

Kluwer Arbitration Blog

2023 Copenhagen Arbitration Day Recap: The Future of Arbitration

Andrew Poole (The Danish Institute of Arbitration) · Saturday, December 23rd, 2023

Following the success of previous editions (see [here](#) for previous coverage), the fourth edition of *Copenhagen Arbitration Day* took place in October 2023. The theme was the “Future of Arbitration” and topics ranged from whether there was a need for a new Arbitration Act, to the role of procedural order no. 1, to what arbitration could be like in 2035. This post summarises the discussions held during the event.

[Brian Mikkelsen](#), former minister of Justice and now head of ICC Denmark, opened the conference. He highlighted the Vikings’ focus on trade as well as the 400-year history of the host venue itself, namely the Old Stock Exchange with its dragon-tailed spire. He emphasised the importance of arbitration to business and society, particularly owing to the present burden on the courts.

A Need for a New Danish Arbitration Act?

[Professor Peter Arnt Nielsen](#) continued to focus on history when discussing the need for a new Danish Arbitration Act. He drew a thread from the first arbitration law in Denmark under Christian V in 1683 to a bill on arbitration in 1972 to the enactment of the [2005 Danish Arbitration Act](#) based on the [1985 UNCITRAL Model Law on International Commercial Arbitration](#).

Professor Nielsen first highlighted the present functionality of the 2005 Danish Arbitration Act, which is a near-identical version in substance of the 1985 UNCITRAL Model Law on International Commercial Arbitration, subject to a few adjustments. For instance, the Danish Act:

- has an express reference to what is arbitrable, i.e. “*legal relationships in respect of which the parties have an unrestricted right of disposition ... unless otherwise provided*” (s.6);
- provides that for consumer contracts, an arbitration agreement made before the dispute arose is not binding on the consumer (s.7(2)); and
- sets out that a challenge of an arbitrator or (subject to arbitrability and consumer exceptions) a challenge to the tribunal’s jurisdiction cannot be invoked later than that provided for in the act in support of an application for setting aside or refusing recognition or enforcement of a subsequent award (ss. 13(4) and 16(4)).

However, Professor Nielsen also suggested that the act could benefit from additions such as

incorporating chapter IV A. of the 2006 amendments to the UNCITRAL Model Law as regards interim measures.

His other suggestions included giving the [Maritime and Commercial High Court](#) jurisdiction for invalidity questions and applying option 1 of Article 7 of the 2006 amendments so that it is clear that an arbitration agreement shall be in writing.

Procedural Order No. 1 – Trends and Practices

[Mika Savola](#) proceeded to discuss the principal topic of procedural order no. 1 (“PO1”), providing a systematic overview. He emphasised the advantage of predictability if procedural issues, as often provided for in a PO1, are set out early in the case. He highlighted PO1 sources such as [UNCITRAL Notes on Organizing Arbitral Proceedings](#), [IBA Rules on the Taking of Evidence in International Arbitration](#) and other PO1s, while stating that it was always key in the PO1 to: (i) ensure equal treatment of the parties; (ii) afford each party a reasonable opportunity to present its case; and (iii) avoid unnecessary costs and delay.

Mr Savola discussed not only traditional considerations, such as deciding between memorial or pleading styles, the scope of any time extensions, document production and hearing agendas, but also newer considerations such as data protection and cybersecurity. He also raised the options of allocating costs based on efficiency of document production, asking parties to draft requested dispositive sections to ensure clarity (which are not binding on the tribunal), submitting witnesses’ personal notes as documentary evidence to ensure equal treatment and reserving a day immediately following the hearing for the tribunal to start deliberations.

Mr Savola ended on a note of caution regarding new case management paradigms (e.g. mid-stream case review conferences and mediation windows) because they could lead to increased costs and psychological biases.

Due Process as a Limit to Discretion in International Arbitration

The next panel allowed audience members worried about due process to breathe sighs of relief. [Professor Friedrich Rosenfeld](#) suggested that there was no need for due process paranoia because many courts have ruled that due process should be understood narrowly, parties can waive their due process guarantees if they do not raise concerns timely, and many courts show deference to arbitral tribunals regarding procedural case management.

[Professor Giuditta Cordero-Moss](#) suggested that Denmark could perhaps not be so opposed to the concept of *iura novit curia* particularly in cases of unresponsive or colluding parties so long as the right to be heard is upheld (e.g. ask the parties for their comments on matters considered relevant by the tribunal but not raised by the parties) and the tribunal cannot be seen to act in excess of its power.

[Henriette Gernaa](#) highlighted that differences often arose owing to different legal backgrounds and that, referring back to Mr Savola’s presentation, PO1s can assist in increasing predictability and so decrease due process paranoia along with a structured case management conference. She also

highlighted the high threshold in Denmark to set aside an award based on an arbitral tribunal's action, especially if such action is covered by the national law, institutional rules and/or procedural orders.

Due process can be given short shrift in the Danish courts, as suggested by Ms Gernaa. The Supreme Court decision (U.2022.1117) she referred to was decided early last year when the court found that a tribunal can deny admission of an expert report and restrict witness examination, among other points, when this was permitted in a procedural order. This 2022 Supreme Court judgment followed the leading Supreme Court judgment from 2016 (U.2016.1558/2H), which sets a high threshold for any setting aside arguments. This earlier judgment made it clear that the courts cannot undertake a substantive review of an award and cannot set aside an award owing to wrong law or poor consideration of facts unless the award is manifestly incompatible with public policy.

Hot Topics for the Arbitration Class of 2035

[Juliet Blanch](#) gave the keynote speech, as if from the future, given to a graduating class in 2035. This thought exercise provided an opportunity to illustrate what arbitration could be like in just over a decade. The focus was on arbitrator appointment and advocacy. It was suggested that artificial intelligence (“AI”) would be able to predict outcomes based on the arbitrators appointed, as well as limit private comments, conference attendance and teaching, owing to their being potential grounds for challenges.

However, future technology could allow for minimised discrimination if advocacy is practised online with homogenous avatars that look and sound similar. Ms Blanch raised questions that included whether it would be an issue if parties had different access to AI, whether parties must agree if AI is to be used, and whether AI use should be disclosed.

She also highlighted two points that may not be changed by technology, as of yet, that of couriering awards around the world if a wet ink signature is needed and that of the importance of the human experience when making a decision (for further discussion of ChatGPT and “shadow arbitrators”, see blog post [here](#)).

Closing Remarks

In his closing remarks, [Jeppe Skadhauge](#), the chair of the DIA, invoked the noted Danish philosopher [Søren Kierkegaard](#) when he described the conference as having encapsulated the concept of looking backwards to proceed forward, as demonstrated by the discussion of topics such as the 2005 Danish Arbitration Act and arbitration in 2035.

Conclusion

The fourth edition of Copenhagen Arbitration Day provides another example of a constructive discussion of Danish, Nordic and international arbitration practice and of practitioner networking opportunities. The fully booked day demonstrates that arbitration goes from strength to strength in

Denmark, as exemplified by the DIA's increase of cases in 2022 compared to 2021, bucking a trend seen elsewhere. Moreover, Denmark is number 1 in the latest indices for the [rule of law](#) and perceived [lack of corruption](#), and number 3 in the [UN SDG](#) index, which add to the attraction of Danish arbitration.

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This entry was posted on Saturday, December 23rd, 2023 at 8:05 am and is filed under [Denmark](#), [Due process](#), [Procedural Order](#)

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