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SOME ASPECTS ABOUT REGULATION OF ARBITRATION IN DENMARK

Eva SMITH

1. The main law regulating arbitration is "lov om voldgift" (law of arbitration).

2. Arbitration is mostly voluntary, but mandatory arbitration exists as well.

2.1. Several arguments exist for not having mandatory arbitration. The main argument is that one does not wish to exclude the ordinary court-system in particular cases. This would be the argument of the parties'right to have their disagreement settled by an independent judge at a public trial as called for by the European Convention of Human Rights article 6., and should therefore be a choice made by the parties. The ordinary court-system has the competence in all cases, except those cases dealt with by the "special"-courts, which arbitration is not one of. A few laws describes that certain cases must begin with mandatory arbitration. This is the case, where one of the parties can submit the other party to arbitration, according to law, when settling a certain kind of dispute, like for instance labour questions. But the parties can always claim a case before a judge jf. EMK article 6.

3. The parties appoint arbitrators.

3.1. This starting point is subject to a few limitations. For example if the parties cannot agree on the arbitrators, the ordinary court-system will assist and rule on this particular issue. Until a few years ago judges could be both the head of the arbitration court (appointed be the parties in unison) and appointed by just one party. Now a judge can only act as the head of the arbitration court. This is also the case, where the parties haven't appointed any arbitrators.

3.2. No.

3.3. Impartiality is guaranteed by the same rules, as the one regulating impartiality at the ordinary court-system.

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3.4. Arbitration between more than two parties is not regulated by a specific set of rules.

3.5. There are no specific rules regulating the contractual relation between the parties and the arbitrators. But an arbitration award can be void, if the composition of the court hasn't been satisfactory for the parties. The relationship between the parties and the arbitrators is based on a mandate (*sui generis*), and the arbitrator is therefore independent of the parties within the limits of the mandate.

4.1. No.

4.3. I don't understand the question.

4.4. No.

4.5. A negative answer to this question, will be the starting point. If the parties still have the legal object at their free disposal, they are free to let arbitrators decide the controversy. If just one party is claiming that a joint agreement on arbitration exists, he will have to bring it up in the first session in court.

4.6. If the case is not yet pending before arbitrators, the legal court decides whether the case fulfils the requirements for arbitration. If the lawsuit is pending before the arbitrators, the State judge is prevented from deciding in the case as regards to the question of competence. The question, as regards to the validity of the agreement of arbitration between the parties, can always be decided upon by the State judge, just not when the case is pending before arbitrators. This general rule can be deviated from, if there are important reasons to do so, like for instance whether or not there is a legally binding agreement among the parties about arbitration.

4.7 and 4.8. In both cases, the State judge and the arbitrators shall rule on the preliminary question as quickly as possible.

5. The parties are free to agree on the proceedings. If the arbitrators do not follow these proceedings, the decision will be void. Did the parties not agree on the proceedings, the arbitrators will decide for them. This means, that the normal legal basis regarding ordinary court proceedings does not apply here. Voldgiftsloven "law of arbitration" says, that a decision by arbitrators is only void if the proceedings have not been satisfactory for the parties. Satisfactory means, that certain fundamental principles of proceedings must be followed.

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5.1. Yes.

5.3. The arbitrators can invite the parties to collect further evidence. The arbitrators can in special circumstances collect evidence on their own, but are obligated to inform the parties, and let the parties look through and comment on the evidence.

5.4. Yes. The arbitrators can be assisted by the ordinary courts to collect evidence (voldgiftsloven § 5).

5.5. Third parties can only be admitted or intervene if both parties agree. This is not regulated by "voldgiftsloven".

5.6. Yes more than one connected arbitration can be unified in accordance with the rules of proceedings for ordinary courts.

6. The content of arbitrators' measures depends on the mandate, given by the parties to the arbitrators.

6.1-6.3. No.

7.1. As far as private parties are concerned, a few criteria applies. The parties shall, first of all, have the legal object at their free disposal. This means, that the decision of for example separation cannot be submitted to arbitration. Furthermore the consideration of safety, security and order in society means, that all criminal cases fall outside the scope of arbitration. It also means, that all cases, which rely on any government acknowledgement or any kind of government control, fall outside the scope of arbitration.

7.2. No, look above at 7.1.

7.3. Yes, roughly.

7.4. No.

7.5. The main contract which the controversy flows from, is separate from the arbitration clause. If the arbitration clause is invalid, it does not mean, that the main contract is invalid to. This is called the doctrine of separability, and applies in Danish law. They do therefore not coincide, but are separate.

7.6. Some subjective measures must be applied in order to make the arbitration clause and arbitration valid. Those measures are the competence of the parties and the clear agreement from the parties, to let the controversy submit to arbitration.

7.7. Certain action in certain situations can be admitted in order to verify the validity. There are, as such, no legal obligations to the shape of the

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agreement and the content "only" needs to be clear and unequivocal. Therefore, in principle, an agreement can become valid by parties' actions.

7.8. No.

8. There are no different types of voluntary arbitration. Union arbitration agreements have, on their own, certain criteria, besides the normal ones, before such an agreement is valid. But as such, there are no different types of voluntary arbitration.

8.5. Yes, if the parties so decide.

9. Principally yes.

10. I don't understand the question.

11.1. No. Reconciliation is not a necessary step, in order to have access to arbitration proceedings.

11.2. No. Reconciliation is not used as a necessary step of arbitration proceedings.

11.3. An attempt of reconciliation is used in practise as an optional method, before the arbitrators decide on the matter.

12. There are different kinds of alternative justice administered by private institutions aimed at favouring conciliation-mediation such as "dansk medation" (danish institution of mediation). Also at the moment an experiment is carried out within the ordinary court system. Otherwise the ordinary courts shall, in accordance with law, always attempt reconciliation of the parties.

Even though parties attempt reconciliation/mediation, they still have the right to try the dispute at court/arbitration.

12.1. An experiment is being done within Family Law. Another within the criminal justice system (minor offences). A third in the courts using judges as meditators.

12.2. Not yet. It is still rather recent in DK.

12.3. *See* 12.2.

12.4. *See* 12.2. They are all just experiments. Arbitration can be used instead, except for criminal cases.

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13. Yes. They are as valid as a judgment or a legally binding settlement. They can only be altered if the formal rules were not followed.

14. An arbitration award cannot be appealed. It's like a voluntary legally binding agreement between the parties. An arbitration award is invalid, if it conflicts with indispensable fundamental principles.

15.2. Danish arbitration awards can be enforced, along the same rules, as normal judgements.

15.3. An arbitration award cannot be appealed. It's like a voluntary agreement between the parties. An arbitration award has the same resistance of a final judgment. The content of the award cannot be subject to review by the court. However the validity of the award can be subject to review by the court, this is for example the case, where there is no valid arbitration agreement, the controversy can not be submitted, lack of competence an so forth.

16. I do not understand the question.

17. There can be admitted a second instance arbitration, if the parties agrees to such a second admittance in the arbitration agreement.

18. The content of an arbitration award cannot be appealed before ordinary courts.

Only costs, arbitrators'fee and the validity of the award can be appealed to the ordinary courts. As said above, the arbitration awards can be appealed to a second instance of arbitration, if the arbitration agreement opens up for such a second instance.

However, as regards to appeal to ordinary courts, under special circumstances parties will be able to resume the case before højesteret (supreme court). This will only be the case where; 1) The arbitration tribunal has been misinformed and the case has therefore been decided upon essentially differently; 2) Or one of the parties will only this way be able to avoid or maintain a radical loss; 3) Or the circumstances strongly point to resumption of the case.

19. It is not subject to the approval by the State judge or subject to a previous granting of executive validity. It draws its validity from its own merits.

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20. "Bekendtgørelse om anerkendelse og fuldbyrdelse af udenlandske voldgiftkendelser og om international handelsvoldgift". There are also a number of the international laws and conventions.

21. The arbitration award is immediate/directly (executive), which means, that an arbitration award is granted executive validity in accordance to the same rules as an ordinary judgment.

22. The executive validity of foreign awards is regulated by "voldgiftloven" § 10 and thereby by regulation nr. 117 af 7. marts 1973 om anerkendelse og fuldbyrdelse af af udenlandske voldgiftkendelser og om international handelsvoldgift. In accordance to this regulation a foreign award is to be acknowledged and carried out (res judicata), if the controversy of the award falls within the scope of arbitration in accordance to Danish law, and the award is not manifestly inconsistent with Danish law.

23. *See* 22.

24. Different conditions apply, when deciding whether it is a national or a foreign award. The main conditions are, where the arbitration was held, or where the ward has been pronounced. Furthermore conditions as the parties' home of arbitration, the place of fulfilment of the contract, will also enter into the total of the evaluation.

25. Private international law is regulating this subject. This would be the principle of pendente lite.

26. *See* 25.

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