Roschier Disputes Index **2021**

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

DISPUTE RESOLUTION TRENDS

METHODS AND PRACTICES

MANAGEMENT

COSTS AND FUNDING

DIVERSITY

DIGITALIZATION

Prospera

BY KANTAR SIFO

ROSCHIER

Index

Foreword

Welcome to the sixth edition of the Roschier Disputes Index, our regular market survey focusing on prevailing practices and trends in dispute resolution in the Nordics.

Our survey has traditionally charted the preferred **dispute resolution methods**, **arbitration rules** and **substantive laws**, the disputes the companies actually have in practice, and the **best way to manage these disputes**. It also observes **trends** on the dispute resolution market. For the 2021 edition we have added some new questions on current issues affecting dispute resolution, such as **digitalization**, **diversity** and the **COVID-19 pandemic**.

Our objectives are to investigate and track developments in how the largest companies in the Nordic region view commercial dispute resolution and manage their disputes. The survey includes respondent companies from Denmark, Finland, Norway and Sweden.

Altogether, 146 in-house lawyers present their views and experiences in relation to key issues concerning commercial dispute resolution. We take pride in the consistently high response rate and we are happy to note the increased parity with respect to location by country of the respondents for the Roschier Disputes Index 2021.

We have again invited leading experts, stakeholders and users of dispute resolution services to comment on the results of the survey. These comments are intended to shed light on the results of the survey and to provide our readers with a more in-depth understanding of the potential reasons for the results.

We wish to thank the following commentators for their excellent analysis and contribution to the report: **Chiann Bao**, Arbitrator and member of Arbitration Chambers; **Jenny Bergendorff**, General Counsel at Skanska; **Ola Ø. Nisja**, Partner at Wikborg Rein; and **Steffen Pihlblad**, Secretary General of the Danish Institute of Arbitration.

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

Roschier Dispute Resolution Team

Methodology

The data for the Roschier Disputes Index 2021 was collected by Kantar Sifo Prospera, part of the Kantar group, which specializes in global market information and insight. Since 1985, Kantar Sifo Prospera has regularly been carrying out surveys and client reviews targeting professionals in the Nordic financial markets.

The results reported in the Roschier Disputes Index are based on in-depth interviews with general counsel and in-house counsel from some of the largest organizations in Denmark, Finland, Norway and Sweden (based on turnover). A list of the 299 companies included in the survey is available on Roschier's website (www.roschier.com). A total of 146 companies participated in the survey, which corresponds to a 49% response rate.

Telephone interviews were conducted from April to September 2020 and were based on a questionnaire prepared by Roschier in cooperation with Kantar Sifo Prospera. All interviews were confidential and the figures have been reported only in the aggregate.

The results from the survey are reported for all interviewees as well as on a countrywide basis. For some questions related to diversity, the results are also reported based on the gender of the respondent.

Overall findings

Arbitration remains the preferred method of dispute resolution overall and there is a general increase in the preference. However, **significant differences** can be seen between the **Nordic countries**. The preference for litigation has decreased in Denmark and Finland.

Aapo Saarikivi
Partner | Roschier

Eva Storskrubb
Counsel | Roschier

Nordic companies have to deal with more disputes, the majority of which are now international for the first time for respondents in all countries. **The regional dispute resolution market is therefore increasingly international.**

The SCC is the only Nordic institute that **is preferred by at least some respondents from all Nordic countries**, and the ICC is by far the most popular arbitration institute outside the Nordics.

Paula Airas
Counsel | Roschier

Gisela Knuts
Partner | Roschier

Nordic companies have **sophisticated and tailored approaches** to the choice of dispute resolution method. However, there has been **no overall increase in the use of mediation or other ADR methods**, the exception being Norway.

Factors related to **experience and trust** are very important when Nordic companies choose **arbitration rules** and the **applicable substantive law**. Neutrality and stability of the underlying legal system are among other important factors.

Carl Persson
Principal Associate | Roschier

Shirin Saif
Partner | Roschier

The COVID-19 pandemic is a factor that has started to **impact** upon companies' resolution of disputes, with Finnish companies so far noting the greatest change.

Digital tools are being used to a varied extent in the support of dispute resolution. Close to half of the respondent companies (48%) have experienced videoconference facilities or other similar remote facilities for the **taking of witness evidence or expert evidence**.

Johan Sidklev
Partner | Roschier

Laila Sivonen
Principal Associate | Roschier

A majority of Nordic companies appear **to work systematically with dispute management**. Aside from using model clauses, popular dispute management techniques include drawing lessons from previous disputes and systematic review of dispute resolution clauses.

Diversity is considered to a greater extent **in the choice of a law firm** (42%) than in the appointment of an arbitrator (19%), according to the respondent companies. Overall, the results show that we still have a lot of work to do in the Nordic dispute resolution market with respect to diversity.

Rikard Wikström-Hermansen
Partner | Roschier

Expert commentators

Chiann Bao
Arbitrator and member of Arbitration Chambers
Hong Kong

Jenny Bergendorff
General Counsel at Skanska
Sweden

Ola Ø. Nisja
Partner and Global Head of Disputes, Wikborg Rein
Chairman, the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce (OCC)
Norway

Steffen Pihlblad
Secretary General of the Danish Institute of Arbitration
Denmark

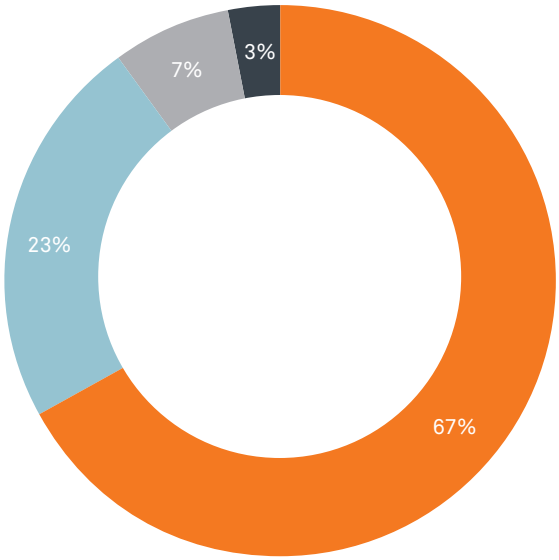
Key findings

- Arbitration is still the preferred method of dispute resolution and overall has increased in popularity.
- Finnish respondents reported a rebound in their preference for arbitration, following a slump in the 2018 Index.
- Norway retains a significantly higher preference for litigation.
- Aside from the non-public nature of arbitration, factors that emphasize the efficiency and flexibility of arbitration are valued highly by Nordic users.
- Nordic companies have sophisticated and tailored approaches to their choice of dispute resolution method.
- Factors related to experience and trust are very important when Nordic companies choose arbitration rules and the applicable substantive law.

PART I

Dispute resolution choices

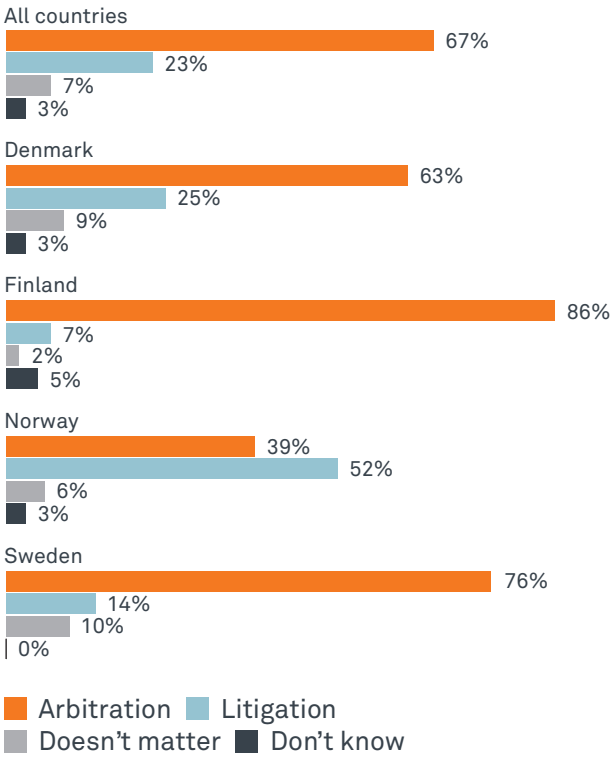
1.1 Preferred dispute resolution method



All organizations

Arbitration Litigation
Doesn't matter Don't know

Arbitration clearly remains the preferred dispute resolution method, confirmed by 67% of the respondents. There has been an overall increase of 6 percentage points compared to the 2018 Index. Arbitration has increased in popularity in all relevant countries, except in Sweden, where the level has remained unchanged and unwaveringly high (76%). The preference for arbitration made a significant rebound in Finland (86%), after a dip in favor in the 2018 survey compared to earlier results.



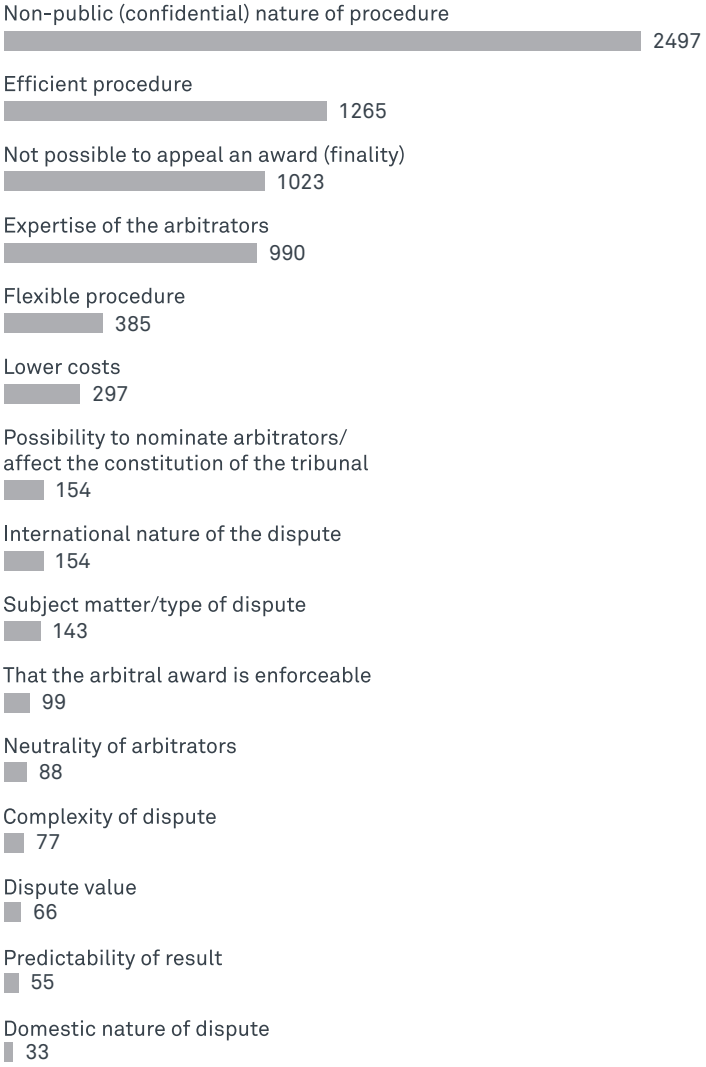
Litigation remains most popular among Norwegian and Danish respondents, scoring 52% and 25% respectively this time. However, overall only 23% of the respondent companies preferred litigation over arbitration. In addition, in both Finland and Denmark the preference for litigation has decreased significantly since the 2018 Index, in Denmark from 38% to 25% and in Finland from 22% to only 7%.

Norway remains the only country in which respondents favor litigation over arbitration, for the first time over 50% since Norwegian companies have been included in the survey (52%). There has nevertheless also been a slight increase in preference for arbitration among Norwegian respondents, from 36% to 39%.

> "It is very difficult to give a general explanation. But one aspect that may be relevant is that the Danish courts have been pushed by the politicians to give priority to criminal cases, to the detriment of commercial ones. Tough on crime is a popular policy. That means that if the courts do not get more resources, the commercial cases are pushed behind and companies will look around for alternatives."
>
> *Steffen Pihlblad on the decrease in preference for litigation in Denmark*

> "The trust in the courts and the tradition for choosing the courts is still very strong. All levels of the court structure have also taken steps to make themselves more attractive."
>
> *Ola Ø. Nisja on the Norwegian preference for court litigation*

1.2 Decisive factors for choice of arbitration



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

The non-public (confidential) nature of arbitration was very clearly the number one reason for selecting arbitration over litigation, with over one-third of the respondents naming it as the most important factor.

Note that arbitration is not necessarily automatically confidential as between the parties in the Nordic jurisdictions. However, it is non-public.

The second and third most important factors for choosing arbitration were the efficiency of the procedure and the final nature of the award/lack of appeal, in this order. They both speak of the importance of expedient proceedings. Arbitration is preferred because it is perceived as efficient, without lengthy and costly appeals.

Lower cost was the sixth most important factor for selecting arbitration. Before this, respondent companies valued in particular the expertise of arbitrators, but also the flexibility of the arbitral process. Interestingly, procedural flexibility has risen significantly in importance compared to the 2016 Index, when we last asked the same question, from being ranked tenth to now being ranked fifth.

Respondent companies indicating a preference for arbitration were asked if there were situations in which they would nevertheless resort to litigation in the courts. Responses varied, but an overarching reason for choosing litigation on occasion was where the disputes were of low value, or related to debt collection or otherwise less complex matters. In addition, respondents referred to cases with potential criminal law aspects as being suitable for the courts. Interestingly, enforceability was raised as a reason for selecting litigation, both to ensure enforceability but also to make enforcement more difficult for the counterparty. Other procedural or practical issues raised can be seen in the comments below.

Respondents on situations in which court litigation is used, despite a preference for arbitration:

"We have a lot of small and domestic counterparties. Arbitration is expensive for them, and because of that we consider litigation as an option."

"If the other party is from the Nordic countries, we prefer court proceedings instead."

"We very rarely use court proceedings. This has happened in isolated cases in non-contractual circumstances and in cases where an interim measure has been justified in order to secure the company's rights pending a final decision in arbitration."

"I'm not surprised by the preference for arbitration as the Nordic countries have had a tradition in engaging in international arbitration. I find it interesting that cost and time efficiency remains a popular factor users refer to when favoring arbitration. As we all know, one of the ongoing topics addressed in our community is how costly international arbitration has become. I suppose users continue to desire such a system, hoping that the inherent flexibility of the arbitral process as well as the finality of the process will translate to a more time and cost efficient process. As for the confidential nature of international arbitration, I appreciate that there is still great attraction in resolving disputes privately and therefore the responses are consistent with my impression as to why users might find arbitration to be preferred over other forms of dispute resolution. I think this factor will be one to watch however as institutions are now reviewing the extent to which awards should be kept confidential."

Chiann Bao on factors for choice of arbitration

1.3 Decisive factors for choice of litigation

In line with the results in the 2014 and 2016 editions of the Index, the vast majority of respondents indicating a preference for litigation cited lower costs as the main reason for their preference. Other main reasons included the possibility to appeal the ruling, the domestic nature of the dispute, the specific type of dispute and the public nature of court proceedings.

When asked in which situations arbitration would still be used, even if litigation was the first preference, respondents mentioned a broad variety of reasons. Complexity and a high degree of specialization of the case could tip the scales in favor of arbitration, according to some respondents. Higher value or more complex cases, such as agreements in M&A transactions, were seen as potentially more suitable for arbitration. Norwegian respondents, who generally prefer litigation, had two main reasons for making an exception: the specialist expertise required for larger and more complex cases and the non-public nature of arbitration.

Other issues raised by respondents show that Nordic companies have sophisticated and tailored approaches to their choice of dispute resolution method.

Respondents on choice between litigation and arbitration:

"I prefer litigation if the dispute is within the European Union. If the dispute is with a party outside of the European Union, I prefer arbitration."

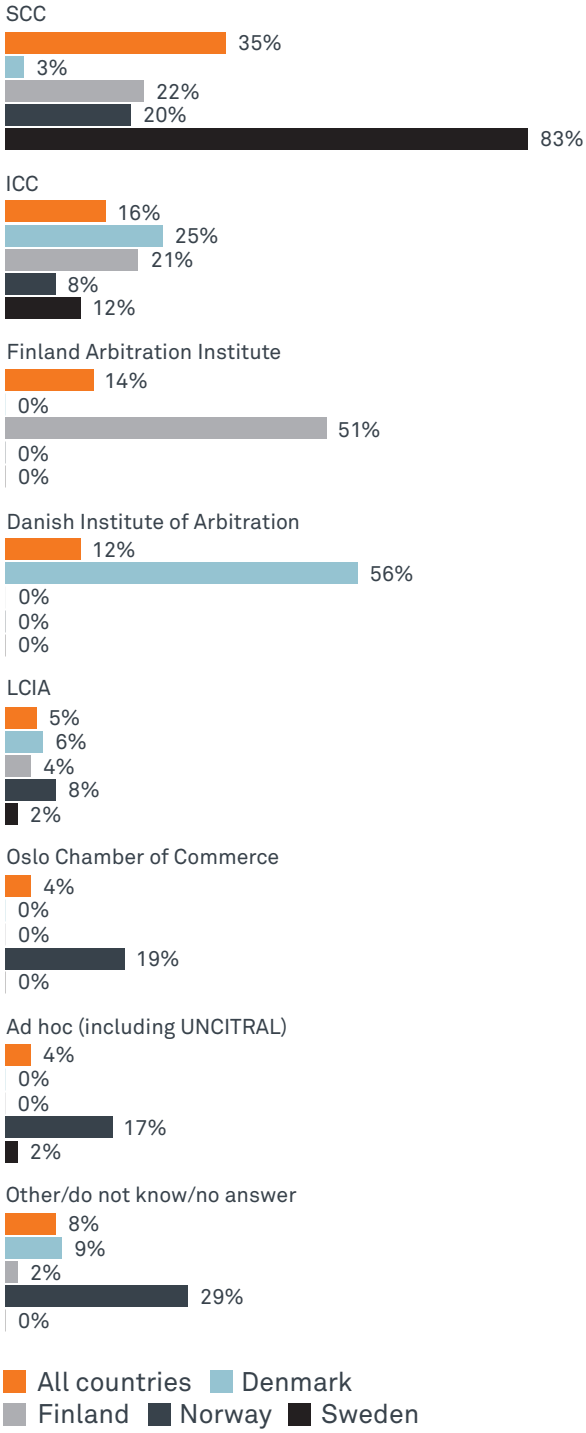
"In complex matters arbitration can be good due to the need for specialized judges and/or judges that are really interested in the matter."

"In certain situations, it may be important for the public to have transparency and then we choose court proceedings. If something needs to go quickly, it can be an advantage to choose arbitration as the appeal process can take a very long time in an ordinary court and become costly."

"We have seen an increase in cases at the Danish Institute of Arbitration. Over the past 15 years or so, our caseload has doubled, and in the last five years, an increase of 5-10%. However, the disputed amounts are also increasing overall, which says something about the relationship between arbitration and litigation. Many companies in Denmark would say that litigation would be chosen in less complicated cases. So even if there has been a small increase in recent years, a much bigger one may occur in a longer perspective."

Steffen Pihlblad on the relationship between litigation and arbitration

1.4 Choice of arbitration rules



Respondents demonstrated a high level of trust in their respective domestic arbitration institutes, but also a tendency to choose internationally-known rules, such as the ICC and the SCC. The SCC was the most popular choice, preferred by 35% of all respondents. The ICC, the Finland Arbitration Institute and the Danish Institute of Arbitration rules followed with 16%, 14% and 12%, respectively. Other institutes' rules, such as the LCIA, are also used, but to a lesser extent than indicated in the 2016 Index. Interestingly, the SCC was the only Nordic institute to be

chosen by respondents from a different Nordic country, suggesting that the Nordic institutes might benefit from marketing each other more.

Institutional arbitration was clearly preferred; Norwegian respondents continue to stand out in their preference for ad hoc proceedings.

Previous experience remains the most important factor in choosing specific arbitration rules. The reputation of the rules was the second most important factor. Compared to previous editions of the Index, neutrality has grown in importance, now ranking third amongst the most important factors, as compared to fifth in 2016. Other factors considered in selecting arbitration rules included the level of professionalism, efficiency and flexibility, and established practice. The counterparty's location was also mentioned in a number of responses.

Respondents on choice or experience of arbitration institutes, showing also the considerable international experience amongst them:

"ICC is expensive and take a little longer, but the quality is high."

"I choose FAI, SCC, LCIA as they have an accepted process, reputation, experience. I opt out of other things."

"Normally, the ICC and other major institutes work well. We would not choose CIETAC (Chinese) as we do not think they are completely impartial."

"Positive experiences of LCIA, ICC, SCC and AAA."

"We have not seen a huge wave of cases from companies in the other Nordic countries at the Danish Institute of Arbitration. But we have had some Norwegian cases, and we have had a lot of seminars and other activities in Norway. However, the greatest proportion of our cases by far consists of Danish companies against non-Danish companies."

Steffen Pihlblad on the preferences of Nordic companies

"When it comes to ad hoc arbitration, the tradition is extremely strong, even if the younger generation sees the advantages of institutional arbitration. However, we also see an increase in institutional arbitration, and a steady increase in cases at the Oslo Chamber of Commerce. I should also mention the NOMA rules, which are not institutional but provide a set of arbitration rules and are popular in the shipping industry."

Ola Ø. Nisja on the Norwegian results on choice of arbitration rules

1.5 Preferred substantive law

We asked respondents which substantive law they prefer in international contracts when they are unable to choose their domestic law. English law has significantly increased in popularity compared to the 2016 Index and is now the preferred alternative. Swedish law, ranked highest in the 2016 Index, came in second. German and Swiss law followed in the rankings, with both increasing in popularity. Respondents generally showed a preference for Nordic or European legislation. The CISG and EU law were mentioned by a number of respondents.

Danish and Swedish respondents had the highest preference for English law. Whereas, among Finnish respondents, the preference for English law had decreased, with Swiss law in particular gaining in popularity compared to the 2016 Index.

Respondents on substantive laws to avoid:

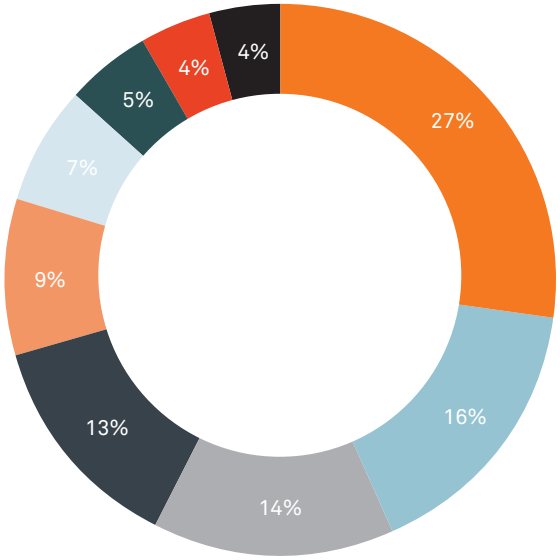
"I would not agree to Chinese or Russian law due to concerns about the independence of their legal system and the lack of credibility."

"China, uncertainty. If able to avoid, several common law systems - lawsuits expensive."

"Countries I have no knowledge of. Smaller jurisdictions where there is no transparency."

"In particular, sharia law in the Middle East."

Most important factor that impacts on choice of substantive law



- Familiarity/experience
- Part of the civil law tradition
- Appropriateness for the type of contract
- Neutrality
- Location of other party
- Location of performance of contract
- Recommendation of external counsel
- Venue of dispute resolution
- Part of the common law tradition

Experience of and familiarity with the particular law were mentioned as the most important factors. Respondents underlined the importance of predictability and trust in the underlying legal system.

Respondents showed a high degree of willingness to reject a substantive law which was not acceptable to them. 73% of the respondents stated that there were substantive laws they wanted to avoid and would not agree to, whilst Danish respondents were the most open to the substantive law of other countries.

Lack of predictability and negative experiences were among the reasons for rejecting a particular substantive law. Concerns with the stability of the underlying legal system as well as potential other influencing factors, such as religious impact, were also mentioned. Many respondents mentioned either European law or a “Western” legal system as the minimum requirement. There were also laws of countries in Europe that were unacceptable to some respondents, including the laws of the Baltic countries, French law, and in some responses also German and English law.

PART II
Actual disputes

2.1 Number of disputes

The respondents experienced a mean of 15 and a median of five non-consumer disputes valued at over EUR 100,000 in the past 24 months. The number was highest in Sweden and Norway, both of which saw a clear growth in the mean average number of disputes. Overall, the mean average has slowly increased since 2016.

A majority of the respondents, 60%, predicts that the number of disputes will remain unchanged during the coming 12 months. Nevertheless, 26% expect the number to increase, whereas less than 10% expect a decrease.

An increase is most expected in Finland and Sweden, with roughly one-third of the respondents expecting more disputes. Denmark was the only country in which more respondents expect a decrease rather than an increase in the number of disputes.

2.2 Nature of the disputes

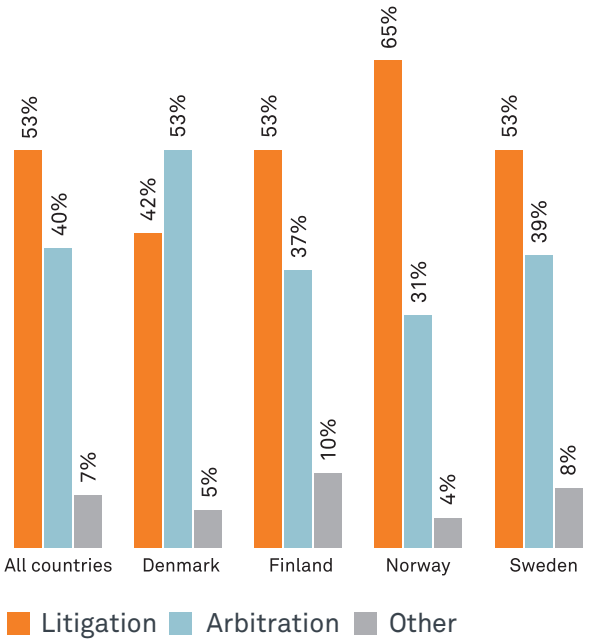
The disputes in which Nordic companies are involved have become increasingly international in nature. International in the respect that the counterparty is domiciled in a country other than the country in which the respondent is domiciled.

For the respondent companies, 58% of their disputes were international in nature. In 2016, the number was 53%, and in earlier editions of the Index the majority of disputes were domestic. Now, for the first time, over 50% of the disputes were international for the respondents in all countries.

Key findings

- There has been a moderate increase in the number of disputes that Nordic companies have to deal with.
- The majority of disputes in which Nordic companies are involved are international in nature.
- There has been no significant development in the use of ADR.

2.3 Types of dispute resolution methods



According to the respondents, litigation remains more common in practice (53%) as compared to arbitration (40%). However, the results show a slow shift towards arbitration, with the proportions being 57% to 34% and 73% to 23% for the 2016 and 2014 editions of the Index, respectively. While there is a growing interest in other means of dispute resolution, such as mediation, the use of other methods has overall remained the same (7% in 2021 and 9% in 2016).

2.4 Settlement and ADR

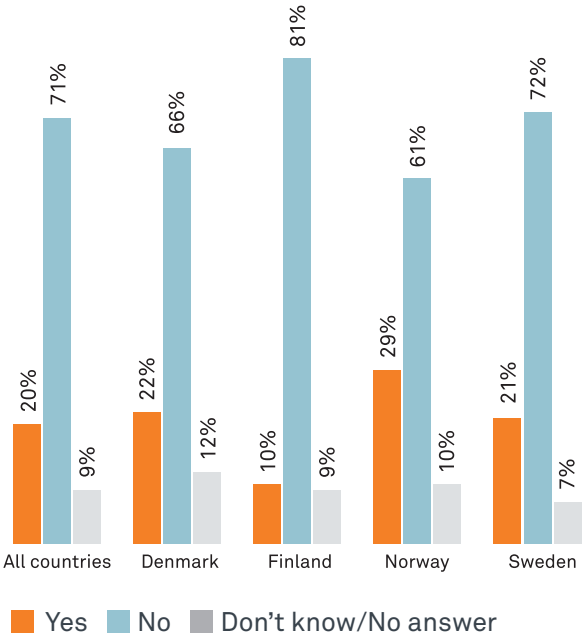
The respondent companies reported settlements in 54% of their disputes during the past two years before a judgment or an arbitral award was rendered. For three out of four countries (Finland, Norway and Sweden), the respondent companies managed to settle in over half of their cases.

Overall, the number of disputes that are settled has remained fairly stable since the results in the 2016 Index. However, Finnish respondents noted a significant increase in the proportion of settlements, namely 58% as compared to 37% in 2016. Norwegian companies also experienced an increase, whereas Danish and Swedish companies experienced a slight decrease.

When asked whether the companies had participated in any form of alternative dispute resolution during the past two years, only 20% of the respondents reported that they had done so. Thus, a clear majority had no recent experience of ADR. Finland remains the country in which ADR was used the least, with only 10% of respondents having participated in ADR.

These results are very similar to those in the 2016 Index, which suggests that no significant overall development has taken place with respect to ADR. However, Norway stands out in this respect, with an increase in participation in ADR as compared to 2016 (29% compared to 19%).

Participation in ADR



> "We also have mediation at the Danish Institute. We are always looking for a soft spot for mediation in every arbitration. The right time for mediation is often during the arbitration. It takes some experience to find the right point in time."
>
> *Steffen Pihlblad on the use of ADR*

> "Companies are accustomed to court-annexed mediation and the majority of such cases are resolved before judgment. ADR, in particular mediation, outside court processes is slowly becoming more popular."
>
> *Ola Ø. Nisja on the use of ADR*

Of the cases that went to ADR, 63% resulted in a settlement. In all countries, more than 50% of the disputes were settled as a consequence. In Sweden, the success rate for settlement in ADR was the highest (79%).

A large number of respondents noted that ADR has not been considered relevant or suitable for their cases, or that negotiations between disputing parties have been considered sufficient. A number of respondents indicated a positive attitude towards mediation or other types of ADR. A few respondents reported negative experiences of ADR, for example that the dispute was not actually settled in the process.

Respondents on why ADR was not used:

"Due to conservatism and lack of enforcement."

"We have been convinced of the strength of our case."

"The court feels like a better alternative, they always work towards reconciliation and finding solutions."

"Probably because it does not solve the problem. An opinion on how to do it, but one tends to disagree afterwards. Better to go for something that actually solves the dispute. It's about time and money."

"I have to say that I am not surprised but perhaps a bit disappointed at the lack of overall development in ADR. While parties are successfully engaging in mediation, such is not well promoted so as to influence others to try. In my own practice as well as in my capacity as Chair of the Task force on ADR and Arbitration, I have seen many creative solutions in utilising the many tools of ADR, including the incorporation of such techniques in arbitration. As companies continue to pressure counsel and the system for a more efficient system, I hope we see a more robust development of a truly flexible and bespoke form of dispute resolution."

Chiann Bao on the development of ADR

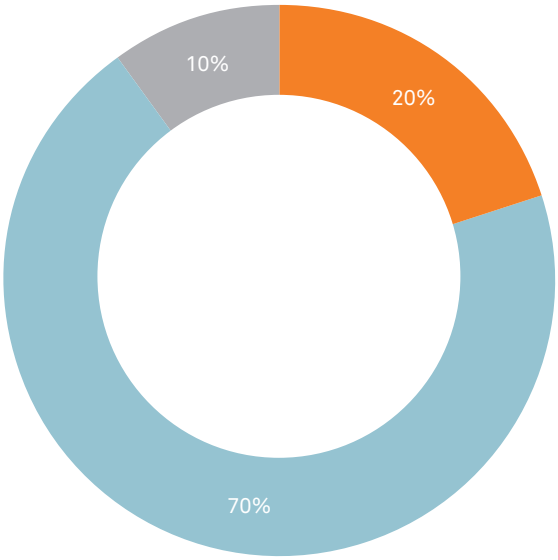
Key findings

- Nordic companies have not experienced strong trends in dispute resolution in recent years. However, the COVID-19 pandemic is a factor that may come to impact disputes and dispute resolution choices, with Finnish companies so far noting the greatest change.
- Close to half of the respondent companies (48%) have experienced videoconference facilities or other similar remote facilities for the taking of witness or expert evidence.
- Other digital tools than facilities for the taking of witness or expert evidence are used to a varied extent, with 15% of the respondent companies having experienced the digital portal of an arbitral institute.
- A majority of Nordic companies appear to work systematically with dispute management.

PART III

Trends

3.1 Changes in disputes and COVID-19



A clear majority of the respondents (70%) have not experienced any particular trends in their company's dispute portfolio during the last few years. None of the Nordic countries stands out in this respect.

Among those respondents that have experienced trends, many noted that disputes have become more complex whereas others noted that settlements have increased. The perceived trends can also diverge; for example, one respondent noted that it selects the disputes it decides to litigate more carefully, while another respondent noted that the threshold to bring a claim has become lower.

Respondents on experienced trends:

"In general, selecting more carefully which disputes to litigate, but then to act with full force (and then coordinated between more jurisdictions) when the decision to litigate has been made."

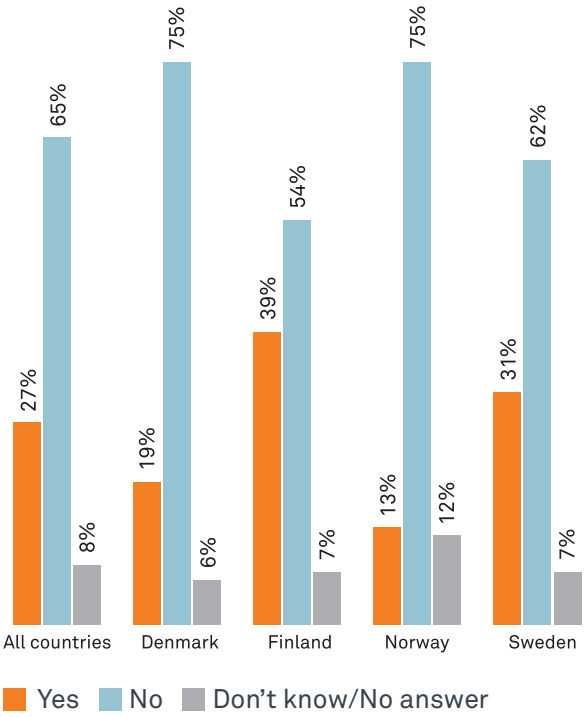
"Companies are increasingly avoiding disputes, more often commercial solutions."

"Disputes have become more complex, more complicated. The parties use more lawyers, which means that the costs spin away."

"I would say that disputes are tied to economic development, especially when it comes to what the disputes are about. In good times, the dispute amounts are often larger because projects are larger and then the risk of large disputes is greater. In a recession, you have more projects but smaller projects. Important money for the parties, so then there are more disputes. But then perhaps also a greater chance of settlement. It comes and goes."

Jenny Bergendorff on trends and dispute types

Change due to COVID-19



According to the results, 27% of the respondents have witnessed new developments due to the COVID-19 pandemic. However, variations can be observed between the countries with respect to the effect of the pandemic. In Finland, 39% of the respondents had witnessed changes due to the pandemic, whereas in Norway only 13% responded the same.

Unsurprisingly, force majeure appears to be the most common cause of corona-related disputes in all the Nordic countries. In addition, the pandemic has caused payment difficulties, postponed negotiations and resulted in slower court proceedings. One respondent had a positive view in that the pandemic was perceived to have made parties more cooperative with respect to disputes.

Respondents on changes due to COVID-19:

"Increasing number of claims and a more aggressive market because of the situation; financial issues have an impact."

"The situation has caused many breaches of contract (delay in delivery etc.) and therefore force majeure clauses etc. in the contracts have been scrutinized (among many other things)."

"More willingness to settle things than normally, to obtain a quick solution."

"The court process is slower. The court uses digital means, e.g. hearing over video."

"In terms of disputes, we have seen a very limited number in Sweden that relate to the pandemic. At a group level, I know that there are some in other jurisdictions. One reason may be that in Sweden we have standard terms in the construction sector and they specifically mention a pandemic, i.e. foresee crisis situations. These standard terms have taken both perspectives into account and often landed in a balanced assessment of what is reasonable."

Jenny Bergendorff on the impact of COVID-19

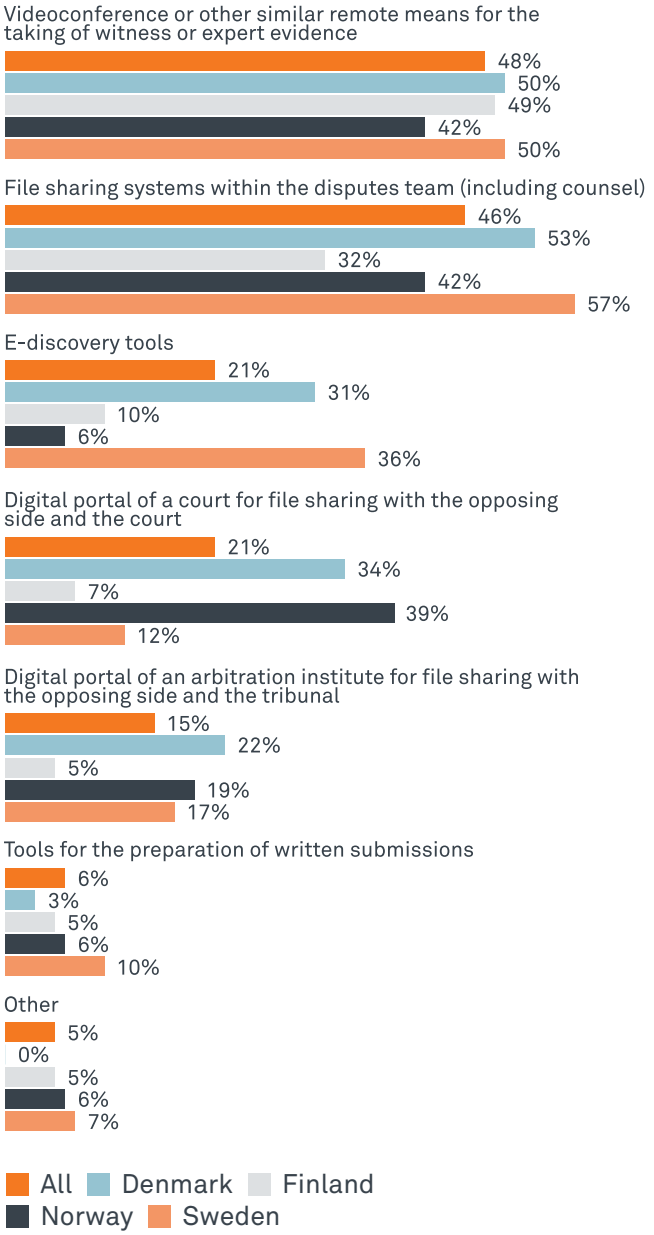
3.2 Dispute management

The dispute management technique most frequently used among the respondents is the implementation of model dispute resolution clauses (77%). Notably, as many as 96% of the Swedish respondents use model dispute resolution clauses. This is an increase of 20 percentage points compared to the 2016 Index. Other popular dispute management techniques include drawing lessons from previous disputes in a systematic manner (68%) and the systematic review of dispute resolution clauses in contracts (62%). The overall results suggest that a majority of respondent companies work systematically with dispute management.

Among the respondents that use other types of dispute management techniques, the following were mentioned as examples: regular meetings with law firms to discuss ongoing disputes and the assistance of experienced negotiators.

> "Over the past years we have worked a lot with contract management and claims management in order to increase knowledge within our organization of our rights and remedies. This is a tool to decrease disputes. For large projects we may specifically put in a senior and experienced person to resolve issues early on when there is a risk of a dispute. Our experience is that at the stage when lawyers are sent in it is often not possible to avoid a dispute."
>
> *Jenny Bergendorff on dispute management techniques*

3.3 Digital tools



A very interesting question, particularly in light of the changes in working methods due to the COVID-19 pandemic, relates to the use of digital tools. The digital tools of which most respondents have experience are videoconferences for the taking of witness evidence or expert evidence and filesharing systems within the dispute teams.

Since this question is new for the 2021 Index, it is not possible to establish an evolution based on previous years. However, it is undeniable that the use of digital tools has increased during this year due to the pandemic and it is likely that this development will also affect dispute management in the future.

We did not ask a question specifically on digital or remote hearings, but it is notable that 48% of the respondents had experience of taking of witness evidence or expert evidence being taken remotely. Some respondents also specifically mentioned an increase in the use of remote hearings when asked about the impact of COVID-19 (see above on the impact of COVID-19).

> "We have not been so successful in conducting remote hearings. Many Danish lawyers seem to see remote hearings as something very radical compared to a traditional hearing. We do not have case law that can support us in imposing a remote hearing upon a reluctant party."
>
> *Steffen Pihlblad on remote arbitral hearings in Denmark*

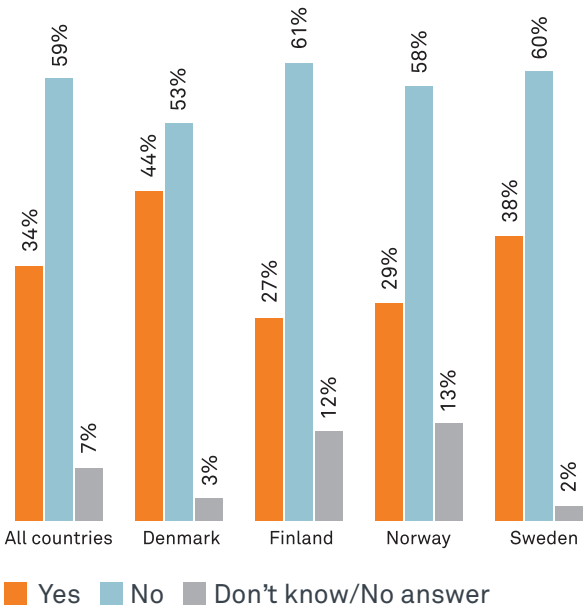
> "We have seen a tremendous amount of remote hearings in court processes. We have also seen remote mediations and remote arbitration hearings during the pandemic. Taking of witness statements over video has become common. I think this period has been an eye opener for the dispute resolution practitioners."
>
> *Ola Ø. Nisja on remote hearings in Norway*

> "At the beginning of the pandemic, many cases were adjourned. A year into this pandemic, arbitrators as well as parties, have become more robust as the contours of due process have been better defined for virtual hearings. While most I think would agree by now that case management conferences and short hearings can easily be conducted remotely, questions remain as to whether or not witnesses can be effectively deposed. I experienced one situation where the technology was not consistently good but we got through it. While it was still more appropriate to conduct the arbitration remotely than adjourn indefinitely, I think counsel could have prepared the technology and the surroundings to enhance connectivity between the witness and the others "in the room." That said, we learn as we go along and with more experience from arbitrators and counsel alike, as well as improved technology, I am optimistic and expect to see more remote hearings in arbitration."
>
> *Chiann Bao on remote hearings in her practice*

3.4 Fees and funding

In addition to a more traditional pricing model based on hourly fees, a number of the respondents answered that they would like law firms to adopt pricing models based on success fees, price caps or combined alternatives as pricing models.

Considered or used alternative fee arrangements



Overall, the interest in alternative fee arrangements increased slightly by 4 percentage points compared to the 2016 Index. In particular, the Danish respondents showed the greatest interest and experienced the largest increase. In addition, 25% of the respondents use fixed legal fees for external counsel in dispute matters.

There have been no significant developments in the use of third-party funding of disputes. The usage remains limited, with 86% of respondents never having considered or used this type of funding.

Respondents on pricing models:

"Fixed fee model, but of course it's difficult, or success fee in combination with a more traditional fee model. The most important thing is transparency."

"The most important thing is to get a good overall picture and an estimate of both the issue and the total cost."

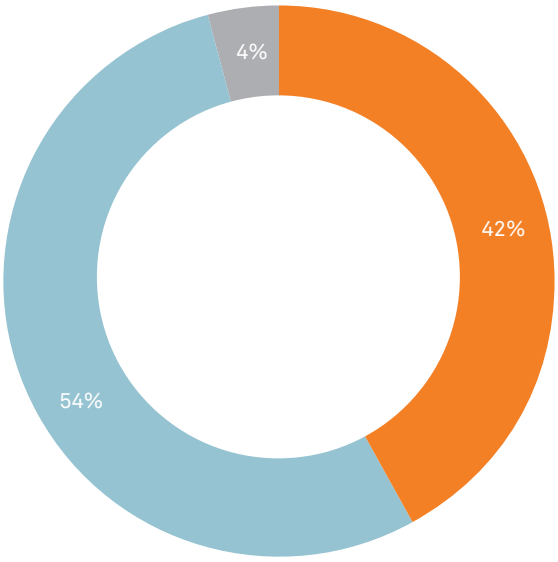
"As much as possible, we want a fixed price. In the event of major disputes – fixed price on the various parts."

"We value predictability but also know that at the start of a dispute it is difficult to predict its scope, for example the length of a potential hearing. We prefer to work with estimates and regular reporting. However, we also use framework agreements with respect to rates."

Jenny Bergendorff on pricing models

PART IV
Diversity

4.1 The importance of diversity when choosing a law firm

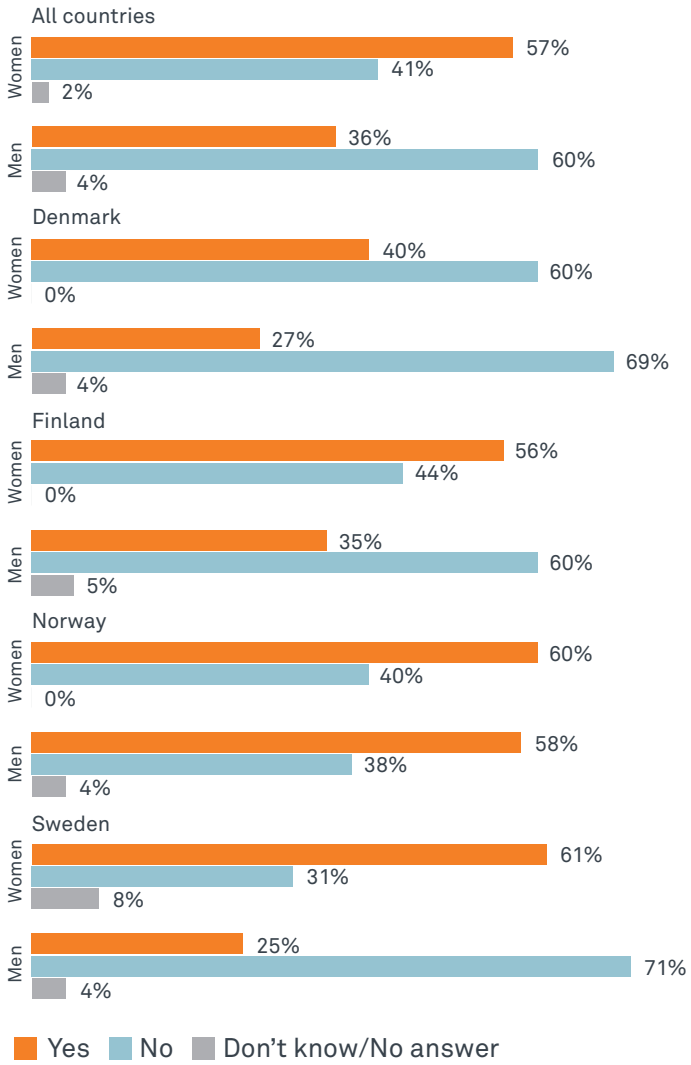


As fostering and removing barriers to diversity has gained increased or renewed attention in business and other walks of life in recent years, we sought to gauge to what extent diversity has come to play a part in Nordic companies' dispute resolution choices. When asked whether diversity is considered in their choice of law firm, 42% of the respondents answered in the affirmative.

Diversity can be defined in different ways and mean different things to different persons or companies. The concept may, but will not necessarily in all cases, include issues such as gender, age, ethnicity, faith, sexual orientation and social background. The respondents did not need to adhere to a specific understanding/definition of diversity but were free to answer the questions based on their personal understanding or following the understanding of the relevant company.

Key findings

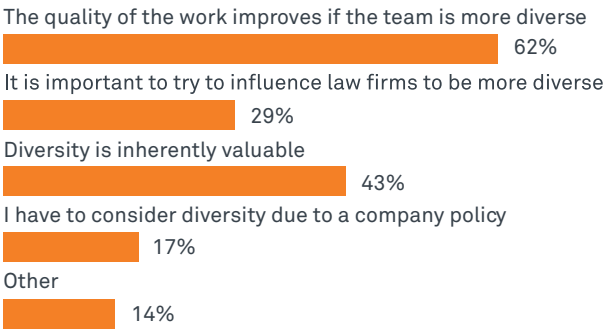
- Diversity is considered more in the choice of a law firm (42%) than in the appointment of an arbitrator (19%).
- There are considerable variations in the importance of considering diversity among the Nordic countries; overall, women were more in favor of considering diversity.
- Personal contacts, experience and merit are stated to be factors that impact on not considering diversity.



However, there are some interesting differences in the results based on nationality as well as on gender. For example, in Sweden, there is a big gap between the female and male respondents. In fact, Swedish women consider diversity most of all (61%), while Swedish men consider diversity the least (25%) in this context. In contrast, the gap between female and male respondents is very small for Norway, 60% to 58%. This means that Norway is the only country in which a majority of both women and men are influenced by diversity in their choice of law firm.

> "Over the years, diversity has often implicitly referred to gender diversity only. Indeed, as we have seen in recent years, the efforts made to create better gender diversity in international arbitration is paying off. However, lack of jurisdiction, age, and socio-economic diversity needs attention. Certain initiatives are starting to address these issues. At the same time, we need to take a holistic approach. What is the root of the problem? How do we effectuate foundational change? Are we using the right metrics to evaluate diversity efforts? By asking these self-reflective questions we can hopefully see systematic changes that will ensure that international arbitration lives up to its name."
>
> *Chiann Bao on diversity*

Reasons for considering diversity when choosing a law firm



A majority (62%) of the respondents think that diversity improves the quality of work. Moreover, 43% are of the opinion that diversity is inherently valuable. There are some notable differences. 89% of the Danish respondents answered that the quality of the work improves if the team is more diverse and 78% that diversity is inherently valuable. In Finland, these numbers were 47% and 41% respectively. It is also interesting to note that, among the respondents that consider diversity when they choose a law firm, only 17% are doing it because of a company policy.

When asked why the respondents do not consider diversity, 75% state that they only consider the merits of the team when they choose a law firm to represent them. From the answers, it is clear that a common reason for not considering diversity is that the choice is based on previous experience and personal contacts. Some respondents emphasized that it costs money to establish contact with a new law firm. Others noted that they take it for granted that the law firms are diverse these days.

Respondents on why they do not consider diversity:

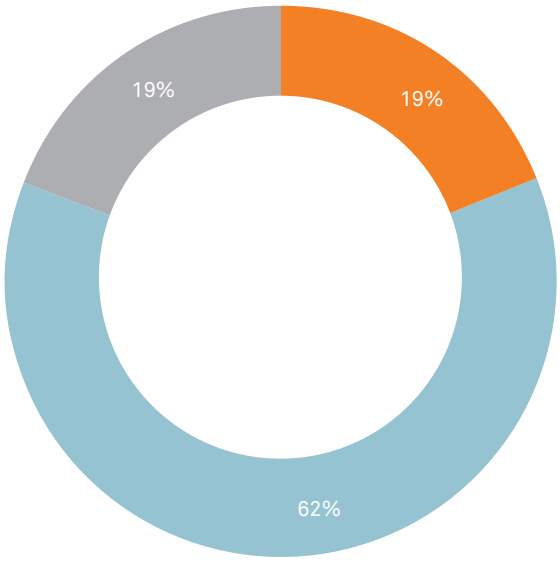
"There is a risk that you choose based on previous experience and price."

"We go to those who we have been working with previously."

"We continue to work with the firms with which we have established contact. It would take time and money to look for a new law firm."

"It is so obvious today with diversity, so I expect all firms to have diversity."

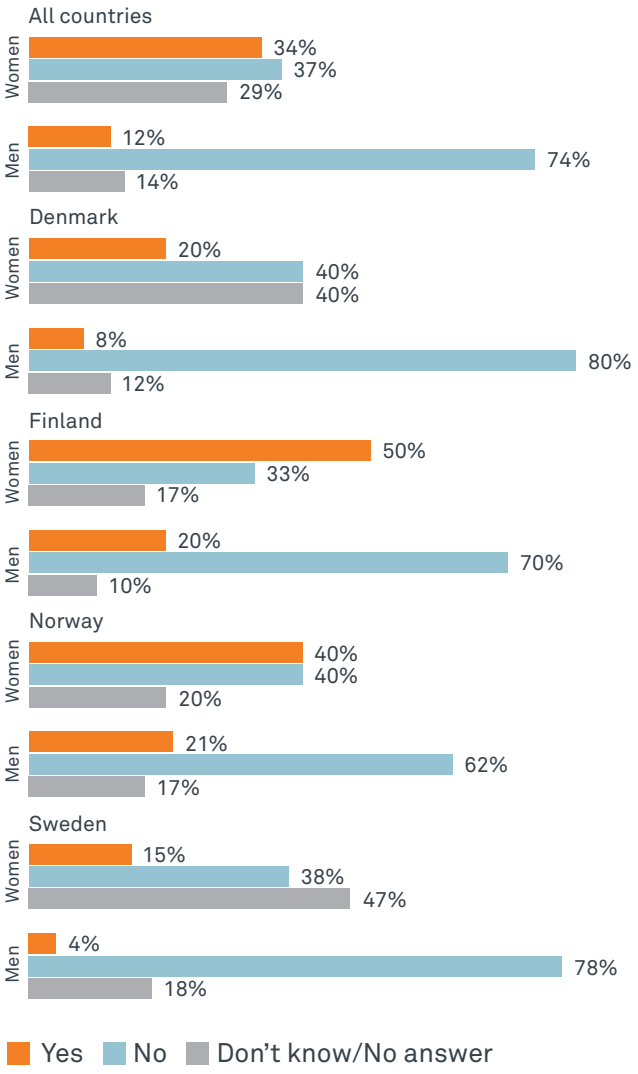
4.2 The importance of diversity when appointing an arbitrator



Yes No Don't know/No answer

Approximately one-fifth of the respondents consider diversity when appointing an arbitrator. This is a noticeably lower number compared to the number of respondents that consider diversity when they choose a law firm.

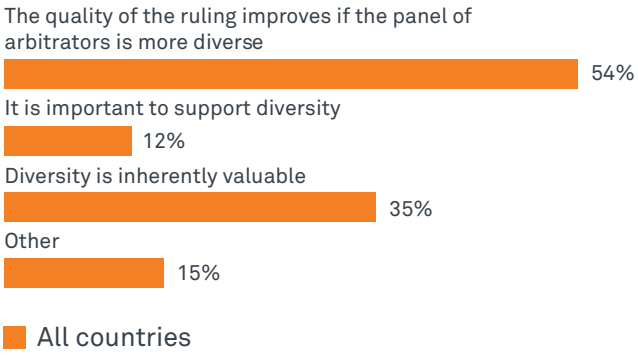
With respect to appointing an arbitrator, female respondents also consider diversity to a greater extent than male respondents do, with Finnish women taking diversity into account the most (50%). It is also notable that overall, Finnish (34%) and Norwegian (24%) respondents consider diversity more than Danish (10%) and Swedish (7%) respondents.



"Happy to see the Norwegian results on diversity overall. This is extremely important and we have a strong tradition of equal rights. That being said, we are far from good enough at this point. The reality is for instance still that far too few women are sitting as arbitrators today."

Ola Ø. Nisja on diversity

Reasons for considering diversity when appointing an arbitrator



The main reason why respondents consider diversity in the appointment of an arbitrator is that it improves the quality of the ruling if the arbitral tribunal is more diverse (54%). The second most common reason is that diversity is inherently valuable (35%). These results can be compared to the responses relating to diversity in choosing a law firm (62% referring to the quality of work and 43% referring to the inherent value of diversity). Accordingly, diversity appears slightly less important in the context of appointing arbitrators. A vast majority (84%) of the respondents that do not consider diversity when they appoint an arbitrator state that they only consider the individual on their merits.

> "In the choice of counsel I am very focused on the person, I do not necessarily consider diversity. However, in the appointment of an arbitral tribunal I would consider it more, it is important to have different perspectives, different backgrounds, on the tribunal."
>
> *Jenny Bergendorff on diversity*

> "We have this issue on the top of our minds when it comes to the institute's appointments. Rarely do we appoint a panel with only men. Having said that it is not always so easy to find female arbitrators with the same level of experience, but we are taking the pledge seriously."
>
> *Steffen Pihlblad on diversity*

Universe of organizations

4 Countries represented in the survey

146 Participating organizations

49% Response rate

299 companies included in the survey

Companies interviewed

32 Denmark

41 Finland

31 Norway

42 Sweden

To see the organizations included in the survey's universe, click here.

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