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# Denmark: the Boundaries Between Arbitration and Civil Proceedings

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On 1 January 2007 a large reform of the Danish Administration of Justice Act came into force. This article describes the boundaries between arbitration and civil proceedings, as many of the special characteristics – and advantages – that apply to commercial arbitration have now been adopted by the civil court system, giving rise to new considerations when deciding on the most suitable venue for dispute resolution in Denmark.

Commencing arbitration usually requires that a security deposit is made for the expected costs of the proceedings, but an arbitration board may also require a registration fee. Civil courts on the other hand require a court fee. This article also deals with this topic as regards suspension of deadlines. Is it enough to send the request for arbitration or must the required securities or fees also have been provided from both parties? What applies to civil proceedings?

Finally, the article will describe the claimant's remedies when the respondent does not provide security as required by an arbitration board. How can the claimant avoid that the respondent effectively blocks for dispute resolution through arbitration, and is this yet another reason to look to the civil court system?

## The new rules on administration of justice

Arbitration has special characteristics that in many cases have made arbitration more attractive than civil action when resolving business disputes. Some of these characteristics have now been enabled as options in civil proceedings with the reform of the Danish Administration of Justice Act, as of 1 January 2007. As a consequence, some of the incentives for choosing arbitration rather than civil proceedings might have been removed. In the following, the boundaries between arbitration and civil proceedings will be analysed, and the question of whether arbitration still has relevant advantages when compared to civil proceedings will be considered.

As mentioned, civil proceedings in Denmark are governed by the Danish Administration of Justice Act. Arbitration is primarily governed by the Danish Arbitration Act of 2005. The Arbitration Act is closely based on the 1985 UNCITRAL Model Law, and also fulfils Denmark's obligations under the New York Convention. The Arbitration Act applies to both domestic and international arbitration, and the Arbitration Act also governs the recognition and enforcement of international arbitral awards.

In Denmark, the two prominent permanent arbitration institutions are Danish Arbitration and the Building and Construction Arbitration Board. Both institutions have their own rules of procedure, and these rules apply together with the Arbitration Act to the extent that the Arbitration Act is not deviated from.

## Renouncing appeal

One of the characteristics of arbitration is that the award is final. In Danish law this universal concept follows from the Arbitration Act as well as the rules of procedure of the arbitration institutions. Since the arbitral award is final, the arbitration process will often be – or at least should be – shorter than civil proceedings, as the dispute will be definitely settled following the conclusion of the

main hearing, avoiding a time-consuming appeal process.

In civil proceedings, it was previously only possible to renounce appeal after the judgment was delivered. However, with the new rules on administration of justice, it is now possible for the parties to agree on renouncing appeal already when the dispute has arisen. In business disputes on issues concerning the respective businesses of the parties, the parties can also agree on renouncing appeal before a dispute has arisen.

There are no special formal requirements to an agreement on renouncing appeal. Thus it can be oral as well as silent. The agreement cannot be terminated by only one part, but the parties can make a new agreement saying that appeal can take place after all. The parties cannot make an irrevocable agreement. The agreement must regard a specific matter, but can be contingent on, for example, that the district court is set by three judges (the district court is as a main rule set by one judge) or that the case is transferred to the high court (as a main rule, cases begin in the district courts).

According to the Arbitration Act, the parties can sign arbitration agreements regarding current disputes or future disputes regarding a specific legal matter. However, pursuant to the Arbitration Act, arbitration agreements concluded before the dispute arose will not be binding on consumers.

Arbitration agreements can be oral or silent as well as in writing, although an oral agreement will be inexpedient for reasons of proof. Moreover, there are no formal requirements for the arbitration agreement (see the Arbitration Act). Since arbitration agreements are mutual, it can only be terminated if the parties agree on it or if one party breaks the agreement.

As it can be seen, the new rules regarding renouncing appeal in civil proceedings bear great similarity to the rules regarding arbitration agreements. As a consequence of the reform, a major advantage of the arbitration system has been made available to all business disputes in the civil court system. When deciding on the applicable venue this has to be kept in mind, not least when drafting contract clauses on future dispute resolution. However, the described development does not make arbitration obsolete – far from it. The waiting times in the civil court system continue to be long in Denmark, and the renouncement of appeal hardly makes a civil proceeding any quicker than arbitration, though it may bring a degree of uniformity to the overall time taken.

## Appointment of expert judges

It is often considered a major feature of arbitration that the parties have some degree of influence on the choice of arbitrators, and that it is generally possible to have experts appointed with expert knowledge in the field of the case. There are no limitations in the Arbitration Act as to who may act as an arbitrator. However, the provision concerning the independence and impartiality of arbitrators (section 12) may not be derogated from.

In cases handled by the Danish Arbitration institution, the arbitrators are appointed by the institution. Before the appointment, the parties are asked to make a statement about the appointment, as described in the rules of procedure of Danish

Arbitration. At the Building and Construction Arbitration Board, a presiding arbitrator with a law degree is appointed by the chairman of the governing body of the board together with two arbitrators with appropriate technical backgrounds, who are appointed by the Board. According to the rules of the Building and Construction Arbitration Board, the parties can object to the appointed arbitrators, but the Board decides whether the objection should be sustained, unless the other party agrees in the objection or the arbitrator in question resigns voluntarily.

The Administration of Justice Act imposes some limitations on the amount of work court judges can undertake as arbitrators. The appointment of court judges as arbitrators must be made by the relevant court president or by a judge nominated by the relevant court president. The president of the court will appoint the most suitable judge, if the party has not requested a specific judge for the job.

According to the new Administration of Justice Act, the court in first tier cases is now able to appoint two expert lay assessors to participate in the proceeding, if special knowledge is of importance to the case. If expert lay assessors have participated in the first tier, the appeal court can also appoint two expert lay assessors to participate in the second tier trial. The parties do not choose the expert lay assessors, but they do have the right to make a statement about whether expert lay assessors should be appointed or not.

It is not completely new to have expert lay assessors in civil proceedings, since it has also before the reform been a possibility at the special Maritime and Commercial Court in Copenhagen, which handles a number of cases regarding, among other things, intellectual property, marketing and competition.

In civil proceedings, the parties do not have any influence on which judges are handling the case.

Thus, as a consequence of the reform, it is no longer a prerogative for the arbitration system to have experts to assist in deciding the dispute. The system for appointing experts at civil courts and at the established arbitration institutions looks somewhat similar, since in both cases it is the court or the institution that appoints the experts. However, there are still significant differences. At Danish Arbitration, each party can put forward its suggestion for an arbitrator, and the suggestion is followed unless the institution deems the suggestion inappropriate. At the Building and Construction Arbitration Board, expert arbitrators are always appointed by the Board itself. In arbitration outside of the established institutions, namely ad hoc arbitration, the parties have even more freedom to appoint particular experts or agree on a way of selecting them.

In the courts, however, experts are only appointed if special knowledge is considered necessary by the court, and the parties have no real influence on the appointment.

For this reason, it is still very relevant to consider the need for experts when deciding the venue for dispute resolution. Although the civil court system has arguably become more in line with the options provided for by arbitration, there are still substantial differences. Only by agreeing on arbitration can the parties ensure that appropriate experts participate in the resolution of the dispute.

Furthermore, if the parties wish to ensure that the individuals with a legal background actually have the necessary experience and legal clout, they must choose arbitration as the venue for resolution of disputes.

### Confidentiality

Another traditional characteristic of arbitration is the confidentiality of the case handling. Although there is no specific provision in the Arbitration Act ensuring confidentiality, the rules of procedure of Danish Arbitration states that the members of the arbitral tribunal and Danish Arbitration shall treat all matters relating to the arbitration case as confidential.

Since arbitration is a private method of dispute resolution, it is generally assumed that both arbitrators and other participants are bound by a duty of confidentiality, relating to all aspects of the case that stems from the general obligation of loyalty in contractual relations. This duty of confidentiality obviously does not prevent parties from requesting the courts to decide on the validity of the arbitral award, or from enforcing the award.

Civil proceedings, on the other hand, are generally public, since the publicity of the proceedings is traditionally seen as a legal rights guarantee. Nonetheless, the business sector finds the confidentiality in arbitration one of the main reasons to choose arbitration as means of dispute resolution. At the courts, parties in business disputes cannot agree on confidentiality, and the administration of justice reform contains no changes regarding confidentiality. Confidentiality in civil proceedings is only possible in certain cases regarding child custody, etc.

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### Arbitration and suspension of limitation

If the parties have agreed on a deadline or if the limitation period is about to run out, it is relevant to determine how and when the deadline or limitation period are suspended.

According to the Limitation Act the limitation period is suspended if a debtor explicitly or by its actions implicitly acknowledges its debt or if legal action is taken against it in order to get the claim determined. This applies to civil proceedings as well as to arbitration, regardless if it is institutional or ad hoc arbitration. However, as regards arbitration the suspension will, according to the Limitation Act, occur when the claimant does what is necessary to commence the arbitration proceedings.

According to the Administration of Justice Act and the Limitation Act, legal action in civil proceedings is taken when the writ of summons is delivered to the court and from this date the limitation period will be suspended. The claim must be pursued within reasonable time. The claimant is obliged to pay a court fee when the writ of summons is delivered to the court. If the court fee is not paid, the court must send a claim for the fee, but if the fee is still not paid, the writ of summons lapses. If the court fee is not paid, the claimant has not pursued the case sufficiently, and the limitation period will then be considered expired.

According to the Arbitration Act, arbitration proceedings commence on the date when a written request for that dispute to be referred to arbitration is received by the respondent. It must appear from the request that arbitration proceedings are commenced. However, the parties are free to agree on other terms, since this provision is optional. The arbitration tribunal can – and usually will – instruct the parties to provide security for the fee of the arbitration tribunal and for compensation for disbursements of the proceedings, though commencement of the case will usually not be dependent on these payments.

According to the rules of procedure of Danish Arbitration, the commencement date of the arbitration is the date when the institution receives a request for that dispute to be referred to arbitration at the institute. However, it is also a condition that the claimant pays a registration fee (€1,000) to the institution not later than the request is received by the institution, and it is stated that a case is not considered to be commenced until the fee has been received. Besides the registration fee the parties shall provide security for the presumed expenses of the case and a fee for the institution.

According to the rules of procedure of the Building and Construction Arbitration Board, the arbitration proceedings

commence when the letter of complaint has been delivered to and registered by the Board. For the Board, it is mandatory for the parties to provide security for the presumed costs including a fee to the Board for coverage of expenses. The security must be provided immediately after the Board has decided the size of the security.

Thus, suspension of limitation in arbitration generally occurs when the first document is received by the respondent or the arbitral institution or tribunal. Only at Danish Arbitration the commencement of the case is dependent on the payment of a registration fee, and thus, suspension of limitation occurs in these cases when the first document is received by the respondent and the registration fee has been paid. The parties can agree on what will commence an arbitration proceeding between them, and in that case, only this action will suspend the limitation period.

However, if the claimant does not provide the required security, the arbitration tribunal can end the arbitration proceedings. The question is then, whether the limitation period would still be considered suspended? According to the Limitation Act the limitation period is suspended when the claimant takes legal action, for example, by commencing arbitration proceedings, but the claimant must pursue the matter within reasonable time. If the claimant does not provide its part of the security, it does not pursue the claim within reasonable time, resulting in the expiration of the limitation period.

### Counterclaims

As a general rule, the parties are joint and severally liable for providing the security deposit required by an arbitral tribunal. However, it is not unusual that the respondent is reluctant to pay its share of the deposit. If the respondent fails to provide its share of the required security deposit to the arbitration institution or tribunal, the claimant has two remedies at its disposal.

The first option is for the claimant to provide the respondent's part of the security. By doing so, the arbitral proceedings can proceed. According to the rules of procedure from Danish Arbitration and the Building and Construction Arbitration Board, the claimant must provide the full security in order to get the proceedings started, if the respondent does not provide its part.

The second option is for the claimant to terminate the arbitration agreement as breached by the respondent, and take the dispute to the civil courts instead.

If the claimant files the lawsuit in continuation of its attempt to settle the dispute by arbitration, the limitation period will be suspended from the moment the arbitration proceedings were commenced.

Thus, it is not unusual for an arbitration case to commence with only the claimant having paid the requested security deposit. If the respondent in an arbitration case makes a counterclaim, the question arises whether the counterclaim itself suspends any deadlines or if the respondent must provide his part of the security deposit before the limitation is suspended.

Pursuant to the Danish Limitation Act, eventual deadlines or limitation periods will be suspended when the counterclaim is put forward during the case. However, in some cases counterclaims are in fact dismissed from arbitration if the respondent does not provide his part of the required security. In these cases there can be little doubt that limitation is not suspended, since the creditor has in fact not taken appropriate measures to commence the case for its claim, as required in the Limitation Act.

If, on the other hand, the counterclaim is not dismissed by the arbitral tribunal, limitation is suspended according to the Limitation Act – at least until the arbitral tribunal should decide to dismiss the claim, for example on the grounds that insufficient security has been provided.

In civil proceedings the defendant is free to make counterclaims. There are no additional court fees for making such claims if the counterclaims are only made to set off the claim entered by the claimant. As regards the suspension of deadlines and limitation period, the general provision applies, thus the suspension becomes effective if the defendant pursues the counterclaim without undue delay.

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Altogether, arbitration should still be seen as an attractive alternative to civil proceedings in Denmark for the business sector. Even though the business sector can agree on renouncing appeal, and expert lay judges can be appointed in the civil courts, the parties in arbitration are generally much more free to influence the appointment of arbitrators with a legal background, experience and expertise, and other experts, and thus to ensure a method of dispute resolution that meets their specific needs. Meanwhile, confidentiality in business disputes is still only an option in arbitration.

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# About the Authors



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Niels Schiersing is a law graduate from University of Copenhagen 1985 and admitted to the Supreme Court of Denmark. Mr

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Mr Schiersing focuses on negotiation and dispute resolution, including domestic and international litigation, arbitration and mediation. He is a certified mediator and arbitrator. Mr Schiersing is a seasoned counsel to Danish and international business entities in complex commercial disputes. He is also a specialist in the areas of international trade and international investment law and as such he represents a foreign state in investment arbitration.

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