

Article for Construction Law International

**"Something is rotten in the state of Denmark - was Shakespeare right?"**

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In the coming years, Denmark will be facing a large number of major building and infrastructure projects. Over the past years, it has become apparent that foreign contractors and some consulting engineers are represented in Denmark only very sporadically. Most recently, Skanska has ceased its activities in Denmark. Examples of new future projects are: the Fehmern Bridge, several port tunnels in both Copenhagen and Aarhus, a new large hospital in Aarhus and Odense, the extension of the Metro in Copenhagen, etc. Below is a brief description of the most important aspects of Danish construction law, which may hopefully serve as a source of inspiration to foreign players on a "need to know" basis.

**General structure of the legal system**

The legal system in Denmark is a civil law system, which has much in common with the systems in other continental European countries, the emphasis being on written statutory law and derivative legislation. To some extent, statutory law is also accepted as setting out general principles of law, which may be applied in unregulated areas. Such statutory law and general principles of law are, of course, also supplemented by case law. Foreign businessmen and their advisers, particularly from Anglo-Saxon jurisdictions, may find that the rules on interpretation of statutes differ from those in common law countries. As in many other civil law countries, the Danish courts are not limited to a strict interpretation of the letter of the law, but are inclined to look to the purpose of the statute. The same interpretive approach is also applied to private agreements where the courts and the arbitration tribunal will give weight to the parties' intentions rather than the strict wording of the agreement. In practical terms, this means that agreements and other documents are drawn up in reliance on both statute and general contractual principles, and in many cases the lengthy and exhaustive agreements familiar in Anglo-Saxon jurisdictions are not necessary or even appropriate in Denmark.

**95% of all construction contracts are subject to general conditions**

Danish construction contracts are characterised by consisting of an - often brief - individual part and a supplementary part with general conditions. The parties enjoy freedom of contract, and construction contracts are not subject to any statutory regulation. There are two sets of standard terms, both enjoying status as agreed documents: General Conditions for the provision of works and supplies within building and engineering from 1992 (referred to as "AB 92") and General Conditions for turnkey contracts from 1993 (referred to as "ABT 93"). Under AB 92, which is comparable to the FIDIC Red Book, 1<sup>st</sup> edition, 1999, the contractor has no design obligation. ABT 93 is comparable to the FIDIC Silver Book, 1<sup>st</sup> edition, 1999. Both sets of terms are agreed documents which are adopted in almost all situations. In Denmark, there are no general

conditions like the FIDIC Yellow Book, 1<sup>st</sup> edition, 1999. FIDIC-based construction contracts are therefore not very common in Denmark.

Both sets of standard terms consist of 47 sections, which govern all building phases and which have turned out to function very well in practice. There are only few general definitions, but a large number of abstract concepts. People from Anglo-Saxon jurisdictions are often very surprised by the limited number of provisions, and major contractors often include provisions in addition to AB 92 or ABT 93.

Arbitration and case law supplements the general conditions and have over the years contributed to the interpretation of the individual terms.

### **The most important terms of AB 92 in the absence of any other agreement**

a. *No requirement for agreements to be in writing*: Regardless of the wording of the standard terms, there is no requirement in practice for agreements to be in writing, for instance where the contractor demands an extension of time (see section 24 (3)), although this is to be preferred for practical purposes of proof.

In arbitration proceedings, other agreements between the parties for written documents are traditionally interpreted very leniently, for instance in situations where the contractor's right to payment for additional work is subject to work notes being completed and signed. In this case, the employer is deemed to obtain an unjust benefit.

b. *No time-limits*: Unlike the FIDIC agreements, e.g. clause 20.1 of the FIDIC Red Book, AB 92 does not provide for any mandatory time-limits resulting in forfeiture of rights other than an acquiescence doctrine and a general time limitation - not even if the contract includes a provision to this effect, e.g. if the contractor exceeds the time for sending his final account.

c. *No engineer*: AB 92 does not include any requirement for an engineer like e.g. the FIDIC Red Book.

d. *Performance bond*: The contractor will usually within a period of 8 workdays issue a performance bond for 15% of the contract sum. After handing over of the work, the amount of the bond will be reduced to 10% of the contract sum and to 2% one year after the date of handing over. Five years after the date of handing over, the bond will expire, unless a claim is raised before then.

If requested by the contractor, an employer working under a private contract must within 8 days of such request issue a performance bond to guarantee payment of the amount owed to the contractor. In practice, the employer will provide a bank guarantee, and in both cases standard guarantees are available. In most cases, the bond will correspond to 10% of the contract sum. An employer or contractor demanding payment under the bond must initiate a special procedure,

asking the Building and Construction Arbitration Board (*Voldgiftsnævnet for Bygge- og Anlægsvirksomhed*) to appoint an independent expert (often an engineer and not a lawyer) to give an opinion and make a decision. The expert's decision, which must be implemented within 3 workdays of receipt, is not binding in any subsequent arbitration proceedings, but the amount of the guarantee will be payable as requested.

e. *The passing of the contractor's risk*: The risk will pass to the employer when the work has been successfully handed over.

f. *Site meetings*: The frequency and agenda of such meetings will be agreed between the parties. The employer will take minutes, which may serve as proof in any subsequent arbitration proceedings.

g. *Payment*: The employer may pay the contractor for the work performed either on account every month or according to an agreed payment schedule.

h. *Extension of time and delay*: The contractor is entitled to an extension of the time if the work is delayed as a result of (1) alterations ordered by the employer, (2) circumstances attributable to the employer, (3) force majeure events, (4) unusual weather conditions preventing or delaying the work, (5) public orders, unless such orders relate to the contractor's own situation. The contractor will be deemed liable for any delay which does not entitle him to extend the time-limit. In practice, daily fines are usually agreed, representing the minimum and maximum damages payable (usually 1-2 per thousand of the contract sum), and the employer cannot make any further claim as a result of delays. In the absence of any agreed fines, the general Danish law of damages will apply, and the employer will be entitled to full compensation of his loss.

i. *Handing over of the work*: Immediately before the work is completed, the contractor must give notice of completion to the employer, who must then invite the contractor to a handing-over meeting. The work will be deemed handed over to the employer on conclusion of the handing-over meeting, unless defects are ascertained that have a material adverse impact on the function of the work delivered. Apart from the requirement for a handing-over protocol to be prepared, there is no other requirement for or tradition of testing the work, like in most FIDIC-based contracts.

j. *Defects*: If the work has been not performed in accordance with the contract, if the contractor has not exercised due professional care and skill or if the contractor has not followed the employer's instructions, the work will be deemed defective. The contractor will be liable for defects for a period of 5 years after the date of handing over. This period will, however, be suspended if the employer gives notice of defects. The contractor is granted an extensive right to perform remedial work, but is not liable for any operational loss, loss of profit or any other indirect loss. In case of disagreement, the existence of the defect must be proved by the employer, who will usually ask for an inspection and survey by an independent expert. The expert will be appointed by the the Building and Construction Arbitration Board in Copenhagen. Both parties may ask questions in writing to the expert, who will then draw up one or more opinions

which will be verified in any subsequent arbitration proceedings. The expert will e.g. consider whether the work has been performed with due professional care; not whether it is defective from a legal perspective, which will be for the arbitration tribunal to determine. It is possible only to a very limited extent to influence the expert or the proceedings by other written expert opinions that are obtained unilaterally. The expert opinions are of great importance as evidence. The appointment of a new expert to give a second opinion is in practice not very common. The costs pertaining to the expert opinion are initially payable by the party requesting the opinion, usually the employer. When the arbitration tribunal makes its award, it will be assessed which party is ultimately to pay such costs.

k. *Institutional arbitration - "one shot gun"*: Disputes will be settled finally and conclusively by the Building and Construction Arbitration Tribunal (*Voldgiftsretten for Bygge- og Anlægsvirksomhed*) in Copenhagen. The Arbitration Tribunal usually consists of one member of the Tribunal's Presiding Committee to be appointed by the chairman and two experts to be appointed by the Tribunal on a case-by-case basis. The parties will produce their evidence in the case, which is conducted as an adversarial procedure. The Building and Construction Arbitration Tribunal has its own rules of procedure to supplement the Danish Arbitration Act 2005 (*lov om voldgift*).

Most cases are heard by three arbitrators: two technical experts and one legal expert. The technical expert is usually an engineer or architect. The legal expert is usually also a High Court or Supreme Court judge (the ordinary courts of law). If the employer has made an agreement with a technical adviser, they have often agreed to use the standard terms "ABR 89 - General Conditions for Consulting Services" (similar to the FIDIC White Book, 4<sup>th</sup> edition, 2006), which includes an arbitration clause (the Building and Construction Arbitration Tribunal in Copenhagen) making it possible to include such adviser in the same case.

On commencement of the arbitration proceedings, the parties must pay an advance amount to the arbitration tribunal to cover the arbitration costs, which will depend on the subject-matter. The unsuccessful party must as a general rule pay all the costs of the arbitration tribunal and will be ordered to pay (part of) the successful party's legal fees and expenses. Awards that are of general public importance will be made anonymous and published in legal journals subject to the parties' consent.

## **Hamlet**

Whether Hamlet was right when he found that "something is rotten in the state of Denmark" is for the reader to decide. But from a construction law perspective, nobody should hesitate to carry out their building projects in Denmark!