FEATURE ARTICLE

Denmark flag depicted in paint colours on multi-storey residental building under construction. Credit: Mehaniq/Shutterstock

Bringing the Danish general conditions into the 21st century

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The Danish general conditions in construction contracting have not been amended since the early 1990s, even though a lot has changed in the real world since then. In many ways, the general conditions needed a 'brush-up' to be brought into the 21st century. This article will highlight a few of the many changes and additions to the new Danish general conditions in construction contracting that entered into force on 1 January 2019.

After the Cold War

A lot has changed since the fall of the Berlin Wall in 1989 – in the world order, everyday life, and in our design and construction of structures. Despite these changes, the Danish general conditions, which, to a large extent, regulate construction law in Denmark as agreed documents, had been left untouched over the past three decades.

The previous agreed documents consisted of:

- General Conditions for consulting services, ABR 89, which were drafted with a specific focus on technical consultation and assistance within the field of building and construction;

- General Conditions for the provision of works and supplies within building and engineering, AB 92; and
- General Conditions for turnkey contracts, ABT 93.

The general conditions can be traced to 1889, when the general conditions applied solely to railroads and hydraulic constructions. Since 1915, Danish construction law has been governed by agreed documents drafted after negotiation and in cooperation between the parties in the industry. Thus, the agreed documents today have high legal value as a source of law. AB 92 was a newer version of the previous AB 72. ABR 89 and ABT 93 were entirely new agreed documents and the first versions of their kind within Danish construction law.

It is, however, very likely that nobody in 1989 or 1993 foresaw the development of, for example, partnering or public–private partnership. Also, it might have been a distant thought that the contractor should design anything if the contract was not to be a design and build contract. Nevertheless, those (and many more) types of construction contracts are not alien to the construction industry of today, though they have lacked sufficient regulation. The previous standard forms lacked sufficient regulation of especially the contract forms involving a lesser or greater degree of contractor's design, thus falling 'in between' the traditional forms of contracts where the design is already in place when the contract between the contractor and the employer is made (AB 92 contracts), and contracts where the contractor bears the main part of the design responsibility (ABT 93 contracts).

There was great demand in the construction industry for a review of the general conditions. Some even claimed to deviate from the general conditions to such a degree that there could no longer be said to be a set of general conditions.

In other words, the previous general conditions did not meet the reality of the construction industry of the 21st century.

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Into the 21st century

In response, a committee was established in spring 2015 consisting of representatives from across the construction industry to review the general conditions. The committee revealed the first drafts of the new agreed documents on 2 February 2018 and the new general conditions entered into force on 1 January 2019.

In many ways, the previous general conditions needed a 'brush-up' to be brought into the 21st century. A few of the many changes and additions will be highlighted.

The new generation of general conditions – AB 18, ABT 18 and ABR 18[1]

Hierarchy of documents

One of the landmarks is Clause 6(3) of AB 18, which lays down a ranking or hierarchy of documents to a construction contract, as is known from the Norwegian and Swedish standard forms of construction contracts. This is an addition to the previous AB 92, which did not include a similar clause.

The hierarchy of six groups of documents seems to be based on the principle of *lex posterior* – the newest document takes precedence in the hierarchy.

In cases of conflict between documents in different groups, the document higher up in the hierarchy stands (*lex superior*). In cases of conflict between documents within the same group, the question of which document takes precedence depends on a specific assessment based on common principles of contract interpretation. This can include the subjective will of the parties, *lex specialis* and *in dubio contra stipulatorem*.[2]

It is possible to deviate from the general rule set out in the clause, either by contract or by common principles of contract interpretation[3]. However, case law shows difficulty in deviating from the general conditions, even in cases where this has been laid down in a contract. With this in mind, it might not be preferable for the general conditions to rank last of the six documents in the hierarchy,[4] but it appears to follow common sense that the general conditions is the lowest-ranking document because the higher-ranking documents include deviations from the general conditions.

A concern has also been raised that placing the contractor's tender above the tender documents may lead to a more formalistic

approach from the contracting authority to any ambiguity in the contractor's tender, in that ambiguity is either considered to be contractual reservations or an alternative tender.[5] It is the authors' view that this is not of concern; rather, this hierarchy of documents follows from procurement law, and it appears to be reasonable to have uniform regulation.

It is the authors' view that the employer (especially where the employer is a contracting authority) should avoid amendments to the hierarchy of documents clause, but instead set a price on the contractor's reservations.

Nevertheless, this clause sets a new standard and will – at least in some cases – force the parties to make a conscious decision as to whether the listed hierarchy of documents stands or not.

Contractor's design

An even more interesting addition in AB 18 is the introduction of the possibility to let the contractor be in charge of part of the design – as opposed to design and build contracts, where the contractor is in charge of the entire design.

The contractor can be liable only for design that they have agreed to perform (Clause 17(1) of AB 18). This precludes the employer from 'forcing' the contractor to design through the employer's variations, unless the contractor initially had agreed to design the specific construction part that is affected by the employer's variation.[6]

Also, an agreement by the contractor to design parts of the construction may be entered into between the parties by their conduct. However, the contractor's shop drawings are not considered to be any kind of design.[7]

With the new provisions, it is now clear – in a legal context – that the contractor *can* design and, when doing so, they will also bear the design liability. However, the clauses about the contractor's design leave room for new disputes.

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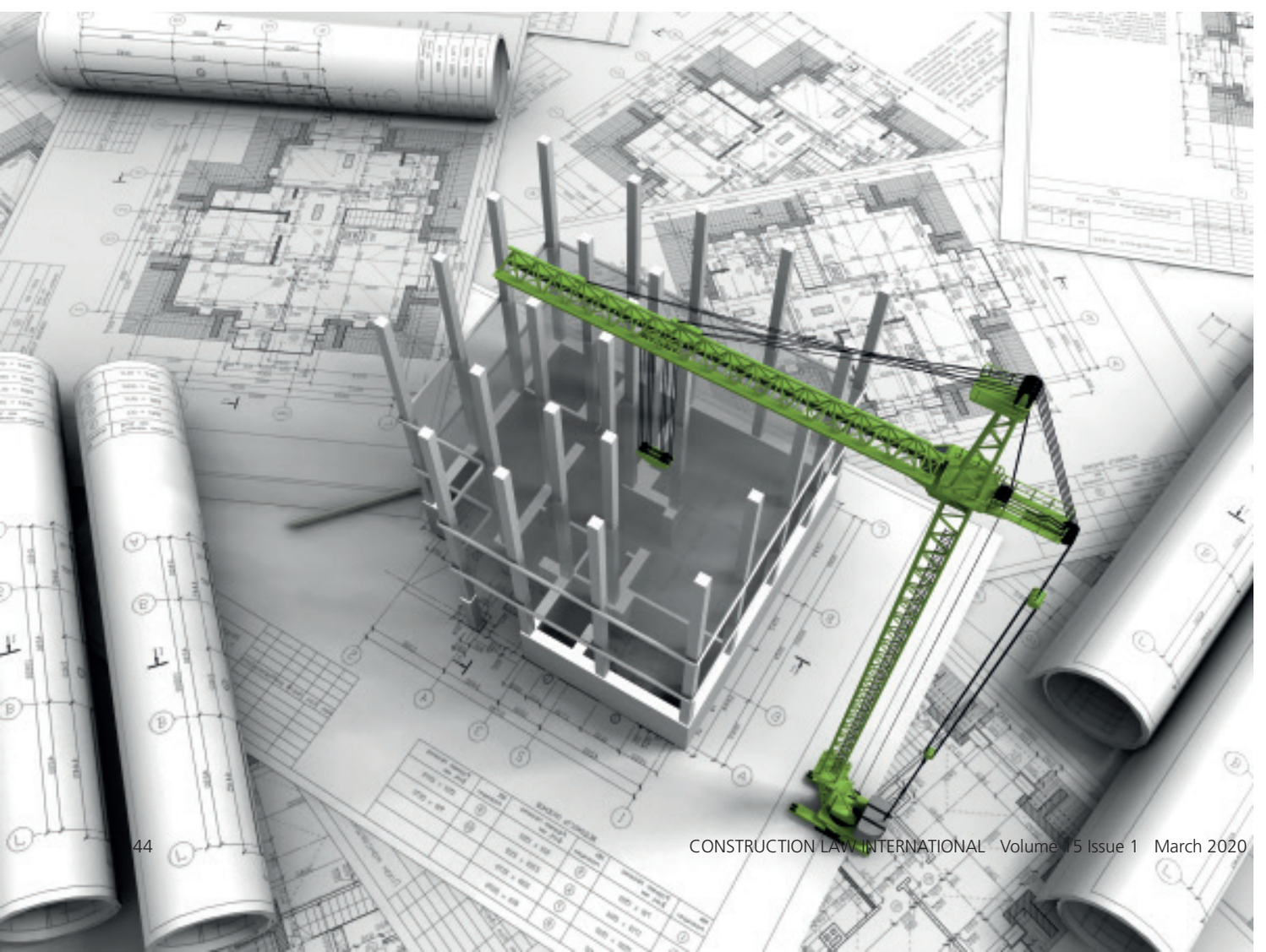

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The designer is obliged to perform the design of the entire project, unless it has been agreed that parts of the design are to be designed by others or in cases where it is common for the contractor to perform parts of the design (Clause 14(1) of ABR 18). However, the contractor is obliged to perform only design that it has agreed to perform (Clause 17(1) of AB 18). This leaves the employer in an unfortunate situation in cases where it is usual for the contractor to perform parts of the design, but these parts of the design are not part of the contract between the employer and the contractor. This seems to be a 'hole' in the new general conditions.[8]

In addition, the contractor has an obligation to undertake quality assurance of its own work (Clause 17(6) of AB 18). It can be questioned whether this would be 'putting the fox to guard the henhouse' – when would a contractor ever admit to another contract party that its own work is faulty, when that might cause liability for the contractor? Also, the contractor is obliged to perform design according to good design practices and will, for that very reason, already be liable for its own design. It seems obvious for the employer to carry out a quality assurance check of the design in question.

The clauses on the contractor's design are relatively long and complicated. Professor Torsten Iversen has suggested in several articles that they should be revised and shortened.[9] However, the committee has chosen to follow only some of these recommendations.

The clauses on the contractor's design are probably one of the most novel additions to the general conditions. However, the clauses leave some ambiguity to be resolved by case law in the future.

Liability for designers

Previously, the employer had difficulty claiming damages based on the liability of designers. If, for some reason, the designer did not include a part of the project in its design, the employer would, as a general rule, have to pay the contractor for the work anyway. The reason was that the employer had to pay for the work under any circumstance – if the design had been done initially, the contractor's contract sum would have been equally higher. In other words, it was difficult for the employer to prove the existence of a loss.

The situation mentioned above has been called the 'value-for-money principle'[10] and it seems to derive from the enrichment doctrine according to which a person may not gain any unjust enrichment. In those cases, the employer would be able to claim damages for the higher price, due to the later procurement of the missing part of the work, only if the work had been included in the project from the beginning.

The value-for-money principle seems to have been a common loophole for designers to escape (most of their) liability for damages due to their faulty design. Only in severe cases would the designer be liable for faulty design.

With the new general conditions for consulting services (Clause 49(2) of ABR 18), the employer's claim for damages has been standardised. The clause states that, in case the employer has to buy a service from the contractor which derives from the designer's lack of incorporating the service in the design from the beginning, the designer is liable to pay the employer liquidated damages of five per cent of the price of the services, for which no price per unit has been set.

Clause 49(2) is limited for cases where the faulty design is discovered during the construction phase.

However, if the total amount of liquidated damages is below two per cent of the contract sum, the designer is not liable to pay liquidated damages to the employer.

The designer's liability for liquidated damages is maximised to ten per cent of the designer's aggregate fee.

The employer is given the option of claiming unliquidated damages if they can prove a loss in excess of the liquidated damages because they did not put the specific services out to competition. In such cases, the employer needs to purchase the 'forgotten' services from the designer at a very late time, which puts the employer in a weak negotiating position with the contractor, who will set a higher price for the change of work than would have been the case if the work had been part of the initial tender. However, this will in many cases be difficult to prove.

In the same way, the designer is given the option to pay unliquidated damages only in

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cases where they can prove that the employer's loss is less than the liquidated damages.

In our opinion, Clause 49(2) of ABR 18 imposes a new regulation of the designer's liability for faulty design which appears to take into account the interests of both the designer (who had quite a large loophole to escape (most of their) liability for his faulty design) and the employer (who has been given an easier way of claiming damages from the designer).

Escalation of disputes

The committee has observed that alternative dispute resolution has a lot to offer to the construction industry in Denmark. On this basis, the committee has put in place a 'Conflict Staircase' and a new dispute resolution regime.

First, if a dispute arises during the construction phase, the project managers of each party are to settle the dispute by negotiation not later than five working days from one of the parties' request for negotiation (Clause 64(1) of AB 18). This fits well with one of the fundamental principles of mediation, which is to hand the conflict back to the parties, who are presumed to be the ones best placed to resolve their own conflict.

Second, if the parties fail to settle the dispute in step one, or if the construction project has been completed, management representatives of the parties are to settle the dispute by negotiation (Clause 64(1) and (2) of AB 18). This must happen not later than five days after the expiry of the deadline in step one.

The parties cannot resort to mediation, conciliation, adjudication or arbitration before the parties have tried to settle the dispute according to the first two steps. This rule also applies with regard to expert opinions.

After the first two steps, the management representatives are to discuss and eventually choose between mediation, adjudication and arbitration in order to resolve the dispute.

Mediation cannot be initiated if, within ten working days (from the submission of the request for mediation), a party requests adjudication (Clause 65(2) of AB 18).

Some practitioners and clients complain about the time it takes to go through a typical arbitration process. In this regard it is interesting to find the adjudication clause in Clause 68 of AB 18. Any party to the contract can request the appointment of an adjudicator to make a decision regarding, for example, the employer or the contractor's right to an extension of time and the employer's entitlement to withhold payments or offset amounts in the contractor's claims for payment (Clause 68(1) of AB 18).

After having received the request for adjudication, the opposing party has ten days to submit a reply. Each party can submit additional pleadings within five working days after receipt of the opposing party's pleading (compare Clause 68(4) of AB 18).

The adjudicator makes a decision no later than ten working days after the receipt of the last pleading (Clause 68(7) of AB 18). Adjudication is binding as an arbitral award (Clause 68(9) of AB 18). It can be appealed to an arbitral tribunal within eight weeks from the date of the decision. The adjudicator's decision is binding until the arbitral award is rendered and becomes binding as an arbitral award if arbitration proceedings ('appeal') have not been initiated within eight weeks after the decision has been rendered.

Arbitration proceedings cannot be commenced until four weeks after conclusion of the first and second steps (Clause 69 of AB 18).

Interestingly, if one of the parties requests mediation, the other party is obliged to participate in the mediation. Arbitration is precluded until the mediation process has been concluded, which will be either with a settlement or when the mediator concludes that it is not possible to reach a settlement between the parties.[11]

The rules for mediation also apply for conciliation (Clause 65(9) of AB 18).

The committee chose this set-up based on experience from other countries where negotiation, mediation and conciliation often result in the settlement of disputes. Those dispute resolution procedures are both quicker and less costly than traditional arbitration proceedings.[12]

The speed of solving of disputes seems to have been especially important to the committee, because having a dispute during the construction phase will in most cases destroy the foundation for cooperation between the parties and provide fertile ground for new disputes to arise.[13]

The procedures of negotiation, mediation, conciliation and adjudication existed long before the new general conditions; however, they have not been sufficiently applied. The committee believes this to be so because these alternative dispute resolution procedures

were voluntary for the parties and were not agreed upon prior to the dispute.

It is the authors' opinion that the alternative dispute resolution procedures have not been sufficiently applied due to the lack of agreement in advance and because of the lack of experience with alternative dispute resolution (not because it was voluntary for the parties).

In general, the new 'model' for dispute resolution in the general conditions seems to focus on settling or resolving the dispute at the lowest possible level. Also, it appears to be a central point that disputes should be resolved more quickly and at less cost than through arbitration in order to enhance cooperation between the parties to the construction project in line with the proactive approach known from the New Engineering Contract (NEC) and FIDIC suites of contracts in relation to good contract administration.

The authors expect the new rules of dispute resolution to bring a series of advantages to the construction industry in Denmark and eventually save the industry from spending enormous amounts of resources on dispute resolution even though it may be observed that, especially adjudication, due to its formal nature and non-verbal basis, may be expected to generate unpredictable results in the first adjudications under the new rules.

The new regime will also have an impact on attorneys practising within construction law. The attorneys will perform a series of new roles in addition to being arbitrators or contract drafters, such as negotiators and mediators, or at least serve their employers through the negotiation and mediation phases.

In total, the general conditions truly seem to have been brought into the 21st century – and to push the legal profession into that very century too. However, one aspect from the previous general conditions that could have inspired the committee is the concise and precise wording of the general conditions. The committee has suggested that the new general conditions, AB 18, ABR 18 and ABT 18, should be reviewed in five years[14] and it is the hope of the authors that the next review will bring a more precise and concise version of the new general conditions.

Notes

1 The new standard forms of agreement also include a number of appendices for special types of contract, eg, project development ('early tender'), pain/gain share contracts and commissioning. There are also two short forms of contract, ie, AB Simplified and ABR Simplified. These two short form contracts are very similar to AB 92 and ABR 89 not including many of the contract management provisions in the new regime with one exception, The simplified versions also follow the new procedural rules at Arbitration Board for Construction and Engineering that can be found at www.voldgift.dk accessed 15 November 2018.

2 Trafik-, Bygge- og Boligstyrelsen (Danish Transport, Construction and Housing Authority), *Betænkning nr 1570.2018* (the 'Report'), 76.

3 *Ibid.*

4 Torsten Iversen, *Om AB-udkastet og dets forhold til lovgivningen samt til andre aftaler* (2018) (TBB2018.398) (The draft general conditions and their relation to statues and other agreements), Ch 9. Also, this place in the hierarchy seems to conflict with the text of clause 47(5), see Torsten Iversen, *Om AB-udkastet og dets forhold til lovgivningen samt til andre aftaler* (TBB2018.398), Ch 10.

5 Anders V Buch, *Mangler i høringsudkastet til AB 18* (TBB2018.373) (Defects/errors and omissions in the draft AB 18), Ch 3.2.

6 The Report, 104.

7 *Ibid.*

8 According to a case published in the *Danish Journal for Construction Law* in 2018 (T:BB 2018.285) an architect could not be held liable for defects in a sunscreen design used for a United Nations building at the port in Copenhagen. The arbitration court held that sunscreens were normally designed by the contractor and since it was not a part of the scope in the contract with the architect (nor the contractor) that any of them should design the sunscreens (that were in fact not saltwater resistant which they should have been due to the proximity to saltwater) the employer had the design liability. This case would no doubt have had the same outcome under AB 18 and ABR 18 due to the 'hole' mentioned in the new regime.

9 Torsten Iversen, *Strejftog i AB-udkastet – forbedringer eller forringelser? – forenklinger eller forviklinger?* (TBB2018.310) (Raid on the draft general conditions – for better or for worse? – simplifications or complications?), Ch 2, and same in Torsten Iversen, *Struktur og sprog i AB-udkastet* (TBB2018.326) (Structure and language in the draft general conditions), Ch 4.

10 Bo S Pedersen mentioned the 'value-for-money principle' during his period of teaching construction law at the University of Copenhagen in autumn 2014.

11 Under s 22.2 of the procedural rules of the permanent Arbitration Board for Construction and Engineering for AB 18, ABT 18 and ABR 18 the arbitral tribunal can ask the Board for appointment of a mediator at any given point during the arbitration process and bring the proceedings to a hold until a mediation process has been tried and concluded.

12 The Report, 20.

13 *Ibid*, 175.

14 *Ibid*, 479.

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