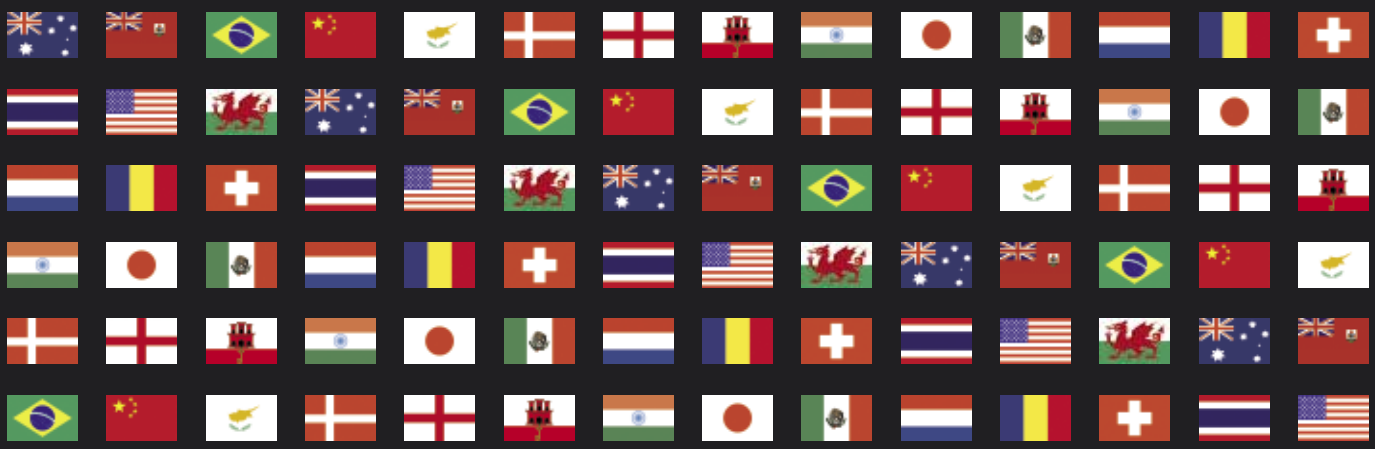
Complex Commercial Litigation 2022

Contributing editor
Simon Bushell



LEXOLOGY
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2017
Fifth edition
ISBN 978-1-83862-637-2

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Complex Commercial Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil, India and the United States.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Simon Bushell of Seladore Legal, for his continued assistance with this volume.

LEXOLOGY®
Getting The Deal Through

London
September 2021

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Denmark

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THOMSEN-FONAGER Advokatfirma

BACKGROUND

Frequency of use

1 | How common is commercial litigation as a method of resolving high-value, complex disputes?

Commercial litigation is a method commonly used to resolve high-value, complex disputes in Denmark. That said, commercial arbitration is also common as a method of resolving such cases. It is not, however, possible to assess which method is more commonly used, as no official statistics exist on the number of litigation cases filed, and because it is not possible to deduce the number of high-value, complex litigation cases from the total number of civil litigation cases filed in Denmark. In the first three months (Q1) of 2021, the Danish district courts received a total of 11,478 civil litigation cases and had a total of 25,696 pending civil litigation cases.

Litigation market

2 | Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

International parties doing business in Denmark often structure their business activities around Danish limited liability companies. As such, international parties are, by means of such a structure, indirectly subject to litigation before the Danish courts to the same extent as other Danish companies. However, international parties also become subject to Danish litigation just by doing business in Denmark, regardless of the structure chosen for such business, as the business activity in itself can establish Danish jurisdiction.

The litigation system in Denmark is well-functioning, and Danish judges are known to be highly professional, impartial and legally qualified. As such, Denmark has a well-established reputation on the rule of law.

In that regard, Denmark ranked number one out of the 126 countries included in the WJL global Rule of Law Index in 2020, and Denmark's civil courts ranked number one in the EU when assessing the perceived independence of the civil courts in the latest EU Justice Scoreboard for 2020.

Legal framework

3 | What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Denmark is subject to what in academic views has been called Scandinavian law, which cannot be described as either civil code or common law. As such, the Danish jurisdiction is a combination of the two, but bears the most resemblance to civil code. Thus, Danish courts render their rulings primarily on statutory law and legal principles combined with the purpose of such statutes and case law. Therefore, case law plays a significant role in Denmark as it sets out interpretation principles for statutes and, consequently, determines how the statutes shall be interpreted.

Understanding the Danish courts' approach to resolving legal disputes is essential when assessing the risks and possibilities related to Danish litigation, since Danish courts will try to infer the intention of the parties (based on the complete material provided by the parties, including witness statements, etc) and make a ruling based on 'the bigger picture' and, hence, take more than the wording of the parties' documents and the relevant statutes into consideration. Consequently, lengthy and exhaustive agreements are not common in Denmark, and entire agreement clauses stating that only the wording of an agreement (or a group of agreements) shall be taken into consideration in the case of a dispute between the contracting parties are not automatically upheld in Denmark.

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

4 | What key issues should a party consider before bringing a claim?

A party should always consider its legal position and assess the possible (and likely) outcome of a litigation case before bringing a claim, simply because the legal costs of bringing a claim – especially if the court ultimately rules in favour of the defendant – can be significant, although it should be noted that legal costs in Denmark are considerably lower than in many other jurisdictions.

Establishing jurisdiction

5 | How is jurisdiction established?

Jurisdiction in Denmark can be established on the basis of the Danish Administration of Justice Act, European regulations, or other international conventions or treaties.

Danish jurisdiction is generally established by the Administration of Justice Act, which decides on both the subject matter jurisdiction (ie, the competency of the court to hear and determine a particular category of cases) and the territorial jurisdiction.

If it is possible to choose between different territorial jurisdictions according to the Act, a claimant can decide which territorial jurisdiction shall be chosen.

When a dispute involves international parties, and the defendant is domiciled within the EU (ie, in an EU member state), the jurisdiction is decided by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and

the recognition and enforcement of judgments in civil and commercial matters (Regulation 1215/2012). According to Regulation 1215/2012, the main rule is that claims must be brought against a defendant in the EU member state where the defendant is domiciled. However, the main rule is deviated from in a number of situations, including but not limited to the following:

- in matters relating to a contract, a claim can be brought against a defendant before the courts at the place of performance of the obligation in question;
- in matters relating to tort, delict or quasi-delict, a claim can be brought before the courts at the place where the harmful event occurred or may occur; and
- in matters relating to claims brought by a consumer against a party in another EU member state, the consumer can bring the claim before the courts where the consumer is domiciled.

Preclusion

6 | Res judicata: is preclusion applicable, and if so how?

Res judicata is applicable in Denmark. Consequently, Danish courts will preclude a claim brought before the courts in cases (1) where a final judgment (not subject to appeal) has been rendered regarding the same claim, or (2) where a final judgment (not subject to appeal) has already been rendered between the same parties and the claim covered by the final judgment is partially the same as the new claim or is based on the same legal foundation as the new claim; and the new claim should and could have been brought by the claimant in connection with the claim covered by the final judgment.

If a claim brought before the Danish courts is precluded, this will lead to the dismissal of the claim (and the whole case if the claim in question is the only claim comprising the case).

Applicability of foreign laws

7 | In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

In some cases, Danish courts must apply foreign law. This can be the case if the parties have agreed on the applicable law (without having agreed on jurisdiction in the same country) or if the character of the dispute leads to a governing law that is different from Danish law.

If the parties have not agreed on the law governing a specific dispute, the most important regulation when determining the governing law is Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I Convention) and Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II Convention).

When a Danish court decides on the applicable law governing a specific dispute – ie, when the parties are not in agreement – the court will interpret the parties' contract documents and the nature of the dispute in light of the Rome I and Rome II Conventions to determine the applicable law. If the governing law is foreign, a Danish court will not interpret the foreign law but will consider the relevant foreign law as a production of evidence by the parties that the court will assess in accordance with the legal principle of free evaluation of evidence. Consequently, it is common that the parties in such cases will produce legal memoranda on the relevant and applicable (foreign) law.

Foreign law will only apply to the merits of the case while procedural questions will be governed by the Administration of Justice Act.

Initial steps

8 | What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

In some situations, it is possible for a claimant to obtain an order freezing a defendant's assets.

In most cases, the claimant will assess the defendant's financial situation prior to taking out a summons against the defendant to assess whether the claimant can reasonably expect to be able to enforce a judgment successfully. In respect of legal entities, such an assessment will often be made based on an entity's public financial reports. For natural persons, it can be difficult to establish a foundation to make such an assessment.

In that context, natural persons can make themselves judgment proof – or perhaps more correctly, collection proof. If a natural person does not possess any assets or funds to satisfy a judgment (in full or in part, or by the payment of instalments), the person concerned can, before a Danish bailiff's court in connection with the enforcement of a claim, declare to be insolvent, making him or her collection proof for a six-month period. If a legal entity declares itself to be insolvent, this will (almost) always lead to bankruptcy; the same is only rarely the case for natural persons.

Freezing assets

9 | When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

The pre-action remedy of freezing a defendant's assets in Denmark can be carried out by obtaining a precautionary attachment ruling by a Danish bailiff's court whereupon the judgment debtor is unauthorised to sell the asset or assets comprised by the precautionary attachment.

However, it is only possible to obtain such a precautionary attachment if:

- the claimant has a monetary claim (not necessarily in Danish kroner);
- the claimant cannot obtain a levy of execution (eg, because the claimant does not have a basis of enforcement or because the bailiff's court suspends the proceedings);
- the claimant can prove on a balance of probabilities that his or her claim exists; and
- the claimant can prove on a balance of probabilities that his or her possibility of receiving effective payment for the claim at a later point in time will be significantly reduced if a precautionary attachment is not delivered.

The bailiff's court can decide that the claimant must provide adequate security for the loss and disadvantage that the defendant (the judgment debtor) will suffer as a consequence of the precautionary attachment if the claimant's claim did not exist.

If the claimant obtains a precautionary attachment, he or she must file an action on the merits of the claim before the civil courts within a week after the precautionary attachment is delivered.

A claimant should consider pursuing a precautionary attachment in situations where his or her claim (in practical terms) is indisputable and where it seems likely that defendant will dispose of his or her assets before the claimant has obtained a levy of execution for the claim.

The practical implication of said rules in Denmark is, however, limited.

Pre-action conduct requirements

10 | Are there requirements for pre-action conduct and what are the consequences of non-compliance?

There are no formal steps that need to be taken prior to commencing proceedings before the Danish civil courts. However, Danish lawyers are subject to a set of rules of conduct that in certain situations may require a lawyer to notify the opposing party before filing a writ of summons with the courts.

Other interim relief

11 | What other forms of interim relief can be sought?

In Denmark, other interim relief to consider are:

- obtaining an injunction stating that a party temporarily must perform, refrain from or tolerate certain specific actions;
- taking of evidence out of court both by way of expert evaluation and by disclosure and discovery of documents; and
- preserving of evidence subject to intellectual property rights or infringement of the rules set forth in the Danish Marketing Practices Act.

Alternative dispute resolution

12 | Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

There are no requirements in Denmark for parties to engage in ADR before commencing legal proceedings. However, it is common that Danish courts at a later state in a case propose that the parties participate in a mediation process where the court will provide a mediator (ie, a conciliation process whereby a neutral third party provided by the court will function as a mediator seeking to promote communication between the parties to resolve the dispute extrajudicially).

At any point in time, all parties to a dispute are entitled to refuse engagement in mediation without such refusal having any impact on the court's hearing of the case, unless the parties have specifically agreed otherwise.

Claims against natural persons versus corporations

13 | Are there different considerations for claims against natural persons as opposed to corporations?

Formally, there are no differences between bringing claims against natural persons and corporations. However, from a practical and non-procedural law perspective, a claimant should consider the opposing party's ability to perform his or her obligations if the claimant is successful in the case. In addition, when bringing an action against a corporation, and especially when the claim is against (one of the companies in) a group of companies, the claimant should be thorough when assessing who to bring the claim against.

Class actions

14 | Are any of the considerations different for class actions, multiparty or group litigations?

Multi-party litigation is common in Denmark and can be established by initial joinder of parties or, subsequently, by third-party proceedings (also known as 'Part 20 claims' brought by or against any legal or natural person who is not already a party to the proceedings).

Class actions can also be brought before the Danish civil courts. However, the provisions on class actions are based on the fundamental principle establishing that class actions can only be brought before the Danish civil courts provided that the rules on class actions are more suitable than the other provisions on multi-party litigation.

In a class action group, the litigation process is controlled by a group representative, and the economic risk for each member of the group is limited to the provision of security demanded initially by the court (possibly with the addition of damages awarded in the case). Consequently, the economic risk is often much lower for a member of a class action group compared with a party to a case governed by the ordinary multi-party litigation provisions.

Third-party funding

15 | What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

There are no restrictions on third parties funding the costs of litigation or agreeing to pay adverse costs. While third-party funding of litigation in Denmark is rare, there are tendencies pointing towards a bigger market for such cases in Denmark in future years.

However, according to the ethical standards for lawyers in Denmark there are restrictions on Danish lawyers' possibilities to conclude contingency fee agreements whereby a lawyer obtains a right (directly or implicitly) to a percentage of the recovered claim if the party is successful with the claim.

Contingency fee arrangements

16 | Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

In Denmark, lawyers cannot act on a contingency fee basis according to which they will receive a percentage of the amount recovered. However, a lawyer can act on a 'no cure no pay' basis if the lawyer's fee payable in the case of success is not calculated as a percentage of the amount recovered for the client.

As such, it can be agreed that a lawyer will not receive any fee payment if a certain criterion is not met (eg, the case is lost), and that the lawyer will only receive a fee payment if that criterion is met (eg, the case is won) on condition that the lawyer's fee is determined according to ordinary criteria (time spent, case value, etc), or the fee is a pre-fixed amount. In contrast, the fee cannot be influenced by the extent to which the criterion is met (ie, to what extent the litigation case is won, what amount was awarded or recovered).

Such (or similar) fee arrangements are only rarely seen in litigation cases.

THE CLAIM

Launching claims

17 | How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Bringing a claim in Denmark is done by filing a writ of summons comprising:

- information regarding the parties to the litigation case, including names and addresses;
- designation of the court having jurisdiction;
- the claimant's claim, including the amount of the claim (also when it is a claim for a declaration);
- a description of the case;
- a comprehensive statement of the claim (the relevant facts of the claim) and the allegations brought to support the claim;
- the relevant evidence (both documents and a list of witnesses) to support the statement of the claim; and

- the claimant's motions on litigatory matters, including, inter alia, if the case is of general public importance, and consequently should be heard by a Danish High Court as the court of first instance; if the court should be manned by more than one judge; and if the claimant wishes certain legal actions (eg, information retrieval by an expert valuation).

In Denmark, the preparation of the case is handled digitally through the Danish courts' internet-based case portal (www.minretssag.dk).

Other than the above-mentioned requirements, there are no formal requirements as to the structure or the content of a writ of summons. The burden of proof is on the party making a claim, and the Danish courts apply free assessment of the evidence provided by the parties when delivering a judgment. As such, both parties must thoroughly consider to what extent the statement of claim must be demonstrated to convince the court of the party's claim and allegations.

In complex commercial litigation cases it is common that the writ of summons (and the following pleadings) are quite comprehensive as both parties wish to illustrate the matter of the case to convince the court of each of their positions. Generally, a solid structure of the raised allegations and the produced evidence is of high importance as this will enable the court to better understand the allegations supporting the claim.

Serving claims on foreign parties

18 | How are claims served on foreign parties?

Service of judicial documents outside of Denmark is mainly based on:

- Regulation (EC) No. 1393/2007 of the European Parliament and of the Counsel of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000;
- the Hague Serving Convention of 15 November 1965; or
- the 1974 Nordic Agreement of 26 April 1974 on mutual legal assistance (between Denmark, Finland, Iceland, Norway and Sweden).

If service of judicial documents is not possible according to one of the above-mentioned agreements, the provisions in the Administration of Justice Act will apply: for example, service will be possible in accordance with the law in the country where the documents are to be served, or, on rare occasions, if the relevant authorities in such country refuse to serve the judicial document or do not comply with a request to serve the judicial documents, service can be carried out by publication in the Danish Official Gazette.

Key causes of action

19 | What are the key causes of action that typically arise in commercial litigation?

Typically, the key causes of action in complex commercial litigation are non-performance of a contract, breach of a legal condition (competition clause, exclusive distribution agreement, etc) or infringement of an intellectual property right.

Claim amendments

20 | Under what circumstances can amendments to claims be made?

During the preparation of a case before the court of first instance the parties are free to amend their claims until the close of the pretrial proceedings (usually four weeks prior to the trial hearing). After close of the pretrial proceedings, amendments to a claim are only allowed in certain situations. At a higher instance (ie, in an appeal trial) there is only limited scope for amending (or supplementing) a claim.

Remedies

21 | What remedies are available to a claimant in your jurisdiction?

Most complex litigation cases concern an obligation to pay a certain amount of money. The claim can be based on a number of different factors, including but not limited to late performance, short delivery, faulty delivery or other breaches of contract.

A claimant can also claim for a declaration, for example, stating that:

- the defendant must acknowledge a certain state under the law;
- the defendant is liable for damages;
- the claimant has ownership of a certain asset (and the defendant does not); or
- the defendant is in breach of a certain obligation (without issuing a claim for payment at this stage).

Further, the claimant can have the courts serve an enforcement notice (an injunction or a prohibition notice, or both) ordering the defendant to desist from one or more specific actions.

Recoverable damages

22 | What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

When claiming damages in Denmark for breach of contract there are, fundamentally, two legal approaches: damages for breach of contract according to which the claimant will claim to be compensated as if the defendant had performed his or her obligations according to the wording of the contract; and damages on a reliance basis according to which the claimant will claim to be compensated as if the contract had never been entered into.

Generally, the claimant can freely decide to calculate the claim according to one of the above principles. However, the claimant cannot successfully claim damages according to both principles at the same time.

Danish courts will, after having established the required legal basis of liability, award damages for ascertainable losses that are causal and adequate. Often, Danish courts award damages on a discretionary and estimated basis (in accordance with the legal principle of free evaluation of evidence), and relatively often the awarded damages are lower than what claimant had pleaded for. As such, some foreigners will find the Danish courts' approach to awarding damages moderate.

RESPONDING TO THE CLAIM

Early steps available

23 | What steps are open to a defendant in the early part of a case?

The defendant can take three steps when a writ of summons has been served and the court has set a date for the defendant to react:

- file a statement of defence on the merits of the case;
- file a statement of defence with a motion to dismiss the case for a technical fault in pleading; or
- ignore the writ of summons and the date set by the court, which will result in a judgment by default against the defendant.

When filing a statement of defence on the merits of the case, the defendant will usually oppose the points of law and fact presented by the claimant in the writ of summons.

When filing a statement of defence with a motion to dismiss the case for a technical fault in pleading, the defendant will allege, for example, that:

- the claimant does not have a sufficient cause of action;
- the parties are subject to agreed arbitration;
- the case has not been submitted to a competent court; or
- the writ of summons does not meet the requirements stipulated in the Administration of Justice Act.

Defence structure

24 | How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

Ordinarily, a statement of defence must be filed within two or four weeks, the latter in cases where the defendant is represented by a lawyer. However, it is common that an extension of the time limit is given if a defendant requests it.

There are no formal requirements regarding the structure of statements, but a statement must comprise the following:

- the defendant's claim (often acquittal or dismissal);
- the defendant's counterclaim, if any;
- a description of the case;
- a comprehensive statement of the claim (the relevant facts of the claim) and the allegations brought to support the claim;
- production of the relevant evidence (both documents and a list of witnesses) to support the defendant's claim; and
- the defendant's motions on litigatory matters, including, inter alia, if the case is of general public importance and, consequently, should be heard by the Danish High Court as the court of first instance; if the court should be manned by more than one judge; or if the claimant is seeking certain legal actions (eg, information retrieval by expert valuation).

A motion to dismiss a case for a technical fault in pleading must be submitted no later than in the statement of defence. If such a motion is delivered later in the proceedings, the motion will be dismissed.

Changing defence

25 | Under what circumstances may a defendant change a defence at a later stage in the proceedings?

The only special rule is a defendant's motion to dismiss a case for a technical fault in pleading, which must be submitted with the statement of defence and cannot be submitted at a later point in time.

Sharing liability

26 | How can a defendant establish the passing on or sharing of liability?

If a defendant is of the opinion that a third party, fully or partially, is liable for the claim brought by the claimant, the defendant can issue a third-party notice against such third party arguing that the third party, fully or partially, shall hold harmless and indemnify the defendant in the event the defendant loses the case brought by the claimant.

A third-party notice is comparable to a statement of claim, and the defendant will, with reference to a third party, be a third-party claimant. As such, when the defendant files a third-party notice, the defendant must comply with the same provisions as a claimant filing a statement of claim.

Such a third-party notice should be filed at the soonest possible moment, as the notice can be dismissed if the claimant raises objections towards the notice, and if the court assesses that the third-party notice could and should have been filed at an earlier point in time.

Avoiding trial

27 | How can a defendant avoid trial?

In almost any dispute, if the conditions are right the parties are interested in finding an amicable solution that could result in a settlement agreement. Settlement agreements are binding, and intrajudicial measures are not needed for a settlement agreement to be binding. If a claimant's claim is a monetary claim, the parties will ordinarily agree that the settlement agreement is enforceable and, consequently, ensure that a trial regarding the existence of the claim is avoided if the settlement amount is not paid in accordance with the settlement agreement.

Sometimes the parties agree on participating in a mediation process, which can lead to a settlement agreement preventing a trial.

When proceedings are initiated by the claimant, the defendant can acknowledge and admit the claim brought by the claimant. Thus, the court will deliver a judgment in accordance with the brought claim. Often, the legal costs imposed by the court in these cases are limited. The same result can be obtained if the defendant does not submit a statement of defence.

Case of no defence

28 | What happens in the case of a no-show or if no defence is offered?

If a defendant does not observe the time limit set by the court to file a statement of defence, the court will deliver a judgment by default in favour of the claimant. As a general rule, the court will not assess whether a claimant's claim is justified. The only significant question is whether the statement of claim has been lawfully served on the defendant in accordance with the provisions set out in the Administration of Justice Act.

The same rule will apply if the defendant (and the defendant's representative) does not appear at the trial hearing.

Claiming security

29 | Can a defendant claim security for costs? If so, what form of security can be provided?

Generally, defendants will not be successful in claiming security of costs in Denmark.

However, a defendant can claim security for costs if the claimant is domiciled outside the European Economic Area (EEA), unless the claimant is domiciled in a country where a Danish claimant bringing a claim according to a treaty would be exempted from providing security of costs.

In cases where the claimant is an association established with the sole purpose of bringing a claim to the courts, the court can, if requested by the defendant, rule that the association must provide security for costs.

Further, in cases where a party has demonstrably delayed or is delaying the case preparations, the defendant can claim security for costs. The possibility of obtaining security for costs in these cases, however, is only rarely applied by the courts in Denmark.

As a main rule, security for costs is provided by depositing a fixed amount with the court or by providing a bank guarantee from a Danish bank with a good reputation.

PROGRESSING THE CASE

Typical procedural steps

30 | What is the typical sequence of procedural steps in commercial litigation in this country?

The typical sequence of procedural steps in complex commercial litigation cases is as follows:

- the claimant files a writ of summons;
- the writ of summons is served on the defendant;
- the defendant files a statement of defence;
- an interim hearing is conducted, ordinarily by phone and with the court and the lawyers representing the parties participating (not the parties themselves). The purpose of the interim hearing is to schedule the rest of the case preparation;
- submission of questions to an expert appointed by the court if requested by a party;
- submission of additional questions to the expert appointed by the court if requested by a party;
- filing of further pleadings by the parties;
- close of pleadings (normally four weeks prior to the oral hearing);
- the claimant's production of a trial bundle, if requested by the court;
- the parties' production of a bundle of authorities, if necessary;
- a trial hearing, including presentation of the case, bringing forward witnesses for them to give testimony and oral pleadings;
- the court delivering judgment (normally four to eight weeks after the trial hearing); and
- filing of an appeal if possible and desired.

Bringing in additional parties

31 | Can additional parties be brought into a case after commencement?

Yes, it is possible to bring additional parties into a case that has already commenced. As such, additional parties can be brought into the case by giving a third-party notice, by third-party intervention or by third-party amicus participation.

Third-party notice

A party to the case can bring a third party into the case by giving a third-party notice.

Third-party intervention

A third party can intervene in a pending case by filing an intervenor's petition. The requirements for such a petition to be granted are that:

- there is jurisdiction for the third party's claim in Denmark;
- the third party's claim can be processed according to the same rules of procedure as the claims comprising the pending case; and
- the third party's claim concerns the same subject matter as the claims comprising the pending case, or that the third party's claim has such a coherence with the claims comprising the pending case that the claims should be processed together.

Third-party amicus participation

Amicus participation by a third party means that the third party is granted the right within the specific limits imposed by the court to make statements and produce evidence in the proceedings. Such third party, however, is not a party to the proceedings, but can still be awarded or have legal costs imposed on him or her.

Consolidating proceedings

32 | Can proceedings be consolidated or split?

Proceedings can be both consolidated and split. In both cases it will be up to the court to decide, within the scope of the relevant sections in the Administration of Justice Act, whether proceedings are best processed if consolidated or split. That said, a consolidation of two or more separate proceedings is much more common than the split of a case.

Court decision making

33 | How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The courts will assess any produced evidence and any claim or factual allegation in accordance with the legal principle of free evaluation of evidence and, as such, the courts will at their discretion decide whether the evidence produced is sufficient. The Danish courts are known for seeking a righteous and fair result, although always with respect for the parties' autonomous management of a case; this means that the courts will assess only evidence and allegations brought forward by the parties, and nothing more.

As a general rule, the burden of proof lies with the party bringing a claim or an allegation. However, if a fact is described by a party (eg, in a pleading), the alleged fact will be considered established if it is not disputed by the counterparty even though the party does not produce any supporting evidence.

34 | How does a court decide what judgments, remedies and orders it will issue?

The court will render a judgment, a remedy or an order based on the claims brought by the parties. The court cannot go beyond the parties' claims when rendering a judgment, etc, but according to the principle that the lesser is always included in the greater (eo quod plus sit semper inest et minus), the court can give partial judgment for a brought claim.

Evidence

35 | How is witness, documentary and expert evidence dealt with?

Documentary evidence is uploaded to the Danish courts' case portal (www.minretssag.dk) during the preparation of a case and in connection with the filing of pleadings.

Witnesses are, as a general rule, heard during the trial hearing. In certain situations, however, a witness statement can be delivered in writing or orally at a preliminary hearing.

Expert evidence is most commonly provided by the use of an expert evaluation according to which an expert selected by the court will review the scene of the events in question and, on that basis and his or her professional competences, will answer questions brought by the parties in an expert report. The expert's report will be produced as evidence, and the report can be certified by the expert giving testimony during the trial hearing, when the parties are eligible to ask elaborating questions based on the report.

36 | How does the court deal with large volumes of commercial or technical evidence?

Generally, large volumes of evidence or technical evidence do not cause problems. That said, large volumes of evidence and technical

evidence always necessitate great endeavours by the parties (and their lawyers) to ensure that the evidence is presented in a structured way, and put in its right context, to enable the court to process and evaluate that evidence expediently.

37 Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Voluntary witness testimonies of foreigners can often be given by video conference, enabling foreign witnesses to avoid travelling (and saving the party bringing forward the witness from including the travelling expenses as part of the witness compensation).

In cases where a witness opposes, that question must be answered by looking at the relevant treaty or convention that Denmark has concluded with the country where the foreign witness is living. The most relevant regulations are:

- Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters;
- Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention); and
- the Danish law on the Nordic duty to give evidence (which came into force as a result of Nordic Council Recommendation No. 17 of 1968). The law applies to persons residing or staying in Finland, Iceland, Norway and Sweden.

As a result, in many cases it will be possible to compel a witness to give testimony in or to a Danish court even when the witness opposes. According to the same regulations, foreign courts can in many cases compel a witness in Denmark to give testimony in or to a foreign court with assistance from a Danish court.

38 How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

In Denmark, there is no testing of witness and documentary evidence before the trial hearing, and if a document is contested by the opposing party, each party must substantiate its allegations regarding the document's evidential value to its best effort.

During the trial hearing, witnesses are asked by the court to confirm their identity before giving testimony.

Cross-examination in Denmark is permitted, and both parties' lawyers will normally ask witnesses questions, beginning with the party who summoned the witness.

Time frame

39 How long do the proceedings typically last, and in what circumstances can they be expedited?

Proceedings in complex commercial litigation cases typically last between 12 and 24 months before the court of first instance, and from a practical perspective the parties only have either very limited or no possibilities to expedite the proceedings. According to official statistics, in Q1 2021 the average processing time for a regular civil proceeding overall (including cases closed by way of out-of-court settlement, etc) was 11.5 months, and for a regular civil proceeding reaching final hearing it was 19.3 months.

Gaining an advantage

40 What other steps can a party take during proceedings to achieve tactical advantage in a case?

In most cases, the possibility of achieving a tactical advantage relates to the subject matter of the proceedings.

Procedurally, the possibility of achieving a tactical advantage is limited, but a party can, inter alia, request an interim order relating to only a part of the subject matter, or summon key witnesses before the counterparty gets the chance to summon them, as the summoning party will be eligible to ask questions to these witnesses first during the trial hearing, which in some cases can be a (significant) advantage.

Impact of third-party funding

41 If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

A third party can fund the costs of the litigation and pay adverse costs. A funding third party is, however, not a party to the proceedings and, as such, this has no formal or legal impact on the case.

Impact of technology

42 What impact is technology having on complex commercial litigation in your jurisdiction?

Paperless trials are becoming more and more common, especially in commercial litigation with an extensive amount of documentation. This is in line with the digitalisation process resulting from the Danish courts' internet-based case portal (www.minretssag.dk), which has made physical papers more uncommon as all documentation, prima facie, most be produced digitally to the courts.

Further and in principle, the courts possess the technology to have witnesses or experts give testimony by video. However, this possibility is still only available as an exemption in situations of an extraordinary nature, as the courts prefer testimonies to be given in person.

Parallel proceedings

43 How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

Parallel proceedings, whether regulatory, criminal or commercial, have no formal impact on a pending commercial case. However, a pending commercial case can be put on hold while awaiting the result of parallel proceedings if requested by a party and if the court concurs with the request. This may be the case if a relevant legal position is expected to be clarified in the parallel proceedings, or if certain relevant facts of the case are expected to be clarified. Such postponement of a pending commercial case will only be granted at the court's discretion when deemed expedient.

TRIAL

Trial conduct

44 How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

The typical sequence of procedural steps in complex commercial litigation cases is as follows:

- the claimant files a writ of summons;
- the writ of summons is served on the defendant;
- the defendant files a statement of defence;

- an interim hearing is conducted, ordinarily by phone and with the court and the lawyers representing the parties participating (not the parties themselves). The purpose of the interim hearing is to schedule the rest of the case preparation;
- submission of questions to an expert appointed by the court if requested by a party;
- submission of additional questions to the expert appointed by the court if requested by a party;
- filing of further pleadings by the parties;
- close of pleadings (normally four weeks prior to the oral hearing);
- the claimant's production of a trial bundle, if requested by the court;
- the parties' production of a bundle of authorities, if necessary;
- a trial hearing, including presentation of the case, bringing forward witnesses for them to give testimony and oral pleadings;
- the court delivering judgment (normally four to eight weeks after the trial hearing); and
- filing of an appeal if possible and desired.

With regard to the length of a trial, proceedings in complex commercial litigation cases can be expected to typically last between 12 and 24 months before the court of first instance

In appeal cases, empirical analysis shows that appeals to the Danish High Courts lasted approximately 16 months in Q1 2021, and the processing time of appeals to the Danish Supreme Court in civil cases was 12.6 months. The same time perspective can typically be expected in appeals in complex commercial litigation cases.

Use of juries

45 | Are jury trials the norm, and can they be denied?

In Denmark, jury trials are not used in civil litigation cases.

Confidentiality

46 | How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

In Denmark, trial hearings in commercial litigation are public and, consequently, anyone can attend a trial hearing. Only on very rare occasions can a commercial trial be held in private, and the absolute main rule is that trial hearings in commercial cases are public.

Any person is entitled to see a court's decision if a request is made within one week after the judgment is delivered, and in many cases (but with the possibility of limiting this access), access to the full decision can be obtained if a request is made. On the other hand, however, this does not entail the public being able to obtain access to the parties' pleadings and the written evidence produced.

If sensitive commercial information needs to be protected, the party producing such evidence must consider anonymising it or redacting sensitive passages. However, if the information is vital for the court's assessment of the case and, consequently, the court needs to be made aware of these factual circumstances, very little can be done.

Media interest

47 | How is media interest dealt with? Is the media ever ordered not to report on certain information?

The media is, as other parties, allowed to attend a trial hearing if the trial is not held in private.

The media is not granted access to the parties' pleadings and the produced written evidence without the consent of the parties.

Proving claims

48 | How are monetary claims valued and proved?

The courts will assess facts and allegations in accordance with the legal principle of free evaluation. If a monetary claim is difficult to demonstrate, an intrajudicial expert opinion composed by an expert appointed by the court can in some cases constitute the necessary documentation for the claim.

In any case, the court will decide whether a monetary claim is adequately demonstrated, and if the court is in doubt, and it has decided that there is a basis for liability and that a loss has been suffered, the court will often estimate or assess the value of the claim on the basis of the produced evidence and allegations brought by the parties. However, the court will often be conservative when making such estimation or assessment for the value of the claim.

POST-TRIAL

Costs

49 | How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

In most cases, Danish courts will award costs according to a scale composed by the presidents of the Danish High Courts on the basis of the amount of a claim. Generally, a party will not receive full compensation for legal costs, whereas other actual expenses defrayed as a direct result of the proceedings (eg, court fees) will normally be compensated in full.

The length of judgments in complex commercial cases can vary from single-digit pages to hundreds of pages. The structure of a judgment ordinarily is as follows:

- statement of claims;
- statement of the facts;
- statement of testimonies given by the parties and witnesses;
- statement of the parties' allegations; and
- the court's reasoning and result

Appeals

50 | When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

All judgments rendered by a Danish court of first instance can be appealed if the monetary value of a claim is at least 20,000 Danish kroner. Cases where the monetary value of a claim is lower can only be appealed if permission to appeal is obtained from the Danish Appeals Permission Board.

Appeals against court of appeal decisions – that is, appeals to third instance of High Court judgments to the Supreme Court – can only be obtained in cases of general public importance and must be granted by the Danish Appeals Permission Board.

Appeals to the High Courts lasted approximately 16 months in Q1 2021, and the processing time of appeals to the Supreme Court in civil cases was 12.6 months.

Enforceability

51 | How enforceable internationally are judgments from the courts in your jurisdiction?

Enforceability is dependent on the rules and regulations in the jurisdiction where the judgment is to be enforced. Within the European Economic Area and the European Free Trade Association, Danish judgments are recognised and can be enforced (directly and as a consequence of

parallel agreements) pursuant to Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

52 How do the courts in your jurisdiction support the process of enforcing foreign judgments?

In cases where foreign judgments are recognised and enforceable in Denmark pursuant to an international regulatory framework, the judgment will be processed by the Danish bailiff's courts, which can declare a foreign judgment enforceable and subsequently enforce it.

Before declaring a foreign judgment enforceable, the request to enforce the judgment will be served on the judgment debtor who can then raise objections concerning the enforceability (but not the subject matter and the judgment's result).

When a judgment is declared enforceable, the bailiff's court will carry out the enforcement of the judgment.

OTHER CONSIDERATIONS

Interesting features

53 Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

Overall, litigation in Denmark is characterised by the high degree of professionalism of the civil courts and a due process of law. As such, Denmark has a well-established reputation on the rule of law, and Denmark ranked number one out of the 126 countries included in the WJL global Rule of Law Index in 2020.

Further, the cost of litigating in Denmark is competitive, and compared to some jurisdictions the costs can even be considered to be low in Denmark.

Special considerations

54 Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

The Danish legal system attributes great significance to the principle that parties are always allowed to respond to evidence produced and allegations brought forward by the opposing party. Consequently, the parties are, as a main rule, allowed to fully perform their respective documentation and allegations prior to the trial hearing.

As such, and while under normal circumstances it is advisable to be thorough when preparing pleadings and to include all the relevant evidence and allegations, it is only in exceptional cases that a party will be precluded from bringing new evidence and allegations (especially in the courts of first instance) if such evidence and allegations are put forward within a reasonable time prior to the trial hearing.

Both parties must consider which arguments and facts to bring forward early in the case preparation, as there can be tactical advantages to withholding certain facts or arguments to see whether the opposing party fails to notice decisive legal or factual aspects of the case.

Jurisdictional disadvantages

55 Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

Depending on one's perspective and expectations, the following features may be considered disadvantageous:

- legal costs are only remunerated according to a scale. As such, the winning party will not receive full cost recovery from the losing party for actual legal costs incurred; and
- Danish courts often aim to infer the intention of the parties to, inter alia, a contract, and therefore may take a more active role in filling in the gaps. This may, depending on the party's home jurisdiction, be an unfamiliar feature.

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UPDATE AND TRENDS

Key developments of the past year

56 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Denmark was once again rated number one in the WJL global Rule of Law Index for 2020, and the Danish civil courts were again ranked first when the perceived independence of courts was assessed in the EU Justice Scoreboard for 2020.

In addition, since the introduction of www.minretssag.dk in 2017 and 2018, the case portal has continuously improved, and the courts are becoming more and more familiar with paperless trials where all the documentation is handled digitally. That said, most trial hearings are still handled with printed paper trial bundles.

Covid-19 is still impacting the courts' processing of claims with regard to the processing time. As such, some courts are still struggling with the piles of cases that have built up during the covid-19 shutdown. Consequently, the government is funnelling more resources to the courts to help reduce the negative impact.

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ISBN 978-1-83862-637-2