Roschier Disputes Index **2016**

A biennial survey on facts and trends in international dispute resolution from a Nordic perspective

TNS Sifo Prospera

ROSCHIER

Roschier Disputes Index 2016

Index

Foreword

Welcome to the Roschier Disputes Index, our biennial market survey focusing on the prevailing practices and trends in dispute resolution in the Nordics. [1]

The Roschier Disputes Index 2016 is the fourth edition of our survey. Since 2014, the survey includes companies from Sweden, Finland, Denmark and Norway. In this report, 143 in-house lawyers present their views on central issues of commercial dispute resolution.

Our objectives are to investigate and track important developments in how the largest companies in the Nordic region view commercial dispute resolution and manage their disputes. This survey sets out the preferred dispute resolution methods, arbitration rules and substantive law, the kinds of disputes the companies actually have in practice, and the best way to manage these disputes. It also observes trends on the dispute resolution market.

This year's edition puts additional focus on success factors for managing major disputes in the view of the respondent companies. This includes key deciding factors when choosing a law firm, the external counsel's key contribution in major disputes, and common denominators for successful and unsuccessful outcomes in major disputes. There are many critical factors which contribute to winning a dispute. However, according to the respondents, thorough preparation and scrupulous gathering of evidence are the most important factors.

A new feature in this year's edition of the Roschier Disputes Index is that we have invited leading experts and users on the dispute resolution market to comment on the results of the survey. These comments are intended to shed light on the results of the survey and give the readers a more in-depth understanding of the potential reasons for the results.

We would like to thank the following commentators for their excellent analysis and contribution to the report: Juhani Pitkänen, Assistant General counsel at Metsä Group; Annette Magnusson, Secretary General of the SCC; Professor Loukas Mistelis, professor of Transnational Commercial Law and Arbitration at Queen Mary University of London; Dr. Remy Gerbay, lecturer in International arbitration at the Centre for Commercial Law Studies, Queen Mary University of London, and Of Counsel at London-based disputes firm Enyo Law LLP; and Stephan L. Jervell, partner at Wiersholm in Oslo.

We hope that the Roschier Disputes Index will continue to be a useful tool for management, general counsel, external counsel and anyone with a particular interest in dispute resolution in the Nordics.

Henrik Fieber
Gisela Knuts
Aapo Saarikivi
Johan Sidklev
Petri Taivalkoski

[1] Sweden, Finland, Denmark and Norway.

Methodology

The data for the Roschier Disputes Index was collected by TNS Sifo Prospera, a leading independent market research firm in the Nordic region. Since 1985, TNS Sifo Prospera has carried out surveys and client reviews targeting professionals active on the Nordic financial markets.

The results reported in the Roschier Disputes Index 2016 are based on in-depth interviews with general counsel and in-house counsel from some of the largest organizations in Denmark, Finland, Norway and Sweden (based on turnover). A list of the 264 companies included in the survey's universe is available on Roschier's website (www.roschier.com). With 143 companies participating in the survey, the response rate was 54%.

Interviews were conducted from September to December 2015 and took place by telephone based on a questionnaire prepared by Roschier in cooperation with TNS Sifo Prospera. All interviews were entirely confidential, and figures have been reported only in the aggregate.

The results from the survey are reported for all interviewees as well as on a countrywide basis.

"The response rate is quite high for a survey of this kind. The sample can be seen as representative with respect to the target population, i.e. large buyers of legal services in the Nordic region. The Prospera survey sticks to the data and provides a good basis for analysis.

Roschier has the benefit of operating in a region where coherence in companies' behaviors is high. The Nordic region is clearly a good geographical area for this kind of survey, and this provides an excellent basis to analyze the results. At the same time, the results are not only relevant to the Nordic region, but also provide insights in the international context.

As regards methodology and focus, the Roschier Disputes Index is closer to the PwC and Queen Mary survey on Corporate Choices in International Arbitration than the White & Case and Queen Mary surveys on international arbitration. The respondents in the Roschier Disputes Index and the PwC and Queen Mary surveys are exclusively corporate counsel, whereas in the White & Case and Queen Mary survey the respondents cover all roles dealing with international arbitration, and the samples are larger."

Loukas Mistelis on the methodology of the survey.

New for 2016:
Comments from experts and users on the market

Dr. Remy Gerbay

Lecturer in International arbitration at the Centre for Commercial Law Studies, Queen Mary University of London, and Of Counsel at London-based disputes firm Enyo Law LLP

Stephan L. Jervell

Partner at Wiersholm, Oslo

Annette Magnusson

Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and General Counsel of the Stockholm Chamber of Commerce.

Professor Loukas Mistelis

Professor of Transnational Commercial Law and Arbitration at Queen Mary University of London

Juhani Pitkänen

Assistant General Counsel at Metsä Group, Helsinki

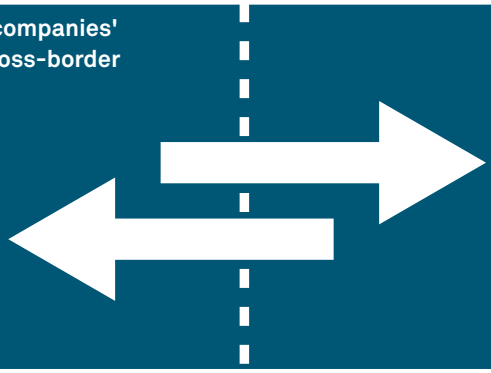
Overall findings

There are differences between the countries with regard to preferences and dispute management.

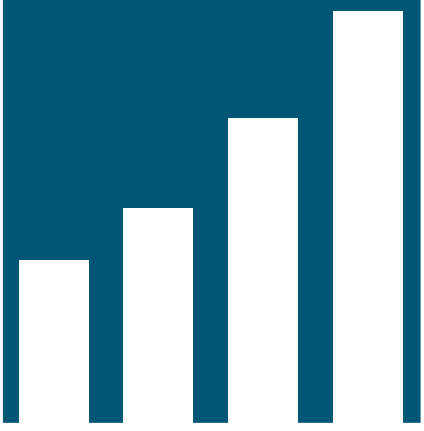
Thorough preparations and scrupulous gathering of evidence are considered success factors for major disputes.

Arbitration is the preferred method of dispute resolution. This year's results indicate that arbitration is also used more frequently in practice and that arbitration is increasing in popularity in terms of companies' actual disputes.

Over half of the companies' disputes have cross-border elements.

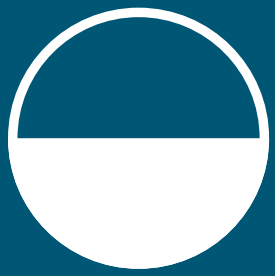


As in previous years, the majority of the respondents did not see any particular trends in their disputes portfolio during the last few years. However, 21% of the respondents anticipate an increase in the number of major disputes in the coming 12 months.



30% of the respondents have considered or used alternative fee arrangements, such as success fees.

Companies settled roughly half of their disputes.



Key findings

Arbitration is still the preferred method of dispute resolution.

Finnish and Swedish respondents prefer arbitration to a higher degree than Danish and Norwegian respondents.

Confidentiality retains its position as the most valued attribute of arbitration, followed by efficiency of procedure and expertise of arbitrators.

When litigation is chosen over arbitration, the majority of respondents state that lower costs, the possibility to appeal the judgment, the public nature of the procedure and the subject matter of the dispute are the most important factors influencing their choice.

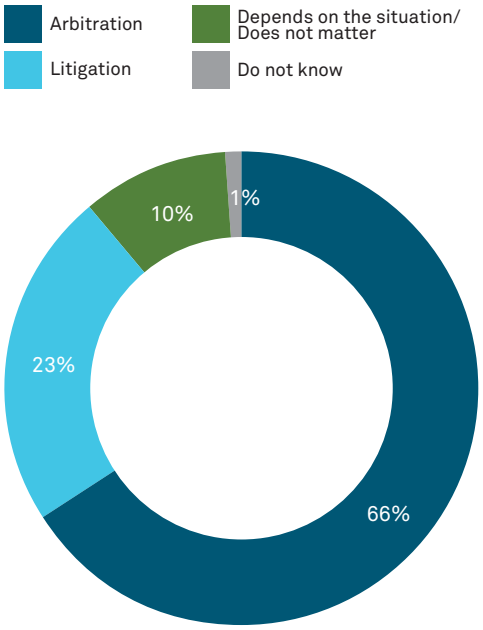
Companies clearly prefer their national arbitration rules. Disregarding the respondents' national arbitration rules, the majority of the respondents prefer the Stockholm Chamber of Commerce (SCC) Rules followed by the International Chamber of Commerce (ICC) Rules.

Previous experience, reputation and costs of the institution and arbitrators are the most important factors when it comes to choosing arbitration rules.

The respondents are cautious of substantive laws they are not familiar with.

PART 1
Dispute resolution choices

Preferred dispute resolution method



Arbitration continues to be the preferred dispute resolution method, which is confirmed by 66% of respondents.

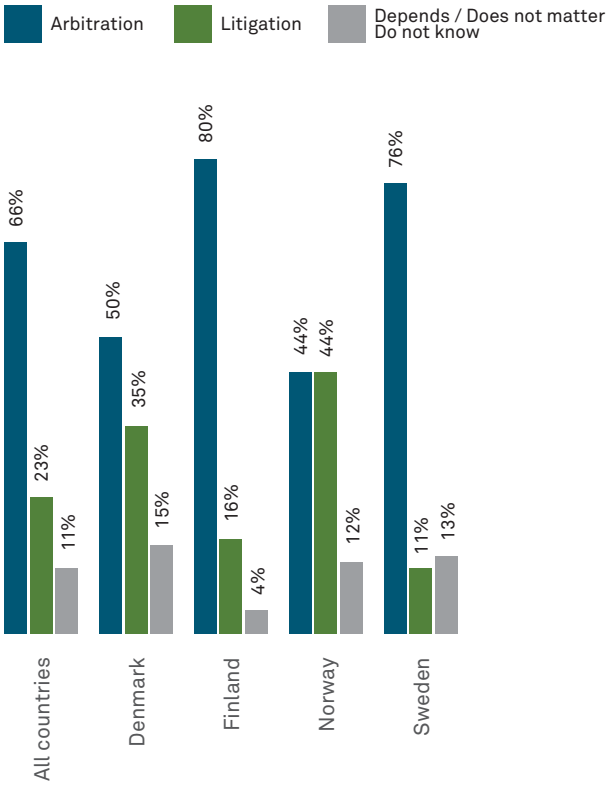
The preference for arbitration has gone up slightly since the 2014 edition of the Roschier Disputes Index, in which 61% of respondents reported arbitration as their preferred dispute resolution method.

Respondents from Finland and Sweden still prefer arbitration to a higher degree than respondents from Denmark and Norway. Altogether, 80% of Finnish respondents and 76% of Swedish respondents chose arbitration compared to 44% of Norwegian respondents and 50% of Danish respondents.

Compared to the 2014 Index, the preference for arbitration in Finland and Sweden has increased by approximately 10 percentage units, whereas the preference for litigation has remained more or less the same.

It is notable that the number of respondents reporting that it does not matter or that they do not know whether litigation or arbitration is preferable has plunged to an all-time low of 11%.

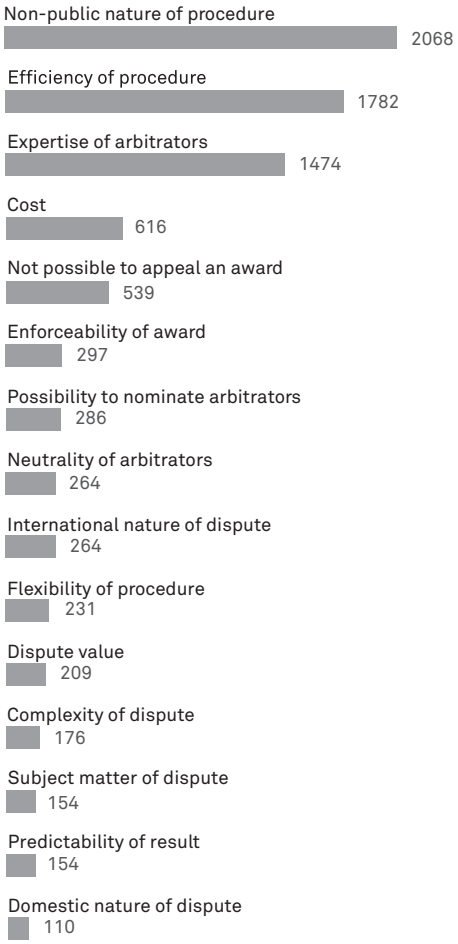
Preferred dispute resolution method



"According to the Roschier Disputes Index 2016, arbitration is the preferred method of dispute resolution among all respondents (66%). In international surveys, preference for arbitration is usually in the same range, around 2/3. The preference rate in the Nordics is therefore not manifestly different, except for Norway. Considering the differences between Norway and the other Nordic countries, the big question seems to be whether the local institutions are doing the right thing. To promote arbitration, it is important to develop the local institutions, to ensure a functional legislative framework, to provide education etc."

Loukas Mistelis regarding that the results indicate that arbitration is the preferred method of dispute resolution in the Nordics.

Decisive factors for choice of arbitration



The preferences are given points based on importance, first, second and third choices being awarded 33, 22 and 11 points respectively.

Confidentiality retains its position as the most valued attribute of arbitration, followed by efficiency of procedure and the expertise of arbitrators. Lower costs are still mentioned as an advantage. Also, finality, enforceability of arbitral awards and the option to nominate arbitrators influence companies to choose arbitration over litigation. All in all, these top six decisive factors for choice of arbitration remain the same as in the 2014 Index.

A new feature that appears in the 2016 Index is that respondents have started to set store by the possibility to nominate the arbitrators and affect the constitution of the tribunal. In this regard, arbitration is clearly more appealing than litigation.

When asked in which situations companies that prefer arbitration would choose litigation instead, the respondents mentioned simple, domestic, non-confidential, low-value disputes, in which the other party is financially weaker, such as a consumer or a small

company. Respondents also recognized that the publicity resulting from litigation may act as an advantage. In addition, disputes with parties operating in the public sector, disputes involving criminal law elements and disputes involving the need for interim measures were given by the respondents as examples of where litigation may be preferred.

"We prefer litigation for low-value contracts in Scandinavian countries and in certain US states and arbitration for higher-value contracts in "exotic jurisdictions"."

Danish respondent regarding situations where arbitration or litigation is preferred.

"In disputes where we want to retain a business relationship, we need to look not only at what is legally right and wrong, but also the bigger picture."

Finnish respondent regarding situations where arbitration is preferred to litigation.

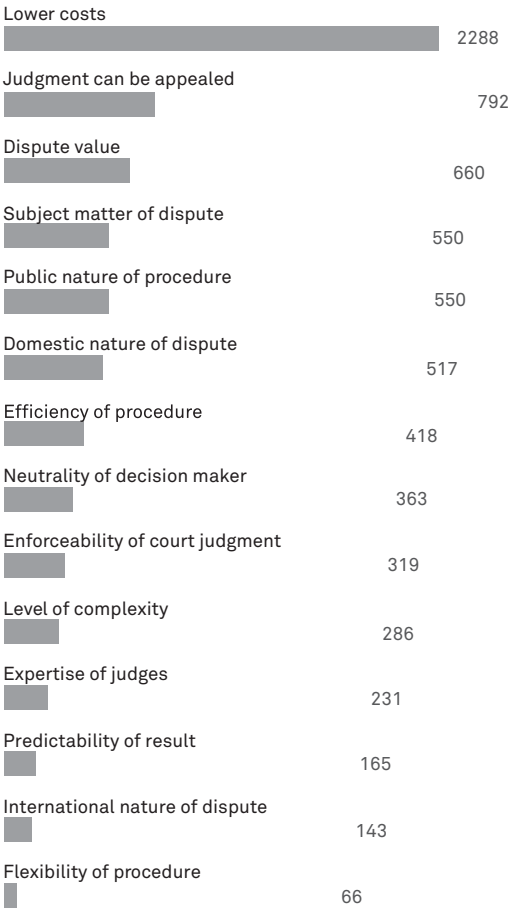
"When speed is a factor."

Norwegian respondent regarding situations where arbitration is preferred to litigation.

"I find the responses regarding the most important factors for choice of arbitration quite interesting. Lower costs are mentioned as the fourth important factor for choice of arbitration, whereas in the Queen Mary survey, costs are seen as a problem. In addition, confidentiality, which according to the Roschier Disputes Index 2016 is regarded as the most important factor, according to the White and Case and Queen Mary survey its importance eroding slowly. I am surprised that confidentiality came so high in the Roschier Disputes Index 2016. Maybe it is because the respondents are not having so many disputes involving the public interest, or not so many investment arbitration cases. The commercial arbitration market is more purist or traditional in this regard."

Loukas Mistelis on the responses regarding the most important factors for choice of arbitration.

Decisive factors for choice of litigation



The preferences are given points based on importance, first, second and third choices being awarded 33, 22 and 11 points respectively

When litigation is chosen over arbitration, the majority of respondents state that lower costs, the possibility to appeal the judgment, the public nature of the procedure and the subject matter of the dispute are the most important factors influencing their choice. All in all, these top five decisive factors, including also the subject matter and domestic nature of the dispute, have remained the same since the 2014 Index was compiled, save for efficiency of procedure, which has been replaced by the value of the dispute in the current 2016 edition.

When asked in which situations respondent companies that usually prefer litigation would resort to arbitration, respondents highlighted confidential, high-value, cross-border disputes, where specific expertise is needed. Arbitration is also perceived as a better choice when the company wants to maintain a good relationship with the other party. It may also be noted that some of the Danish respondents also prefer arbitration for minor, lower-value disputes.

"Litigation when the matter is less complicated. Arbitration when it's confidential. Depends on the case."

Norwegian respondent regarding choice of dispute resolution method.

"Dispute with a very low value and only domestic parties. Very simple disputes, not complicated disputes, for example contractual disputes."

Finnish respondent regarding situations when litigation is preferred to arbitration.

"Low-value contracts in Scandinavian countries and in certain US states."

Danish respondent regarding situations when litigation is preferred to arbitration.

"Disputes with a low value where media attention could not cause any harm."

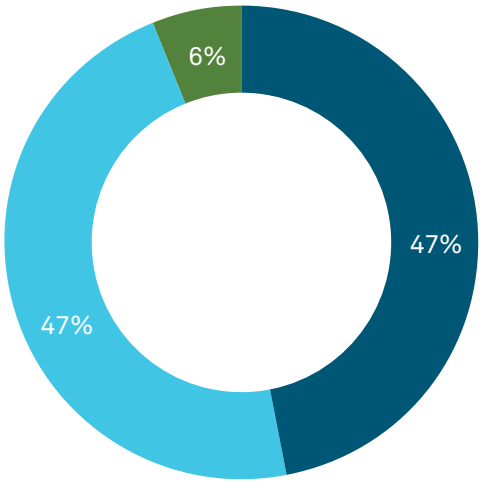
Swedish respondent regarding situations when litigation is preferred to arbitration.

Impact of type of dispute

There are certain types of contracts where the respondent tends to refer to a certain dispute resolution mechanism

There are not

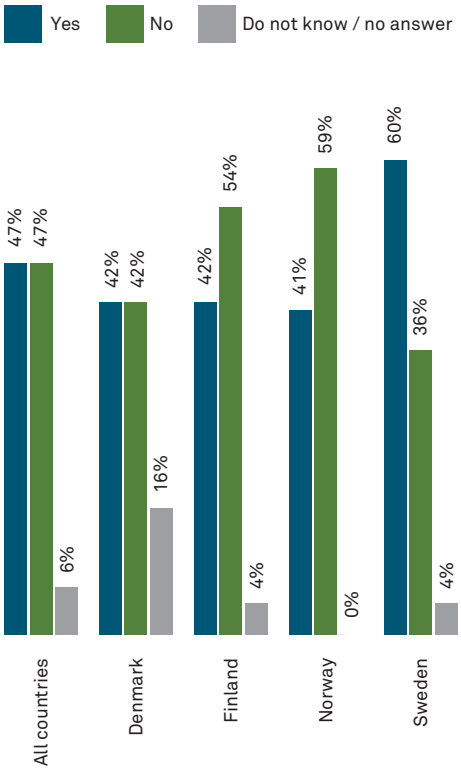
Do not know/no answer



"Standard agreements with suppliers and customers are referred to litigation."

Norwegian respondent regarding the impact of the type of dispute.

Certain types of contracts that usually refer to a certain dispute resolution mechanism



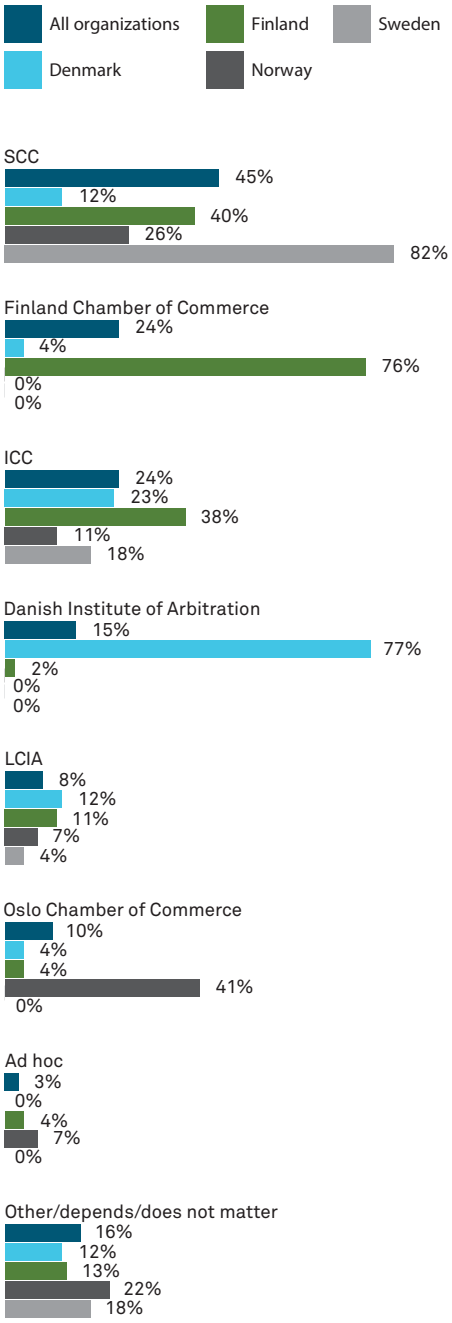
The number of respondents indicating that they usually refer certain types of non-consumer contracts to a certain dispute resolution mechanism has decreased by 13 percentage units since 2014 and by 19 percentage units compared to 2012. This could indicate that companies are getting more flexible in alternating between different kinds of dispute resolution methods.

The numbers for Sweden differ from the other countries, with 60% of the respondents stating that they differentiate between dispute resolution mechanisms based on the type of contract. The Swedish respondents mentioned, inter alia, construction contracts, purchase agreements, acquisition contracts and industry-specific standard agreements as examples of types of contract types in which the dispute resolution mechanism is usually predetermined.

"Arbitration for cross-border contracts, distributer shipping agreements, acquisitions, intellectual property agreements and executive agreements."

Finnish respondent regarding the impact of the type of dispute.

Preferred arbitration rules



Since the first edition of the Roschier Disputes Index in 2010, respondent companies have consistently displayed a preference for their national arbitration rules. This trend has not changed. Disregarding the respondents' national arbitration rules, the majority of the respondents prefer the Stockholm Chamber of Commerce (SCC) Rules followed by the International Chamber of Commerce (ICC) Rules. The Danish respondents prefer the ICC Rules to a greater extent than the respondents in the other countries.

Swedish respondents are the most likely to favor their national SCC rules (in 82% of cases), while Norwegian respondents prefer the Arbitration Institute of the Oslo Chamber of Commerce (Oslo CC) Rules only 41% of the time, which corresponds to the frequency with which Finnish respondents refer to the Swedish SCC Rules.

The rules of the London Court of International Arbitration (LCIA) are chosen only on rare occasions, in 8% of cases. However, using the rules of any of these institutions in arbitration is more common than ad hoc arbitration, which is preferred by only 3% of the respondents.

The SCC Rules receive praise for their simplicity, flexibility and good reputation. The SCC rules are stated to be modern (yet reliable and predictable), the appointed arbitrators skilled and the costs lower than, for example, in ICC arbitration.

The ICC Rules are said to be broadly recognized, well-established and globally well-known. They are found to be professional and predictable, and most likely to be accepted by international counterparties. The high cost

"The SCC is well known both to us and counterparties."

Swedish respondent regarding preferred arbitration rules.

"SCC's popularity stems from the good work done by the SCC and by the arbitrators acting in SCC cases. That work has built trust in the arbitral procedure under the SCC rules. In addition, the popularity shows that the respondents also have trust in Sweden as a jurisdiction.

If all arbitral institutes in the region make progress and develop good procedures, it will benefit arbitration in general. I do not see this as a zero sum game: if one arbitration institute grows, it does not automatically mean that another one has to shrink. Globally, arbitration institutes are growing, which is natural as many economies are growing. Even if it is cyclical, the general trend is that the institutes are gaining more ground."

Annette Magnusson on what makes the SCC so popular and whether she sees any risk of the SCC's popularity declining if the other Nordic arbitration institutes continue to grow stronger.

is the main concern with the ICC rules, together with inefficient case management.

The Arbitration Institute of the Finland Chamber of Commerce (FAI) Rules, as well as the Oslo CC Rules and the Danish Institute of Arbitration Rules are most frequently chosen by local companies that already have a positive experience of the rules in question, specifically their simplicity and cost-efficiency. These rules are usually chosen because of tradition, and their familiarity and proximity. Proceedings under the LCIA Rules, on the other hand, are said to be expensive and the rules most suitable for disputes only in certain industries, such as shipping, international finance and insurance.

"The relative unpopularity of the LCIA in the region compared to local institutions can be explained by three factors. First, the frequent yet incorrect assumption of many in-house lawyers that parties in LCIA proceedings need to retain English counsel, which companies fear will drive costs up. Secondly, the use by the LCIA of an "hourly rate" for arbitrators' fees (instead of an ad valorem system, as is more typically the case in Scandinavia) may create a feeling of unpredictability as to the arbitration costs for parties who do not use LCIA arbitration on a regular basis. To deal with this issue, the LCIA has recently released extensive information on average costs. In my experience, the LCIA is in fact very competitive from a costs perspective, including for small and medium size disputes."

Remy Gerbay on the limited preference for LCIA Rules in the Nordics.

One interesting difference between the Nordic countries is that, to a greater extent than the other respondents, the Norwegian respondents prefer ad hoc arbitration. By tradition, ad hoc arbitration has a strong standing in Norway.

The respondents are reluctant to try out arbitration rules of which they do not have previous experience. Many respondents mention Eastern Europe, Russia, China and the Middle East, as well as Mexico and African countries, such as Tanzania, Nigeria and Senegal. These jurisdictions are perceived as old-fashioned, unpredictable and/or difficult to understand.

"In my view, the reason behind this is that traditionally, we have had many ad hoc proceedings in Norway, which is why the rules of the Oslo Chamber of Commerce have not been so frequently used. In a small community with a high level of trust, like Norway, ad hoc proceedings work well. Another reason is that the rules of the Oslo Chamber of Commerce have been a bit outdated, but this is something we are currently working on, as new rules have been drafted and are implemented as we speak. A new board, consisting of both new and old directors (and of which I am a member), has recently been elected, and we are looking forward to making progress in this regard.

In the old days, 30 or so years ago, the arbitration business in Norway mainly consisted of disputes in relation to the shipping industry. Nowadays, the situation is different. Most business in Norway and the other Nordic countries is international. A contractual partner from e.g. Germany will not agree to ad hoc arbitration as a Norwegian business partner would, which is why we need to update our rules. Norwegian companies do however tend use the SCC, due to the proximity in geography and culture."

Stephan L. Jervell on the significantly lower number of Norwegian interviewees stating that they prefer their local arbitration institution, the Oslo Chamber of Commerce.

The Anglo-Saxon rules are criticized for their process-oriented rather than solution-oriented approach, as well as for their high costs and higher damages awards. Furthermore, the JAMS arbitration rules in the US are mentioned as an example of rules which would not be chosen by the respondents.

"We know it well and it suits us."

Norwegian respondent regarding the preference for ad hoc arbitration.

Important factors when choosing arbitration rules

The preferences are given points based on importance, first, second and third choices being awarded 33, 22 and 11 points respectively.

When asked which factors are the most important when choosing a set of arbitration rules, the respondents list previous experience, reputation and cost of the institute and arbitrators' fees as the three most important considerations. Particular aspects of institutional rules and local arbitration law are perceived as the least important factors. The list of factors to be taken into consideration when choosing the rules has remained the same since the 2014 Index.

"The FAI – familiarity, experience and we know they work well, with efficiency and neutrality. The ICC is not preferred, since our impression is that it is quite expensive, but it would be accepted."

Finnish respondent regarding preferred arbitration rules.

"The ICC – it is international and the counterparty is familiar with it."

Danish respondent regarding preferred arbitration rules.

"I believe that the choice of arbitration institute is based on the trust in that specific institute, and general trust in the jurisdiction (a modern arbitration act, trustworthy national courts etc.). These factors are often tied to a specific country. A pan-Nordic institute would be quite abstract and would make it difficult for the users to build a relationship of trust to in the short run. People tend to have a stronger relationship to individual countries. I therefore do not foresee the creation of a pan-Nordic arbitration institute, replacing the existing ones. This obviously does not mean that it would not be good to implement the same practices and increase cooperation between the institutes in the Nordic countries."

Annette Magnusson on creating a pan-Nordic arbitration institute.

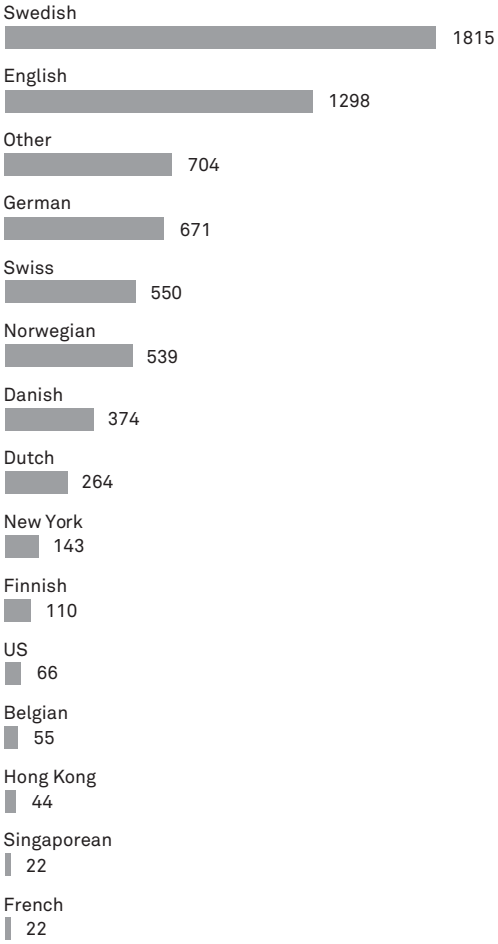
"I prefer institutional over ad hoc – It's good to have some supervision, checking the fundamentals."

Finnish respondent regarding preferred arbitration rules.

"ICC – Recognized and can get enforcement from a recognized institution"

Swedish respondent regarding preferred arbitration rules.

Preferred substantive law



The preferences are given points based on importance, first, second and third choices being awarded 33, 22 and 11 points respectively.

When asked which substantive law companies prefer in international contracts when they are unable to choose their domestic law, Swedish and English law were indicated as clear favorites by the respondents, followed by German, Swiss, Norwegian and Danish law. Finnish law appears only ninth on the list, after Dutch and New York law. All in all, the laws of the Nordic countries have gained popularity since the 2014 Index was compiled. Besides that, the most prominent change is that US law has lost its appeal among Nordic companies. When in 2014 US law was the fourth choice for the respondent companies, many respondents now indicate it as an example of a governing substantive law they would not agree to.

Finnish and Norwegian respondents most frequently choose Swedish law, while Danish and Swedish respondents prefer English law. Out of the respondents, Danish and Swedish respondents are most likely to choose Norwegian law. Finnish law is chosen most frequently by Swedish respondents, Danish law by Norwegian respondents.

The majority of companies do not agree to a choice of law when the legal system in question is too different from their own. The same applies to the choice of arbitration rules: the respondents are cautious when it comes to substantive laws they are not familiar with. The outcome of the procedure in these cases is perceived as more unpredictable. Respondents also voice concern about legal certainty, due process and access to justice, with regard to substantive laws of jurisdictions such as China, Russia, Middle East and Africa, to name a few. Also French and Spanish law are viewed by some respondents as unacceptable.

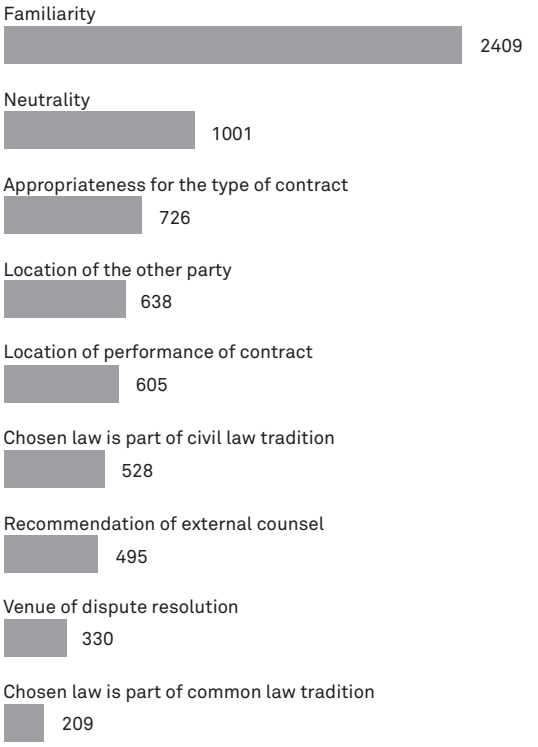
"The relatively high frequency of the use of English law as the governing law of contracts may, to a certain extent, be a byproduct of the use of the English language in contract negotiations. This being said, it is usually considered that, in certain fields such as the sale of goods and shipping, English law is the most common choice of foreign law. On the other hand, it is interesting to note that, while English law is frequently chosen, the survey also suggests a general level of skepticism towards common law. This could be explained by the limited level of familiarity with the common law tradition in Scandinavian countries (which are civil law countries)."

Remy Gerbay on the popularity of English law as governing law according to the results.

"English law – the system is different from ours and we are not familiar with it."

Finnish respondent regarding substantive laws they would not agree to.

Important factors when choosing substantive law



The preferences are given points based on importance, first, second and third choices being awarded 33, 22 and 11 points respectively.

The three most important factors influencing the choice of substantive law are the respondents' own familiarity with and experience of that particular law, the perceived neutrality and impartiality of the legal system, and a case-by-case evaluation of how appropriate the substantive law is for the specific type of contract. The location of the other party and that of the performance of the contract are also considered important.

The findings are compatible with the fact that substantive laws of the Nordic countries are nowadays chosen more frequently, to the detriment of, for example, more distant US law. Many of the decisive factors can also be seen as elements of a cost-effective procedure, which supports the presumption that companies are becoming more conscious of the costs of dispute resolution.

(Please note that "US law" is used as a generic term to represent the laws of various states in the United States.)

"There are many reasons for not agreeing to certain substantive laws, such as lack of familiarity and previous experience, conflict between our 'normal' laws vs. theirs, reputation and difficulty in finding the right external counsel."

Danish respondent on the choice of substantive law.

"Not US law – Not know to us and there could be legal issues we are not aware of"

Swedish respondent regarding substantive laws they would not agree to.

"Anything outside western Europe – we do not operate outside that geographical area"

Norwegian respondent regarding substantive laws they would not agree to.

PART 2
Actual disputes

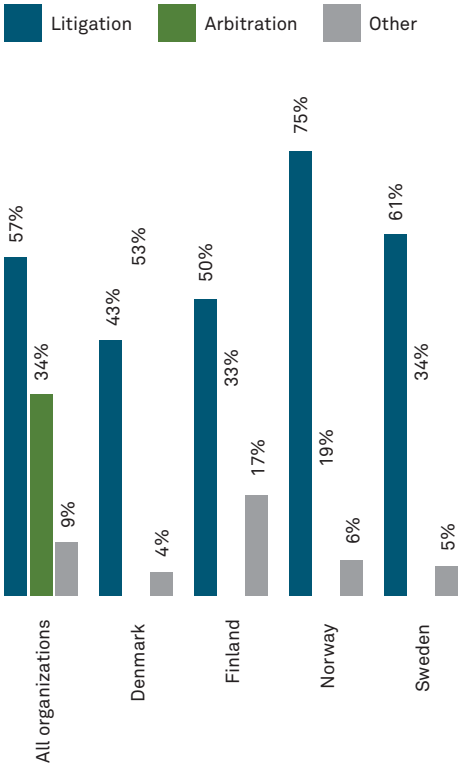
Number of disputes

The respondents experienced a mean of 11 and a median of five non-consumer disputes valued at over EUR 100,000 in the past 12 months, the number being the highest in Sweden and Finland and the lowest in Norway and Denmark.

A "dispute" is defined as a claim made against the company. Formal proceedings do not need to be instituted for the matter to be defined as a dispute. Sending a claim letter is considered sufficient.

Types of dispute resolution methods

Dispute resolution method for the larger disputes during the last 24 months



Litigation is in practice still more common (57%) than arbitration (34%), even though respondents state their clear preference for the latter (66%). The difference between the two has nonetheless declined since the compilation of the 2014 Index, which showed a slight increase in the amount of litigation. According to the 2014 Index, 73% of disputes were litigated and only 23% arbitrated. The current data is in line with the finding that arbitration is becoming more common than litigation, not only in theory but now also in practice.

Key findings

Arbitration is becoming more common in relation to litigation, also in practice.

Disputes have become more international, with over half of the disputes having cross-border elements.

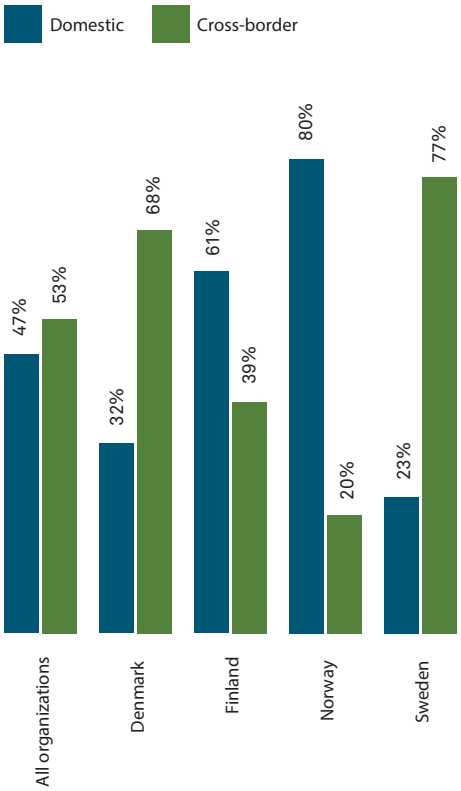
Altogether, 46% of the reported disputes concerned sale and purchase agreements and service agreements and 21% intellectual property.

Companies settled roughly half of their disputes before a judgement or an arbitral award was rendered.

The highest number of litigated disputes is reported by Norwegian respondents (75%), whereas in Denmark only 43% of disputes are resolved through litigation. Quite surprisingly, the number of arbitration cases is the highest in Denmark (53%), whereas only around 34% of disputes go to arbitration in the traditionally arbitration-friendly countries of Sweden and Finland.

Nature of actual disputes

Cross-border and domestic disputes during the last 24 months



Overall, disputes have become more international, with just over half of the disputes now having cross-border elements. This might demonstrate a subtle change in the business environment, given that, according to the previous editions of the Roschier Disputes Index, the number of domestic disputes has traditionally been higher.

Differences between the Nordic countries are significant. Swedish and Danish respondents report the highest number of cross-border disputes (77% and 68% respectively), whereas in Norway cross-border disputes account for a mere 20% of all disputes.

"One interesting theme reflected in the RDI 2016 results – and there is evidence of this also in the previous studies I have seen from Roschier – is that the Nordic disputes market is clearly well defined. Despite this, it is not very introvert, and there seems to be a lot of international interaction. As shown in the results, about half of the disputes have cross-border elements. This may be in part because of the prominence of the SCC. In my opinion, the Nordics are a very international and thriving market for disputes.

At the same time, Nordic disputes appear to be regional or limited to the northern hemisphere. There seems to be relatively little interaction with Africa, South America or South Asia. This is very different from the common law axis which one sees in the UK. Perhaps Nordic companies are not used to interacting with the more distant common law countries. This forms an interesting geographical scope."

Loukas Mistelis' general comment on the results of the survey.

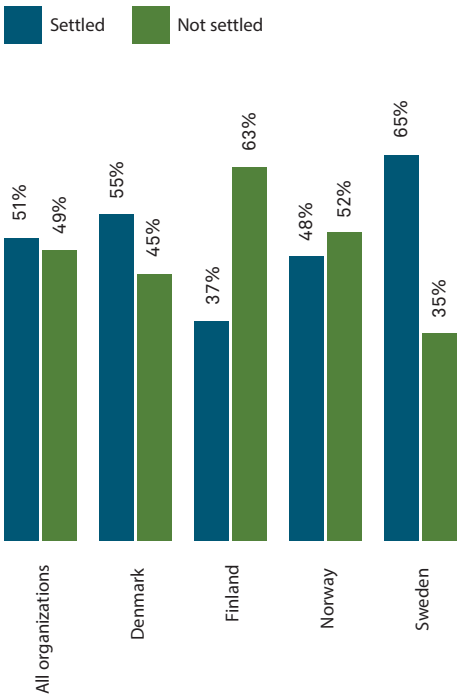
Subject matter of contractual disputes

Of all large disputes, 46% concerned sale and purchase agreements and service agreements. The second largest category was IP disputes (21%), followed by disputes concerning co-operation agreements (13%), competition law (11%) and tax (10%). Also, business acquisitions (9%),

shareholder agreements (3%) and investment treaty protection (1%) were mentioned.

There are some differences between the respondent countries. For example, Denmark has the highest number of disputes concerning co-operation agreements, and Sweden the highest number concerning competition law.

General level of settlement



The respondent companies reported having settled roughly half of their major disputes during the past two years, before a judgement or an arbitral award was rendered. Amicable settlement was most common in Sweden.

Key findings

When choosing a law firm for a major dispute, the firm's expertise in the substantive legal issues relevant to the dispute is considered the key deciding factor.

The law firm's prices are mentioned by many as important but not crucial.

In terms of the external counsel's work in relation to major disputes, there is a high demand amongst the respondents for high-quality strategic advice as well as a convincing performance at trial or during the hearing.

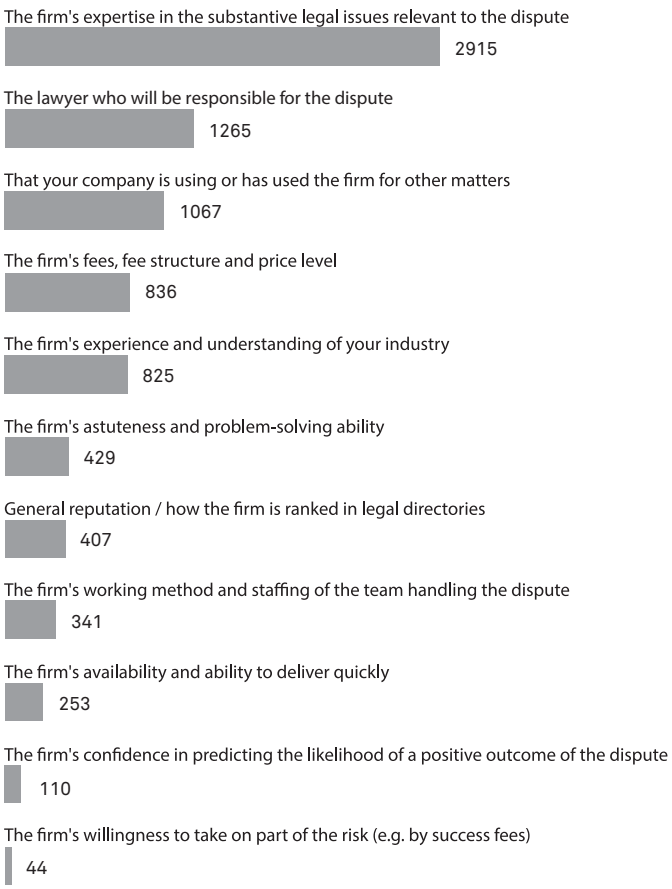
The success factors identified for a successful outcome in major disputes are, above all, thorough preparations and carefully gathering evidence.

Poor preparation, weaknesses in evidence, poor cooperation with the external counsel and lack of understanding of facts carry a risk of an unsuccessful outcome.

PART 3
Key factors for successfully managing major disputes

Choice of law firm

Important factors when choosing law firm



The preferences are given points based on importance, first, second and third choices being awarded 33, 22 and 11 points respectively.

A clear majority of the respondents stated that the law firm's expertise in the substantive legal issues relevant to the dispute was the key deciding factor when choosing a law firm for a major dispute. The reason for this is the respondents' desire to ensure that the firm has a track record in similar disputes. The second most important factor, according to the respondents, is the lawyer who will be responsible for the dispute. Thus, the results show that the choice of law firm for major disputes is not solely influenced by the qualities of the firm but also dependent on the specific lawyer that will be responsible for the dispute.

The third most important factor is that the respondent's company is using or has used the firm for other matters. This may be indicative of the fact that some respondents prefer working with a limited number of providers of legal services.

In addition, the firm's fees, fee structure and price level is considered important by many of the respondents. However, a majority of the respondents name this as the third most important factor – it is rarely deemed the most important factor. This shows that price is important, but not decisive for the choice of law firm for major disputes. Furthermore, the firm's experience and understanding of the client's industry are considered important by some respondents.

"Genuinely, the rankings do not really matter that much for anyone knowledgeable of the local legal scene. Rankings may be a source of information for a client who is looking for an attorney for the first time in a market, but for domestic clients who know the market and the lawyers, the rankings rarely matter. The expertise, personality and tactical understanding of the very attorneys does matter, it is not equally relevant which firm they represent.

To my understanding, there are certain law firms in New York, the "fearsome foursome", that other attorneys dread as firms. There the name of these law firms may guarantee a certain level of recognition even in the eyes of the judges. At least in the Nordics I would say that the quality of the particular attorney matters much more. Naturally the legal systems are very different too."

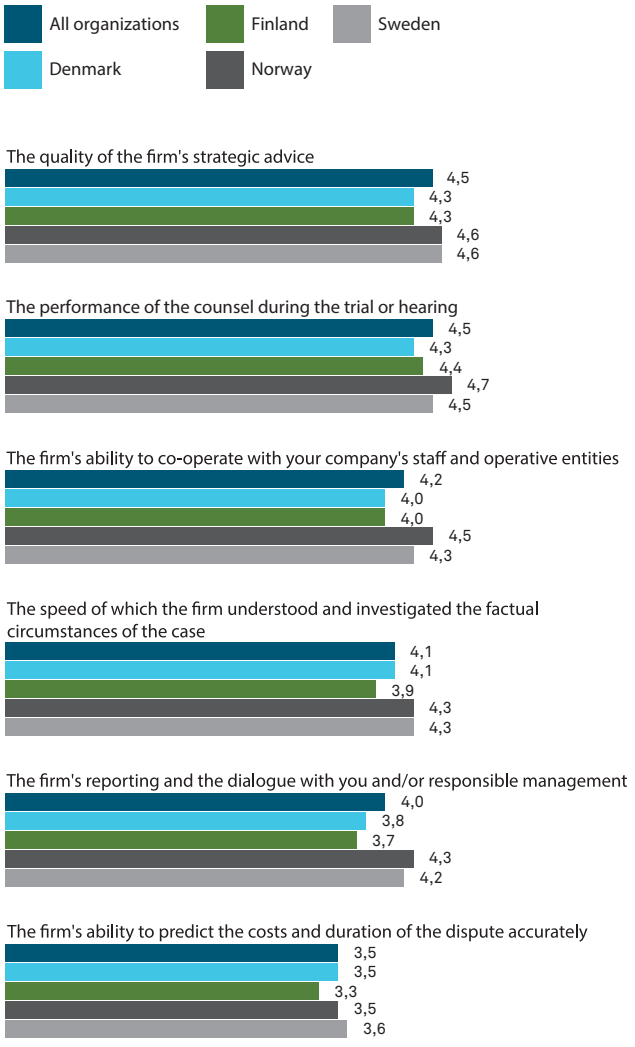
Juhani Pitkänen regarding the choice of law firm and the fact that according to the results of the survey, the reputation of law firms is ranked 7th among the factors that affect the choice of law firm.

"Of course it helps using a good law firm which offers good quality advice."

Finnish respondent about common denominators for successful outcomes in major disputes.

The firm's willingness to bear some of the risk is rarely taken into account by the respondents when choosing a law firm. In recent years, it has been widely discussed in the legal industry that the buyers of legal services would start requiring the lawyers to assume some of the risk. The results of our survey, however, indicate that this is not valued in practice, at least not yet. This is also the case for the lawyers' ability to predict the likelihood of a positive outcome of the dispute. Few respondents deem this important.

The external counsel's key contribution in major disputes



The preferences are given on a scale of 1-5, where 5 represents "of very high importance" and 1 "of no importance at all".

All of the criteria, except the firm's ability to predict the costs and duration of the dispute accurately (which is only considered important by some of the respondents), are considered important by the respondents. The respondents value high-quality strategic advice, good performance by counsel during the trial or hearing, the ability to co-operate

with the company's employees, the ability to understand and investigate the facts of the case quickly, good reporting to, and dialogue with, the company's management, and the ability to predict the costs and duration of the dispute accurately.

Clearly, there is a high demand amongst the respondents for high-quality strategic advice and a convincing performance by external counsel at trial or during the hearing. Hiring strategic-minded lawyers who make an accurate assessment of the case and decide on the right strategy are mentioned by several respondents as the common denominators for a successful outcome in a dispute. The majority of the respondents seem to agree that major disputes cannot be resolved in a standardized manner but require problem solving skills and strategic thinking.

Somewhat less important are the firm's ability to cooperate with the company's employees, the speed at which the firm understands and investigates the facts of the case, and the firm's dialogue with the general counsel and the company's management.

Finally, the firm's ability to predict the costs and duration of the dispute accurately is considered fairly important, but the least important among the other factors. As with the choice of law firm, the respondents indicate that for major disputes costs are not a primary decisive factor.

"That we hired strategic-minded lawyers."

Finnish respondent about common denominators for successful outcomes in major disputes.

"Very well prepared documents and the performance of the counsel during the trial."

Danish respondent about common denominators for successful outcomes in major disputes.

"The personal co-operation between us and the external lawyer"

Swedish respondent about common denominators for successful outcomes in major disputes.

"Very important that the lawyer really understands the facts and has a clear impression of the case."

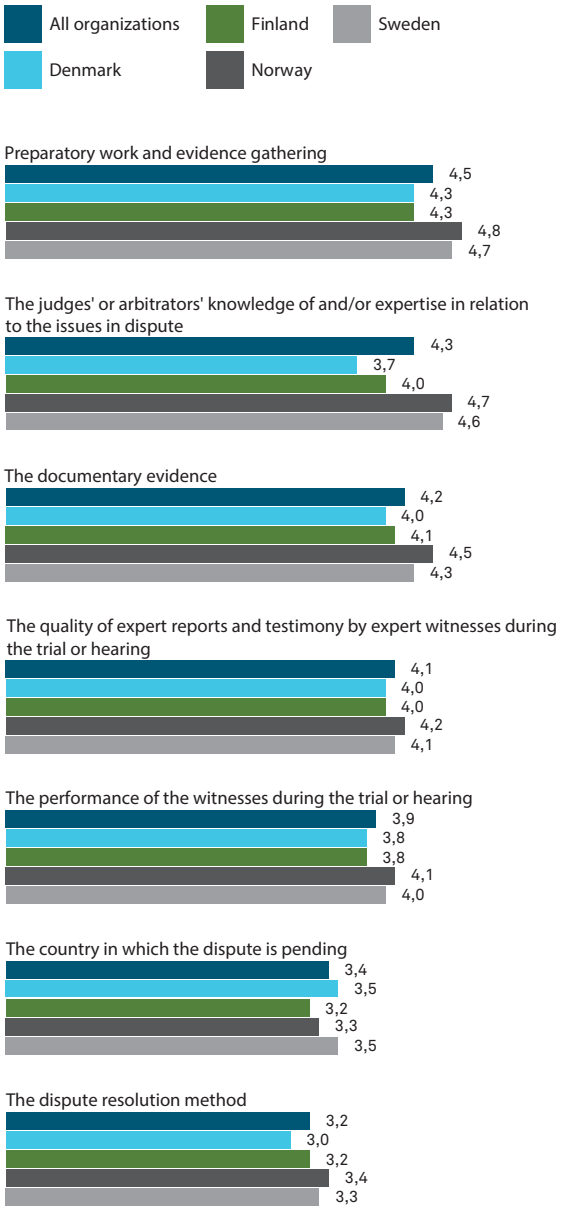
Danish respondent about common denominators for successful outcomes in major disputes.

"I believe that it is important for an external attorney to have a good sense for tactics. A vague case cannot however be saved even with the best of strategies. If the positions are equal or if you have a strong case, a good strategy or tactics can be decisive. With strategy I don't mean procedural tricks, but a smart way to present your case to the arbitrators or judges.

The attorney has to take the lead when planning the strategy. The attorney is after all the one who will eventually implement the strategy in a court or arbitration. At the same time it is important that the client's values and ethics are not compromised by the strategy chosen by the attorney. The initiative for a strategy should come from the attorney, but the client and its in-house counsel should be active in commenting."

Juhani Pitkänen on the fact that a good strategy is considered by many respondents as an important factor for a successful outcome in a dispute.

Success factors in preparing for and carrying out a major dispute



The preferences are given on a scale of 1-5, where 5 represents "of very high importance" and 1 "of no importance at all".

Preparatory work and evidence gathering, the judges' and arbitrators' knowledge of and/or expertise in relation to the issues in dispute, the documentary evidence, the quality of the expert reports and testimony by expert witnesses, and the performance of the witnesses during the trial or hearing are all considered important by the respondents.

"Details – to get to know the case and really understand the material to find the right arguments and evidence."

Swedish respondent about reasons for a successful outcome

"Hard work in gathering evidence"

Finnish respondent about reasons for a successful outcome

However, the majority of the respondents identified preparatory work and evidence gathering as the most important factors. The importance of thorough preparation and carefully gathering the evidence are also repeatedly mentioned by many respondents as common denominators for a successful outcome. Almost as important is the judges' and arbitrators' knowledge of and/or expertise in relation to the issues in dispute. As presented above, the importance of the knowledge and expertise of the judges and arbitrators is evident also from the fact that arbitrators having relevant expertise and the ability to nominate arbitrators are deemed decisive factors for the choice of arbitration. For many respondents, the views of carefully-chosen expert witnesses and the performance of the witnesses were seen as key to winning a dispute.

"Skillful lawyers, good preparation and strategy"

Swedish respondent about reasons for a successful outcome

There are virtually no identifiable differences between the Nordic countries in this regard. However, the respondents from Denmark consider the judges' and arbitrators' knowledge of and expertise in relation to the issues in dispute less important than the respondents from the other Nordic countries.

When asked about the common denominators for a successful outcome in the major disputes that the respondents have won, many mentioned thorough preparation and scrupulously gathering and analyzing evidence (particularly written evidence). Many also identified good cooperation and communication with the counsel and that the counsel was able to understand all the facts of the case and make it understandable to the arbitrators or judges.

"Good preparations and good cooperation with the counsel"

Finnish respondent about reasons for a successful outcome

When asked instead to name the common denominators for unsuccessful outcomes in major disputes, the respondents mentioned virtually the same denominators as when asked to identify the denominators for a successful outcome. The respondents mentioned poor preparation, weaknesses in evidence (both lack of written evidence and poorly-prepared witnesses), poor cooperation and control of the external counsel, and lack of understanding of facts, both by the arbitrators/judges and by the external counsel. This indicates that major disputes require comprehensive knowledge of all of the facts and evidence. Such in-depth knowledge is achieved by means of thorough preparations and good team work between the in-house team and the external counsel.

"Bad preparations and poor cooperation with external lawyers."

Norwegian respondent about the reasons for experienced unsuccessful outcomes

"I was surprised to see that many companies seem to go into disputes either at least somewhat unprepared or unaware or even aware of the fact that they don't have a solid case. In my view, all disputes divert the management's attention away from business, its primary task, and should therefore be avoided. So why would anyone enter into a dispute with a bad case in their hands? Many of the interviewees state that the reason for an unsuccessful outcome was unrealistic expectations. If I personally am in a position to choose, I would not spend money and resources on a dispute where the merits are not in our favor. Exceptionally, though, the choice of litigating/arbitrating might be related to a question of reputation or principle, in which case a careful and educated decision needs to be taken."

Juhani Pitkänen regarding the common denominators for a successful/unsuccessful outcome.

"1) Written evidence was not in our favor, 2) the lawyer didn't make the case understandable, 3) the judge didn't get the case."

Finnish respondent about the reasons for experienced unsuccessful outcomes

"Expert witnesses that did not do a good job"

Swedish respondent about the reasons for experienced unsuccessful outcomes.

"When the arbitrators did not understand the case."

Danish respondent about the reasons for experienced unsuccessful outcomes

"Difficulty in gathering enough evidence."

Norwegian respondent about the reasons for experienced unsuccessful outcomes

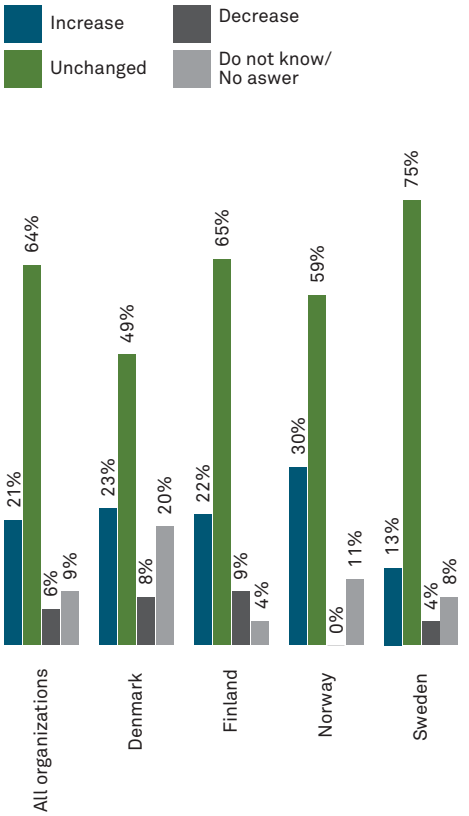
"Bad control of the dispute – let too much to the external counsels"

Swedish respondent about the reasons for experienced unsuccessful outcomes.

PART 4
Trends and dispute management

Trends

Anticipated changes in number of major disputes in the next 12 months



As in previous years, the majority of the respondents (61%) did not see any particular trends in their disputes portfolio during the last few years. All the same, most respondents (64%) do not anticipate any significant changes in the quantity of their major disputes in the next 12 months.

Among the respondents stating that they have noticed trends, several mention that the disputes are becoming more comprehensive and more complex. Some of the respondents also mention that they have noticed that more cases are settled and that mediation is used more frequently. Other respondents, on the other hand, mention that companies are less willing to settle.

Notably, as many as 30% of the Norwegian respondents anticipated an increase in the number of disputes compared to only around 20% of the Finnish and Danish respondents and

Key findings

As in previous years, the majority of the respondents did not see any particular trends in their disputes portfolio during the last few years. However, 21% of the respondents anticipate an increase in the number of major disputes in the next 12 months.

Almost one third of the Norwegian respondents anticipated an increase in the number of disputes and attributed the predicted change to a tougher environment in the oil industry with lower oil prices.

Many of the respondents use standardized dispute management techniques. The most commonly used technique is the use of a model dispute resolution clause.

The respondents do not seem to see a strong need for creative pricing models for disputes. Most respondents answer that they prefer hourly billing, fixed fees and hourly rates together with discounts and a reliable estimate and/or price cap.

13% of the Swedish respondents. The Norwegian respondents attributed the anticipated change to developments in the market, pointing to a tougher environment in the oil industry with lower oil prices. Among the other respondents who believed the number of their disputes would increase in the following 12 months, several attributed this to a tougher business climate and a more Anglo-American influenced approach to business and contracts.

"The sort of Anglo-American approach to claims and contracts spreading elsewhere in the world."

Finnish respondent regarding what may cause change in the number of disputes.

"A change in the business climate, an increased tendency that US behavior has spread to the whole world."

Swedish respondent regarding what may cause change in the number of disputes.

"There is a tougher environment in the oil industry."

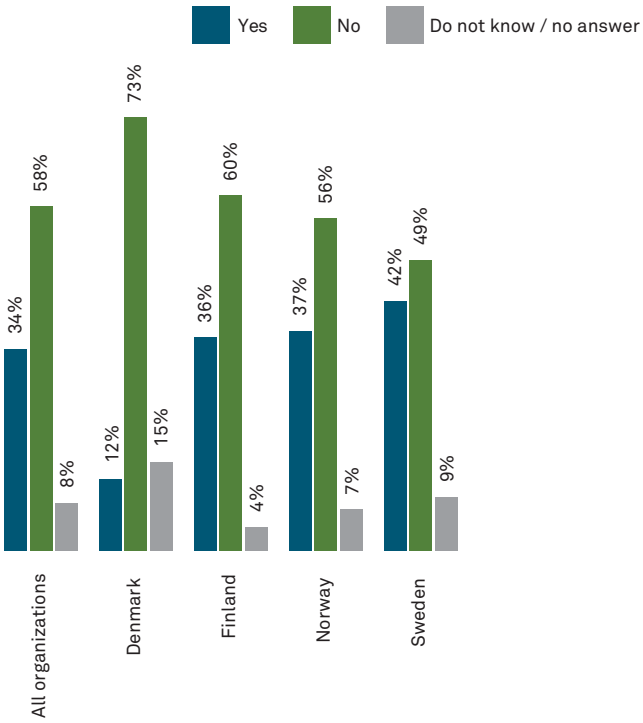
Norwegian respondent regarding what may cause change in the number of disputes.

"I am not sure that I entirely agree that the number of disputes generally increases when the economy declines. To a certain extent that is a myth. In a financial crisis, companies often do not want to put money on litigation or arbitration. Personally, I believe that the use of ADR will increase, since it is often faster and cheaper and the winning party gets paid quicker.

While there may be an increased number of disputes in Norway at the moment, I do not believe that is a trend that follows from the financial downturn."

Stephan L. Jerwell on the fact that many Norwegian respondents have stated that they believe that the number of disputes in Norway will increase due to the decline in oil prices and the current general recession in Norway.

Written dispute polices



Approximately one third (34%) of the respondents had written policies regarding how to handle disputes. Among the companies having such a written policy, the policy often contains guidelines as to when a dispute should be handled by a lawyer, appropriate dispute resolution methods, how to react to a notice of claim from a counterparty, and when external counsel should be contacted in the event of a dispute.

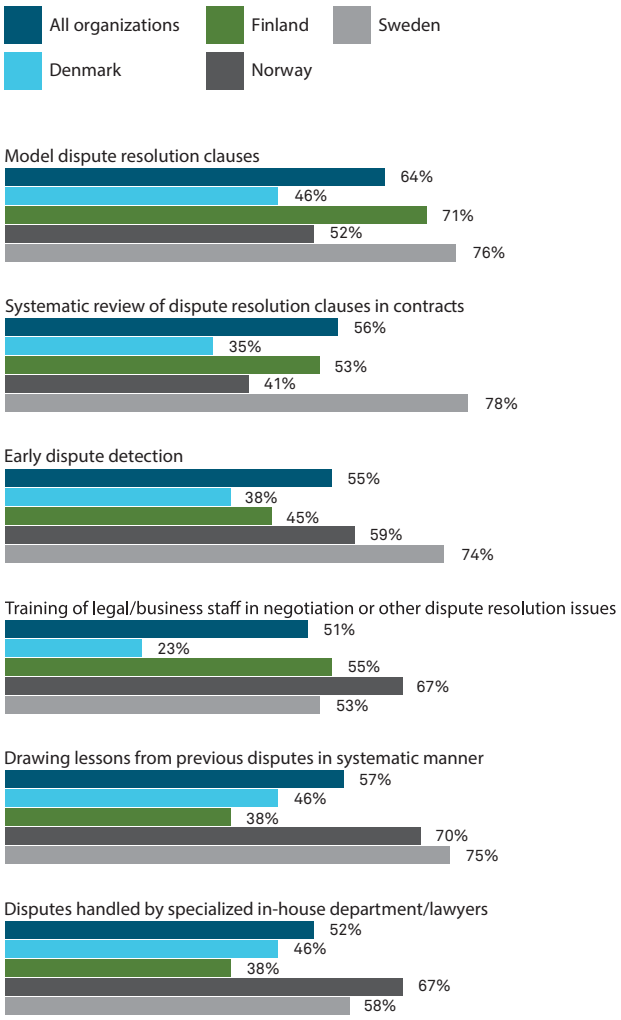
The use of such written policies as a method to manage disputes was most frequently used by Swedish respondents (42%) and least frequently by the Danish respondents (12%).

"The answers to this question reflect a very diverse reality. At one end of the spectrum, we have companies with no disputes policies at all and no in-house lawyers versed in dispute resolution. At the other end, we find highly sophisticated operators who often count within their ranks former litigators. A previous empirical survey conducted by Queen Mary University suggests that one sector in which the level of sophistication is very high is the energy/oil & gas sector. However, one can discern across the board a trend towards more sophistication. This may be explained by the increased budgetary pressures which in-house counsel are facing nowadays."

Remy Gerbay on the use of written dispute policies.

Other dispute management techniques

Use of dispute management techniques



In addition to the use of written dispute policies, the respondents also confirmed that they use several other dispute management techniques. The results are similar to previous years.

The technique most frequently used among the respondents is, as in the 2014 survey, the implementation of model dispute resolution clauses (64%). Other methods included drawing lessons from previous disputes in a systematic manner, the systematic review of dispute resolution clauses in contracts, early dispute detection, specialist in-house lawyers or a specialist legal department managing disputes, and training legal/business staff in negotiations or other dispute-related issues.

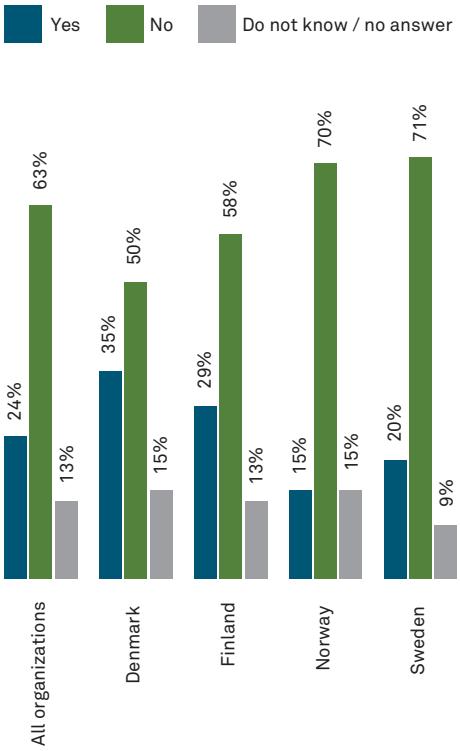
The respondents in Finland, Sweden and Norway use dispute management techniques to a greater extent than the respondents in Denmark.

"The most important phase is the time preceding the dispute, i.e. before the actual legal proceeding or even before a proper dispute has even arisen. Preventive legal management is the most important factor in managing disputes and if we end up in a dispute, we have most often already failed at something. A good contract is a contract that does not give parties a reason or excuse to end up in court. The second important factor in managing a dispute is the preparation for a process. But, unfortunately, even good preparation cannot change the merits of a case."

Juhani Pitkänen on dispute management.

Cost control

Use of fixed legal fees

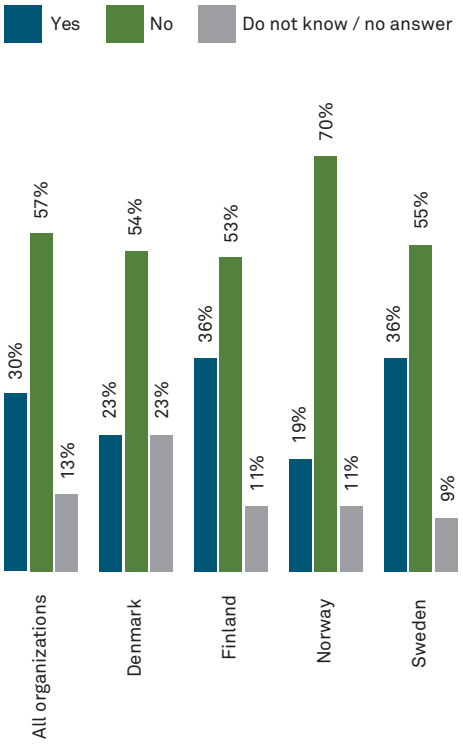


"Hourly rates with a price cap"

Norwegian respondent regarding what kind of pricing model for disputes the respondent would want law firms to adopt in the future

About one quarter of the respondents used fixed legal fees for external counsel in dispute-related matters. The Norwegian and Swedish respondents are most reluctant to use fixed fees.

Considered or used alternative fee arrangements (e.g. success fees)



Interestingly, 30% of the respondents have considered or used alternative fee arrangements such as success fees. Alternative fee arrangements are most popular in Finland and Sweden. In these countries, as many as 36% of the respondents have considered or used alternative fee arrangements. However, third-party funding, which in recent years has been predicted to increase, is still rarely contemplated or used according to the results. Only 6% of the respondents answered that they have considered or used funding from a third party.

"A mix of success fees, conditional fees, but in the form of a staircase depending on the outcome of the case"

Swedish respondent regarding what kind of pricing model for disputes the respondent would want law firms to adopt in the future

When asked what kind of pricing model for disputes the respondent would want law firms to adopt in the future, many of the respondents do not seem particularly interested in creative solutions. The most common responses are hourly billing and fixed fees. Many of the respondents also mentioned the use of hourly rates together with discounts and a reliable estimate and/or price cap. However, some of the respondents are more inventive and mention success fees and some more innovative fee structures.

"The results show that there is fairly limited experience of, and little appetite for, alternative fee arrangements. This is counter intuitive when one considers the longstanding criticisms raised by the users of arbitration about excessive costs. However, it may well be that the lack of predictability in some alternative fee arrangements models make it difficult for in-house counsel to "sell" these models to the company executives. Rightly or wrongly, a more expensive but predictable fee arrangement will often be preferred to a potentially cheaper but less predictable one. There also seems to be very little actual experience of third-party funding. However, I think that this will change relatively quickly."

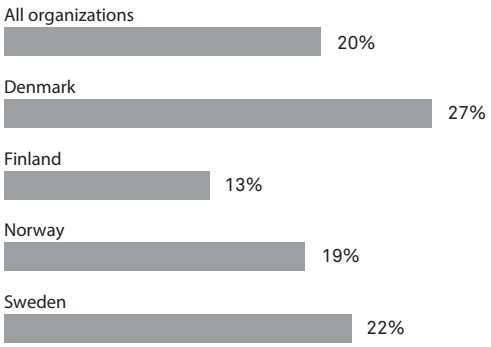
Remy Gerbay on the use of alternative fee arrangements.

"Since the amount of work is very difficult to estimate, hourly fees with discounts and caps is the most practicable solution."

Finnish respondent regarding what kind of pricing model for disputes the respondent would want law firms to adopt in the future

PART 5
Alternative dispute resolution

Participation in ADR



Most organizations have not participated in ADR proceedings during the past two years. However, among those organizations who have employed this method of dispute resolution, which includes 20% of all respondents, the process is most popular in Denmark (with a 27% participation rate) and least popular in Finland (with a participation rate of 13%).

Of those organizations who participated in ADR, the respondents experienced a median of four disputes in which ADR was used in the past 24 months.

The mean is the arithmetic average of a set of numbers. The median is described as the numeric value separating the higher half of a sample, a population, or a probability distribution, from the lower half.

"Better try to have a little than nothing."

Danish respondent regarding why it had chosen to use ADR

A recurring reason for not participating in ADR was that there had been "no need" for it among those surveyed. Other reasons included a lack of familiarity with the process and the fact that ADR was not discussed or proposed in the negotiation phase of the agreement. A Swedish respondent went so far as to say they had little faith in the process and that in the event of a dispute it is better to decide the issue via a "real process".

Key findings

Many organizations simply perceive no need for ADR.

ADR was most commonly used in Denmark in the last two years.

Disputes submitted to ADR resulted in a settlement most frequently in Denmark, least frequently in Finland.

On the other hand, Finnish and Swedish respondents in particular highlighted ADR's innate simplicity, efficiency and cost effectiveness as reasons to choose this method for resolving commercial disputes. When the goal is to preserve the relationship between the parties, the cooperative nature of ADR may make it the best choice for meeting the parties' needs, according to respondents.

"If you can't get along without help, you can't get along nonetheless."

Swedish respondent regarding why it had chosen to use ADR

An interesting observation is that preference for ADR in the Nordic countries is much lower than one would have expected. Maybe this is because of the efficiency of general courts. In my experience, mediation is a lot more popular in the UK and the US than in Scandinavia, although the cases resolved through mediation are not necessarily the biggest cases, although increasingly high stake cases are resolved via mediation. In Europe, the situation in general appears to be quite diverse.

Loukas Mistelis on the results regarding the use of ADR.

"We have not really seen any development in this respect, and we see very few mediation cases at institutional level. It is difficult to say what the reasons for this is. If you sit down and make a list of all the positive aspects of mediation, you get a very long list of commercially good reasons to use mediation. Nevertheless, mediation in commercial cases is still marginal. I believe one of the reasons why mediation is not gaining much popularity is that the potential users are not used to it and that they rather use the regular methods of dispute resolution. There is a threshold for using mediation in many countries, but no one seems to know what the reason for that is."

Annette Magnusson on the fact that results indicate that the use of ADR has stayed at the same level in Sweden and in the Nordics as a whole as in the 2014 survey.

Type of ADR

Those who did participate in ADR overwhelmingly chose mediation (75%), with a small percentage (14%) of respondents from all four countries who used ADR opting for adjudication instead or alongside. Adjudication itself appears to be more frequently employed in Sweden, Norway and Finland, with around 20% of respondents from each country saying they had employed the process. Danish respondents opted exclusively for mediation, with 0% choosing adjudication as their preferred ADR method.

By mediation we mean mediation proceedings during which the mediator aims to facilitate the communication between the parties and help the parties to reach a settlement, without assessing the dispute on its merits. By adjudication we mean mediation proceedings during which the mediator evaluates the merits of the dispute.

"Standard mediation with written presentations from both parts."

Danish respondent regarding how the ADR proceedings were carried out

"Introductory meeting, brief written presentations, negotiation."

Swedish respondent regarding how the ADR proceedings were carried out

"It's very much led by the party."

Finnish respondent regarding how the ADR proceedings were carried out

"I believe that the difference [in the results regarding the use of ADR in Norway between the 2014 Roschier Disputes Index and this year's Roschier Disputes Index] is mainly a result of how the questions were presented. In the 2014 survey, it seems that also court mediation was included, whereas the 2016 questions exclude court mediation.

The difference in the results became quite significant, as court mediation is practically mandatory in Norway. When parties go to court, they are asked if they would participate in mediation first. If they agree, mediation is initiated in the court's regime and in practice it can vary significantly depending on the judge. Some judges give it 10 minutes whereas others will give it considerably more time.

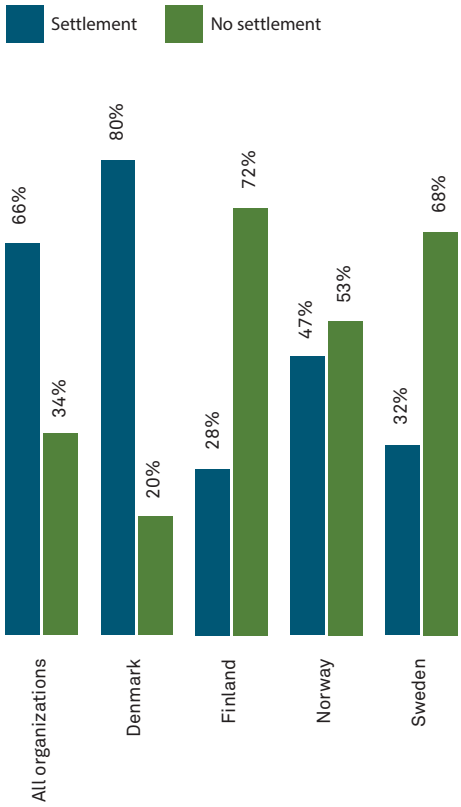
Mediation outside the courts is used quite frequently in Norway. The best kind of mediation, in my opinion, is non-binding mediation with an appointed mediator. A well-known Norwegian mediator told me that around 90% of his mediation proceedings lead to an amicable settlement. In Norway, mediation is often used in large, complex matters and it is of course very beneficial if you start the mediation proceedings early in a dispute before the legal costs start to accrue. At the moment we use mostly ad hoc mediation, but we have plans to create mediation rules for the Oslo CC as well."

Stephan L. Jervell on the use of ADR in Norway and the difference in the results regarding the use of ADR in Norway between the 2014 Roschier Disputes Index and this year's Roschier Disputes Index.

"Förliksråd – both parties present their side of the story, the mediator comes up with a suggested solution and then we see if the parties can meet in the middle."

Norwegian respondent regarding how the ADR proceedings were carried out

Result of participation in ADR



The results indicate that the number of ADR proceedings that lead to a settlement differs greatly between the Nordic countries. An astonishing 80% of Danish respondents who participated in ADR reported that the process culminated in a settlement, while only 28% of Finnish respondents could say the same. In Norway and Sweden the percentages were 47 and 32, respectively.

"I do not have an explanation for the differences between the countries. A factor that affects the result of mediation in general are the parties' expectations and at what stage of the dispute mediation is tried. Sometimes mediation is regarded only as extended negotiations in the presence of a third party, and sometimes the parties are truly seeking a mutually beneficial solution. Successful mediation requires that the parties know what they are expecting before they enter into the mediation."

Annette Magnusson on the indication that the number of ADR proceedings that lead to a settlement differs greatly between the Nordic countries.

Universe of organizations

4
countries represented in the survey

264
companies included in the survey's universe

Companies interviewed

26	Denmark
45	Finland
27	Norway
45	Sweden

143
participating organizations

54%
response rate

Visit www.roschier.com to see a list of the organizations included in the survey's universe.

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