# Take-Aways from the Copenhagen Arbitration Day 2019

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The Danish Institute of Arbitration (DIA) and ICC Denmark hosted Copenhagen Arbitration Day earlier this year. Discussion took place on a wide range of topics such as the criticism of arbitration, diversity and the Prague Rules.

The day began with three lunchtime seminars. The first took place at the University of Copenhagen, where four speakers focused on investment arbitration in a post-truth world.

Jan Heiner Nedden of Hanefeld Rechtsanwälte noted that the criticism of arbitration, which was centered on issues such as transparency, legitimacy and the alleged favouring of investors, was mainly based on rumours, inaccurate information and tenuous assumptions. He stated that it was up to the arbitration

community to change arbitration's reputation and highlighted that investment, rather than commercial, arbitration bore the brunt of the criticism.

Steffen Hindelang of the University of Southern Denmark supported the position that there was not an overwhelming favouring of investors in investment arbitration by showing that nearly half (47%) of the already concluded intra-EU investment arbitration cases, between 1987 and 31 July 2018, were decided in favour of a state. However, he noted that statistics could be used to argue almost any position on this.

Ole Spiermann of Bruun & Hjejle followed by noting that the statistics overlooked "no clear winner" outcomes such as if an investor were awarded less than anticipated, and so suggested that states may benefit more than what is generally perceived. He also added that the current criticism might be a reaction to the high praise of investment arbitration when it first began.

Joanna Jemielniak of the University of Copenhagen next highlighted the EU's strong support of its Investment Court System, which is often portrayed as a response to arbitration's criticism. However, she noted that this new system still relies heavily on existing arbitral rules. She also anticipated the importance of the CJEU opinion on the Investment Court System in the EU-Canada trade agreement, discussed in the Kluwer Arbitration Blog post here.

At the second seminar held at Gorrissen Federspiel, Henriette Gernaa discussed the importance of nationality, forum and legal traditions. She noted that international arbitral procedure could often reflect regional styles and illustrated her case by presenting different configurations regarding seat, arbitrator nationality, party nationality, etc. and queried to what extent the differences could affect factors such as disclosure, experts and tribunal proactivity. She suggested that a single international style could aid predictability for users as well as reduce the likelihood of overly regulated and extensive arbitration clauses, while emphasising that any interplay between international and regional practice should focus on what serves the users best.

The third seminar took place at Kromann Reumert, where the former president of the Danish Supreme Court, Torben Melchior, highlighted the advantages of Danish arbitration including: lower DIA costs, pro-enforcement judgments and Denmark's top ranking in the World Justice Project's Rule of Law Index. Frank Bøggild of

Kromann Reumert then followed and spoke about the rise of M&A arbitrations owing to issues such as warranty breaches and shareholders' liability, and the consequent increase in toughened rhetoric, horse-trading of claims and forensic expertise. He advised that topics such as discovery and standard arbitration clauses should be commonly considered when drafting M&A agreements.

After lunch, the day continued at the 17th century Old Stock Exchange. The host speakers, Steffen Pihlblad, Secretary-General of the DIA, and René Offersen of DLA Piper and of the ICC International Court of Arbitration, focused on diversity. Steffen discussed the United Nations Sustainable Development Goal 5 of gender equality, the Arbitration Pledge and that proportionally, the DIA selects more women arbitrators than parties do. René highlighted that the ICC Court has gender parity among its members for the 2018-2021 term, and that its scrutiny process supports the quality of awards, noting that awards should be "self-explanatory and convincing".

The first keynote speech picked up on regional perspectives, with Peter Rees QC of 39 Essex Chambers providing a commentary on the Prague Rules. He highlighted that the rules state that they supplement the agreed procedure, rather than replace it (see here for a previous Kluwer Arbitration Blog post comparing the Prague Rules with the IBA Rules). However, he also remarked that the rules focused on the tribunal's proactivity, for instance the tribunal can decide which witnesses to call and how they are examined. Regarding oral evidence in particular, he stated that any decision to limit cross-examination must be taken carefully as a tribunal needs to be sceptical about documents. In support of his case, he provided two engaging examples where witness examination had crucially changed the interpretation of the evidence.

Dan Terkildsen of Lundgrens next moderated a panel of four. Johan Tufte-Kristensen of the University of Copenhagen began by discussing confidentiality; he highlighted that different jurisdictions and institutions can vary in their approaches, and there are different degrees of confidentiality, from privilege to trade secrets to NDAs. He discussed possible solutions ranging from procedural orders to confidentiality agreements to unilateral statements. He also raised the possibility that penalties could be agreed if confidentiality were to be breached.

Anna-Maria Tamminen of Hannes Snellman followed and focused on different considerations for witness evidence. For instance, three issues which can come

into play are: 1) how the evidence is gathered (whether from notes, documents or interviews); 2) who gathers the evidence (whether in-house or external counsel, with their own jurisdictions and personal styles); and 3) why the evidence is gathered (to prove facts, help the narrative or assist in understanding technical aspects?). Moreover, regarding how evidence is received, cognitive bias based on whether the claimant or the respondent called the witness could arise. The understanding of the evidence could be affected by issues such as leading or open questions, whether a tribunal tells a witness that it is acceptable to say "I don't know", or how counsel responds to a witness' responses, such as by summarising or just a nod of the head. Lastly, Anna-Maria highlighted how individuals may remember facts differently. She exemplified this by starting her presentation with three reasons why she liked visiting Copenhagen, and ending the presentation by asking the audience members which reasons they had remembered.

Jon Stokholm, Justice of the Danish Supreme Court, focused on witness statements. He discussed the Danish approach of not generally having them, and of rather relying on examination-in-chief and cross-examination so that a judge is able to obtain an immediate impression of the witness. He noted that written statements could be expensive, time-consuming and restrict a witness' memory, but was also aware that a lack of statements could lead to misunderstanding because of the limited ability to prepare. He recommended that the earlier the terms of evidence were discussed, the better, as there could be different opinions on issues such as whether the parties or the tribunal question the witness, and whether a witness statement is admitted or dismissed if it does not give rise to cross-examination.

Lastly, a technological perspective was voiced by Kasper Mortensen of Kammeradvokaten/Poul Schmith. He highlighted the finding in a 2017 ICC Commission Report on IT in international arbitration, that the absence of negative data suggested that IT use in arbitration was relatively problem-free. Regarding recognised challenges, he provided practical tips such as if a party sends out files in a non-standard format, that party should also provide software so that the recipients can read the files and if there are numerous files, to ensure that there is an appropriate filing system to facilitate identification.

Dr Inka Hanefeld of Hanefeld Rechtsanwälte gave the second keynote speech on inherent powers, which she said could both reinforce and comfort practitioners when in doubt as to what to do. She observed that there was no single accepted approach, as the need and basis of inherent powers can depend on institutional

rules and jurisdictions. She also suggested that inherent powers found by tribunals can anticipate institutional rules, such as the power to effect summary proceedings under the ICC rules. She concluded by noting that the scope of inherent powers was uncertain, but she suggested that their understanding could allow for a realisation of arbitration's full potential and counter due process paranoia (see here and here for previous Kluwer Arbitration Blog posts on inherent powers and due process paranoia, respectively).

At a dinner held at the Royal Danish Library, Georg Lett of DLA Piper ended the day with a speech on arbitrators' impartiality, which highlighted the influence of culture and legal traditions on arbitration.

**Concluding Remarks**

Denmark bridges the legal traditions of common and civil law systems, such as by emphasising the importance of advocacy on the one hand and by limiting disclosure on the other. The international speakers and audience for the Copenhagen Arbitration Day attested to this mix of traits, and afforded a balanced hub for reflection on different arbitral practices, not least demonstrated by the Prague Rules, seen by some as a civil law response to the IBA rules' favouring of common law. This neutral position, alongside Danes' flair for English and the day's success, herald strong foundations for future developments and discussion. The next edition of the day is scheduled for 2 April 2020.

*The views and opinions expressed in this article are those of the author and do not necessarily reflect the views of Gorrissen Federspiel.*