

**Organizational Conflict Resolution and Strategic Choice:  
Evidence from a Survey of Fortune 1000 Companies**

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One of the most pronounced changes in the design and structure of American organizations over the past thirty years has been the increased prevalence of third-party dispute resolution mechanisms for dealing with workplace conflicts and disputes. Beginning in the late 1970s, a growing number of organizations turned to alternative dispute resolution (ADR) practices in an effort to contain the various costs associated with employment disputes. The growth of ADR was primarily driven by the managers of nonunion firms, but these managers adopted dispute resolution methods (primarily arbitration and mediation) that had been used for 30 or more years by unionized firms.

The rise of these alternative methods for dealing with conflict have had far-reaching ramifications for organizations and their employees (Roche, Teague, and Colvin 2014; Avgar 2016). One such consequence is that organizations adopting ADR practices have, in essence, curtailed their reliance on traditional approaches to dispute resolution that depend primarily on management's decision-making authority and often on litigation, replacing them with approaches that are adopted and instituted primarily by management but which may provide employees, supervisors, and other stakeholders with a greater role in participating in these organizationally promulgated mechanisms. ADR mechanisms are usually generated and administered by the management of an organization, in contrast to more traditional dispute resolution mechanisms that are either generated jointly by managers and union representatives under collective bargaining or imposed by government authority. The adoption of these ADR practices also represents an explicit recognition by management of the central role that conflict plays in the workplace, something that organizations are often reluctant to do. These developments, therefore, represent a significant shift in the manner in which many organizations have come both to view and to deal with workplace conflicts and disputes.

Conflict resolution scholars have shown great interest in the nature of this institutional shift, which has led many organizations to revisit their traditional strategies for addressing organizational conflict (see for example Avgar 2016; Colvin 2003a). As a result, the body of empirical evidence regarding the prevalence of ADR practices has been steadily growing. Yet despite the existence of evidence regarding the *use* of ADR, empirical research examining the strategic underpinnings of this organizational transformation remains sparse. A number of important questions remain underexplored: For instance, are there underlying strategies that drive organizations to abandon the use of traditional methods of dealing with workplace conflict in favor of new and alternative methods? Are certain organizational strategies and motivations associated with specific types of ADR practices? To what extent is ADR usage influenced by the level of organizational commitment to these practices? Addressing these questions requires additional empirical evidence regarding the factors that motivate organizations to alter, often dramatically, the ways in which they manage and resolve workplace conflict.

In an effort to address these questions, our paper focuses on both the strategic rationales and the organizational commitment to ADR that may underpin the use of two dominant and well-established dispute resolution practices, namely, mediation and arbitration. Both mediation and arbitration rely on third-party neutrals as a means of resolving workplace conflicts and disputes. Both mechanisms, we maintain, also require organizations to be truly committed to their use for them to be genuinely effective as conflict management tools.

Nevertheless, mediation and arbitration have a number of significant procedural differences that clearly distinguish one practice from the other. For example, a mediator lacks the authority to impose a settlement on the disputants, while an arbitrator has that authority. Mediation is a process that, at its core, strives to uncover disputants' underlying interests (and

not merely their positions), and a mediator who can help the parties to recognize their underlying interests is better equipped to assist the parties in reaching a settlement. Often a mediator can provide creative options for resolving the parties' dispute that the parties could not have developed on their own. In sum, a mediator's primary role is to assist the parties in identifying common and opposing interests and in finding settlement options that satisfy those interests (Moore 2014).

Arbitration, on the other hand, is a quasi-judicial process that focuses primarily on the merits of the disputants' arguments. Resolution is reached through a ruling that is imposed by the arbitrator, usually in the form of a written award. The arbitrator's primary responsibility is not to uncover the parties' underlying interests but, rather, to adjudicate the case presented to him or her and to make a declaration as to the merits of each party's claims (Elkouri and Elkouri 2012).

Each of these conflict resolution practices has fundamentally different advantages and disadvantages and can lead to very different types of outcomes. As an overarching proposition, we maintain that an organization's use of either arbitration or mediation is likely to be influenced by fundamentally different factors. Our paper explores this proposition by examining the relationship between different organizational motivations and commitment levels, on the one hand, and the frequency of an organization's use of mediation and arbitration, on the other. Specifically, we argue that an organization's use of either mediation or arbitration to resolve workplace disputes is a function of both its strategic approach to ADR and its commitment to the use of such practices. By distinguishing between an organization's underlying strategic orientations and its commitment to ADR, we are better able to understand the role that managerial choice plays in explaining the use of different conflict resolution practices.

We explore these questions using the results of a survey of Fortune 1000 corporations regarding their use of ADR practices, which we have supplemented with a wide array of published data on the characteristics of these corporations. Our sample thus constitutes a broad cross-section of large U.S. employers and the extent of their use of ADR. Industrial relations scholarship has long advanced the notion that managers, like other actors, make workplace decisions based on strategic choices and the specific goals and objectives they are interested in promoting (Kochan, Capelli, and McKersie 1984; Kochan, Katz, and McKersie 1986). Yet rarely has this framework been applied to organizational decisions regarding the use of mechanisms for dealing with workplace conflict. This study, we believe, adds both theoretical and practical value to our knowledge of this subject.

### **Explaining the Rise of ADR**

The conflict resolution landscape in U.S. firms has changed dramatically over the past forty years (Lipsky et al. 2015; Colvin et al. 2006). Some observers have called this historic change the “ADR revolution” (see, for example, Lipsky, Avgar, and Lamare 2014 and American Arbitration Association 2008). Over this period empirical evidence has demonstrated that a growing number of organizations have moved away from traditional means of resolving workplace conflict and have instituted the use of arbitration, mediation, and other dispute resolution methods. Many scholars have maintained that organizations have adopted these techniques, in large part, to address conflicts and disputes without the need to resort to litigation (Colvin et al. 2006; Lipsky et al. 2014, 2015). At the heart of this transformation has been the assumption, made by scholars and practitioners alike, that firms stand to benefit by abandoning conflict resolution approaches that rely heavily on either managerial authority or litigation (Bingham et al. 2009; Avgar 2016). When ADR began to take root in organizations in the 1970s,

both practitioners and scholars believed that organizations were principally motivated by their desire to avoid the time and cost of using the courts to resolve the numerous employee claims that had been triggered by workplace legislation passed by Congress during the 1960s (Lipsky, Seeber, and Fincher 2003).

As time passed, however, it became evident that litigation avoidance was not the only motive—or in many cases even the major motive—driving employers to adopt ADR. Scholars examining the reasons for the rise of ADR over the past forty years have pointed to multiple pressures and expected organizational benefits, ranging from perceived efficiency gains to the greater satisfaction all parties enjoyed by virtue of using ADR rather than litigation to resolve their disputes (for a review of pressures leading to the rise of ADR see Lipsky et al. 2014). As a growing number of organizations adopted ADR, it became clear that still other motivations drove employers to use ADR, including their belief that ADR helped them to avoid unions, their recognition that the use of ADR could improve their ability to recruit and retain employees, their belief that using ADR could lead to more durable resolutions of their disputes than litigation, and other factors. Indeed, as will be seen below, the potential benefits associated with an organization's use of ADR vary greatly, and different ADR mechanisms are likely to have distinctive effects that are a function of management's own expectations and perceptions of ADR's potential benefits.

Two general explanations for management's adoption of ADR dominate the existing scholarship on conflict resolution. One focuses on the link between *external environmental pressures* and the use of various ADR and conflict management approaches. According to this approach, ADR can be viewed as an attempt to minimize the organization's susceptibility to environmental pressures and constraints (see, for example, Edelman, Erlanger, and Lande 1993;

also see Colvin 2013; Lewin 2008; Colvin 2003a). Thus, for example, a great deal of conflict resolution research has focused on the significant organizational costs associated with the increase of the government regulation of the workplace beginning in the 1960s and the subsequent increase in employment litigation. In response to what many firms perceived to be a litigation “explosion,” a growing number of them sought to buffer these external factors by adopting private methods of resolving workplace disputes (Avgar 2015; Lipsky et. al. 2014; Colvin 2007; Olson 1992).<sup>1</sup>

Another frequently cited external driver of ADR adoption has been management’s recognition of the potential to use employer-promulgated ADR as a substitute for dispute resolution mechanisms developed jointly by unions and employers under collective bargaining (Colvin et. al. 2006; Colvin 2003b). One of the dominant features of a unionized workplace in the U.S. is a well-established grievance procedure, which typically includes several steps that both parties can use to resolve a dispute and which usually culminates in binding arbitration. Some organizations appear to view ADR as a means of offering employees the benefits of an institutionalized and structured conflict resolution procedure but without the need for unions (Avgar et. al., 2013).

Finally, market competition has also been cited as an external pressure leading firms to revisit their methods for resolving workplace conflict (Lipsky et. al. 2003). Increased competition, in either the product or labor market, is likely to motivate firms to reconsider the manner in which they organize and structure work, including the ways in which conflict is resolved. Many firms adopted ADR in an effort to cut their costs; often ADR was a means many

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<sup>1</sup> There is a debate on whether the litigation explosion was genuine or merely perceived. See, for example, Lipsky, Seeber, and Fincher 2003, pp. 58-61.

firms used in the belief that it would improve and enhance communication and problem solving (Lipsky et. al. 2003).

A more recent proposition emphasizes the relationship between *internal organizational pressures* and the use of ADR. This research examines the link between ADR and the adoption of internal conflict management practices, on the one hand, and internal organizational pressures and challenges, on the other (Roche and Teague 2012; Avgar 2016; Colvin 2003a). Specifically, researchers have linked the dramatic restructuring of work practices and organizational arrangements over the last several decades, which have been designed to increase flexibility, employee autonomy, and engagement, with the need to introduce new methods to resolve conflict (Lipsky et. al. 2014; Avgar 2016). The dismantling of traditional hierarchical structures associated with many of the prevalent restructuring efforts since the 1980s brought about a very different attitude about conflict and cooperation and, in turn, necessitated new ways of addressing and resolving conflict. ADR, according to this viewpoint, is the product of a reconceptualization of conflict within firms and the recognition that its resolution is central to advancing new ways of organizing work (Roche, Teague, and Colvin 2014).

Taken together, ADR scholars have thus provided several potential motivations driving the increase in the use of new methods to resolve conflict. Although this body of research has contributed greatly to existing knowledge about the pressures that have led organizations to adopt new conflict resolution methods, there remain areas of inquiry that have been, for the most part, missing from this literature.

For example, although existing research has highlighted multiple factors that might in general help explain the increasing use of ADR by U.S. firms, we know little about the extent to which the importance of these factors varies across different firms. We argue that it is likely that



firms have different strategic approaches that motivate their use of new conflict resolution practices, and these differences in strategic approaches result in variation across organizations in their use of arbitration, mediation, and other ADR techniques. One notable exception to the relative absence of research on this question, and one that serves as a building block for our research, is Colvin's seminal 2003 study in which he documents the role that different perceived threats play in telecommunication firms' decisions to adopt two conflict resolution procedures, namely, arbitration and peer review (Colvin 2003a). Colvin found that firms in the telecommunications industry that faced a greater threat from litigation were more likely to adopt arbitration, an adjudicative process with many features similar to litigation, while firms that needed to cope with a high level of unionization were more likely to adopt peer review, a conflict resolution technique that allows for meaningful employee involvement in resolving complaints by fellow employees. Colvin's study sets the foundation for the argument we advance in this paper that organizations vary in the strategic benefits they hope to derive from the adoption of different ADR techniques.

A related limitation associated with the existing research is the absence of a recognition of the inherent differences between different conflict resolution processes. Specifically, there is little research exploring the extent to which variation in the use of fundamentally different ADR practices is the product of variation in internal and external organizational pressures that firms believe are linked to perceived organizational benefits. Do firms with different strategic orientations toward ADR adopt and use more frequently different conflict resolution practices? Furthermore, is there a link between variation in firms' strategic orientations, their commitment to the use of ADR, and the specific practices they adopt and use?

To address these questions, we must first distinguish different ADR practices based on their core characteristics. One of the most well-established distinctions made in the conflict resolution literature is between *interest-based* and *rights-based* conflict resolution options. The distinction between these two conflict resolution categories is important because it goes to the heart of the underlying logic driving organizations to use these different types of practices. The most important distinction between an interest-based option and a rights-based option is the amount of authority the option provides a third party in determining the outcome of the dispute. Interest-based conflict resolution options, like mediation and facilitation, delegate virtually no authority to a third party to impose a settlement on the disputants, whereas rights-based options, like arbitration, delegate to a third party complete or nearly complete authority to impose on the disputants a binding and usually final decision.

Interest-based options are informal processes designed, for the most part, to assist the parties in reaching a negotiated settlement that they fashion themselves (Wall and Lynn 1993; Moore 2014; Colvin et. al. 2006). Interest-based processes, like mediation, are therefore not designed to adjudicate the merits of a given dispute—that is, to decide which party is right or wrong—and do not involve a third party as a decision maker (Colvin 2014). An interest-based option like mediation is often used to assist the parties in resolving an impasse over important core issues; for example, mediators often assist unions and employers to resolve conflicting positions they have taken on wages and salaries. Interest-based options are often appreciated for their potential to increase the likelihood that the parties, with the assistance of a neutral, may be able to achieve creative solutions that not only resolve the conflicting positions they have taken on core issues but also address the parties’ differing interests and needs uncovered during the mediation process (Kolb 1983; Latreille and Saundry 2014; Colvin 2014). Interest-based options,

accordingly, are often attractive to organizations not only because of their capacity to deliver settlements that reconcile the parties' differences on positions but also serve the parties' mutual interests and encourage problem solving (Avgar 2015). In sum, these options are often preferred by disputants that seek informal and often less time-consuming processes that focus on attaining mutually acceptable settlements (Latreille and Saundry 2014; Colvin 2014).

By contrast, rights-based options, like arbitration, do not, for the most part, have the capacity to deal with the disputing parties' underlying interests or needs. Rather, these processes use a third-party decision maker who focuses on the merits of each party's claims and arguments (Latreille and Saundry 2014; Colvin 2014). Arbitration and other rights-based options are designed to adjudicate each disputant's claims by focusing on the facts in the specific dispute with the goal of providing a third party with enough evidence to make a final and declarative ruling or award (Colvin et. al. 2006; Avgar 2015). In contrast to interest-based options, rights-based options provide organizations with a much higher level of certainty regarding the formal, and usually final and binding, resolution of a given dispute. These options are likely to be attractive to organizations that have a preference for finality and certainty in dispute resolution and seek to shield themselves from exposure to litigation.

This brief description of interest-based and rights-based options suggests that each of these distinct conflict resolution processes holds unique advantages and disadvantages for the disputants. The conflict resolution literature has described the extent to which parties might find one category of options preferable to the other (Roche, Teague, and Colvin 2014). Mediation, in sum, has the inherent potential of assisting the disputants in arriving at a resolution that is acceptable to both parties. Arbitration, by contrast, highlights the importance of reaching a final and binding resolution that takes account of the actual facts and merits of the dispute.

In this paper we develop the argument that a firm's ADR strategies are likely to be associated with a firm's use of one conflict resolution option or the other. More specifically, we examine whether a firm's use of either arbitration or mediation is a function of (1) the extent to which the use of either of these dispute resolution processes aligns with the *goals* and *objectives* management is seeking to advance, and (2) the extent of the firm's *commitment* to the use of these practices. We expect to find that an organization's use of either mediation or arbitration may be governed by different underlying strategic objectives as well as the firm's broader commitment to ADR. In what follows, we further develop this strategic choice argument.

### **A Strategic Choice Framework for the Study of Organizational Conflict Resolution**

To test the proposition that an organization's use of specific ADR practices, such as arbitration and mediation, is governed by an organization's strategic choices (i.e., its goals and objectives), we postulate that firms can be distinguished on two dimensions: (1) on the basis of their *strategic orientations* toward ADR (the principal objectives the organization seeks to advance in adopting specific ADR practices) and (2) their *commitment to the use* of alternative conflict resolution options. A firm's strategic orientation stems from top management's vision of what it expects to attain from the use of ADR practices instead of relying on litigation. A firm's commitment to ADR captures the extent to which a firm's policies and practices support the adoption and use of ADR. Commitment thus represents a firm's willingness to invest resources, both financial and human, in alternative dispute resolution practices. We maintain that these constructs capture two important and independent dimensions of a firm's strategic choice. We expand on each of these constructs below.

## Strategic Orientation

Organizations, we maintain, vary not only in the conflict resolution practices they adopt but also in the underlying motivations guiding these adoption decisions (see, for example, Avcilar 2016; Lipsky and Avcilar 2008). Accordingly, we want to test empirically whether there is a link between these underlying motivations, or strategic orientations, and a firm's choice of specific conflict management practices.

Our strategic choice framework for conflict resolution builds on the seminal industrial relations research that highlighted the importance of the choices made by managers and union leaders in influencing variation in organizational practices (see, for example, Kochan et al. 1986; Kochan, Katz, and Cappelli 1984). For example, in the context of collective bargaining relationships, industrial relations scholars have emphasized how the strategic choices made by managers, union leaders, and other actors have influenced the nature and quality of their relationships. Kochan et al. (1986) argue that the nature of industrial relations systems is not simply shaped by organizational reactions to institutional forces, but is rather the product of decisions made by top and middle managers and their union counterparts. These actors face a range of strategic choices, and the decisions they make regarding these choices significantly influence the outcomes they attain. Kochan and his colleagues focused on the relationship between the actors' strategic choices and industrial relations outcomes, but we maintain that their theoretical framework also applies to the relationship between the actors' choices and organizational conflict management.

Building on existing industrial relations research, we propose three conflict management objectives that drive an organization's decision to emphasize the use of ADR rather than litigation to resolve workplace disputes: (a) *improving organizational efficiency*, (b) *enhancing*

*sustainable and satisfying resolutions of workplace disputes, and (c) limiting the organization's exposure to litigation.* We hypothesize that each of these strategic orientations will be associated with the frequency of an organization's use of mediation or arbitration in employment relations.<sup>2</sup>

*Improving organizational efficiency.* This strategic orientation applies to organizations that believe that ADR can be used to advance organizational efficiency. As Estreicher and Eigen have pointed out, some organizations view conflict resolution as a tool for reducing the logistical and administrative costs of workplace conflicts and disputes (Estreicher and Eigen 2010).

Previous research revealed that a majority of Fortune 1000 firms used ADR because they believed that arbitration, mediation, and other ADR techniques saved both time and money in dealing with workplace conflicts (Lipsky et. al, 2003, pp. 101-105).<sup>3</sup> If an organization focuses on the efficiency benefits of ADR, it is not focusing on the relational or broader organizational benefits of these practices. Rather, it is concentrating principally on logistical efficiencies. An organization's focus on efficiency benefits suggests that it attaches a high value to reducing legal costs and increasing its ability to buffer the organization from litigation threats.

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<sup>2</sup> We adopt the current practice of distinguishing between employment relations and labor relations. Employment relations applies specifically to the relationship between non-union employees and their employers, while labor relations applies to the relationship between unionized employees and their employers. The use of arbitration or mediation in employment relations is largely (if not entirely) the consequence of policies and practices promulgated by an employer; the use of arbitration or mediation in labor relations is largely (if not entirely) the consequence of policies and practices developed jointly by employers and unions in collective bargaining. The terms "employment mediation" and "employment arbitration" refer to the use of mediation and arbitration in employment relations, i.e., non-union settings. The terms "labor mediation" and "labor arbitration" refer to the use of mediation and arbitration in labor relations, i.e., under collective bargaining. In both employment relations and labor relations, of course, public policy (or "external law") influences the use of both mediation and arbitration. Although we focus on the use of employment mediation and employment arbitration by the organizations in our sample, we account for the degree of unionization in the organizations in our sample because we recognize there may be spillover in ADR practices from the unionized portion of a firm's workforce to the non-union portion, or vice versa (Avgar et. al. 2014). Nevertheless, our theoretical framework focuses on the conflict management strategies firms adopt for their non-union employees.

<sup>3</sup> A survey of Fortune 1000 corporations in 1997 revealed that "more than 80 percent of the [corporate] respondents believed that mediation saves time and money, while slightly less than 70 percent believed that arbitration saves time and money" (Lipsky et. al, 2003, p. 102).

Is there a link between a firm's focus on improving organizational efficiency and its use of mediation and arbitration? There are obviously costs and benefits associated with a firm's use of mediation and arbitration, and a firm's perception of the relative costs and benefits of using either mediation or arbitration will affect its view of which technique is most likely to have the capacity of improving its organizational efficiency. For example, there are direct costs associated with the use of these practices. It is widely believed by both practitioners and scholars that mediation is a faster and cheaper means of resolving disputes than arbitration. In contrast to arbitration, mediation is much more informal and procedurally flexible. Indeed, many scholars and practitioners believe that arbitration has become costlier and more time consuming in recent years (for empirical evidence, see Stipanowich and Lamare 2014). Given the likelihood that the direct costs of mediation are significantly lower than the direct costs of arbitration, and assuming approximately equivalent benefits of the two practices, we hypothesize that *firms that focus on improving efficiency will prefer the use of mediation over the use of arbitration.*

*Enhancing sustainable and satisfying resolutions of workplace disputes.* As we have noted, an organization's adoption of conflict resolution practices has been linked to efforts by the organization to address internal managerial problems and inadequacies. This strategic orientation is consistent with research that has focused on the relationship between ADR, on the one hand, and internal organizational needs and restructuring, on the other (see Avgar 2016; Colvin et. al. 2006). Many conflict management proponents argue that the real power of the ADR "revolution" is in providing managers with better tools for dealing with a range of contemporary managerial challenges (see for example Avgar 2016). For example, many corporations have grown increasingly aware of the costs associated with turnover and the benefits of retaining talented employees. Using conventional litigation to resolve workplace disputes often means damaging or

even destroying relationships, rather than leading to durable outcomes (Lipsky et. al. 2003). Previous research shows that organizations that adopt ADR as a means of addressing these managerial challenges are seeking to increase their problem-solving capabilities and to improve relational dynamics (Lipsky et. al. 2003; Lipsky and Seeber 2006). Our discussion of interest-based and rights-based options highlights the unique advantages that the former have in delivering durable and sustainable resolutions that satisfy parties' multiple and diverse interests. As such, we hypothesize that *firms that primarily use ADR to enhance the sustainability of the resolution of workplace disputes are more likely to use mediation rather than arbitration.*

*Limiting the organization's exposure to litigation.* Conventional wisdom regarding the rise of ADR in resolving workplace disputes holds that the growth of workplace litigation in the 1970s played a major role and possibly a dominant one (Lipsky, Seeber, and Fincher 2003). Congress passed landmark employment legislation in the 1960s and 1970s, including the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA) of 1967, the Occupational Safety and Health Act (OSHA) of 1970, and the Employee Retirement Income Security Act (ERISA) of 1974. The passage of these statutes, many scholars believe, resulted in a historic surge in employment litigation in the 1970s (Olson 1992). A seminal event in the development of ADR was a conference held at the Harvard Law School (the Pound Conference) in 1976. At that conference the Supreme Court's Chief Justice, Warren Burger, called for the development of informal dispute resolution procedures that would serve to unclog the crowded dockets of the courts. In 1994, a federal commission chaired by former Secretary of Labor John T. Dunlop reported that the number of employment lawsuits filed in federal courts had grown by more than 400 percent over the previous two decades (U.S. Department of Labor 1994, pp. 25-33). The so-called "litigation explosion" resulted in significant delays and an increase in the cost



of settling employment disputes (Olson 1992; U.S. Department of Labor 1994, p. 50).

Consequently, a growing number of employers, particularly in the 1980s and 1990s, adopted mediation, arbitration, and other ADR techniques to cope with the litigation explosion.

Many employers have appreciated the advantages that ADR, and especially arbitration, has over litigation. First, employment lawsuits are a matter of public record, whereas the use of ADR is almost always a private matter. Decisions reached by judges and juries in the courts are always published, whereas mediation sessions are almost always private and only a small minority of arbitration awards are ever published. The public nature of litigation creates significant exposure risks for firms and their employees. Judicial rulings often create precedents, which may have long-lasting and far-reaching effects beyond the case in question. Private arbitration, by contrast, is less prone to decisions that set precedents and may therefore be preferred by both employers and employees. Why does the confidentiality of arbitration and other ADR techniques appeal to both employers and employees? If an employee who is discharged wants to contest the employer's action in the courts, both the employee and the employer risk exposing sensitive matters that both parties prefer to remain confidential. Neither side in most employment disputes wants to air its dirty laundry. The vast majority of arbitration awards remain confidential, and thus offer both firms and employees the opportunity to protect sensitive information regarding their disputes.

Second, the litigation process has far more substantial discovery than arbitration. Discovery can be time consuming and expensive (and therefore possibly contributes to firms' efficiency concerns). But discovery also represents still another avenue that might require an employer to disclose information he/she prefers to keep private (for example, if a court requires a company to disclose information on employee wages and benefits that the company has always

considered confidential). Third, firms that use employment arbitration understand that arbitration awards are almost always final and binding on both parties. It is very difficult for either party to have an arbitration award vacated on appeal to the courts. By contrast, an employment dispute decided by a judge or a jury can be tied up for years in appeals to higher courts.

Firms that seek to limit their exposure to litigation may nevertheless appreciate the formality and structure that a court proceeding provides. If they prefer to use a rights-based option to resolve an employment dispute, nevertheless their experience may cause them to believe that arbitration is a better rights-based option than litigation. Therefore, we hypothesize that *a firm that seeks to limit its exposure to litigation will prefer to use arbitration rather than mediation to resolve employment disputes.*

### **Organizational Commitment to ADR**

Another key factor explored in this paper is the organization's *commitment* to ADR. Conceptually, we believe that there is a need to distinguish between an organization's strategic orientation toward conflict management and the extent to which it is committed to making conflict resolution practices available to (or even mandatory for) its employees. This line of inquiry is motivated by the recognition that an organization may choose to adopt an ADR practice without necessarily committing to its operational availability to its workforce.

One of the longest standing debates within the ADR scholarly and practitioner communities revolves around the extent to which adoption of such practices reflects a genuine commitment on the part of firms to provide employees with real access to these alternative methods of resolving conflict (Lipsky, Seeber, and Fincher 2003). Some employers have been known to adopt ADR and other human resource policies without dedicating sufficient staff and financial resources to ensure the effective implementation of those policies. It is commonly

recognized in employment relations that a firm may have an array of policies on paper (e.g., in its employee handbook) that are rarely implemented in practice.

ADR proponents, on the one hand, maintain that the adoption of these policies potentially represents a powerful tool firms can use to increase employee access to forums that have the capacity to settle and resolve disputes (Estreicher 2000). Opponents, on the other hand, raise doubts regarding the real intentions driving organizations to adopt ADR (Fiss 1984). Firms adopting ADR may want to claim the benefits of private conflict resolution mechanisms but may not necessarily be committed to breathing real life into these practices. Some firms may believe the mere adoption of ADR policies provides them with political and public relations benefits but calculate that the costs of an authentic commitment to the implementation of those policies outweigh the benefits (Lipsky, Seeber, and Fincher 2003).

This debate highlights the need to account for an organization's actual commitment to ADR, independent of its strategic orientation. Firms are likely to vary in the extent to which they are committed to the widespread availability of, and employee access to, ADR practices. Accordingly, we argue that organizations make two central and distinguishable strategic decisions regarding ADR. First, organizations make strategic decisions about the objectives and anticipated returns they seek to obtain by adopting ADR practices. Second, organizations also make decisions about the extent to which they are willing to commit to the adoption and availability of, and access to, these ADR practices.

We maintain that organizations can signal their commitment to ADR in at least five ways. (1) *Availability*. A firm's commitment to ADR is, among other factors, a function of the extent to which these conflict resolution practices are made available to the firm's workforce. Making ADR practices available to a large proportion of the workforce is one step that signals an

organization's commitment to using ADR to resolve workplace conflict. More limited availability, on the other hand, may signal that a firm has reservations about fully committing to ADR. Some of the firms we have studied, for example, have used a pilot program for a segment of their workforce to test the effectiveness of ADR, and if they conclude the pilot was successful, they then extend the availability of ADR to the firm's entire workforce.

(2) *Mandatory Usage.* A firm's commitment to ADR is also a function of the extent to which it requires employees to use these practices to address their workplace disputes. A firm that makes the use of ADR a mandatory step in its dispute resolution process (even if that process might end in litigation) forces its employees to use ADR if they want to have their employer address their workplace complaints. Conceptually, a non-union employer can require its employees to use any and all of the techniques it includes among its ADR policies, including mediation, fact-finding, peer review, and other interest-based options. In practice, however, the mandatory use of ADR is especially relevant for arbitration and other rights-based options. Typically, a firm that makes arbitration mandatory for its employees requires them to sign an agreement (i.e., a contract) that constitutes their consent to waive their right to resort to litigation to resolve an employment dispute and conveys their consent to rely on arbitration to do so (Colvin et al. 2006). Mandatory arbitration remains one of the most controversial features of the use of ADR by non-union employers, and some of these employers believe it is not in their own best interests to force their employees to sign such waivers. But we contend that an employer who chooses to use mandatory ADR has clearly made an unequivocal commitment to ADR, even if this is motivated by a desire to advance a managerial benefit.

(3) *Established policy.* A third signal of a firm's commitment to ADR is if it embeds these procedures as part of its established policies as opposed to the firm using ADR in an *ad-*

*hoc* manner or only when it is required to do so by either contractual or court mandates. A 1997 survey of Fortune 1000 corporations revealed that many companies were using arbitration and mediation on an *ad hoc* or voluntary basis but had not yet incorporated these ADR practices into their established policies (Lipsky et. al. 2003, pp. 98-101). At that time, ADR was still a novel approach to handling workplace conflict, and many companies had not fully committed to incorporating ADR practices into their established policies. But over the last two decades, a growing proportion of U.S. corporations, motivated not only by their successful experience with the use of ADR but also by their recognition that ADR serves their larger strategic purposes, have incorporated ADR into their established policies (Stipanowich and Lamare 2014).

(4) *Due process*. Another procedure that firms can use to signal their commitment to ADR is to provide comprehensive due process protections for employees that make use of these practices. Critics of ADR have expressed serious concerns about the extent to which employers provide their employees with due process protections and safeguard their fair treatment in using ADR (Stone 1998). In 1995, a group of major organizations, including the American Arbitration Association (AAA), the American Bar Association (ABA), the Federal Mediation and Conciliation Service (FMCS), and the National Academy of Arbitrators (NAA), joined together to issue the Due Process Protocol for the mediation and arbitration of employment disputes. Employers who agree to abide by the Due Process Protocol guarantee that their employees will have fundamental due process protections, including the right to be represented by an advocate of their own choosing, full access to all relevant information and documents, and participation in the selection of a mediator or arbitrator who is well qualified and trained (Dunlop and Zack 1997). Before the AAA administers an employment arbitration case, it requires that employers agree to abide by the Due Process Protocol. Increased organizational attention to procedural

fairness is another signal of an organization's commitment to ADR as a legitimate means of addressing workplace conflict.

(5) *Scope*. Finally, from a substantive standpoint, commitment to ADR is signaled when a firm makes use of these practices to resolve a broad array of conflicts and disputes. The type of conflicts and disputes subject to a firm's ADR policies can have a narrow scope (e.g., limited to one or two categories, such as discrimination complaints or complaints about health and safety) or a broad scope (e.g., covering a range of topics even broader than a typical collective bargaining agreement, including wages, hours, working conditions, and allegations of statutory violations, and even employee complaints about the quality of supervisor-employee relations or other so-called "quality of work" issues). Gosline and her colleagues noted that a broad scope "allows employees and managers to raise concerns without framing them as violations of legal rights" (Gosline et. al. 2001:10). Thus, we maintain that firms that make ADR available for the resolution of a wide array of conflict and dispute categories demonstrate a greater level of commitment to ADR than firms that make such practices available for the resolution of only a narrow and limited set of conflicts and disputes.

We hypothesize *that firms that demonstrate a higher level of commitment to ADR across all of these five dimensions are more likely to use both mediation and arbitration more frequently than firms that have a lower level of commitment.*

### **Data**

The data used for this study were obtained from a 2011 survey of Fortune 1000 corporations augmented by published data that provided various characteristics (financial performance, firm size, etc.) for each of the corporations included in our survey.

The objective of the 2011 survey was to obtain comprehensive information about each corporation's use of ADR from the person in the organization responsible for, or most knowledgeable about, the organization's ADR policies and practices. After extensive consultation with a large number of practitioners (including human resource managers, inside counsel, outside counsel, consultants, and other ADR experts), we concluded that the general counsel (GC) of the corporation was very likely to be the most knowledgeable person in the organization about ADR. Empirical evidence suggested that in most large organizations ADR is managed by the GC and the GC's deputies (Lipsky 2014).<sup>4</sup> Our judgment that the GC was the most knowledgeable person about the organization's litigation strategies and ADR policies was confirmed by these interviews. If we were unable to interview the GC, we settled for one of the GC's top deputies, usually the corporation's employment counsel.

Our survey was administered by a university-based survey research institute, which was able to obtain responses from 368 of the Fortune 1000 corporations. Preliminary analysis of the survey results suggests that our sample of corporations is an excellent cross-section of the Fortune 1000, as indicated by the distribution of corporate responses across industries, number of employees, and level of revenues. The results of the survey also demonstrate that a large majority of the firms in the sample (over 80 percent) offered their employees either arbitration and mediation (or both) to resolve employment disputes; a significant number (approximately a third) used approaches (often called "systems") that gave employees the choice of multiple dispute resolution options (which usually included arbitration and mediation but also might include other ADR techniques such as fact-finding, med-arb, early neutral evaluation, and peer

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<sup>4</sup> In a 2013 survey, Lipsky found that in about 75 percent of the organizations surveyed the ADR program was managed by either the corporate legal department or a semi-autonomous office headed by a corporate attorney; in other organizations the ADR program was managed by a human resource manager (Lipsky 2014).

review). Our survey also indicated that a minority of large U.S. corporations (approximately a tenth) continued to rely on litigation and usually eschewed the use of ADR.

### **Testing for Strategic Choice**

To assess whether distinctive strategies underpin a firm's logic for using ADR, we turn to a specific question asked in our survey. The question put to each respondent was the following: "When your company has decided to use ADR instead of litigation, which of the following reasons generally help to explain that decision?" Respondents could select as many of the following options as they wished: saves time; saves money; is desired by senior management; uses expertise of a third-party neutral; preserves good relationships between disputing parties; provides more durable resolution of disputes; is required by contract; preserves confidentiality; avoids establishing legal precedents; gives more satisfactory settlements; provides a more satisfactory process; is court mandated; allows parties to resolve disputes themselves; and has limited discovery. We want to underscore the fact that several of these items (saves time, saves money, preserves good relationships, etc.) asked the respondent to make a comparison with litigation. At least two other items (is required by contract and is court mandated) do not require the respondent to make a comparison with litigation.

Of the 368 respondent companies, 361 answered that at least one of these items explained their decision to use ADR instead of litigation. We maintain that many of the items listed are, indeed, manifestations of certain organizational strategies, which may be either explicitly developed or merely latent, that are commonly found across corporations. We also maintain, however, that some of the items are inconsistent with the conception of strategic thinking. For example, in conducting factor analysis (reported below) we drop the item "is court mandated" because we seek to explain the use of arbitration and mediation when those techniques are



policies adopted by a corporation and not imposed by an outside authority. Similarly, we also drop the item “is required by contract” because this item implies an organizational reaction to a negotiated requirement that may be entirely separate from a strategic initiative pursued by a corporation. To account for non-strategic factors that affect the use of ADR, we treat contractual requirement as a variable separate from strategic factors in our models.<sup>5</sup>

We performed a series of confirmatory factor analysis (CFA) tests on the items listed.<sup>6</sup> In order to determine model fit, we assess the  $\chi^2$  values versus a saturated model, the root mean square error of approximation (RMSEA), and the comparative fit index (CFI), each of which, when taken together, demonstrates goodness-of-fit (see Bollen and Stine 1992). We add to this information both the Bayesian Information Criterion (BIC) and Akaike Information Criterion (AIC) for each model, which are other common measures of relative fit. Lower  $\chi^2$ , RMSEA, AIC, and BIC values and higher CFI values indicate better fit. The CFA results are shown in Table 1.

[Table 1 about here]

We first model strategy as a single omnibus factor, which includes all items suitable for analysis. All tests indicate poor goodness of fit when treating strategy as unidimensional ( $\chi^2=220.160$ ,  $p<.01$ ; RMSEA=0.121; AIC=4289; CFI=0.738). This is not particularly surprising, given our expectations that strategic orientations would be comprised of several dimensions and not a single omnibus measure.

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<sup>5</sup> We also drop the items “is desired by senior management” and “uses expertise of a third-party neutral.” These two items are dropped from our factor analysis because, in our judgment, they are clearly not proxies for strategic thinking. Management’s desire to use ADR is likely to be a *product* of strategies, not a component of them, while neutral expertise is valuable irrespective of the strategy adopted by the organization. Our decision to drop each of these four items is supported by the results of our factor analysis, which are available on request, that show no significant value is gained by including them in our analysis.

<sup>6</sup> The CFA tests were run in Stata, using the `-sem-` command. Following CFA, we computed factor scores using the `-predict-` post-estimation command, and used these factor scores as our key independent variables. We employed the same process for both our strategy and commitment variables.

Second, we consider whether strategy might constitute two factors--one that combines efficiency and sustainable/satisfying resolutions and a second that considers limiting exposure to litigation. Efficiency includes the items “saves time,” “saves money,” and “has limited discovery.” Sustainable/satisfying resolutions includes the items “provides a more durable resolution (compared to litigation),” “allows parties to resolve disputes themselves,” “preserves good relationships between disputing parties,” “gives more satisfactory settlements,” “provides a more satisfactory process,” and “preserves good relationships between disputing parties.” Limiting exposure to litigation consists of “preserves confidentiality,” “avoids establishing legal precedents,” and “has limited discovery.” The process of discovery is, as previously noted, both time-consuming and costly and also makes firms susceptible to potential exposure, so we expect that it should underpin both efficiency and exposure limitation strategies. The two-factor model performs better than the omnibus measure but still fails to meet the various thresholds of acceptability under CFA (for instance, RMSEA values are above 0.05,  $\chi^2$  values remain statistically significant relative to the saturated model, and CFI values are still below 0.90; all these results are problematic). Again, these results are not unexpected, given our view regarding the factors underpinning strategic orientations in ADR.

We next assess the three-factor model that we initially believed should most closely comport with our hypotheses regarding latent strategic orientations. This model considers efficiency, sustainable/satisfying resolutions, and exposure limitation as three dimensions of strategy. Table 1 shows that we find a much better fit ( $\chi^2=68.167$ ,  $p<.01$ ; RMSEA=0.058; AIC=4145; CFI=0.947) than we do for either of the first two models, with some standard indications of acceptability in a three-factor model.

Somewhat unexpectedly, however, the three-factor model of organizational strategy does not perform as well as a four-factor model, which treats satisfaction as a dimension separate from sustainable resolutions. We tested this four-factor model and found that it had the best fit of all those we tested ( $\chi^2=33.660$ ,  $p>.10$ ; RMSEA=0.026; AIC=4119; CFI=0.991). Our CFA results demonstrate that the firms in our sample separate their view that ADR policies lead to more sustainable resolutions than litigation from their view that ADR policies also lead to higher levels of organizational satisfaction with the outcomes reached by using ADR, the processes used to achieve those outcomes, and the relationships preserved by the parties in workplace disputes. This fourth factor, in sum, reflects our survey respondents' satisfaction with the perceived procedural, distributive, and interactional satisfaction benefits of using ADR rather than litigation to resolve workplace disputes. The notion that satisfaction is an important and independent dimension of ADR has been studied in the context of employee attitudes about the introduction of conflict management systems (Eigen and Litwin 2014) but has otherwise rarely been viewed as a distinctive strategic dimension of the use of ADR.

Accordingly, given the strength of our results, we have chosen to pursue this four-factor model in our analysis, separating satisfaction from sustainable resolutions.<sup>7</sup> In so doing, we have also slightly modified our hypotheses. Our expectations about efficiency and limiting exposure to litigation remain the same, and we continue to believe that sustainable resolutions are likely to drive mediation usage (for the reasons we discussed in an earlier section), but we now posit that firms that value satisfaction are more likely to use *both* arbitration and mediation in workplace

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<sup>7</sup> We cross-load relationship preservation on both dimensions of strategy because we believe that this item is both a useful proxy for interactional justice and also a determinative aspect of sustainable resolutions. As a series of robustness checks, we also considered a five factor model (treating relationship preservation as a latent strategy) and made various adjustments to the composition of the four factors. None of our additional tests produced results that fit better than the four-factor model reported in this paper.

disputes. Relative to litigation, we believe that both ADR mechanisms will be perceived by corporations as superior to litigation because of their perceived procedural, distributive, and interactional benefits.

### **The Relationship between Strategic Choice and ADR Practices**

Having used factor analysis to establish that four latent strategic orientations emerge when Fortune 1000 corporations are asked why they use ADR instead of litigation, we next assess the extent to which these factors are associated with different dispute resolution practices. To explore whether the use of ADR, particularly arbitration and mediation, might depend on the strategic orientation of the organization, we were able to use questions in our survey about how frequently the respondents thought their corporations used either voluntary mediation or binding arbitration when dealing with employment disputes among their non-union workforce.<sup>8</sup> Respondents could answer on a 1-5 scale (1=never, 2=rarely, 3=occasionally, 4=frequently, 5=always) for their use of both employment mediation and arbitration. The majority of respondents that their organizations used mediation either occasionally (35 percent) or frequently (44 percent); only three percent said they never used mediation, while seven percent of the firms indicated that they always used mediation. Conversely, when asked about their use of arbitration, 45 percent indicated that they never arbitrated non-union employment disputes and

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<sup>8</sup> Corporations vary on how either mediation or arbitration can be initiated in any given dispute, and the trigger for the use of one mechanism or the other depends on the specifics of the corporation's dispute resolution policies. ADR policies are usually designed to handle employee complaints (rather than management or supervisor complaints); accordingly, an employee complaint triggers the use of a corporation's ADR policies. But whether an employee's complaint is then handled by mediation, arbitration, or another ADR option depends primarily on whether the firm has mandatory or voluntary ADR policies. In a corporation that uses mandatory ADR policies, an employee with a complaint is required to use the ADR procedures (mediation, arbitration, etc.) the organization makes available; in a corporation that uses voluntary ADR policies, an employee has some degree of choice based on available ADR procedures for seeking the means of resolving his/her complaint (e.g., arbitration rather than litigation, or vice versa). As such, it is important to acknowledge the fact that our dependent variable is, to some extent, influenced by individual employee choice. Nevertheless, we maintain that the use of various ADR methods by nonunion employees is shaped primarily by organizational choices and managerial preferences. .

24 percent said that they rarely used it. Only 12 percent responded that they frequently arbitrated these types of claims, while four percent said they always used arbitration. The four percent that always used the practice included companies well-known for their mandatory employment arbitration procedures, such as KBR (the Halliburton subsidiary) and DISH Network.

Our key independent variables are the four factor scores, gleaned from our CFA results, which are used to measure strategic orientation: efficiency, satisfaction, sustainable resolutions, and limiting exposure to litigation. We also create another key independent variable measuring the extent to which the corporation has committed to using ADR policies for resolving employment disputes. To assess commitment, we include an omnibus factor derived from several items in our survey that we believe characterize commitment (see Appendix A for the exact wording of each question included in the factor analysis). One item is the *availability* of a firm's ADR program, as measured by the percentage of the non-union workforce covered by its ADR policies. Another is the extent to which the company uses *mandatory ADR*, that is, requires that its employees use the firm's ADR program before proceeding to litigation. Additional items reflect the *scope* of the firm's ADR policies: are the corporation's ADR policies used to handle only disputes over wages, hours, and working conditions? Or are they also used to handle employees' statutory complaints? We also include a measure of whether the firm's ADR practices are a product of company *policy*, rather than merely *ad hoc* in nature. Finally, we include an item indicating whether the corporation's ADR procedures comply with the *Due Process Protocol* for statutory employment disputes.<sup>9</sup> Given our fit statistics under CFA ( $\chi^2=8.091$ ,  $p>.10$ ; RMSEA=0.028; AIC=1695; CFI=0.997), we believe that, when taken as a

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<sup>9</sup> When including the Due Process Protocol compliance question, we code all "don't know" answers as "no" on the assumption that, if the general counsel did not know whether the company complied with the Protocol, it was likely that the firm did not comply.

singular scale, each of these items combines to create a good proxy for the firm's overall commitment to ADR.<sup>10</sup>

We also control for a variety of firm characteristics in our tests to help mitigate against the possibility that our key measures could be conflated with other factors that might also shape the frequency of employment mediation and arbitration usage. First, as noted, we account for instances where corporations might be required to use a dispute resolution technique because of contractual requirements. We also control for firm size, on the assumption that larger firms, because of their greater financial and human resources, might be more frequent users of mediation and arbitration (size is broken into the following categories: 5,000 employees or less; 5,000 to 10,000 employees; 10,001 to 25,000 employees; 25,001 to 50,000 employees, and 50,001 or more employees). Additionally, we include a proxy for the overall financial health of the company near the time of the survey, which is measured by the total revenue produced by the firm in 2009 (revenue is categorized into less than \$2.5 billion; \$2.5 to \$5 billion; \$5 to \$10 billion; and greater than \$10 billion).<sup>11</sup>

We also control for the industry in which the firm operates (categorized into financial or investment firms; manufacturing companies; retail and wholesale trade firms; services corporations; and all others). It may be the case that firms within different industries have

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<sup>10</sup> Within this omnibus factor, we allow the error terms for ADR usage in wage disputes and ADR usage in statutory disputes to co-vary (we assume that if a firm uses ADR for one dispute type it is likely to also use ADR for other types). We also allow for error covariance between ADR coverage and having a company policy as an ADR trigger (firms with higher coverage are probably also more likely to have a policy triggering the use of ADR). Additionally, we explored whether other survey items might contribute to a latent ADR commitment structure. One item asked the following: If an employee has a complaint, can he or she go to his/her immediate supervisor, the HR office, the EEO office, and/or the general counsel's office? The second asked whether the employer paid for the costs of handling employment disputes. Conceivably, being able to take a claim to any office or supervisor and having the employer agree to pay all legal costs could be indicators of ADR commitment. However, we found no evidence that these questions improved our model, so we excluded them from our final omnibus commitment measure.

<sup>11</sup> We also tested other definitions of corporate revenue. For example, the variable could be measured continuously; we also tested a measure of the corporation's overall revenue rank in the Fortune 1000. Additionally, we created a variable capturing revenue per employee by dividing total revenue by number of employees. Altering the revenue variable by using any of these definitions does not affect the results reported in this article.

distinctive strategies toward conflict, or that industry is serving as a proxy for a variety of differences in the culture and organizational dynamics of a company. In an effort to capture variation in the competitiveness of an industry, we also include a dummy variable denoting whether the industry in which the corporation is located was subject to federal deregulation over the past 40 years. Federal deregulation of industry began under President Nixon and was accelerated during the Carter and Reagan administrations. Among the industries that have been deregulated are airlines, railroads, trucking, ocean transportation, energy, telecommunications, and finance (Belzer 2000; Derthick and Quirk 1985). Deregulation, of course, was intended to make an industry more competitive, and a firm in a more competitive industry faces increasing pressure to cut its costs. Pressure to cut costs (including legal costs), we hypothesize, leads firms to use ADR.

To account for the possibility that firms with a union presence might behave differently with regard to their non-union conflict management practices from those without any unionized employees, we include a dummy variable indicating that at least some of the company's employees were unionized.<sup>12</sup> About 43 percent of the firms in our sample, our survey revealed, had no unionized employees at all; only 19 percent of the firms reported that more than 75 percent of their employees were unionized. This variable provides a preliminary means of testing whether union avoidance was a strategy driving firms to adopt ADR: we hypothesized that firms with no unionized employees would be more likely to rely on employment mediation and

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<sup>12</sup> Respondents were asked, "In your U.S. operations, what percentage of your workforce is unionized?" The GC could select either 0%, 1-10%, 11-20%, 21-30%, or more than 30%. We collapse these categories into a dummy variable indicating any union presence, though results are identical if we use the full categorical measure.

arbitration more frequently than firms with unionized employees.<sup>13</sup> Finally, we include location (state-based) fixed-effects in all our regression models, based on the location of the company's headquarters. By including location fixed-effects, we are able to account for a number of uncodified geographic differences across the respondent firms, including the specific state-level legal and regulatory environments in which the firm's headquarters operates, and a number of other environmental factors that might be captured by accounting for location.

### **Ordinal Regressions**

To examine the relationship between ADR strategic orientations, commitment to ADR, and the frequency with which a firm uses employment mediation or arbitration, we perform ordinal regressions. The results are found in Table 2.

[Table 2 about here]

Two of the four strategic orientation factors that emerged from the CFA predict increasing frequency of mediation usage. As firms scored higher on the efficiency orientation factor, they were increasingly frequent users of mediation ( $\beta=1.638$ ; S.E.=.590;  $p<.01$ ). Similarly, companies with a stronger satisfaction orientation also relied on mediation more heavily ( $\beta=1.402$ ; S.E.=.748;  $p<.10$ ). However, having stronger orientations on both sustainable resolutions and exposure limitation did not influence a firm's use of mediation to resolve its workplace disputes.

The outcomes for mediation can be compared with those found when assessing the frequency of a firm's use of employment arbitration. Corporations that valued ADR for its efficiency, sustainable resolutions, or exposure limitation features were no more or less likely to

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<sup>13</sup> We tested several versions of the union variable and found that changing the definition of the variable did not alter our regression results. Arguably, it might be more valid to test the relationship between unionism and a firm's ADR *policies* rather than a firm's ADR *usage*. Earlier research has uncovered a more complex, nuanced relationship between union avoidance and ADR than we can explore in this article. See Avgar et al. 2013.



use arbitration frequently than firms that did not value these aspects of ADR. However, firms with stronger orientations on the satisfaction they obtained from using ADR were more likely ( $\beta=1.762$ ; S.E.=.824;  $p<.05$ ) to turn to arbitration more frequently as their ADR mechanism of choice. Thus, our hypotheses about the relation between firms' strategic orientations and ADR usage are only partially supported by our statistical results. On the one hand, as we hypothesized, firms that valued the efficiency of mediation and the likelihood of achieving satisfactory settlements used mediation frequently; on the other hand, contrary to our hypothesis, firms that desired to limit their exposure to litigation could not be distinguished from firms that did not have that orientation in how frequently they used arbitration. Instead, it was firms' satisfaction with the outcomes of arbitration that motivated them to use this dispute resolution method.

As we hypothesized, corporations with higher levels of commitment to employment ADR more frequently used both mediation ( $\beta=.433$ ; S.E.=.125;  $p<.01$ ) and arbitration ( $\beta=1.702$ ; S.E.=.168;  $p<.01$ ). The strength of this finding strongly supports our theoretical model that posits that one needs to control for a firm's commitment to ADR if one wants to understand fully the strategic orientations driving a firm to use ADR policies and practices.

In tests not shown but available on request, we use seemingly unrelated regressions with our mediation and arbitration models to test whether the strategic orientation and commitment coefficients differed across the two equations. This approach allowed us to explore the extent to which there was a significant difference in the influence of our strategy and commitment findings depending on the chosen ADR mechanism. We find significant differences in our coefficients for efficiency ( $p<.05$ ) and commitment ( $p<.01$ ) but not satisfaction or sustainable resolutions. This result supports the ordinal regression outcome coefficients for strategy, which suggest that efficiency is related to mediation but not arbitration usage, satisfaction is related to

both practices, and neither sustainable resolutions nor exposure limitation is related to either mechanism. The seemingly unrelated regression outcomes also indicate that, although commitment meaningfully influences both mediation and arbitration usage, the magnitude of the effect is stronger with regard to arbitration than mediation.<sup>14</sup>

Aside from strategic orientation and commitment, we find evidence that other factors associated with the frequency of firms' use of either employment mediation or employment arbitration differ within our sample. For example, not surprisingly corporations were far more likely to use arbitration because it was required by contract ( $\beta=1.337$ ; S.E.=.412;  $p<.01$ ), whereas a contractual requirement did not influence firms' use of mediation.

Also, firm size was not associated with variations in the frequency of employment mediation, but significantly contributed to the frequency of the use of employment arbitration, with larger firms more likely to turn to arbitration than smaller firms ( $p<.01$  for all size categories). Corporate financial health was unrelated to either mediation or arbitration frequency. Regarding industry, relative to financial/investment companies, those in manufacturing were more likely to use mediation ( $\beta=1.383$ ; S.E.=.484;  $p<.01$ ) but less likely to use arbitration ( $\beta=-1.614$ ; S.E.=.540;  $p<.01$ ). Retail firms also used employment arbitration less often ( $\beta=-1.379$ ; S.E.=.558;  $p<.05$ ), while those in industries that did not fit in the chosen categories were more likely to mediate their disputes than were financial or investment firms ( $\beta=1.479$ ; S.E.=.594;  $p<.05$ ). Finally, union presence was unrelated to either the use of non-union employment mediation or the use of non-union arbitration, while deregulation (contrary to our expectations)

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<sup>14</sup> Seemingly unrelated regression analysis is an imperfect way of testing whether coefficients differ significantly across models because it presumes OLS, not ordinal regressions. However, we are unaware of any other methods by which identical independent variable structures can be tested against each other with differing dependent variables except for the seemingly unrelated regression framework.

was associated with decreased mediation frequency ( $\beta=-.813$ ; S.E.=.404;  $p<.05$ ) and had no relation to arbitration frequency.

### **Discussion and Conclusions**

We believe our paper makes a number of contributions to the study of workplace dispute resolution, in general, and to the study of mediation and arbitration, in particular. First, our confirmatory factor analysis provides strong support for the argument that the motivations driving firms to use ADR can be categorized into a set of coherent strategic orientations. We had initially proposed three overarching strategic orientations but found evidence to support four separate, distinguishable, and internally consistent bundles. Specifically, we found that the strategic drivers for ADR usage include: 1) improving organizational efficiency; 2) providing sustainable resolutions of employment disputes; 3) enhancing parties' satisfaction with ADR outcomes; and 3) limiting the firm's exposure to litigation. This evidence is important because it supports the proposition that the adoption of ADR is the product, among other factors, of strategic choice. Demonstrating coherent and conceptually sound strategic factors indicates that, in making ADR-related decisions, firms distinguish between very different types of potential benefits. It is important to note that the four-factor model that emerged from our analysis is consistent with our general argument regarding variation in organizational strategic motivations. Firms, according to this analysis, distinguish between ADR's capacity to provide the durable resolution of employment disputes from its ability to enhance satisfaction with ADR outcomes.

Our findings go beyond documenting the existence of clear and distinguishable strategic orientations. We document a relationship between a firm's dominant strategic orientations and the use of two different practices, namely, mediation and arbitration. Specifically, we find that firms with a strategic orientation that values efficiency are significantly more likely to use

mediation frequently than firms that place less value on efficiency. Similarly, firms focused on enhancing their satisfaction with ADR outcomes are also significantly more likely to use mediation frequently than firms that attach less value to this benefit. A satisfaction orientation was also found to be significantly related to the frequency of arbitration usage. Taken together, this evidence documents an important link between a firm's strategic posture towards ADR and its actual use of different practices.

These findings are interesting in a number of ways that are worth noting. First, our findings regarding the relationship between an efficiency orientation and the frequency of mediation use support our hypothesis and suggest that firms that are focused on logistical and financial efficiencies are more likely to rely on mediation as a preferred method to resolve workplace conflict. Second, consistent with our hypothesis, we found a significant relationship between a satisfaction orientation and the frequency of mediation use, but we also found a significant relationship between satisfaction and firms' frequency of the use of arbitration, which we did not hypothesize. These findings suggest that firms focused on the benefits of the satisfactory outcomes associated with ADR (compared to the outcomes associated with litigation) are more likely to use both forms of ADR. Despite our expectations, firms appear to view the use of both mediation and arbitration as capable of advancing this organizational objective.

It is also important to highlight what we did not find. Contrary to our hypotheses, we did not find a significant relationship between a firm's focus on the durability of conflict resolution outcomes and the frequency of mediation use. This is surprising since it runs counter to much of the literature on mediation, which emphasizes the unique advantage of this interest-based option in delivering resolutions that are based on the parties' needs and interests and, therefore, much

more durable and sustainable than other techniques (see, for example, Moore 2014). Future research will need to explore the extent to which a firm's strategic orientation on the sustainability of ADR outcomes may be related to other conflict resolution methods beyond mediation and arbitration.

Similarly, the fact that we did not find a significant relationship between a strategic orientation that focuses on limiting the firm's exposure to litigation and the use of either arbitration or mediation was also surprising. One of the most widely held assumptions in the dispute resolution field is that an organization's decision to adopt and use ADR--especially arbitration--is strongly motivated by a desire to minimize its exposure to litigation and its associated costs. The rise of ADR in the United States has commonly been seen as a reaction on the part of organizations and individuals to the high cost and time-consuming nature of litigation. Research shows that in the 1980s and 1990s firms believed that arbitration and mediation would serve as sufficient and effective substitutes for litigation. Previous empirical evidence supports the view that in the early days of the so-called "ADR revolution" using arbitration and mediation were the principal methods organizations--particularly corporations--used to avoid litigation (Stipanowich and Lamare 2014). But more recent research demonstrates that organizations increasingly believe that arbitration has become nearly as complex, time consuming, and expensive as litigation (see, for example, Lipsky, Avgar, and Lamare, 2016), and this belief may help explain the lack of a relationship between a corporation's desire to limit its exposure to litigation and its use of arbitration.

Our findings do show, however, that corporations continue to rely on mediation and (especially) arbitration because they believe these practices result in more satisfactory outcomes than litigation. Our interviews with corporate attorneys and managers (as well as research by

other scholars) help to explain this result. Arbitration, in contrast with litigation, allows employers to maintain nearly total control over the rules that lead to the outcomes of employment disputes. Recent court decisions have reduced the degree of employer flexibility in this regard, but employers continue to retain considerable discretion over how employment arbitrations are conducted. Employers can, for example, insure the confidentiality of the proceedings, exercise significant influence on the selection of the neutral, and limit discovery. Perhaps most importantly, there is a growing cadre of experienced and talented neutrals who specialize in employment disputes, and most employers would prefer to have these neutrals decide such disputes, rather than judges and juries.

A third contribution of this paper is the establishment of a relationship between an organization's commitment to ADR and its use of mediation and arbitration. Our findings support the argument that firms vary in terms of their overall commitment to ADR and that this variation helps to explain variation in usage patterns. Greater levels of commitment to ADR are, according to our findings, associated with the increased use of both mediation and arbitration. Thus, our analysis suggests that firms not only make strategic choices about their use of mediation and arbitration (and possibly other ADR options) but also need to decide their level of commitment to these practices once they are adopted.

Our study is not without limitations. First, our data were collected using a single respondent—the general counsel or a high-ranking attorney in the GC's office. This raises the usual challenges associated with a single respondent, including questions of bias and reliability. Nevertheless, given the nature of the questions posed in our survey, which centered on the dispute resolution practices employed by the firm, we are confident that our respondents were in the best position to complete the survey in an accurate and informed manner. Second, our data is

cross-sectional and as such limits our ability to make causal inferences about the relationship between our strategic choice variables and ADR usage. We are, nevertheless, confident in the theoretical foundation for our hypothesized effects. Furthermore, we believe that documenting a significant association between strategic orientation and ADR commitment, on the one hand, and the use of mediation and arbitration, on the other, is in and of itself a contribution to the existing literature. Finally, our study focuses on two specific types of ADR practices—mediation and arbitration—that are by far the most dominant of all ADR techniques. Building on our foundation, future research is needed to examine the relationship between firms' strategic choices and other forms of ADR.

## Appendix A

The following questions were used to derive our ADR commitment factor:

1. What proportion of your employees are covered by either voluntary mediation, non-binding arbitration, binding arbitration, and/or other forms of ADR?
  - a. 0%
  - b. 1-25%
  - c. 26-50%
  - d. 51-75%
  - e. more than 75%
  
2. Of the following mechanisms, which **one** most often triggered the use of ADR in **employment disputes** in your company?
  - a. Part of a contract
  - b. Ad-hoc / voluntary basis
  - c. Company policy
  - d. Court mandate
  - e. Other
  
3. Do your ADR procedures to resolve employment disputes cover wages, hours and working conditions? (yes or no)
  
4. Do your ADR procedures to resolve employment disputes cover statutory claims? (yes or no)
  
5. Would you say that, in general, the ADR procedures for handling employee complaints are mandatory or voluntary? As an example: In a system with mandatory procedures, an aggrieved employee might be obligated to first use programs such as mediation, arbitration, etc. In a system with voluntary procedures, an employee could go directly to litigation without using any such programs.
  - a. Voluntary
  - b. Mandatory
  
6. True or False: Our procedures comply with the Due Process Protocol for statutory employment disputes.
  - a. False
  - b. True



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**Table 1: Confirmatory Factor Analysis**

	$\chi^2$	RMSEA	AIC	BIC	CFI
One Factor Model (Unidimensional Strategy Measure)	220.160***	0.121	4289.724	4406.391	0.738
Two Factor Model (1) Efficiency and Sustainable/Satisfying Resolutions; (2) Exposure Limitation	198.169***	0.118	4271.733	4396.177	0.766
Three Factor Model (1) Efficiency; (2) Sustainable/Satisfying Resolutions; (3) Exposure Limitation	68.167***	0.058	4145.731	4277.953	0.947
Four Factor Model (1) Efficiency; (2) Sustainable Resolutions; (3) Satisfaction; (4) Exposure Limitation	33.660	0.026	4119.225	4267.002	0.991

\*\*\* =  $p < .01$ ; \*\* =  $p < .05$ ; \* =  $p < .10$  (versus saturated model – non-significance indicates best fit)

Note: Efficiency = saves time, saves money; has limited discovery

Satisfaction = gives more satisfactory settlements; provides a more satisfactory process; preserves good relationships between disputing parties

Sustainability = provides more durable resolution (compared to litigation); allows parties to resolve disputes themselves; preserves good relationships between disputing parties

Exposure Limitation = preserves confidentiality; avoids establishing legal precedents; has limited discovery

**Table 2: Ordinal Regressions**

	<b>Mediation Usage Frequency</b>	<b>Arbitration Usage Frequency</b>
	Coefficient (Standard Error)	Coefficient (Standard Error)
<b>STRATEGY AND COMMITMENT FACTORS</b>		
Efficiency	1.638*** (.590)	-.658 (.635)
Sustainability	-1.551 (1.394)	-.511 (1.505)
Satisfaction	1.402* (.748)	1.762** (.824)
Exposure Limitation	3.294 (2.287)	-2.685 (2.574)
Commitment to ADR	.433*** (.125)	1.702*** (.168)
<b>CONTROLS</b>		
Use ADR Because It Is Required by Contract	-.484 (.345)	1.337*** (.412)
Firm Size: 5,000 to 10,000 Employees	.327 (.437)	1.500*** (.527)
Firm Size: 10,001 to 25,000 Employees	.480 (.447)	1.747*** (.515)
Firm Size: 25,001 to 50,000 Employees	.831 (.528)	2.016*** (.567)
Firm Size: 50,001 + Employees	.799 (.622)	1.826*** (.662)
Total Revenue: \$2.5 to \$5 Billion	.247 (.404)	-.144 (.449)
Total Revenue: \$5 to \$10 Billion	.044 (.467)	-.360 (.501)
Total Revenue: \$10 Billion +	.127 (.540)	-.725 (.587)
Industry: Manufacturing	1.383*** (.484)	-1.614*** (.540)
Industry: Retail and Trade	.743 (.510)	-1.379** (.558)
Industry: Services	.966* (.516)	-.051 (.531)
Industry: Other	1.479** (.594)	-.625 (.638)
Industry Is Deregulated	-.813** (.404)	.439 (.441)
Company Has a Union Presence	-.137 (.299)	.266 (.323)
State Fixed-Effects	Yes	Yes
N	266	265
$\chi^2$	98.33***	236.66***
pseudo-R <sup>2</sup>	0.337	0.774

\*\*\* = p<.01; \*\* = p<.05; \* = p<.10

Note: Reference categories are: 5,000 employees or less; \$2.5 billion revenues or less; financial industry. Mediation and arbitration frequency are measured from 1-5, where 1 = never and 5 = always.