

**33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in**

**your country?**

No.

**34. 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?**

Pursuant to the Act, the arbitral tribunal or a party (subject to the approval of the arbitral tribunal) may request that evidence is taken before the ordinary courts in accordance with the provisions of the Danish Administration of Justice Act.

Local courts cannot as such compel witnesses to participate in arbitration proceedings but witnesses may be examined by the ordinary courts as part of the process of taking evidence and sanctions apply if witnesses are unwilling to participate.

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

Danish lawyers are subject to a set of ethical guidelines issued by the Danish Bar Association.

Arbitrators must be impartial and independent when acting as arbitrators.

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

Confidentiality of arbitration proceedings is subject to the parties agreeing hereto.

**37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?**

No.

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

The arbitral tribunal will determine its own fees and the settlement of its expenses on the basis of the economic value of the case and (absent any other agreement) on the basis of what is deemed reasonable and customary given the nature of the case and its specific circumstances. For purposes of awarding costs, the arbitral tribunal will take into consideration the case is an international arbitration, whether it concerns complex issues and the duration of the case/proceedings.

The arbitral tribunal will allocate the costs of the arbitration between the parties. The arbitral tribunal may order a party to cover all or part of the costs of another party.

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

Pre- and post award interest may be included in accordance with the claims put forward by the parties.

### 40. 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?

A party relying on the arbitral award for purposes of recognition and enforcement shall supply to the relevant authorities a duly certified copy of the award and of the arbitration agreement if the agreement is in writing. The documents must, if necessary, be accompanied by a duly certified translation into Danish.

Unless the parties have agreed otherwise, awards must be reasoned. According to Danish case-law, the threshold is generally high in relation to establishing that an award lacks sufficient reasoning.

### 41. 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 timeframe for the recognition and enforcement of an award will depend on the facts of the case. Typically, enforcement of at least domestic awards may be

effected within a relatively short period of time. Depending on the circumstances, an award may be enforced ex parte (if necessary, subject to the provision of security for costs).

### 42. 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?

Chapter 9 of the Act governs the recognition and enforcement of awards. The chapter applies to the recognition and enforcement of all arbitration awards, regardless of the country in which they were rendered and regardless of whether the award was rendered in a country that has acceded to the New York Convention. As a general rule, the same standard of review is applied.

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

The law does not impose any limits on the available remedies in an arbitration process.

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

Arbitration awards may not be appealed under Danish law. However, the award may be challenged in local courts for the reasons listed in Section 39 of the Act, including most notably (i) that the party against whom the award is invoked was not properly notified of e.g. the arbitration, (ii) that the award concerns a dispute which is not covered by the arbitration agreement and (iii) that the composition of the arbitral tribunal or the process of the arbitration did not comply with the parties' agreement or the law of the country in which the arbitration took place.

### 45. 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)?

No.

**46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?**

As a general rule, arbitral awards may be enforced against state entities. In Danish legal literature, it is assumed that Denmark acknowledges a state's immunity in cases concerning sovereign activities, but not in commercial activities.

**47. 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?**

Depending on the circumstances, third parties or non-signatories may be bound by the award – at least if they may be said to have displayed implied consent with regard to the commercial contract in question (including any arbitration clauses). In such cases, third parties or non-signatories may as a general rule challenge the recognition of an award.

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

No. However, the Danish Institute of Arbitration has recently adopted a new set of procedural rules according to which a party must immediately inform (inter alia) the arbitral tribunal and the parties of the identity of any third party who has accepted to fund the costs of the case.

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

Yes, the procedural rules of e.g. the Danish Arbitration Institute and the Arbitration Board provide for emergency arbitrator relief. Decisions made by emergency arbitrators are readily enforceable.

**50. 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?**

Various Danish arbitration institutional rules (such as those employed by DIA) offer simplified and expedited arbitration procedures. Often no specific economic threshold applies in order for the parties to agree upon the application of such procedures. Expedited procedures are frequently used.

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

No, not currently.

**52. 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?**

To our knowledge, there have not been any such recent court decisions. However, recently there have been court decisions on whether specific national arbitral awards should be set aside. Ultimately, none were set aside.

**53. 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?**

Danish case-law regarding corruption is rarely seen as corruption allegations are rarely put forward.

If claims for damages due to corruption are put forward in civil litigation, the claimant bears the burden of proof. The courts do not apply any special evidentiary standard in this regard.

**54. Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in *Slovak Republic v Achmea BV (Case C-284/16)* with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?**

To the best of our knowledge, there have been no such



cases. We are not familiar with any pending decisions on this matter.

**55. Have there been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?**

To the best of our knowledge, there have been no such cases. We are not familiar with any pending decisions on this matter.

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

As a response to the COVID-19 pandemic, most arbitral institutions have taken temporary measures by way of imposing restrictions on the number of meeting participants and by organizing online case management meetings.

**57. 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 Danish Institute of Arbitration has adopted new procedural rules which took effect on 13 April 2021. The new provisions include the possibility of conducting virtual hearings (or examining parties or witnesses virtually) for purposes of promoting greater use of technology and cost-efficiency. Furthermore, as a point of departure, all written communication in the case must be exchanged by way of e-mails or in some other electronic form.

**58. In your country, does the insolvency of**

**a party affect the enforceability of an arbitration agreement?**

As a general rule, the insolvency of a party does not affect the enforceability of an arbitration agreement. Following insolvency (bankruptcy) of a party, the trustee in bankruptcy must decide whether to enter into pending arbitrations and must in that regard respect any existing arbitration agreements.

**59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?**

Denmark is a Contracting Party to the Energy Charter Treaty. To our knowledge, no specific views have been publicly expressed with regard to the current negotiation.

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

No.

**61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?**

Together with the other Nordic countries, Denmark has issued the following statement on 21 October 2019: *"The Nordic countries value the objectives of the ISDS reform that reflect the rule of law principles such as legitimacy, independence, openness, expertise, predictability and cost-efficiency. Therefore, we are looking forward to a holistic reform of the current ISDS system. We put a high value on the important work the working group has done so far and will continue to support the work to reform the ISDS."*

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