

**An Uncertain Destination: On the Development of Conflict Management
Systems in U.S. Corporations**

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INTRODUCTION

For nearly two decades a "quiet revolution" has been occurring in the American system of justice. There has been a dramatic growth in the use of alternative dispute resolution (ADR) to resolve disputes that might otherwise be handled through litigation. We define ADR as *the use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute*.¹ In the United States, mediation, arbitration, and their variants are ordinarily private processes in which the disputants themselves select, hire, and pay the third-party neutral who resolves, or attempts to resolve, their dispute.

In some industries, such as construction, ADR has been used extensively for several decades; similarly, in some types of disputes, such as those arising in labor-management relations, ADR (in the form of arbitration and mediation) has been used for nearly a century, but most especially since the end of World War II. In most industries and in most types of disputes, however, the use of ADR is a relatively recent phenomenon. The diffusion of ADR began in earnest in the 1970s and accelerated in the 1980s.² Many American corporations are now using ADR routinely to resolve a wide variety of disputes. In 1997, two of the authors of this paper surveyed the corporate counsel of the Fortune 1000 and discovered that eighty-eight percent of the respondents reported using mediation and seventy-nine percent reported using arbitration at least once in the preceding three years. In fact, the "typical" (or median)

¹ David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (1998).

² See, e.g., Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 Ohio St. J. on Disp. Resol. 1 (2000); E. Wendy Trachte-Huber & Stephen K. Huber, *Alternative Dispute Resolution: Strategies for Law and Business* (1996); U.S. Comm. on the Future of Worker-Management Relations ("The Dunlop Commission"), *Report and Recommendations* (1994).

corporation had used ADR on numerous occasions in almost every kind of dispute, particularly commercial, contractual, and employment disputes.³

We found that a vanguard of corporations had moved beyond the use of ADR as a *matter of policy or practice* and had adopted the use of some form of a *conflict management system*.⁴ A small number of corporations had rejected the use of ADR entirely. On the basis of our research, we realized that there was a great deal of variance in the choice of a conflict management strategy by U.S. corporations, ranging from traditional reliance on litigation, to experimentation with various ADR techniques, to the adoption of a full-blown conflict management system. The variance in the corporate choice of a conflict management strategy intrigued us greatly, and in the next phase of our research we began to develop a model that would explain this variance.

The meat of this paper is an exposition of the analytical model we developed that we believe explains the choice of strategy. We readily acknowledge that we have not yet rigorously tested the central tenets of our model — although we believe it would be possible to do so. We maintain, however, that our model is supported by the evidence we have obtained to date, including not only the data in our extensive 1997 survey but also additional evidence we have gathered in approximately twenty corporate case studies we have conducted over the past three years.

Our survey and field research have led us to some tentative conclusions that do not conform to the conventional wisdom of our field. From its inception, ADR has been controversial. On the one hand, ADR has been embraced by a coterie of "champions" who have always believed that its advantages over litigation were so obvious and compelling it would only be a matter of time before ADR was adopted

³ Lipsky & Seeber, *supra* note 1, at 9.

⁴ ADR in the Workplace, Track I Committee, Guidelines for the Design of Integrated Conflict Management Systems within Organizations (2000); Cathy A. Costantino & Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (1996).

universally. These champions have also been missionaries, proselytizing their faith in all quarters and making numerous converts. Like all true believers, ADR champions cannot understand why others have not yet "gotten the faith." On the other hand, there has always been a group of ADR opponents who believe ADR undercuts our system of justice and must be resisted.⁵ ADR champions believe in the inevitability of ADR, while ADR opponents believe the movement to ADR can be stopped and even reversed. On balance, we believe in ADR's merits and share many of its champions' convictions. Our research — which is based on the analytical model we present in this paper — suggests, however, that there is nothing inevitable about the ultimate triumph of ADR.

Indeed, in some of the organizations we have studied, the use of ADR may have already peaked and a return to more traditional approaches to conflict management may have begun. The research we have conducted underscores our belief that the future of ADR in American corporations depends on the extent to which ADR policies and practices become institutionalized — that is, whether they become a more or less permanent part of the culture of the organization. Of course the future is uncertain, but it is entirely possible that the worst fears of ADR's champions — and the fondest hopes of its opponents — may come to pass. Instead of advancing steadily into the future, ADR may find itself in retreat. Because we personally believe the advantages of ADR significantly outweigh its disadvantages, we would regret such a development. As social scientists, however, we need to report the truth as we find it. We hope our research will serve to strengthen the resolve of ADR's proponents rather than give comfort to its opponents.

⁵ See, e.g., Katherine Van Wezel Stone, Mandatory Arbitration of Individual Rights: The Yellow Dog Contract of the 1990s, 73 *Denv. U. L. Rev.* 1017 (1996).

The Advantages and Disadvantages of ADR

Many organizations have adopted ADR because they believe it is a means of circumventing the expensive, time-consuming features of conventional litigation.

The parties in a conventional court proceeding often invest considerable money and energy, from the time of the initial filings in a court suit, through interrogatories and depositions, to the time of the trial itself, and, in ninety percent of all cases, negotiate a settlement "on the courthouse steps" or in the judge's chambers. The costs of litigation include, of course, not only the awards or settlements themselves but also the so-called "transaction costs" associated with settling disputes, including the costs of inside and outside legal counsel, of expert witnesses, of gathering documents and engaging in discovery, and so forth. In the U.S. the transaction costs of litigation are often two or three times greater than the settlements themselves.⁶ Moreover, this calculation does not include the value to the disputants of the time saved as a consequence of resolving disputes quickly — reducing these "opportunity costs" may be the largest benefit of using ADR.

In theory, ADR is a means of circumventing the expensive, time-consuming features of conventional litigation. ADR processes are not usually confined by the legal rules that govern court proceedings, such as those governing the admissibility of evidence and the examination of witnesses. Arbitrators, for example, may conduct expedited hearings, dispense with pre- or post-hearing briefs, consider hearsay evidence, and allow advocates to lead their witnesses. Discovery is almost never a part of the mediation process and is used only slightly more often in arbitration, usually when the parties request it. The parties have significantly more control over the ADR process than they would over a court proceeding. Within broad limits, the parties can design the ADR procedure themselves. Because

⁶ David B. Lipsky & Ronald L. Seeber, In Search of Control: The Corporate Embrace of ADR, 1 U. Pa. J. Lab. & Emp. L. 133,142 (1998).

the disputants often jointly select the neutral, they are likely to have more trust and confidence in the neutral's ability than they would in a judge who otherwise would be assigned to hear the case.

Moreover, compliance with the eventual settlement is less likely to be a problem when the disputants have controlled the process that produced the outcome.

Although there are many advantages to the use of ADR, some observers contend that it poses a substantial threat to the system of justice in the United States. ADR in effect transfers the dispute resolution function from public forums (the courts, regulatory agencies, etc.) to private ones. Typically, ADR proceedings are private and confidential, in contrast to court decisions. For example, arbitration decisions are seldom published because they are considered the property of the disputants. The increasing privatization of the American system of justice, critics maintain, poses serious challenges for the guarantees of due process and equality under the law.⁷

Data Collection and Methodology

Several years ago we began a long-term study of the use of ADR by American corporations. In our 1997 survey of the Fortune 1000 companies' use of ADR, we succeeded in interviewing the counsel, deputy counsel, or chief litigator in 606 of these corporations.⁸ We then began a series of onsite interviews at approximately twenty of the corporations that had been included in the survey, with a view toward compiling comprehensive case studies about these organizations' dispute resolution strategies and policies. The corporations included in our series of case studies are listed in the Appendix. In conducting these corporate case studies, we purposely included companies that had a variety of

⁷ Michael Delikat & Rene Kathawala, Arbitration of Employment Discrimination Claims Under Pre-Dispute Agreements: Will Gilmer Survive? 16 Hofstra Lab. & Emp. L. J. 83 (1998); Stone, *supra* note 5, at 1036.

⁸ Lipsky & Seeber, *supra* note 6.

dispute resolution policies, ranging from strongly pro-ADR to strongly anti-ADR. We also tried very hard (but with incomplete success) to include companies from a wide variety of industries.

To select the companies we wanted to use for case studies, we used the results of a question contained in our 1997 survey that dealt with corporate policy toward ADR. Responses to that question revealed significant variation in the ADR policies and procedures adopted by major U.S. corporations. On one end of the spectrum, a handful of corporations used ADR as a matter of policy in all types of disputes. On the other end of the spectrum, a small number never used ADR in any type of dispute. The vast majority of corporations, however, had a pragmatic view of ADR, using it when they thought it was appropriate but not fully embracing nor completely rejecting it as a matter of policy.⁹ We attempted to construct a list of companies for interviews that represented the full spectrum of opinion on the subject from those who "always attempted to use ADR" to those who "never use ADR." We also felt it critical to get a wide spectrum of opinion within the company. Therefore, we attempted to interview not just corporate counsel, but also the chief financial and human resource officers. We hypothesized that one important aspect of the development of conflict management systems would be the integration of ADR policies across functional lines of responsibility and dispute areas. While we were not successful in gaining complete access to all the companies we sought to include in our sample, we do believe we were able to gain enough access to get an understanding of policy development and strategic choice regarding ADR in a sufficient number of the companies we had targeted. In some cases, we were not able to obtain permission to reveal the names of the officials we interviewed or to identify the names of the companies that provided information. Throughout this paper, we will sometimes reveal the names of companies or individuals, but in other cases we will not.

⁹ Id.

We intentionally concentrated on corporate decision-making for two principal reasons. First, although there has been considerable research on various aspects of the operation of various ADR procedures, there has been very little research on the formation of corporate strategies.¹⁰ It was obvious to us that understanding the growth and diffusion in ADR policies throughout American business, as well as the barriers to that diffusion, required a clear delineation of how top managers made decisions on the management of disputes. Second, our 1997 corporate survey revealed that some corporations were moving beyond the use of ADR policies to the adoption of conflict management systems. We were especially interested in understanding the transition to a systems approach undertaken by a vanguard of American corporations. In addition to our onsite interviews, we have also been collecting publicly available information on the use of ADR by other businesses and large organizations. This paper presents our conclusions regarding the current use of ADR and the potential for its further development in the United States.

An Analytical Model of the Corporation's Choice of Conflict Management Strategies

ADR seems to have arisen largely as a response to changes — some long-term and some short-term — in the corporate environment, that made its use an attractive alternative to conventional litigation. These environmental changes, in turn, were filtered through a set of organizational characteristics. Our model is depicted in Figure 1. As the figure shows, we divide the dependent variable in the model — the corporation's choice of conflict management strategy — into three categories, which we label *contend*, *settle*, and *prevent*. Obviously, these categories are somewhat arbitrary. In truth, corporate strategy ranges across a spectrum, and grouping large numbers of corporations in a particular category may possibly blur important differences across corporations in that category. To some degree

¹⁰ See, e.g., Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, in *Employment Dispute Resolution and Worker Rights in the Changing Workplace* 95 (Adrienne E. Eaton & Jeffery H. Keefe eds., 1999); U.S. General Accounting Office, *ADR: Employers' Experience with ADR in the Workplace* (1997).

each corporation we have studied had its own unique conflict management strategy, tailored to fit its own objectives and circumstances. We defend our three-part categorization because we believe it captures the most fundamental differences in corporate strategy that we observed in our research.

In the *contend* category we include those corporations that clearly prefer litigation to ADR. These are corporations that never or rarely use any ADR technique to resolve a dispute. They reject the use of ADR as a matter of corporate policy, although occasionally some of them will accept the use of mediation or arbitration in a particular dispute. In the *settle* category, we include a majority of the major corporations in the United States. Again, we recognize that there are critical differences in corporate strategy across this large group of companies, but in general these corporations use ADR either as a matter of policy or on an *ad hoc* basis in a variety of different types of disputes. In the *prevent* category we include corporations that apparently use ADR in all types of disputes as a matter of policy. In this category are the corporations that have developed conflict management systems; that is, they do not merely use a particular dispute resolution technique as a matter of practice or even policy, but have instead developed a comprehensive set of policies designed to prevent (if possible) or to manage conflict. We will have more to say about conflict management systems later in the paper, but at this point we should note that a corporation that has adopted a *system* is one that has moved from a *reactive* to a *proactive* approach to conflict management. In a conflict management system, the responsibility for preventing and resolving disputes is not confined to the counsel's office but has been extended to virtually every manager in the organization.

As Figure 1 shows, we maintain that a corporation's choice of conflict management strategy is a function of two factors: *environmental* and *organizational*. In the environmental category we list several exogenous variables that we hypothesize influence the corporation's choice of strategy. For example, we hypothesize that market factors influence the corporation's choice of strategy: corporations

operating in more competitive, global markets tend to rely on ADR more heavily than do corporations in less competitive markets. The underlying logic supporting this proposition is straightforward:

corporations in competitive markets need to be more diligent about controlling and reducing their costs, and ADR is a means of controlling and reducing the costs of dispute resolution. Corporations in less competitive markets have less need to be concerned with the costs of litigation. In a later section of the paper we will discuss all the environmental variables we list in Figure 1.

Our model postulates that these variables operate through a set of organizational characteristics. For example, we hypothesize that a corporation is more likely to rely on ADR if it has experienced a "precipitating event," such as a major multi-million dollar lawsuit, than a corporation that has not experienced such an event. Exogenous environmental factors may be necessary conditions for a corporation to adopt a pro-ADR policy, but they may not be sufficient conditions. In our model we hypothesize, for example, that a corporation which both operates in a competitive market and has been a defendant in a major lawsuit is much more likely to have a pro-ADR policy than a corporation which operates in a competitive market but has not experienced that type of "precipitating event." In other words, in our model it is the interaction of environmental and organizational (or exogenous and endogenous) variables that influence a corporation's choice of strategy.

INSERT FIGURE 1 HERE

Our model does not suggest that environmental factors invariably lead to a particular conflict management strategy. Many corporations experienced rising litigation costs in the 1970s and 1980s, but not all corporations responded to that factor by adopting pro-ADR policies. A corporation that faces an escalation in litigation costs presumably considers how it might reduce or minimize those costs. It might choose ADR as a cost-saving measure. Or it might respond in a different fashion, by seeking other means of more efficiently managing litigation for example. Indeed, if the corporation has reason to believe the

rise of litigation costs is a transient phenomenon, it may decide to do nothing in response. How an organization makes decisions in the face of changing environmental conditions is a complex phenomenon. Clearly, corporate "culture" plays a critical role, but culture is an amorphous term requiring definition. The culture of a corporation reflects the values, experiences, and belief structures of the organization's decision makers. Similar corporations faced with a common set of environmental challenges might choose very different conflict management strategies and, in fact, this is a situation we observed in our research. For example, one of the companies in our study, PECO Energy (now Exelon), adopted a sophisticated conflict management system, but most other utility companies have not. Another company in our study, Haliburton (and its construction subsidiary, Brown and Root), pioneered the use of mandatory pre-dispute arbitration agreements in employment, but most other companies in the construction business have not used them. The Zachry Construction Company, a large contractor located in San Antonio, has consciously considered Brown and Root's approach and decided not to adopt it. These decisions, we maintain, are a function of the organizational variables listed in Figure 1.

In our 1997 survey of corporate counsel, we asked the respondents a series of questions regarding how they would characterize their organizations' conflict management strategies.¹¹ On the basis of their responses to these questions, we have been able to group the corporations into the *contend*, *settle*, and *prevent* categories. Table 1 shows the proportion of Fortune 1000 companies in each of these categories. These proportions must be considered rough estimates, subject to the caveats previously discussed. Moreover, the proportion of companies in each category is constantly shifting. Presumably, the number of corporations in the *contend* category is shrinking and the number in the *prevent* category is growing, but this is by no means certain. Nevertheless, we estimate that about nine percent of major U.S. corporations reject ADR and belong in the *contend* category, seventy-four percent

¹¹ For an explanation of our methodology, see Lipsky & Seeber, *supra* note 1, at 9-14.

belong in the broad *settle* category, and seventeen percent strongly favor ADR, have some form of a system, and accordingly belong in the *prevent* category.

After we grouped the corporations in our sample into the three conflict management strategies, we were able to perform some simple analyses to determine the correlates of the corporation's choice of strategy. We found that the corporation's choice of conflict management strategy was highly correlated with size, as measured by either revenue or number of employees: corporations in the *prevent* category tended to be significantly larger than corporations in the *contend* category (albeit all corporations in the Fortune 1000 have revenues greater than a billion dollars) and corporations in the *settle* category tended to fall in the middle range. Market pressure also proved to be related to corporate choice of strategy. Corporations facing greater market pressure (as measured by industry concentration ratios) tended to choose the *prevent* or systems strategy, while corporations facing less market pressure tended to choose the *contend* or traditional litigation strategy. Once again, corporations in the *settle* category tended to fall in the middle. Lastly, we found a pattern between choice of strategy and industry (denoted by the two-digit SIC industry in which the corporation conducted its primary business). For example, as Table 1 shows, corporations choosing the *prevent* strategy tend to cluster in financial services, insurance, construction, and nondurable manufacturing. But industry patterns in corporate strategy are harder to discern than Table 1 might suggest. As the PECO and Haliburton examples suggest, the variance in corporate strategy within an industry can be very great indeed. In Table 1, construction is listed in both the *contend* and the *prevent* categories because there are corporations in the construction industry that fall on either end of the spectrum.

ON THE CORPORATION'S CHOICE OF A CONFLICT MANAGEMENT STRATEGY

In this section of the paper, we provide a more detailed discussion of a corporation's choice of a conflict management strategy, drawing especially on our fieldwork and case studies.

Contend

In both our corporate survey and our field studies, we discovered that some corporations — albeit a shrinking minority — have chosen to reject almost any use of ADR and instead have decided to *contend* any claim or charge brought against the organization. The *contend* group in Table 1 consists of those corporations that, in the light of their own environmental setting and organizational characteristics, have chosen to continue their traditional approach to litigation. In our 1997 survey,

INSERT TABLE 1 HERE

these corporations responded that when their corporation is either a defendant or plaintiff in a lawsuit, they prefer to "litigate always." We categorize them as *contenders* because the top managers and lawyers in these corporations, as a matter of conscious policy, rigorously defend their interests in virtually every lawsuit or legal proceeding in which they are involved. As a group, they are the most likely to see the downside of negotiation; they put a heavy premium on "winning" legal contests and they understand that negotiators usually need to compromise and therefore cannot "win" all the time. They tend to view legal proceedings, therefore, as zero-sum games and they do not fear the risk of conceiving every legal matter as a "win-lose" contest.

We talked to the Senior Vice-Chairman and Chief Administrative Officer of the Emerson Electric Corporation, a successful multi-billion dollar international corporation headquartered in St. Louis, Missouri, and later invited him to participate in a session we were asked to organize for the 1998 *Forbes Magazine* "superconference" on ADR. The Vice-Chairman began his presentation on that occasion by

showing a slide that reproduced the American Revolutionary War flag that has a rendering of a coiled snake and the warning, "Don't Tread on Me." He used the flag as a symbol of Emerson's strategy on litigation management. On any given claim, the Vice-Chairman explained, Emerson will decide whether the corporation is right or wrong. If the corporation believes it is wrong, it will readily concede the issue and attempt to settle the case. Such cases are relatively rare, according to the Vice-Chairman. When the corporation decides it is right, however, it will make every effort to defend its position and is unwilling to make compromises or concessions to an opposing party. It has been important to Emerson to establish a reputation as an organization that will fight all claims that (in its view) lack merit. The use of mediation, arbitration, or any other form of ADR, in Emerson's view, undercuts the corporation's conflict management strategy. Over time, the Vice-Chairman maintained, this policy of *contending* almost every claim has had the effect of deterring lawsuits and reducing the corporation's legal costs.

Not every corporation that we place in the *contend* category has adopted such a stringent, if principled, approach to conflict management. Some *contenders* are, arguably, somewhat more pragmatic and flexible than Emerson. For example, we conducted interviews at the Schering-Plough Corporation, one of the largest pharmaceutical companies in the world. Schering-Plough produces the best-selling allergy medication, Claritin. In common with other manufacturers of pharmaceuticals, Schering-Plough is often sued by users of its products who claim the drugs they used did not have the intended effects. Also, Schering-Plough has been the defendant in several expensive lawsuits involving claims by current or former employees. The corporation's litigation experience led it to undertake a comprehensive study of the use of ADR as a substitute for the corporation's policy of contending. The vice-president of human resources and the corporation's deputy counsel conducted a thorough year-long study and concluded that the systematic use of ADR might indeed save the corporation time and money. Nevertheless, they did not recommend that the corporation adopt the use of ADR as a matter of

policy. In the course of their study, they discovered that middle managers at Schering-Plough thought any use of ADR threatened their authority. Middle managers and supervisors make decisions that are the source of many corporate disputes. They want their decisions to be supported by the corporation. If top management uses ADR to arrive at negotiated agreements that compromise these decisions, middle managers may feel their authority is undermined. In the end, Schering-Plough decided not to adopt the use of ADR as a matter of policy (although it will use mediation in selected cases) because its middle managers firmly believed such a policy would undercut their authority.¹²

Hewlett Packard, another firm we studied, also belongs in the *contend* category. Hewlett Packard, we believe, is typical of the high-tech firms in Silicon Valley. The success of these firms depends in part on their ability to innovate new technologies, and they attempt to retain control of their innovations through the use of patents and copyrights. Intellectual property is in many ways the lifeblood of these corporations, and they are prepared to fight anyone who threatens their intellectual property rights. For Hewlett Packard, and for many other Silicon Valley firms, the stakes in many lawsuits are so high the idea of negotiating or mediating a compromise settlement cannot be considered. The use of ADR in the Silicon Valley also seems to run counter to the entrepreneurial culture prevalent there. Bill Gates was reluctant to negotiate a settlement of the government's antitrust case against Microsoft, and the effort by federal court judge Richard Posner to mediate a settlement failed. However, Gates was prepared to make some significant concessions and Posner came very close to mediating a settlement in the case.¹³

In sum, the firms we examined in the *contend* category have little interest in ADR, formally or informally. They may express some discontent with the American legal system, but in general they are

¹² Lipsky & Seeber, *supra* note 1, at 24.

¹³ Ken Auletta, *World War 3.0: Microsoft and Its Enemies* (2001).

quite prepared to litigate when they believe it is necessary and in some cases they even relish the opportunity.

Settle

Based on our research, we believe the overwhelming majority of U.S. corporations routinely attempt to *settle* almost all complaints and claims against them. Some corporations may do this as a matter of conscious policy and some as a matter of established practice. These corporations have neither wholeheartedly adopted nor categorically rejected the use of ADR. Instead, they usually approach conflict management in a pragmatic and flexible fashion while, at the same time, adhering to their own core values and principles. They tend to view conflict management less in strategic terms and more in terms of tactical choice. The tactics and techniques they use in a particular case are normally chosen on an *ad hoc* basis and depend on the specific circumstances of the case. They view the techniques of ADR as part of a toolkit that includes other options, including contending.

To the extent that a corporation in this category pursues a deliberate litigation or conflict management strategy, it is driven by counsel's office, often working collaboratively with outside counsel, the chief financial officer, the human resource function, or another appropriate part of the corporation. The counsel's office seldom needs to involve top management directly in its day-to-day handling of claims and complaints, unless the corporation's lawyers find themselves in a situation that potentially represents a significant financial liability for the corporation or a critical matter of principle and precedent.

Corporations in the *settle* category take one or both of two approaches to the use of ADR. One approach is to use ADR on a *post-dispute* basis and the other is to use it on a *pre-dispute* basis. A corporation that uses ADR on a post-dispute basis will attempt to use mediation, arbitration, or one of

their variants after a dispute between the corporation and another party has arisen. These corporations are prepared to pursue litigation in a particular case when they believe the stakes involved, either in terms of money or principle, dictate that choice. In the majority of cases, however, they are prepared to negotiate a settlement of a dispute. In a typical corporation, the counsel's office, frequently relying on the advice of outside counsel, decides at each stage of a case whether negotiating an agreement or proceeding to the next stage of the case is the wise course of action. In these corporations the use of ADR is simply part of the litigation manager's toolkit. At some point in the processing of a particular case, the lawyers representing the corporation and the other party (or parties) in the dispute come to believe that the use of mediation or arbitration is a desirable alternative to pursuing the next stage of litigation.

The other approach a corporation can choose is the use of ADR on a *pre-dispute* basis. When a corporation uses ADR on a pre-dispute basis, it identifies certain types of transactions that are prone to disputes and decides as a matter of policy to use ADR to resolve such disputes. Typically, corporations using pre-dispute ADR will seek to include an ADR provision in contracts covering the transactions in question. A corporation may include an ADR provision in all of its construction contracts, product warranties, or executive salary agreements. For example, almost all-automobile manufacturers include an arbitration provision in the leases signed by their customers. Computer manufacturers routinely include arbitration provisions in their warranties; customers who sign these warranties may or may not realize that if they have a product liability claim against the manufacturer they are required to have the claim arbitrated and cannot pursue a lawsuit in the courts. A growing number of employers require their

employees to sign *mandatory pre-dispute arbitration agreements*, a practice sanctioned by the U.S. Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*¹⁴ and *Circuit City Stores, Inc. v. Adams*.¹⁵

In our 1997 survey, many of the corporate lawyers we interviewed told us their corporation had adopted a pro-ADR policy. We discovered in our field work, however, that counsel's view of the corporation's conflict management strategy wasn't always shared by other key members of the organization. Indeed, in a few cases corporate managers had very little awareness of, or no knowledge at all about, counsel's pro-ADR policies. On the basis of our survey of the Fortune 1000, we might have categorized a corporation as "strongly pro-ADR," but the counsel's view of the corporation's conflict management strategy had not necessarily penetrated other parts of the organization. In this respect, the results we obtained in our survey might have been somewhat misleading. In that survey we only interviewed one respondent in each corporation, usually the counsel or one of his or her deputies. We did not fully realize until we conducted our field research that the respondent we had interviewed in the counsel's office did not always speak for his or her colleagues — with hindsight, not a surprising phenomenon.

For example, we conducted several interviews in a large Midwestern corporation that, on the basis of our earlier survey, we had classified as "strongly pro-ADR." When we arrived on the scene, however, we found that the respondent we had interviewed was the corporation's staunchest ADR "champion." His colleagues, both inside and outside the counsel's office, did not share his views, nor did they agree that the corporation had adopted ADR as a matter of policy. This corporation clearly did use ADR, but ADR was less a matter of corporate policy and more a matter of tactical choice made within the counsel's office. When we returned to Ithaca, we re-categorized the corporation in our database.

¹⁴ 500 U.S. 20 (1991).

¹⁵ 532 U.S. 105 (2001).

Obviously, however, we were not able to do this exercise for all the corporations in our survey, so the presence of respondent bias — a common problem in survey research — needs to be considered in interpreting our survey findings.

Corporations that we include in the *settle* category typically have a strong preference for negotiating settlements of claims whenever it seems feasible (in some rough cost-benefit sense) to do so. In contrast to *contenders*, these corporations seem to attach less value to winning and more value to resolving disputes in an expeditious fashion. *Settlers* do not normally view all lawsuits and legal proceedings as zero-sum games. They are more likely to view conflict management as an exercise in "mixed-motive decision making."¹⁶ Individuals and organizations in a mixed-motive "game" understand that sometimes the game is a zero-sum (or win-lose) one, and sometimes the game is a variable sum (or win-win) one; they adopt strategies and tactics suitable to the type of game they believe they are playing. Similarly, settlers continually make assessments of the character of the claims they are handling and choose a conflict management strategy that they believe fits the nature of the claim.

In the *settle* category, therefore, corporate conflict management is *reactive* and *contingent*. In many of the corporations we studied, counsel's office viewed the use of ADR in certain classes of disputes as an experiment. The corporate representatives we interviewed often had an open mind about ADR and wanted to let their experience with its use guide them on the possibility of adopting ADR as a corporate policy. We began to call some of the corporations in the *settle* category *incrementalists*. Their mode of operation was to experiment with ADR in some types of disputes (say, employment cases), and, if they were satisfied with its use in those cases, to extend its use to other types of disputes.

¹⁶ The term is associated with the work of Richard E. Walton and Robert B. McKersie. See, e.g., Richard E. Walton & Robert B. McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (2d ed. 1991); see also Richard E. Walton et al., *Strategic Negotiations: A Theory of Change in Labor- Management Relations* 41 (1994).

For example, we conducted interviews at Kaufman and Broad, one of the nation's largest home builders. (By some measures Kaufman and Broad is the largest home-builder in the United States, although its operations are concentrated in California, where it is headquartered, and the Southwest. In 1999, Kaufman and Broad built 21,000 homes.) Kaufman and Broad routinely includes mediation and arbitration clauses in the home-building contracts it signs with customers. Customer claims of defects in the homes they have purchased are submitted to mediation and, in some cases, to arbitration. Customers waive their right to sue Kaufman and Broad when a claim is deemed suitable for arbitration. Over the years Kaufman and Broad developed a very favorable view of the use of ADR in its home-building contracts. There came a time when it decided to adopt mandatory pre-dispute arbitration for its sales staff, where disputes over commissions were a frequent occurrence.

We found this pattern of incrementalism in several of the corporations we studied. We observed that ADR was initially an innovation adopted for limited use in one class of disputes, subsequently proved to be successful, and then was diffused into other arenas. We entered the field phase of our research with a tentative hypothesis that proved to be incorrect, however. We expected to find that most corporations would use what we would term an *integrated conflict management strategy*, by which we mean a more-or-less standard corporate-wide approach to conflict management. We found in fact that most corporations do not have an integrated conflict management strategy but, instead, have a patchwork (more kindly, a pragmatic and flexible) approach to conflict management, using one strategy in one class of disputes and a totally different strategy in other classes of disputes.

At this stage of our research we have formed a revised hypothesis regarding the integration of a corporation's conflict management strategies. We now believe that corporate structure strongly influences the choice of conflict management strategies. In particular, the degree of centralization of authority within the corporation is a significant determinant. All other things equal, a highly centralized

organization tends to have a standard approach for conflict management, while a decentralized organization does not. For example, we conducted interviews at both Warner Bros, and Universal Studios in Los Angeles. Warner Bros, is a subsidiary of AOL Time Warner and Universal is owned by The Seagram Company Ltd. Both studios, however, have considerable autonomy, and both have an approach to ADR distinctly different from the approach of their parent organizations.

It is a truism that the culture — the traditions, norms, and standards of behavior — of producing motion pictures and television programs differs from the culture of publishing magazines or providing internet services. The vast majority of studio employees, including actors, directors, writers, and musicians, are unionized and have a long history of craft bargaining.¹⁷ These traditions have strongly influenced the studios' attitudes toward ADR — and not necessarily in a positive direction. In common with other unionized employers, the experience that Warner Bros, and Universal have had with the use of mediation and arbitration in collective bargaining has, to say the least, colored their view of the use of ADR in other types of disputes. In the motion picture industry arbitration clauses are routinely included in executive contracts and in many construction contracts. But we would characterize the studios' attitudes toward ADR as cautious and even wary, and by no means has the experience in Hollywood spilled over into other business units in the parent corporations.

It is also the case that the perception of a negative experience with ADR can deter its diffusion to other parts of an organization. For example, we conducted interviews at Kaiser Permanente at its headquarters in Oakland, California. Kaiser Permanente, of course, is not a corporation but is America's largest not-for-profit health maintenance organization. It serves nearly nine million members in seventeen states. Kaiser requires patients treated by its doctors and medical facilities to sign mandatory

¹⁷ See, e.g., Lois S. Gray & Ronald L. Seeber, *Under the Stars: Essays on Labor Relations in Arts and Entertainment* 113-80 (1996).

arbitration agreements. Such agreements require patients with medical claims, including allegations of malpractice, to waive their right to sue and submit them to arbitration. It was highly embarrassed by a couple of arbitration cases, reported extensively by the *San Francisco Chronicle*, that allegedly demonstrated the problems of mandatory arbitration.¹⁸ (In 1999, The Institute for Civil Justice conducted a study of the use of arbitration in healthcare disputes. It discovered that, on the one hand, only nine percent of all physicians ask patients to sign arbitration agreements. On the other hand, seventy-one percent of all HMO insurance plans ask new enrollees to sign arbitration agreements. In most cases, however, these agreements only cover disputes over benefits and do not cover malpractice claims.) As a consequence of its experience in arbitration, including the negative publicity, Kaiser revised but did not abandon its mandatory arbitration policy. In 1999, it decided to turn over the administration of the arbitration procedure to the American Arbitration Association instead of managing the procedure itself. By doing so Kaiser clearly hoped to reassure the public that its arbitration procedure was an impartial and fair one. Again, however, Kaiser's difficulties in this regard have limited the diffusion of ADR to other types of disputes.

Our respondents at the USX Corporation told us the corporation had a "tradition of litigation" but in recent years it had become more open-minded about the use of ADR. USX is, apparently, one of many corporations experimenting with alternatives to litigation. It has been motivated by the growing burden of statutory employment cases and its potential liability in asbestos lawsuits. We also conducted interviews at Mirage Resorts, Inc. One of the largest hotel and casino operators in the country, Mirage also owns the Bellagio, Golden Nugget, and Treasure Island hotels in Las Vegas, the Beau Rivage in Biloxi, Mississippi, and (at the time we conducted our interviews) was developing a large hotel and casino in Atlantic City. For many years, until he sold the corporation to MGM Grand in 2000, Mirage was

¹⁸ See, e.g., S.F. Chron., Nov. 29, 1998, at 7; New Times, Dec. 9, 1999.

owned by Steve Wynn.¹⁹ We were impressed with the apparent extent to which Wynn directed policy in every corner of the corporation. In the gaming industry, lawsuits are an everyday occurrence, and under Wynn Mirage had more than its fair share. Wynn's legal battles with Donald Trump were an ongoing saga in the late 1990s.²⁰ But Wynn, in many ways the quintessential pragmatist, was always prepared to experiment with alternative means of settling disputes. Consequently, Mirage attorneys were disposed to use mediation, particularly in cases where the stakes weren't very high. In our view Mirage was a classic example of how top management ultimately drives the choice of a conflict management strategy.

As we noted earlier, each corporation is a story unto itself. A diverse set of circumstances and motivations influence the choice of a conflict management strategy in each of the companies we studied. Nevertheless, we think a careful observer can discern clear patterns in the evidence. In the settle category are a very large number of corporations pursuing a variety of specific strategies. All of them, however, use ADR regularly, if not routinely, as a means of managing disputes.

Prevent

All of the corporations we include in the *prevent* category told us in our 1997 survey that, as a matter of policy, they always use ADR to resolve at least one type of potential dispute (e.g., employment, commercial, etc.). Most of the corporations in this category told us they always use ADR in a variety of different types of disputes, and some told us they *always use ADR in all disputes*. A significant number of these corporations have adopted a conflict management system, and we now need to explain more thoroughly what we mean by the term "system."²¹ There is no general agreement,

¹⁹ Michael Brick, MGM Grand to Acquire Mirage Resorts for \$4.4 Billion, N.Y. Times, Mar. 6, 2000.

²⁰ See, e.g., AP Newswires, Nov. 2, 1999; Dow Jones Bus. News, Apr. 22, 1999.

²¹ For classic works on the system concept, see, for example, Ludwig Von Bertalanffy, General Systems Theory: A New Approach to the Unity of Science, 23 Hum. Biology 302 (1951), and Kenneth E. Boulding, General Systems — The Skeleton of Science, 2 Mgmt. Sci. 197 (1956).

even among experts, on the precise definition of a conflict management system.²² An authentic system is *not* merely a practice, procedure, or policy. Although it may incorporate practice, procedure, and policy, a system is something more encompassing. We prefer the definition of a system contained in *Guidelines for the Design of Integrated Conflict Management Systems within Organizations*, a report prepared for the Society for Professionals in Dispute Resolution by an *ad hoc* committee.²³ The report says an effective conflict management system has five characteristics. We paraphrase the report's prescription below:

(1) *Scope*. A system should have the broadest feasible scope, allowing all types of problems to be considered.

(2) *Culture*. A system should welcome dissent (or tolerate disagreement) and encourage resolution of conflict at the lowest possible level through direct negotiation.

(3) *Multiple access points*. Users of a system should be able to identify, and have access to, the person, department, or entity most capable (in terms of authority, knowledge, and experience) of managing the problem in question.

(4) *Multiple options*. A system should allow users the choice of more than one option for resolving a problem or dispute; more specifically, a system should contain both rights-based and interest-based options for addressing conflict.

(5) *Support structures*. A system requires support structures that are capable of coordinating

²² Karl Slaikeu & Ralph H. Hasson, *Controlling the Costs of Conflict: How to Design a System For Your Organization* (1998); William Ury et al., *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (1998); J.M. Brett et al., *Managing Conflict: The Strategy of Dispute Systems Design*, 6 *Bus. Wk. Executive Briefing Service* (1994); Costantino & Merchant, *supra* note 4.

²³ ADR in the Workplace, Track I Committee, *supra* note 4. The senior author of this paper was a member of the Committee.

and managing the multiple access points and multiple options; the structure should integrate effective conflict management into the organization's daily operations.

Designers of systems need to pay particular attention to questions of fairness. The SPIDR committee, after considerable debate, reached agreement on the eight essential elements of a fair conflict management system: (1) to the extent possible, participation in a system should be voluntary; (2) the privacy and confidentiality of the processes should be protected to the fullest extent allowed by law; (3) neutrals (mediators, arbitrators, ombudspersons, etc.) should be neutral and impartial; (4) neutrals should be adequately trained and qualified; (5) the legitimacy of a system is enhanced to the extent that it is "characterized by diversity in the core of neutrals, including mediators and arbitrators"; (6) a system should have policies that specifically prohibit any form of reprisal or retaliation; (7) a system must be consistent with an organization's existing contracts, including collective bargaining agreements; and (8) a system must not undermine the statutory or constitutional rights of the disputants.

In our own research we have found some of the corporations that claim to have conflict management systems would not meet all the criteria prescribed by the SPIDR committee. In American corporations today, a system of the type prescribed by SPIDR is more the ideal than the reality. We have studied corporations that we believe have systems, even though they may fall short of the ideal recommended by the SPIDR committee. On the basis of our own research, we have found that corporations with systems also have the following characteristics: (1) the organization's approach to conflict management is *proactive* rather than *reactive*: the corporation has moved from waiting for disputes to occur to preventing (if possible) or anticipating disputes before they arise; (2) the responsibility for conflict (or litigation) management is not confined to the counsel's office or to an outside law firm, but is shared by all levels of management; (3) the responsibility for preventing and resolving conflict is, therefore, delegated to the lowest feasible level of the organization; (4) managers

are held accountable for the successful prevention or resolution of conflict, and the reward and performance review systems in the organization reflect this managerial duty; (5) education and training in relevant conflict management skills is an ongoing activity of the organization; and (6) managers use the experience they have gained in preventing or resolving conflict to improve the policies and performance of the organization.

Some corporations and organizations are well-known for their development and use of conflict management systems: General Electric, Nestle USA, the U.S. Postal Service, Johnson and Johnson, and the Bureau of National Affairs come quickly to mind.²⁴ Included in our study are several corporations that have all or most of the essential elements of an authentic conflict management system: Alcoa, Chevron, PECO Energy, and Prudential. Alcoa has a program called "Resolve It" that incorporates many of the features of a system previously described, including multiple options and multiple access points, voluntary participation, the right to representation, protection against retaliation, and an ongoing commitment to training. In our interviews at Alcoa we learned that the development of its system was triggered in large part by the corporation's downsizing in the 1980s, which was accompanied by a rash of lawsuits. Alcoa's success with the use of ADR in employment disputes has led to the corporation exploring ways to incorporate ADR provisions into its commercial contracts. In addition, Alcoa has pioneered the use of a fixed-price contract with its outside counsel: Alcoa and its principal outside law firm negotiate a yearly fee for the firm's services that covers all cases handled by the firm. This

²⁴ Lisa B. Bingham et al., *Mediating Employment Disputes at the United States Postal Service: A Comparison of In-House and Outside Neutral Mediator Models*, 20 *Rev. Pub. Personnel Admin.* (2000), *infra* at Chapter 38; Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, 17 *Rev. Pub. Personnel Admin.* 20. (1997); F. Peter Phillips, *Problem Solving and Dispute Resolution in the Workplace* (unpublished paper prepared for *Employment Law and Litigation Update 2000*, Georgetown University Law Center, Washington, DC, March 30-31, 2000).

arrangement clearly strengthens the law firm's incentive to resolve cases as quickly as possible and, accordingly, predisposes the firm's attorneys to favor ADR.

Chevron has a comprehensive program similar to Alcoa's but also gives employees access to an ombudsperson. A large class-action sex discrimination case was one of the factors motivating Chevron to adopt an employment conflict management system. PECO Energy is a utility company heavily committed to the use of nuclear power.²⁵ An accident at one of the corporation's nuclear facilities, which was followed by several major lawsuits and a considerable amount of unwanted publicity, was an event that helped to precipitate the corporation's adoption of ADR.

Similarly, Prudential was the object of a series of embarrassing lawsuits and SEC investigations in the 1990s. One lawsuit resulted in Prudential agreeing to pay \$2 billion to over one million policyholders who sought restitution for abuses in the company's life insurance sales practices.²⁶ Top management responded to this crisis by resolving that the company would adhere strictly to a code of ethics. It established an independent ethics office whose head reports directly to the CEO. To improve employment relations, the company came to believe that a comprehensive and fair dispute resolution system was needed, and it viewed such a system as an expression of its renewed commitment to ethical behavior. It hired Ernst & Young to conduct a benchmarking study of dispute resolution systems in other organizations. After a year's work, the consulting firm submitted its report and recommendations to Prudential, which the company adopted and implemented. Prudential's system contains almost all the elements recommended by the SPIDR committee. Noteworthy is the fact that the system is operated by

²⁵ Agis Salpukas, *Peco and Unicom to Merge in Big Bet on Nuclear Power*, N.Y. Times, Sept. 24, 1999, at C5. PECO Energy merged with the Unicom Corporation to form Exelon in 2000.

²⁶ Coverage by the press of Prudential's troubles was extensive. See, e.g., *Corporate Focus: Uncertainty Clouds Prudential's Settlement Process*, Wall St. J., Dec. 11, 1998.

an autonomous office within the organization, headed by an experienced and respected attorney who also reports directly to the CEO.

The emergence of conflict management systems in American corporations is such a recent phenomenon it is difficult, if not impossible, to gauge the success of such initiatives. Our respondents at these corporations have told us that to date their experience has been favorable, by which they usually mean that participants in these systems (managers, employees, customers, suppliers, etc.) have said they have had satisfactory experiences using these systems. Our respondents report, further, that most complaints are resolved early in the procedures and few end up being resolved by outside neutrals. They have also reported that, contrary to the expectations of some skeptics, making elaborate procedures available for employees and others does not promote the filing of complaints. On the other hand, we have not been able to quantify the costs and benefits of using systems and cannot provide bottom-line measures of the effectiveness of the systems' strategy.

ENVIRONMENTAL FACTORS

In this section we discuss the environmental factors, shown in Figure 1, that we hypothesize are independent variables influencing the corporation's choice of a conflict management strategy.

Market Competition

Our field research strongly suggests that an important environmental shift that has changed businesses' approach to dispute resolution is the competitive pressures brought about by the globalization of the economy. Over the past twenty years, increasing competitive pressure has caused corporations to examine every facet of their operations in an attempt to minimize all costs and achieve every conceivable efficiency. Internal counsel has not been immune to that pressure. Once seen as a

cost, not necessarily controllable, legal expenses could now be managed, much as businesses attempted to manage the cost of materials, human resources, and marketing. This has caused pressure to be placed upon general counsel to manage their internal costs, and their management of external counsel, in a much more efficient way. Under this regime, litigation expenses are not costs that just occur, but rather costs to be minimized whenever possible.

Government Regulation

In its 1994 report, the Dunlop Commission noted two related but distinct problems in contemporary employment law. "The first is a steep rise in administrative regulation of the workplace, whose overlapping mandates (both federal and state) impose significant costs on employers and employees. The second is the explosion of litigation under laws that rely in whole or in part on individual lawsuits for enforcement."²⁷ Regarding the growth of the statutory regulation of employment relations, at the same time that employees' collective rights were weakened by the decline of unionization, their individual rights were strengthened through a series of federal and state statutes. In the employment area, for example, between 1960 and 1990, Congress passed at least two dozen major statutes. The starting point for this trend is generally accepted to be the passage of the Equal Pay Act of 1963, followed quickly by the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Occupational Safety and Health Act of 1970. After a lull during the Reagan years, Congress passed the Americans with Disabilities Act in 1990, the Civil Rights Act of 1991, and the Family and Medical Leave Act in 1993.

As the Dunlop Commission recognized, it is important to realize that statutory regulations impose costs on employers that are independent of their effects on litigation. That is, there are

²⁷ Comm. on the Future of Worker-Management Relations, *supra* note 2, at 49.

overhead or fixed costs associated with many forms of statutory regulation. For example, a new employment statute almost always has staffing and organizational consequences for major employers. Lawyers in the corporate counsel's office and human resources managers need to understand the implications of the new statute for their organization. New staff may need to be added to both functions and the organization may need to lean more heavily on outside counsel, consultants, trainers, and educators. That regulations impose costs on employers is a truism that does not need elaboration here, although the magnitude of those costs and the scale of potential benefits are always matters of serious debate. It is sufficient to note for our purposes that the steep rise in statutory employment regulations prompted employers to seek methods of minimizing the effect of these regulations on their cost of doing business. For many employers ADR seemed to be an obvious method of minimizing such costs.

Litigation Trend

A principal cause of the rise of ADR in the United States, many observers believe, is the perceived "litigation explosion" that began in the 1960s and, some contend, continues to this day.²⁸ "Proponents of this view tend to focus primarily on the growth of torts, especially personal injury claims based on product liability theories."²⁹ But they also note that business litigation has expanded in other areas as well, including employment, civil rights, contractual, and environmental disputes. The growing statutory regulation of employment gave rise to new areas of litigation, ranging from sexual harassment and accommodation of the disabled to age discrimination and wrongful termination. More and more dimensions of the employment relationship were brought under the scrutiny not only of the court system but of a multitude of regulatory agencies.

²⁸ Patrick M. Garry, *A Nation of Adversaries: How the Litigation Explosion Is Reshaping America* (1997).

²⁹ Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 *Law & Soc. Inquiry* 497, 498 (1996).

Proponents of the view that there has been a litigation explosion cite the fact that since the 1960s litigation increased approximately seven times faster than the national population. An estimated thirty million civil cases are now on the dockets of federal, state, and local courts, a number that has grown dramatically in recent years. The U.S. has about five percent of the world's population but seventy percent of the world's lawyers.³⁰ A 1994 survey by Tillinghast-Towers Perrin estimated that tort liability cost the U.S. \$152 billion a year.³¹ In the last two decades, the number of suits filed in federal courts concerning employment matters grew by four-hundred percent.³² In the decade of the 1990s, the number of civil cases in U.S. federal courts involving charges of discrimination nearly tripled. Plaintiffs who won their employment discrimination suits received a median award of \$200,000 in 1996; one in nine received an award of \$1 million or more.³³

The purported increase in business and employment litigation has been accompanied by delays in the settlement of such cases. According to the Dunlop Commission, "Overburdened federal and state judicial dockets mean that years often pass before an aggrieved employee is able to present his or her claim in court."³⁴ In 1994, a panel of nine federal judges commissioned by the Judicial Conference of the United States noted that the huge increases in the caseload of the federal courts had further slowed the already languid rate of processing civil cases.³⁵ In sum, the litigation explosion clogged the dockets of federal and state courts in the U.S., leading to longer delays and higher costs in the use of traditional means of dispute resolution.

³⁰ Garry, *supra* note 28, at 15-16.

³¹ Stephen Gold, *Step Ladders and Lawsuits*, Wash. Times, Nov. 21, 1997.

³² U.S. Comm. on the Future of Worker-Management Relations ("The Dunlop Commission"), *Report and Recommendations* (1994), pp. 25-33.

³³ 33U.S. Department of Justice, *Civil Rights Complaints in U.S. District Courts, 1990-98*, Bureau of Justice Statistics Special Report 1-13 (2000).

³⁴ Commission on the Future of Worker-Management Relations, *supra* note 2, at 50.

³⁵ *Id.*

Some have challenged whether there has been, in fact, a significant increase in litigation. For example, one study examined federal litigation involving the 2,000 largest U.S. corporations during the period 1971-1991.³⁶ The study concluded that the litigation explosion is largely a myth. "It may have had some credibility ten years ago, near the peak of the post-1971 rise in litigation levels, but it has much less now. [In] most major categories of litigation, filings have actually declined in recent years. If there ever was a 'litigation explosion' affecting business in the federal courts, it has generally subsided."³⁷ Although this research undermines the conventional wisdom to some extent, it does not paint a complete picture: obviously, by confining the analysis to the largest corporations, the study leaves open the question of litigation trends for smaller businesses. They also omit trends in state courts and in state and federal regulatory agencies from their analysis of business litigation. More importantly, perhaps, is the strong perception, confirmed by the interviews we have conducted with corporate managers and lawyers, that corporations are much more likely to be defendants in civil litigation of all types than they were a generation ago. That perception, regardless of whether it is based in reality or not, has translated into action for many businesses, as they seek to gain more control over the litigation process and its results.

Legal and Tort Reform

Frustration with the growing burden of litigation led many in the business community to oppose various federal measures to regulate the employment relationship and to lobby for tort (or legal) reforms that would limit the ability of one party to sue another. Proposed measures have included limitations on damages, "loser pays" requirements, caps on contingency fees charged by lawyers, restrictions on class action suits, and other measures. Leading business organizations, including the

³⁶ Dunworth & Rogers, *supra* note 29.

³⁷ *Id.* at 558-59.

National Association of Manufacturers and the Chamber of Commerce, became proponents of tort reform. The American Tort Reform Association, also representing business interests, played a major role in the public relations and lobbying efforts to achieve reforms preferred by the business community. Corporations and their allies often join forces with the Republican Party to press for tort reform, although the issue was never framed entirely along conventional political lines.

Trial lawyers, civil rights organizations, labor unions, and other liberal groups usually oppose the push for tort reform. Most, but certainly not all, Democratic Party lawmakers either opposed reform or were selective in their support of reform measures. Opponents of tort reform argue either that there hasn't been an authentic litigation explosion or that if there has been one, it has served a useful social purpose.³⁸

The movement for tort reform may have crested with the election of a Republican majority in the 104th Congress. The Republican Party's "Contract with America" contained a provision pledging the party to support reform that would curtail the flood of "frivolous lawsuits and outlandish damage rewards [that] make a mockery of our civil justice system."³⁹ Congressional Republicans, however, failed to achieve comprehensive tort reform, although piecemeal measures were passed and signed into law by President Clinton. At the state level the movement for tort reform has also had mixed and limited success.

We believe the growth of ADR over the last two decades is closely related to the movement for tort reform. The corporate interest in both ADR and tort reform is motivated by the same set of factors: the belief that there has been a dramatic growth in litigation resulting in an ever-increasing burden of

³⁸ Samuel Jan Brakel, *Using What We Know About our Civil Litigation System: A Critique of 'Base-Rate' Analysis and Other Apologist Diversions*, at <http://www.lawsch.uga.edu/~galawrev/vol31/brakel.html> (Mar. 24, 1999).

³⁹ Yesim Yilmaz, *Private Regulation: A Real Alternative for Regulatory Reform*, 303 *Pol. Analysis* 1-34 (Apr. 20, 1998).

legal costs borne by American business. In the corporate mind tort reform and ADR are also linked to the perception that there is excessive government regulation and a need to strip away this excess. Arguably, ADR, tort reform, and deregulation are complimentary efforts by corporate America. One can hypothesize that if the business community had achieved the comprehensive tort reform it sought, accompanied by the thorough elimination of objectionable regulations, the corporate interest in ADR would be much less intense. That is, ADR and tort reform are to some degree substitutes for one another, and the corporate failure to achieve its objectives on tort reform has probably intensified the corporate interest in ADR.

On the other hand, it would be a mistake to believe that the various interests supporting tort reform were identical to those supporting ADR. Our research suggests that many corporate managers and lawyers believe there is a crisis in our legal system and yet they do not favor ADR. The most conservative spokespersons, who are often allied with the corporate community, are often staunch advocates of tort reform but oppose the use of ADR. (The Cato Institute, as represented by articles appearing in its publication, *Regulation*, would be an example.) They believe systemic change in the legal system is required and ADR is merely a palliative. By contrast, more moderate elements of the corporate community may support tort reform but believe it is even more important to develop effective means of managing disputes.

Statutory Requirements and Court Mandates

The Congress and most state legislatures have a long history of encouraging, and occasionally mandating, the use of negotiation, mediation, arbitration, and other private methods of resolving disputes. We need not document that history here but merely note that key landmarks include the Federal Arbitration Act of 1926, as well as the Railway Labor Act, the National Labor Relations Act, and other federal statutes regulating labor-management relations. Federal and state courts have usually

supported statutory measures designed to promote the private resolution of disputes. Most notably in labor relations, after World War II, the courts increasingly deferred to arbitration as a means of settling disputes.⁴⁰

When the ADR movement gained momentum in the 1970s, the courts proved to be equally supportive. In its seminal *Gilmer* decision in 1991, the U.S. Supreme Court ruled that a stock broker who had agreed to the New York Stock Exchange's rule requiring arbitration of employment disputes between brokers and member firms could not sue his employer for an alleged violation of the Age Discrimination in Employment Act but instead must arbitrate the dispute.⁴¹ Since *Gilmer*, most federal appellate courts in the U.S. (with the notable exception of the Ninth Circuit) have applied the principle in that case in other industries in a variety of employment statutes.⁴²

Over time both federal and state courts have adopted so-called "court-annexed" ADR procedures designed to expedite the litigation process. Early neutral evaluation, summary jury trial, arbitration, fact-finding, and mediation are some of the most common ADR techniques that have been adopted by the courts. As Fitz Gibbon notes, "Court annexed ADR is a simple and predictable response to the increased use of litigation to resolve disputes and to solve societal problems. It builds on proven and traditional methods of extrajudicial settlement; it reflects the fact that parties frequently settle their differences even after they [have] resorted to court and commenced litigation."⁴³ The court systems in more than half the states now encourage, or even mandate the use of court-annexed ADR procedures to

⁴⁰ This is especially seen in the Supreme Court's Steelworker Trilogy: *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enter. Wheel & Car Corp.* 363 U.S. 593 (1960). F. Elkouri & E. Elkouri, *How Arbitration Works* 28-47 (5th ed. 1991).

⁴¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁴² Among the numerous analyses of the law in this area, see Delikat & Kathawala, *supra* note 7; Trachte-Huber & Huber, *supra* note 2, at 741-73.

⁴³ Susan FitzGibbon, *Appellate Settlement Conference Programs: A Case Study*, in *Alternative Dispute Resolution: Strategies for Law and Business*, at 977 (E. Wendy Trachte-Huber and Stephen K. Huber eds. 1996).

reduce backlogs and speed up the handling of disputes. In many states the use of these procedures has especially taken root in the management of family disputes but more recently has spread to most types of civil cases.

The support that ADR has received in the courts has been buttressed by federal and state statutes designed to promote or require its use. Although the effort to achieve federal tort reform has not yet succeeded, legislators and policymakers have not been oblivious to the stresses being felt in the American legal system. In 1990, for example, Congress passed the Civil Justice Reform Act, which required federal district courts to experiment with case management systems. The net effect of this statute was to encourage the courts to institute various forms of ADR. In 1998 Congress took the next step, requiring federal district courts to use ADR. In recent years Congress has frequently added ADR provisions to statutes it has passed, usually allowing claimants the option of using mediation before turning to the appropriate regulatory agency or the courts for resolution. Administrative agencies, such as the federal Equal Employment Opportunity Commission, have begun to require the use of ADR (usually mediation) to resolve complaints.⁴⁴ Recently the U.S. Department of Labor established a pilot program to test the efficacy of using mediation to resolve enforcement cases arising under the many statutes administered by the Department. (The Department made a grant to the Alliance for Education in Dispute Resolution to develop, manage, and evaluate this program.) In addition, many state administrative agencies have experimented with ADR as a response to the costs and delays inherent in their systems.

⁴⁴ U.S. Equal Employment Opportunity Commission, *Alternative Dispute Resolution Policy Statement* (1995). See also Paul Steven Miller, *EEOC Adopts ADR Methods*, *Disp. Resol. J.* 17, 87 (1995).

In sum, judicial and legislative support of the use of ADR has contributed to the permissive environment in which American businesses have developed their ADR policies over the past two decades.

Unionization

An important long-run change in the fabric of corporate life has been the decreasing likelihood of any plant or facility within a corporation being unionized.⁴⁵ The American labor movement's membership as a proportion of the labor force peaked in the early post-World War II period and has declined steadily for more than forty years. In the year 2000, only eleven percent of the total workforce were union members; the proportion of the private sector workforce unionized had fallen to eight percent. Some experts believe that there are signs that the further decline of unionization is unlikely, but agree that there is no sign of a significant upturn.⁴⁶

On the one hand, the decline in unionization has generally been welcomed by corporations. On the other hand, the lack of a formal method of dispute resolution for day-to-day employment problems has led some companies to conclude that unresolved conflicts have their price as well. Almost all collective bargaining agreements in the United States incorporate a grievance procedure for handling disputes over the application or interpretation of those agreements. The grievance procedure almost always provides for the use of arbitration to resolve grievances that have not been settled earlier in the procedure. Many unionized employers became accustomed to relying on these formal procedures for resolving employment disputes and, indeed, even came to see the advantages of their use. In the absence of grievance and arbitration procedures, employees alleging either statutory or contractual

⁴⁵ Harry C. Katz & Thomas A. Kochan, *An Introduction to Collective Bargaining and Industrial Relations* 118-23 (2000).

⁴⁶ See, e.g., *id.* at 137.

violations by their employers need to resolve such disputes by bringing suit against their employer. The simultaneous decline of unionization and rise of ADR was, we maintain, more than a coincidence. Many nonunion employers came to realize that the use of some form of employment ADR provided a faster and cheaper means of resolving disputes than conventional litigation.⁴⁷

Unions have viewed the use of ADR in employment relations with some skepticism. Many unions fear that employers often institute workplace dispute resolution systems as a means of avoiding unionization. Because most employers will not freely admit to anti-union motives, hard evidence on this concern is lacking. In the course of our field research, however, several of our corporate respondents readily admitted that union avoidance was a principal motive for their use of ADR in employment relations. Although labor's fears are, in some cases, justified, many unions have supported the development of workplace dispute resolution systems that extend beyond the traditional grievance procedure. For example, certain employee concerns, ranging from the quality of their relations with supervisors and fellow employees to the adequacy of their computers and office equipment, are not usually matters that are easily handled through the grievance procedure. Some unions have discovered that employee complaints that fall outside the purview of the mandatory topics of bargaining may be addressed effectively through a dispute resolution system designed jointly by the parties. Indeed, some unions have embraced ADR with enthusiasm, not only valuing its potential benefits for its members but also recognizing that ADR systems can extend the authority and influence of a union into areas normally considered management prerogatives.⁴⁸

⁴⁷ Trachte-Huber & Huber, *supra* note 2 at 9-29.

⁴⁸ David B. Lipsky & Ronald L. Seeber, *Resolving Workplace Disputes in the United States: The Growth of Alternative Dispute Resolution in Employment Relations*, 2 J. Alt. Disp. Resol. Emp. 37 (2000).

ORGANIZATIONAL CHARACTERISTICS

Continuing with our explication of the model depicted in Figure 1, we now turn to the role of organizational factors in determining the corporation's choice of a conflict management strategy.

Corporate Culture

We have referred to the important role corporate culture plays in determining conflict management strategies in earlier sections of this paper. Corporate cultures "provide organizational members with more or less articulated sets of ideas that help them individually and collectively to cope with all of [the organization's] uncertainties and ambiguities. People in organizations, as in social life generally, generate ideologies that tell them what is, how it got that way, and what ought to be. Such ideologies form the *substance* of cultures."⁴⁹ In conducting our field studies, we were struck by the differences in the cultures and ideologies of the various organizations we visited. Many other researchers, of course, have observed the same phenomenon.⁵⁰ It seems obvious to us that there is a close relationship between the culture of a corporation and the nature of its choice of conflict management strategy.

Culture is such an enormous all-encompassing concept, and clearly we cannot do justice to the role it plays in determining corporate strategy in this paper. We can, however, briefly examine one aspect of culture and its relation to strategy: the extent to which authority relationships in a corporation are hierarchical and authoritarian versus the extent to which they are nonhierarchical and egalitarian.⁵¹ We hypothesize that conflict management systems are more likely to emerge in egalitarian organizations than in hierarchical ones. We discovered in our case studies that the widespread adoption

⁴⁹ Harrison M. Trice & Janice M. Beyer, *The Cultures of Work Organizations* 1-2 (1993).

⁵⁰ See, e.g., Terrence E. Deal & Allan A. Kennedy, *Corporate Cultures: The Rites and Rituals of Corporate Life* (1982); Trice & Beyer, *supra* note 49, at 33-76.

⁵¹ *Id.* at 66-67, 235-37.

by employers of team-based production has created a substantial need for effective conflict resolution as well. In traditional hierarchical work organizations employers can usually (but admittedly not always) rely on their authority to minimize and resolve conflicts. But when employers reorganize their workers into teams — and particularly when they introduce the use of so-called "high performance work systems" — they give up a considerable amount of their authority and control over their own employees. In organizations in which there are authentic work teams, the employees themselves assume major responsibility for preventing, negotiating, and resolving conflicts. Some corporations that use teams, however, have realized that the creation of more formal dispute resolution systems enhances the effectiveness of their teams.⁵²

Management Commitment

During the course of our research, it became clear to us that the role of top management in shaping the corporation's conflict management strategy cannot be overestimated. We heard several stories about CEOs who usually paid little attention to conflict management, but focused intently on the topic after the corporation experienced a major, expensive, lawsuit, or a crisis involving the legal function. In some cases we also heard stories about CEOs becoming concerned about the ongoing costs of the corporation's legal affairs and directing a significant budget cut for the counsel's function. In one case, a CEO ordered the downsizing of several staff functions, including the counsel's office, and the counsel reacted by adopting strongly pro-ADR policies, which he believed would help him stay within the bounds of his smaller budget. In some corporations the Chief Financial Officer, concerned about the corporation's litigation costs, became the organization's most ardent ADR champion.

⁵² Thomas A. Kochan, Harry C. Katz, & Robert B. McKersie, *The Transformation of American Industrial Relations* (1986).

It should be clear that management commitment is a two-sided variable, as are the other variables in our model. That is, management can be committed to either a pro-ADR or a pro-litigation strategy. In the case of Emerson, management was clearly committed to a pro-litigation strategy. In some cases, past experiences with mediation or arbitration helped to shape management's attitudes. Some of our interviewees revealed to us that they had become interested in conflict management through a single or small number of ADR experiences. Often, they were exposed to mediation or arbitration as an experiment in dealings with another company. They were satisfied with the result and attempted to replicate it in their own company. This mechanism does not always work to create an atmosphere in which ADR flourishes, however. A small number of companies we surveyed told us that their past experiences with ADR had been negative or simply not good enough to cause them to seek to manage conflict in this manner.

In a handful of cases we confess we could not fathom why management had a pro-ADR or a pro-litigation attitude. For example, we visited two companies that were very similar in many respects but the CEO of the one company was strongly committed to ADR while the CEO of the other company was strongly opposed to ADR. We suspect that ideology and personality differences helped to shape these contrasting attitudes.

The Role of the Champion

Another key feature of the organizations that were developing integrated conflict management systems was the role of key internal champions. In virtually all of our interviews with companies with conflict management systems, the interviewees would point to a single or a very small group of individuals who were responsible for initiating and maintaining the system in the early stages of its development. As Ulrich notes, a champion is a change agent, that is, a person within an organization

dedicated to the "cultural transformation" of the organization.⁵³ Champions, Ulrich says, play four roles: they are sponsors of the change they advocate; they help facilitate the change by obtaining internal support, external support, and management ownership; they help design the change; and they demonstrate, by example, experiments, and pilot efforts, the superiority of the change they advocate.⁵⁴ The role of the champion underscores, however, the fragility of systems development in this arena. Champions are often faced with powerful opponents within the organization. In one of the organizations we studied, the ADR champion in the counsel's office was opposed by the anti-ADR director of human resources. The ADR champion lost the battle and left the organization. When the champion leaves his or her position or moves to another organization, the entire ADR effort may be thwarted if no one steps into the champion's role.

Exposure Profile

One of the factors that lead to a more aggressive business response to the litigation explosion is the amount of potential litigation exposure faced by an individual firm. This "exposure profile" of a particular corporation is a function of the industry in which it operates, the firm's history, the nature of employment in the firm (particularly whether the jobs it offers are high-risk or low-risk), and its relationships with other businesses and consumers. Some firms, for example, are in industries that make inherently dangerous products, or products that have been associated with class actions in the recent past. Other firms have been accused of, and sometimes found liable for, business practices that have led to widespread litigation. Firms vary by size of employment and unionization, which leaves some very large nonunion firms with significant potential litigation exposure. Some firms have a large number of business relationships which, because of the pressure of time, simply cannot be allowed to result in

⁵³ Dave Ulrich, *Human Resource Champions: The Next Agenda for Adding Value and Delivering Results* 184-85 (1997).

⁵⁴ *Id.* at 184-88.

costly and time-consuming litigation. Finally, some firms have so many business transactions that could sour and lead to litigation — consumer transactions involving relatively expensive goods for example — that they are highly exposed to litigation. In sum, we hypothesize that the higher the corporation's exposure profile, the more likely it is, all other things being equal, that the corporation will adopt a conflict management system.

The Precipitating Event

In many of the corporations we studied, we found that the company was motivated to consider the adoption of an ADR strategy because of a "precipitating event" — a multi-million dollar lawsuit, a series of lawsuits, or some type of crisis or catastrophe, that led to lawsuits and a public relations problem for the corporation. As previously noted, companies such as PECO Energy and Prudential adopted sophisticated conflict management systems largely because they had been the object of lawsuits causing considerable embarrassment for the corporations. Alcoa moved in the direction of a conflict management system after downsizing its workforce resulted in a series of expensive lawsuits. In most corporations top management doesn't interfere with counsel's day-to-day management of the legal function. But an expensive lawsuit will most definitely attract the attention of the CEO and other top managers. Major lawsuits are often the occasion for top management to review the corporation's conflict management strategies and policies. Such reviews frequently reveal the costly and time-consuming nature of litigation, and prompt top managers to seek alternatives. In some corporations the counsel's office may have been promoting the use of ADR on an ad hoc basis for many years but was only able to adopt the use of ADR as a matter of corporate strategy after the corporation faced a major crisis. An expensive lawsuit, however, doesn't always lead to the corporation's adoption of pro-ADR policies, as the Schering-Plough example illustrates.

If our hypothesis about the relationship between precipitating events and conflict management strategies is correct, it constitutes yet another example of how corporate policy is often based on managers' experience with — and desire to avoid — worse-case scenarios, rather than policy being based on the corporation's normal (or median) experience.

DOES EXPERIMENTATION BECOME INSTITUTIONALIZED?

In this paper, we have described a number of examples of ADR policies and systems in various stages of development and formality. We have difficulty concluding, however, that any of the corporations we have studied have reached the stage of institutionalizing their ADR systems, even those we include in the *prevent* category. By "institutionalization" we mean a system or function that has become a more or less permanent part of the fabric of the organization, in the same sense that functions such as marketing, finance, human resources, and the counsel's office itself. As we've noted, ADR policies and practices are relatively recent corporate phenomenon, developed largely in response to certain shifts in the environment of the corporation. The emergence of corporate conflict management systems is an even more recent phenomenon. When we began our investigation, we expected to find the *diffusion* of ADR experiments across firms, particularly firms within the same industry. We also expected to find that the corporation's adoption of ADR techniques for one type of dispute would lead to the adoption of those techniques for other types of disputes. For example, if a corporation had successfully used ADR in consumer disputes, we expected it to use ADR in employment and environmental disputes. In other words, we hypothesized the existence of an *integrated conflict management strategy* within the organization.

In fact, however, we did not observe either diffusion or integration in our research — certainly not to the extent we expected. Many of the corporations we have studied engage in a considerable amount of benchmarking, keeping close tabs on the conflict management practices and strategies of other companies, particularly in the same industry. But benchmarking doesn't necessarily lead to diffusion; indeed, it can deter diffusion, if the corporation doing the benchmarking concludes another corporation's experience with a particular practice has been less than satisfactory. At times a corporation's adoption of ADR policies seems idiosyncratic, dependent on the values and inclinations of the CEO, the evangelizing of an effective champion, or some other factor unique to the corporation.

Frankly, we were surprised at the lack of "integration" in many of the corporations we studied. The variance in conflict or litigation management within a corporation can be quite astonishing. The employment counsel might be an ardent ADR champion but the firm's chief litigator might be anti-ADR. Of course, variance in conflict management within a corporation can be a perfectly rational response to differences in the corporation's objectives and values in different types of disputes.

What factors have prevented the institutionalization of ADR systems in American corporations? There are many possible explanations for this lack of institutionalization of ADR. In this section we will explore a few of the hypotheses we believe have the most credibility. Consider, first, the environmental factors that appear to have brought about the rise of ADR. Over the past twenty years, changes in these factors all served to buttress the business case for ADR, but all of these factors could potentially move in the opposite direction, thus undercutting the case for ADR. For example, global competition intensified dramatically over the last two or three decades, but it is not certain that global competition will have the same influence on corporate strategy in the future that it had in the past. Given the increasingly chronic weakness of the Japanese economy and other Asian economies, global competition may not be the same spur to corporate action that it once was. Also, government regulation, particularly of

employment relations, grew dramatically in the 1960s and 1970s, helping to fuel the alleged litigation explosion. But clearly the Bush administration is not disposed to favor the further regulation of American business. If market competition and government regulation have reached a plateau, two important factors that brought about the rise of ADR will no longer be significant.

We noted in an earlier section of the paper that some scholars questioned the validity of the litigation explosion. By most measures, the upward trend in litigation probably came to an end a decade ago and caseloads in most courts have leveled off. Ironically, the success of ADR may be partly responsible for that, and although tort reform hasn't been enacted at the federal level, it has advanced steadily at the state level. (Recent efforts in Congress to pass a "Patients Bill of Rights," giving patients the right to sue their HMOs, may trigger a new wave of litigation.) The courts themselves, at both the federal and state level, have made strenuous efforts to introduce internal reforms and most now have established ADR programs. If there is any prospect of a litigation "implosion" and if the courts succeed in improving their management of litigation, the impetus for corporations to institutionalize ADR will be substantially diminished.

As unlikely as it may seem, some of the employment trends that have favored the development of ADR could be reversed as well. For example, the reemergence of the union movement as a significant institution in the private sector would almost certainly decrease corporate interest in ADR programs. Also, it seems clear that we are at or near the end of the expansion of individual employment rights through state and federal legislation. Any or all of these changes would make ADR marginally less attractive to many corporations.

There are other factors within the corporation that deter the institutionalization of ADR programs and systems. Consider, for example, the phenomenon of the "precipitating event": some of our interviewees noted that the further into the past a precipitated event receded, the less compelling

that event was as a factor motivating the corporation's development of an ADR program. To the extent that the creation of an ADR program is the corporation's short-term response to a crisis, the foundation for institutionalizing such a program remains tenuous. Moreover, as we noted earlier, we have found very little evidence of the diffusion of ADR policies and practices across dispute areas within firms. Nearly all of the firms we have studied confine the use of ADR to certain types of disputes. For example, conflict management systems of the type we've described in this paper are most frequently used in employment relations. They are almost never used — and indeed would have little application — to other types of disputes. (Arguably, a conflict management system might be useful in customer, client, and vendor relationships, but it is difficult to imagine the use of a system, as we've defined it, to financial disputes.) When we asked our respondents whether their corporation planned to apply an ADR strategy they were using in one dispute area to a different dispute area, most said they did not really consider it a possibility. Indeed, we cannot cite a single example of a corporate that employs a truly integrated and consistent strategy toward all disputes it potentially faces. On the basis of our case studies, we conclude that the vast majority of corporations favor *dispute* management over *conflict* management.

The vast majority of corporations in the United States have adopted ADR in one form or another because they hoped ADR would save time and money. In our survey of the Fortune 1000, about eighty percent of the respondents told us "saving time" or "saving money" were the primary reasons the corporation had used ADR.⁵⁵ In fact, however, there is very little hard evidence that corporations actually do save time and money by using ADR. It is not clear to us that many corporations are even gathering the information necessary to make a cost-benefit analysis. In our interviews we pressed our respondents to tell us what they were doing in this regard, and most gave us vague responses or

⁵⁵ Lipsky & Seeber, *supra* note 1, at 16-19.

admitted they weren't doing much. Some corporations apparently do have internal tracking systems (Alcoa and the FMC Corporation come to mind). But we were consistently surprised at the lack of rigorous data collection and analysis of ADR within corporations. The lack of analysis is in part a consequence of the fact that there is no accepted paradigm in the dispute resolution field for conducting the analysis. The task of developing appropriate metrics in dispute resolution has not yet been undertaken, and until it is measuring the success (or failure) of ADR will be problematic.

We noted earlier the important role that champions have played in developing ADR systems within corporations. In the course of our research we have met many champions, and we admire almost all of them. It often takes courage to be a champion within an organization. But the critical role played by a champion works against the institutionalization of an ADR program. Time and again we encountered champions who had become frustrated and discouraged, and some who had simply given up.

Any movement that relies heavily on the heroic efforts of individual champions is a fragile movement indeed. Nevertheless, ADR certainly has become institutionalized in some settings. For example, it seems to be a continuing and integral part of a number of firms in the construction industry and in the securities industry. What are the conditions most conducive to the institutionalization of ADR? Tentatively, we conclude that institutionalization is most likely to occur when (1) the corporation faces, on a regular and continuing basis, a large number of the same type of dispute; (2) the disputes do not typically involve high stakes, either in terms of money or principle; (3) the disputes involve the interpretation and application of contracts rather than statutes; and (4) it becomes indisputably clear to the corporation (even if it does not conduct a concrete cost-benefit analysis) that the time and money saved from using ADR rather than litigation is highly significant. We do not maintain that these

conditions are the only ones that can lead to institutionalization, only that institutionalization is more likely when these conditions are present.

A SUMMARY OF OUR FINDINGS AND CONCLUSIONS

Our research has led us to a conclusion we did not anticipate. Somewhat surprising to us, and contrary to much of the popular literature and perceptions regarding ADR, we do not believe the ADR movement has achieved the critical mass necessary to institutionalize it within most large businesses or other organizations. Although the use of ADR procedures by American corporations is very widespread, support for ADR policies in many corporations is confined (often to one or two "champions") and frequently hasn't penetrated the upper reaches of management. Unless ADR becomes more imbedded in corporate culture, the ADR movement is likely to stall or even retreat in the coming years.

Specifically, our research has revealed the following:

- (1) In most organizations, ADR is a *reactive* response rather than a *strategic* choice. Our corporate survey had caused us to believe that a growing number of managers supported ADR policies and were creating systems as part of a larger strategy of conflict management. In the case studies we have conducted, however, we found that the use of ADR was nearly always an *ad hoc* response to a specific, repetitive set of disputes faced by a business.
- (2) The rise of ADR in American business was the consequence of changes in a set of environmental factors (such as the perceived litigation explosion), and a reversal of direction of these factors could very well lead to a decline in the use of ADR. Although ADR has been institutionalized in a handful of corporations, in the vast majority it has not become part of the corporation's standing policies. Without further institutionalization, ADR may prove to be a transitory phase

rather than a permanent shift in corporate conflict management. Our survey results and our onsite interviews revealed that a number of societal forces have developed over the past twenty years or so that had strongly encouraged businesses to consider ADR as a dispute management tool. In recent years, however, many of those forces have lost their potency and may even be moving in an opposite direction. ADR has not taken such a strong hold in American corporations that it cannot easily be abandoned if the environmental reasons for using it disappear.

- (3) Conceptually, it is important to distinguish between *dispute* management and *conflict* management. Our research demonstrates that dispute management overwhelms conflict management as the dominant mode of corporate behavior. When we began our field research, we expected to find corporations moving beyond the use of ADR to manage disputes toward the establishment of conflict management systems, which in theory have the purpose of preventing or eliminating conflicts before they rise to the level of explicit disputes. In fact, with the exception of a handful of corporations noted earlier, we have found almost no such behavior on the part of U.S. businesses.
- (4) Our corporate survey revealed that companies used ADR for *instrumental* purposes. That is, typically corporate managers and lawyers valued ADR because they believed its use served larger corporate objectives. For example, almost all of our interviewees were attracted to ADR because of its potential to save time and money through more efficient dispute resolution. Almost none of them supported the use of ADR because they thought it was a fairer and more just means of resolving disputes. On balance, our corporate respondents believe conventional litigation provides better procedural safeguards than ADR, but they were willing to forego these safeguards if there was a reasonable chance of saving time and money.

We do not have a crystal ball that allows us to predict with certainty the direction ADR will take in the future. We merely want to note that our analytical model suggests that ADR in the corporate community may grow in significance in the future, or it may decline, depending on the direction taken by the environmental and organizational factors that we believe determine the corporation's choice of a conflict management strategy. Our friends in the ADR movement may find our analysis dismaying. We hope that, rather than being dismayed, they will resolve to make an even more strenuous effort to achieve their objectives.

FIGURE 1. Corporate Strategic Approaches to ADR.

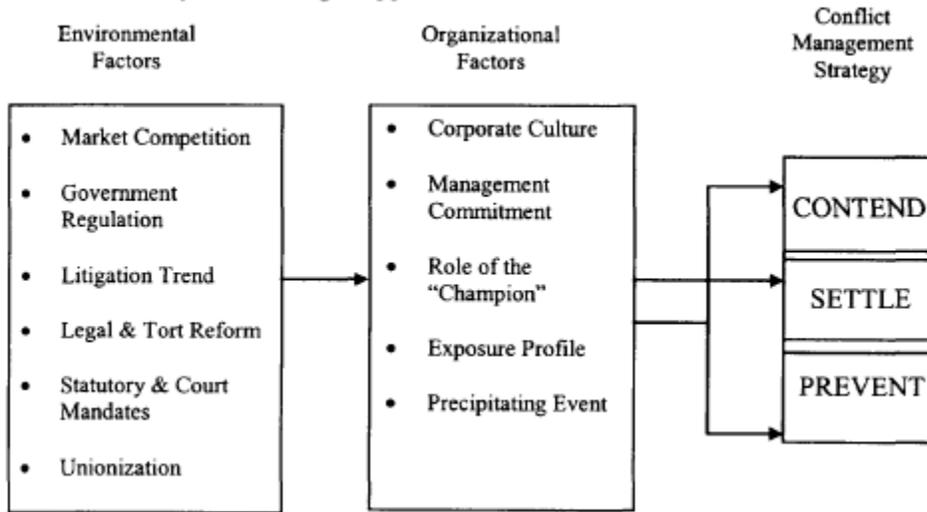


Table 1. Corporate Conflict Management Strategies: Proportions of the Fortune 1000 Corporations in the Contend, Settle, and Prevent Categories

Strategy	Percentage	Size	Market pressure	Industries
Contend	9	Smaller	Less pressure	Service, durable manufacturing, construction
Settle	74	Medium	Some pressure	Transportation, communications, utilities, trade, finance
Prevent	17	Larger	More pressure	Financial services, insurance, construction, nondurable manufacturing