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CD corporate disputes

DISPUTE RESOLUTION IN SCANDINAVIA

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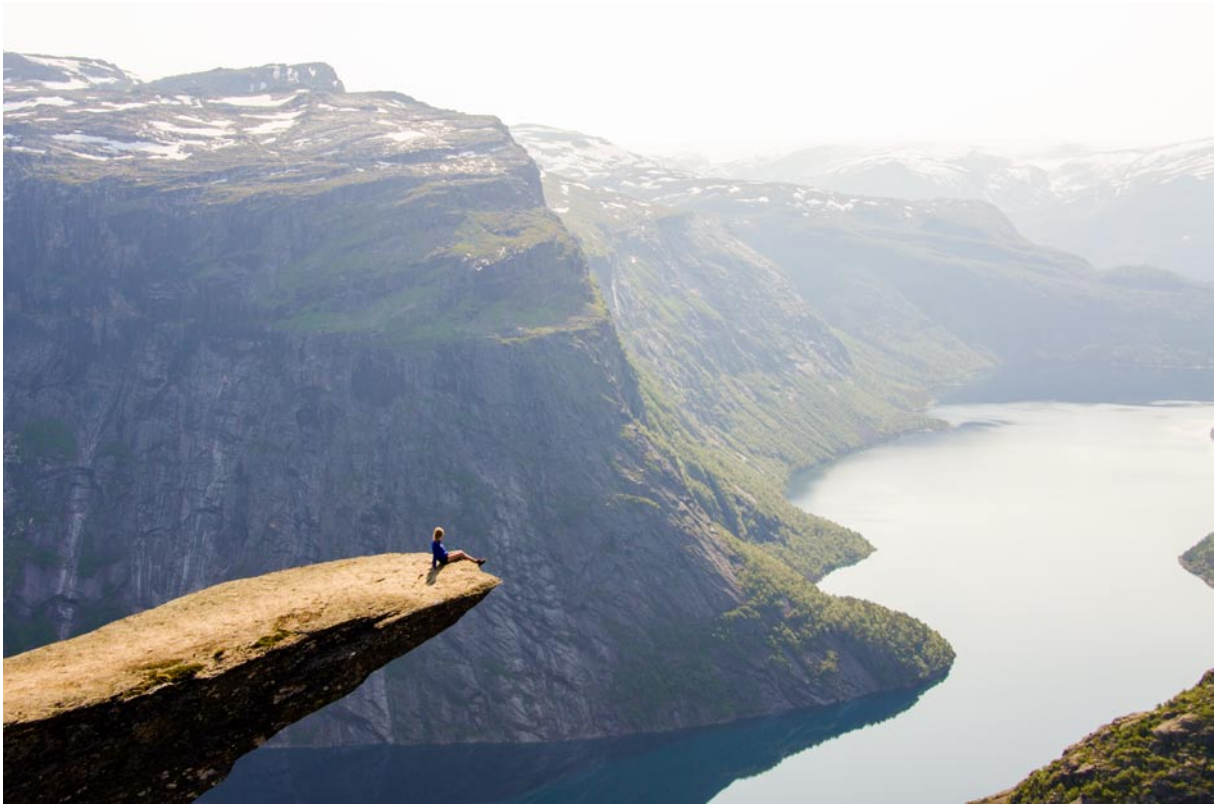
MINI-ROUNDTABLE

DISPUTE RESOLUTION IN SCANDINAVIA



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Krister Azelius has been a partner at Vinge since 1996 and heads the firm's litigation and arbitration team in Southern Sweden. He has extensive experience of acting as counsel in international and national arbitration, as well as national litigation. He also serves as arbitrator. He regularly publishes papers on dispute resolution issues in English and Swedish. Mr Azelius is a member of the Executive Committee of the Swedish Arbitration Association.

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Gisela Knuts is a partner specialising in commercial dispute resolution. Her practice includes litigation, arbitration and alternative dispute resolution. She has been involved in disputes relating to, e.g., construction, energy, distribution, M&A and anti-trust damages. Ms Knuts practices in both Finland and Sweden and frequently acts as arbitrator under a variety of arbitration rules as well as in ad hoc proceedings.

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Jacob Møller Dirksen is a partner with Horten, specialising in complex dispute resolution. He heads the firm's Commercial Disputes & Arbitration department group and has significant experience as counsel in both international and domestic litigation and arbitration. Further, he sits as an arbitrator. Mr Møller Dirksen is a member of the Board of the Danish Association of Arbitration, and he is founder and the current Chairman of YAC (Young Arbitrators Copenhagen).

CD: Could you provide an overview of the current dispute resolution landscape across Scandinavia? How would you describe the infrastructure and processes in place to support dispute resolution?

Knuts: The legal system of the Scandinavian countries provides two primary options for the resolution of commercial disputes: the ordinary court system and arbitration. Generally, arbitration is the preferred method for resolving commercial disputes in Scandinavia. Companies in Finland and Sweden favour arbitration to a higher degree than companies in Denmark and Norway. However, the majority of actual disputes are litigated in court, even though most of these disputes are contractual in nature. Smaller, low-value and domestic claims are often referred to litigation, while complex, large-value or international matters are referred to arbitration. Even though the Stockholm Chamber of Commerce (SCC) is the most well-known venue for arbitration in Scandinavia, the Arbitration Institute of the Finland Chamber of Commerce (FAI) also has a fairly strong standing in the region and, naturally, especially among Finnish companies.

Azelius: Sweden has a robust system to support dispute resolution, with a well-developed system for both litigation and arbitration. Mediation, which is becoming increasingly popular, is used in both litigation and arbitration. The general courts in Sweden are typically not adapted to handle complex and large-scale issues, with the exception of some of the larger courts. Small value and less complex disputes are generally handled in an efficient manner at the general courts. The arbitration institution is well developed in Sweden, with the Stockholm Chamber of Commerce (SCC) as its first advocate. The SCC, which will be celebrating its centennial in 2017, receives approximately 200 new cases each year. The SCC is very active in questions regarding arbitration in Sweden, from lobbying important questions raised by the arbitration community with legislators to arranging conferences.

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>
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Møller Dirksen: The predominant method of dispute resolution in Denmark is the use of the regular Danish court system. However, in recent years arbitration has become increasingly popular as a dispute resolution mechanism in commercial cases, and this trend seems to be continuing. The favouring of arbitration is probably attributable to the introduction of a new Danish Arbitration Act in 2005, which is based on the UNCITRAL Model Law, the internationalisation of the Danish Institute of Arbitration's Rules, and the general international trend towards arbitration. Speaking in general terms, the infrastructure and processes in Denmark are excellent and provide a very good basis for solving disputes.

CD: How prevalent is the use of alternative dispute resolution (ADR) in Scandinavia? How might this approach be more beneficial than proceeding directly to litigation?

Møller Dirksen: In Denmark, for many years the industry has been anticipating an increase in the use of ADR, such as mediation, although the big leap forward remains to be seen. When facing a dispute, the parties could very well consider mediation rather than litigation since mediation supports the preservation of the parties' business relationship, and it allows the parties to have direct influence on the outcome of the dispute. Furthermore, even though litigation costs are quite low in Denmark, mediation is generally cheaper. However, arbitration is currently the favoured alternative to litigation, as parties often want to use a swift, confidential and binding method to resolve their disputes.

Knuts: ADR such as organised adjudication and mediation is fairly seldom used by companies in Scandinavia. However, in recent years there has been an overall increase in ADR participation. In Finland, ADR procedures are not as popular as arbitration as a means of resolving business disputes. However, mediation is being actively promoted and has become more popular over the past few years. One interesting fact is that the Roschier Disputes Index 2014 showed that ADR was used more than twice as much among Norwegian companies as among the respondent companies in Sweden, Finland and Denmark. If disputes can be resolved faster through ADR than through litigation or arbitration, at less expense and with no public exposure, dispute resolution through ADR will no doubt be a preferred choice for many companies in the future.

Azelius: In Sweden, we have seen an increase in the use of mediation and other ADR methods during the last couple of years. However, the most common type of ADR is still contacts between counsel prior to initiating litigation or arbitration. The benefits of solving a dispute without resorting to litigation or

arbitration are many and well known. In Sweden, general courts now often suggest that mediation proceedings are initiated between the parties. Moreover, it is now a requirement in the Swedish Code of Judicial Procedure that the judge enquires as to whether there is a possibility for the parties to reach a settlement. The extent of this investigation is highly dependent on the judge responsible for the case.

CD: In your opinion, what are the strengths and weaknesses of Scandinavian countries as seats for arbitration proceedings? Are there stark differences between each country in the region?

Azelius: The strengths of the Scandinavian countries and Sweden in particular are that they are neutral, arbitration friendly countries with modern legislation which is comparable to international standards. Arbitration is an old tradition in Sweden. In consequence, the courts are generally used to adjudicating challenge proceedings and other court proceedings originating from arbitration. Additionally, there is a large pool of counsel with experience in domestic and international arbitration. Sweden has ratified the New York Convention. Two weaknesses of Sweden as seat for international arbitration proceedings are that possible court proceedings following arbitration have to be held in the Swedish language. Hence, evidence and submissions have to be presented in Swedish. Moreover, multiparty provisions are lacking in the Swedish Arbitration Act. However, both issues will hopefully be overcome in the revision of the Swedish Arbitration Act which is currently taking place. There are no stark differences in this regard between the countries as their legislation is based on the UNCITRAL Model Law.

Møller Dirksen: The modernised Danish Arbitration Act, the well-functioning infrastructure, the modern Danish Institute of Arbitration and the geographical position of the country make Denmark a good seat for arbitration and Denmark is therefore worth considering when two foreign parties seek a neutral country in which to conduct the arbitration. Furthermore, corruption rates are extremely low, and the courts respect and recognise the autonomy of the arbitral process. Generally, the court system is considered very arbitration-friendly. All Scandinavian countries are well-suited for arbitration, and there appears to be no real weaknesses.

Knuts: The main strengths of the Scandinavian countries as seats for arbitration proceedings are that they have experienced and well-organised arbitration institutes and arbitration friendly courts. In addition, their procedural traditions are particularly suitable for international arbitration as they constitute a combination of Continental European civil law and common law traditions. The

procedure is principally adversarial, as opposed to inquisitorial, with the parties themselves essentially controlling the facts and evidence to be introduced. The weaknesses of arbitration identified by the Scandinavian companies in the Roschier Disputes Index 2014 were costs, the somewhat convoluted procedure and the length of the proceedings – basically, the same weaknesses that are mentioned by arbitration users regardless of where arbitral proceedings are conducted.

CD: What advice would you give to parties looking to commence arbitration proceedings in Scandinavia? How should a company go about developing an effective strategy?

Knuts: In Scandinavia, as in most other places, the composition of the arbitral tribunal is one of the most important strategic decisions. I would encourage parties involved in arbitration in Scandinavia to be mindful of issues such as the dynamics of the tribunal, the choice of applicable law and the seat of the arbitration when selecting the arbitrators. Developing an effective strategy is an important success factor when looking to commence arbitration proceedings. An effective strategy usually requires a combination of experienced counsel well versed in the applicable law and the arbitration rules to be applied, and hands on in-house counsel who can contribute the relevant industry and corporate knowledge.

Azelius: Before the dispute even arises, it is important to spend time on drafting the dispute resolution clause. It is usually not sufficient to use a standard boilerplate clause, in particular where multiparty issues can occur. In many disputes, it is important to first assess the possibility of reaching a settlement. When arbitration has been initiated, the appointment of arbitrators is one of the most important strategic decisions during the preparation of the proceedings. If the tribunal consists of all Swedish arbitrators, or if the chairperson is Swedish, it is preferable to engage Swedish counsel. In general terms, a Swedish arbitrator will typically prefer oral evidence to witness statements, as well

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as oral closing statements as opposed to written ones. Moreover and also by way of generalisation, a Swedish arbitrator will adopt a stricter view on discovery than a common law lawyer.

Møller Dirksen: The point of departure would be to quickly identify a law firm with specialist knowledge within the legal area in dispute, but even more importantly with profound experience in conducting arbitration cases in the country in question and under the arbitration rules to be applied. The fact that corruption is almost nonexistent, that ethical standards among lawyers and arbitrators are generally high, and that culture

may differ from other countries, means that parties from other cultural backgrounds should exercise caution in relation to contacts with witnesses, experts and arbitrators as this may negatively impact on the chances of success. A particular point that deserves attention when developing an effective strategy is the appointment of arbitrators. Generally speaking, many Scandinavian arbitrators will have a preference for oral testimony over written witness statements, and in terms of evidence production most Scandinavian arbitrators will allow limited discovery as compared to arbitrators from common law countries.

CD: To what extent is the autonomy of the arbitral process fully recognised across Scandinavia? What, in your opinion, are the benefits and drawbacks of such self-determination?

Møller Dirksen: In Denmark, the autonomy of the arbitral process is fully recognised, as courts rarely interfere. The Danish Arbitration Act, being based on the UNCITRAL Model Law, contains the principles that the arbitral tribunal rules on its own jurisdiction, competence-competence, that the courts must recognise and enforce domestic and foreign arbitration awards, and that the courts should only play a limited role, both in terms of control and assistance. By way of example, the courts usually respect broad formulations on the scope of the arbitration agreement. Generally, the autonomy of the arbitral process promotes Denmark as a good seat for arbitration, and it strengthens the entire arbitral process. On the other hand, the absence of adequate court supervision could tempt people to abuse the arbitration system and thereby compromise the principles of due process. However, Denmark does seem to have a system that takes these considerations into account.

Knuts: In Finland, the autonomy of the arbitral process is well recognised. Under the Finnish Arbitration Act, a national court may only intervene in the arbitral process under very limited circumstances. An arbitral tribunal may rule on its own competence to adjudicate the dispute, although this decision may later be challenged in the local courts. An arbitral award may also only be set aside by a national court on limited grounds, such as when the arbitral tribunal has exceeded its authority or if the arbitral tribunal did not give a party a sufficient opportunity to present its case. However, the threshold for a national court to set aside an arbitral award is quite high. The benefits of the autonomy of the arbitral process are naturally that the parties are free to structure the process as they see fit without any intervention by the national courts. There are no drawbacks that would be specific for the Nordic countries.

Azelius: The Swedish Arbitration Act imposes few obligations on the parties. It is generally accepted that the parties own the arbitration proceeding. Upon application by a party, the courts will however decide on jurisdiction, appointment and dismissal of arbitrators, and discovery or the taking of evidence outside of the arbitration proceeding. The notion that the parties own the process often leads to a more efficient proceeding which is adapted to the dispute. However, in ad hoc arbitration, as opposed to institutional arbitration, this can be an issue since an obstructing defendant can easily delay the proceedings. However, proceedings with an experienced and impartial tribunal reduce the risk of delay, as is the case in institutional arbitration.

CD: Do any particular challenges or issues exist in terms of enforcing arbitral awards in Scandinavia? How are foreign arbitral awards dealt with in light of the Arbitration Act, the UNCITRAL Model Law and the New York Convention, for example?

Azelius: Sweden has ratified the New York Convention, without reservations. Foreign awards will be enforced if none of the exceptions stated in the Swedish Arbitration Act are applicable. The exceptions correspond with Article V of the New York Convention and accordingly they also correspond with the provisions in the UNCITRAL Model Law and other Scandinavian countries. The rules on invalidity of arbitral awards have been debated recently. The provisions are scrutinised in the revision of the Swedish Arbitration Act. In Sweden, an arbitral award is invalid if it includes an issue which may not be decided by arbitrators under Swedish law, or if the award, or the manner in which it arose, is clearly incompatible with the basic principles of the Swedish legal system, or if it is not signed and in written form. There is no time limit for submitting an application on invalidity of an award. No countries apart from Sweden and Finland have such a rule. This issue will hopefully be resolved in the revision of the Swedish Arbitration Act. It is proposed to repeal the invalidity

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rules and to include the public policy rule as a new ground for setting aside an award.

Knuts: Decisions on recognition and enforcement of arbitral awards are taken by the Finnish courts. Finland has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Finland has not made any reservations regarding reciprocity or restricted the Convention's application to awards in commercial disputes. Foreign arbitral awards are therefore enforceable in Finland. The grounds for refusing the enforcement of an arbitral award rendered outside Finland are slightly different under the Finnish Arbitration Act from those applying to awards rendered in Finland, whereas the enforcement procedure as such is identical. The threshold for Finnish courts to refuse enforcement of an arbitral award – whether domestic or international – is high. Therefore, there are no particular challenges in terms of enforcing foreign arbitral awards in Finland.

Møller Dirksen: Denmark has ratified the New York Convention, and arbitral awards rendered in foreign countries are generally recognised as binding and are enforced in Denmark in accordance with the provisions of the Danish Administration of Justice Act on the enforcement of judgments. Accordingly, the principles adopted in Denmark correspond to those of the UNCITRAL Model Law. This is a different approach than the approach when dealing with the enforcement of foreign judgments, as this is a very rare sight in Denmark. Accordingly, foreign judgments are in general not recognised under Danish law and can generally not be enforced, which clearly speaks in favour of using arbitration as a method to solve disputes.

CD: What future developments and trends do you expect to see in Scandinavian dispute resolution in the years ahead? Does Scandinavia have the capacity to become an arbitration hub to rival more established European seats such as London, Paris and Geneva?

Knuts: Over the next five years, we expect companies to develop their dispute management techniques and adopt written disputes policies with model dispute resolution clauses and implement a systematic review of dispute resolution clauses in contracts. As a result of this, we will see more diversified dispute resolution methods. For bigger disputes, we will probably continue to see full-fledged arbitration proceedings. For smaller local disputes, on the other hand, we will see more litigation or fast track arbitration. We may also see an increase in documents only proceedings. We also expect to see an increased use of ADR. In addition, we anticipate that external funding of arbitration claims will become more common. Even though third party funding is still unusual in Scandinavia,

we have seen examples of it in Finland. We also expect that the increased competition between the arbitration institutes might lead to specialisation among the institutes in the future.

Azelius: Expect to see even more East-West disputes as well as investor-state disputes choosing Sweden or Scandinavia as their preferred seat of arbitration. As contracts generally become increasingly complex, also expect to see more multiparty disputes. It is important that the arbitration community continues to highlight and debate current trends and issues in order to keep the dispute resolution infrastructure on a par with the constantly developing commercial world. Furthermore, expect more dispute resolution which is tailored for the dispute at hand, as mediation, fast track arbitration and emergency arbitration. In this regard, Sweden can provide a modern way of resolving disputes, with the help of a very active and modern arbitration community, led by the SCC, in Sweden.

Møller Dirksen: Currently, there is no information on possible changes to the legal regime setting the framework for dispute resolution in Denmark. In recent years there has been a significant increase in the interest in arbitration. Accordingly, both the Danish Arbitration Association and the organisation Young Arbitrators Copenhagen have been created to promote knowledge of arbitration nationally and internationally. It could reasonably be expected that the use of ADR such as mediation will gain more ground in Denmark, but this might very well be in the sense of becoming a supplement to arbitration, rather than an alternative, especially in long-term business relationships. The Danish Institute of Arbitration already receives more than 100 cases per year, and as such Denmark does indeed have the capacity to become an increasingly popular place to arbitrate. CD