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THE NEW DANISH ARBITRATION ACT

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LT Admissibility; Denmark; Expert evidence; Interim orders; International commercial arbitration; Time limits

Introduction

On June 14, 2005, the Danish Parliament adopted a new Arbitration Act[1] (the "new Act" or the "new Arbitration Act"), which entered into force on July 1, 2005 with regard to arbitration proceedings being instituted in Denmark after this date.[2]

The new Act repeals and replaces the former Danish Arbitration Act of 1972[3] (the "1972 Arbitration Act"), which regulated only a small number of the many complex issues that can arise in arbitration proceedings. The 1972 Arbitration Act was largely outdated and there was thus widespread agreement in legal circles in Denmark that an extensive law reform was needed both in relation to domestic Danish arbitration and also in relation to international arbitration taking place in Denmark.

The new Arbitration Act is based on a detailed law reform proposal published in April 2003 by a working group under the Danish Law Society. The proposal as well as the adopted Act are both based on the UNCITRAL Model Law of 1985 (the "Model Law"), which is also the basis of arbitration laws in the other Scandinavian countries.[4]

The Danish Minister of Justice declared that the purpose of introducing the new Arbitration Act was to make Denmark a more attractive forum for international arbitration for the benefit of the Danish business environment, and to bring Danish legislation in line with international standards in the field of commercial arbitration.

It naturally remains to be seen whether the new Act can fulfil the long-awaited need for providing a better environment for both national and international arbitration. However, the immediate impression is that the new Act brilliantly combines mandatory legal guarantees with flexible procedural rules.

General overview

Chapter 1 of the new Arbitration Act contains general provisions regarding the scope of application and facultative rules concerning waiver of rights to object, and the competence and assistance of the domestic courts in relation to arbitration proceedings.

Chapter 2 includes rules on the arbitration agreement, arbitrability, arbitration agreements involving consumers and interim measures.

Chapters 3–7 set out rules concerning the constitution of the arbitral tribunal, the competence of the arbitrators, the arbitration proceedings, the award, termination of proceedings and costs. With the exception of certain provisions[5] concerning assistance from the domestic courts, basic procedural rights and consumers, the parties may deviate from these rules by agreement.

The remaining rules in cc.8–10 are mandatory and regulate the procedure for challenging an award, recognition and enforcement, commencement provisions, etc.

By the adoption of the new Act, the Danish accession to the Geneva Protocol of 1923, the Geneva Agreement of 1927, the Geneva Convention of 1961 and the European Council Agreement of 1962 on the applicability of the Geneva Convention, will all be terminated. The 1958 New York Convention remains in force in Denmark.[6]

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1. *Lov om Voldgift*, Act 553 of June 24, 2005, and its *travaux préparatoires* are available (in Danish) on the internet at *www.ft.dk/samling/20042/lovforslag/1127/*. All Danish legislation referred to in this article is available at *www.retsinfo.dk*.
2. See s.40 of the new Act.
3. Act 181 of May 24, 1972.
4. Since 1985, approximately 59 jurisdictions have adopted the UNCITRAL Model Law on International Commercial Arbitration. The Model Law and related material can be found on the internet at *www.uncitral.org*.
5. See s.2(2) of the new Act.
6. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards entered into force in Denmark on March 22, 1973.

It should also be mentioned that the new Act involves a change to the Danish Penal Code by the insertion of a new s.304a, according to which the bribing of an arbitrator is explicitly made a criminal offence.[7] This change enables Denmark to ratify the European Council Additional Protocol to the Criminal Law Convention on Corruption, to which Denmark acceded in 2003.

Provisions of particular interest

The most significant feature of the new Arbitration Act is of course that it is based on the UNCITRAL Model Law of 1985, and it implements the majority of the Model Law's principles and rules of arbitration (several of which were not dealt with in the 1972 Act), such as the principle of "Competence-Competence" (*i.e.* the competence of the arbitral tribunal to decide on its own jurisdiction) and "separability" of the arbitration agreement, as well as provisions concerning the nomination of arbitrators, the arbitration proceedings, waiver of the right to object, applicable law, etc. These principles and provisions are well known and have been described in great detail elsewhere in the literature,[8] and the authors will therefore not analyse them further here.

In the following, they will instead focus on the provisions in the new Arbitration Act that deviate from the Model Law and also describe some of the particularities of Danish procedural law that may be of interest to international practitioners involved in arbitration proceedings in Denmark, for example when the domestic courts are called upon to intervene or assist in the proceedings.

Scope of application

The new Act is applicable in relation to domestic and international arbitration where the place of arbitration is Denmark.[9] On this point s.1 of the new Act deviates from Art.1 of the Model Law in that it does not distinguish between domestic and international proceedings taking place in Denmark. The new Act does therefore not define international arbitration, as the Model Law does.

Certain provisions of the new Act do, however, apply with regard to arbitration taking place outside Denmark or with regard to arbitration proceedings where the seat of the tribunal has yet to be determined. The domestic courts must for instance reject claims brought before them, if the claims are to be settled by arbitration, even if the place of arbitration is outside Denmark, or if the place of arbitration is still undecided, when the lawsuit regarding the dispute to be resolved by arbitration is filed. The new Act also has international effect *inter alia* with regard to recognition of foreign awards, interim measures and obtaining of evidence.

Furthermore, provided that at least one of the parties is domiciled in Denmark, and provided that the seat of the tribunal has yet to be established (*e.g.* by the arbitral tribunal itself), the provisions in c.3 of the new Act concerning the assistance of the domestic courts with regard to the constitution of the arbitral tribunal and the challenging of an arbitrator can also be applied.

Finally, it should be noted that the new Act excludes from its scope of application arbitration proceedings concerning labour law disputes arising out of collective bargaining agreements regulated by the Danish Labour Act[10] or similar *leges speciales*.

The form of the arbitration agreement

Danish law has always recognised the freedom of Contracting Parties to choose any form of agreement, as long as the common intention can be seen from the form chosen. Accordingly, an arbitration agreement can be made orally, in correspondence between the parties, in a contract clause or by means of a reference to a standard contract containing an arbitration clause.[11] The formal requirement in Art.7(2) of the Model Law stipulating that arbitration agreements must be in writing has thus not found its way into the new Act; however, the safest way of securing the validity and binding effect of an arbitration agreement and thus minimising the risk of protracted procedural disputes is of course to make use of a written contract clause based on the precedents available, such as the clause suggested by the Danish Arbitration Association (see below for further details on this organisation).

The agreement to arbitrate disputes can concern an already existing dispute or a future dispute, but in consumer contracts arbitration clauses concerning future disputes do not bind the consumer.[12] As under other systems of law, arbitration is restricted to disputes suitable for arbitration. Disputes over child alimony,

7. The giving, promising or offering of a bribe will be punishable with a prison sentence of up to 18 months. The same criminal liability applies for arbitrators, who receive, claim or accept a bribe.

8. See for example Aron Broches, "The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation" (1987) 18 *Netherlands Yearbook of International Law*. See also Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2001) and Andrew Okekeifere, "Appointment and Challenge of Arbitrators under the UNCITRAL Model Law: Agenda for Improvement" [1999] Int.A.L.R. 167–174 and [2000] Int.A.L.R. 13–18.

9. See s.1 of the new Act. According to s.44, the Act does not apply to Greenland and the Faeroe Islands. For these parts of Denmark, the 1972 Arbitration Act is still in force until the new Act is implemented by royal resolution, as provided for in s.44.

10. *Lov om Arbejdsretten*, Act 183 of March 12, 1997, s.22.

11. Arbitration clauses are for example included in the standard contract forms used in the Danish construction industry, AB92 or ABT93 Art.47 (for contractors) and ABR89 Art.9 (for engineers and architects), all of which refer disputes to be settled by arbitration under the rules of the permanent arbitration institution for the construction industry, The Building and Construction Arbitration Board (*Voldgiftsnævnet for Bygge og Anlægsvirksomhed*). More information about Danish construction law arbitration and this institution is available (in Danish) on the internet at *www.voldgift.dk*.

12. See s.7(2) of the new Act.

Table 1 Overview of issues where the domestic courts may intervene in arbitration proceedings under the new Danish Arbitration Act

Provision	Issue
s.9	Each of the parties can request the domestic courts to order an interim measure or to enforce an award.[15]
s.11(3)	If a party fails to appoint its arbitrator, the other party may request the domestic courts to appoint one.
s.13(3)(1)	A decision by the arbitral tribunal rejecting the challenging of an arbitrator for lack of competence or independence may be brought before the domestic courts.
s.14(1)(2)	Each of the parties may request the domestic courts to decide on the withdrawal of an arbitrator owing to circumstances making it impossible for the arbitrator to perform his duties.
s.16(3)(2)	Each of the parties may request the domestic courts to decide on the issue of the competence of the arbitral tribunal.
s.27(1)	The arbitral tribunal or each of the parties may request the domestic courts to assist in the obtaining of evidence.
s.27(2)	The arbitral tribunal may request the domestic courts to request the European Court of Justice to decide on an issue concerning EU law.
s.34(3)	Each of the parties may request the domestic courts to decide on the issue of the arbitration costs as well as the arbitrators' fees.
s.37	Each of the parties may request the domestic courts to set aside the award.

adoption or custody rights cannot for instance be settled by arbitration under Danish law. Furthermore, disputes regulated by administrative law aimed at protecting public interest cannot be subjected to arbitration under Danish law either.[13]

The role and intervention of the domestic courts

Section 4 of the new Act establishes the basic main rule in arbitration law, namely that the courts are not competent to rule in matters which are to be resolved by arbitration. According to s.8, the domestic courts must therefore, upon the request of the defendant, reject a lawsuit involving a claim which the parties have agreed to resolve through arbitration.[14]

The new Act, like the Model Law, does, however, provide a number of exceptions to this main rule and allows for the intervention of the domestic courts in a number of situations, as shown in Table 1.

A request to the domestic courts under the new Act must be made to the court which would have had jurisdiction had the parties not agreed on arbitration.[16]

Decisions made by the domestic courts, with the exception of decisions concerning the appointment of an arbitrator on behalf of one of the parties under s.11(3), can be appealed to a higher domestic court. The new Act deviates from the Model Law on this point. An appeal will not, however, automatically stay the arbitral proceedings, although a stay or delay will almost inevitably be the result of an appeal in some situations.[17]

Evidence and assistance of technical experts

According to s.19(2) of the new Act, the arbitral tribunal determines what type of evidence is admissible, and

13. See decision of the Danish Supreme Court in the matter *Danmarks Apotekerforening v Apoteker Stepan Svoboda* UfR 1999.829.
14. Such a request must be made in the respondent's first written submission responding to the writ; *cf.* s.357(2) of the Danish Administration of Justice Act (the "DAJA"). See also Bernt Hjejle, *Voldgift* (3rd ed., 1987), p.68.
15. See in further detail below.
16. Often, the Danish High Courts (the Eastern or Western Division) will be competent if the amount in dispute exceeds DKK 1,000,000. Otherwise, the city court at the respondent's place of domicile will have jurisdiction. In special cases the Maritime and Commercial Court in Copenhagen has jurisdiction.
17. See Yves Derains & Eric A. Schwarz, "A Guide to the New ICC Rules of Arbitration" p.180; W. Laurence Craig, William W. Park & Jan Paulsson, "International Chamber of Commerce Arbitration", p.206; Julian Lew, Loukas A. Mistelis & Stefan M, Kröll, "Comparative International Commercial Arbitration", at §13.30 and a decision of the Cour d'appel Paris of February 25, 1994 in *Re Ministry of Public Works v Société Bec Frères*, printed in XXII Y.B. Comm'l Arb. 682 (1997).

on what factual basis the matter shall be decided. There is no duty to give evidence before the arbitral tribunal under the new Act; however, upon the request of one of the parties or at its own initiative the tribunal may, pursuant to s.27(1), request the assistance from the domestic courts in the obtaining of evidence in accordance with the rules of the Danish Administration of Justice Act[18] (the "DAJA"). This provision may for example be used to compel witnesses to give testimony before the domestic courts.[19]

With regard to documentary evidence, foreign lawyers involved in Danish arbitration proceedings should be aware that discovery as known in US and English law does not exist under Danish law. A party can of course request the other party to produce certain evidence, but there is no duty to comply with such a request. Instead, the failure of a party to produce requested evidence may have a prejudicial effect on his case.[20] This principle is reflected in s.25(3) of the new Act, which stipulates that the arbitral tribunal may proceed to decide the case on the evidence available, if one party fails to produce its evidence.

On the contrary, a third party who is requested to produce documents of relevance to the case in his possession may be ordered by the court to comply with such a request, unless the documents are exempt or excluded owing to their content.

With regard to the admissibility of illegally obtained documents, Danish case law is scarce and unclear.[21] It is thus up to the arbitral tribunal to determine at its own discretion whether, for example, stolen documents can be produced or not.

In many types of international arbitration proceedings, it is common practice for the parties to select their own technical experts, who will analyse the facts of the matter and present their conclusions in separate expert reports, which are designed to support the claims made in the arbitration by the respective parties.[22] Before ordinary Danish courts, the use of unilaterally obtained expert reports is generally frowned upon as being contrary to the *principium contradictionis*, and the courts have therefore declared such reports inadmissible in a number of decisions.[23] The approach to unilaterally obtained expert reports is, however, less strict in arbitration proceedings,[24] although their evidential value is limited compared to a joint expert survey, known as *syn og skøn* under Danish law.[25]

The *syn og skøn* procedure is widely used in Danish proceedings and has been regulated in detail in c.19 of the DAJA, which will apply if the domestic courts are called upon to assist in conducting a *syn og skøn* pursuant to s.27(1) of the new Act. Provisions concerning *syn og skøn* are also found in the rules of procedure of the Danish Institute of Arbitration[26] and in the above-mentioned standard contracts, AB92 and ABT93 which are used in the construction industry.[27] Foreign practitioners representing parties in Danish arbitration proceedings—in particular in relation to construction disputes—are thus more than likely to encounter this legal institution, which should therefore receive some comments here:

First of all, it should be noted that the purpose of a *syn og skøn* is to provide the parties with an equal opportunity to have the facts of the matter explored and to provide the court with an objective expert assessment of these facts.[28] *Syn og skøn* can also be used before an actual dispute has arisen as a means of establishing proof of certain factual matters that may be impossible to examine and assess at a later stage.

Syn og skøn can be initiated either by the arbitral tribunal itself[29] or upon the request of the parties, who can suggest one or more expert candidates (the so-called *skønsmænd*) to be appointed by the tribunal. Only persons who are of unblemished character, unprejudiced and competent can be appointed as a *skønsmand*.[30]

The mission of the experts is (1) to examine and assess certain factual elements of the case, such as a defective machine or a building, and (2) based on the examination and assessment, to produce an expert report, (the *syn-og skønsrapport*), which contains answers to particular and precise questions posed by the parties.

Importantly, the experts must restrict themselves to give an opinion on factual matters only, and thus cannot answer question regarding legal issues. In practice this often gives rise to problems, for example in regard to assessing whether a building suffers from defects, since

18. *Lov om Rettens Pleje*, LBK 961 of September 21, 2004. See especially: c.18 regarding witnesses, c.19 regarding expert surveys and c.28 regarding documentary evidence.
19. s.178 of the DAJA.
20. s.344(2) of the DAJA.
21. See Advokat Martin Gräs Lind, "Ulovligt tilvejebragte beviser i civile retssager", Ugeskrift for Retsvæsen 2004B, pp.85 *et seq.* and Advokat Clement Salung Petersen, "Bevissikring ved krænkelse af immaterialrettigheder m.v.—udvalgte problemstillinger og praktiske erfaringer", Ugeskrift for Retsvæsen 2005B, pp.10 *et seq.*
22. See Michael E. Schneider, "Technical Experts in International Arbitration, Introductory Comments to the Materials from Arbitration" (1993) 11 *ASA Bulletin* 446 *et seq.*
23. See for example UfR 1978.877 (concerning an expert report on the causes of a fire) and UfR 1981.137 (regarding defects in a building). If the object of the appraisal has perished and a joint expert survey is thus not possible, the courts may allow a unilaterally obtained expert report to be produced as evidence; see for instance UfR 1971.94, UfR 1978.877 and UfR 1979.870.
24. Art.35(2) of the Rules of Procedure of the Danish Institute of Arbitration thus provides that the parties are entitled to produce their own expert witnesses. The rules are available in Danish, English, German and French on the institute's website: *www.denarbitra.dk*.
25. Erik Hørlyck, *Syn og Skøn* (2004), pp.67 & 70.
26. Art.35(1) of the Rules of Procedure.
27. See fn.13 and Art.45 in AB92 and ABT93.
28. Benhard Gomard, *Civilprocessen* (2000), p. 451. Herein lies the main difference between *syn og skøn* and a unilaterally obtained expert opinion.
29. See s.26 of the new Act.
30. ss.197–199 of the DAJA. Objections are presented in accordance with the procedure stated in s.200(2) of the DAJA.

it is usually not possible to determine whether a defect exists without comparing the actual work performed to the contractual specifications. Since the contract is subject to interpretation, which is a legal issue, the experts will often find themselves walking a fine line between assessing factual matters and legal/contractual matters.

In complex cases, it is not uncommon that the experts are asked to examine certain factual matters several times, and the parties can also ask follow-up questions based on the answers given in the expert report. During the oral hearing, the experts will be cross-examined as witnesses—a procedure known as *afhjemling*[31] during which the experts will be asked to confirm and elaborate on their findings.

In practice, the expert report will often settle the dispute between the parties, because it determines, in an objective manner, the facts of the matter, which are usually the root of the parties' dispute. Experts acting as *skønsmænd* thus play a key role in many arbitration cases, and on this basis, one might recommend Contracting Parties to regulate in their arbitration clause how to appoint or challenge the appointment of an expert, the number of experts to be appointed, under which circumstances a new *syn og skøn* can be requested, etc. since these issues are not regulated in the new Act.[32] In the absence of such contract regulations, Danish arbitral tribunals are likely to seek guidance in the arbitration case law developed by the above-mentioned Building and Construction Arbitration Board (*Voldgiftsnævnet for Bygge og Anlægsvirksomhed*)[33] and perhaps also in the case law of the domestic courts concerning *syn og skøn* pursuant to s.210 of the DAJA.[34]

Interim measures

Section 17 of the new Act, like Art.17 of the Model Law, vests the arbitral tribunal with the power to order necessary interim measures upon the request of one of the parties. The arbitral tribunal may require the requesting party to provide adequate security[35] as a condition for ordering an interim measure. It should be noted that interim measures ordered pursuant to s.17 are not enforceable under Danish law. Accordingly, a party in need of an interim measure would usually prefer to seek the intervention of the domestic courts, which pursuant to s.9 of the new Act, are empowered to order enforceable interim measures, such as an injunction or a freezing order in accordance with the provisions found in cc.56–57a of the DAJA.

A request for a freezing order pursuant to s.9 is made to the enforcement court at the debtor's place of domicile, where the debtor is working, where there is security for the claim or where the object of enforcement is located.[36] The request has to be in writing and must contain the claimant's arguments for freezing the respondent's assets. Any relevant documents on which the claimant relies must be enclosed with the request.[37]

The request must be followed by an action (a so-called *justifikationssag*) before the domestic courts to confirm the freezing of the assets. Such an action is to be initiated within one week, from the date of the freezing order, in accordance with s.634(1) of the DAJA. The arbitration proceedings will continue, regardless of a freezing order being issued.[38]

The following basic conditions have to be fulfilled before the freezing of assets can be allowed:[39]

- The claim has to be pecuniary and existing. In other words, the claimant has to demonstrate the existence of a financial obligation owed by the respondent.[40]
- It is impossible to seize the debtor's goods directly. (If this possibility exists, the court will not issue a freezing order but instead refer the claimant to seize the debtor's assets.)
- The possibility of securing payment would deteriorate if the debtor's assets were not frozen, (for example because the debtor is rapidly moving assets out of the country or giving assets away).[41]

Furthermore, as mentioned above, the claimant will often have to provide security as a condition for the freezing of the respondent's assets. This is done in order to provide security for any loss which the claimant might inflict upon the respondent as a result of the freezing of his assets. Security can be provided in the form of a bank guarantee or a cash deposit.

31. s.204, subs.3 of the DAJA.
32. The Building and Construction Arbitration Board (*Voldgiftsnævnet for Bygge og Anlægsvirksomhed*) has issued a set of detailed rules regulating the appointment of experts, which supplement Art.45 in AB92 and ABT93. Further information is available (in Danish) at *www.voldgift.dk*.
33. The decisions of the Building and Construction Arbitration Board are reported in the legal review *Kendelser om Fast Ejendom* published by DJØF.
34. In some cases the courts have allowed a new *syn og skøn* where experts with a different background from the ones initially appointed are needed or where the expert report contained errors; see for example UfR 1979.654 and UfR 1957.348. A new *syn og skøn* can also be allowed if the expert report contains errors or if it can be shown that the experts were incompetent, see for instance UfR 1983.594.
35. For further details on the question of what amounts to adequate security under Danish law and in Danish construction law in particular, see Jacob C. Jørgensen, "Betryggende sikkerhedsstillelse efter AB92 §6" (1999) 9 Juristen 372 *et seq.*
36. DAJA s.487. The court fee amounts to DKK 300 + 1/2 percent of the amount of the claim exceeding DKK 3,000. The court fee has to be paid with the request for a freezing order. If the court fee is not paid, the request will be denied.
37. DAJA s.631.
38. Jakob Juul and Peter F. Thommesen, *Voldgift* (2003), p.129 and Bernt Hjejle, *Voldgift* (1987), p.69.
39. DAJA ss.627–629.
40. Bernhard Gomard, *Fogedret* (1997), p.223.
41. See for example UfR 1996.1688 H where the debtor had already moved abroad and was receiving an amount from a settlement in a different case. However, according to UfR 2001.667 V the fact that the debtor is living abroad is in itself not enough to grant a freezing order.

If assets which are registered in public records, such as real estate, ships, airplanes or listed securities, are frozen, the claimant must undertake the relevant act of perfection to secure his right to the assets against *bona fide* third party creditors. In case the respondent goes bankrupt, the freezing order will become void.[42]

A freezing order can be levied with respect to as many of the respondent's assets as needed to provide adequate security for the claim and any expenses related to the freezing.[43] The freezing of assets will deprive the respondent of the right to dispose over the assets in any manner, which is not in line with the terms of the freezing order.[44] This does not exclude the respondent's common use of the assets.[45] Accordingly, if a bank account is frozen, the respondent may still pay bills and usual expenses while the freezing order is in place. Should the respondent dispose of the assets to the detriment of the claimant, the respondent may be held liable according to the Danish Penal code.[46]

Pursuant to DAJA s.630, the respondent can prevent the freezing order by providing adequate security for the claim including any possible interest on the claim. The enforcement court will decide whether the security is sufficient. The parties can appeal the enforcement court's decision within a four-week deadline.[47] The appeal will not stay the arbitration proceedings.

If the tribunal rejects the claimant's claims in the arbitration, in whole or in part, the domestic courts will in accordance with s.639 of the DAJA decide on the claimant's liability for any damage, which the freezing order may have caused.[48]

Questions regarding EU law

The decision of the European Court of Justice (the "ECJ") in *Eco Swiss v Benetton*[49] establishing that EC competition law is a part of the public policy of the European Community and therefore must be respected in international arbitration, underlines the importance of giving international arbitral tribunals the possibility to ask for a preliminary ruling from the European Court of Justice in matters involving for instance Arts 81 and 82 of the EC Treaty. With s.27(2) of the new Act this possibility has been provided.

The provision allows the arbitral tribunal to ask the domestic courts to request the ECJ to decide on a preliminary question of Community law before rendering the award. Such a request[50] must be made to the domestic court, which would have had jurisdiction over the matter, had the parties not agreed on arbitration. The domestic court will allow such a request if it deems that the conditions for putting a preliminary question before the ECJ are met. These conditions are:

- The domestic court requesting the ECJ to render a preliminary ruling must be a court within a Member State.
- The preliminary ruling must concern the EC Treaty or other Acts of the European Community.
- The preliminary ruling has to concern a real and genuine legal dispute.[51]
- Finally, the domestic court is obligated to ensure that the actual and legal circumstances are sufficiently described before the ECJ.[52]

Challenging an award

According to s.37 of the new Act, an action for setting aside the award can be filed with the domestic courts within 90 days from the receipt of the award. The grounds for setting aside an award are the same as in the Model Law. A decision by the city courts can automatically be appealed to the High Courts, and if the case is initially brought before a High Court, the case can be appealed to the Danish Supreme Court.[53]

Enforcement of an award

Chapter 9 of the new Act contains provisions regarding the recognition and enforcement of awards that are equivalent to the provisions found in the Model Law and in the 1958 New York Convention. The enforcement of arbitral awards are subject to the same rules of the DAJA[54] which regulate the enforcement of judgments.

The limits of this article do not allow for a detailed analysis of these rules. The authors will therefore limit themselves to one specific issue which is regularly encountered in enforcement proceedings, namely the issue of whether set-off can be invoked by the debtor at the enforcement stage.[55]

This question is regulated in s.522 of the DAJA, which provides that set-off with a counterclaim in the enforcement proceedings may be allowed if the general conditions for non-contractual set-off are met, *i.e.*: (1) there is reciprocity of the parties; (2) the claims are of an identical nature; and (3) the counterclaim has matured.

As an additional condition for allowing set-off in the enforcement proceedings, the counterclaim must either be enforceable according to DAJA s.478, or

42. Gomard, n.39 above, at p.236.
43. DAJA s.632(1) and UfR 1976.998.
44. DAJA s.632(2).
45. Gomard, n.39 above, at p.233.
46. Penal Code, s.283(1), s.292 & s.293(2).
47. DAJA s.640 & s.586(1).
48. Jakob Juul and Peter F.Thommesen, *Voldgift* (2003), p.130.
49. ECJ Case 126/97.
50. A court fee of DKK 400 is payable upon the filing of the request.
51. See ECJ Case 104/79 *Pasquale Foglia v Novello*, which first established the condition that the issue should concern a real and genuine legal dispute.
52. See ECJ Case 320–322/90 where a question regarding the interpretation of competition law was dismissed, owing to insufficient information.
53. See s.368(1) & s.368(3) of the DAJA.
54. DAJA cc.45–55.
55. See for further details about set-off and the enforcement of arbitral awards under the 1958 New York Convention: Jan van den Berg, *The New York Arbitration Convention of 1958* (1981), pp.240 *et seq.*

Table 2 Overview of the procedural time-limits in the new Danish Arbitration Act

Provision	Issue	Time limit	Commencement of time limit
s.11(2)	The appointment of the party-appointed arbitrators	30 days	Upon the request of the other party
s.11(2)(2)	The appointment of the chairman by the arbitrators	30 days	The parties' appointment of their arbitrators
s.13(2)	Challenging of an arbitrator for lack of independence or competence before the tribunal	15 days	The challenging party obtaining knowledge of the identity of the arbitrator or the circumstances giving rise to challenging the arbitrator for lack of independence
s.13(3)	Challenging of an arbitrator for lack of independence or competence before the domestic courts	30 days	The point in time when the party becomes aware of the decision of the arbitral tribunal concerning the challenge
s.16(3)	Challenging the competence of the arbitral tribunal before the domestic courts	30 days	The point in time when the decision of the arbitral tribunal is deemed to have been received by the party
s.16(2)(1)	Objection concerning the competence of the arbitral tribunal.	Objection must be raised in the Statement of Defence at the latest	Statement of Defence
s.16(2)(3)	Objection concerning the competence of the arbitral tribunal on issues arising during the proceedings	Objection must be raised as soon as the issue arises	When the issue arises
s.33(1)	Request concerning the correction of the award with regard to miscalculations, errors in writing etc.	30 days	The receipt of the final award
s.33(3)	Request for Decision concerning the rendering of an additional award	30 days	The party's receipt of the final award
s.32(2)	Correction of the award on the tribunal's own initiative	30 days	The rendering of the final award
s.34(1)	The fees to the arbitrators and the arbitration costs fall due	30 days	The termination of the arbitration
s.34(3)	Bringing before the courts the question of the arbitrators' fees	30 days	The receipt of notice regarding the arbitrator's fees by the party
s.37(4)	Commencement of legal proceedings before the courts for setting aside the award	90 days	The receipt of the award by the party

acknowledged by the creditor (according to the award) or otherwise have been established.[56]

Costs

Some of the most interesting provisions of the new Act are set out in c.7 concerning costs. No equivalents to these provisions are found in the Model Law and they thus deserve some comments here:

Especially s.34(2) attracts attention, as it provides that the parties to an arbitration will be jointly and severally liable for the expenses in relation to the arbitration proceedings, *i.e.* primarily the fees and expenses of the arbitrators and the administration costs of the tribunal. In the award, the liability to pay the costs and fees will usually be placed on one of the parties, but this division of liability will only have effect internally between the parties.

Section 34 is unprecedented in the UNCITRAL Model Law, but is known from other procedural rules of international arbitration. The provision can be deviated from by agreement between the parties and the arbitrator(s) or by referring to the rules of procedure of an arbitration institute, which do not contain such provisions. The arbitrators will then be aware from the outset that there are no provisions on joint and several liability in regard to their fees and the costs of the arbitral tribunal.

It should be noted that the Danish Institute of Arbitration recently adopted a new set of rules containing scales of anticipated costs and fees.[57] In proceedings under the rules of the Danish Institute of Arbitration there is thus a fairly high level of transparency with regard to the total costs of the arbitration. However, users should be advised that the publicised figures only are approximated expenses, and may thus vary from case to case depending on the complexity and size of the issues.

Also s.34(3) should be mentioned since no equivalent rule is found in the Model Law. Pursuant to this provision, the parties may bring the decision of the arbitral tribunal concerning costs and fees before the domestic courts. Such an action will not, however, result in an extension of the time limit for paying the costs and fees, and it is only the tribunal's decision on the size of the costs and fees that can be brought before the domestic courts. The tribunal's decision pursuant to s.35 on the apportionment of the costs and fees between the parties cannot be tried by the domestic courts. The parties can not deviate from this provision by agreement.

Procedural time-limits

The new Act contains a number of procedural time-limits, most of which come from the Model Law. The different deadlines are shown in Table 2 above.

Conclusions

Summing up, it appears that the new Act finally has brought Danish legislation in line with international standards within the field of arbitration law, and the new Act is certain to provide lawyers, the business and commercial community as well as the domestic courts with an efficient and flexible legal framework for conducting arbitration proceedings in Denmark.

56. See Bo von Eyben, *Kreditorforfølgning* (2001), p.76.
57. The scales of costs and fees are available at *www.denarbitra.dk*