Roschier Disputes Index **2014**

A Biennial Survey on Facts and Trends in International Dispute Resolution from a Nordic Perspective

TNS Sifo Prospera

ROSCHIER

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Foreword

The Roschier Disputes Index is a market survey that focuses on practices and trends in dispute resolution from the perspectives of the largest companies in four Nordic countries. The objectives are to investigate central issues in commercial dispute resolution and to track important developments in how these companies manage their disputes.

The Roschier Disputes Index 2014 is the third edition of our biennial survey. This edition includes companies not only from Finland and Sweden but also from Denmark and Norway. Furthermore, this edition puts additional focus on dispute management techniques. What is more, the 2014 Index divides the respondent companies into industry sectors. To the extent that it is statistically possible to draw conclusions related to the various industry sectors, such results are reported for the first time in this year's Index.

In 2010 and 2012 we observed that, although respondents showed a general preference for arbitration, most disputes were dealt with through litigation. The same holds true today to an even greater extent. The 2014 results show an increase in both the use of and the preference for litigation, which cannot be solely explained by the addition to the survey of companies from Denmark and Norway.

In the previous editions we also observed a willingness to explore alternative dispute resolution (ADR). Since then, ADR has become only slightly more common in Finland and Sweden. The 2014 results show that ADR is used to a significantly greater extent in Norway than in the other Nordic countries, and Denmark and Norway have markedly higher rates of successful settlement discussions than both Finland and Sweden.

This year efficiency clearly emerges as an important factor overall in the choice of dispute resolution method. Yet responses indicate that efficiency is not always achieved in practice, neither in arbitration nor in litigation. Cost is also considered an important factor, in particular when companies choose whether to pursue litigation. This is interesting, in as much as the possibilities for appeal often add to the cost, which means that the cost of litigation is not necessarily lower than that of arbitration.

The Nordic respondent companies reported using a variety of dispute management techniques, from standard dispute resolution clauses to early dispute detection. Centralization and increased control are examples of recent changes in how companies handle disputes. In addition, companies that foresaw a change in their dispute resolution practices emphasized simplification and dispute avoidance. Such observations imply an increasing consciousness of how disputes can affect business and an increasing focus on minimizing risks related to disputes.

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

Henrik Fieber
Gisela Knuts
Petri Taivalkoski
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Methodology

The data for the Roschier Disputes Index were collected by TNS SIFO Prospera, a leading independent market research firm in the Nordic region. Since 1985, TNS SIFO Prospera has carried out surveys and client reviews targeting professional players in the Nordic financial markets.

The results reported in the Roschier Disputes Index 2014 are based on comprehensive interviews with CEOs, CFOs, general counsel and in-house counsel from some of the largest organizations in Denmark, Finland, Norway and Sweden, as measured by turnover. A list of the 180 companies included in the survey's universe is appended to the 2014 Index, which is available on our website. With 133 companies participating in the survey, the response rate was 74%.

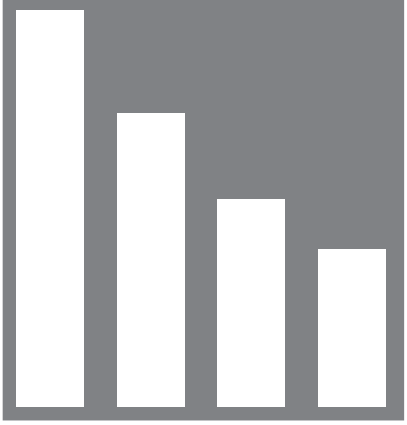
Interviews were conducted from October 2013 to January 2014. They were executed by telephone and based on a questionnaire prepared by Roschier in cooperation with TNS SIFO Prospera. All interviews were entirely confidential, and figures have been reported only in the aggregate.

The results from the survey are reported on a countrywide basis. In addition, the respondent companies are divided into the following industry sectors: Real Estate & Construction, Information & Communications Technology, Engineering & Machinery, Energy & Utility and Other. To the extent that it is statistically possible to draw conclusions related to the various industry sectors, such results are reported in the Roschier Disputes Index 2014.

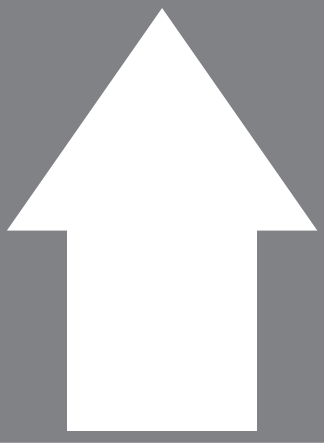
Overall Findings

ADR is more common in Norway than in Denmark, Finland and Sweden.

Finland and Sweden have a stronger preference for arbitration than do Denmark and Norway.



Since the 2012 Index, the use of and the preference for litigation have increased, as has the use of ADR.

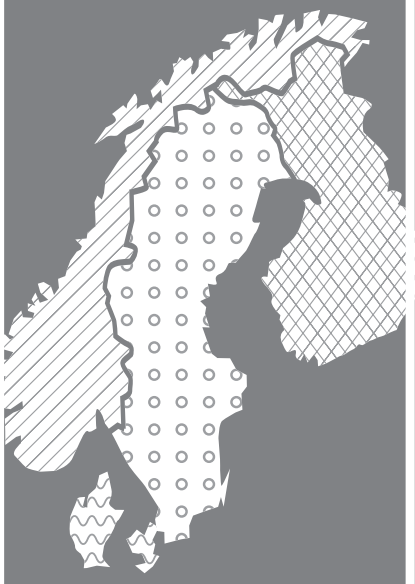


The dispute resolution market is relatively stable.

Numerous dispute management techniques are used, but standard dispute resolution clauses are most common.

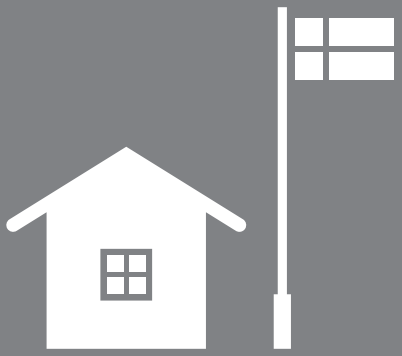
Clear differences exist among the countries

e.g., in relation to preferred dispute resolution method and use of ADR.



Cost control is exercised by traditional means, such as fixed fees and follow-up of estimates.

Familiarity remains an important factor in choosing between arbitration rules and between foreign substantive laws.

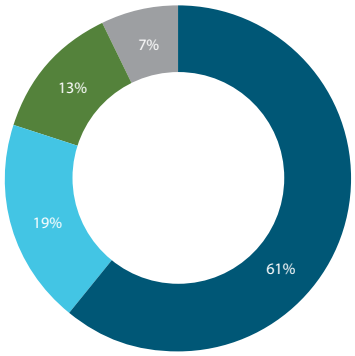


Dispute Resolution Choices

Key Findings

- Respondent companies still prefer arbitration over litigation, but their preference for arbitration is lower than it was in the 2010 and 2012 editions of the Roschier Disputes Index.
- Finland and Sweden favor arbitration more than Denmark and Norway do.
- Preference for litigation has increased.
- Efficiency is an important factor in respondent companies' choice of dispute resolution method, but efficiency is not always achieved in practice.
- Companies may be putting increased emphasis on cost in their choice of dispute resolution method.
- The SCC Rules are the most popular rules among arbitration rules.

Preferred Dispute Resolution Method

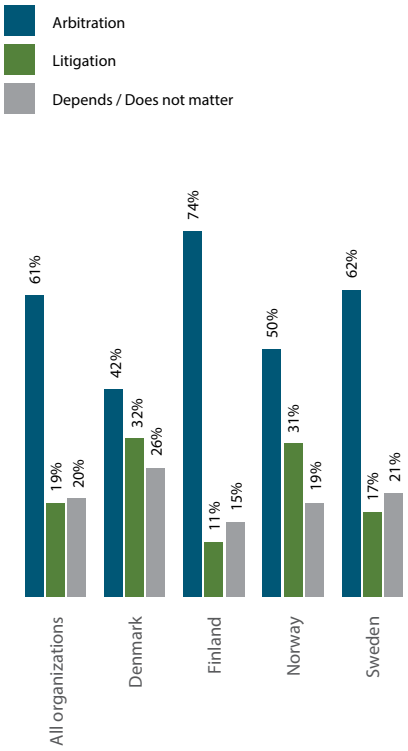


Arbitration is still the preferred dispute resolution method, as confirmed by 61% of respondents.

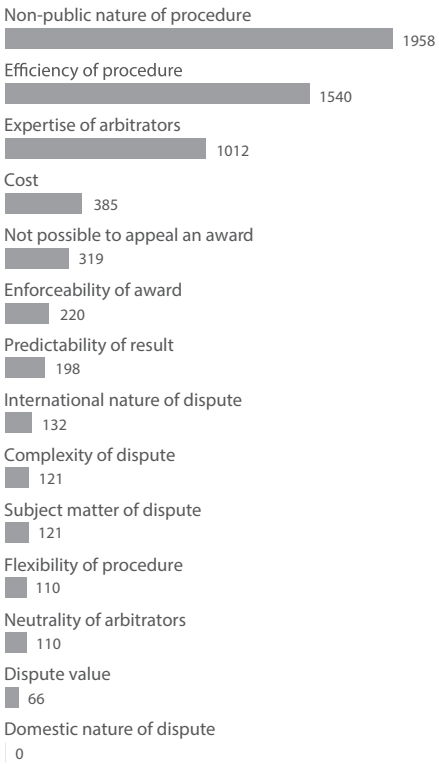
This figure, however, is lower than it was in the 2010 and 2012 editions of the Roschier Disputes Index. In both of these, more than 70% of respondents reported arbitration as their preferred dispute resolution method. Does this statistic indicate a shift in preference or a trend?

The results show a divide between the Nordic countries: companies in Finland and Sweden favor arbitration to a higher degree than do companies in Denmark and Norway. Among the Finnish respondent companies, for example, 74% preferred arbitration, compared to only 42% of the Danish respondent companies. Looking solely at the Finnish and Swedish companies, there is a slight increase in preference for litigation, with 14% favoring litigation, up from 9% in the earlier editions of the Index. The status in Denmark appears more fragmented overall in comparison to the situation in the other countries.

Finally, among the different industry sectors represented by the respondent companies, results indicate that the defined sectors (i.e., Real Estate & Construction, Information & Communications Technology, Engineering & Machinery and Energy & Utility) prefer arbitration, whereas the diverse group Other prefers litigation.



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.

A significant number of respondents cited the non-public nature of arbitration proceedings as the most important factor in their choice of arbitration as a method for dispute resolution. Respondents deemed the efficiency of the procedure and the expertise of the arbitrators as the second and third most important factors, respectively. These top three factors, although not in this order, have been the same since the 2012 Index, indicating that they are firmly established. Since the 2012 Index, non-publicity has become the predominant factor in the choice of arbitration.

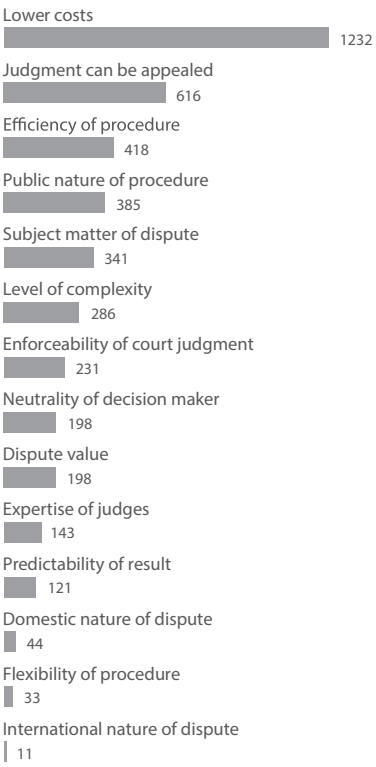
When asked what the main disadvantage of arbitration was, the majority of respondents identified cost, just as the majority of companies did in the Roschier Disputes Index 2012. Nevertheless, arbitration is companies' preferred dispute resolution method. Cost seems to be a real concern for respondent companies, which may have consequences for arbitration in the long run. The slight shift identified in preference for litigation is notable in this respect.

In addition to the non-appealable nature of arbitration, heavy procedure and extended length of time were among other perceived disadvantages of this type of dispute resolution. This observation points to the fact that efficiency, one of the most important factors in companies' choice of arbitration, is not always achieved. Because more Swedish respondent companies than any other surveyed country's companies found arbitration efficient, it is possible that there is an actual or perceived difference in arbitral efficiency among the surveyed countries.

"Could be costly and heavy procedures."

Respondent regarding the main disadvantages of arbitration.

Decisive Factors for Choice of Litigation



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

When asked which factors are most important in their choice of litigation, the majority of respondents identified cost, and held litigation proceedings to cost less than do other dispute resolution methods. This is in contrast to the results from Roschier Disputes Index 2012, which found that cost was among the least decisive factors in companies' choice of litigation. (Note, however, that a direct comparison cannot be made, because the question was worded differently in the previous survey.)

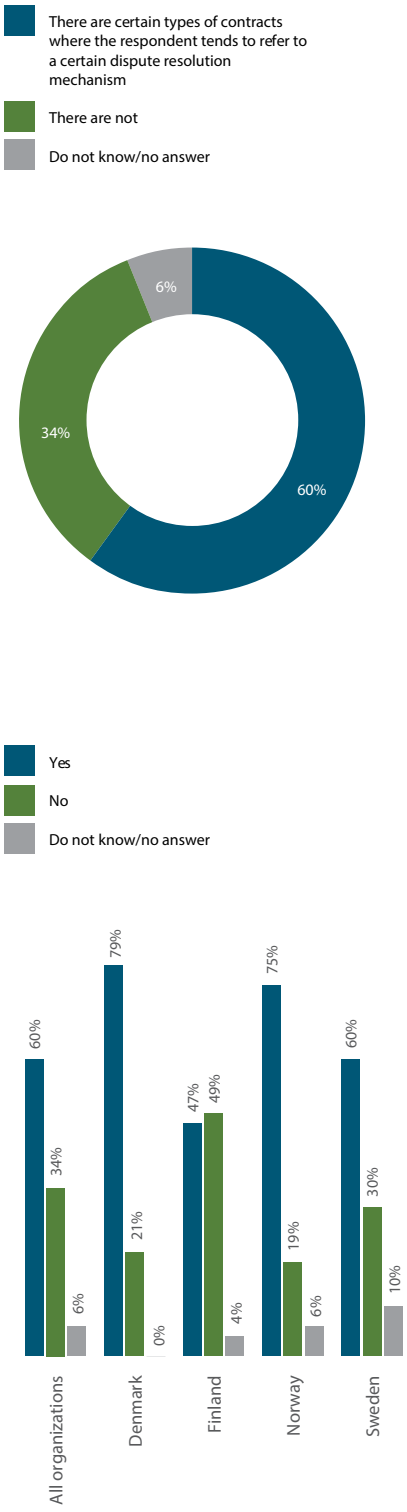
Respondents identified the possibility to appeal a court judgment and the efficiency of the procedure as the second and third most important factors for choosing litigation, respectively. The neutrality of the decision maker was considered the most important factor in 2012, but it didn't make the top three in the 2014 Index, indicating that companies perceive other factors to be more important now. (Note, however, that the question was worded differently in the previous survey).

When asked about the main disadvantages of litigation, several respondents mentioned judges' lack of expertise and the publicity of court proceedings. Many also mentioned the long duration of the proceedings. This information points to the fact that efficiency, which is one of the most important factors in companies' choice of litigation, is not always achieved in practice. Respondents from Finland and Sweden were more likely than their counterparts from Denmark and Norway to identify these particular disadvantages, which might indicate that court proceedings are at least perceived to be more efficient in Norway and Denmark. One must not draw too far-reaching conclusions, however, because, for example, the perception of arbitration as efficient in Sweden may impact the relative perception of litigation as inefficient.

"Not the place for sensible environment, business solution."

Respondent regarding the main disadvantages of litigation.

Impact of Type of Dispute



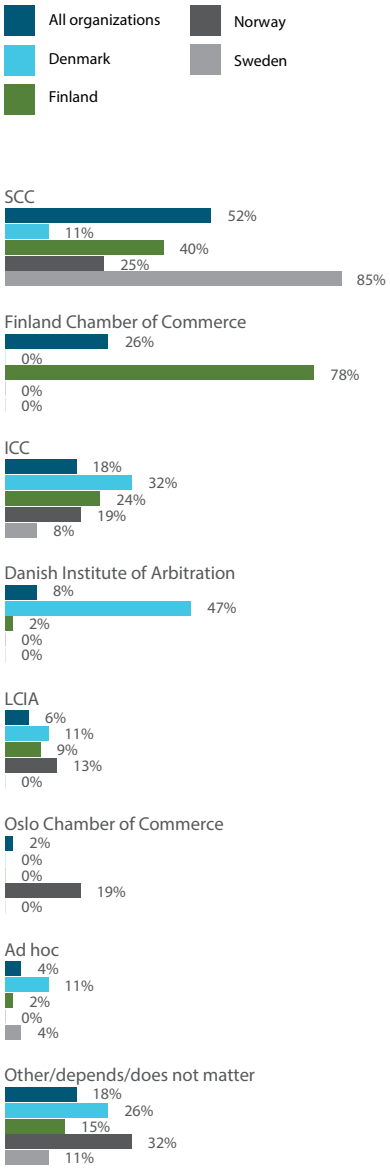
When deciding between arbitration and litigation, the respondents considered such factors as the level of complexity of the contract, the contract's value and the international nature of the dispute. As in the 2012 Index, the majority of the respondent companies in the Roschier Disputes Index 2014 indicated that they use a certain dispute resolution method for specific types of contracts. Substantial differences still exist between the jurisdictions: 79% of Danish respondent companies answered that they differentiate based on the type of contract, yet only 47% of Finnish respondent companies do the same.

Respondents indicated that they would choose arbitration for complex, large-value or international matters, as well as for sensitive matters or matters where expertise is needed. Respondents in general specified that they would choose litigation for smaller domestic and low-value contracts, as well as for matters where private persons or consumers are concerned.

"We always refer to arbitration, except for smaller local deals in countries where we know the courts are functioning."

Respondent regarding the impact of the type of dispute.

Preferred Arbitration Rules



Overall, the Stockholm Chamber of Commerce (SCC) Rules were most popular among all respondent companies, with 52% stating their preference for these rules. Similar to the results from the 2010 and 2012 editions of the Roschier Disputes Index, companies in the 2014 Index tended to prefer their national rules. Significantly larger numbers of the Danish, Finnish and Norwegian respondent companies, however, preferred non-national arbitration rules. Among all respondents, 18% preferred the International Chamber of Commerce (ICC) Rules, with the Danish and Finnish respondent companies favoring these rules most. Preferences for other arbitration rules were uncommon, but ad hoc arbitration was most popular among the Danish respondent companies. Among the industry sectors, Real Estate & Construction (44%) and Engineering & Machinery (31%) preferred the ICC.

When asked why they prefer certain rules, many respondents said that the SCC Rules are easy to understand, indicating that familiarity and closeness were driving factors in preference. Those companies that preferred the ICC Rules substantiated their preference by saying that these rules are globally recognized and respected and are easy for counterparties to accept. The London Court of International Arbitration (LCIA) Rules and the SCC Rules were also perceived as being internationally recognized. In addition, some respondents mentioned particular expertise as a reason for preferring the LCIA Rules, and several respondents mentioned cost-efficiency as a reason for preferring the SCC Rules.

"We know them, it's convenient."

Respondent regarding the SCC.

"They are trustworthy."

Respondent regarding the ICC.

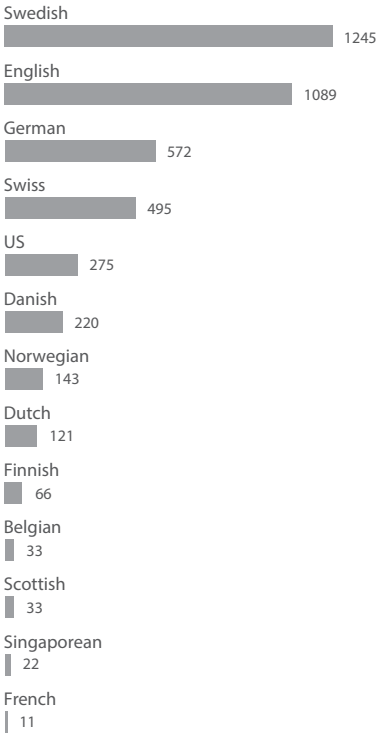
"Has the most expertise within shipping."

Respondent regarding the LCIA.

When asked which factors are most important in their choice of a certain set of arbitration rules, respondents stated that previous experience with the rules, the reputation of the rules and the local law of the seat were the top three, in that order.

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

Preferred Substantive Law



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

When asked to indicate preferred substantive law in international (not purely domestic) contracts, excluding relevant national laws (Danish, Finnish, Norwegian and Swedish), respondents showed a definite preference for English law, followed by German law and Swiss law. One reason for the greater preference for English law may be the prevalence of English law in agreements in the financial sector, with a clear majority of respondents in the financial sector favoring English law. Quite a few respondents from Denmark, Finland and Norway preferred Swedish law; the laws of the other Nordic countries were not so popular. These findings are in line with the results presented in Roschier Disputes Index 2012. In addition, Swedish respondents had a greater preference for US law than did other respondents.

Respondents identified their own familiarity and experience with a particular law as the most important factors in their choice of certain substantive rules. Neutrality and impartiality of the legal system, followed by appropriateness for the type of contract, were also perceived as fairly important factors.

Furthermore, 26% of the respondent companies answered that they had had a bad experience with a certain foreign substantive law, whether French, Russian, English or US. Some respondents found English law complex and others considered US law too different from the Nordic systems of law. In addition, some respondents perceived US law to entail a substantive risk of facing a high number of claims and high-value damages.

(Please note that "US law" is used as a generic term to represent all the various states' laws.)

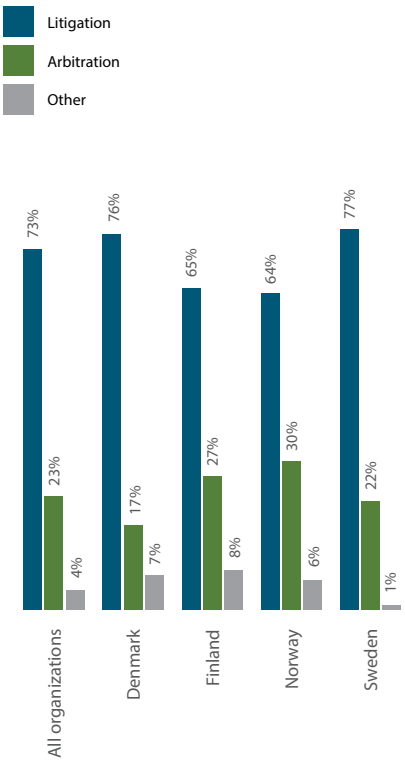
Actual Disputes

Number of Disputes

The respondents experienced a mean of 14 and a median of five non-consumer disputes valued at over 100 000 EUR in the past 12 months.

"Dispute" is defined as a claim made against a company. The sending of a claim letter is considered a dispute, as is the taking of other measures to put a company on notice of a disputed claim. Formal proceedings do not need to be instituted for the matter to be defined as a dispute.

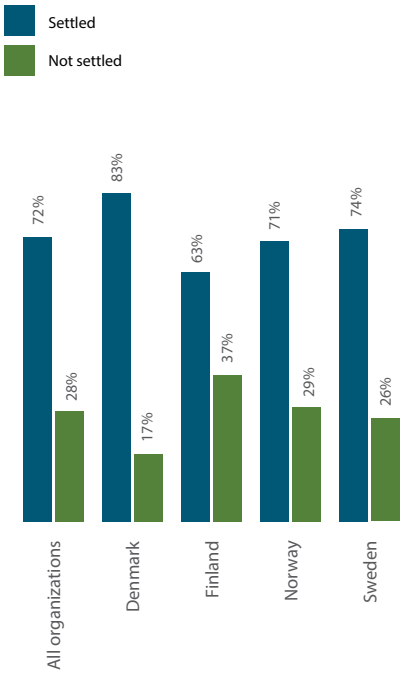
Types of Dispute Resolution Methods



The respondent companies' actual disputes were more often litigated (73%) than arbitrated (23%). The high percentage of litigated disputes is noteworthy, especially given that the respondents tended to prefer arbitration. The Swedish respondent companies reported the highest litigation figures (77%) even though 62% of these companies replied that they preferred arbitration.

The data in Roschier Disputes Index 2014 show that slightly more disputes were litigated and slightly fewer were arbitrated as compared to the figures in the 2012 Index. The addition of Danish and Norwegian respondents cannot fully explain this change, since also the responses of the Finnish and Swedish companies confirm this trend (as compared to 2010 and 2012).

General Level of Settlement



The respondent companies reported being able to settle 72% of disputes amicably (i.e., the parties reached a settlement either in direct negotiations

Key Findings

Companies litigate disputes more often than they arbitrate them.

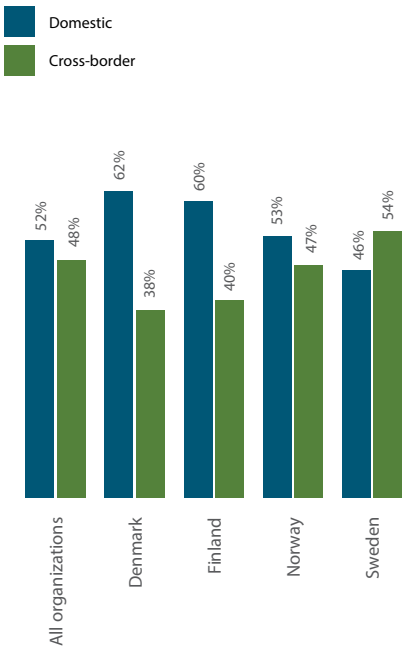
The level of litigation of disputes appears to have increased slightly.

Companies are able to settle amicably a significant percentage of disputes.

Finland has the lowest dispute settlement rate.

or, for example, in mediation before a judgment or an arbitral award was rendered). Finnish respondents reported settling the fewest disputes amicably, though by a relatively small margin. Energy & Utility is the sector in which the fewest settlements were achieved.

Nature of Actual Disputes



Slightly over half of the disputes were domestic (52%). This figure is similar across all the respondent countries and has not changed significantly since the 2012 Index. Some noteworthy differences appear among industry sectors. For example, most disputes in the Real Estate & Construction sector were domestic (92%), as compared to a high level of cross-border disputes in the Information & Communications Technology (81%) and the Engineering & Machinery (78%) sectors.

Subject Matter of Disputes

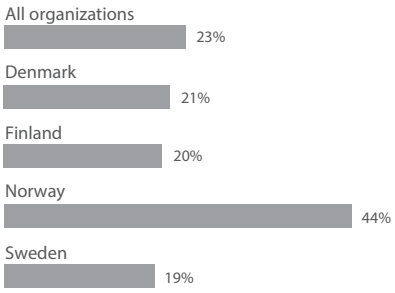
Of all large disputes, 25% concerned construction/real estate. Other significant subjects of disputes were patents/intellectual property (12%), product liability/product guarantee (10%), banking/finance (9%), competition law infringement (8%), distribution/sales (8%), suppliers/sub-suppliers (8%), other regulatory (8%), insurance (8%), employment-related issues (6%) and the environment (6%). Subjects of disputes with lower numbers included public procurement, agency, mergers and acquisitions and licensing.

The subjects of disputes differ in some ways among the respondent countries. For example, construction/real estate was the most common subject matter for all the respondent countries except Denmark. In Denmark, the number of disputes over patents/intellectual property was far higher than in the other respondent countries.

It is unsurprising that construction/real estate is the most frequent subject of disputes in the Real Estate & Construction sector and that patents/intellectual property is the most frequent subject of disputes in the Information & Communications Technology sector. In addition, product liability/product guarantee disputes are the most common type in the Engineering & Machinery sector and regulatory and construction disputes are the most common type in the Energy & Utility sector.

Alternative Dispute Resolution

Participation in ADR

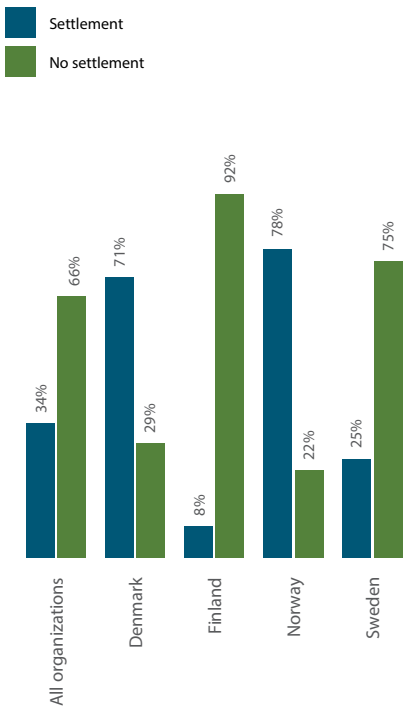


During the past 24 months, 23% of the respondent companies participated in mediation or other forms of alternative dispute resolution (ADR) proceedings. This represents an overall increase in ADR participation over the results reported in the 2010 and 2012 editions of the Roschier Disputes Index. ADR was used more than twice as much among Norwegian companies (44%) as among the other respondents, but the addition of Norway in the 2014 Index was not the only reason for the increase: Sweden also saw an increase of 8 percentage units.

The respondents experienced a mean of seven and a median of three disputes in which ADR was used in the past 24 months.

More than half (56%) of these ADR proceedings were voluntary, and almost one-third (27%) were mandatory preliminary procedures. Norway stood out in regard to mandatory ADR proceedings: 58% of the Norwegian respondents had participated in a mandatory ADR procedure, as compared to 25% of the Danish, 20% of the Swedish and 11% of the Finnish respondents.

Results of Participation in ADR



More than one-third (34%) of the ADR proceedings resulted in settlement. Comparing Denmark and Norway to Finland and Sweden reveals significant differences: while 78% of Norwegian and 71% of Danish ADR proceedings resulted in settlement, only 25% of Swedish and 8% of Finnish ADR proceedings resulted in settlement.

Important Factors When Using ADR

Most respondents identified efficiency and low cost as important factors for using ADR. Among other factors mentioned was the service of a professional third party to manage the process and exercise control over the outcome.

Key Findings

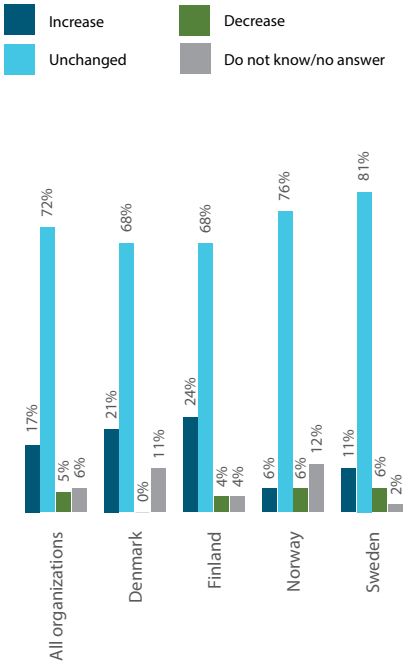
Participation in ADR has increased.

ADR is most commonly used in Norway.

ADR results in a successful settlement more often in Denmark and Norway than in Finland and Sweden.

Trends and Dispute Management

Trends

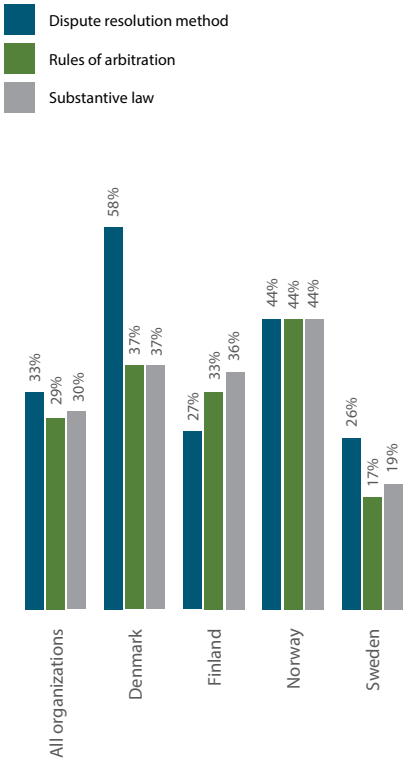


Most respondents (70%) did not see new trends or significant changes in the quantity, level and subject matter of their disputes in the past two years. In addition, most respondents (72%) anticipated that they would encounter as many disputes in the coming 12 months as they had encountered in the previous 12 months. Notably, more Danish (21%) and Finnish (24%) respondents anticipated an increase in the number of disputes than did Swedish (11%) and Norwegian (6%) respondents. No respondents in the Real Estate & Construction sector anticipated an increase in disputes.

Most respondents who believed their number of disputes would increase in the coming 12 months attributed the change to the poor economy. Several other respondents attributed it to the increased complexity of business, a tougher dispute climate and increased regulation.

> "The numbers have gone up, all parties know their rights better now."
>
> *Respondent regarding dispute trends in the past years.*

Written Policies



About one-third (33%) of the respondents had written policies regarding appropriate dispute resolution methods, appropriate rules of arbitration and/or appropriate substantive law, with policies regarding appropriate dispute resolution methods being the most common. Such written policies were least used among Swedish respondents as a method to manage disputes.

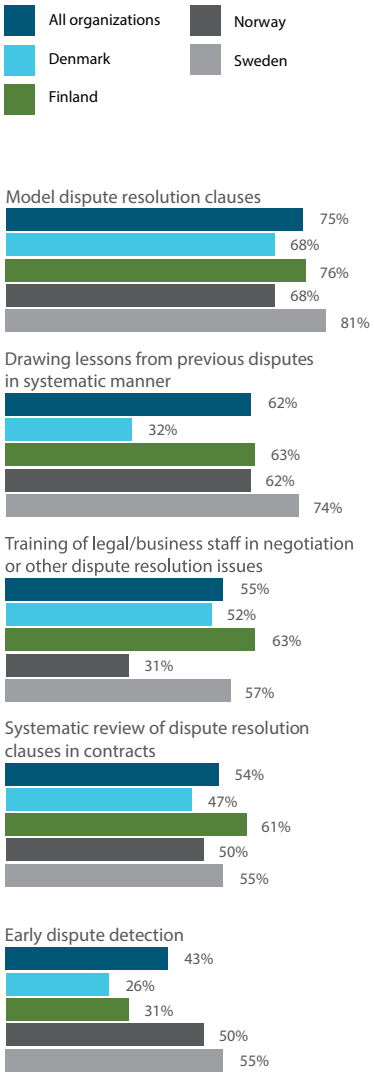
Key Findings

The respondents do not foresee dramatic changes or new trends in the area of disputes.

The most commonly used dispute management technique is the standard dispute resolution clause.

Fixed fees and follow-up of estimates are the most common techniques for cost control.

Other Dispute Management Techniques



The respondents confirmed that they used several dispute management techniques. The technique they used most was the implementation of model dispute resolution clauses (75%). Other methods included drawing lessons from previous disputes in a systematic manner, training legal/business staff in negotiation or other dispute resolution issues, systematic review of dispute resolution clauses in contracts, and early dispute detection.

Half of the respondents reported that a specialized in-house lawyer or department handled disputes internally, but when asked what other techniques they used, several respondents confirmed that the use of external counsel was a customary part of dispute management when a specific need arose.

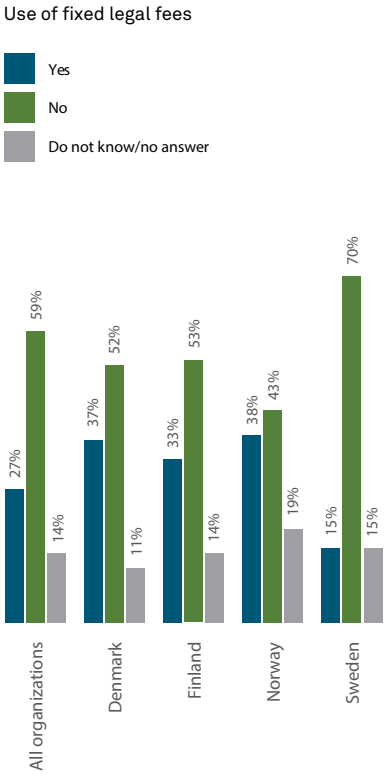
The Information & Communications Technology sector respondents were more likely than any other sector respondents to use dispute resolution techniques. For example, it was very common for the companies in this sector to draw lessons from previous disputes in a systematic manner.

Changes in Handling Disputes

Only 8% of the respondent companies had recently made changes to the way they handled disputes. Among the more common changes was designating more control to the head office in all dispute matters.

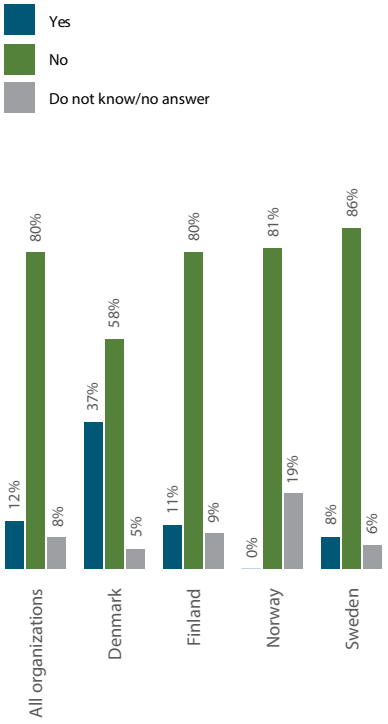
A minority (10%) of the respondent companies said they would make changes in the near future to the way they handled disputes. Among these anticipated changes were more cost-consciousness, simplification and efficiency, as well as an increased emphasis on dispute avoidance, standardization and ADR.

Cost Control



Nearly one-third (27%) of the respondents used fixed legal fees; these were least used among Swedish respondents. Only 12% of the respondents had considered or used alternative fee arrangements, such as third-party funding; more Danish respondents (37%) than any other respondents had considered or used such arrangements.

Considered or used alternative fee arrangements or third party funding



Several respondents said they exercised control over the external cost of dispute resolution by asking lawyers for an estimate, signing an agreement in advance and following up on the costs on a regular basis. Other techniques that several respondents mentioned were following the case closely and being involved in the management of the dispute, having framework agreements with law firms, doing more work internally, and using fixed fees or contingent fees for the lawyers.

"Estimation and follow-up of these continuously during the dispute."

Respondent regarding how cost control is exercised.

Universe of Organizations

4
countries represented in the survey

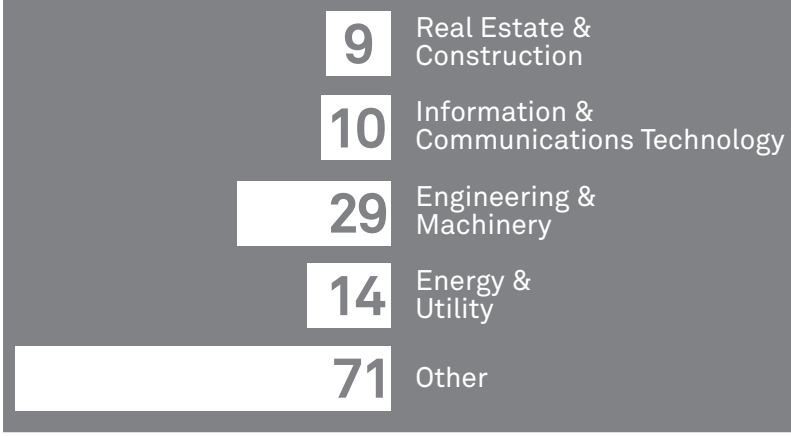
180
organizations included in the survey's universe

133
participating organizations

Interviewed companies

19	Denmark
45	Finland
16	Norway
53	Sweden

Respondent companies by industry sector:



74%
response rate

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

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