

Contractual Aspects of Arbitration Agreements in Danish Law

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1 Contractual Basis

The provision of article 7(1) of the Arbitration Act concerns the rights of the parties to settle by arbitration any existing or future disputes in a defined legal matter of a contractual or non-contractual nature. This provision is in accordance with article 7(1) of the Uncitral Model Law on International Commercial Arbitration. Article 7(1) of the Model Law on International Commercial Arbitration stipulates that all arbitration agreements must be concluded in writing. The Danish law includes no such formal requirements. The provision of article 7 may not be dispensed with by agreement – not even by agreement to arbitrate under foreign law. As such, the provision is mandatory internationally.

Through the provision, the general principles of contract law which apply to the formation of contracts are transferred to the area of arbitration. Thus, the traditional rules of contract law apply to the formation of arbitration agreements. The provision of article 7 applies to arbitration taking place both in and outside of Denmark and to arbitration in which the seat of arbitration has not yet been identified, cf. article 1(2) of the Arbitration Act. This implies that the parties have made an agreement to settle by arbitration.

In U 2013.61, a contractor had negotiated a construction contract. The developer, however, concluded a similar contract with another contractor. Consequently, the former contractor brought an action against the developer, claiming compensation for loss of profits on the basis that a binding agreement had already been made. The developer argued that the case be dismissed on the grounds that the alleged agreement on which the contractor had based his claim would have included reference to AB 92 (Danish standard-form contract), to which settlement by arbitration would apply. The Appeal Court admitted the case as it did not find that arbitration was agreed between the parties.

2 Conclusion of Separate Agreements

According to article 1(2) of the Arbitration Act, an arbitration agreement may consist of an arbitration clause included in a contract or a separate agreement. In this section, separate agreements are addressed. The term separate agreement refers to an agreement in which the arbitration agreement is the principal element. In general, an arbitration clause forms part of a larger agreement thus, this is not likely to be the most common form of arbitration.

Whether a separate agreement on arbitration has been made is governed by the general rules of contract law, which apply to the formation of contracts.¹

1 Cf. for more details Andersen, Mads Bryde, *Grundlæggende aftaleret* [Basic Contract Law], 4. Ed., Copenhagen 2013, p. 140 ff, Gomard, Bernhard, Pedersen, Hans Viggo Godsk and Ørgaard, Anders, *Almindelig kontraktsret* [General Contract Law], 5. Ed., Copenhagen 2015, p. 29 ff, Hansen, Ole & Ulfbeck, Vibe, *Lærebog i aftaleret* [Textbook of Contract Law], 2014, p. 31 ff and Madsen, Palle Bo in *Aftaler og mellemmand* [Agreements and Intermediaries]. 6. Ed., 2012, p. 31.

Thus, it is essential whether an offer has been made and whether this has been accepted in due time and in accordance with the principles of contract law. TBB 2001.412VG is an example of a case in which a separate arbitration agreement was not made. In this case, confirmation to participate in survey and valuation could not be regarded a separate arbitration agreement. The result corresponds to general contract law, which stipulates that the content of an agreement must be made clear.

In TBB 2001.412, a general contractor requested a survey and valuation report from another general contractor. Subsequently, the general contractor called in a subcontractor with the following message “I must ask you to be present and attend to your interests during the survey and valuation taking place on Tuesday 21 December 1999 at 11:00 at - - -, since this survey and valuation will be equally binding as regards the case between you as a subcontractor and my client. For good measure, I must request you to confirm your acceptance of this to me in writing - such as by signing the identical attachment, which you may then send by fax to my office - otherwise, I must file a formal complaint against you before the Court of Arbitration” (translated from Danish). The subcontractor’s confirmation was not considered confirmation that the case was to be settled by arbitration. Acceptance of arbitration cannot be implied into the confirmation.

Thus, the parties must make an explicit agreement to settle the case by arbitration. In U 1945.1060 H it was thus found that the parties had merely agreed to appoint surveyors.

U 1945.1060 H: a completed construction work gave rise to a dispute between the contractor and the developer on whether some of the claims of the contractor were justified. A lawyer suggested for the parties to settle the dispute by arbitration. In response, the developer accepted the suggested arbitrators as “my surveyors”, upon which the case “ought to come to a solution”. According to the agreement, the surveyors in question subsequently met with the parties on the premises on which the construction work had been completed. The parties also attended this meeting. Subsequently, the arbitrators made a decision. The developer refused to acknowledge the order and claimed not to have agreed to settlement by arbitration. A Supreme Court majority ruled in favour of the developer and found that an arbitration agreement had not been concluded. The Supreme Court found that the developer had not approved the proposal to settle by arbitration.

3 Subsequent Amendments to the Arbitration Agreement

3.1 General Conditions

Amendments to an arbitration agreement are ordinary legal transactions. As a point of departure, the amending agreement must therefore comply with the rules traditionally stipulated within this area. Thus, amendments must be made by way of formal agreement, inactivity or by way of either of the parties confirming the amendments through their acts or omitted acts. Amendment to an agreement implies that the arbitration agreement is no longer valid, in whole or in part. In

general, this means that one or more requirements which, according to the agreement, were subject to arbitration must now be brought before the ordinary courts. However, the amendment may also stipulate that cases must be decided by a different arbitral tribunal than originally agreed.

Amendments to the arbitration agreement may only be made on the basis of a binding agreement between the parties. This means that amendments must only be made following the acceptance of both parties. A distinction is made between two instances. In the one instance, the question of amending the agreement is generated in the communication between the parties. In the second instance, the question of amending the agreement arises by the acts of one party – typically by way of their court or arbitration attendance – proving the party's acceptance of the amendment.

The possibility for subsequent amendments being made involves a shift in the legal matter. The party against which the judicial act is brought may choose to maintain the original agreement or to take part according to the new forum. This will apply whether the judicial act takes the form of a summons or a statement of claim. This may be said to constitute inequality of contractual obligations in regard to the forum of choice.² Such inequality of contractual obligations would generally imply that the legislative period of the opportunity to speculate is shortened as much as possible, cf. the regulations stipulated in article 7 of the Danish Bankruptcy Act on the opportunities available for the bankruptcy estate to extend the contracts of the estate. Essentially, this situation corresponds to the general act of making a promise. The promisor is also bound indefinitely, while the promise is not binding on the promisee until the acceptance is brought to the promisor's knowledge. In the event that no fixed time for acceptance is stipulated, this will be determined in accordance with section 3 of the Danish Contracts Act, in which, on a par with the other rules applying to inequality of contractual obligations, a relatively short time for acceptance is fixed.

3.2 *Amendment by Declaration*

The original agreement may be amended according to the general principles of freedom of contract. This will apply irrespective of whether the original agreement contains an arbitration clause. Similarly, on the conclusion of a new agreement, an agreed arbitration clause may be dispensed with. In the event that one party disputes the existence of a binding arbitration agreement, this must also apply. This party will be bound by such declaration. Subsequently, the party cannot successfully invoke the arbitration agreement during subsequent legal proceedings.

As a general rule, a party cannot be obliged to settle a dispute by arbitration on the grounds of inactivity. Therefore, if a party incorporates additional terms after the agreement has been concluded – typically an order confirmation – the other party will generally have no duty to complain. This is in accordance with the general provision of inactivity being non-binding. However, as with other

² Cf. *Jespersen, Halfdan Krag*, T:BB1998.12.

areas, acquiescence may take effect where one party has produced a situation causing for the other party to believe that an agreement has been made.

Contractual binding effect may occur as a result of the correspondence which generally precedes the legal proceedings of a case. In this event, the lawyers of the parties will typically compete in presenting the legal position of their principal as convincingly as possible. In some cases, however, they seem to disregard the existence of an arbitration clause which the party wishes to retain or an arbitration clause to which the party wishes to oppose. It may be an issue whether this arbitration agreement may be considered dispensed with by agreement, such as when it is stated that a request may be sent for waiver of service and notice or that the writ of summons is to be taken to court. Conversely, the arbitration may be considered accepted in the event that a statement is made on the presentation of a statement claim or on the statement of claim being calmly awaited. In U 2011.3246, one party had not waived arbitration by failing to respond to an email correspondence in which the opposing counsel referred to taking legal action. Cf. the similar case T:BB 2009.506/2, during which, in spite of an arbitration clause in a rental agreement, the parties had entered into a suspension agreement to bring a case before a rent tribunal - i.e. traditional court proceedings. Thus, the parties were not found to have departed from the agreement that any disputes must be settled by arbitration.

The basic question is in what instance a statement or other conduct may be deemed binding. We must assume that, in accordance with general regulations, the parties are bound by their statements. In general, the parties are not bound by their inactivity, however.

This is illustrated in the following. A raises a claim against B; the latter objects to this claim. B declares that A must issue a writ of summons or file a statement of claim against B. In a situation such as this, A is entitled to take legal action as specified by B, regardless of whether this is in accordance with that which was originally agreed between the parties. The reason for this is that, in accordance with the general principles (Danish Contracts Act, section 1), B is bound by his statements; however, see KFE 2001.17 (T:BB 2000.256). In a different situation, A announces his intentions to issue a writ of summons against B. The parties have made an agreement to settle by arbitration. In this case, B is not obligated to inform A of the existence of the arbitration clause, which B intends to invoke. However, B might need to refrain from communicating too much in order to avoid a situation in which his acceptance is presupposed, causing the situation to become similar to that of the first example.

Settlement by arbitration presupposes the existence of a dispute. Therefore, one particular question may arise if one party is not fully aware of the existence of a dispute. If a demand is not disputed, the party having issued this demand has no cause for initiating arbitration proceedings. In general, the inability to pay is assumed to be the cause for the non-payment of an issued demand, and therefore collection proceedings with no element of dispute are commenced. Thus, due to the lack of response, the party issuing the demand is unaware of any objections to the demand. If this is the case, the initiation of legal proceedings is justified, and the defendant cannot reject such legal proceedings with reference to the

arbitration clause, cf. U 1955.282 H. Conversely, if objections are not made until after the legal proceedings have been initiated, the defendant is entitled to initiate arbitration proceedings and thus terminate the proceedings commenced in court. Again, this may be justified by the aforementioned ancillary obligation between the parties. Thus, inactivity may be said to have a binding effect in this particular case.

3.3 *Amendment by Conduct*

We now pose the question as to when a party, through acts or omitted acts, may be said to have accepted that the arbitration agreement be waived. This issue is not covered by the Arbitration Act; thus, general contract law governs this. The party in question will typically enter an appearance and assert a claim on the merits of the case, and thus not a claim for dismissal. Thereby the chance exists for the defendant's participation in the case being interpreted as an acceptance of the court constituting the appropriate forum; cf. U 1995.343, in which the defendant took too long to raise a claim for dismissal and instead made detailed comments on the topics submitted for survey and evaluation; thus, the party was found to have waived the right to arbitrate as regards the substance of the case.

An assessment of this must take as its point of departure the application of general contractual effect. Thus, if action is taken which may be interpreted as the acceptance of the court, the arbitration agreement may be considered waived. If the party has entered an appearance before the court, naturally, this may be perceived as tacit acceptance of the termination of the arbitration agreement. Therefore, as a general rule, any participation in the process must imply tacit consent to derogate from the arbitration clause. Since the defendant must make formal objections at the initial stage of the process, the result may also be justified by civil procedure rules.

Procedural steps produce the contractual effect. Such steps may be active. Thus, if proceedings are brought before the court, the defendant is considered to have waived the right to settle by arbitration. Other procedural steps may be submission of pleadings, responding to the request for further information, participation in the preparation of the themes submitted for survey and evaluation or attendance in the process of survey and evaluation. These may also include inactivity as regards the procedural acts of the other party. When no objections have been made to the arbitration clause for an extended period, this may become relevant. In practice, a combination of several factors may apply. In U 2002.681, large claims were made. Thus, the High Court found that the counsel for the defendant having waived service and notice and having filed a draft defence statement did not constitute grounds for the arbitration clause being waived. In U 2006.3167 H, a guarantor did not object to part of the claim being settled in court and had thus lost the right to settle by arbitration.

The scope of this derogation from the arbitration clause may be questioned. The derogation may be considered an overall termination of the arbitration agreement, or the arbitration agreement may be considered to have been

cancelled only as regards the dispute in question. By their participation in the proceedings, it seems fair to assume that the party did not wish to change the basic agreement. Therefore, it must be assumed that the agreement still remains effective and that any future disputes between the parties must be settled by arbitration. Thus, this corresponds to the similar issue of arbitration proceedings being initiated without any contractual indemnity.

When a party fails to perform their obligations in accordance with the arbitration agreement, this may be considered a waiver of arbitration. The party may, for example, fail to appoint an arbitrator in due time or fail to give security. In this case, the opponent would be entitled to consider the arbitration agreement terminated and initiate legal proceedings. This may also be applicable in the event that one of the parties otherwise seeks to delay the case.

The agreement to settle by arbitration may be established on the grounds of other operative facts. Such agreement may be established if the parties are involved in the arbitration proceedings. If one party is not aware of their participation in arbitration proceedings, such participation does not automatically imply that an agreement to settle by arbitration is established. In general, all parties must be given clear notice of their involvement in arbitration proceedings; therefore, the burden is on the party having not been aware of the existence of such proceedings to prove this. In U 1945.1060 H, the Supreme Court found that one party believed to be attending a meeting with surveyors.³

U 1945.1060 H: A completed construction work gave rise to a dispute between the contractor and the developer on whether some of the claims of the contractor were justified. A lawyer suggested for the parties to settle the dispute by arbitration. In response, the developer accepted the suggested arbitrators as “my surveyors”, upon which the case “ought to come to a solution”. According to the agreement, the surveyors in question subsequently met with the parties on the premises on which the construction work had been completed. The parties also attended this meeting. Subsequently, the arbitrators made an order. The developer refused to acknowledge the order and claimed not to have agreed to settlement by arbitration. A Supreme Court majority ruled in favour of the developer and found that an arbitration agreement had not been concluded. The Supreme Court found that the developer had not approved the proposal to settle by arbitration. Moreover, the Supreme Court found that the manner in which the meeting was held could not have caused for the developer to believe that this was an arbitration meeting.

4 Disputes Covered by the Agreement

Article 7(1) of the Arbitration Act establishes that the parties may agree to settle by arbitration existing or future disputes in a defined legal matter of a contractual or non-contractual nature. Thus, the validity of the arbitration

³ This decision is also referred to in section 2 above.

agreement presupposes its restriction to a defined legal matter. In article 7(1), “of a contractual or non-contractual nature” mainly refers to international applications of the Arbitration Act.

The provision thus provides a broad legal basis for any dispute arising from a specific matter relating to contract being governed by the arbitration clause. In most cases, the arbitration clause may include that “any dispute arising out of” or “in connection” with the matter relating to contract is subject to the arbitration clause. This means that disputes concerning powers relating to remedies according to traditional contractual law are covered by the clause. Disputes regarding termination, lien, right of stoppage in transit, proportionate reduction and damages would thus be covered.

The parties involved in case U 2007.1378, a Danish company as charterer and a German shipping company as carrier, had signed a contract of carriage. According to this contract, all disputes arising out of or in connection with the contract of carriage or its validity were to be settled by arbitration in London in accordance with English law. Upon the carrier having exercised a lien, the goods were released when a bailiff established that a lien could not be lawfully exercised. Subsequently, the charterer brought an action against the carrier and made a claim for compensation for the unjustified detention. On the grounds that such claim was not covered by the arbitration agreement, the charterer put forward a rather vague view that the claim for compensation was a non-contractual claim, which was not covered by the Merchant Shipping Act. Since it was clear that the dispute arose out of the contract of carriage, the court ruled against the charterer, and the County Court and Appeal Court both rejected the case. See also case U 2008.1348, in which the issue regarding the dismissal of a Danish folk high school staff member was reasonably justified by matters relating to the school or to the dismissed staff member. This was to be settled by arbitration. Cf. the similar case U 1997.751 H in which a pig farmer made a claim for compensation for a sales ban imposed due to an outbreak of disease in the pigs. This claim for compensation was subject to the arbitration clause between the parties.

The decision made in U 1986.318 H, however, does not correspond to this. According to an executive service agreement, any disputes related to the understanding and interpretation of the agreement could not be brought before the ordinary courts, and were instead to be settled finally by arbitration. The Supreme Court found that the dispute was not covered by the arbitration clause. The Supreme Court found that although the justification of the claims were to be determined on the basis of the rights and obligations of the executive manager as stipulated in the contract of employment, the dispute relating to this was not covered by the arbitration clause. This decision does not make much sense.

The Supreme Court may grant access to the voting records of decisions having been made more than 20 years ago. For the preparation of this article, the Supreme Court granted permission to the examination of the voting records of case U 1986.318 H. Being granted access to such voting record requires that the names of participating judges are not revealed, that voting records are not quoted and that its content is treated with discretion. A review of the voting records of

the Supreme Court reveals the principal arguments on which the decision was based. The Supreme Court based its deliberations on legal theory on arbitration, according to which the arbitration clause covered disputes which were clearly within the scope of the clause. The applied theory was that of *Bernt Hjejle: Frivillig voldgift* [Voluntary Arbitration] p. 54 and p. 11 and *Bernhard Gomard: Voldgift i Danmark* [Arbitration in Denmark] (1979) p. 21. The Supreme Court found that the wording of the specific clause might not generally lead to the perception that the clause would cover any disputes on claims made regarding an alleged unjustified dismissal. This would be applicable even when the assessment of such claim would require the evaluation of claims resting with the executive manager as stipulated in the contract of employment. The Court took the view that only the disputes which might arise during the course of employment are clearly within the scope of the clause since, in view of their continuing cooperation, both parties are likely to wish for their disputes to be settled by arbitration in order to avoid court proceedings. As in the present case, in which the cooperation had already ceased to exist, the parties were, however, not found to share such wish. Furthermore, the Court stated that in the event of uncertainty in the interpretation of employment clauses, this must follow the general practice of interpretation in favour of the employee.

Thus, the Supreme Court largely based its decision on the fact that disputes covered by such clauses may only comprise disputes arising during the course of the employment and to some degree may rely on the interpretation of cases of doubt in favour of the employee. Today, this will be considered a restrictive interpretation of an arbitration clause. In comparison to today's general understanding, this decision may have placed a greater emphasis on the ongoing cooperation of the two parties. In U 2013.2338 H, actions for damages against two former bank employees were considered covered by an arbitration clause included in their severance agreements. This decision may allow for U 1986.318 H to go down in legal history.

For parties which have concluded several different agreements, the most practical approach would be to include identical arbitration clauses in such agreements. An arbitration clause only applies to disputes arising out of the contract in question. This means that any disputes arising from other contractual relations between the parties may not be covered by the arbitration clause. In this regard, please refer to U 2012.281 Ø. In this case, the parties had included an arbitration and governing law clause in a distribution agreement. A marketing and investment agreement had also been concluded between the same parties. Thus, any disputes relating to the latter agreement would not be covered by the arbitration clause included in the distribution agreement.

It might not always be clear whether more than one agreement has been concluded between the parties. When the parties conclude agreements to supplement the original agreement, any such supplementary agreements will also be covered by the arbitration clause. In a decision made by the High Court of Western Denmark in case TBB 2012.645, a construction contract on carpentry and bricklaying had included an arbitration agreement. At a later date, the parties concluded an oral agreement establishing that the contractor would also perform the plumbing work. During a subsequent dispute, the High Court found that the

part of the dispute relating to the plumbing work was also covered by the arbitration clause. When the matters relating to contract merely share some common features at the practical level, separating the cases is generally assumed impractical. Such separation is assumed not to have been intended by the parties when concluding the agreements. Therefore, the cases may be assumed to be collectively settled by arbitration.

The general agreement between the parties usually relates to transfer, to both parties transferring a service to the other party. Hereinafter, these services are referred to as the main service and the quid pro quo. In general, this will involve the transfer of an asset in return for payment. Disputes may arise as regards the contents of both the main service and the quid pro quo. There can be little doubt that any such dispute will be covered by the arbitration clause. However, whether or not a milk quota is included in a tenancy agreement has been a recurring issue. In a contractual context, this may be perceived as a matter of whether or not the transfer would include the produced results of that which is transferred. Two decisions made by the High Court of Western Denmark have produced contradictory outcomes. Thus, in U 2002.2336 the High Court found that a dispute in which a tenant farmer claimed the value of a milk quota was not covered by an arbitration agreement; in U 2002.870, however, the High Court established that the dispute was covered by the arbitration agreement.

As previously mentioned, it seems reasonable to qualify such dispute as relating to the content of the services of the parties. More accurately, therefore, such dispute should have been covered by the arbitration agreement in accordance with U 2002.870. In 2002.2336, in which legal proceedings were commenced, the termination of the contractual relation between the parties was presented. However, where a dispute arises from the agreement, an arbitration clause is generally not limited in time by the term of the contract; thus, this may hardly be supportive of the result.

In consequence, any dispute not arising from the contract will not be covered by the arbitration agreement either. An example of this might be a dispute on a breach of the Danish Marketing Practices Act, cf. U 2000.897 H.

5 Transfer and Repayment

The issue addressed in this section is how, according to the contract, an arbitration clause is impacted by the transfer of claims. In practice, this may take place when an arbitration clause has been concluded in a matter relating to contract between a seller and a buyer, and the seller/assignor transfers their claim on the purchase price from the buyer/debtor to an acquirer.

The first question relates to whether or not the acquirer is bound by the arbitration clause concluded between the seller and the buyer. The acquirer succeeds the position of the assignor. Therefore, the answer to our question must be that the acquirer must be bound by the arbitration clause. The second question which has been addressed repeatedly in previous case law is whether

the buyer/debtor will continue to be bound by the arbitration clause with the acquirer.

It is widely known that claims may be transferred. Thus, the holder of a claim relating to the law of obligations may transfer such claim to an acquirer. Thereby, the claim relating to property is transferred from the holder or the assignor to the acquirer. In such cases, the rights obtained by the acquirer will not go beyond those of the assignor, cf. article 27 of the Danish Debt Instruments Act (*gældsbrevsloven*). The position of the debtor in relation to the acquirer is thus identical to that of the assignor. Thus, upon the transfer, the acquirer will assume the assignor's legal status in relation to the debtor. However, specific legal provisions may allow for exceptions. The question is then whether the principle stipulated in article 27 of the Danish Debt Instruments Act may govern whether or not the other contracting party will be bound by the arbitration clause.⁴

Therefore, the point of reference is this: if the seller transfers the claim, upon having fulfilled their obligations, the arbitration clause is included in such transfer, cf. U 1986.403 and U 2002.290 H, and is binding in the new legal matter.⁵ A similar result may be found in Swedish case law in NJA 1997.866. However, if the transfer leads to changes which leave the contracting party in a less favourable position than stipulated in the arbitration clause when the contract was concluded, other conditions may be applicable.

In T:BB 2000.456, a financial institution had issued a guarantee in favour of a contractor. According to the guarantee, the financial institution is subject to financially compensate the developer in the occurrence of any alleged faults and deficiencies. The financial institution had issued a counter-guarantee as security. The contractor went bankrupt. In accordance with general rules, any claims for recovery against the contractor were subsequently vested in the bankruptcy estate. Subsequently, the bankruptcy estate and the developer were obligated to settle all unresolved disputes excluding the claim for recovery. The claim for recovery transferred the bankruptcy estate to the counter guarantor. Subsequently, the counter guarantor filed a complaint against the developer.

During this case, the developer demurred. Firstly, this claim was based on the non-existence of an arbitration agreement between the developer and the counter guarantor. This allegation must be taken as an indication that an arbitration clause cannot lawfully be transferred. This position is false, cf. the first part of this text. The second allegation brought forward was that the claim was not a contractual claim but instead a claim for restitution. The allegations of the claimant are briefly referred to in the written decision, and these were based on a "sacrifice threshold" as described in article 33 of AB 92. The nature of this dispute is clearly related to construction law; article 47(1) of AB 92 merely stipulates that any disputes arising between the parties must be settled by arbitration, thus, it is not a

4 Cf. Girsberger, Daniel and Hausmaninger, Christian (1992) 8 ARB.Int'L, 2 p. 145, however uncertain Juul, Jakob and Thommesen, Peter Fauerholdt, *Voldgiftsret* [Danish Arbitration], 2. Ed., 2008, p. 106.

5 Cf. Heuman, Lars in *Festschrift till Sveriges Advokatsamfund 1887-1987*, p. 236 ff and Heuman, Lars in *Skiljemannarätt*, 2007 p. 109 ff with additional references.

prerequisite for settlement by arbitration that the dispute is related to construction law.

The arbitral tribunal rejected the action on the grounds that the bankruptcy estate had assigned to the claimant said claim for recovery of the overall contractual relationship. Against this backdrop, the defendants were able to oppose to their arbitration agreement with the bankrupt party also being made applicable in relation to the complainant. Subsequently, the arbitral tribunal referred to the courts, should the claimant wish to establish the claim, and arbitration was thus rejected.

In T:BB 2000.456, the opinion of the arbitral tribunal seems unclear; however, it does seem fairly clear that none of the defendants' pleas for dismissal were sustained. The arbitral tribunal stated that part of the claim had been transferred. According to the law of obligations, a partial transfer can be made. However, in plain terms, the transfer may not cause undue nuisance to the debtor, which may be somewhat restricting. The claim must not, for example, be divided and transferred to ten different acquirers, thus requiring the debtor to make ten different payments instead of merely one.⁶

In T:BB 2000.456, however, paying the counter guarantor was found to be no more difficult than paying the claimant, and this interpretation would have led to an acquittal instead of a dismissal. The statement referring to only part of the dispute being transferred might relate to the dispute having been settled upon the conclusion of the agreement between the developer and the bankrupt. However, no part of the statement suggests this; furthermore, this is a substantive issue which ought not lead to dismissal. Therefore, this decision is not easily incorporated in existing law.

Contrary to this we find T:BB 1999.72. In this decision, the arbitral tribunal acknowledged that the already conducted transfer of the substantive claim had involved the intervention of the arbitration clause. The arbitral tribunal stated, however, that the intervention of this new party could not cause payment of additional legal costs to be made. This implies recognition of the principle that the transfer or severance of the claim may not leave the debtor in a less favourable position. This decision seems a convincing example of the prevailing state of the law.⁷

The general content of an arbitration agreement is reciprocal. In general, this will entail that both parties of a case are affected in the exact same manner. This implies that the principle stipulated in article 27 of the Danish Debt Instruments Act will lead to the jurisdiction clause or arbitration clause becoming binding and having an identical impact on the acquirer and the assignor; thus, the identity of the counterpart makes no difference. Essentially, the transfer, by which the debtor becomes bound by an arbitration clause with another party than initially expected, must not prejudice the position of the debtor.

6 Cf. Hagstrøm, Viggo, *Obligationsrett* [The Law of Obligations], 2. Ed., 2011, p. 860 f, Ussing, Henry, *Almindelig Del* [The Law of Obligations, General Part], 4. Ed., 1961, p. 235 f and PECL article 11:103.

7 Cf. Kristensen, Lars Hedegaard, *Studier i erhvervsfinansieringsret* [Studies in Business Finance Law], 2003, p. 70 f.

We might establish the general rule that a transfer of the agreement will not render the position of the contracting party less favourable. However, this will be subject to individual assessment. In this context, whether being bound to the acquirer or the assignor will serve to prejudice the rights of the contracting party may be the crucial factor. Since the content of the clause remains unaltered regardless of the identity of the parties being bound by it, whether or not the legal entity being bound – the assignor or the acquirer – will make a difference will be subject to comparison.

For instance, a Danish and Canadian party agree that any disputes arising between them must be settled by arbitration in Canada. In this case, the Danish party is at a disadvantage. If the claim is transferred to another Canadian party or to a Brazilian party, this will not prejudice the rights of the Danish party. The contractual relation with the assignor also stipulated settlement by arbitration in Canada. A different situation might be that of a Danish buyer and a Canadian seller concluding an agreement to settle any future disputes by arbitration in Paris. In this case, if the claim is transferred to a French acquirer, the clause is not likely to apply. This is based on the importance of neutrality in arbitration; it is considered essential that the seat of the arbitration is neutral to all parties. In the latter situation, the transfer will prejudice the rights of the debtor, who is thereby no longer likely to be bound by the arbitration clause.

This legal situation reflects the arbitration clause being particularly favourable to one party, who will now be able to settle disputes by arbitration in their home country. In such situation, the other contracting party is no longer likely to be bound by the arbitration clause. However, if no aspect of the situation serves to place the contracting party in a less favourable position on account of the transfer, the arbitration clause must be respected. In this context, the decision T:BB 2000.456 must be considered faulty. In this case, the arbitral tribunal dismissed a complaint in which part of the claim had been transferred.

Another issue relates to subrogation. This issue was addressed in U 2014.2042 H. During contract work, damage was caused to an adjoining property. The insurance company paid damages to the owner of the adjoining property. Subsequently, the insurance company brought an action against a sub-consultant. The sub-consultant claimed for the case to be dismissed with reference to the arbitration clause contained in the agreements concluded between the developer and the lead contractor and between the lead contractor and the sub-consultant. The Supreme Court stated that, in accordance with the general principles of the law of obligations, in paying damages to an injured party, a liability insurance company is subrogated to the rights of the insured (the developer) against the technical adviser, against whom the claim is made.⁸ Originally, the claim arose from a dispute relating to how the sub-contractor was solving the task and would therefore have been covered by the arbitration clause. Subsequently, the Supreme Court found that if the developer had brought a claim directly against the sub-contractor, the developer would have been bound by the arbitration clause. Subsequently, the claim was covered by the arbitration clause.

⁸ Cf. Ussing, Henry, *Enkelte kontrakter* [Individual Contracts], 2nd edition, 1946, p. 259.

The issue was already addressed in the High Court decision U 1986.403. This decision concerned a jurisdiction agreement; however, the principles of this decision must be applicable to an arbitration clause. The jurisdiction agreement was concluded between a financial institution and a customer, upon which all legal proceedings between the parties were to be determined by the jurisdiction of the financial institution. A third party mortgagor had to pay off the customer's debt and subsequently sued the customer. The customer, having subsequently moved abroad, claimed for the case to be dismissed on the grounds that due to the special nature of the jurisdiction agreement concluded between the financial institute and the customer, the agreement was not covered by the right of subrogation. The third party mortgagor believed, however, to have intervened in the jurisdiction clause.

Thus, these cases concern a settlement and the transfer of a claim. The legal effect within these two areas are mutually consistent and consistent with the general law of obligations.

6 Concluding Remarks

This article has sought to discuss the contractual aspects of Danish arbitration agreements. Broadly speaking, the various issues and solutions addressed in this context follow the general contractual principles of Danish law. Without having explored this issue in more details, it appears that, within these specific areas, Danish law is consistent with the general legal position of international arbitration.