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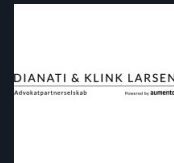
Country Comparative Guides 2024

Denmark

Construction

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This country-specific Q&A provides an overview of construction laws and regulations applicable in Denmark.

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Denmark: Construction

1. Is your jurisdiction a common law or civil law jurisdiction?

Denmark is a civil law jurisdiction. The primary source of Danish law is statutory law and government orders authorized by law, supplemented by customary law and case law.

2. What are the key statutory/legislative obligations relevant to construction and engineering projects?

There is no specific Danish legislation for construction contracts. General principles of contract and tort apply.

A set of national general conditions of contract ("AB Standards") are widely accepted and used in the Danish construction industry. A fairly new set of such AB standards (with the suffix "18") was published on June 21st, 2018. The older standards (AB 92, ABT 93 and ABR 89) are still being used, but as more projects based on the older standards are completed, the new standards are more and more often adopted by the industry. Fundamental principles remain unchanged in the new AB standards, but there are important changes to a number of areas, e.g. dispute resolution.

Public authorities and other public-sector employers are obligated to use the AB Standards and must comply with the public procurement legislation.

When planning and executing a construction project, there are also several legal requirements set out in various acts and government orders that apply. For example, the Building Act and government order on building regulations (in Danish: Bygningsreglementet) set out specific requirements for constructions, including technical requirements on lighting, acoustics, indoor climate, etc.

3. Are there any specific requirements that parties should be aware of in relation to: (a) Health and safety; (b) Environmental; (c) Planning; (d) Employment; and (e) Anti-corruption and bribery.

(a) health and safety;

The Danish Working Environment Act and government orders issued thereunder set out health and safety requirements for carrying out work.

For almost any construction work, the employer is responsible for appointing one or more working environment coordinators and for ensuring that they prepare and continually update a health and safety plan for the work. The purpose of the health and safety plan is to identify risks and to establish measures to prevent injuries at the work site.

Where health and safety requirements are not adhered to, the Danish Working Environment Authority can issue specific orders on how to carry out the work and also bring the work to a stand-still until the issue has been corrected.

(b) environmental issues;

Danish legislation on environmental matters is wide-ranging and complex, but is in general based on EU legislation.

Most aspects will typically be handled during the planning stage, but a wide range of polluting activities or activities that include such risks require specific permits. Some projects require an Environmental Impact Assessment, which can be a costly and time-consuming process.

(c) planning;

In general, specific requirements for how constructions must be built are set out in building regulations, whereas the planning legislation sets the framework for where constructions can be built.

The municipalities are responsible for the physical planning of both cities and rural areas in accordance with the development plans. Local development plans can also set out certain requirements for how constructions must be built, e.g. that roofs of houses within an area must be red. In terms of larger projects, it is common (but not required) that a project-specific local development plan is made in close cooperation between the developer and the municipality. Such project-specific plans are usually very detailed in terms of how the construction must be built.

(d) employment; and

In Denmark trade unions have the right to negotiate collective agreements with employers and employers' organisations, which set out basic working conditions in the business or industry.

There is no legal requirement for a company to follow or enter into a collective agreement, but trade unions can and may decide to take industrial action, such as striking, in order to persuade a company to reach an agreement.

Foreign companies working in Denmark must notify the Register of Foreign Service Providers (RUT).

Many public authorities and other public sector employers include in construction contracts social clauses (e.g. requiring that contractors employ a certain number of apprentices) and labour clauses (e.g. requiring that all workers are entitled to working conditions similar to those set out in collective agreements). They may also include chain liability clauses (stating that the main contractor is responsible and liable for the compliance of sub-contractors (of any tier) with labour clauses).

(e) anti-corruption and bribery.

The Danish Competition Act prohibits agreements and conduct that directly or indirectly restrict fair competition and trade, such as market sharing and price-fixing.

An unlawful act may result in prison, a fine and/or quarantine (a ban on bidding on tenders made by a public entity for a duration of time). EU legislation will apply instead of the Danish Competition Act in cases with cross-border dimensions.

4. What permits/licences and other documents do parties need before starting work, during work and after completion? Are there any penalties for non-compliance?

Permits are generally not required in order for a contractor to perform work, but for some work (e.g. electrical work and plumbing work) an authorization is required.

The Building Act regulates the circumstances under which the employer (or the turnkey-contractor) must apply for a building permit (to start work) and an occupancy permit (needed for occupation). Permits are not required for all construction work, but the work must be executed in accordance with the building regulations, even if permits are not required.

A building permit does not include a technical verification of the project, and although a building permit has been issued, non-compliance with the act or the building regulations may still result in the refusal of an occupancy permit.

5. Is tort law or a law of extra contractual obligations recognised in your jurisdiction?

General principles of tort apply to construction contracts, unless otherwise agreed in the contract. In order to raise a successful claim for damages, the claim holder must document a loss, intentional or negligent conduct by the other party, and a causal connection between such loss and the intentional or negligent behavior.

The AB Standards state that the contractor is not liable for consequential damage, operational loss, loss of profit or other indirect loss suffered due to defects in the work.

Punitive damages are not awarded under Danish law.

6. Who are the typical parties to a construction and engineering project?

In case of a turnkey contract, there will typically be an employer and a turnkey contractor, who will enter into contracts with architects, engineers and other consultants as well as sub-contractors and suppliers. The turnkey contractor will typically be responsible for designing the project based on functional requirements from the employer.

If the employer decides to engage directly with consultants to have the project designed, the construction work can be awarded to a main contractor, or the employer can enter into contracts on a trade-by-trade basis.

7. What are the most popular methods of procurement?

Most of the larger construction projects in Denmark, public as well as private, are put out to tender for competitive bidding.

Public authorities and other public sector employers are obligated to comply with the public procurement legislation if the monetary value of a project exceeds a certain amount.

In addition to turnkey contracts, general contracts and individual trade contracts, public private partnerships

(PPP) where the private company continues to manage the project after hand-over of the work are not unusual for public projects such as office buildings and court houses.

8. What are the most popular standard forms of contract? Do parties commonly amend these standard forms?

The vast majority of construction contracts in Denmark are based on one of the national general conditions of contract (AB Standards). The AB Standards are agreed documents that have been negotiated by various stakeholders in the Danish construction industry. The standards (except for AB-Consumers) have quite recently been updated and two abridged versions have been introduced. The six AB Standards are:

1. AB 18 (General conditions for building and construction works and supplies), in replacement of AB 92.
2. ABT 18 (General conditions for design and build contracts), in replacement of ABT 93.
3. AB-Consumers (General conditions for provision of building works for consumers).
4. ABR 18 (General conditions for consultancy services for building and construction works), in replacement of ABR 89.
5. AB Abridged (Abridged general conditions for building and construction works and supplies)
6. ABR Abridged (Abridged general conditions for consultancy services for building and construction works)

Public authorities and other public-sector employers are obligated to use the AB Standards.

The AB Standards are commonly amended by the parties.

9. Are there any restrictions or legislative regimes affecting procurement?

Except for the public procurement legislation, there is no specific legislation affecting procurement. General contract law and principles apply.

10. Do parties typically engage consultants? What forms are used?

The parties usually engage consultants, such as architects and engineers, to do design work, supervisory control of the work and sometimes project management.

The majority of consultancy contracts are based on ABR 89 or ABR 18.

11. Is subcontracting permitted?

Under the AB Standards, unless otherwise agreed subcontracting is permitted to the extent that it is common or natural to delegate the work. This will very often be the case.

Most sub-contractor agreements are currently based on AB 92 or AB 18 and are often drafted to ensure back-to-back terms (that are the same as the terms of the main/turnkey contract).

12. How are projects typically financed?

Public projects are for the most part financed by tax revenue, but can also be financed in other ways. The first phase of the Copenhagen Metro was partly financed by the sale of land, and the next phase of the metro was partly financed by operating income from the existing metro line as well as sale of land.

In case of public-private partnerships (PPP), the project can – if not financed by loans from banks or financial institutions – be financed directly by the private supplier. This could be a pension fund investing in alternatives to stocks and bonds due to the current low interest environment.

Private projects are typically financed by mortgages or loans from banks or other financial institutes.

13. What kind of security is available for employers, e.g. performance bonds, advance payment bonds, parent company guarantees? How long are these typically held for?

Under AB 18 and ABT 18, a contractor must provide a performance bond within 8 working days from entering into the contract, unless the agreed contract price is less than DKK 1 million. The amount of the performance bond must equal 15% of the contract price (exclusive of VAT).

At the time of the hand-over of the work, the performance bond is reduced to an amount equal to 10% of the contract price (including any changes to the scope of work). One year after the hand-over, the performance bond is reduced to 2% of the contract price, and five years after the hand-over, the guarantee expires (in both cases only if the employer has not made claims for defects, in which case the performance bond will be reduced/expire

when such defects have been rectified).

Contractors are usually paid for the work (already) performed, however, where a contractor is entitled to advance payments for materials not yet delivered on site, the employer will be entitled to an advance payment bond.

Parent company guarantees are not common but may be required in some cases. If requirements for financial solidity of a contractor are included in a tender, such requirements can sometimes be met by issuing a parent company guarantee.

14. Is there any specific legislation relating to payment in the industry?

The parties are, in accordance with the freedom of contract principle, generally free to agree on the terms they wish.

However, under the Danish Interest Act, the agreed payment period between two businesses or a business and a public authority can generally not be more than 30 days. Other payment terms that are deemed unreasonable by a Danish court or an arbitration tribunal can also be set aside, but this would be unusual between professional parties.

15. Are pay-when-paid clauses (i.e clauses permitting payment to be made by a contractor only when it has been paid by the employer) permitted? Are they commonly used?

Pay-when-paid clauses are not uncommon in Danish construction contracts.

In a ruling from 2015, an arbitration tribunal found, in a dispute between a main contractor and a sub-contractor regarding a claim for additional work that it was irrelevant that the contract contained a clause stating that claims for additional work would only be honoured to the extent that the employer paid and accepted the claim.

It cannot be concluded that "pay-when-paid" clauses are generally void, as the specific circumstances of the case are not described in detail in the case summary, and it is not clear why the arbitration tribunal found the clause irrelevant, but "pay-when-paid" may be disregarded as unreasonable.

16. Do your contracts contain retention provisions and, if so, how do they operate?

Unless a specific payment plan has been agreed upon, AB 18/ABT 18 states that the contractor is entitled to receive payment twice a month for work performed, upon written request to the employer.

If the contractor has not performed as agreed the employer is only obligated to pay for the work actually performed and may withhold payment for the unperformed work. The employer can also retain a reasonable amount as security until identified defects have been rectified.

17. Do contracts commonly contain delay liquidated damages provisions and are these upheld by the courts?

Most construction contracts in Denmark include delay liquidated damages provisions. The AB Standards state that no additional claims arising out of the delay can be made in excess of any agreed liquidated damages. If liquidated damages have not been agreed upon, damages will be calculated in accordance with general principles of tort.

The courts and arbitration tribunals in Denmark generally uphold provisions on liquidated damages, provided that the employer has notified the contractor of the delay (within a reasonable time after the employer became aware of it) and that liquidated damages will be claimed from a specific point of time as a result thereof. The employer must also on an ongoing basis register and notify the contractor of the duration of the delay. Under some circumstances, stricter conditions for claiming liquidated damages apply.

18. Are the parties able to exclude or limit liability?

In accordance with the freedom of contract principle, the parties are generally free to exclude or limit liability. However, liability caused by wilful misconduct cannot be excluded or limited, and a court or arbitration tribunal may set aside an agreed exclusion or limitation of liability due to gross negligence.

The AB Standards state that the contractor is not liable for consequential damage, operational loss, loss of profit or other indirect loss suffered due to defects in the work. Liability for consultancy work is limited further in ABR18, and product liability for contractors is limited to the

amount insured in the product liability insurance.

19. Are there any restrictions on termination? Can parties terminate for convenience? Force majeure?

Construction contracts cannot be terminated for convenience unless the parties have agreed to this in the contract. Under the AB Standards, the employer is entitled to reduce the scope of work, but must then compensate the contractor for lost profits and other losses.

The AB Standards do not mention termination due to force majeure, but in accordance with general principles of contract law, force majeure can, in some cases, give rise to relief.

Under the AB Standards, termination for default is restricted to cases of severe breach, such as material delay that causes considerable inconvenience to the employer, quality of work that gives the employer reason to believe that the contractor will not be able to complete the work without material defects, and material delay caused by an employer who does not make reasonable efforts to fully expedite the work.

When assessing whether a contract can be terminated or not, importance is not only attached to the severity of the breach, but also to the consequences of the breach. For example, it is easier to terminate a construction contract if the work has not commenced than if the construction work is at an advanced stage.

In order to terminate a construction contract for default the party terminating the contract must have notified the other party of the breach prior to termination and provided the other party with reasonable time to try to rectify the breach.

Without previous notice, a termination will usually be deemed unwarranted.

In addition to the above cases of breach of contract, the AB Standards also include provisions allowing a party to terminate a construction contract due to bankruptcy, suspension of payments, etc.

However, in some of these situations mandatory provisions in the Danish Bankruptcy Act may prevent termination of the contract.

20. What rights are commonly granted to third

parties (e.g. funders, purchasers, renters) and, if so, how is this achieved?

Rights are generally not granted to third parties in Danish construction contracts.

The AB Standards state that if a claim for defects cannot be made against the contractor or consultant (or it involves great difficulties) the employer is entitled to make the claim directly against the contractor's sub-contractors or consultant's sub-consultants.

Claims made directly against sub-contractors and sub-consultants are, provided that the AB Standards have been agreed upon, subject to any limitation of liability clause in the main contract and in the sub-contract.

21. Do contracts typically contain strict provisions governing notices of claims for additional time and money which act as conditions precedent to bringing claims? Does your jurisdiction recognise such notices as conditions precedent?

The AB Standards include several provisions stating that a party must give notice to the other party. In most cases such provisions are construed as setting out rules as to the burden of proof.

However, there are some situations where a failure to give notice results in claims being forfeited: when the employer can claim damages for delay (liquidated damages), and when after receiving requests from the employer the contractor fails to submit a final account (in which case some types of claims are forfeited).

If the contractor submits a final account, but forgets to include a legitimate claim, such claim will usually also be forfeited.

Claims for defects must also be made within the agreed deadlines.

22. What insurances are the parties required to hold? And how long for?

Under AB 18 /ABT 18, the employer must take out insurance that covers damage due to fire and storms with an insurance period from the commencement of the work and until the time when all defects discovered at the hand-over have been rectified.

The employer may choose an all-risk insurance instead.

The contractor must take out statutory liability and product liability insurance. The consultant must take out usual professional liability insurance.

Furthermore, any company with employees must obtain statutory industrial injuries insurance.

23. How are construction and engineering disputes typically resolved in your jurisdiction (e.g. arbitration, litigation, adjudication)? What alternatives are available?

Within the Danish construction industry, a large majority of disputes (that are not settled amicably) are settled by arbitration.

Except for AB-Consumers, all of the AB Standards state that disputes are to be finally settled by an arbitration tribunal appointed by the Danish Building and Construction Arbitration Board, and the decisions made by such tribunals are final.

If the parties have not agreed on an AB Standard, or if the arbitration agreement therein has been deviated from, disputes will be settled by the Danish courts.

With the 2018 update of the AB Standards, the dispute resolution clauses were thoroughly updated. In the updated standards, the parties are required to attempt to settle the dispute by negotiation (first between project managers and then between management representatives) before initiating any other dispute resolution measures.

It may be requested that some types of disputes (that cannot be settled amicably) be settled by an umpire (adjudicator) to effect a speedy resolution. Only some types of disputes can be brought before the umpire, unless the dispute concerns claims with a value of less than DKK 200,000, and the parties must first have attempted to settle the dispute by negotiation. The decisions made by the umpire are binding, but can be brought before an arbitration tribunal.

Mediation is expected to be used more frequently than before. If a party requests mediation the other party is obliged to participate, and an arbitration cannot be initiated while the mediation process is pending.

Both in case of disputes and in order to establish proof of a matter, a party may request the Danish Building and Construction Arbitration Board or the Danish courts to appoint an expert appraiser to provide a technical assessment.

The expert appraiser can inspect the work, register his/her findings ("inspection") and make a technical assessment based on his/her inspections ("survey"). It is not the expert's task to express his/her opinion on legal matters.

After having received the expert appraiser's assessment, it is often possible to reach an out-of-court settlement. However, the expert's assessment is not binding on the parties.

24. How supportive are the local courts of arbitration (domestic and international)? How long does it typically take to enforce an award?

Arbitration awards are generally recognized and enforced by the ordinary court system. An award can be enforced after 14 days.

Denmark is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958. Foreign arbitration awards can usually be enforced in Denmark.

25. Are there any limitation periods for commencing disputes in your jurisdiction?

According to the Danish Limitations Act, the general limitation period is three years calculated from the first day on which the claim holder could demand that his/her claim be fulfilled.

If the claim holder was not aware of the claim, e.g. due to latent defects that only later materialized, the three-year limitation period is calculated from the day the claim holder became or should have become aware of the claim.

However, irrespective of any lack of knowledge, the claim will be statute-barred 10 years after the first day on which the claim holder could demand that the claim be fulfilled, unless the statute of limitation is suspended before that time.

The limitation period is suspended when the claim holder takes legal action against the debtor. It can also be suspended under certain other circumstances.

Regarding claims due to defects, the AB Standards contain deadlines for notification. The contractor and/or the consultant must be notified within a reasonable time after the employer knew or should have known about the defect, and no later than five years after the hand-over or the employer will forfeit the claim.

26. How common are multi-party disputes? How is liability apportioned between multiple defendants? Does your jurisdiction recognise net contribution clauses (which limit the liability of a defaulting party to a “fair and reasonable” proportion of the innocent party’s losses), and are these commonly used?

Multi-party disputes are very common in Denmark, as arbitration agreements are part of all the AB Standards (except for AB-Consumers), and the AB Standards allow for defendants to have their other contracting parties (sub-consultants, sub-contractors and suppliers) joined as parties to the arbitration proceedings.

An employer can also decide to take legal action against more than one party under the same arbitration proceedings, e.g. if it is unclear whether a defect is caused by design work, construction work or both.

If two or more parties are found liable for a loss, they will be jointly and severally liable to the claim holder, unless otherwise agreed. Under ABR 18, the consultant’s liability for losses in some situations is limited to the proportion of the loss that has been caused by the consultant (pro rata liability).

The apportionment of liability between two or more liable parties is for the arbitrators to decide. Arbitration tribunals in Denmark are known for being pragmatic, and the liability will typically be apportioned based on the degree of negligence and other specific circumstances.

27. What are the biggest challenges and opportunities facing the construction sector in your jurisdiction?

The Danish construction sector faces uncertain times. New construction projects have been decreasing in number, and there has been an increase in bankruptcies. Rising material costs due to supply chain difficulties and rising interest rates are some of the causes of the slowdown in the market.

However, for several materials, prices now seem to be falling again (although the prices are still higher than a few years ago), and if this trend continues, there could be an uptick in new construction projects.

The Russian invasion of Ukraine and the increase in energy and utility costs have boosted interest in energy supply and energy saving solutions. This may offer opportunities in the construction sector, including more

renovation projects.

New regulation effective from the beginning of 2023 requires that the environmental impact of new construction projects over a lifespan of 50 years must be documented through a Life Cycle Assessment (LCA) calculation. For new buildings over 1000 square metres, a threshold value of 12 kg CO2 equivalent per square metre per year applies.

28. What types of project are currently attracting the most investment in your jurisdiction (e.g. infrastructure, power, commercial property, offshore)?

The Danish Government invests heavily in infrastructure such as metro and bridges. The public healthcare sector has also attracted significant investments, as several hospitals are being renovated or re-built.

The larger cities have seen a great population growth and urbanisation in recent years and there is a severe housing shortage, causing increasing prices. It has been proposed to create more than 500 hectares of new land in and near Copenhagen.

Finally, even more speculative investments as office space and warehouses seem to be attracting attention from investors.

29. How do you envisage technology affecting the construction and engineering industry in your jurisdiction over the next five years?

The Danish construction industry has not moved in the same pace as other manufacturing industries when it comes to technology and digitalization. However, an increased focus on sophisticated 3D models for design work (such as BIM (Building Information Modelling) and VDC (Virtual Design)) seems to be a tendency that will affect the industry with the purpose of increasing productivity and efficiency in the construction industry. These models will be further elaborated with 4D/5D, which allows a dimension of time and economy in the modelling.

This development should provide a greater insight and form the basis for innovation and new solutions.

30. What do you anticipate to be the impact from ongoing supply chain issues and the escalation

of material costs over the coming year?

The supply chain issues and the escalation of material costs have resulted in a decreasing number of new construction projects and have contributed to an increase in bankruptcies, causing a slowdown in the market.

However, for several materials, prices now seem to be falling again (although the prices are still higher than a few years ago), and if this trend continues, we expect there to be an uptick in new construction projects over the coming years.

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