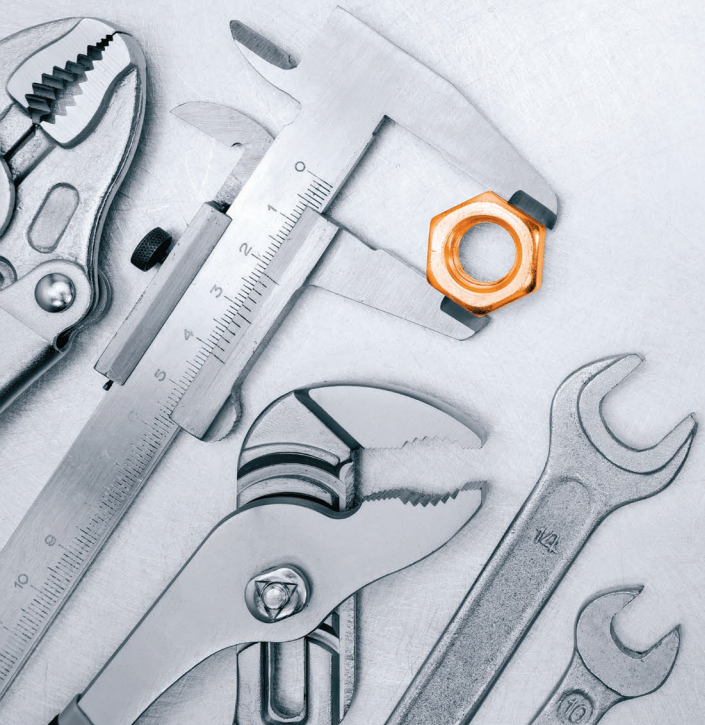
ROSCHIER DISPUTES TOOLKIT
FOR NORDIC COMPANIES



ROSCHIER

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Foreword

With this booklet, the Roschier Disputes Toolkit for Nordic Companies, we have sought to create something unique. The Roschier Toolkit provides practical information on commercial dispute resolution and conflict management for companies engaging in international commerce. Its purpose is to provide an easily accessible guide for lawyers and other professionals who are not specialists in the field of dispute resolution, but nevertheless deal with disputes from time to time as part of their work.

The Toolkit contains practical tips and reflections on a broad range of topics likely to be encountered by in-house counsel in their everyday work. The topics which we have chosen for the Toolkit include reflections on what causes disputes and how to manage them, dispute resolution clauses, applicable law, and choice of counsel for litigation and arbitration abroad. In addition, the Toolkit explores interim measures, production of documents, costs and criminal law aspects, settlement, mediation, and enforcement.

In broad terms, the Toolkit addresses questions of dispute resolution in an international setting, as one must in today's global economy. The point of view is Nordic, and Nordic companies are the primary target audience. Needless to say, the contents are generic by nature. Even if helpful as a source of ideas and inspiration, the Toolkit does not aspire to replace legal advice tailored to the needs of an individual case.

We hope that you will find the Roschier Disputes Toolkit for Nordic Companies useful in your everyday work.

Roschier Dispute Resolution practice

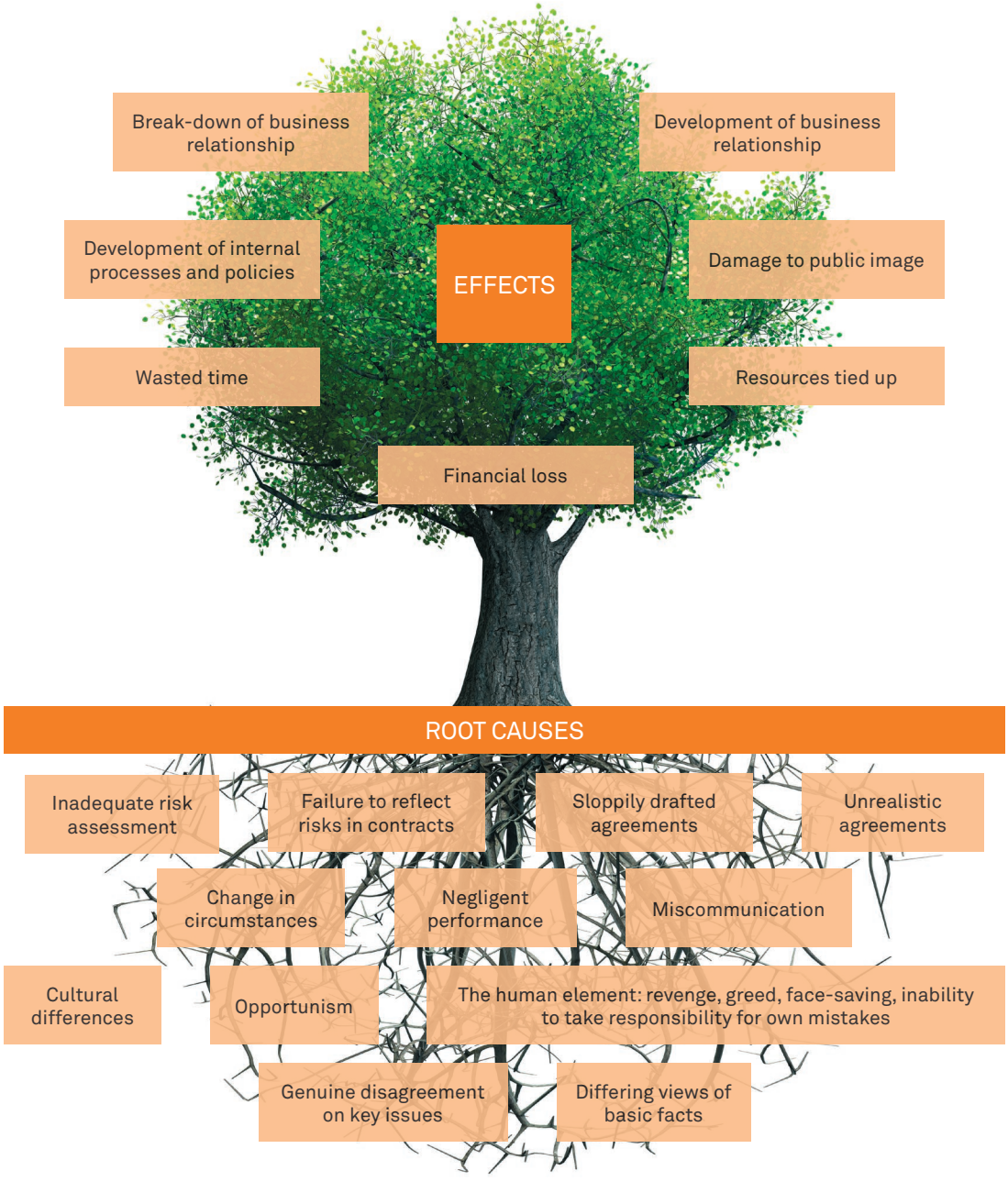
1 Causes of disputes and how to manage and avoid them

Conflicts are an inevitable part of human life and, consequently, of business activities. Only a small number of conflicts develop into actual legal proceedings, that is, in most cases into litigation or arbitration. Generally speaking, the fewer disputes in any given company, the better. Then again, there are situations when it may be crucial for a company to pursue a matter vigorously in all available instances to maximize the chances of a positive outcome. Thus, companies should try, on the one hand, to avoid having minor conflicts develop into legal proceedings, and on the other hand, to make sure that the conflicts that do develop into actual legal disputes are handled in the best possible way. Understanding the root causes of conflicts and their effects is the first step towards better dispute management.

Example 1: Seller A agrees to produce and deliver X-ray equipment to buyer B based on jointly agreed specifications. Shortly after signing the contract, the government in B's home country tightens the requirements for allowed doses of radiation, rendering the intended equipment illegal. A and B fail to agree who bears the costs resulting from modifications to the equipment.

Example 2: Distributor D has purchased a shipment of automobiles from manufacturer O, half of which are badly damaged in a storm while onboard a cargo vessel *en route* to their destination. Carrier C is suspected of negligence in loading and securing the vehicles in the hold, but files for bankruptcy shortly after claims start piling up. D, who has paid for the vehicles in advance, seeks recourse from O as well as C's insurer I.

Root causes of conflicts and their effects



The importance of mind-set

An important aspect in our own control is the mind-set of our own organization. A dispute or a conflict often arises on the grass-root level of the organization by employees. An employee of the organization may, for example, notice a malfunction in brand new machinery he or she operates. Once observed, clear communication and reporting channels are then needed to take matters forward and start investigating the causes and effects of the malfunction. Depending on how serious the situation is, senior management and the legal department may get involved at different stages, including informing the counterparty of the defect and requesting that they fix it.

It is crucial that any issues and problems are brought early on to the attention of the legal team, as opposed to trying to solve them independently or, worse, to hiding one's own mistakes. The earlier problems are handled in a professional way, the better the chances are that they can be resolved efficiently, avoiding a spiral towards a legal dispute.

Disputes policy and learning from past conflicts

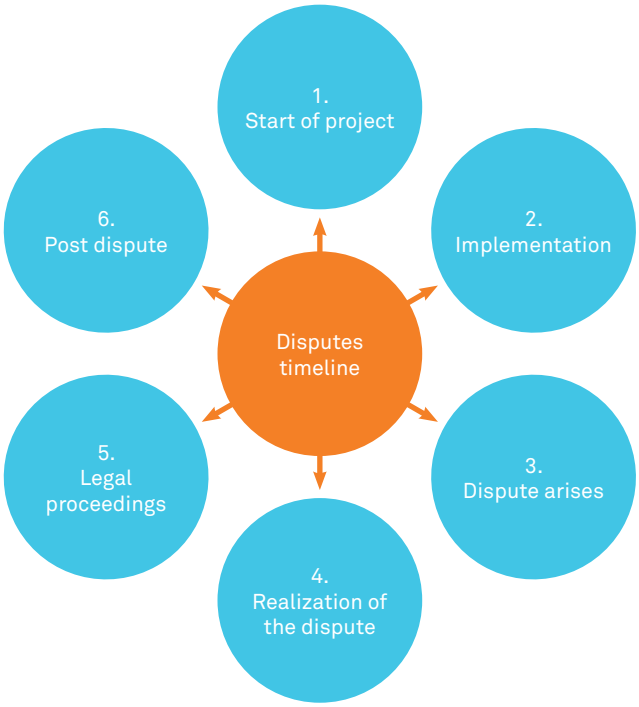
Understanding and managing disputes requires knowing your business and understanding the business-specific risk factors, which may be different from country to country or from sector to sector. How an organization deals with its disputes and what an organization can learn from its prior disputes should be part of its risk management. Analysis of past disputes in a so-called evaluation loop provides valuable insight into conflict-sensitive areas of the business and organization, the possible shortcomings of contract terms, and simply how the organization could do better next time. It helps to develop and improve guidelines or standard procedures to handle disputes. Raising awareness within the organization is key to better performance in the future.

Depending on the size of a company and the number of disputes or claims it has, it may be useful to have a written policy for dispute resolution matters. For example, such a policy can set out in a structured manner guidance and internal practices on a number of matters, including:

- The preferred dispute resolution methods
- The preferred dispute resolution venues
- Applicable laws for all or certain types of disputes
- Whom to contact in the organization when a conflict arises
- At which stage different senior levels of management get involved
- At which stage (external) legal counsel get involved.

Elaborating a policy for disputes helps create a strategy for early dispute resolution, where a company actively considers when disputes may arise in the course of the usual business cycle and tries to work on internal structures to detect disputes at an early stage. As discussed in chapters 6 and 7, it is often best for businesses to settle disputes and maintain good working relationships with its contract parties. Such a strategy may involve training the company's staff in settlement negotiation or mediation. Roschier offers several tools and services to assist in creating a more proactive dispute management. These include: contract portfolio review, standard contracts, past disputes review, guidelines, and training.

In considering disputes management issues, it is important to take into account the full timeline of relevant events.



ISSUES TO CONSIDER BEFORE AND DURING CONTRACT PERFORMANCE FROM A CONFLICT MANAGEMENT PERSPECTIVE

Consider risk allocation with an open mind while preparing contracts

- Always make adequate risk assessments and factor them appropriately into the contract.
- Placing all obligations and liabilities on your contracting party during contract negotiations can be counterproductive, even if you are in a position to dictate terms.
- An agreement can be healthier and more cost-effective if risks are distributed depending on which party is best able to carry them.

Draft contracts that the parties can comply with in real life

- Unrealistic contractual requirements will only lead to widespread non-compliance that may undermine the contract itself.
- Be mindful of plausible changes in economic circumstances and legislation during the lifetime of the contract.

Consider changing the contract if the parties find it difficult to comply with the contract

- Acknowledging and accepting behavior that does not conform to the contract can lead to complicated situations where parties no longer know what their obligations are.

Appoint contract managers, at least for larger projects

- When someone is clearly responsible for compliance with the contract, it is more likely that things will proceed smoothly and professionally.

Raise awareness within your organization

- Make sure your organization is aware of the core contractual rights and obligations related to the work they perform.
- Make sure your organization knows what to do with a claim event or with a claim from the counterparty. Functioning escalation procedures and reliable flow of information are key.

- This may require a mindset change, the elaboration and implementation of policies or training.

Where your counterparty fails to comply with its obligations, notify them in writing or by other verifiable means

- A lack of formal notice can easily lead to claims being denied later on.
- Notices of non-compliance can be polite and constructive; no need to be aggressive unless the circumstances warrant it.

Despite the above, be practical. Focus on what matters

- Being too demanding can also lead to unnecessary disputes.

Alarm bells should ring when your contracting party displays consistent behavior indicating they are building a case file

- That may be the last point in time to avoid an escalating conflict.
- In any event, make sure the counterparty is not the only party documenting your joint project.
- In a legal proceeding, the party with a professionally managed project file has a fundamental evidentiary advantage.

Where possible, involve legal counsel early on

- Choices made early on may have profound effects on how the matter looks later in the eyes of a judge or an arbitrator who will ultimately decide who is right and who is wrong.
- Choices made early on may significantly impact on a party's bargaining position in settlement negotiations aimed at avoiding a dispute.

Be mindful of lessons learned

- Make sure the organization takes the time to review past disputes and identify any lessons learned.
- Ask what went wrong? Why did the dispute materialize? Why was the dispute not resolved at an early stage?
- Ask how can we improve our trading terms, operating procedures or other practices in order to keep the same problem from reoccurring? Revise the organization's disputes policy where appropriate.

2 Dispute resolution methods and clauses - dos and don'ts

Why is choice of venue and method important?

A well drafted dispute resolution clause gives parties certainty about *how* and *where* any potential future disputes will be resolved. This is why the choice of dispute resolution method and venue are so important. If a contract includes no dispute resolution clause, this leaves the venue and method uncertain and thus risky. This uncertainty can be exploited to obstruct the proceedings or lead to litigation to establish the correct place or method.

The risk is often greater in international cases, where the lack of dispute resolution clause leads to additional complications. The risk is particularly elevated, when contracting with a party not domiciled in the European Union, or in a situation that is not covered by any relevant bilateral or multilateral treaty that regulates these issues between states. Consequently, as a matter of principle, one should always include a dispute resolution clause in contracts. The purpose of this chapter is to provide information on different dispute resolution methods and particular points for consideration in international matters, as well as practical tips on drafting dispute resolution clauses.

ALL DISPUTES

Aspects of the procedure affected by venue and method

- Efficiency and flexibility
- Possibility to appeal
- Expertise of the decision maker
- Language
- Cost
- Public or non-public

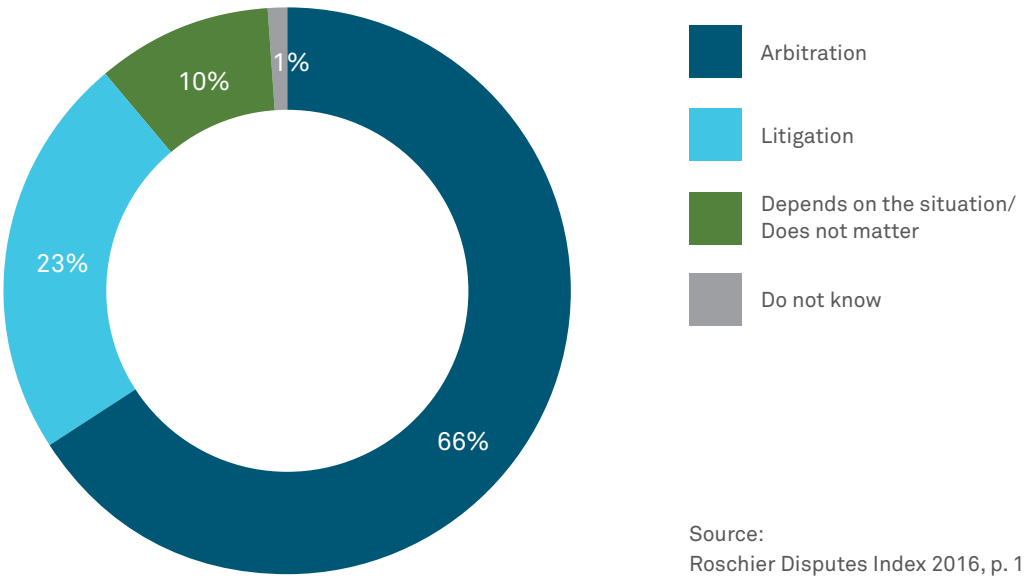
INTERNATIONAL DISPUTES

Further aspects to consider

- Finding a "neutral" venue and method that does not favor one party over the other
- The location of assets and the possibility to enforce a final judgment or arbitral award in a foreign jurisdiction
- Matching the venue and method with choice of applicable law

Based on the findings of the Roschier Disputes Index 2016, the preferred dispute resolution method for Nordic companies was arbitration.

Preferred dispute resolution method



Source:
Roschier Disputes Index 2016, p. 10.

Court litigation

Court litigation is the common default if no other dispute resolution method is chosen. This can be a suitable choice based on an evaluation of the factors mentioned in the table below. However, if these factors raise concerns, arbitration may be a suitable alternative.

ALL DISPUTES

Special characteristics of court litigation

- Public procedure
- Possibility of appeal
- No choice of the presiding judge(s)
- Judge(s) may not have expertise in commercial matters

INTERNATIONAL DISPUTES

Further considerations

- In a foreign court you may encounter unfamiliar procedural rules and practices
- Cases will be handled in the official language of the court, so considerable time and money may have to be spent on translation and interpretation
- Costs, including court fees, and efficiency may vary considerably between jurisdictions
- Unfortunately, the rule of law may be weak in certain jurisdictions or there may be problems with corruption
- International jurisdiction and enforcement depend on international rules and treaties, and where such rules are not available there may be considerable added complexities

THE BRUSSELS I REGULATION

The main EU legal instrument on international jurisdiction and enforcement is the Brussels I Regulation.

What? The Brussels I Regulation Recast (1215/2012) is the key EU law on issues of jurisdiction and enforcement in **civil and commercial** matters. Preceded by Regulation (44/2001) and the Brussels Convention of 1968.

Aim to prevent the same cases from being decided in more than one court at the same time (parallel court proceedings) and to promote the mutual recognition and free movement of judgments in the EU context.

Content: Regulates the determination of jurisdiction of EU Member State courts in specific cross-border cases. Also regulates the recognition and enforcement of Member State court judgments within the EU.

The general rule on jurisdiction is that a company with its domicile in an EU Member State must be sued in the courts of that State.

Alternative jurisdiction for matters related to contracts is with the courts at the place where the obligation in question should be performed. For the sale of goods that is where, under the contract, the goods were delivered or should have been delivered. For the provision of services that is the place where, under the contract, the services were provided or should have been provided.

Alternative jurisdiction for tort matters is with the court at the place where the harmful event occurred or may occur.

Further rules on special jurisdiction or exclusive jurisdiction apply to, for example, consumer contracts, insurance, individual employment contracts, and real estate.

Party autonomy: Parties are free to agree on the court they want to go to, with limited exceptions.

General lis pendens rule remains: Where proceedings involving the same matter, between the same parties, are brought in the courts of different Member States, any court other than the court first seized must suspend the case until the jurisdiction of the first court is established.

Lis pendens rule for exclusive choice of court agreement: All other courts including the first court must suspend any proceedings as soon as the designated EU Member State court under an exclusive jurisdiction clause has been seized.

Arbitration remains outside the Regulation.

Other international instruments that may be relevant:

- The Lugano Convention between the EU Member States, Norway, Iceland and Switzerland.
- The Hague Convention on Choice of Court Agreements (2005) that applies to the EU Member States (except Denmark), Mexico and Singapore at the time of writing.

Potential future instruments to be monitored:

- The Hague Conference on Private International Law has revived its Judgments Project, which is meant to write a broad international convention on jurisdiction and recognition and enforcement of judgments. In 2016 a Special Commission was set up to prepare a draft Convention.

REGULATORY DISPUTES

Companies may have significant contentious matters that are regulatory rather than commercial in nature: for example, in relation to taxation, registration of intellectual property rights, market supervision and anti-trust, planning and zoning, or production of goods that requires licenses, permits or approvals.

When dealing with domestic authorities and regulatory issues, complaints may ultimately have to be settled in administrative procedures in local courts or in specialized administrative courts. Rules on civil procedure or on jurisdiction and enforcement of civil and commercial matters often either do not apply or may be supplemented by additional rules of administrative procedure.

Arbitration

Arbitration is a state-sanctioned private dispute resolution method. It can be used for most commercial disputes in the Nordic countries. However, depending on the jurisdiction, there may be limits on the kinds of disputes that can be settled in arbitration. For example, in consumer, employment, competition, and intellectual property matters, arbitration may not be permitted. Generally speaking, however, any matter which the parties can settle freely, can be arbitrated.

An arbitration conducted in a certain country will follow the arbitration law in that country, meaning that arbitral proceedings are connected to legislation at the seat of the arbitration. This law will typically govern the limits of arbitrability, the rules for challenging an arbitral award, the potentially confidential nature of arbitration, and the obligations of courts to support arbitration.

ALL ARBITRATIONS

Special characteristics of arbitration

- Flexible procedure
- Non-public procedure
- "One stop shop" - no appeal, only limited opportunities to challenge
- Parties may be able to choose the arbitrators
- Arbitrators often have expertise in commercial matters
- Cost of arbitrators and arbitration institute will be borne by the parties

INTERNATIONAL ARBITRATIONS

Further considerations

- In international arbitration the proceedings can reflect a mix of traditions or a more commercial international approach
- Cases can be handled in a language chosen by the parties
- International acceptance and enforcement regulated by the New York Convention

THE NEW YORK CONVENTION

What? The Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958.

Who? At the time of writing 156 Contracting States.

Aim: (i) to recognize and enforce arbitration agreements and

(ii) to recognize and enforce foreign arbitral awards.

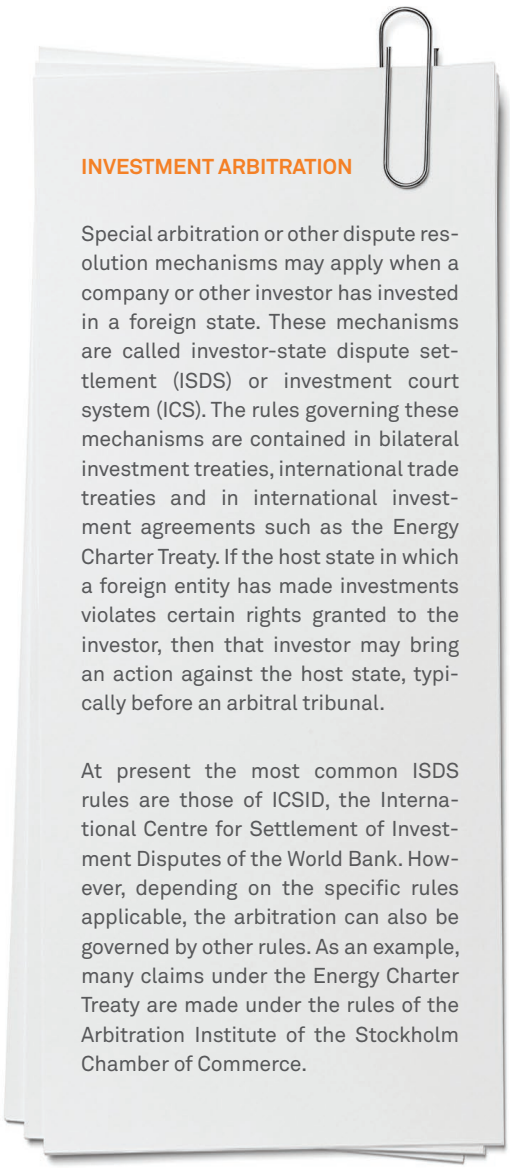
Content: Protects the parties' choice to resolve dispute by arbitration and allows awards to be recognized and enforced outside the territory in which they were made.

Courts in Contracting States must refer the parties to arbitration if there is an arbitration agreement between the parties and one party asks the court to do so – unless the court finds that arbitration agreement is not valid.

Courts in Contracting States must also accept arbitral awards issued in another Contracting State, making the awards part of their national legal system (recognition) and ordering compliance with them (enforcement). Note that States may limit this to commercial awards and may require reciprocity, meaning that the country where the award is made must also be a State that grants reciprocal treatment.

Local rules govern enforcement procedures. Limited grounds for refusal of recognition and enforcement may exist. However, this will depend on local interpretation. Court practice in some countries is more "arbitration-friendly" than in others. Courts in some Contracting States also have more experience with these matters.

More information can be found at:
www.uncitral.org and www.newyorkconvention.org.



INVESTMENT ARBITRATION

Special arbitration or other dispute resolution mechanisms may apply when a company or other investor has invested in a foreign state. These mechanisms are called investor-state dispute settlement (ISDS) or investment court system (ICS). The rules governing these mechanisms are contained in bilateral investment treaties, international trade treaties and in international investment agreements such as the Energy Charter Treaty. If the host state in which a foreign entity has made investments violates certain rights granted to the investor, then that investor may bring an action against the host state, typically before an arbitral tribunal.

At present the most common ISDS rules are those of ICSID, the International Centre for Settlement of Investment Disputes of the World Bank. However, depending on the specific rules applicable, the arbitration can also be governed by other rules. As an example, many claims under the Energy Charter Treaty are made under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

Mediation

Settlement and mediation may be useful ways of resolving disputes in an informal setting. Mediation may be used to reach settlement at various stages of a dispute: when a dispute has just arisen, or even after court litigation or arbitration is already under way.

Mediation is mainly a voluntary tool. If the parties are able to agree on resolving their differences in this manner, they may often benefit in terms of time and costs as compared to other, more formal dispute resolution methods. Due to these time and cost benefits, mediation is encouraged and promoted in many countries. This means that in some countries parties may be required to consider mediation, and courts will have to check whether the parties have fulfilled this requirement.

For the purposes of drafting a dispute resolution clause, it is important to consider whether such mediation option should be included in the clause itself. Before a party can request arbitration or litigation, many contracts require upper management to negotiate and/or may require that the parties go to mediation, adjudication, or another procedure (multi-tiered clauses). While these clauses are meant to promote amicable resolution before starting formal legal proceedings, they are only helpful where both parties want to find an amicable solution. Clauses that do not allow a party to initiate arbitration or litigation immediately can cause problems in situations where negotiations or other procedures will waste time, or in situations where there are strict time limits for making a claim. If multi-tiered clauses are nevertheless used, consider making the first stages optional.

TIPS FOR DRAFTING DISPUTE RESOLUTION CLAUSES

In our experience, Nordic companies and their advisors are generally well-informed when it comes to drafting dispute resolution clauses. They normally avoid the most common pitfalls and get their basic clauses right. However, the following tips may still hopefully provide useful guidance.

1. Choose the appropriate dispute resolution method for you
Consider what is best for your organization in general, as well as the needs of a specific project or contract. Arbitration may well be useful, flexible and preferable in most instances, but there can also be valid reasons to choose court litigation. Consider the choice in the context of your organization's disputes policy, if your organization has such a policy.

2. When opting for arbitration, choose institutional arbitration
A competent arbitration institute fulfills a number of highly important functions, without which an arbitration may become difficult. The administrative costs of arbitration institutes are normally reasonable and can be offset by the control an institute exercises over the fees of arbitral tribunals.

3. Where possible, use model clauses and keep it simple
The model clauses of arbitration institutes have been designed to work in a wide variety of situations. Most contracts will be fine with a simple model clause, and there is no need for changes. If you have particular needs, especially in a setting involving multiple contracts or multiple parties, contact a specialist.

4. Consider the possibility of expedited arbitration, but with caution
Expedited or fast-track arbitration is a swift, cost-efficient method for resolving relatively simple, low-value disputes. As a rule, expedited arbitration is a written proceeding based on documents only. The difficulty is in making the choice in advance: Any given contract may produce either simple or complicated disputes. Things can go very wrong if a complex dispute has to be decided in expedited arbitration. In order to draft a clause that accounts for both options, contact a specialist.

5. Always specify the language and seat of the arbitration
Failure to specify these expressly in the contract, even in purely domestic contracts, can lead to complications and long legal proceedings if a dispute occurs.

6. Avoid references to exotic laws, seats of arbitration and arbitral institutes
What is "exotic" depends on what your organization is familiar with. The point is not to commit to unknown procedures. Unusual choices may be entirely appropriate if you know what you are agreeing to. The established traditional venues for international arbitration are normally safe choices, even where your organization has no prior experience with them.

7. The number and selection of arbitrators - different approaches
Specifying the number of arbitrators, normally one or three, simplifies the process of putting together the arbitral tribunal and helps the arbitration move forward swiftly. On the other hand, leaving the determination of the number of arbitrators to the discretion of the arbitration institute will better ensure that the composition of the tribunal is appropriate for the dispute that occurs, even if this causes some delay in the early stages of an arbitration.

Check the chosen institutional rules or legislative framework if you want to have the opportunity to appoint a member of the arbitral tribunal or if you want the party-appointed arbitrators to be able to choose or propose the chairperson. Institutes allow parties to participate in different ways in the appointment process. If you want to ensure participation, you may have to specify it in the clause.

8. Be careful with overly stringent or unrealistically specific requirements
Sometimes parties want to draft an arbitration clause requiring the conclusion of arbitration proceedings within a very short period of time, or specifying the characteristics the arbitrators must fulfill. If these requirements are unrealistically demanding, they may cripple the arbitration clause.

9. Beware of multi-tiered dispute resolution clauses
As noted above, clauses that do not allow a party to initiate arbitration or litigation immediately can be very problematic and, in the worst case scenario, can create the risk of no legitimate place for a party to bring a justified claim. If multi-tiered clauses are used, consider making the first (negotiation and/or mediation) stages optional.

10. Remember to consider confidentiality
The degree to which arbitration is considered confidential varies from jurisdiction to jurisdiction. A general confidentiality clause in a contract will not necessarily apply to an arbitration arising out of the same contract. Therefore, where the parties want to maintain a certain degree of confidentiality, this should be agreed expressly.

11. Be mindful of risks relating to unilateral dispute resolution clauses
In addition to a primary method of dispute resolution, like arbitration, which both parties to a contract can request, many dispute resolution clauses state that only one of the parties has a unilateral option of requesting legal proceedings in a different place, or even before "any court of competent jurisdiction". While it is understandable that companies may want to adopt these clauses, courts in a number of jurisdictions have set aside or adjusted such clauses as unfair.

Multiple contracts and parties – added complications?

Any lawyer specialized in dispute resolution will tell you that drafting functional arbitration agreements or other dispute resolution clauses in situations with multiple parties or multiple contracts is a challenge. But why? Fundamentally, this is because dispute resolution clauses are creatures of contract. The jurisdiction of an arbitral tribunal, for example, is based on the agreement between the parties. Situations involving multiple contracts and/or more than two parties easily create numerous questions of interpretation. In other words, the parties often end up in a secondary dispute about the correct way to solve their primary dispute.

Below are a few examples of the issues that come up:

- Did the parties intend for claims arising out of separate contracts to be decided in a single proceeding?
- Did the parties intend to give all of several parties to a set of contracts the right to make claims and to request arbitration against any other party?
- A, B, C and D are parties to the same contract. Did the parties intend that a claim by A against B and a separate claim by C against A and D could be decided together?
- Which of A, B, C, D, E, and F, all parties to a single contract, are allowed to participate in an arbitration between A and B under that contract?

There are no easy answers to minimizing such complications. It often helps to draft clauses that work well together. Drafting a joint clause for all contracts can also help in some situations. On the other hand, trying to pre-empt problems by adding extra language to a dispute resolution clause can be counterproductive. Luckily, many arbitration institutes today have rules to deal with these issues in a flexible way, using their best judgment.

In any event, the best clause in these situations will depend on case-specific circumstances. Different institutional arbitration rules may also deal with such situations differently. When in doubt, contacting a specialist is highly recommended.

Outside the arbitration context, the situation is slightly different but may be equally complex. The domestic rules on court procedure will often decide whether multiple claims or parties can be joined or consolidated in one proceeding. However, the court may use its own discretion rather than follow the parties' wishes or intentions. National rules on collective proceedings, group actions and collective redress may also vary considerably.

International situations may become even more complex if the domestic rules differ. The Brussels I Regulation is meant to address this situation in certain cases; among other things, the Regulation allows parties to raise claims against multiple defendants in the court of a Member State where one of them is domiciled, if the claims are so closely connected that it is best to hear and determine them together to avoid the risk of conflicting judgments from separate proceedings.

3 Does the applicable law make any difference?

Contracts are always governed by an applicable substantive law, meaning a law that will determine legal issues that arise from the contract. Like it or not, companies active in international commerce regularly find it necessary to enter into contracts governed by unfamiliar foreign substantive laws. Even if there are considerable similarities between the contract laws of most legal systems, the details can prove very different and sometimes cause surprises. Below are some basic issues to keep in mind:

- Never leave the applicable law unregulated in a contract, not even in contracts between parties from the same country. Not expressly agreeing on the applicable law may cause considerable problems.
- A good substantive law is one that your organization is familiar with. If you do not know the law in question, it is usually sensible to seek advice from qualified external counsel.
- It is important to understand that a choice of law clause in a contract has its limits. The choice of law clause will not necessarily extend to all legal issues arising in the context of a contractual relationship.
- There may be circumstances where a court or arbitral tribunal must apply certain overriding mandatory rules of a law other than the one chosen by the parties, often known as public policy.

In international matters, it is important to consider matching the choice of law with the chosen venue and method of dispute

resolution. Applying a foreign law in court litigation may involve additional costs and uncertainty about the outcome. International arbitral tribunals may have more experience than local courts in dealing with a foreign law, and parties may even select arbitrators who are familiar with the applicable foreign law. According to the Roschier Disputes Index 2016, Nordic companies consider the following factors particularly important when choosing substantive law:

Important factors when choosing substantive law

Source:
Roschier Disputes Index 2016, p. 18.

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

THE ROME I AND ROME II REGULATIONS

What? The Rome I Regulation on the law applicable to contractual obligations and the Rome II Regulation on the law applicable to non-contractual obligations establish a uniform regime of conflict-of-laws rules that apply to contractual and non-contractual obligations in the EU Member State courts.

Aim to make court decisions more predictable, to provide greater legal certainty, and to reduce the practice of "forum shopping" within the EU.

Content: Regulate choice of law with regard to contractual (Rome I) and non-contractual (Rome II) obligations in cases with connecting factors with more than one state.

Universal application: Any law designated by the Regulations will apply regardless of whether it is the law of an EU Member State.

Party autonomy: Parties can agree on the applicable law.

In the absence of party choice:

- Under the Rome I Regulation, the contract will generally be governed by the law of the country where the party required to effect the characteristic performance of the contract resides. For example, a contract for the sale of goods is governed by the law of the country where the seller resides. A contract for the provision of services is governed by the law of the country where the service provider has his habitual residence. There are special rules for carriage, consumer, insurance and employment contracts.
- Under the Rome II Regulation, the governing law will be the law of the country where the damage occurs regardless of the country where the event giving rise to the damage occurred and regardless of the country or countries where the indirect consequences of that event occur. There are special rules for product liability, unfair competition, environmental damage, infringement of intellectual property and industrial action.

Overriding mandatory rules: Overriding mandatory provisions of law may apply regardless of the law designated by the Regulations.

Public policy of the forum: A court can decide not to apply a provision of the law designated by the Regulations only if applying it would violate the public policy of the forum.

Arbitration agreements and agreements on the choice of court are excluded from the Rome I Regulation.

WHY CHOOSE NORDIC LAW AND ARBITRATION FOR INTERNATIONAL COMMERCIAL CONTRACTS?

In choosing the applicable law and place of arbitration, predictability and access to a fair trial are crucial. Here lies the first and most obvious selling point for Nordic law. And there are many others.

Nordic law is a safe choice

- The Nordic countries have the most stable, reliable and predictable legal and political environments in the world. Denmark, Finland, Norway and Sweden were ranked the top four countries in:
  World Justice Project – Rule of Law Index 2016.
  Transparency International – Corruption Perceptions Index 2016.

Nordic law includes elements typical to both civil and common law

- Legislation enacted by parliament is the primary source of law.
- In contract law and the law of obligations, no great codifications exist. Norms are based on case law, as systematized in the doctrine.
- Civil procedure is adversarial, but there is no discovery.

Nordic law respects party autonomy and offers flexibility

- Nordic laws are designed for liberal market economies. Legislators typically seek to facilitate a business friendly environment when adopting or amending commercial legislation.
- Nordic laws respect freedom of contract. *Pacta sunt servanda* is the leading maxim.
- In business, the written wording of a commercial contract is the fundamental starting point for interpretation.
- Safety valves exist to deal with egregious situations and to prevent blatantly unreasonable outcomes.

Nordic law favors pragmatism over legal formalism

- Business realities and commercial common sense are given room in legal reasoning.
- No written form, stamp, company seal or other form requirements, with only limited exceptions.

Nordic law is accessible outside the Nordics

- Nordic statutes are freely available in foreign languages, English in particular.

4 Choice of counsel for litigation and arbitration abroad

Court litigation is typically a local affair requiring local counsel. If you find your company engaged in court litigation in a foreign country, the litigation will follow that foreign country's national rules of procedure. Regardless of where your company is from, it must subject itself to the rules, customs and procedures of the foreign court. Thus, for court litigation in Brutopia, you will invariably need advice from local Brutopian counsel who is an expert in navigating the quirks and pitfalls of the Brutopian system. Foreign counsel will not have the necessary local knowhow and will often not even be entitled to appear in court.

But how to find appropriate Brutopian counsel? The more exotic the location, the more difficult the task. International legal directories (various Chambers guides, The Legal 500 etc.) are a helpful source, but will only give you a basic idea of the profiles who are valued internally on a particular market. You will not only need someone capable of operating locally, but also someone who is internationally oriented and capable of explaining the local rules and procedures to you. It is usually helpful to utilize your networks for recommendations. In addition, friendly law firms in your home jurisdiction will usually be happy to share their experiences and to assist in identifying the best options. Roschier at least do this regularly for many of our clients. Finally, if the cost can be justified, it may even be worthwhile to travel to the country in question in order to interview and compare the main candidates face to face.

Conversely, international arbitration is what you make of it. Arbitral proceedings can be molded freely to reflect the expectations of the parties and the needs of the particular case. This applies regardless of the seat of the arbitration or the applicable substantive law. This in turn means that Nordic companies can – if they so choose – seek to influence the conduct of their arbitrations abroad by promoting Nordic notions of efficient, practically oriented and reasonably light-weight dispute resolution techniques. They can equally seek to promote other familiar approaches, bringing a Nordic flavor to the matter even where the arbitration takes place in a far-away country. But how to achieve this?

Shaping an arbitration requires an understanding of the drivers. What are they? In our experience, the primary factors affecting the conduct of an arbitration are the parties' choice of external legal counsel and the subsequent choice of arbitrators, which in most cases is driven by counsel rather than the actual parties to the arbitration. It is only natural that counsel and arbitrators would seek to structure an arbitration in ways with which they are familiar.

On the next two pages, you will find a section that explores options for Nordic companies by using a hypothetical scenario of "arbitration proceeding in Brutopia under Brutopian law." When looking into different options and trying to find the right counsel for you, it may prove fruitful to consult trusted Nordic counsel in the process of appointing counsel. Even if you are considering opting for a local foreign firm or a large multinational, a trusted Nordic counsel can add value by knowing what to look for in counsel, by providing strategic advice throughout the proceedings and by functioning as a conveyor and interpreter of expectations between the client and the acting counsel.

QUESTIONS TO ASK WHEN CHOOSING COUNSEL FOR INTERNATIONAL ARBITRATION

Who has solid experience in international arbitration?

What kind of arbitration proceedings do we want?

Who is best positioned to understand and convey our story?

What is the subject matter of the dispute?

What is the applicable law?

What is the seat of the arbitration?

What is the amount of the claims?

What is our budget?

Which resources do we require?

What about communication and cooperation between staff, witnesses and lawyers?

Lead counsel for arbitration proceeding in Brutopia under Brutopian law. What options does a Nordic company have?

OPTION 1 – LOCAL COUNSEL

For many companies, the first reaction is to appoint Brutopian counsel and Brutopian arbitrators for an arbitration seated in a faraway location such as Brutopia. This, however, will normally result in the arbitration turning into an exotic, Brutopian affair. While this might be appropriate in small, low-value cases involving local deals, we submit that in many situations this would neither be strategically wise nor in the best interests of a Nordic company. Admittedly, Brutopian local counsel may still be required to provide input on the applicable law, which however usually represents a lesser component in the overall costs of an arbitration.

OPTION 2 – MULTINATIONAL LAW FIRM

A second, alternative approach for a Nordic company is to appoint as lead counsel a large multinational law firm, typically headquartered in the UK or the US. The advantage of this approach is to avoid turning the arbitration in Brutopia into a Brutopian affair. Instead, the multinational law firm will likely drive the arbitration towards international arbitration practices, which serve to level the playing field between the Nordic company and its Brutopian counterpart. Indeed, over the last few decades, the practice of international arbitration has experienced a considerable degree of convergence, often representing a compromise between common law and civil law solutions and procedures. Additionally, large multinationals will typically have extensive multicultural resources at their disposal, plus a track record of handling similar matters in various jurisdictions.

A downside that Nordic companies occasionally associate with large multinational law firms is that their interpretation of international practice may be more influenced by common law notions of discovery and other processes which are prone to result in heavy, costly and time-consuming arbitral proceedings. Moreover, the multinationals may not always be optimally positioned to understand and convey a Nordic company's "story" to the arbitral tribunal.

OPTION 3 – NORDIC LEAD COUNSEL

A good option worth keeping in mind is to appoint Nordic lead counsel, regardless of the seat of the arbitration or the applicable law. In our experience, this possibility is not always understood or appreciated by Nordic companies, even if it represents a number of clear advantages. Indeed, Nordic counsel are normally well positioned to understand and convey a Nordic company's storyline. They are more likely to bring a Nordic flavor to the matter and to promote efficient, practically oriented and reasonably light-weight dispute resolution techniques within the framework of international arbitration practice. In addition, Nordic counsel may be able to bring the benefits of a long term client relationship to best serve the client. Where jurisdiction-specific advice is required, this can be easily addressed through expert witnesses or local co-counsel. Caution is advised, however, Nordic law firms must naturally have sufficient expertise and experience to take on a lead counsel role where the seat of the arbitration and applicable substantive law are foreign.

To provide an example, Roschier successfully represented a Nordic corporation and its foreign subsidiary as respondents in an ICC arbitration seated in Istanbul, Turkey, with claims exceeding USD 100 million. In this particular case concerning claims arising out of the cessation of a long-term business relationship, the client retained Roschier in order to replace an American law firm that had acted as lead counsel during unsuccessful jurisdictional stages of the arbitration. Given that lead counsel for the counterparty was American and that multiple nationalities were represented on the arbitral tribunal, the proceedings largely followed international practice.

As the applicable substantive law was Turkish law, Roschier worked side by side with Turkish counsel in defending our mutual clients' interests, with Turkish counsel providing substantive input on the applicable law and liaising with legal experts. Arguing a case under a foreign law does not differ much from arguing a new case based on new evidence. While differences in detail should not be underestimated, most contract laws today provide for similar rules and tools, and the relevance of local peculiarities, if any, tends to diminish when heard before international tribunals. Even if certain specific features of the applicable law did play an important role in the dispute, the most determinative elements of the case revolved around questions of fact. In our experience, this is very often the case, and the majority of work relating to a legal proceeding typically focuses on project management and the processing of large amounts of documentation and data.

Following various developments and a hearing of several days in Istanbul, the case resulted in a clear victory for Roschier's clients, with the tribunal dismissing all claims and even finding it had no jurisdiction over the Nordic parent entity, thus showcasing the added value that Roschier and other Nordic firms can bring to their clients in arbitrations taking place in foreign jurisdictions and under foreign laws.

5 Other issues to consider in a dispute

Interim measures

Resolving a dispute and securing your rights through arbitration or litigation typically takes a long time. Meanwhile, business, projects and life in general continue, and the facts and circumstances in dispute may change and develop before the legal proceeding is over. Some of these developments may endanger the rights or interests you are trying to protect in the proceedings.

Interim measures are designed to respond to a need that a final award or judgment cannot meet. Their purpose is to provide temporary protection against certain actions by the adverse party that may endanger a claim or right before an enforceable judgment is given. Events that may require filing for interim measures may include, for example:

- A company shows signs of hiding its assets
- A company plans to sell your assets to a third party
- A company intends to call a guarantee
- A competitor shows signs of entering the market, disregarding a patent
- A company threatens to terminate a supply contract for seasonal products

Interim measures can take many different forms, and so imaginative thinking may be useful. However, the most far-reaching measures are usually the most difficult to get, and they may also involve greater risk. Available interim measures usually include attachment of assets, attachment of objects, and different types of

court orders that stop a party from taking certain actions or order a party to do something. In broad terms, interim measures usually fall into one of the following categories:

- Measures affecting the parties' contractual or other relationship, or preserving the status quo, e.g. injunctions preventing market entry.
- Measures to facilitate and protect the proceedings, e.g. evidence preservation.
- Measures to facilitate enforcement in the future, e.g. attachment of assets.

Interim measures are a useful tool that can make a real difference when used and timed correctly. Situations where interim measures are needed often involve great urgency, and there is typically little time to reflect on the decisions that need to be made. That being said, effective use of interim measures requires strategic thinking and analyzing scenarios, risks and outcomes. Interim measures, when requested or granted, may significantly change the dynamics of the dispute between the parties. Sometimes the granting or dismissal of an interim measure may even lead to a quickly negotiated settlement, or otherwise remove the need for the main proceeding.

Both courts and arbitral tribunals can grant interim measures. We will explore these two avenues next.

Interim measure timeline

Interim measures in courts

As a starting point, some forms of interim relief are usually available everywhere. The actual measures available and the requirements for obtaining them, however, vary from jurisdiction to jurisdiction and should be checked on a case by case basis. Advice from local counsel is always necessary when seeking interim measures from courts in a certain jurisdiction.

In Finnish and Swedish courts, interim measures can usually be obtained quickly, and applications are often decided urgently based on documents only. To balance the relative ease by which interim measures are granted, enforcement of interim measures will normally require some security, often in considerable amounts, to cover any loss caused to the opposing party. Interim measures in Finland and Sweden are subject to strict liability for damages if the measure later proves to have been unfounded.

Procedural requirements to keep the interim measure in force can vary. In most jurisdictions, an interim measure can only be requested to support or protect interests in a main proceeding. Unless already pending, main proceedings may need to be filed shortly after an interim measure has been obtained.

In international cases, interim relief may have links to several different countries. Cross-border enforceability of interim relief orders, especially those decided without hearing both parties, may not be possible, because the rules for international enforcement may only apply to final court rulings in proceedings where both parties have had the opportunity to appear. For example, some applicants have had to seek separate attachment applications in each country where the opposing party's assets are located. To deal with this issue, the EU Member States, excluding the UK and Denmark, have created a separate cross-border interim relief application that has been available since January 2017, the so-called European bank account preservation order.

EUROPEAN ACCOUNT PRESERVATION ORDER

What? Regulation (655/2014) establishing a European Account Preservation Order (EAPO) procedure to facilitate cross-border debt recovery in civil and commercial matters is applicable from January 2017.

Scope: Only applies to creditors and bank accounts in the participating EU Member States (i.e. not in the UK and Denmark) and in cross-border matters.

A cross-border case is one in which the bank account to be preserved is in a Member State other than:

(i) the Member State of the court before which the application for an EAPO preservation order is filed; or

(ii) the Member State in which the creditor is domiciled.

Aim: to prevent not only the debtor, but also persons authorized by the debtor, from using the funds.

Available before, during, and after the main proceeding with certain preconditions.

The conditions for granting the preservation order are:

(i) sufficient evidence that there is an urgent need for a protective measure because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult; and

(ii) sufficient evidence that creditor is likely to succeed on the substance of his claim against the debtor.

The procedure is always ex parte, but the debtor must be served promptly after preservation of the account and has limited and specific remedies against the enforcement of the order and as well as against the order itself.

Security: The applicant must provide security as a main rule.

Liability: The Regulation provides a minimum standard for applicant liability where damage caused by the preservation order is the creditor's fault. Member States can maintain or introduce other grounds for liability in their national law.

Asset information: The Regulation also includes rules that assist a creditor that has already obtained a judgment in obtaining information on the debtor's accounts.

Enforceability: An EAPO issued in one Member State is directly enforceable against a bank account in another Member State following the domestic enforcement rules of the latter State.

Interim measures in arbitration

Some institutional arbitration rules and arbitration laws have limited the parties' ability to apply for interim measures in national courts to "appropriate circumstances" (ICC Article 28.2, FAI Article 36.6) or "exceptional cases" (LCIA Article 25.3). In most cases, however, an arbitration agreement does not limit a party's ability to apply for interim measures from the courts. Regardless, parties may want to seek interim measures from an arbitral tribunal rather than state courts for various reasons: unavailability of interim measures from the relevant court, concerns of confidentiality or impartiality, and the need to provide a high-value security to enforce a court-ordered interim measure. Arbitral tribunals are also not limited to interim measures available in courts. On the other hand, arbitrators have no power over third parties.

Arbitrators get their power to order interim measures from the arbitration agreement, in most cases institutional arbitration rules agreed by the parties, and/or the applicable procedural law. While the wording of institutional rules varies, a common nominator is a broad formulation of the arbitral tribunal's powers.

The most significant drawback of arbitrator-ordered interim measures is that arbitrators, unlike state courts, mostly lack coercive powers. Arbitrator-ordered interim measures often rely on voluntary compliance, as it is usually not in a party's best interest to act against an order by the arbitral tribunal. According to the 2012 International Arbitration Survey carried out by the School of International Arbitration at Queen Mary University, London (p. 16), arbitral tribunals grant only 35% of all interim measure applications. The voluntary compliance rate, according to the Survey, was 62% on average, 68% in Western Europe and 39% in Eastern Europe.

Arbitrator-ordered interim measures may also be enforceable through applications to national courts or enforcement authorities, depending on the country. Court enforcement is an exception rather than a rule. It is highly unlikely that Finnish and Swedish courts generally would enforce interim measures ordered by an arbitral tribunal. Broader enforcement possibilities do exist in some places, including England, Switzerland and Germany, and should always be separately verified case by case. According to the 2012 International Arbitration Survey (p. 17), on average parties seek court enforcement in 10% of cases where arbitral tribunals grant interim measures.

Interim measures from arbitral tribunals vs. courts – a comparison

ARBITRAL TRIBUNAL		COURT
Moderately slow	Speed	Usually fast, but depends on jurisdiction
Usually non-public	Confidentiality	Usually public
Not available before Tribunal constituted, unless emergency rules apply	Availability	Always available
No or limited availability *ex parte*	*Ex parte* measures	Often possible *ex parte*
Limited enforceability, depending on jurisdiction	Enforceability	Enforceable in the jurisdiction where applied for
Varies, but usually no security	Security	Can require a high security amount

Emergency arbitration

There may be situations where a party needs urgent interim measures before the constitution of an arbitral tribunal in order to avoid losing its rights. To meet this need, many institutes, including the ICC, SCC and FAI, have implemented emergency arbitration rules.

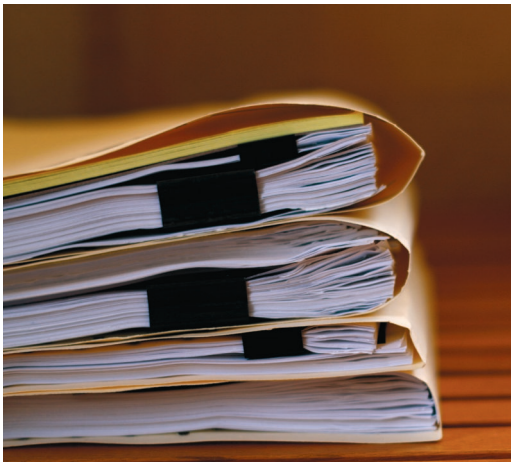
For example, Roschier recently represented a claimant in SCC emergency arbitration proceedings where the claimant asked to freeze the adverse party's immovable assets. The claimant applied to the SCC for the appointment of an emergency arbitrator in accordance with the SCC Rules and received an emergency award within eight days.

Checklist for interim measures

- [ ] Why do we need an interim measure?
- [ ] What is the content and scope of the measure?
- [ ] What are the pros and cons?
- [ ] How does the measure affect the dynamics of the dispute now and in the future?
- [ ] Which criteria need to be met before the measure is granted?
- [ ] Which forum do we apply to?
- [ ] How quickly will the interim measure be granted?
- [ ] Can we or should we apply for an interim measure ex parte?
- [ ] Will the interim measure be enforceable? In which jurisdictions?
- [ ] What is the likely amount of security, if any, to be lodged to enforce the measure?
- [ ] How high is the risk of losing the main proceedings and ultimately being liable for damages caused by the interim measure?
- [ ] What is the potential amount of damages?
- [ ] What is the cost risk?

Production of documents

A party may not be able to prove a valid claim or defend itself properly without access to documents or other evidence in possession of another party. For this reason, most legal systems allow litigants to request that the counterparty or third parties produce documents in their possession for use as evidence.



In most legal systems where specific, easily identifiable documents are important to the outcome of a case, document production will be ordered. However, approaches to document production vary greatly across the globe. In some jurisdictions, especially in certain common law countries, parties to litigation are generally expected and required to hand over broad categories of their internal documents to a counterparty. In these countries, obtaining broad document production – often called discovery – is generally considered a fundamental procedural right, whereas lawyers from civil law countries typically resist the notion of broad discovery.

In the international arbitration community, practitioners with common and civil law backgrounds vigorously debated the boundaries of document production. International arbitration practice today has adopted a compromise between two extremes. This is reflected in the 2010 IBA Rules on the Taking of Evidence in International Arbitration (p. 8) which, according to their commentary, "represent a balanced compromise between the broader view generally taken in common law countries and the more narrow view generally held in civil law countries." While the IBA Rules do not apply unless agreed by the parties, which in our experience is not often the case, arbitral tribunals nevertheless may and often do use them as guidance.

Considering the importance document production may have for the case and its outcome, the rules and practices of different jurisdictions should not be ignored. In situations where a claimant has multiple options for where to bring a claim, one issue to consider is the availability of document production. An interesting option to keep in mind is US Code 1782 §, which allows the use of US discovery in aid of legal proceedings pending abroad. The Hague Evidence convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and the EU Regulation (1206/2001) should also be borne in mind as instruments to obtain evidence located abroad.

Costs and alternative funding arrangements

Litigation does not come cheap. Parties incur costs up-front as the proceedings progress and final recovery of costs, if any, can take years. What is more, the "loser pays" rule that applies in the Nordics is by no means a universal rule. Courts and tribunals can sometimes also use costs as a tool to punish parties for undesirable conduct during the proceedings, although it still seems that this possibility is not used as much as it could be. Aspects that may affect the final allocation of costs include, for example:

- Applicable law
- Agreement on cost allocation
- Relative success
- Complexity
- Genuine lack of clarity or gap in legal issues
- Reasonableness of costs
- Quantum / costs ratio
- Perceived quality of legal representation
- Approach to in-house costs
- Evidence of costs incurred
- Document production (scope/use)
- Unnecessary or dilatory procedural demands
- Unsubstantiated or irrelevant allegations

For companies faced with proceedings, financing the process is one obvious point

of interest. There are different options, including third-party funding. This is also good to consider when assessing the counterparties' moves: Parties that may not have previously had sufficient financial means to pursue certain types of claims now have easier access to financial assistance from third parties, provided that their claim has valid grounds. Third-party funders will rigorously assess the claims and their chances of success. However, those who employ alternative funding arrangements are not always in financial distress. On the contrary. Such arrangements can be used as tools for managing and sharing the inherent risk involved in pursuing a claim.

Third-party funding

Classic third-party funding is an agreement where a third party finances a party's legal representation. The agreement may give the third-party funder the right to a part of the proceeds if the claimant prevails. It is also possible to "monetize" an enforceable award or judgment, that is, sell it to a third party. Depending on the terms and conditions of the funding arrangement, the third-party funder may have full control, or at least some influence, over the case.

According to the Roschier Disputes Index 2016 (p. 30), third-party funding still remains rarely contemplated or used in the Nordics, despite predictions of future growth. Only 6% of Index respondents from Denmark, Finland, Norway and Sweden answered that they had considered or used funding from a third party. This being said, third-party funding is definitely on the rise in international dispute resolution hubs.

Third-party funding is not yet regulated in all countries, and there is a lack of uniformity. However, as third-party funding gains more ground, more regulation is implemented. As a recent example, Singapore enacted the Civil Law Amendment Bill on 10 January 2017, allowing for third party funding in international commercial arbitration cases.

Claims vehicles

Setting up a special purpose vehicle (SPV) dedicated to a case and its financing to contain the risk is another possibility. This often involves assigning a group of similar claims and/or causes of action from multiple parties to a single SPV, which then pursues these claims in its own name against the liable party or parties. Typically, a claims vehicle will return a considerable portion of potential gains to the original claimants. In Europe, claims vehicles have been used especially in cartel damages claims. Grouping claims within an SPV can lead to simplified proceedings and lower legal costs, but caution is advised: not all jurisdictions view claims vehicles favorably.

Criminal law – an increasing presence in ordinary business contexts

One important element to consider when avoiding unnecessary conflicts and dealing with actual commercial disputes is the ever-increasing importance of criminal law in the business environment. In many countries, an increased emphasis on compliance and anticorruption efforts has made criminal law a new business concern, with investigative authorities redirecting their resources at areas of business that previously had no contact with criminal law. Regrettably, it has also become more common for some companies to initiate criminal proceedings against their counterparties in an effort

to advance their interests in commercial disputes, for example for fact-finding or data collection purposes.

In today's world, where news travel fast and public opinion can be easily influenced through social media, a criminal investigation initiated by a company against a competitor or the adverse party in an actual dispute can have unpredictable consequences. Acknowledging this fact and preparing for it in advance is likely to mitigate criminal law related risks significantly.

There are many ways for companies to protect themselves in advance. For example, companies can create clear and easily accessible internal compliance and ethics policies and guidelines. Policies and guidelines should be supported by consistent messages from the top and middle management ("tone from the top" and "tone from the middle"). In addition, companies should identify, measure, and monitor the specific risks relevant for their business and allocate resources to control such risk. Companies should consider conducting third party due diligence when entering into contracts with new business partners.

Sometimes, however, even the most prudent precautions are not enough, and a company becomes involved in criminal proceedings. If that happens, it is imperative to take the matter seriously from the outset, to conduct the necessary internal investigations, to prepare an initial legal assessment of what has happened, and to document these steps carefully. This can become important as the case develops, for example, concerning imposition of a possible corporate fine.

It is advisable that a company involved in a criminal investigation retain external counsel specialized in criminal law as early as possible to plan the company's overall defense approach, to assist persons of interest in their dealings with investigative authorities and, in general, to make sure that the company's rights are not compromised during the investigation.

External counsel can also assist in securing appropriate treatment of confidential information, in case-related interaction with the media and other interest groups, and in observing applicable disclosure obligations for listed companies.

USEFUL COMPLIANCE TIPS TO CONSIDER

- Clearly define and communicate the company's tolerance for engaging in operations with elevated compliance risks.
- Make sure that policies and guidelines are accompanied by sufficient training.
- Do not let questionable behavior go unchallenged.
- Conduct third party due diligence when entering into a new partnership.
- Conduct compliance due diligence in connection with significant mergers and acquisitions.
- Prepare for potential investigations by drafting internal guidelines on how to react in case your organization becomes a party to criminal proceedings. Specify who is responsible for the initial contact with the authorities, or contacting the legal department.
- Find out what has happened, conduct an initial case assessment based on your findings, and document these steps carefully.
- Retain outside counsel specialized in criminal law as early as possible and let them assist you with all communication with the investigative authorities and the media.
- Remember that how you communicate about the case during the proceedings is in many respects, most importantly reputation-wise, as important as the actual outcome of the case.

6 Understanding the dynamics of settlement

The benefits of amicable settlement are easy to see: When parties settle their disputes on their own, less time, money and personnel are dedicated to legal battles and more to actual business. When considering whether to settle a dispute, it is good to consider the following:

First, disputes and legal proceedings may harm existing business relationships between the parties. Reaching a settlement often helps repair the relationship and secure future business.

Second, disputes are costly creatures, both in terms of time and money. All companies realize that disputes cost money in the form of legal fees, but many are surprised by the amount of company resources necessary for evidence retrieval and other support, not to mention the mental strain on the personnel directly involved. A successfully concluded settlement helps minimize all these costs and allows an organization to focus its resources on productive work.

Third, legal proceedings always involve a considerable degree of risk and uncertainty. Settlements help dissolve that risk in a controllable way.

Considering all the benefits of settlement, it is a wonder really that not all disputes are settled at an early stage. What prevents parties from reaching settlement? You will find some observations below.

It is often helpful to view disputes and attempts to resolve them as complicated business negotiations; this makes it easier to understand the dynamics of settlement. Indeed, making a settlement agree-

ment (see settlement agreement checklist at the end of this chapter) is much like a negotiated business transaction, and many of the same basic features apply.

Prior to settlement negotiations, sophisticated parties to a dispute will make an internal assessment of their position by identifying their BATNA, WATNA and RATNA.

BATNA

Best alternative to a negotiated agreement.

Example: The company wins 100% of its claims, and 100% of litigation costs are reimbursed by the counterparty as voluntary payment.

WATNA

Worst alternative to a negotiated agreement.

Example: The company loses 100% of its claims, and the court orders the company to pay 100% of the counterparty's litigation costs, plus other costs of litigation.

RATNA

Realistic alternative to a negotiated agreement.

Example: The company wins 50% of its claims, and the court orders the parties to bear their own costs and share any other costs of litigation 50/50.

In other words, parties try to assess the likely outcome of a legal proceeding, while also considering the range of reasonable best and worst case scenarios. If a party believes that continuing the dispute would achieve a better outcome than they would get in settlement negotiations, no agreement will be reached; the dispute will continue, provided that the parties are prepared to bear the associated risks.

What stands in the way of settlement?

Disputes often continue, despite settlement attempts, because of an imbalance of information between the parties. The parties may not have access to the same evidence, or they may not have sufficiently understood their counterparty's position. The parties' legal assessment of the same facts may also simply be different. Finally, in an effort to save costs, a party may not have thoroughly investigated the facts and law before a dispute escalates to a legal proceeding.

This informational imbalance can be, and often is, addressed during legal proceedings. Indeed, different dispute resolution procedures strive to create a dialogue between the parties, often in the form of a written claim and defense, followed by a second round of written submissions, plus an evidentiary hearing. During these stages, the parties begin to better understand each other's positions and the evidence available. As a consequence, the

parties' respective assessments of the case often begin to come together, resulting in a greater likelihood of settlement towards the end of the proceedings.

Personal relationships and human emotions may also play an important role in causing or continuing disputes. Disputes among large, sophisticated companies are no exception. Where this is the case, settlement may be more difficult to reach unless the emotional aspects of the dispute are considered in the settlement negotiations. Mediation is often helpful in such circumstances. Also, before entering into settlement negotiations, any personal agendas of the negotiators, such as the effect of the outcome on bonuses, should be addressed if possible.

External factors can also affect settlement prospects. Occasionally, the parties may find it difficult to settle because of the message it would send to the market. Alternatively, a party may want to create a precedent out of the case, which obviously limits the possibilities of settlement. In some circumstances, obtaining a final verdict – regardless of the outcome – may be more important than settlement.

RECOMMENDED READING

Roger Fischer, William Ury, Bruce Patton (2012): Getting to Yes: Negotiating An Agreement Without Giving In.

William Ury (1993): Getting Past No. Negotiating Your Way from Confrontation to Cooperation.

TIPS TO MAXIMIZE THE LIKELIHOOD OF SETTLEMENT

Conduct a **detailed, front-loaded factual inquiry** at the outset of a dispute. While incurring costs, such an inquiry can avoid wrong decisions based on inaccurate facts.

Objectively **assess the range of likely outcomes** of litigation or arbitration (BATNA, WATNA and RATNA) before engaging in serious settlement discussions. If possible, also try to consider the dispute from your counterparty's point of view.

Try to **avoid** situations where decision-makers are **emotionally involved** in the dispute or have **personal motives** that may not be in line with the company's interests.

Carefully listen to your counterparty. You may learn things to your advantage.

Always treat your counterparty with **respect**.

Only **make reasonable settlement offers** that your counterpart should take seriously. Otherwise you may alienate your counterparty, and discussions may come to a premature end.

Where appropriate, consider making the **first concrete settlement offer**. Research suggests that the first reasonable proposal sets the scene for subsequent negotiations and results in a real first mover advantage.

Settlements are not limited to the subject matter of the claims in dispute. Explore the possibility of **including external elements in the settlement**, such as future business opportunities, discounts, public announcements or visibility within your network.

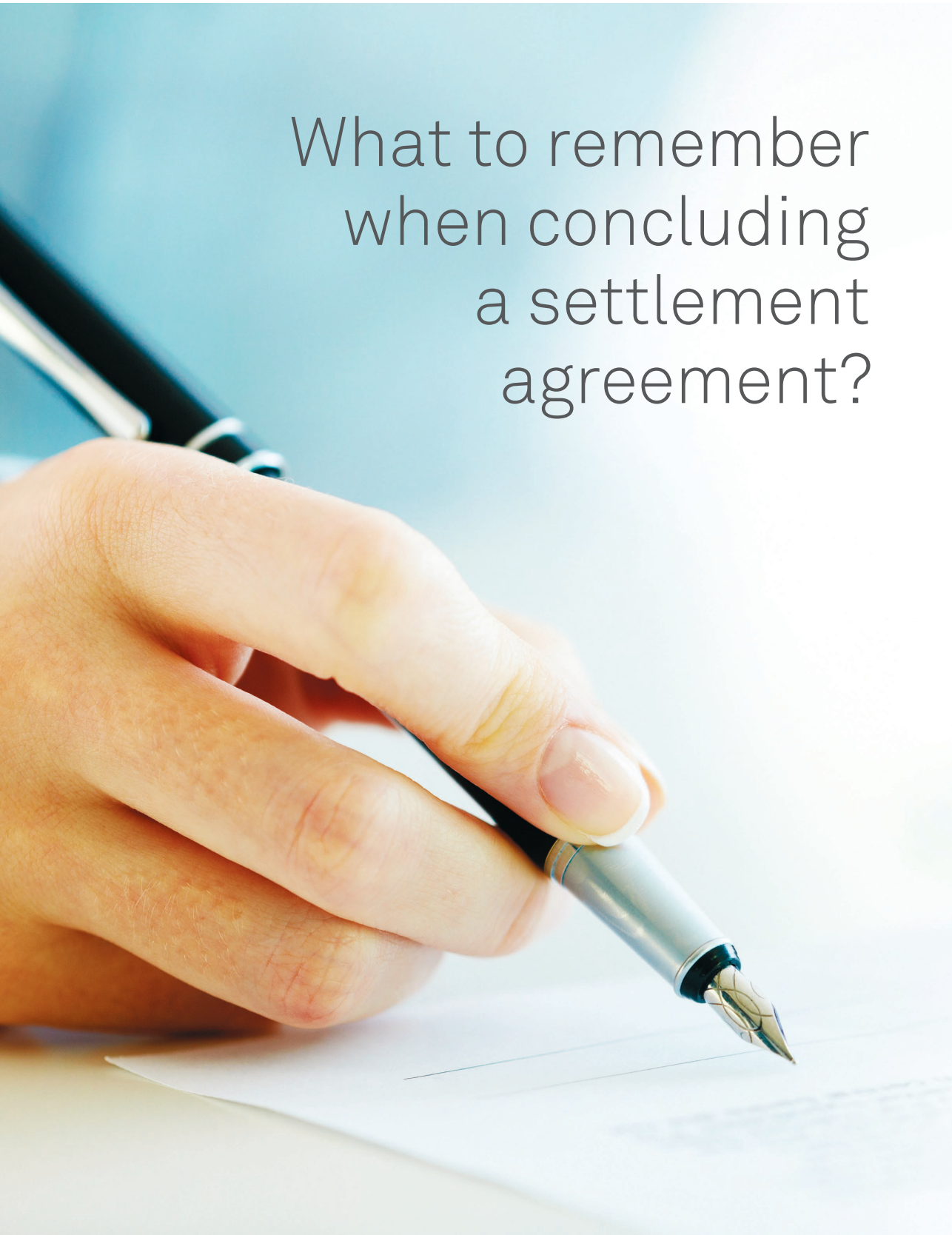
Carefully consider the **timing of settlement offers** and other messages. For example, make a settlement offer at a point in time when you have a position of strength in relation to your counterparty, or when the counterparty could still avoid substantial legal costs by settling quickly.

Be creative. Consider the possibility of introducing elements into the settlement that are not a part of the parties' actual dispute.

Be open to mediation or other forms of **alternative dispute resolution**.

Rule of thumb: A good indicator of a **balanced settlement** is that both parties feel slightly disappointed with the terms.

What to remember when concluding a settlement agreement?



- [ ] **Purpose of the agreement.** Describe the background to the settlement and the intentions of the parties.
- [ ] **Scope of settlement.** Often the most important but also the most difficult part in a settlement agreement. Easier when the parties no longer have an ongoing business relationship, but otherwise may require careful drafting.
- [ ] **General release & no remaining claims.** Clause confirming that the parties release and discharge each other from any claims, demands, liabilities and causes of action in relation to the scope of the settlement, and that no such claims or potential claims remain following settlement.
- [ ] **Payment.** Most settlement agreements involve a monetary payment. It is important to specify who pays, how much, how, when, where, currency, and consequences of non-compliance. If one of the parties has no payment obligation, an express mention is recommended.
- [ ] **Termination of legal proceedings.** If legal proceedings are pending, it is important to agree on how and when they are to be terminated.
- [ ] **Effect of prior rulings.** If rulings relating to the scope of settlement have already been issued by courts or arbitral tribunals, it makes sense to explicitly state what effect said rulings shall have as between the parties following settlement.
- [ ] **Sequence.** It is imperative to agree on the sequence of activities put in motion by the settlement agreement. These may include payment, waiver, withdrawal of proceedings or other settlement mechanism. A related issue is whether the settlement agreement has full effect from signing or whether it only enters into effect once defined conditions precedent are fulfilled.
- [ ] **No admission of liability.** Entry into the settlement agreement means that the parties have resolved their differences, but is in no way indicative of one or the other party being liable.
- [ ] **Non-disparagement.** Confirmation that neither party will make adverse statements regarding the other concerning the scope of settlement.
- [ ] **Dispute resolution and applicable law.** The same considerations regarding these clauses apply as with any other contract. If the contract from which the dispute arose remains in force, it is often advisable to refer to the dispute resolution and applicable law clauses in that contract.
- [ ] **General boilerplate.** As important in settlement agreements as in any other agreement.

7 Mediation – What's the point?

The "orange example" – a simple illustration of the power of mediation.

Meet Mother. She has two children. One day, Mother sees her children crying, fighting and screaming. Worried, she asks: "What seems to be the problem?" She soon finds that there was one orange left in the house and both children wanted the orange. What did Mother do?

Mother put on her Mediator hat. She took the orange from the children and asked each of them the reason *why* they wanted the orange. The results of this inquiry turned out to be very helpful. One of the children informed Mediator Mother of her desire to make orange juice. The other, in turn, told Mediator Mother he was baking a cake and needed the orange peel for the recipe.

By focusing on *interests*, meaning *why* the children actually wanted to have the orange, rather than arguments supporting their claim to the orange, Mediator Mother helped her children to settle. The solution was simple, really. First the child who wants the orange juice presses the juice. Rather than throw the peel away directly, the child gives the leftover peel to the other one who can grate the peel for his cake. Both are satisfied. Mediation has worked.

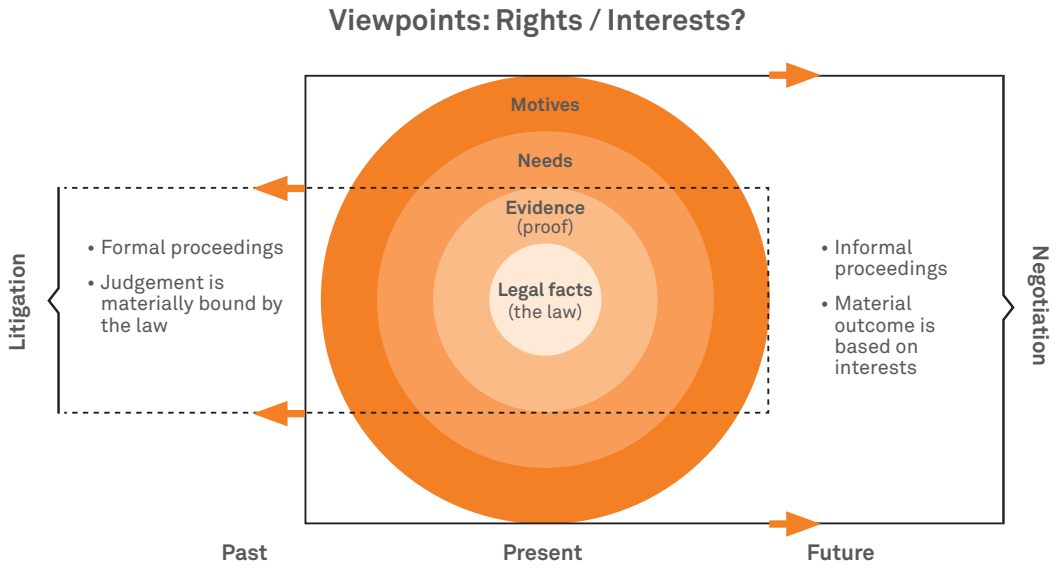
Mediation

Mediation is a voluntary, non-binding and confidential process in which a neutral mediator helps the parties to a dispute to negotiate a settlement. Mediation focuses on the interests of the parties rather than their legal rights. This allows the parties to find innovative solutions that go beyond their positions in a particular case.

How does mediation work?

Mediation is structured negotiation. It does not aim to decide who is right or wrong. Rather, it helps the parties to find a viable solution by exploring their interests, needs, and motives instead of remaining within the boundaries of facts and legal rights. In the course of mediation, a neutral third party mediator uses different techniques to help the parties communicate with each other. One such important technique is a caucus session, where the mediator has confidential discussions with each party separately. Correctly used, caucus sessions can be a fine tool if they do not raise unwarranted suspicions of mediator bias.

The differences between traditional dispute resolution methods and mediation can be illustrated as follows:



The added value of mediation (compared to regular negotiations without third party involvement) comes from the mediator and the facilitative mediation process.

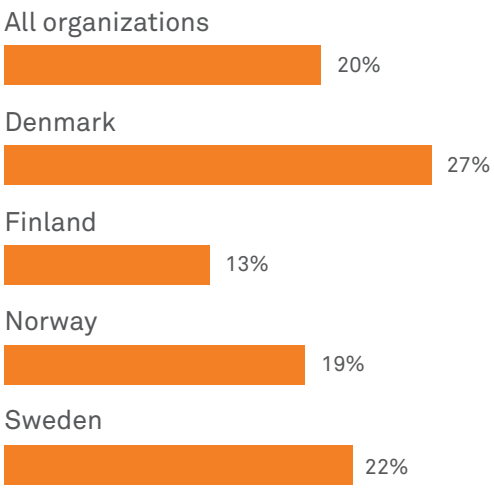
Does mediation work in real life?

Chapter 6 of this Toolkit discusses the dynamics of settlement. While no statistics are available on the success rate of settlement negotiations conducted by businesses without the assistance of a mediator, some statistics on mediation do exist.

Despite these positive general statistics, mediation and other forms of alternative dispute resolution (ADR) are still not widely used in corporate and commercial disputes in the Nordic countries. In the biennial Roschier Disputes Index survey, we have collected information from the largest companies in the Nordic countries on alternative dispute resolution (ADR) since 2010.

Based on the figures in the most recent (2016) edition, participation in ADR may differ considerably from country to country.

Participation in ADR



CEDR STATISTICS

The Centre for Effective Dispute Resolution (CEDR) has conducted surveys on the attitudes of civil and commercial mediators. According to CEDR's Seventh Mediation Audit – a survey of commercial mediator attitudes and experience, published on 11 May 2016, the general mediation settlement rate was 86%. Settlement was achieved on the day of mediation in 67% of cases. In addition, settlement was achieved in 19% of the cases shortly after mediation (CEDR Seventh Mediation Audit, at www.cedr.com).

ICC STATISTICS

The International Chamber of Commerce has also published statistics of mediations under the ICC Mediation Rules. The ICC's settlement rate is 74% when the file is transferred to the mediator, and increases to over 80% when the parties hold a first meeting with the mediator. According to the statistics, costs average less than 1% of the amount in dispute, which have ranged from less than USD 20,000 to more than USD 500 million. (ICC Mediation and ADR Statistics at www.iccwbo.org).

Source:
Roschier Disputes Index 2016, p. 31

The reason why ADR remains fairly limited in commercial cases in the Nordic countries has not been established, and one can only speculate. One possible explanation is that companies are still unfamiliar with the process. We hope that this Toolkit can provide some useful information and advice on when mediation may be a successful dispute resolution tool.

I want to try mediation. How can I go about it?

- Parties can agree to submit their disputes to mediation even at the contracting stage. When agreeing on a dispute resolution method, model clauses are highly recommended. Many institutions such as the ICC, SCC and FAI have their own mediation rules and model clauses. The possibilities that the mediation fails or that the other party does not agree to mediation should be taken into account in the dispute resolution clause. For further guidance on drafting dispute resolution clauses, please see chapter 2.

- The parties can also agree to mediation after the dispute has already arisen and legal proceedings are pending. For example, a case already pending in court can be taken to court mediation, a voluntary process managed by a judge where the parties try to resolve their dispute amicably. As mediation is only helpful if both parties are committed, forcing mediation on a party is rarely a good idea and is unlikely to yield results.

TIPS FOR A SUCCESSFUL MEDIATION

Compared to litigation or arbitration, mediation offers a better setting for creative thinking and for reaching an amicable solution. Considering the benefits of early settlement, which can be reached in a matter of days in a best-case mediation scenario, mediation should be more widely used than it currently is. This being said, for mediation to actually work, certain basic elements must be in place:

- All parties genuinely want to settle and are committed to the mediation.
- All parties understand that the mediation process is a structured negotiation, not a process to decide who is right and who is wrong.
- The mediator is neutral, knowledgeable and experienced.
- The right persons with power to represent the companies are present.
- The right persons have enough time.
- The right persons are committed to the mediation.
- Personal incentives that could affect the outcome are neutralized.
- Sufficient preparation precedes the mediation, including defining BATNA, WATNA and RATNA, and identifying information that needs to remain confidential.

8 Enforcement

In the Nordics, companies generally expect their business partners to honor the outcome of a dispute and to comply voluntarily with an adverse ruling. While this is often the case, occasionally the losing party is either unable or unwilling to comply. In these situations, a final decision may be worth nothing if it cannot be enforced. Thus, the first rule of enforcement is to consider enforcement at the outset of each dispute, or possibly even at the outset of a new business relationship. It may be too late when you have the final judgment or award in your hand. It may even be too late when you initiate legal proceedings. Luckily, companies have multiple tools and possibilities at their disposal both during and after the proceedings. It may even be possible to secure the company's position before the proceedings have started.

Before and during the proceedings

First and foremost, monitor counterparty risk. Get to know the counterparty's business and financials. Important elements include corporate structure and domicile, operations, solvency and location of main assets. The analysis is easier for long-term business partners, but at least a basic "enforcement due diligence" is often sensible even if it requires more effort. Also, one should remember that situations may change rapidly and previously unknown information on the counterparty's financials may come out during the proceedings, which is why one should be vigilant and observe changes that may affect the counterparty's ability or willingness to comply voluntarily. As discussed in chapter 5, different types of

interim measures are available and can be considered to secure enforcement.

The place where the majority of the counterparty's assets are located is also the likely place of enforcement of an award or judgment. When deciding on the dispute resolution clause for the contract, consider the ultimate place of enforcement. Enforcement of the final decision may even depend on the forum, or at least the forum may make a difference in terms of effort, time and cost required to enforce the final decision. For more discussion on dispute resolution clauses, please see chapter 2.

After the proceedings

Once you have a final award or judgment in your hand, enforcement becomes a top priority. Even if the judgment is not final and binding, enforcement options exist and should be examined. Enforcement of a judgment may be possible even if an appeal is pending. In a best case scenario, the counterparty will comply voluntarily.

Voluntary payment and settlement

Voluntary compliance is generally high, even in cross-border settings. This is confirmed by the 2008 International Arbitration Study (p. 8) by the School of International Arbitration at Queen Mary University of London. According to the Study, 84% of responses indicated full compliance with arbitral awards in more than 76% of cases. In fact, corporate counsel reported during the interviews that more than 90% of the awards were honored by the non-prevailing party. Principal reasons to comply with the award, according to the Study, included preserving a business relationship. These results largely match our experience.

In order to avoid lengthy enforcement procedures and to receive the amounts due faster, settlements are often negotiated after an award or a judgment is given. According to the 2008 International Arbitration Study, principal reasons for settlement included avoiding costs (33%), saving time (23%), preserving the working relationship (19%), desire for prompt receipt of the amount due (16%), and concerns about likely place of enforcement (9%).

Post-award settlements may include, for example, the following modifications to the parties' obligations under the original decision:

- Changes to timing of performance
- Agreement on payment in instalments
- Agreement on reduced payment
- Changes to obligation to pay interest (rate, due date) or compensation for costs

When negotiating after prevailing in arbitration or litigation and assessing the terms and conditions that might be acceptable, it will be necessary to carefully weigh the gains and losses as well

as chances of succeeding in enforcement of the full award, including the time and effort that this may take.

Exequatur and enforcement

In a purely domestic context, enforcing a judgment or award is usually straightforward: Take it to the execution office. A cross-border context adds complexity to enforcement. While losing parties often comply voluntarily, forced execution with the assistance of courts and execution offices is occasionally necessary.

Depending on the judgment or award you are trying to enforce, different international instruments are available to assist in enforcement. In arbitration, the relevant treaty is the New York Convention of 1958. In litigation, there are multiple instruments – both bilateral and multilateral – depending on the nationality of the judgment and the place of enforcement. What often surprises companies is that international treaties mostly deal with the recognition and enforceability of a foreign ruling in principle (exequatur). After obtaining exequatur, the execution stage – actually turning the ruling into money or enforcing the outcome awarded – still remains before local execution authorities who apply their domestic rules.

The New York Convention, The international success story

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is one of the most important and successful United Nations treaties in international trade law and the cornerstone of the international arbitration system. The New York Convention requires courts of contracting states to give effect to agreements to arbitrate and to recognize and enforce awards made in other contracting states with only limited exceptions. To date, there are 156 parties to the Convention. For more information, please see page 18.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding, article, the party applying for recognition and enforcement shall, at all time of the application supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Litigation, Enforcement instruments to keep in mind

Brussels I Regulation Recast (1215/2012)

Main rule on recognition and enforcement: Judgments of EU Member State courts can be enforced directly in other Member States. A separate declaration of enforceability is no longer required from the court at the place of enforcement.

Limited **grounds for refusal** of enforcement, including public policy, still remain. However, the party seeking to stop the enforcement must bring a separate application for refusal. The court can decide to make enforcement conditional, to limit enforcement to protective measures, or to suspend enforcement while such an application is pending.

For further details on the Regulation, please see page 15.

The Lugano Convention

The Lugano Convention on jurisdiction and the recognition and enforcement of judgments (2007/712/EC), replacing the 1988 Convention, applies between the EU Member States and Switzerland, Norway and Iceland. The Lugano Convention closely resembles the Brussels I Regulation but also applies to the EEA countries that are not EU Member States.

Nordic Countries

The Convention of 11 October 1977 concerning the Recognition and Enforcement of Judgments in Civil Cases governs recognition and enforcement of judgments between the Nordic countries Finland, Sweden, Norway, Denmark and Iceland. It remains relevant outside the scope of the Brussels and Lugano regimes.

The Hague Convention on Choice of Court Agreements

The Hague Convention of 30 June 2005 on Choice of Court Agreements applies to exclusive choice of court agreements in civil or commercial matters, in international cases. Applicable to EU Member States (except Denmark), Mexico and Singapore at the time of writing. The Convention provides that any judgment by the chosen court must be recognized and enforced in other Contracting States. Limited grounds for refusal apply.

What if no enforcement instrument is available?

In the absence of applicable international conventions or EU legislation to support enforcement, a foreign judgment will often not be directly recognized and enforced. In these cases, new proceedings on the merits usually must be initiated against the other party to obtain an enforceable judgment. Admittedly, the domestic laws of many countries do recognize foreign judgments under certain conditions.

Even if a foreign judgment is unenforceable, this does not mean that it has no relevance. On the contrary, the judgment can still be used in the new proceedings as evidence of the facts and circumstances of the case and the content of the applicable foreign law. The evidentiary value of a foreign judgment is determined case by case. Courts assess the evidentiary value of such judgments in the same way as any other evidence submitted by the parties. While the court is not bound by the judgment's findings, they may have considerable value in practice.

Enforcing settlement agreements

Disputes often settle during proceedings, and the need for an enforceable award or judgment on the questions at dispute disappears. However, parties may need to have their settlement agreements declared enforceable by competent courts or arbitral tribunals. In international arbitration, consent awards, which record the settlement terms into an arbitral award, are widely used. Such awards can usually be enforced under the New York Convention, but enforceability should be verified case by case.

Many national laws also allow enforcement of settlement agreements made in mediation, but this may vary from country to country. In international disputes, cross-border enforceability may be more difficult or impossible. Some institutional mediation rules, such as the FAI and SCC Rules, include the possibility of recording settlement as an arbitral award. Such an award is enforceable, provided that the criteria of the New York Convention are met. The EU Mediation Directive (2008/52/EC), in turn, allows parties to request that the content of a written agreement resulting from mediation be made enforceable. Such confirmation can occur either by judgment, decision or other valid act.

Tracing assets and working with a bailiff

Where is the money, or is there any? This question is answered at the latest when the bailiff goes to work. Significant delays can elapse from the moment a party receives an award or a judgment to the moment when money is transferred to that party's bank account when the other party does not want to pay. The amount of time and money needed multiplies fur-

ther if the other party actively tries to hide assets or otherwise delay enforcement.

It is important to understand that there are no guarantees when it comes to effective enforcement by local execution officials. When working with the local enforcement machine at the place where the losing party's assets are located or believed to be located, assistance of local counsel who understands how the machine works is key.

Finding assets and turning them into cash can also take a lot of time. Asset tracing is most effective if a party already has some understanding of which assets exist and where they are located. Even where sufficient assets are discovered, the debtor may delay enforcement by contesting the various actions of execution officials. Judicial safeguards to ensure proper procedure do exist, and they can be effectively used or even misused to delay enforcement.

Team and contacts

Roschier's Dispute Resolution practice focuses on prevention and handling of disputes. Our team regularly works on the major commercial disputes in the region, with a particular emphasis on international arbitration and complex commercial court disputes. Our lawyers frequently represent leading companies in domestic and international litigation and arbitration. A key strength of the team is derived from the deep knowledge of specific areas, such as intellectual property, energy, IT, competition and product liability. We have the capability and experience to manage disputes both locally, in Finland and Sweden, and internationally.

Our team in Helsinki

Top row left to right: Minna Vammeljoki, Aapo Saarikivi, Laila Sivonen, Gisela Knuts, Milla Laurio, Henrietta Hindström, Henrik Sajakorpi.
Middle row: Paula Airas, Petri Taivalkoski, Joel Kujala, Katarina Rehnberg.
Bottom row: Mari Vanhanen, Kaisa Mattila, Elisa Varetsalo.

One of the unique features of Roschier's Dispute Resolution practice is the close cooperation between our teams in Helsinki and Stockholm. When handling disputes, we also work closely with colleagues who specialize in other practice areas in order to ensure the best possible assistance for our clients. Our international network includes law firms across the globe, which allows us to assist our clients wherever the need may arise.

Our team in Stockholm

Top row left to right: Henrik Fieber, Lars Johansson, Eva Storskrubb, Björn Johansson Heigis, Rikard Wikström.
Middle row: Annika Pynnä, Johan Sidklev, Shirin Saif, Anton Salamon.
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Roschier is one of the leading law firms in the Nordic region. The firm is well-known for its excellent track record of advising on demanding international business law assignments, large-scale transactions and major disputes. Roschier's main offices are located in Helsinki and Stockholm, with a regional office in Vaasa. The firm's clients include leading domestic and international corporations, financial service and insurance institutions, investors, growth and other private companies with international operations, as well as governmental authorities.

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