DELOS
dispute resolution

DENMARK

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

PETER SCHRADIECK, JIMMY SKJOLD HANSEN
AND RIKKE SILKE KJELDSEN
OF PLESNER

PLESNER

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SAFESEATS@DELOSDR.ORG | DELOSDR.ORG

JURISDICTION INDICATIVE TRAFFIC LIGHTS

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VERSION: 25 MAY 2018 (v01.001)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is a fully recognized dispute resolution mechanism in Denmark, considered on an equal footing with litigation in terms of enforceability and procedural guarantees. Denmark enacted its first statute dedicated to arbitration in 1972, which is also the year it acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards. Following the 2005 revision of the Danish Arbitration Act ("DAA"), Denmark became a UNCITRAL Model Law country. Denmark ranked as number one overall out of 113 jurisdictions worldwide in the 2016 and 2017-2018 WJP Rule of Law Indexes, and is thus a very safe and modern forum for arbitration proceedings. With a legal reform currently in the pipelines, Denmark is arguably becoming an even more apparent alternative to the more traditional arbitration venues in Europe.

Key places of arbitration in the jurisdiction	Copenhagen, with its concentration of large firms and convenient access for foreign travelers, is usually the preferred venue for international arbitration proceedings seated in Denmark. Several of the Copenhagen-based law firms have facilities that will accommodate the needs of larger hearings. A selection of hotels and conference venues also offer good facilities.
Civil law / Common law environment?	Civil law. In order to identify the relevant rule(s) of law, it will often be necessary to also look to case law, custom and - to a lesser extent doctrine. This feature, together with the language barrier, makes Danish law somewhat inaccessible to foreign practitioners unfamiliar with the Nordic legal tradition.
Confidentiality of arbitrations?	The DAA does not specifically provide for the confidentiality of the arbitration proceedings but the Code of Conduct of the Danish Bar Association places Danish lawyers under a duty of professional secrecy. It the parties wish to ensure that they and the arbitral tribunal are bound by a duty of confidentiality, they should set this out in the arbitration agreement directly or request that the arbitral tribunal order the confidentiality of the proceedings.
Requirement to retain (local) counsel?	The DAA does not compel parties to retain counsel for the arbitration proceedings, but it will often be advisable to be assisted by counsel familiar with Scandinavian law and language, especially when the dispute is to be adjudicated under Danish law. Denmark belongs to the Nordic Civil law tradition and has a relatively strong tradition for codifying the law. In order to identify the relevant rule(s) of law, it will often be necessary to also look to case law, custom and – to a lesser extent doctrine. This feature, together with the language barrier, makes Danish law somewhat inaccessible to foreign practitioners unfamiliar with the Nordic legal tradition.
Ability to present party employee witness testimony?	Upon conferring with the parties, the arbitral tribunal may determine the permitted means of discovery, including whether party employees, other fact witnesses and experts shall be allowed to give testimony.

Ability to hold meetings and/or hearings outside of the seat?	Upon conferring with the parties, the arbitral tribunal may conduct meetings and hearings outside the designated legal seat.
Availability of interest as a remedy?	Upon conferring with the parties, the arbitral tribunal may decide on appropriate remedies, including whether to add simple or compound interest on any sums awarded.
Ability to claim for reasonable costs incurred for the arbitration?	Upon conferring with the parties, the arbitral tribunal may award and allocate reasonable costs.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The DAA does not set forth any restrictions regarding contingency fees or third-party funding. Under the Code of Conduct of the Danish Bar Association, lawyers may not charge a percentage of the sums awarded to the client as such, but their fees may otherwise reflect the outcome of a case, and lawyers are free to operate on a "no cure, no pay" basis.
Party to the New York Convention?	Yes.
Other key points to note	ϕ
WJP Civil Justice score (2017-2018)	0.86 – ranked second (Overall score: 0.89 – ranked first globally).

ARBITRATION PRACTITIONER SUMMARY

Arbitration is a well-established dispute resolution mechanism in Denmark which enacted its first piece of statutory legislation dedicated to arbitration in 1972, when Denmark also acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards (New York Convention). Denmark became a UNCITRAL model law country with the 2005 revision of the Danish Arbitration Act (DAA),[1] incorporating the 1985 version of the model law. While Denmark has not yet implemented the latest version of the model law, the jurisdiction nonetheless offers a modern and internationally recognizable legal framework for conducting arbitrations. Additionally, an imminent legal reform will, when adopted, align Denmark with the current model law and other best international practices in the field of arbitration and potentially even provide further "arbitration-friendly" benefits such as restrictions on appeal of arbitration-related court decisions and centralization of all such decisions at one specialised court.

Date of arbitration law?	The first piece of statutory legislation dedicated to arbitration was in 1972. It was revised in 2005.
UNCITRAL Model Law? If so, any key changes thereto?	Denmark is a model law country. However, the 2006 revision of the Model Law has not yet been incorporated into the DAA. As a consequence, while the DAA does set out a regime for the issuance of interim measures (albeit not to the level of detail of the 2006 model law), there is currently no applicable rules on the enforcement of interim measures ordered by arbitral tribunals. The contemplated legal reform of the DAA is expected to remedy this discrepancy between the model law and Danish legislation. The territories of Greenland and the Faeroe Islands, which enjoy Home Rule, still apply the 1972 Danish Arbitration Act and are thus not model law countries (territories).
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	At present, the DAA and the Danish Administration of Justice Act (AJA) do not draw a clear distinction between decisions taken by courts in connection with arbitral proceedings and regular litigation. As such, motions in relation to arbitral proceedings must be introduced at the competent district court (in Danish: *Byretten*) with the high court (in Danish: *Landsretten*) and, potentially, the Supreme Court acting as an appellate jurisdiction. The legal reform will, if adopted in its current form, concentrate all arbitration-related matters at the Maritime and Commercial Court of Copenhagen (in Danish: *Sø- og Handelsretten*) and significantly restrict the possibility of appeal of arbitration-related court decisions.
Availability of *ex parte* pre-arbitration interim measures?	The existence of an arbitration agreement does not preclude parties from seeking interim relief from the courts in accordance with section 40 of the AJA, but Danish courts would normally not accept granting such relief without affording all concerned parties with an opportunity to comment. Such *ex parte* measures would

[1] The law was voted unanimously by the Danish Parliament on 14 June 2005, published on 24 June 2005 and entered into force on 1 July 2005. It is available at:

http://voldgiftsinstituttet.dk/wp-content/uploads/2015/01/danish_arbitration_act_2005.pdf.

	in all likelihood be considered at variance with the principle of equal treatment set forth at section 18 of the DAA.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal is competent to rule on its own jurisdiction (DAA, section 16). The arbitral tribunal's positive finding that it has jurisdiction over a matter can be contested before the courts within 30 days, provided that a partial award is issued on jurisdiction (Section 16(3) of the DAA; negative findings by the arbitral tribunal cannot be brought before the courts). Such recourse is not suspensive of the arbitration. The competence of state courts in arbitration-related matters is narrowly defined, *i.e.,* when seized of motion against the competence of the arbitral tribunal, the court will only examine the validity of the arbitration agreement and arbitrability of the issues at hand and will otherwise desist itself in favour of the arbitral tribunal (DAA, section 8(1)).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	DAA mirrors the grounds set forth in the New York Convention for setting aside or denying enforcement of an award. Moreover, these grounds are narrowly construed in Danish case law.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The rules set forth at section 39 of the DAA on the grounds for denying enforcement of awards are mandatory, including part 1(e) which refers to awards that have not become binding or have been set aside at the seat. Whereas the wording of the provision ("*can be denied*") suggests some discretion for the courts, we are not aware of any examples of courts having accepted to enforce awards that were annulled at the legal seat.
Other key points to note?	ϕ

JURISDICTION DETAILED ANALYSIS

While commercial arbitration is still little known to the general public in Denmark, it has for many years been a popular dispute resolution mechanism in commerce, considered on an equal footing with litigation in terms of enforceability and procedural guarantees.

Ranked as number one out of 113 jurisdictions worldwide in the 2016 and 2017-2018 WCJ Rule of Law Indexes,[2] Denmark is a "safe" jurisdiction offering reliable arbitration infrastructures, comprising a modern regulatory framework, generally arbitration-friendly courts and an increasingly specialised body of practitioners.

With a legal reform currently in the pipelines, Denmark is arguably becoming an even more credible alternative to the more traditional arbitration venues in Europe. The present Guide is intended to serve as an introduction to the current state of the law under the 2005 Danish Arbitration Act ("DAA") and the Administration of Justice Act ("AJA"), which are the relevant legal codes with respect to arbitration and arbitration-related court proceedings. We will attempt to flag areas where more comprehensive changes are being envisaged by the legal reform process. A summary of the key features of the contemplated legal reform is furthermore included in section 6 below.

1. The Legal Framework

1.1 Legal Environment

Together with the other Scandinavian countries, Denmark is commonly considered as belonging to the Romano-Germanic Civil law tradition. Denmark upholds a strong separation of powers and has a relatively strong tradition for codifying the law. The Danish legislature consists of the Danish Parliament, while the Government exercises executive powers (but may propose enactment of new laws). The role of the Danish courts – the judiciary – is exclusively to interpret the law and not to embark on law-making itself, although the Supreme Court may from time to time establish clarifications of the law or legal practices (by *obiter dicta*) in specific cases.

Nonetheless, it is often necessary to look to case law, custom and – to a certain extent – legal doctrine when identifying the relevant rule(s) of law, a considerable part of which has not been codified. These features, together with the fact that secondary sources of the law (*i.e.,* case law and doctrine) often are only available in Danish, make Danish law somewhat inaccessible to foreign (non-Scandinavian) practitioners.

The earliest statutory manifestation of arbitration in Danish law is found in the 1683 law compilation, known as "*Danske Lov*"[3] which endorsed the parties' contractual liberty to withdraw a given dispute from the purview of the regular courts, subject to any royal prerogative. The first statute dedicated to arbitration was enacted in 1972,[4] and Denmark became a UNCITRAL Model Law country with the 2005 revision of the DAA,[5] which reflects the 1985 UNCITRAL Model Law on International Commercial Arbitration ("Model Law") with only minor amendments.

Denmark acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards ("New York Convention") in 1972 and joined the European Union (then "the European Communities") the following year. Denmark is a party to a host of other international instruments aimed at facilitating transnational trade

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2 Denmark's overall score was 0.89; available for 2016 and 2017-2018 respectively at: https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (p. 5) and https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition_0.pdf (p. 5).

3 Literally "The Danish Law".

4 Greenland and the Faeroe Islands are under home rules and still apply the 1972 Arbitration Act.

5 The full text in English available at: http://voldgiftsinstituttet.dk/wp-content/uploads/2015/01/danish_arbitration_act_2005.pdf.

and judicial corporation, including, *i.e.*, the Vienna Convention on the International Sale of Goods ("CISG") and several of the Hague and Geneva Conventions.

Since 1894, Denmark has had its own regional arbitration institution. The Danish Institute of Arbitration ("DIA") in its current form has existed since 1981.

Additionally, Denmark has a number of sector-specific arbitration boards and panels. From an arbitration perspective, the most relevant is the Danish Building and Construction Arbitration Board (the "Arbitration Board"; in Danish: *Voldgiftsnævnet for Bygge- og Anlægsvirksomhed)*, which administers most disputes in the building and construction sector in Denmark. The Arbitration Board is a quasi-public arbitration institution in the sense that its mandate to administer arbitrations within this specific field of law is approved by the Government. The General Conditions for the Provision of Works and Supplies within Building and Engineering of 10 December 1992 (in short in Danish: *AB 92*) is an "agreed document" for the industry and thus forms part of nearly all public tenders and most contracts within the construction sector. *AB 92* designates the Arbitration Board as the forum for solving disputes (Section 47 of *AB 92*).[6] Although parties are at liberty to opt out of *AB 92*, most disputes in the Danish construction sector are conducted under the arbitration rules of the Arbitration Board.[7] While this form of arbitration falls within the definition of arbitration for the purposes of the DAA and the New York Convention, it differs from the usual framework of commercial arbitration in a number of ways. Most notably, parties do not take part in the constitution of the arbitral tribunal. Instead, the members of the arbitral tribunal – usually a panel of three, which are subject to usual requirements as to impartiality and independence – are selected by the Chairperson of the Presidency of the Arbitration Board.

1.2 The DAA and the UNCITRAL Model Law

As indicated above, the DAA predates the 2006 revision of the Model Law, which has therefore not yet been implemented in Denmark. While there are substantial overlaps between the most recent version of the Model Law and the DAA, some discrepancies exist.

One of the major differences between the DAA and Model Law concerns the specific conditions for the issuance of interim measures by arbitral tribunals and the regime for their enforcement, which are set out at Articles 17-17J of the Model Law. Under Danish law, and contrary to the Model Law, such measures are not directly enforceable.

Against this background, in 2016, the DIA set up a working group charged with the task of revising the DAA. One of the key initiatives of the proposed reform is to transcribe Articles 17-17J of the Model Law into the DAA. The other particulars of the reform will be treated in more detail in section 6.

2. The Arbitration Agreement

2.1 Characteristics and Validity of the Arbitration Agreement

There is no specific rule in the DAA regarding which law governs the arbitration agreement itself. Depending on the specific case and any other potential laws in play, the governing law of the contract in question (*lex causae*) will usually be considered as the governing law also with respect to the arbitration agreement.

The DAA and general Danish contract law do not set forth any specific requirements as to the form of the arbitration agreement, so in principle also oral arbitration agreements may be valid. While it is of course almost impossible to prove the existence of an arbitration agreement in the absence of any written material, arbitration agreements deductible from the parties' unambiguous behaviour (*e.g.,* failure to object throughout the proceedings), written (informal) exchanges between the parties or stipulations set out in a

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6 Available at: https://voldgift.dk/?lang=en.

7 Available at: https://voldgift.dk/wordpress/wp-content/uploads/2014/09/C-Voldgiftbehandling-2010-Engelsk.pdf.

party's general terms and conditions will generally be upheld under Danish law, provided that mutual consent to arbitration can be established.

As a matter of Danish law, the arbitration agreement is considered to be severable from the remainder of a contract containing the arbitration agreement (clause). The principle of severability is enshrined in Section 16(1) of the DAA and means that the invalidity of the main contract does not necessarily lead to the invalidity of the arbitration clause.

Section 16(1) of the DAA also codifies the principle of *competence-competence*, and thus the Danish courts rarely adjudicate the validity of the arbitration agreement (see section **Error! Reference source not found.** below).

2.2 Scope of the Arbitration Agreement

2.2.1 The Possibility of Extending the Arbitration Agreement to Third Parties

The DAA is silent as to the potentially binding effect of an arbitration agreement vis-à-vis non-signatories. As a general rule, only the signatories to a contract are bound by its terms, but this is not to say that a non-signatory would not under any circumstances be considered a party to the arbitration agreement. In this respect, one might mention situations of individual and universal succession or contracts specifically designed for the re-assignment of rights and obligations to an entity which was not a party to the original agreement.

Domestic courts across Europe have occasionally accepted to "pierce the corporate veil" between a signatory and another corporate entity within the same group. This has been done when the parties' common intention that the non-signatory would also be bound by the arbitration agreement could be reasonably deduced from the involvement of the non-signatory in the conclusion, performance and termination of the contract and/or it was thought likely that the third party would draw benefit from the contract.[8] Whereas the group of companies/alter ego theory is fairly well-established in for example French case law and the concept of "piercing the corporate veil" (in Danish "*hæftelsesgennembrud*") is also known in Danish doctrine, there is not yet any conclusive practice to this effect in Danish or Scandinavian case law.[9]

Specifically in relation to construction disputes under AB 92, this agreed document provides in Section 47(8) that in case AB 92 has been agreed between the developer and multiple parties (contractors and suppliers) the arbitration agreement in Section 47(1)-(7) of AB 92 also applies to the internal relationship between such parties. Danish case law supports this notion of extending the arbitration agreement to non-signatories within the construction sector where AB 92 has been agreed between the developer and two or more parties.

2.2.2 Limitations for Certain Types of Disputes

Pursuant to Section 6 of the DAA, parties may refer to arbitration all disputes arising from legal relationships over which they enjoy "*an unrestricted right of disposition*". In other terms, while parties are in principle at liberty to exclude the jurisdiction of the regular courts for some types of legal relationships, others are by their nature incapable of being submitted to arbitration (they are "inarbitable").

There is no official list of non-arbitrable issues. In general, under Danish law, the courts retain jurisdiction for some areas of the law involving public policy concerns. This is the case of family law and criminal law and other areas of law partially governed by public law rules and/or enforced by a specialised administrative tribunals or bodies, *e.g.,* anti-trust/competition law. However, recent EU case law suggests that a dispute

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8 A leading case from France is the *Dow Chemical* decision handed down by the *Cour d'Appel de Paris* (Rev. Arb. 1984, 98) in an International Chamber of Commerce matter: ICC Case No. 4131, Y.C.A. Vol. IX (1984), 131.

9 *See,* Niels Schiersing, Voldgiftsloven, p. 155.

involving infringements of EU competition law may be "arbitratable" provided that the aggrieved party can be considered to have specifically consented to arbitration for this type of dispute.[10]

Unlike certain jurisdictions, an arbitration agreement in a contract between a consumer and a professional is not automatically invalid, but it will be subjected to closer judicial scrutiny than contractual relationships between professionals. Pursuant to Section 7(2) of the DAA, pre-existing arbitration agreements in consumer contracts are not binding on the consumer. Under Section 16(4) of the DAA, a consumer will only lose the right to invoke the unenforceability of the pre-existing arbitration agreement if the consumer has been informed (by legal counsel, the arbitral tribunal or otherwise) that the arbitration agreement is unbinding and the consumer nonetheless continues with the arbitration.

3. Intervention of Domestic Courts

Where a dispute is covered by a valid arbitration agreement, the role of Danish courts is narrowly defined: Pursuant to Section 4 of the DAA, courts may intervene only where their competence is expressly foreseen by law, such as in relation to assistance with constitution of the arbitral tribunal or deciding challenges in *ad hoc* cases, assistance securing evidence, issuing or implementing interim measures and setting aside and enforcement proceedings.

3.1 Competence-competence

As mentioned, under Section 16(1) of the DAA, the arbitral tribunal is competent to rule on its own jurisdiction (*competence-competence)*. Under Section 8(1) of the DAA, the Danish courts shall respect this division of competence in favour of the arbitral tribunal.

Accordingly, where a case is submitted to the Danish courts, they will – at a party's request – dismiss the case (without prejudice) if an arbitration agreement is invoked, unless the arbitration agreement is null and void, inoperable or incapable of being performed (Section 8(1), first sentence, of the DAA). The courts will make this assessment if no arbitration is pending. However, if arbitration has already been initiated, the courts can only assess whether the dispute is arbitrable (Section 8(1), second sentence, of the DAA) and in the affirmative will dismiss the case (without prejudice).

3.2 Anti-Suit and Anti-Arbitration Injunctions

Danish law does not recognize anti-suit or anti-arbitration injunctions issued by a court. In addition, anti-suit injunctions are rarely (if ever) issued by arbitral tribunals. While the latter may occur in theory, the DAA (or the AJA) does not govern such injunctions. At least in Denmark, it is difficult to see a need for anti-suit injunctions, as the courts will normally have to dismiss cases automatically if an arbitration is pending under the arbitration agreement in question, be it in Denmark or in another jurisdiction (see section **Error! Reference source not found.** above).

4. The Conduct of the Proceedings

Subject to the limitations set out at Sections 4 and 8(1) of the DAA, Danish courts oversee and may assist with certain aspects of the arbitral proceedings. For example, courts may be approached with requests for assistance with the constitution of the arbitral tribunal in the context of *ad hoc* proceedings, to decide on challenges and to provide various types of support to the arbitral tribunal and the parties while the arbitration is pending.

This being said, the DAA confers a broad discretion to the parties and the arbitral tribunals to tailor the proceedings to their needs. Section 19 of the DAA specifies that, in the absence of an agreement by the parties, the arbitral tribunal is at liberty to conduct the proceedings as it deems appropriate.

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10 Available at: http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=352/13&td=ALL.

4.1 Constitution of the Arbitral Tribunal

4.1.1 The Default Rules

Under Section 11(2) of the DAA, if the arbitration agreement is silent on the method for constituting the arbitral tribunal, there will be three arbitrators and each party shall nominate an arbitrator within 30 days of receipt of a request from the other side to do so. The co-arbitrators shall then, in turn, jointly nominate the president of the arbitral tribunal.

Where Section 11(2) does not result in the constitution of the arbitral tribunal within the 30-day time limits, each party can request the courts to designate an arbitrator on behalf of the defaulting party or on behalf of the co-arbitrators. Such requests will be accepted whenever (i) the seat of arbitration is in Denmark, undetermined or the court holds jurisdiction *ratione personae* over one of the parties to the dispute; and (ii) it is not possible to constitute the arbitral tribunal pursuant to Section 11(2) of the DAA.

The DAA does not expressly contemplate the scenario where the arbitration agreement provides for one arbitrator but the parties fail to nominate jointly the sole arbitrator within thirty days. It follows implicitly from the wording of Section 11(3) that, in such circumstances, a party may also refer the matter to the courts.

By law, when called upon to assist with the constitution of the arbitral tribunal, the courts must have regard to the desired characteristics and qualifications of the arbitrator(s) as set out in the arbitration agreements and must ensure that the arbitrators are impartial and independent of the parties.

4.1.2 Multi-Party Disputes

The DAA does not specifically envisage complex arbitrations involving more than two parties.

It has not been settled in Danish jurisprudence how Danish courts must respond to a request to compose an arbitral tribunal in a multi-party scenario where one side fails to nominate an arbitrator. It is conceivable that a court might appoint all three members of the arbitral tribunal by reference to the principle of equal treatment enshrined at Section 18 of the DAA[11] and, in fact, the working group preparing the draft proposal for the revision of the DAA has suggested adopting a new provision as Section 11a, whereby the courts may appoint all the members of a three-member arbitral tribunal if one side fails to jointly nominate an arbitrator within 30 days of receiving the notice from the other side.

4.2 Challenges

Section 12 of the DAA places prospective and acting arbitrators under a strict duty to disclose any circumstances of a nature to give rise to justifiable doubts as to their impartiality and independence.

Under Section 13 of the DAA, in the event of a challenge brought on the basis of an arbitrator's alleged lack of impartiality and/or independence, the arbitral tribunal itself must decide whether to uphold such challenge unless the parties have agreed to another procedure. Under section 13 of the DIA rules, for example, challenges are decided by the Chairman's Committee after affording the non-challenging party and the arbitral tribunal with an opportunity to comment.

If the challenge is rejected, the arbitral tribunal's decision can be contested before the courts within 30 days. Such proceedings are not an everyday occurrence in the Danish legal system and, accordingly, it is difficult to make any general observations about the level of scrutiny performed by the Danish courts in this context. Both the DAA and Sections 60 and 61 of the AJA, which list the grounds disqualifying judges acting in litigation proceedings, leave a wide margin of appreciation to the courts.

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[11] This principle laid down in the leading French case of *Siemens v. BKMI and Dutco* rendered by the French *Cour de Cassation* on 7 January 1992, where it was considered at variance with the principle of equal treatment for the institution (in that case the International Chamber of Commerce in Paris) to appoint only on behalf of one side.

As one Danish scholar and practitioner observed, the judicial practice of recent years appears to be informed by the IBA Guidelines on Conflicts of Interest in International Arbitration. For example, the circumstance that an arbitrator has expressed general views on an issue that might be relevant to the resolution of the dispute, has been held insufficient to disqualify the arbitrator in question.[12]

It has not been settled in Danish case law whether and under which circumstances failure to disclose a potentially relevant piece of information may in itself be sufficient to disqualify an arbitrator. Looking to the case law in other Scandinavian countries, it would seem that that although such an omission would generally not be enough in itself, it may, in conjunction with others elements, plead in favour of upholding a challenge.[13]

4.3 Interim Measures

Under Section 17 of the DAA, the arbitral tribunal may issue interim measures. This rule is broad and based on the 1985 Model Law version. The rules is addressed further in the following.

In addition, under Section 9 of the DAA, parties may also seek interim relief from the courts (in accordance with Section 40 of the AJA). Section 9 of the DAA is mandatory and applies regardless of where the seat of the arbitration is located. It appears inconceivable that Danish courts would grant any form of interim relief without affording all concerned parties with an opportunity to comment. Indeed, with the possible exception of a notoriously non-participating party known to decline service, such *ex parte* measures would in all likelihood be considered at variance with the principle of equal treatment set forth at Section 18 of the DAA.

Under Section 27 of the DAA, the courts may also assist in evidence taking.

4.4 Party Autonomy and Discretion of the Arbitral Tribunal

No obligation to retain counsel: For the arbitration proceedings, parties may elect not to retain local counsel, or use any internal/external counsel for that matter. However, considering the particularities of the Danish legal system, it will in many instances be preferable to be assisted by local counsel, particularly when the dispute is governed by Danish substantive law and/or the DAA.

Protection of confidentiality: The DAA does not provide for the confidentiality of the arbitral proceedings. However, this is normally agreed before or during the proceedings (by way of Section 19(2) of the DAA or institutional rules). Most Danish legal professionals, including lawyers, are under a strict duty of professional secrecy, subject to the ordinary rules of civil liability.

Duration of the proceedings: The DAA does not regulate the length of the proceedings. As such, the parties and the arbitral tribunal are at liberty to define the procedural calendar in view of their availability and the nature of the dispute.

Location of meeting and hearings: Danish law does not impose any physical limitations as to where the arbitral tribunal may deliberate or convene meetings or hearings. It follows from Section 1 of the DAA that the arbitration will be deemed to have taken place in Denmark whenever the designated seat in Denmark regardless where the hearings and meetings physically take place.

Need for an in-person hearing: Under Section 24 of the DAA, the arbitral tribunal can decide whether to hold a hearing or whether to decide the dispute on documents only with the caveat that an in-person hearing must be held if this is requested by one of the parties.

No arbitration-specific limits on permitted evidence: As per Section 19(2) of the DAA, the arbitral tribunal determines which evidence shall be admitted to the records and how to assess the probative value of the

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12 The IBA Guidelines lists this scenario on as a "green item" which does not give rise to a disclosure obligation for prospective arbitrators.

13 Schiersing, p. 227.

pieces of evidence adduced. In the event of a recalcitrant party, the arbitral tribunal, or a party having obtained prior consent from the arbitral tribunal, may solicit the courts' assistance with securing evidence. For example, an arbitral tribunal may prefer that a testimony be given before the national courts to enhance its probative value.[14]

Remedies: The law does not lay down any arbitration-specific limitations on the arbitral tribunal in terms of available remedies. As a matter of Danish law, nothing precludes a party from seeking, or an arbitral tribunal from awarding, simple or compound interest on the sums requested.

Costs: The initial determination of the costs is left at the discretion of the arbitral tribunal which, under Section 34 of the DAA, fixes the costs of the arbitration, including the arbitrators' fees and costs.

Under Danish law, the parties are jointly and severally liable for the costs of the arbitration. Unless the parties have already agreed on a specific allocation, the arbitral tribunal can decide in which proportion each party shall bear the costs (see Section 35 of the DAA). Pursuant to Section 35(2) of the DAA, the arbitral tribunal may require one side to cover the legal costs (in whole or in part) of the other side. The DAA does not specify the reasons that may justify awarding a party all of its costs but, usually, the "costs follow the event principle applies", *i.e.*, the party which has been successful on the merits will recover its legal costs. This being said, arbitral tribunals will generally also have regard to the parties' conduct during the proceedings and may penalize dilatory tactics and other disruptive behaviour at the costs stage. In that, Danish arbitrators may look to the relevant provisions of the AJA for guidance.[15]

The arbitral tribunal's decision on the quantum of the tribunal's fees and costs can be appealed separately to the Danish courts within 30 days (see Section 34(3) of the DAA), *i.e.,* without the need to challenge the award (as a whole). The decision with respect to the allocation of costs, including the fees and costs of the arbitral tribunal, and the decision with respect to reimbursement of fees and costs to the other party can only be contested by way of challenging the award (in whole or in part).

Funding and fee-arrangements: The DAA does not set forth any restrictions regarding contingency fees or third-party funding. However, as also envisaged under Article 9(2) of Delos' Rules of Arbitration, fee-arrangements between parties and arbitrators are often agreed, failing which the fees of the arbitral tribunal shall be reasonable under the circumstances. Under the Code of Conduct of the Danish Bar Association,[16] lawyers may not charge a percentage of the sums awarded to the client but they may operate on a "no cure, no pay" basis.

Civil and Criminal liability: Under Danish law there are no specific concerns with respect to the civil or criminal liability of arbitrators or any other stakeholders in the arbitration proceedings. Arbitrators do not specifically benefit from any statutory immunity to civil liability but may ask parties to agree to a limitation on their liability as a condition for accepting to serve as an arbitrator. Similar to Article 11 of Delos' Rules of Arbitration, Article 36 of the DIA Rules specifically provides that, to the extent permissible under the applicable law, the arbitral tribunal and any persons appointed by it, as well as the DIA itself shall be exempt from liability for any act or omission in the context of the arbitration. The arbitration rules of the Danish Building and Construction Arbitration Board contain a similar provision at Article 36.

Interim measures: As suggested above, one of the more notable differences between the DAA and the UNCITRAL Model Law concerns the arbitral tribunal's ability to issue enforceable interim measures.

Without ever mentioning "interim measures" per se in the context of the arbitral tribunal's attributions, Section 17 of the DAA vests the arbitral tribunal with the power to take such "provisional steps" as it deems necessary, having regard to the nature of the dispute, and to order a party to put up security in connection

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14 False testimony given before the state courts gives rise to criminal liability pursuant to paragraph 158 of the Danish Criminal Code.

15 *See,* AJA, §§318 *et seq*.

16 Available at: http://www.advokatsamfundet.dk/Service/English.aspx.

with such steps.[17] In view of the broad wording of Section 17, it may be assumed that arbitral tribunals may grant interim measures corresponding to those available to regular courts under Chapter 40 of the AJA and the 2006 Model Law.

Unlike Sections 9 and 27 of the DAA, Section 17 only applies to arbitrations seated in Denmark and parties can vary or exclude this provision by contract.

If the party that the measure is directed at does not comply voluntarily, there is no legal basis under Danish law allowing the other side party to demand the enforcement of such "provisional steps". For this reason, and although the arbitral tribunal may decide to sanction a non-complying party at the costs stage, parties will often prefer petitioning courts directly for interim measures to avoid undue delays.

The report of the DIA Commission for the revision of the DAA heralds a rather far-reaching reform of Section 17 which will, if adopted, transcribe the 2006 UNCITRAL model provisions on interim measures into Danish law. While the actual content of the temporary measures available to arbitral tribunal will hardly be affected, these changes are expected to greatly facilitate the issuance and enforcement of interim measures where a dispute is subject to an arbitration agreement.

5. The Award

In general, the legal framework applicable in Denmark in relation to setting aside and enforcing an arbitral award does not materially deviate from the rules in the New York convention or the Model Law. Setting aside of an arbitral award and enforcement of such awards follow different procedures, but the courts' decisions in that respect turn on similar substantive issues.

5.1 Setting Aside of the Award

5.1.1 The Formal Requirements for the Award

The formal requirements for the award are set forth at Section 31 of the DAA: The award shall be in writing, signed and dated by the arbitrators and state where the award was rendered, *i.e.,* the place of arbitration. Furthermore, the award shall set forth the grounds on which it is based unless the parties have agreed to waive the requirement that the arbitral tribunal provide reasons or have requested an award merely recording a settlement agreement.[18]

5.1.2 The Criteria for Having an Award Set Aside

As a preliminary remark, Danish law prohibits judicial review of the award as to its merits – save where the outcome is considered at variance with the Danish public order. That is to say, as a matter of Danish law, there is no possibility of appeal per se.

When the seat of the arbitration is in Denmark, the courts may set aside an award on the grounds listed at Section 37(2) of the DAA, which mirrors Article V of the New York Convention and Section 34 of the model law. The list set out at Section 37(2) of the DAA is exhaustive and is generally narrowly interpreted by the courts. The provision is mandatory, that is to say that parties cannot contractually opt out of or vary Section 37.

Setting aside proceedings must be commenced before the district court within three months of receipt of the award.

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17 Similarly, Article 21 of the DIA Arbitration Rules provides that arbitrators may order such interim measures as it considers necessary in respect of the subject-matter of the dispute and order a party to put up security in connection with such measure(s).

18 DAA, section 35(2).

For the time being, evidence produced in such proceedings must normally be accompanied by their translation into Danish if Danish is not the language of the arbitration. This, however, may change with the reform of the DAA.

Recourse to courts to have an award set aside pursuant to Section 37(2) does not automatically suspend enforcement, but will likely do so in most cases. Under Section 39(3) of the DAA, where setting aside proceedings are pending, the enforcement court may suspend treatment of the matter and at the demand of the requesting party and may require the other side to put up appropriate security.

5.2 Enforcement of the Award

Danish courts will readily enforce arbitral awards rendered in a foreign jurisdiction save where one of the grounds for denying enforcement set out at Section 39 is met (and most likely also when the award has been annulled by the courts at the seat – however, this issue is not yet settled in case law). These grounds are the same as those giving rise to the setting aside of an award and thus follow the New York Convention and the model law.

Pursuant to Section 38(1) of the DAA, irrespective of whether the place of arbitration is in Denmark or abroad, an award is enforceable in accordance with the rules set forth in the AJA concerning the enforcement of judgements.[19]

Failing voluntary compliance with an arbitral award, enforcement proceedings can be introduced before the enforcement court (in Danish: *Fogedretten*), which is a division of the district court, pursuant to chapter 46 of the AJA. Usually the competent enforcement court will be at place where the losing party is domiciled or has his usual place of business.

The party seeking to have the award enforced must produce a certified true copy of the award and the arbitration agreement (provided the latter is in writing). For the time being, such documents must normally be accompanied by a certified translation into Danish.

6. Key Features of the Contemplated Legal Reform

In 2016, the DIA set up a working group charged with drafting and presenting a proposal for the revision of the DAA in order to ensure that Denmark will be able to preserve its status as a "Model Law country" going forward and to bring Denmark on par with most recent developments in the more traditional hubs for international arbitration (or ideally provide an even better legislative framework than this). At the time of writing, the parliamentary process towards having the working group's proposal enacted as law is in its initial phases. The present guide will be updated in due course to reflect the revisions made to the DAA by the legislator.

As suggested above, one of the focal points of the legal reform is to establish a regime for the interim measures issued by arbitral tribunals and ensure that these can be easily enforced. However, the report of the working group identifies several other avenues for improving and streamlining the arbitral process, *i.e.,* restricting the possibility of appeal of court decisions in arbitration-related matters. Furthermore, it is envisaged that the Maritime and Commercial Court of Copenhagen will have exclusive jurisdiction over all such arbitration-related matters.

6.1 Interim Measures

At present, the DAA recognizes the ability of arbitral tribunals to take such temporary steps as they consider necessary for the conduct of the proceedings and to order a party to put up appropriate security in connection herewith. Parties are at liberty to contractually agree that the arbitral tribunal may order interim

[19] AJA §§ 478 *et seq*.

measures, for example by opting-in to the rules of a specific institution. Nevertheless, under Danish law, there is currently no legal basis to demand the enforcement of such measures.

In order to align the DAA with the model law, the DIA working group has included new language which essentially reproduces the text of Article 17 of the model law in the draft wording of Section 17 of the DAA. The draft provision specifies the forms of interim measures available to arbitral tribunals, the conditions for their issuance. It also sets out the regime for the enforcement of interim measures, including an exhaustive list of grounds for which enforcement may be denied.

6.2 Restriction of Appeal

Under the current system, the AJA does not draw a clear distinction between decisions taken by courts in connection with arbitral proceedings and other types of decisions. As such, these are subject to appeal through the ordinary channels, save for decisions to appoint arbitrators under Section 11(3) which are not subject to appeal. As such, court decisions taken in relation to arbitral proceedings may be tried before the district court (in Danish: *Byretten*), the high court acting as an appellate jurisdiction (in Danish: *Landsretten*) and, potentially, the Supreme Court (in Danish: *Højesteret*), provided that leave for third instance appeal is granted.

In order to streamline the process, the DIA working group suggests excluding appeal for all decisions rendered under Sections 13 (challenges) 14 (replacement of arbitrators) 27 (assistance with discovery) and 34 (review of costs decisions taken by arbitral tribunals) of the DAA. It is furthermore recommended that decisions pertaining to the competence/jurisdiction of the arbitral tribunal under Section 16(2) may be appealed to the Supreme Court only if they pose a question of general interest. The same scheme is suggested for the courts' decisions under Sections 37 (setting aside of awards) and 39 (decisions denying enforcement).

6.3 Concentration and Specialisation at the Maritime and Commercial Court

It is envisaged that arbitration-related matters will be concentrated with the Maritime and Commercial Court of Copenhagen. Pursuant to the suggested scheme, the Maritime and Commercial Court will have exclusive jurisdiction in nearly all arbitration-related matters, *i.e.,* decisions on the constitution of the arbitral tribunal under Sections 11 of the DAA, decisions on the impartiality and independence of arbitrators under Section 13 of the DAA, decisions under Section 14 which deals with the replacement of arbitrators and Section 34 providing for court review of arbitrators' decisions as to costs.

Proceedings under Section 37 (setting aside of awards) will also be referred to the Maritime and Commercial Court. In the suggested scheme, enforcement proceedings under Section 38 of the DAA will still be instituted directly before the enforcement court. Recourses against a decision denying enforcement under Section 39 of the DAA, where the enforcement division of the district court retains jurisdiction in the first instance, will also be heard by the Maritime and Commercial Court.

6.4 Other Issues

Complex arbitrations: As previously mentioned, the DIA working group recommends that Section 11 of the DAA, setting out the procedure for constituting the arbitral tribunal in ad hoc arbitrations, be supplemented with provisions specifically designed for cases with more than two parties. It is also suggested that Section 19 of the DAA be completed with a provision expressly allowing for the consolidation of concurrent and related arbitration proceedings.

Expert witnesses: It is also suggested that Section 26 of the DAA be clarified so that it is clear that parties, and not just the arbitral tribunal, may engage expert witnesses.

Translation into Danish: Finally, the working group suggests that parties be allowed to produce documentary evidence in English (as well as Swedish and Norwegian) in enforcement and setting aside proceedings.

7. Further Reading in English

For a more in-depth perspective on arbitration in Denmark, readers may wish to consult: (i) Pihlblad, Steffen og Lundblad, Christian, et al., Arbitration in Denmark, 1st edition, DJØF Publishing, 2014; (ii) P.R. Meurs-Gerken, Distinctive Features of the New Danish Arbitration Act [2005] The ICC International Court of Arbitration Bulletin, volume 16 , issue 2 , s. 47-49; and (iii) Voldgiftsinstituttets inhabilitetspraksis 2016 (English) –Journal of International Arbitration, 2016, 33(6), 577-651. [JOIA-33.6] (available at: https://voldgiftsinstituttet.dk/bibliotek-2/).