

**Patterns of ADR Use in**

# **CORPORATE DISPUTES**

**By David B. Lipsky and Ronald L. Seeber**

**The following article is an excerpt from "The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations," a survey published in 1998 by the Cornell/PERC Institute on Conflict Resolution.**

**A**lternative dispute resolution means different things to different people, and the term is often used so broadly as to be meaningless. In our attempt to gauge the extent of ADR use, it was therefore critical that all survey respondents use a common definition. After considering many options, we chose to 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."

We asked respondents a range of questions designed to gauge the extent of ADR use. Specifically, we wanted to know which ADR processes they used (e.g., mediation) and in what kinds of cases (e.g., employment). We asked about respondents' experiences not just with mediation and arbitration but also with other processes and techniques that we suspected were less widely used.

Nearly all our respondents reported some experience with ADR, with an overwhelming 87% having used mediation and 80% having used arbitration at least once in the past three years. More than 20% said they had used mediation-arbitration ("med-arb"), mini-trials, fact-finding, and/or employee in-house grievance procedures in the past three years. Finally, respondents from about

60 corporations (10%) had experience with ombudspersons and peer reviews. We conclude that ADR has made substantial inroads into the fabric of American business, with counsel overwhelmingly preferring mediation (63%); arbitration was a distant second (18%). Other forms of ADR have clearly not replaced tried-and-true tactics completely, and in fact pale in importance beside mediation and arbitration.

Our interest was not just in the breadth of ADR use but also in its depth of penetration into the dispute resolution system of individual firms. Having tried a process, does a firm resort to it again? Because frequent and one-time users are represented equally in the data, our survey asked

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*David Lipsky is a professor at Cornell University and the director of the Cornell/PERC Institute on Conflict Resolution.*

*His research and teaching primarily focus on negotiation, conflict resolution, and collective bargaining.*

*Ronald Seeber is a professor at Cornell University, and the executive director at the Cornell/PERC Institute on Conflict Resolution. His research has covered a wide range of topics in the field of labor-management relations.*

**Table 1**  
*Use of Mediation in Rights and Interest Disputes (in percent)*

Frequency	Rights disputes	Interest disputes
Very frequently	5.6	1.7
Frequently	13.1	2.1
Occasionally	43.2	7.6
Rarely	29.9	28.2
Not at all	8.1	60.4

*Note: Companies reporting that they did not use mediation were excluded from the data in this table.*

respondents additional questions about the frequency of their use of mediation and arbitration in the last three years. Only 19% of those who had used mediation reported using it frequently or very frequently, almost 30% said they used it rarely, and the largest group (43%) used it occasionally. The pattern is similar for arbitration; 21% reported frequent or very frequent use, 33% used it rarely, and 42% used arbitration occasionally. These numbers are significantly smaller than the responses to the question about simple use, indicating that a much smaller group of firms have what could be called extensive ADR experience. The reality of corporate ADR experience is one of significant breadth but little depth.

We also wondered about the types of disputes for which ADR processes were being used, specifically "rights" and "interest" disputes. These terms are commonly applied in some fields, such as employment, but have different meanings in other areas. We define a rights dispute as a conflict that arises out of the administration of an already existing agreement. An interest dispute is a conflict that arises during the negotiation of a new agreement. In practical terms, interest disputes arise between parties trying to forge a relationship, while rights disputes arise between parties already in a relationship.

We found significantly different patterns in the forms of ADR used for rights disputes and interest disputes. As Table 1 shows, almost 92% of the respondents have used mediation in rights disputes, but more than 60% have never used it for interest disputes. Table 2 indicates a similar pattern for arbitration, with over 95% of the respondents reporting some use of arbitration in rights disputes, while in interest disputes nearly 64% have not used it at all. Therefore, wherever we examine frequency data, we use only the findings concerning rights disputes.

In sum, nearly all corporations have experience with ADR, but a much smaller number of companies use mediation and arbitration frequently, even in rights disputes. Mediation and arbitration are used even less often in interest disputes.

We expected that those corporations that had

**Table 2**  
*Use of Arbitration in Rights and Interest Disputes (in percent)*

Frequency	Rights disputes	Interest disputes
Very frequently	7.5	3.0
Frequently	13.1	2.1
Occasionally	41.6	10.7
Rarely	33.2	20.5
Not at all	4.5	63.7

*Note: Companies reporting that they did not use arbitration were excluded from the data in this table.*

tried mediation or arbitration would be more likely to have also tried the other six ADR processes that we identified (ombudspersons, fact-finding, peer review, mini-trials, med-arb, and in-house grievance procedures), and the survey responses confirmed this. Companies that use mediation or arbitration frequently are much more likely to have experimented with less commonly used methods, such as ombudspersons or peer-based processes, and on average had tried four of the eight processes. We speculate that corporations first try mediation or arbitration; if those processes are of value to them, they continue to use them but also experiment with other forms of ADR.

### Situational Use of ADR

Our survey asked about the circumstances in which ADR is appropriate, including each corporation's general strategy when it is the initiating party and when it is the defending party. We thought that a company might prefer to litigate when initiating and negotiate when on the defensive, and that corporations could vary their strategy depending on the situation. Company A may sue Company B, and even though B may want to negotiate a resolution, it may be obligated to defend itself in court. With those points in mind we asked questions relating to companies' overall strategy toward conflict resolution (see Table 3).

We found that only 5% and 6% of corporations always choose to litigate when they are the

**Table 3**  
*Conflict Resolution Policies of Corporations Represented in Sample (in percent)*

Strategy	Defending party	Initiating party
Always litigate	5.0	6.1
Litigate first, then move to ADR when appropriate	24.7	21.4
Litigate only when appropriate; use ADR for all other disputes	25.2	27.0
Always try to use ADR	11.7	11.3
No company policy	20.8	22.1
Other	12.6	12.1

**Table 4**  
*ADR Use by Type of Disputes (in percent)*

Type of Dispute	Mediation	Arbitration
Employment	78.6	62.2
Commercial/contract	77.7	85.0
Personal injury	56.5	31.8
Construction	39.3	40.1
Product liability	39.3	23.3
Real estate	31.9	25.5
Environmental	30.8	20.3
Intellectual property	28.6	21.0
Consumer rights	24.1	17.4
Corporate finance	13.3	12.3
Financial reorganization/workout	10.3	8.1

defending and initiating parties respectively. A larger group, but still a small minority of firms, always choose an ADR strategy whether defending or initiating. Most firms adopt a more conditional posture but in general are open to ADR. A reasonably large proportion of the corporations have no policy on this matter, and their comments indicate that they set strategy on a dispute-by-dispute basis.

Before analyzing the data, we had believed that if a corporation was the initiating party and at least initially in control, its decision to use or not use ADR might better reflect corporate policy. Based on our data, it appears to make no difference. Corporate policy seems to be largely independent of a company's status as the defending or initiating party.

We also thought that the subject matter of a conflict might affect a corporation's preference for ADR. On the one hand, we speculated that corporations might see it as advantageous to litigate certain types of disputes that the courts or administrative agencies are particularly well-positioned to resolve. This could occur when corporations see litigation as more likely to produce a favorable outcome. On the other hand, corporations might see the conditions surrounding some areas of conflict as more favorable to negotiation. To ascertain whether these differences affected a corporation's preference for ADR, we asked the respondents whether they had used mediation or arbitration in 11 specific dispute situations (Table 4).

As the data indicate, the proportion of firms

that have used mediation and/or arbitration to resolve different types of disputes varies widely. The raw rankings from high to low are similar for mediation and arbitration, with commercial/contract disputes and employment disputes at the top of both lists. Financial disputes of all types, including corporate finance, are rarely submitted to either form of ADR. The other types of disputes fall into a middle range. Again, our initial hypothesis that mediation is a threshold ADR process seems to be upheld. Mediation is used more extensively across the board. Likewise, ADR appears to be a near-standard practice for some conflicts but rarely used for others.

Apparently corporations do not consider ADR appropriate or useful in all arenas but rather use it more selectively. It may also be that ADR has grown easily in certain areas of dispute handling and may yet be used more extensively in other areas.

### **ADR Use by Industry**

As we have shown, ADR use is not uniform. There are important variations among corporations in their preferences for one dispute process over another and in the kinds of cases for which they use ADR. ADR use also varies significantly by industry, and we see at least two plausible reasons for this. First, within a particular industry

behavior patterns or norms tend to be uniform, and the use of ADR may be one such norm. For example, negotiation may be the preferred method of dispute resolution in one industry simply because it has always been used. Second, industry variation in ADR use may be attributable to the fact that conflicts in certain industries, such as construction, are more amenable to resolution with ADR techniques than the conflicts in other industries.

Table 5 shows the proportion of corporations in each of the major industrial groups that have had some experience with each of the eight ADR procedures. These findings indicate that nearly all corporations have had some experience with mediation and with arbitration. All of the firms in mining and construction reported having used both, and even in the service sector, where the levels of experience were the lowest overall, well over four-fifths of the firms had used mediation in the past three years.

An examination of the less commonly used

***Companies that use mediation or arbitration frequently are much more likely to have experimented with less commonly used methods, such as ombudspersons or peer-based processes...***

**Table 5**  
*Use of ADR Procedures by Industry (in percent)*

Procedure	Mining/ construction	Durable mfg.	Non- durable mfg.	Trans./com./ utilities	Trade	Finance	Insurance	Service
Mediation	100	87	88	90	89	90	87	84
Arbitration	100	74	84	86	73	80	79	75
Med-arb	45	41	37	42	40	41	49	46
In-house grievance	27	28	24	41	34	49	39	35
Mini-trials	36	29	25	23	18	22	16	11
Fact-finding	9	20	15	21	30	22	20	23
Peer review	9	9	10	9	14	8	8	14
Ombudsperson	27	11	6	8	13	15	12	5

**Table 6**  
*Preferred ADR Procedures by Industry (in percent)*

Procedure	Mining/ construction	Durable mfg.	Non- durable mfg.	Trans./com./ utilities	Trade	Finance	Insurance	Service
Mediation	60	70	65	63	56	68	59	50
Arbitration	30	16	23	18	18	17	19	17
Med-arb	0	6	3	13	8	2	5	23
In-house grievance	0	5	4	4	13	2	11	10
Mini-trials	0	1	0	0	0	0	0	0
Fact-finding	0	1	3	0	3	6	0	0
Peer review	0	0	1	0	0	0	3	0
Ombudsperson	10	1	0	4	2	4	3	0

ADR techniques reveals more significant variation by industry. For example, nearly half the financial firms had an in-house grievance procedure, while only 24% of the nondurable manufacturing firms did. For mini-trials and ombudspersons, firms in the mining/construction sector had significantly more experience than firms in other industries. Thirty-six percent of mining/construction firms had used mini-trials, as compared with only 11% of service firms. More than 27% of the mining/construction firms reported having an ombudsperson, while only 5% of the service firms did. Mining/construction firms were less likely than other firms to use fact-finding. Finally, the use of peer review and med-arb does not seem to vary much across industries.

As discussed above, most firms across all industries list mediation as their preferred ADR technique, although the mining/construction sector has a substantial proportion (30%) preferring arbitration. (see Table 6.)

Industry differences may also account for differences in corporate policy. We classified all respondents into two policy groups, one made up of companies that tend always to litigate or to litigate first when they are the initiating party and the other consisting of companies that always use ADR, or seek to, and litigate only as a last resort. For this analysis we eliminated those companies with no stated ADR policy.

Our findings revealed some industry differ-

ences. A raw ranking shows that the mining/construction sector tends to use ADR; in this group, 70% of the respondents reported that their firms use ADR most or all of the time to resolve disputes. By stark contrast, 54% of the firms in the transportation/communications/utilities sector report that they prefer to litigate, making this the industry group most likely to do so.

Up to this point we have examined industry differences in the use of ADR, not how often firms in these industries use the various processes. The figure for the mining/construction sector stands out: 54% of the firms in this sector report using mediation frequently or very frequently—more than twice the next-highest percentage, for the service sector.

The results are similar on the use of arbitration, with the percentage for firms in mining/construction higher than other industries; 60% of the firms in this sector report that they use arbitration frequently or very frequently. Companies in all the other industries report using arbitration much less frequently, and in durable manufacturing only 13% used it frequently or very frequently.

Why is mining/construction so different from the other industries? One can speculate that mining and construction are most in need of ADR because delay caused by a dispute can destroy a project or even a business. A construction project cannot be held up while a dispute with a supplier is being resolved in the courts, for example. This

industry has had to develop and nurture alternative dispute resolution procedures that allow work to continue while the dispute is being resolved.

Finally, we examined the use of mediation and arbitration by industry for different types of disputes. As shown in Tables 7 and 8, these results are very interesting. As we observed earlier, nearly all the industries report heavy use of ADR for employment disputes; 64% to 91% of firms have used mediation. Likewise, nearly all the firms report using mediation in commercial and contract disputes. In the second tier of disputes, however, for which ADR use is less universal, there is significant variation by industry. Manufacturing firms use ADR to resolve environmental and intellectual property disputes more than firms in any of the other industries. Further, finance firms show much higher than average use of mediation for disputes involving financial reorganization, consumer rights, and corporate finance. While the result for consumer rights is easily explainable, since ADR has long been established as the appropriate means for handling disputes involving brokers and cus-

tomers, it is not so straightforward to explain the higher usage of mediation in financial reorganization or corporate finance. Below-average use in some industries occurs simply because the concept of a dispute is irrelevant. For example, a very small number of firms in finance report using mediation to resolve product liability cases (they have no products in a conventional sense), and no mining or construction firms had used mediation to resolve disputes involving corporate finance.

### Summary

Nearly all U.S. corporations have some experience with the basic ADR processes of arbitration and mediation. As we look more carefully at the data, however, we see that ADR is used to resolve specific types of disputes under specific circumstances. A much smaller number of companies have extensive experience with ADR or have tried to use it as a general mechanism for dispute resolution.

### Other Important Findings

The study's other sections delve into the reasons why some corporations use ADR and why

*Table 7*  
*Percentage of Firms Using Mediation by Type of Disputes and Industry*

Type of dispute	Mining/ construction	Durable mfg.	Non- durable mfg.	Trans./com./ utilities	Trade	Finance	Insurance	Service
Employment	64	85	84	84	88	75	81	91
Commercial/contract	100	90	84	83	77	91	89	79
Personal injury	67	72	74	70	69	45	71	60
Construction	100	48	60	65	55	47	50	42
Product liability	50	76	71	26	55	10	55	53
Real estate	50	33	36	54	51	59	50	47
Environment	43	54	56	51	27	21	29	42
Intellectual property	17	64	55	23	31	18	15	44
Consumer rights	29	33	25	43	27	57	52	45
Corporate finance	0	19	22	12	20	46	13	19
Financial reorganization	13	15	12	14	15	38	30	5

*Table 8*  
*Percentage of Firms Using Arbitration by Type of Disputes and Industry*

Type of dispute	Mining/ construction	Durable mfg.	Non- durable mfg.	Trans./com./ utilities	Trade	Finance	Insurance	Service
Employment	71	69	71	73	76	58	58	71
Commercial/contract	100	88	91	92	85	87	81	94
Personal injury	67	31	45	43	59	26	48	48
Construction	100	50	59	58	54	49	33	55
Product liability	60	38	48	14	46	7	33	26
Real estate	67	28	38	30	49	37	21	53
Environment	40	45	35	33	31	9	5	12
Intellectual property	0	39	49	13	22	22	4	38
Consumer rights	50	22	25	15	19	50	43	28
Corporate finance	0	20	21	6	17	40	24	18
Financial reorganization	0	12	20	15	13	15	18	7

others don't, the economic and other factors that help shape ADR policy and strategy of many corporations, and the future of ADR. The following are excerpts from sections two to five of some of the important findings in the report.

#### *Why Do Corporations Use ADR?*

One of the more significant forces driving corporations toward ADR is the cost of litigation and the length of time needed to reach a settlement. All else being equal, ADR is widely considered cheaper and faster....

Cost reduction may be the most widely cited reason for choosing ADR, but corporations report many reasons as well.... We found that many of the answers related to the parties' desire to control their own destinies—to have some control over the path to resolution, even if (as in arbitration) they cannot control the outcome....

The most often cited reason to use mediation (identified by more than 82% of the respondents) was that it allows the parties to resolve the dispute themselves; both sides must agree to a settlement. In stark contrast, both arbitration and the court system lead to decisions the parties may not agree with.

Eighty-one percent of those surveyed said that mediation provided a more satisfactory process than litigation, 67% said it provided more satisfactory settlements, and 59% reported that it preserved good relationships. In sum, these responses indicate that mediation provides not just an alternative means to conventional dispute resolution but a superior process for reaching a resolution....

In general, the support for arbitration among corporations is not as strong as it is for mediation. For example, just over 60% of respondents said they believed that arbitration provided a more satisfactory process than litigation—significant, but not nearly the overwhelming support we saw with mediation....

The reasons corporations have moved toward ADR can be divided broadly into economic and process-control reasons. Most of the participants in our study believe that there are economic reasons to use ADR processes; compared with conventional dispute resolution processes, they save their companies time and money. But there is strong evidence that regaining control of the dispute resolution process is an important motivation as well....

#### *Corporate Policy and Strategy*

The ADR policy adopted by a corporation appears to be systematically related to a set of economic and market factors as well as conscious strategies adopted by the corporation. Large corporations that have faced intense competitive

pressures and have engaged in downsizing and re-engineering appear more likely to have strong pro-ADR policies. Also, corporations that have adopted cutting-edge management strategies seem likelier to be pro-ADR. By contrast, smaller, more profitable corporations... are more likely to favor litigation.

#### *Barriers to the Use of ADR*

When corporations use mediation frequently or very frequently, the dominant reason they do not use it is because opposing parties won't agree to it; more than 93% of the respondents from these companies cited this reason. Respondents from corporations that only occasionally or rarely use mediation gave a variety of reasons for not using it....

The results for frequent versus infrequent users of arbitration are roughly comparable; when corporations use arbitration frequently, the reason they don't use it is because the opposing party is unwilling to do so. By contrast, corporations that rarely use arbitration avoid it because they don't like the process and lack confidence in the arbitrator.

***Large corporations that have faced intense competitive pressures and have engaged in downsizing and re-engineering appear more likely to have strong pro-ADR policies.***

#### *The Future of ADR*

Is it reasonable to expect that the use of ADR by U.S. corporations will continue to grow in the future? We asked the respondents in our survey a series of questions designed to determine their view on this issue.... In general, a large majority of the respondents in our survey believe that they are "likely" or "very likely" to use mediation in the future—38% and 46%, respectively. They were more cautious about the use of arbitration. Only 24% said they were very likely to use it in the future, while 47% said they were likely to do so. More than 29% said they were unlikely or very unlikely to use arbitration in the future, whereas only 16% answered similarly in the case of mediation. Nevertheless, if these projections are accurate, the use of ADR by U.S. corporations will grow significantly. ■

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*This report was a joint venture of Cornell University, the Foundation for Prevention & Early Resolution of Conflict (PERC), and PricewaterhouseCoopers, L.L.P.*

*For more information contact:*

*Christopher B. Colosi*

*Cornell/PERC Institute on Conflict Resolution*

*Tel: (607) 255-1124*