



# ROSCHEIER DISPUTES INDEX 2012

FACTS AND TRENDS IN INTERNATIONAL DISPUTE RESOLUTION - A NORDIC PERSPECTIVE



# Foreword

The Roschier Disputes Index comprises a market survey focusing on the prevailing practices and trends in dispute resolution as seen from the perspective of the largest Swedish and Finnish companies.

The objective of the Roschier Disputes Index is to garner opinion on the various facets of commercial dispute resolution; preferred dispute resolution method, preferred substantive rules of law as well as arbitration rules, and the most important developments noted or anticipated in the way the largest companies in the region resolve disputes.

The Roschier Disputes Index 2012 follows the first Roschier Disputes Index published in 2010. This edition focuses on the same overall themes as before. The Roschier Disputes Index 2010 has served as an inspiration for our 2012 edition and we have also attempted to answer some of the questions which arose from the results in 2010.

The Roschier Disputes Index 2012 differs from its predecessor in that companies were asked to address questions from a Nordic – Baltic perspective in 2010. No such limitation was imposed this time. The largest companies amongst those domiciled in Sweden or Finland have a varied geographical grasp and we considered it valuable to get the full perspective of the interviewed companies.

Interestingly, 54% of companies stated that they responded to the questionnaire from a global perspective, whilst 24% responded from a regional perspective and 22% from a local one. Hence, one key finding is that over two thirds of the largest companies in the region have an international perspective on dispute resolution.

We observed in 2010 that most disputes are dealt with in litigation although there is an overwhelming preference for arbitration before a dispute materializes. We have for this edition attempted to understand the discrepancy in more detail. Interestingly we found that a majority of actual disputes dealt with in litigation concern contractual matters, e.g. matters for which the parties have had an opportunity to choose arbitration.

We also observed in 2010 that most disputes involve what companies consider to be their core business. We have this year attempted to find out in more detail in which fields companies have their largest disputes. Aside from commercial sales contracts such areas as product liability, intellectual property and employment emerged as central in the responses as well as amongst other M&A and competition disputes.

It is not surprising that competition law disputes emerged in our survey. Finland has experienced a recent boom of so called private enforcement litigation, e.g. damages claims between private parties for breach of competition law. A similar development has yet to happen in Sweden although it may be more a question of time considering the overall European development. While there is a great deal of homogeneity between the Swedish and Finnish jurisdictions there are of course also variances, some of which can be seen in the survey results of this year's Disputes Index.

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



Claes Lundblad



Petri Taivalkoski



Gisela Knuts



Henrik Fieber

# Methodology

The data for the Roschier Disputes Index was collected by TNS SIFO Prospera, an independent market research firm that is one of the leading market information and insight companies in the field with 25 years' experience of conducting research in the Nordic region.

The results of the Roschier Disputes Index are based on comprehensive interviews with General Counsel, CEOs, CFOs and in-house counsel from the 192 largest organizations in Sweden and Finland based on turnover. The response rate was 76%, i.e. 146 organizations responded to the survey. Subsidiaries that have their own legal department or handle legal issues themselves were interviewed; subsidiaries were excluded only if interviewers were directed to the parent company. Numerous international subsidiaries have their legal department outside the Nordic region; such subsidiaries are not included in the survey. The universe of organizations is presented at the end of this report. The companies in the survey all have a (global) turnover larger than approximately EUR 0.5 billion.

Interviews were conducted from 2 January to 9 March 2012. The interviews were executed as telephone interviews 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 interview process demonstrated on a general level that there is variance among companies as to experience of dispute resolution and engagement in such issues.

The survey results are in parts divided by country and a distinction has been made for the very largest Tier 1 companies amongst this particular universe of large companies.

Tier 1 companies include 43 of the interviewed organizations that each have a turnover of at least EUR 5 billion inclusive of subsidiaries.

# Key Findings

The Roschier Disputes Index 2010 anticipated no major changes over the coming 5 years. This observation seems on a general level to be confirmed by the survey findings in the 2012 Disputes Index.

Arbitration remains the overall preferred dispute resolution method. There is nevertheless a preference to refer simple and routine matters to litigation whereas complex and high-value matters are referred to arbitration. In addition, the international nature of the dispute leads to a preference for arbitration.

However, of actual disputes the majority is still dealt with in litigation and the findings show that the majority of these litigated disputes are contractual ones. As litigation is preferred for smaller value contracts and less complicated disputes, this could mean that smaller contracts result in more disputes or that parties generally more often settle disputes generating out of bigger contracts.

Central areas in which companies overall experience disputes and in particular large disputes are commercial sales contracts, product liability, intellectual property and employment as well as amongst other M&A and competition.

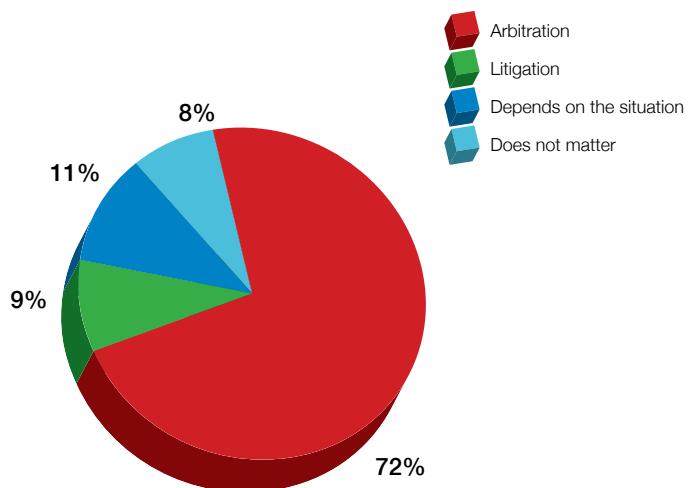
As in 2010, there seems to be an interest in ADR and a willingness to participate in ADR as well as a willingness to settle disputes instead of proceeding further to litigation or arbitration.

Although no major changes have occurred it seems that there are some signs of a shift in the market. The dispute resolution climate is perceived as tougher and it seems as if a more aggressive dispute resolution style is developing; bigger claims are being presented and companies are sued increasingly. Overall the number of disputes seems to be increasing.

# Survey Findings

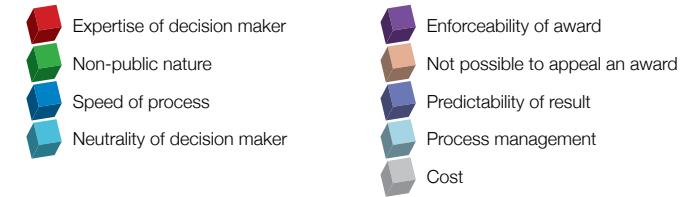
## Dispute Resolution Choices

### Preferred Method



When asked about preferences, arbitration is clearly still the preferred dispute resolution method, which 72% of respondents confirmed.

### Decisive Factors for Choice of Arbitration

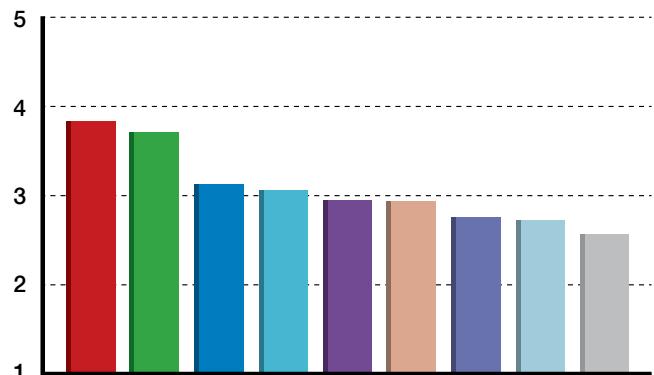
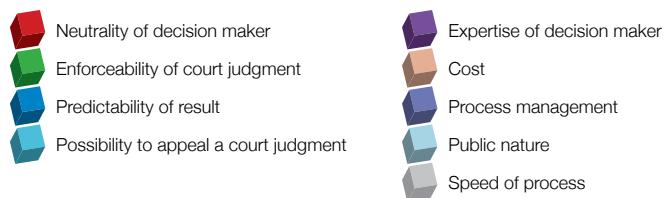


When asked which are the most important factors for choosing arbitration the expertise of the decision maker and the non-public nature of the process were considered the most important ones whereas the factors that had the least relevance were process management and costs.

Whilst costs are in comparison to other factors not perceived as decisive in the choice of arbitration and whilst arbitration is clearly the preferred dispute resolution method several respondents mentioned costs and price setting when asked about the main disadvantages with arbitration. This indicates that companies on balance still prefer arbitration despite costs factors but that costs may be a concern for them. In addition, amongst other the selection of arbitrators, the non-appealable nature, enforceability problems in some countries as well as predictability and objectivity of the arbitrators were perceived disadvantages.

"I don't see any disadvantages!"

### Decisive Factors for Choice of Litigation

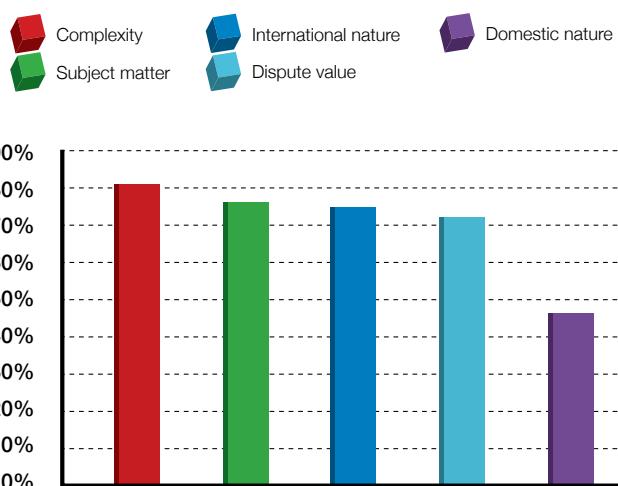
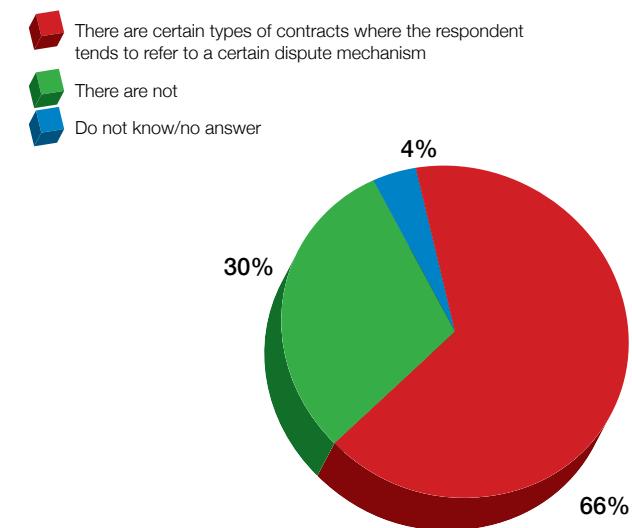


When asked which are the most important factors for choosing litigation the neutrality of the decision maker and the enforceability of court judgments were considered the most important ones whereas the factors that had the least relevance were the speed of the process and the public nature of the process.

The speed and the public nature of the process are not decisive factors in the choice of litigation. On the contrary, when asked about the main disadvantages with litigation, several respondents mentioned the public nature or the long time frame of the process. However, the overwhelming majority of the respondents perceived the quality of the decision maker (e.g. "lack of expertise", "lack of industry knowledge") to be the main disadvantage with litigation.

"Question of quality, not the same level in all countries."

## Impact of Type of Dispute

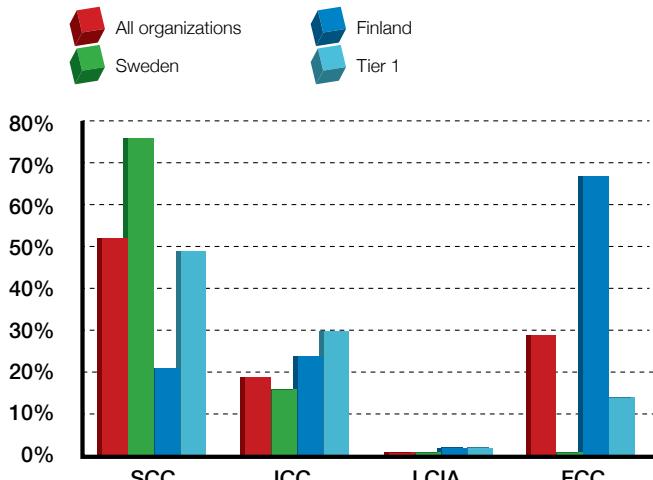


The majority of the respondents have certain types of contracts which they generally tend to refer to a certain dispute resolution mechanism. In addition, respondents consider that such factors as the international nature of a dispute, its complexity, its subject matter and its value may impact on the choice between litigation and arbitration.

Respondents in general specified that for smaller, simple, lower value, routine matters (e.g. employment law or debt collection) or where private persons are concerned the choice would be litigation. For complex, large value or international matters, as well as for sensitive matters or matters where expertise is needed (e.g. M&A or license disputes) the choice would be arbitration. One respondent specifically mentioned mediation as the method sometimes preferred for a particular type of contract.

**"Most of the standard contracts refer to litigation as normal business, extraordinary business we refer to arbitration."**

## Preferred Arbitration Rules



Overall the Stockholm Chamber of Commerce (SCC) rules were the most popular (52%) among all companies. Similarly to the results in 2010 companies clearly prefer the rules of the institutions of their domicile. Nevertheless, a significantly larger part of Finnish companies prefer other institutional rules than the FCC (Finland Chamber of Commerce) rules such as the SCC, ICC (International Chamber of Commerce), or LCIA (London Court of International Arbitration) rules. 19% of all companies prefer the ICC rules, but the percentage is higher among the Tier 1 companies (30%). Preferences for other arbitration rules were uncommon.

When asked which are the most important factors for choosing a certain set of arbitration rules, respondents perceived neutrality and freedom to appoint an arbitrator, followed by reputation of the rules and the substantive rules of law applicable to a dispute, as the most important factors.

## Preferred Substantive Law

When asked to indicate preferred substantive law in international (not purely domestic) contracts and excluding choice of the relevant national laws (Swedish or Finnish law), English law was the most preferred (19%) followed by Swiss (10%) and German (3%) law. A multitude of other laws including US State, French and Russian law were preferred only by a very small number of respondents some mentioning "Northern Europe" or "Continental Europe" as a criterion.

## Actual Disputes

When asked which are the most important factors for choosing certain substantive rules of law neutrality and impartiality of the legal system, followed by own familiarity and experience were perceived as important factors.

**"A well developed substantive law which does not contain strange details."**

## Key Findings

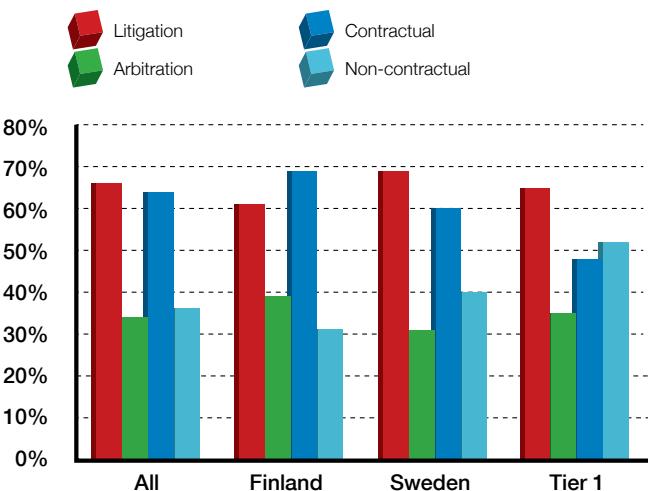
- Arbitration is still the preferred dispute resolution method. Preferred arbitration rules depend strongly on the country of domicile of the company.
- The expertise of the decision maker and the non-public nature are perceived as the most important factors whereas the costs of arbitration do not have an important role when choosing the dispute resolution method. There are also certain concerns regarding objectivity and predictability in arbitration.
- Complexity, subject matter and value of the dispute influence preference when choosing the dispute resolution method. Simple and routine matters are referred to litigation, complex and high-value matters to arbitration.

## Number of Disputes

When asked about the number of disputes over 100 000 EUR during the past 12 months the range of the respondents replies was between 400 and 0. "Dispute" was defined as when a claim has been made by either party against the counterparty, it being sufficient that a "claim letter" has been sent or other measures have been taken to put the counterparty on notice of a claim that is disputed. Formal proceedings did not have to have been instituted for the matter to be defined as a "dispute".

If one discounts the outliers the mean value was 23 disputes per organization whilst the median value was 5 disputes per organization. (The mean value is the average of the distribution. The median value is the number at which half of the respondents are below and half are above.)

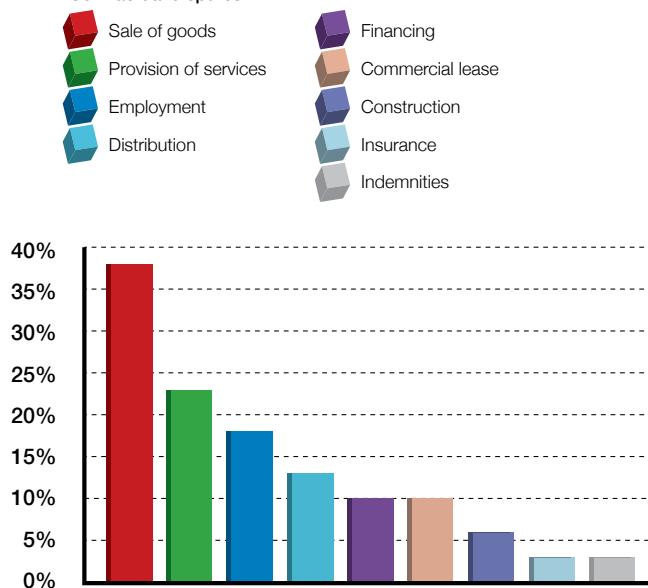
## Type of Dispute Resolution Method



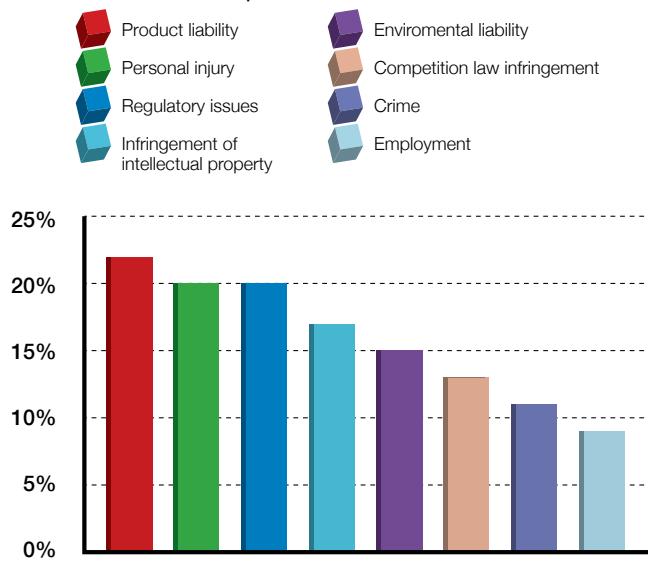
The actual disputes of the respondents are more often litigated (66%) than arbitrated (34%). Such high litigation figures are interesting, especially taking into account the fact that respondents clearly prefer arbitration. The higher litigation figures cannot even be explained with the fact that such disputes would mostly be non-contractual, as the result shows the opposite. Out of the litigated disputes as much as 64% are contractual disputes.

## Subject Matter of Actual Litigation Disputes

### Contractual disputes



### Non-contractual disputes

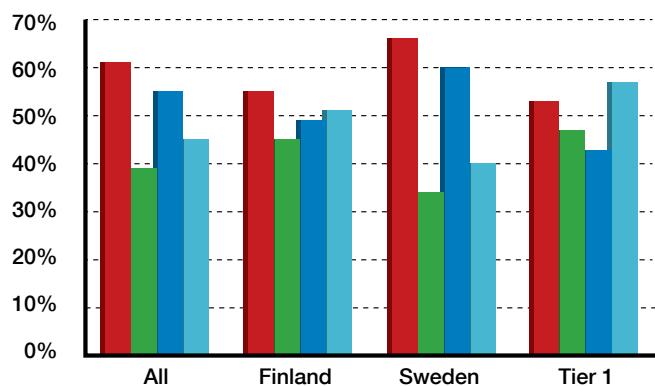


The most significant group of contractual disputes dealt with in litigation concerned sale of goods (38%). The other significant groups were provision of services (23%), employment (18%), distribution (13%), financing (10%) and commercial leases (10%). Among the varied other smaller groups were for example franchising and agency disputes. For Tier 1 companies sale of goods disputes were the most significant group (50%).

The most significant group of the non-contractual litigation disputes concerned product liability (22%). The other significant groups were personal injury (20%), intellectual property (17%), environmental liability (15%), competition law infringement (13%) and crime (11%) as well as the more general group "regulatory matters" (20%). Among the varied other smaller groups were for

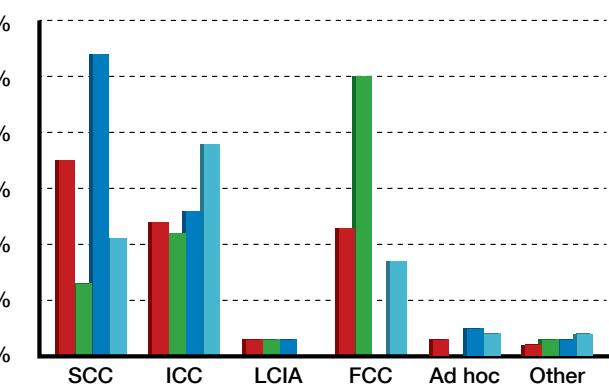
example infringement of trade secrets and property damages. For Tier 1 companies two large groups emerged, namely personal injury (27%) and product liability (31%) followed by environmental liability (23%) and competition law infringement (19%).

## Nature of Actual Disputes



For both litigation (61%) and arbitration (55%) slightly over half of the disputes were domestic. For both Finnish and Tier 1 companies the majority of arbitrations were international.

## Rules Applied in Actual Arbitrations



The overall most applied arbitration rules were the SCC rules (35%) followed by the ICC rules (24%). Finnish companies experienced 13% SCC arbitrations whereas no Swedish companies participated in FCC arbitration. For Tier 1 companies the most applied rules were the ICC rules (38%).

## Alternative Dispute Resolution

### Applied Substantive Law

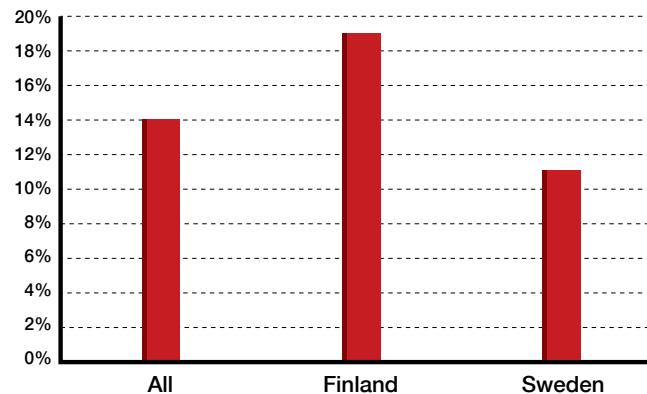
A multitude of different laws were applied in the actual disputes. That the relevant national laws (Swedish or Finnish law) are amongst these is not surprising. It is nevertheless notable that Swedish law was applied in 33% of the actual disputes that Finnish companies were involved in.

English law was overall the second most applied substantive law (37%) and first among the non-national laws. For Tier 1 companies English law was applied in over half of the disputes (54%). After English law German (21%), State in the US (19%) and Swiss (14%) law were the foreign laws most frequently applied.

### Key Findings

- The majority of the actual disputes are dealt with in litigation (66%).
- Most of the contractual litigation disputes concerned sales contracts whereas most of the non-contractual ones concerned product liability. The largest disputes that companies had been involved in concerned aside from the above mentioned subject matters amongst other employment, intellectual property, competition and M&A.
- There are overall only slightly more domestic than international disputes.
- English law was the most applied law aside from Finnish and Swedish law and for Tier 1 companies in over half of the actual disputes.

### Participation in ADR



During the last 12 months, 14% of the respondents had participated in mediation or other form of ADR proceedings. ADR was used almost twice as much among Finnish respondents (19%) as among Swedish respondents (11%). As much as one fourth of Tier 1 respondents (26%) had used ADR.

Over half (52%) of the ADR proceedings in which the respondents had participated in was voluntarily whereas in almost one third (29%) of the cases the ADR proceedings were a mandatory preliminary procedure under the dispute resolution clause. ADR was used more in Sweden (67%) as a voluntary dispute resolution method than in Finland (42%).

### Important Factors when Using ADR

When asked which were the important factors when using ADR respondents mentioned speed and the possibility to settle the dispute and find an early solution. Other factors mentioned were e.g. the possibility to maintain business relations, (low) costs, confidentiality, industry knowledge and voluntariness.

*"In ADR parties try to find reconciliation before going deep into a dispute which might last for several years."*

### Key Findings

- The level of ADR has remained stable in comparison to the results of the Roschier Disputes Index 2010. In most cases ADR was used voluntarily. This may imply an increasing interest in ADR although the traditional dispute resolution methods still prevail.

## What Will the Future Bring?

### Trends

"The US style is coming to Europe, a more aggressive way – keep on suing companies trying to claim compensation."

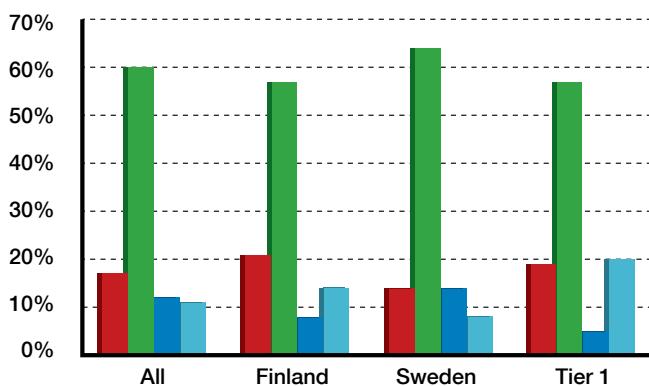
"Eager to claim and fight in our industry, even though costs are high."

The respondents anticipate that there may be changes in the type of disputes in the future. It seems that litigation may partly be becoming more aggressive. Further, some respondents envisage that the disputed values are increasing. On the other hand, it seems that the strive to settle may also have increased. The respondents also anticipate an increase in certain types of disputes, for example in patent/IP and employment disputes.

"Increased interest in reconciliation during the process."

### Number of Disputes

 Increase  
 Decrease  
 Unchanged



Most respondents (60%) anticipate that the number of disputes will remain unchanged during the coming 12 months. Notably more Finnish respondents (21%) anticipate an increase in the number of disputes than Swedish respondents (14%). In year 2010 this was the opposite (Sweden 30%, Finland 15%).

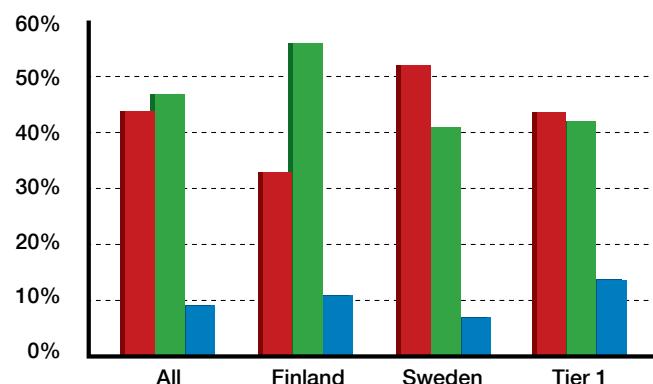
"Overall there are more disputes that reach the point that they involve lawyers."

"The threshold before going to the district court is lower now than 5 years ago."

### Disputes Policy

 Yes  
 No

 Do not know/no answer



Almost half (44%) of the respondents have a written policy for handling disputes, while almost half (47%) do not have any written policy. Disputes policies are more common in Sweden as over half of the Swedish respondents (52%) have a disputes policy, while only one third (33%) of the Finnish companies do so.

Only 10% of the respondents anticipate changes to the way in which the company will handle disputes the coming year. When asked what changes the respondents anticipate, predominant predictions were standardization, emphasis on dispute avoidance and increased use of ADR.

## Key Findings

- An increase in certain types of disputes is anticipated. It also seems that the global financial crisis has resulted in two parallel but divergent developments; companies seem to be more willing to settle and negotiate on the disputes; on the other hand, companies seem to take tougher and rougher positions, e.g. in relation to amounts of compensation.

# Universe of Organizations

## Sweden

The following Swedish organizations were included. In order to ensure the anonymity of the interviewees, the list does not specify participating and non-participating organizations.

AarhusKarlshamn	Lantmännen ek. för.
ABB Norden Holding	Liljedahlsbolagen
Ahlsell	Lindab International
Alecta	LKAB
Alfa Laval	Meda
AMF	Modern Times Group MTG
Apoteket	Nobia
Arla Foods	Nordea
Assa Abloy/Cardo	Nordstjernan
AstraZeneca	Nynas
Atlas Copco	OK-Q8
Autoliv	Outokumpu
Axfood	Papyrus Holding
B&B TOOLS	Peab
Bilia	Perstorp Holding
Boliden	Pfizer
Borealis	Posten
Bravida	SAS
Capio/Ygeia Topholding	SCA
Cargotec Sweden	Scan
COOP Sweden (KF)	Scania
Corral Petroleum Holdings/Preem	Schenker
Danske Bank	SEB Enskilda
Duni	Securitas
Dunross & Co	Shell, Svenska
E.ON Sverige	Siemens Industrial Turbomachinery
Electrolux	Skanska
Eniro	SL, Storstockholms Lokaltrafik
Ericsson	Sony Ericsson Mobile Comm.
Folksam	Statoil, Svenska
Fortum	Stockholms Stadshus
Gambro/Indap Sweden	Stora Enso Skog
Getinge	Sveaskog
Green Cargo	Swedbank
Gunnebo	Swedish Match
H&M	Systembolaget
Haldex	Södra Skogsägarna ek. för.
Hewlett-Packard Sverige	Tamro
Holmen	Tele2
Husqvarna	TeliaSonera
IKEA	Toyota Industries Europe
Indutrade	Trav och Galopp
JM	Trelleborg
Kuoni Scandinavia	Vattenfall
L E Lundbergföretagen	Volkswagen Group Sverige
Länsförsäkringar	Volvo
Länsförsäkringar Bank	Volvo Personvagnar

## Finland

The following Finnish organizations were included. In order to ensure the anonymity of the interviewees, the list does not specify participating and non-participating organizations.

ABB	Paulig
Ahlstrom	Planmeca
Alko	Pohjola Insurance
Amer Sports	Pohjola Pankki
Cargotec	Pohjolan Voima
Danske Bank Group/Sampo Group	Pöyry
Delta-Auto/Delta Motor Group	Raisio
Destia	Ramirent
Dynea	Rautaruukki
Elisa	Rettig Group
Fingrid	Sampo
Finnair	Sandvik Mining and Construction
Finnlines	Sanoma
Fiskars	Schenker East
Fortum	SEB
Gasum	Skanska
GT Trading	SRV Yhtiöt
Hankkija-Maatalous	St1
Helsingin Energia	Stockmann
Helsingin ja Uudenmaan Sairaanhoidopiirin kuntayhtymä	Stora Enso
Helsingin Osuuskauppa Elanto	Suomen Lähikauppa
HKScan	Suomen Osuuskauppojen Keskuskunta, SOK
Huhtamäki	Tamro
IImarinen	Tapiola
Itella	Teboil
Karl Fazer	TeliaSonera Finland
Kemira	Tellabs
Kesko	Tieto
KONE	UPM-Kymmene
Konecranes	Uponor
Kuusakoski Group	Valio
KWH-koncernen	Varma
Lemminkäinen	Veho Group
Metso Paper	Veikkaus
Metsälaitto Group	Wihuri - Wihuri Group
NCC Rakennus	VR-Yhtymä
Neste	VW-Auto Group
Nokia	Wärtsilä Yara Suomi
Nokia Siemens Networks	YIT
Nokian Renkaat	YIT Rakennus
Nordea Bank	
Norlisk/OMG Finland	
OMG Kokkola Chemicals	
Onvest	
Oriola-KD	
Orion	
Outokumpu Outotec	

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# ROSCHIER

## Sweden

/Stockholm  
Blasieholmsgatan 4 A, P.O. Box 7358  
SE-103 90 Stockholm, Sweden  
Tel. +46 8 553 190 00  
[www.roschier.com](http://www.roschier.com)

## Finland

/Helsinki  
Keskuskatu 7 A  
FI-00100 Helsinki, Finland  
Tel. +358 20 506 6000  
[www.roschier.com](http://www.roschier.com)

/Vaasa - regional office  
Hovioikeudenpuistikko 11  
FI-65100 Vaasa, Finland  
Tel. +358 20 506 6010  
[www.roschier.com](http://www.roschier.com)

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