The Appropriate Resolution of Corporate Disputes

A Report on the Growing Use of ADR by U.S. Corporations

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CORNELL/PERC INSTITUTE ON CONFLICT RESOLUTION

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THE SCHOOL OF INDUSTRIAL AND LABOR RELATIONS AT CORNELL UNIVERSITY & THE FOUNDATION FOR PREVENTION AND EARLY RESOLUTION OF CONFLICT

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Preface

One of the foremost trends in corporate America in the 1990s has been the shift from traditional litigation and government agency resolution of disputes toward the use of alternative dispute resolution (ADR). So far, however, policy makers in the public sector and corporations in the private sector have been making decisions about how to invest in ADR on the basis of very limited information. Now it seems that ADR has been in place long enough that assessments can be made about its effects, including whether it has resulted in systematic changes in how disputes are resolved within and between organizations.

In the late spring of 1996, discussions along these lines commenced among the principals of the Foundation for the Prevention and Early Resolution of Conflict (PERC), the then newly formed PERC/Cornell Institute on Conflict Resolution, and Price Waterhouse LLP. (Since then, Price Waterhouse has merged with Coopers Lybrand to form PricewaterhouseCoopers LLP.) A plan emerged to conduct a survey of U.S. corporations on their use of ADR, and a work team representing those organizations was formed to design an ADR survey to be conducted by Cornell University. This survey, the most comprehensive such effort to date, contacted the 1,000 largest U.S. corporations to find out how many of them use ADR, what forms of ADR they use, what kinds of disputes are resolved by ADR, and the prospects for ADR in American business. We believe that the answers, together with the analysis provided in this report, offer significant new insights into the use of ADR by major corporations.

This work could not have been completed without the contributions of many individuals and organizations. We owe a very special debt of gratitude to Ted Kheel, President of the PERC Foundation, for his support, assistance, and wise counsel. We also especially thank William Lurie, past president of the Business Roundtable, and Tom Donahue, past president of the AFL-CIO, who served as co-chairs of the PERC Foundation during the first year of this research project. We are indebted to them for their encouragement, comments, and advice. Barbara Deinhardt, Counsel to the PERC Foundation, also played a significant role in the development of this project. We also thank Leslie Hoffman, Executive Director of Earth Pledge Foundation, for her contributions to our work. Fred Roffman, Director of Marketing at PricewaterhouseCoopers, initially proposed that this project be undertaken, and his continuing interest in and support of the project are deeply appreciated. We want to thank Deborah Enix-Ross, Director of International Arbitration, for her valuable suggestions and comments, as well as Michael O. Gagnon, Senior Partner, and the entire Price Waterhouse organization for their support. Funding for the study was generously provided by the William and Flora Hewlett Foundation.

In developing the survey instrument used in this research, we relied on numerous people for advice, assistance, and guidance. Unfortunately, we cannot list all of them here. We especially want to thank Saul Kramer, Paul Salvatore, and their colleagues at Proskauer, Rose, Goetz & Mendelsohn; Daniel Bordoni and his colleagues at Bond, Schoeneck & King; and James Mingle, Mike Kimberly, and Pat McClary at the Cornell University Counsel's Office. Several of our colleagues at the Cornell University Law School provided us with valuable advice, notably Katherine Stone, Ted Eisenberg, and Stuart Schwab. Our understanding of the use of ADR in corporate America benefited from discussions we had with Jim Henry, President of the Center for Public Resources/Institute for Dispute Resolution.

The research reported here is based on a survey conducted by the Computer-Assisted Survey Team (CAST) at Cornell University. Yasamin DiCiccio, Director of CAST, joined our research team at the start of our project and provided invaluable assistance at every stage of our work. We also want to thank Lisa Horn, Manager of CAST, who provided critical documentation and statistical assistance.

We have presented earlier versions of this research in a variety of forums. At MIT in April 1997 we presented preliminary results to an industrial relations workshop conducted by Professor Thomas Kochan. We are grateful to him and his colleagues for their valuable suggestions. In May 1997 we made a presentation at the conference "Alternative Dispute Resolution in the Private Sector" in

Pittsburgh, and we thank Robert Fayfich of Conflict Resolution Center International for his assistance. In Washington, D.C., also in May 1997, we presented a version of our results to the SPIDR Second Annual Professional Development Conference, and we especially thank John D. Settle and JonBickerman, the organizers of the conference, for their help.

We want to acknowledge the extremely valuable assistance provided by Theresa Woodhouse in the preparation of the manuscript. Chris Colosi, Program Coordinator of the Institute on Conflict Resolution, provided valuable support for every phase of the project. Erica Fox expertly edited the initial draft of this report. Lavinia Hall edited a near-final draft; Elizabeth Holmes copyedited and designed the report. Last but not least, we thank Missy Harrington, whose diligent assistance was essential to the success of this project.

We must add the usual disclaimer: Any errors of fact or interpretation that remain are solely the responsibility of the authors, and none of the views expressed in this report are necessarily shared by any of the individuals acknowledged here.

Introduction

A quick scan of the business and legal press reveals that, compared with a few years ago, many more disputes are being resolved through negotiation, mediation, and arbitration. The change is an incremental one, on the upper end driven by costly, difficult cases involving business risks that have called for the innovative handling of dispute resolution processes, and on the everyday level driven by the need for lower-cost, streamlined ways to handle growing numbers of ordinary disputes. Policy makers at all levels of government have encouraged this trend. Accompanying this public policy movement, increasing numbers of law firms and corporate legal departments are establishing alternative dispute resolution (ADR) practice sections, acquiring expertise or hiring experts in dispute resolution.[1]

The employment field is a good example. In the area of union-management relations, the established pattern has been for the parties themselves to resolve nearly all disputes. Outside the unionized sectors of the economy, however, for the past thirty-five years individual employees have been granted a long list of rights through statute, ranging from discrimination and pension protections to provisions for safer and healthier workplaces. Each of these laws has been accompanied by a dispute resolution process, often involving a federal or state administrative agency and ultimately the court system. Because of long delays to resolve disputes, the associated expenses, the outcomes produced, and the resulting frustration of citizens, there has been an effort to establish ADR processes in individual employment cases, typified by the decision in *Gilmer v. Interstate/Johnson Lane Corp.* In *Gilmer* the Court sanctioned mandatory arbitration of an Age Discrimination in Employment Act claim as a substitute for statutorily enforced rights.[2]

Many corporations are encouraging the use of ADR not only where it has traditionally been used but also to solve an ever-widening range of conflicts between the corporation and other businesses, individuals, and government agencies. In each of these relationships, it appears that the overwhelming costs of litigation have pushed corporations toward increasing their use of ADR processes.

This growing trend and the widespread need for information about appropriate means of resolving corporate disputes motivated us to conduct the survey reported on here. Before this project, the most comprehensive survey of this type was one conducted by DeLoitte and Touche in the early 1990s.[3] In beginning this survey in 1997, we believed that the rapid growth of ADR during the 1990s warranted a more current and comprehensive look at the practice of and aspirations for ADR in the largest 1,000 U.S. corporations. For the purposes of our survey and this report, we have defined 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.*[4] We were aware, and often reminded our respondents, that negotiation is the core of all dispute resolution. To make our survey manageable, however, we limited it to processes involving third-party neutral assistance.

Methodology for the Research

The original survey instrument, proposed by the team from the Foundation for the Prevention and Early Resolution of Conflict (PERC), Cornell University, and Price Waterhouse LLP, was revised more than twenty times during the summer and early fall of 1996 as we tested our ideas with colleagues at Cornell and law firms throughout the Northeast. In October of that year, the survey was tested on a sample of attorneys in a variety of corporations to ensure its validity and reliability. The overall goal was an instrument that would provide answers to some critical questions yet would be concise enough to be completed in fifteen minutes or less; brevity, we thought, would help us gain the cooperation of those who set corporate policy regarding the use of ADR. The final version of the instrument is included as an appendix to this report.

Once the instrument was finalized, we constructed the sample of respondents. Our target individuals were the general counsel or chief litigators for the Fortune 1,000 corporations in the United States. We used the Fortune 1,000 as of the end of 1995 as our base list of companies, omitting firms that had merged or gone out of existence during 1996. The Computer-Assisted Survey Team (CAST) at the School of Industrial and Labor Relations at Cornell had responsibility for the data-gathering

portion of the project. The members of CAST mailed the survey throughout January and February 1997 to each of the potential respondents. In an accompanying letter, the potential respondents were given three options: (1) to complete the survey in traditional written fashion and fax or mail it back to Cornell, (2) to call CAST to set a time for an interview so that the survey could be completed by phone, or (3) to wait for a CAST interviewer to telephone. Each option offered respondents the opportunity to comment in an open-ended manner on other concerns related to ADR, and many of those comments are included in this report. This innovative approach ultimately led to a response rate of well over 60 percent—extremely high, given that surveys of high-level corporate populations usually generate response rates of less than 20 percent. For example, the Deloitte and Touche survey of this same population had 246, or approximately 25 percent of the potential respondents.

About the Respondents

Chart 1 shows the industry distribution for Fortune 1,000 corporations and for our final sample of 606. We chose the Fortune 1,000 as a sample population to enable us to draw broad conclusions about how ADR is practiced throughout the American economy. The corporations represented in our sample match almost exactly the industry distribution of the Fortune 1,000, which allows us to discuss differences in ADR practice across industry groups.

Our respondents also represent the Fortune 1,000 in other important ways: average returns to investors, revenues, and numbers of employees. One point worth reinforcing about the companies represented in our sample and the Fortune 1,000 is that these are very large companies, as witnessed by the average revenues

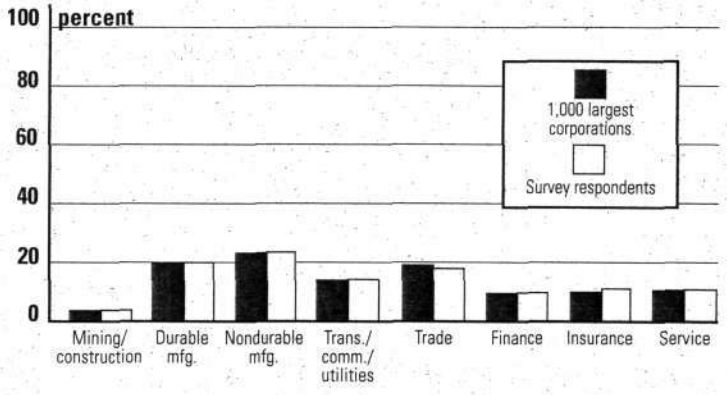

Chart 1. Sample Characteristics

Table 1
Returns to Investors, Revenues, and Number of Employees in Fortune 1,000 Companies versus Sample

	Fortune 1,000	Survey
Returns to investor	28.4%	27.8%
Revenues (billions)	$5,391.7	$6,424.5
Number of employees	24,526	28,454

and employment shown in Table 1. We have taken care not to overextend our conclusions to smaller corporations. Small and large businesses may differ significantly in the use of ADR, and with no data on the former, we cannot make comparisons. We think this is the only important caveat that needs to be advanced, and we are confident that our sample allows us to draw conclusions about large firms in a wide variety of industries.

Overall Conclusions

We report our conclusions in the five parts following this introduction. Part 1 summarizes the patterns of ADR use. It became clear that however the questions are asked, the results indicate that ADR processes are well established in corporate America, widespread in all industries and for nearly all types of disputes that we considered. Moreover, ADR practice is not haphazard or incidental but rather seems to be integral to a systemic, long-term change in the way corporations resolve disputes. Many corporations see it as a strategic tool for use in all conflicts.

In Part 2, we discuss how and why corporations choose to use ADR in specific cases, particularly the factors that trigger mediation and arbitration. It is clear that virtually all who use ADR expect to save time and money and report that they do so, by comparison with litigation and administrative agency processes. Interestingly, for some corporations, control over the process is as important as cost and time reasons for turning to ADR.

In Part 3, we categorize corporations by their preference for negotiation over litigation or vice versa and discuss the implications for each model's use of ADR. We focus on how corporate policy has developed, particularly the factors driving it. Policies favoring ADR practice greatly affect the level of ADR use within that firm, and we predict that many corporate policies will change to favor ADR over judicial processes, causing ADR to grow substantially. We also examine different patterns within industries and

observe that ADR is used to resolve different kinds of disputes in different industries.

In Part 4, we shift our attention to those firms and cases in which the choice is made not to use ADR. We conclude that there are significant barriers that prevent corporations from seeing ADR as useful or desirable in many situations. One critical factor is the difficulty of getting the other party to agree to use ADR. To consider ADR, both parties in a dispute have to want to negotiate and have the support of their superiors for an ADR process. In many companies, a critical obstacle to ADR use is the other side's resistance or blocking by higher management. Also important is the view of neutrals. Many corporations report a lack of confidence in the professional competence of neutrals, particularly arbitrators.

In Part 5, we speculate on the future use of ADR—areas in which we think it will grow, more stable areas, and areas in which use may even decline. We also focus on the factors influencing patterns of growth and decline.

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Patterns of ADR Use

Alternative 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.

Chart 2 reports respondents' experiences with the eight forms of ADR we asked about. Nearly all our respondents reported some experience with ADR, with an overwhelming 87 percent having used mediation and 80 percent having used arbitration at least once in the past three years. More than 20 percent 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 sixty corporations (10 percent) 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 percent); arbitration was a distant second (18 percent). 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 respondents additional questions about the frequency of their use of mediation and

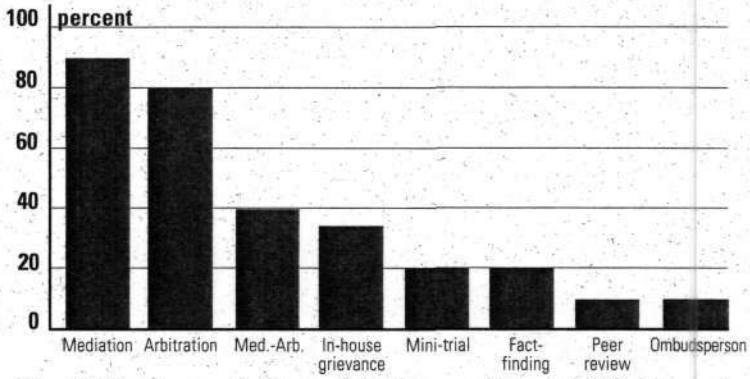

Chart 2. Experience with Forms of ADR among Fortune 1,000 Companies

arbitration in the last three years (see Table 2). Only 19 percent of those who had used mediation reported using it frequently or very frequently, almost 30 percent said they used it rarely, and the largest group (43 percent) used it occasionally. The pattern is similar for arbitration; 21 percent reported frequent or very frequent use, 33 percent used it rarely, and 42 percent 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.

Table 2
Frequency of ADR Use in Rights Disputes (in percent)

Frequency	Mediation	Arbitration
Very frequently	5.6	7.5
Frequently	13.1	13.1
Occasionally	43.2	41.6
Rarely	29.9	33.2
Not used in rights disputes	8.1	4.5

Note: Among all respondents, 87% reported using mediation; 78% reported using arbitration.

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 3 shows, almost 92 percent of the respondents have used mediation in rights disputes, but more than 60 percent have never used it for interest disputes. Table 4 indicates a similar pattern for arbitration, with over 95 percent of the respondents reporting some use of arbitration in rights disputes, while in interest disputes nearly 64 percent 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.

Table 3
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.

Table 4
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.

We expected that those corporations that had 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

Table 5
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

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 5).

We found that only 5 percent and 6 percent of corporations always choose to litigate when they are the 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 eleven specific dispute situations (Table 6).

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.

Table 6
ADR Use by Type of Dispute (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

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. This is a point we address further in Part 5, "The Future of ADR."

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

Table 7
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

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 7 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 ADR techniques reveals more significant variation by industry. For example, nearly half the financial firms had an in-house grievance procedure, while only 24 percent 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 percent of service firms. More than 27 percent of the mining/construction firms reported having an ombudsperson, while only 5 percent 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 percent) preferring arbitration. (See Table 8.)

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 have eliminated those companies with no stated ADR policy.

As Chart 3 indicates, some industry differences are apparent. A raw ranking reveals that the mining/construction sector tends to use ADR; in this group, 70 percent of the respondents reported that their firms use ADR most

Table 8
Preferred ADR Procedure 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

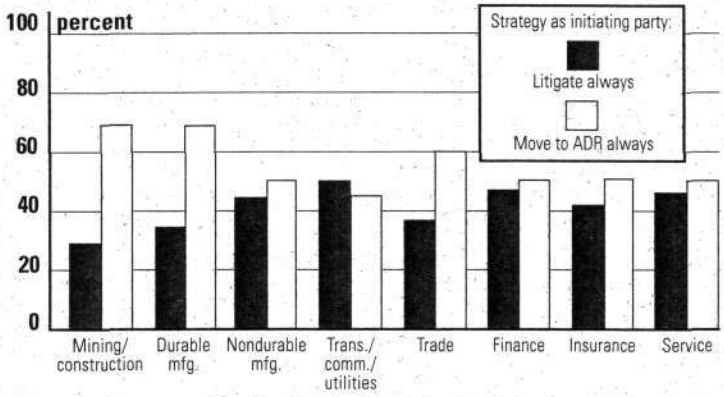

Chart 3. Corporate Conflict Resolution Policy by Industry

Table 9
Frequency of Use of Mediation by Industry (in percent)

Frequency	Mining/ construction	Durable mfg.	Non-durable mfg.	Trans./com./ utilities	Trade	Finance	Insurance	Service
Very frequently	9	6	1	5	1	10	14	6
Frequently	45	14	18	9	15	6	7	17
Occasionally	36	42	43	55	41	35	50	43
Rarely	0	31	32	26	35	31	20	29
Not at all	9	6	6	6	8	19	9	6

Table 10
Frequency of Use of Arbitration by Industry (in percent)

Frequency	Mining/ construction	Durable mfg.	Non-durable mfg.	Trans./com./ utilities	Trade	Finance	Insurance	Service
Very frequently	10	4	5	8	9	8	10	6
Frequently	50	9	18	19	9	6	13	12
Occasionally	30	49	45	42	26	38	41	41
Rarely	10	34	28	28	49	34	31	41
Not at all	0	3	3	3	7	14	5	0

or all of the time to resolve disputes. By stark contrast, 54 percent 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. Tables 9 and 10 show how frequently firms in eight industries use mediation and arbitration. In Table 9, the figure for the mining/construction sector stands out: 54 percent 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 percent 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 percent 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 11 and 12, these results are very interesting. As we observed earlier, nearly all the industries report heavy use of ADR

Table 11
Percentage of Firms Using Mediation by Type of Dispute 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 12
Percentage of Firms Using Arbitration by Type of Dispute 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

for employment disputes; 64 percent to 91 percent 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 customers, 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.

Clearly, significant differences exist in both practice and policy across industries, and, as the results reveal, different patterns of use are developing. Later in the report, as we develop our model of ADR use, we will explain some of these differences. There clearly is a need for further research to explain why some industries differ so significantly from the overall patterns.

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.

2

Why Do Corporations Use ADR?

So far we have focused on the patterns of ADR use by U.S. corporations. Now we need to delve more deeply into the reasons corporations use ADR. In this part we look at the mechanisms that initiate the use of ADR and at the less mechanistic aspects of dispute resolution, specifically the reasoning that goes into a corporation's decision to use ADR.

Decision making in this area is frequently ad hoc. As particular disputes arise in the course of business, an alternative to litigation may be necessary to maintain that business or the business relationship. Case-by-case decision making seems to characterize much of the use of ADR. An important variation on this situation occurs, however, when corporations agree in advance by contract to use mediation or arbitration in the event of a dispute. We speculate that the adoption of ADR clauses in contracts by a majority of companies would be an important step toward the institutionalization of ADR within corporations, a sign that it had become a standard practice.

Another triggering event occurs when the court or an administrative agency orders the parties to try resolving the dispute themselves through negotiation, mediation, or arbitration. Such court-ordered ADR now plays a significant role in encouraging corporations to negotiate when they otherwise might not. Even court-ordered ADR is usually still voluntary and can be avoided if a corporation wishes to do so.

Triggers for ADR

Our survey asked about the specific triggers for the use of mediation or arbitration. As Chart 4 shows, two primary mechanisms trigger the use of mediation: either circumstances lead to an ad hoc, voluntary decision to mediate, or a court orders it. The decision to mediate in advance as part of a contract or as company policy is much less common. Few corporations mediate as a matter of company policy, although many have signed the Center for Public Resources pledge to try ADR before litigation.

In stark contrast to the reasons they initiate mediation, corporations overwhelmingly pursue a process of arbitration because the parties have agreed to it in advance and have included it as a

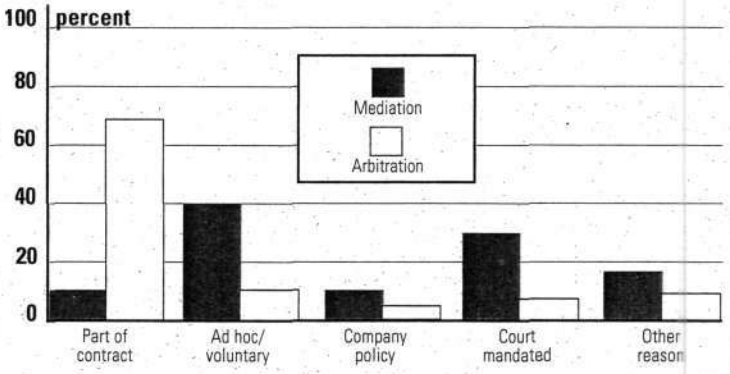

Chart 4. ADR Triggers for Mediation and Arbitration in U.S. Corporations

provision in a contract. For example, the counsel for a mutual life insurance company told us, "My company generally does not volunteer to use arbitration. We only use it when we are required to do so contractually. We operate a registered brokerage, which is a member of the NASD [National Association of Securities Dealers]. NASD requires arbitration, and so we use it under that agreement." This typifies corporations' experience overall. Only rarely (in 8 percent of the cases) do corporations report using arbitration because courts ordered them to do so, and parties choose to arbitrate only 10 percent of the time.

We surmise that, compared with arbitration, mediation is tried more experimentally and more readily because the stakes are lower. If it doesn't work out, the parties can always revert to litigation. The courts seem to be in concert with that view, in that they are ordering mediation much more frequently than arbitration. Even there, the courts urging the parties to mediate does not ensure serious efforts to reach agreement. The decision to arbitrate, except in rare cases, means the parties will have to accept the outcome of the process. Consequently, parties enter into this form of ADR much more deliberately.

The corporations most likely to agree in advance to use mediation or arbitration, we

Table 13
Triggers for Use of Mediation by Frequency of Use in Rights Disputes (in percent)

Frequency	Contract	Ad hoc	Company policy	Court order	Other
Very frequently	14	17	34	21	14
Frequently	13	35	25	16	10
Occasionally	11	47	5	25	13
Rarely	7	38	2	39	14

speculate, might be those most experienced in using ADR. If the key players in the company are comfortable with arbitration or mediation, knowledgeable about its workings, and satisfied with the outcomes produced, we would expect in the future to see more companies signing agreements in advance, more companies with pro-ADR policies, fewer instances of court-ordered arbitration or mediation, and less use of ADR on an ad hoc, case-by-case basis.

We compared the triggers for mediation with the frequency of its use (see Table 13) and found that the more frequently a company mediates, the more likely it is to agree in advance (by contractual clause or company policy) to use mediation. Among companies that use mediation very frequently, 14 percent report they use it because it is contractually required, compared with only 7 percent for companies that rarely use the process. In that same vein, companies that use mediation very frequently are the least likely to use it on a case-by-case basis. Only 17 percent of companies that mediate "very frequently" decide to do so on a case-by-case basis; for companies that go to mediation "frequently" the figure is 35 percent, and it is even higher for companies that use mediation less.

Likewise, company policy drives the decision to mediate only among those companies that use mediation frequently or very frequently and almost never among those that use the process less. The frequency of court-ordered mediation, with the decision to do so outside the control of the parties, does not seem to vary as significantly, although it is ordered slightly less frequently if the companies involved in the dispute generally use mediation a great deal. This may very well indicate that parties predisposed to mediate disputes are rarely ordered to do so by the courts, in all likelihood because they have already exhausted mediation as a means of dispute resolution.

We also examined triggers for the use of arbitration by the frequency of its use (see Table 14). As might be expected, the more frequently a company has used arbitration in the past, the more contractually triggered and policy-driven arbitration we see. The vast majority of companies that use arbitration frequently or very frequently do so because of contractual arrangements. As already noted, court-ordered arbitration is relatively rare. When it does occur, it is almost always imposed on parties that rarely use arbitration, and in our sample, it was never ordered for companies that used arbitration very frequently. Companies that use arbitration frequently also rarely choose to use it on a case-by-case basis, whereas companies that have less frequently used the process are more likely to choose it under ad hoc circumstances.

Table 14
Triggers for Use of Arbitration by Frequency of Use in Rights Disputes (in percent)

Frequency	Contract	Ad hoc	Company policy	Court order	Other
Very frequently	82	6	9	0	3
Frequently	82	2	3	3	10
Occasionally	73	9	2	8	7
Rarely	63	14	2	11	10

Overall, these data indicate that arbitration is a relatively fixed process, favored by those who have more experience with it and agree in advance that it will be the means of resolving any disputes. By contrast, mediation is triggered in many different ways. In addition, the survey data suggest that those who have used mediation relatively frequently exhibit an increased preference to use it again.

Economic Reasons for Using ADR

Our survey asked respondents: "When your company decides to use mediation [or arbitration], is it because it . . . ?" Fourteen possible reasons were given to which the respondent had to reply yes or no. These responses provide us with a reasonably complete understanding of the forces that cause a company to decide to mediate or arbitrate a particular dispute.

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, and our respondents support this idea. As Chart 5 shows, respondents overwhelmingly—more than 80

percent for mediation and nearly 70 percent for arbitration—report using ADR because they believe it saves both time and money.

Clearly, many corporations are under significant cost pressures, yet when asked whether these pressures affected their companies' decision to use ADR, only 55 percent of the respondents said yes. We thought this was a surprisingly low number, since we had assumed that cost-cutting

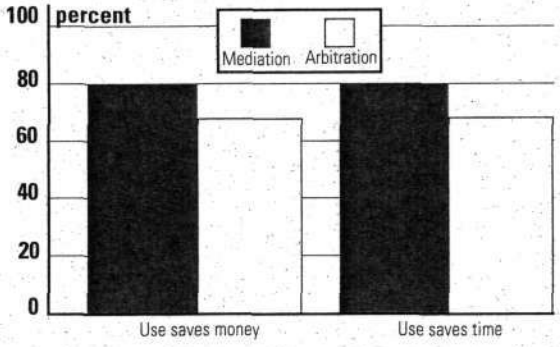

Chart 5. Economic Value of ADR to Companies Using It

lay behind much of the movement toward ADR. Chart 6 takes this analysis a bit further by dividing the respondents into two groups: those who stated that cost pressures had driven their corporations to use ADR and those who said that cost pressures did not play a role. We found that those in the former group were much more likely to have saved time and money by using mediation or arbitration. For example, almost 97 percent of those respondents whose companies were under cost pressures reported that mediation saved money. Clearly, those companies that opted to use ADR because of cost pressures believe they have saved money, even more so than those that used ADR for other reasons.

Process-Control Reasons for Choosing ADR

Cost reduction may be the most widely cited reason for choosing ADR, but corporations report many other reasons as well. In all likelihood some corporations use ADR without obtaining adequate evidence that it will save time and money. Some might even choose to use ADR if doing so cost more money. We asked a number of questions to find out what factors beyond time or money savings influence companies to choose ADR, and 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)

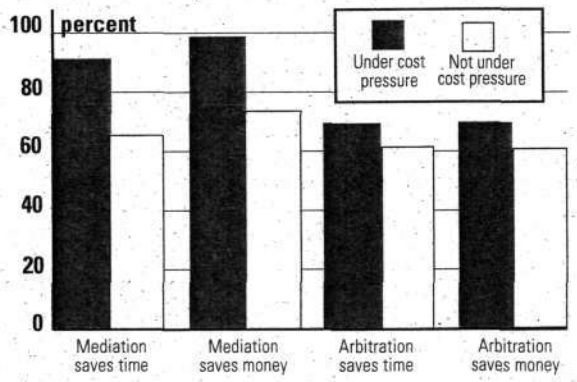

Chart 6. Value of ADR to Companies under Cost Pressure

Table 15
Reasons Companies Use Mediation and Arbitration (in percent)

Reasons	Mediation	Arbitration
Saves time	80.1	68.5
Saves money	89.2	68.6
Uses expertise of neutral	53.2	49.9
Preserves good relationships	58.7	41.3
Required by contract	43.4	91.6
Provides more durable resolution	31.7	28.3
Preserves confidentiality	44.9	43.2
Avoids legal precedents	44.4	36.9
More satisfactory settlements	67.1	34.8
More satisfactory process	81.1	60.5
Court mandated	63.1	41.9
Dispute involves international parties	15.3	31.9
Allows parties to resolve disputes themselves	82.9	—
Has limited discovery	—	59.3
Standard industry practice	—	33.7

they cannot control the outcome. Table 15 summarizes these "process-control" reasons along with others.

Specific reasons for choosing to mediate vary, as the following comments illustrate:

> One reason we use mediation is because we have a lot of environmental disputes involving complicated scientific issues, and we can select a mediator who knows more about such issues than a judge would.

> Mediation creates an environment in which the parties can speak freely about their perspective on the merits of the claim. There doesn't seem to be the filtering that occurs in the courtroom.

> Mediation allows each side to understand what's really important to the other side. It's not always simply a matter of money. Sometimes a simple apology can go a long way to resolving a dispute.
>
> In employment law disputes, mediation provides a catharsis for people who think they've been wrongly injured. It helps them get over their problem.

The most often cited reason to use mediation (identified by more than 82 percent 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 percent said it provided more satisfactory settlements, and 59 percent 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.

Consistent with the results presented earlier, some parties engage in mediation because it is required by contract (43 percent) or is court mandated (63 percent). More than half the respondents saw the mediator's expertise as an advantage of the process. For example, the general counsel of a Midwest financial services corporation expressed this opinion: "Mediators are sometimes good and sometimes bad, but they are generally better than arbitrators." In Part 4 of this report, we analyze the parties' views of mediators and arbitrators in more detail, but this response was typical; many of the respondents appeared to have some ambivalence toward mediators and arbitrators.

The results for the same series of questions with regard to companies' reasons for using arbitration are also presented in Table 16. The overwhelming reason respondents gave was that they are required to do so by contract; in other words, in effect, they agreed to follow this route prior to the dispute.

In general, the support for arbitration among corporations is not as strong as it is for mediation. For example, just over 60 percent 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. Likewise, respondents supported the other process-control reasons for using arbitration in smaller, albeit significant, numbers. As one respondent from a large insurance company said, "Arbitration is cheaper [than litigation], faster, confidential, final, and binding. What more can I say?"

Although two-thirds of the respondents thought that mediation produced more satisfactory settlements than litigation, only about one-third could say the same for arbitration. Nearly 60 percent believed that mediation preserved good relationships, while 41 percent believed this was true of arbitration. In sum,

Table 16
Reasons Companies Use Mediation, by Frequency of Use in Rights Disputes (in percent)

Reason	Very frequently	Frequently	Occasionally	Rarely	Not at all
Saves time	97	91	81	74	69
Saves money	97	97	91	83	81
Senior management desire	69	68	46	32	39
Uses expertise of mediator	69	66	53	48	40
Preserves good relationships	83	74	64	46	31
Provides more durable resolution	40	55	33	23	15
Required by contract	41	56	45	42	26
Preserves confidentiality	74	56	46	34	38
Avoids legal precedents	57	48	49	37	33
More satisfactory settlement	93	87	69	53	55
More satisfactory process	97	96	82	72	73
Court mandated	66	61	62	68	57
Dispute involves international parties	21	20	16	15	5
Allows parties to resolve disputes themselves	100	97	84	76	68

Note: These data include all companies that reported using mediation in either rights or interest disputes, so the "not at all" column represents use of mediation in interest disputes.

although there is strong support for the cost reduction role of arbitration, there is much less support for the notion that arbitration has value as a means of controlling the process.

One further set of data needs to be analyzed before we can conclude this part of the report. Some would say that the views of those with significant experience in using mediation and arbitration are more valid than the views of those with less experience. In Table 16 we correlate the amount of experience companies had with mediation, as reported in their data on frequency of use, with their reasons for using mediation.

In general, those respondents who had used mediation frequently or very frequently were more uniform in their opinions of why they used the process than those respondents who used mediation less frequently. Respondents who used mediation the most frequently reported higher proportions of affirmative responses for every reason their companies might use the technique. These respondents answered in the affirmative for both time and money reasons. Further, when there was strong support among all respondents for these reasons to use mediation, respondents whose companies were frequent and very frequent users of mediation answered in the affirmative for these reasons almost universally. The same was true of the process-control reasons.

We tested the parallel proposition for arbitration (see Table 17) and found the data strikingly parallel to the results for mediation: the views of those in the companies with the most arbitration experience are more uniform than those of the respondents in general.

Summary

In this part we have attempted to answer the question of why corporations choose to use mediation or arbitration instead of litigating their disputes in court. The answer to this question leads us to a more general understanding and model of the growth of alternative dispute resolution, and we present that model in Part 3.

As the findings just described indicate, mediation and arbitration processes are not institutionalized. In general, parties are reluctant to agree in advance to mediate and make that decision on a case-by-case basis. In contrast, arbitration, although less widely used, is almost always agreed to in advance. Those companies that use both mediation and arbitration more frequently seem much more willing to incorporate these processes into contracts and to try ADR processes as a matter of company policy.

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. In fact, for some corporations, particularly those that are not under significant cost pressures, the opportunity to regain control may be their most important motivation.

Table 17
Reasons Companies Use Arbitration, by Frequency of Use in Rights Disputes (in percent)

Reason	Very frequently	Frequently	Occasionally	Rarely	Not at all
Saves time	86	72	73	56	75
Saves money	86	70	74	58	65
Senior management desire	69	52	49	32	37
Uses expertise of arbitrator	69	50	56	39	32
Preserves good relationships	51	58	43	33	21
Provides more durable resolution	56	37	26	23	26
Required by contract	97	100	94	86	76
Preserves confidentiality	55	47	46	37	37
Avoids legal precedents	61	31	39	33	30
More satisfactory settlement	44	40	35	31	35
More satisfactory process	76	69	63	51	60
Court mandated	45	36	45	40	48
Dispute involves international parties	17	36	42	25	11
Has limited discovery	70	64	68	46	50
Standard industry practice	55	46	35	24	25

Note: These data include all companies that reported using arbitration in either rights or interest disputes, so the "not at all" column represents use of arbitration in interest disputes.

3

Corporate Policy and Strategy

A natural question that must be addressed in any study of ADR is why its use has increased so dramatically in recent years. After all, arbitration, mediation, and other ADR techniques have been around for a century, if not longer. Some observers trace their use to biblical times. In labor-management relations, arbitration and mediation were first used in the nineteenth century. Commercial arbitration began even earlier. Certainly complaints about the excessive costs and delays associated with litigation are not new; remember, for example, Charles Dickens's vivid depiction of the never-ending civil suit *Jarndyce v. Jarndyce* in *Bleak House*. Why, then, is the ADR "revolution" so recent in origin?

Our study suggests that the rapid spread of ADR techniques in the United States is a consequence of a unique convergence of several important societal factors. These factors are summarized in Figure 1, which in effect presents a simple "model" of ADR use in corporate America.

Competitive Pressures and Restructuring

The key factor that explains the increased use of ADR, we maintain, is competitive pressure. Although many American corporations were insulated from international competition for most of the post–World War II period, by the 1980s they felt the full effects of global competitive pressures. To compete effectively in foreign and domestic markets, American corporations went through a wave of mergers, acquisitions, and takeovers. They also engaged in downsizing, reengineering, and restructuring. All of these factors, our model suggests, combined to motivate corporations to use ADR.

In other words, the quest in the 1980s to be more efficient and more cost-effective led corporations, in time, to examine the costs associated with their legal affairs. As mentioned earlier in this report, many respondents identified these corporate cost pressures as a major factor motivating them to adopt ADR. Some of them told us that the "transaction" costs of settling a dispute—the costs of inside and outside legal counsel, the costs associated with expert witnesses, and so forth—were often two to three times the amounts of the settlements themselves. The corporation would often invest considerable money and energy from the time of initial filings in a court suit through interrogatories and depositions to the time of the trial itself, and then—in 90 percent of all cases—settle "on the courthouse steps" or in the judge's chambers. It was in this context that many corporations began to assess the possibility of using mediation or arbitration to save the time and expense associated with litigation.

Efforts to find more efficient and effective ways of doing business often resulted in the corporation focusing on its legal department. Some of our respondents told us that their departments had been downsized and restructured. Top management, we were told, had required the corporate counsel to cut his or her budget. Relationships with outside law firms were redefined. The corporate counsel, often at the urging of the company's CEO, carefully assessed the use of ADR as a cost-saving measure.

Frustration with the Legal System

Another set of factors, largely independent of competitive forces, also was driving corporations to use ADR. In Figure 1, these factors are labeled "frustration with legal system." It is, of course, well known that federal and state regulation of corporate behavior multiplied in the post–World War II period. In the area of employment law alone, between 1960 and 1990 Congress passed at least two dozen major statutes regulating employment conditions, including the Civil Rights Act of 1964, the Occupational Safety and Health Act in 1970, the Employee Retirement Income Security Act in 1974, the Americans with Disabilities Act in 1990, the Civil Rights Act of 1991, and the Family and Medical

Leave Act of 1993, to mention only a few. More and more dimensions of corporate behavior were brought under the scrutiny not only of the court system but of a multitude of regulatory agencies. In the employment area, for example, corporate counsel had to cope with new areas of litigation ranging from sexual harassment and accommodation of the disabled to age discrimination and wrongful termination. Many of the courts and administrative agencies became burdened with backlogs of cases, and, as many of our respondents commented, the delays in settling these disputes became intolerable. The frustration brought on by these problems was another factor motivating corporations to adopt alternative dispute resolution.

Court and Contract Mandates

Legislators and policy makers were not oblivious to the stresses being felt in our legal system. In many situations they responded by encouraging the use of ADR. In 1990, for example, Congress passed the Civil Justice Reform Act, which encouraged federal courts to experiment with ADR. The court systems in more than half the states now encourage, or even mandate, the use of ADR to reduce backlogs and to speed up the handling of disputes. A growing number of administrative agencies, such as the federal Equal Economic Opportunity Commission (EEOC) and state-level workers' compensation boards, have begun to encourage the use of ADR to resolve complaints that would otherwise need to be handled by the agency itself. In addition, as mentioned earlier, companies are increasingly incorporating provisions requiring ADR into contracts they negotiate with their vendors, suppliers, customers, and employees.

The U.S. Supreme Court has also been inclined to favor the use of ADR, especially in employment disputes. In *Gilmer v. Interstate/Johnson Lane Corp.*, decided in 1991, the Court held that a provision in an employment contract requiring an employee to use arbitration to resolve a claim arising under the Age Discrimination in Employment Act was enforceable by the courts.[5] The initial application of the *Gilmer* principle to age discrimination suits in the securities industry has subsequently been broadened to the application of other statutes in other industries. The significance of this decision is that it allows employers to require their employees to agree to employment contracts that substitute arbitration for litigation in disputes in which arguably a statutory violation has occurred. Subsequent court decisions have made it clear that there are limitations on the applications of *Gilmer*.[6] For our purposes, however, it is significant to note that the courts' support of ADR has spurred its use in major corporations.

Characteristics of Pro- and Anti-ADR Companies

Having identified several large global and domestic forces exerting strong pressure on U.S. corporations to adopt ADR, we naturally asked why some Fortune 1,000 companies have embraced ADR while others have not. Of the more than six hundred corporations in our sample, respondents from about thirty-five indicated that they never used ADR, and some of these respondents were adamantly opposed to its use. One opponent told us, "ADR is a response to perceived problems in a system that's worked for two hundred years. Let's fix the problems rather than develop new ones."

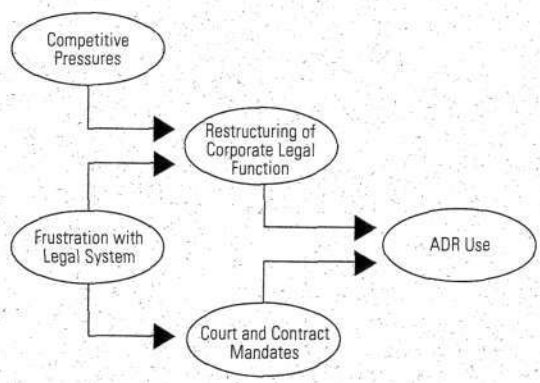

Figure 1. Factors Affecting Growth of ADR Use

What distinguishes these thirty-five companies that "litigate always" (i.e., the companies that told us they never use ADR) from the seventy-three companies that "try to move to ADR always"? Because the survey is confidential, we cannot identify individual companies. We can say, however, that the strongly pro-ADR companies tend to be the very largest ones in the Fortune 1,000 and to be known for adopting so-called progressive policies in other areas. For example, many pro-ADR companies were among the first to embrace total quality management and team-based production systems. Several were leaders in introducing high-performance work systems. Most faced significant global competitive pressures and engaged in downsizing in the 1980s. A pro-ADR policy seems closely linked to this array of corporate policies.

The companies in the group that never used ADR tended to be smaller than average (although all corporations listed in the Fortune 1,000 are very large indeed). They also tended to be very profitable and under much less cost pressure than the pro-ADR group. Several have reputations for dealing with unions in a militant fashion.

We did a significant amount of analysis to confirm our impressions about the characteristics that distinguish strongly pro-ADR corporations from more resistant companies. For one line of analysis, we compared companies whose respondents identified them as "strong ADR" companies with those said to be "strong litigators." Table 18 shows the connection between corporate size and ADR policy for these two groups; the strong litigators clearly tend to be smaller than the pro-ADR companies.

Table 18
Conflict Resolution Policy of Strong Litigators versus Strongly Pro-ADR Companies by Size of Corporation (in percent)

Corporate policy as	Quartile (smallest to largest)			
initiating party	1	2	3	4
Litigate always	30.6	41.7	22.2	5.6
Move to ADR always	20.9	16.4	25.4	37.3

We also wondered whether this relationship would hold up if we examined other combinations of categories. For example, we combined companies strongly resistant to ADR ("litigate always") with resistant companies ("litigate first") and compared them with more pro-ADR companies (the "litigate only [when] appropriate" group combined with the "move to ADR always" group). We called the former group the "litigate mostly" group and the latter the "use ADR mostly" group. Chart 7 shows that even when the companies are sorted and combined in this fashion a strong relationship exists between corporate size and ADR policy. The "litigate mostly" group tends to be clustered in the first quartile (smallest size), while the "use ADR mostly" companies tend to be distributed more evenly across the quartiles but are much more concentrated in the largest ones.

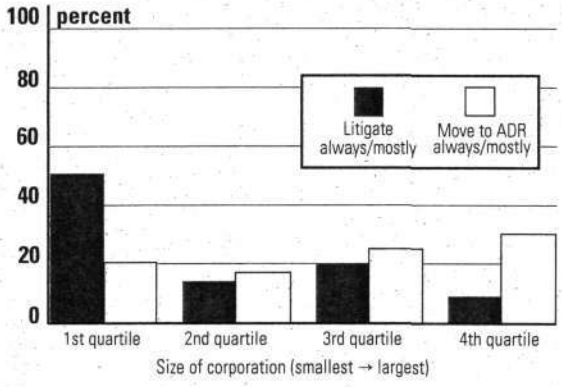

Chart 7. Corporate Policy toward ADR by Size of Company

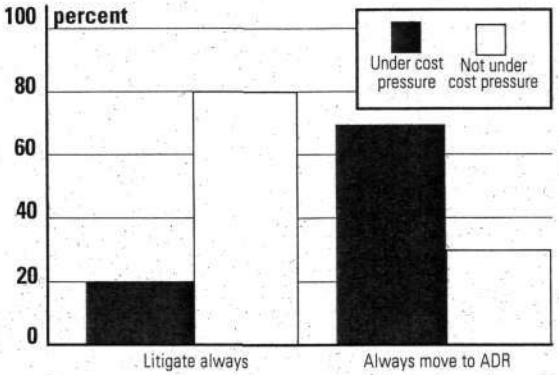

Chart 8. Relationship between Corporate Conflict Resolution and Cost Pressures

We also examined the relationship between corporate ADR policy and cost pressures. The strong connection between being under cost pressures and developing a pro-ADR policy is most apparent when we compare the "litigate always" companies with the strongly pro-ADR companies, as shown in Chart 8. It is still significant, however, if not quite as strong, when we compare the "litigate mostly" and "use ADR mostly" groups.

Use of Conflict Management Systems

As we analyzed our survey data, a finding began to emerge that we had not fully anticipated. A significant number of respondents told us that their companies had developed—or at least planned to develop—what can best be described as a conflict management system.[7] Such a system incorporates the use of ADR but also emphasizes dispute prevention.

Corporations engaged in conflict management tend to use a variety of procedural devices for handling disputes. Many combine an in-house grievance procedure with other prevention measures. Some corporations have invested in training programs, including traditional classroom training as well as role playing and interactive exercises, that help employees understand the application of statutes and policies relevant to their responsibilities. Corporations have trained groups of employees ranging from top-level managers to rank-and-file workers. Some corporations have also engaged in ongoing compliance reviews.

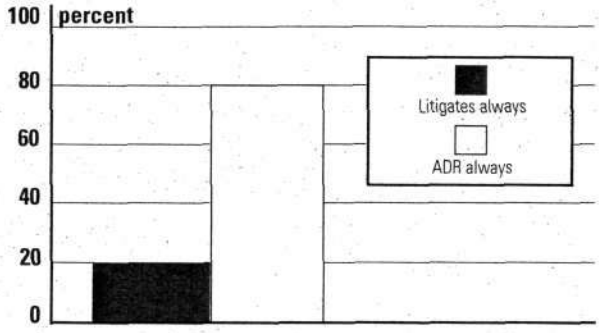

Chart 9. Availability of Conflict Resolution Training in Companies That Litigate or Use ADR

Our survey instrument did not ask respondents directly whether their companies had a conflict management system. After the fact, however, we realized we had asked about various components of such a system, including, for example, conflict resolution training. Chart 9 shows that a strong relationship exists between a corporation's ADR policy and the training it provides in conflict resolution; 80 percent of the companies that pursue "ADR always" also make conflict resolution training available, whereas only 20 percent of the companies that "litigate always" do so. Indeed, we found a strong association between companies that have a strong pro-ADR policy and those that have an in-house grievance procedure, use peer review, use ADR broadly in many kinds of disputes, and provide training in conflict resolution. Our findings suggest that in many companies with strong ADR policies, ADR isn't simply a set of techniques added to others the company uses but represents a change in the company's mind-set about how it needs to manage conflict.

Use of ADR in International Disputes

Another question that particularly interested us was the extent to which ADR is used in international disputes. As shown in Table 19, although mediation and arbitration are both used extensively, there is apparently a somewhat greater tendency for Fortune 1,000 corporations to use arbitration rather than mediation in international disputes. About one-third of respondents said that the question did not apply to them; not surprisingly, most of these represented corporations that competed only or primarily in domestic markets.

We were also interested in whether the use of ADR in international disputes was related to ADR use in other kinds of disputes. Table 20 shows that there is a fairly significant relationship between a corporation's tendency to employ mediation in international disputes and the corporation's general use of mediation. For example, more than 80 percent of the corporations whose respondents said they frequently use mediation in other kinds of disputes report that they are likely or very likely to use it in international disputes.

Table 21 provides parallel findings for the use of arbitration. Again, there is a correlation between use of arbitration generally and use in international disputes specifically. Thus, about 80 percent of the respondents who said that their companies frequently used arbitration in other kinds of disputes also said they were likely or very likely to use it in international disputes. In sum, there appears to be a significant correlation between corporate use of ADR in domestic disputes and its use in international conflicts.

Table 19
Use of Mediation or Arbitration in International Disputes (in percent)

Frequency	Mediation	Arbitration
Very likely	10.1	17.8
Likely	32.6	32.6
Unlikely	15.8	10.3
Very unlikely	6.9	6.5
Not applicable	34.6	32.8

Table 20
Likelihood of Using Mediation in International Disputes versus Use in General (in percent)

Use of Mediation	Very likely	Likely	Unlikely	Very unlikely
Very frequently	29	47	18	6
Frequently	35	51	5	9
Occasionally	14	51	27	8
Rarely	6	48	30	16
Not at all	12	47	29	12

Table 21
Likelihood of Using Arbitration in International Disputes versus Use in General (in percent)

Use of Arbitration	Very likely	Likely	Unlikely	Very unlikely
Very frequently	43	35	4	18
Frequently	37	45	18	0
Occasionally	24	58	13	4
Rarely	22	43	20	14
Not at all	11	22	11	56

Summary

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 reengineering 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, sometimes controlled by one or two families, are more likely to favor litigation. When it comes to choosing between litigation and ADR, these companies would rather fight than switch.

A logical question that follows is whether corporate policies have an effect on the actual disposition and real cost of disputes. Our survey results do not give us a clear answer to this question. We do know, as previously noted, that our survey respondents believe overwhelmingly that the use of ADR has saved them time and money. But those companies that do not have a policy of relying on ADR may be pursuing other objectives. We will have more to say on this point in Part 4.

4

Barriers to the Use of ADR

In our interviews with corporate counsel, we discovered several key reasons why some corporations chose not to use ADR. Some lawyers told us, for example, that they would use ADR only if and when senior management supported it. While many senior managers approve of ADR and support its use, and although a counsel's office can exercise broad discretion over whether to use ADR in routine disputes, the use of ADR ordinarily requires the support of top managers in disputes involving important legal principles or potentially large settlements. The bigger the case and the higher the stakes, the more likely it is that the CEO or the chairman of the board will be involved in the decision to use ADR. Also, adopting a set of strong ADR policies usually requires the involvement of both the counsel's office and other top managers. The adoption of a conflict management system is often a strategic decision, as we noted in Part 3, and is likely to involve the CEO and other top managers in addition to the general counsel.

Our interviews also suggested that middle managers sometimes find ADR threatening. On the one hand, they make decisions that are the source of many corporate disputes; on the other hand, 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 that their authority is undermined. A representative from a leading pharmaceutical company told us the company had estimated that ADR would save it millions of dollars in litigation costs but that it had not instituted a policy of using ADR because its middle managers thought such a policy would undercut their authority.

Some of our respondents told us that they did not use ADR because, compared with litigation, it was still too difficult to initiate. That is, in some respects it was still easier to initiate a court suit than to pursue mediation or arbitration. Why is this? Quite simply, because using ADR usually requires the agreement of the opposing party in a dispute, and reaching such an agreement with an adversary can be difficult. Even initiating a discussion of the possibility of a negotiated settlement can be seen as a sign of weakness. In some disputes, both parties would prefer to settle but do not initiate negotiations because they don't wish to signal anything except determination to litigate to the end.

Even if one party understands the potential gains to both disputants from opting for ADR, there is clearly no guarantee that the adversary party will have the same assessment. The use of ADR requires a level of sophistication that one of the parties may not have. Persons suing a corporation may have an emotional investment

in the dispute that prevents them from understanding the potential benefits of ADR. Moreover, the use of ADR to resolve disputes tends to blur—if not eliminate—the distinction between winners and losers. This is particularly true for negotiated settlements, and even in some cases for arbitrated settlements, where the arbitrator has split the difference. Corporate counsel may not care about this, but it may be important to an opposing lawyer. If an opposing counsel, and his or her client, believe there is a chance for a big "victory" in a suit against a major corporation, they may not be inclined to agree to an ADR process.

Therefore, because the use of ADR generally requires a negotiated agreement between complainant and respondent, and because there are numerous barriers to achieving such agreements, there may be a tendency to resort to litigation even when the benefits of using ADR are apparent. Indeed, several respondents emphasized that using ADR requires a change in the disputants' mind-sets—that is, in the culture of handling disputes—and not merely the ad hoc consideration of alternative methods for resolving them.

Advantages and Disadvantages of ADR

Some companies do not use ADR because they find aspects of the mediation or arbitration process undesirable, including some of the very same characteristics that other companies like. For example, ADR processes are not usually confined to legal rules, such as those governing the admissibility of evidence and the examination of witnesses. Arbitrators may consider hearsay evidence, and advocates may lead their witnesses. Discovery is rarely part of the mediation process and seldom part of the arbitration process, unless the parties choose to employ it. There are even fewer procedural constraints on the behavior of mediators. A general counsel from a public utility told us, "Cost isn't the issue—it's the lack of rules. Litigation may be expensive, but it does have rules. Unless we see a fair and quick resolution, we don't use mediation."

In some disputes the lack of legal rules and constraints helps to expedite settlement, but in other disputes corporate lawyers prefer the procedural safeguards provided by conventional litigation. This especially appears to be the case when important legal principles are involved or when a company wants a court decision to set a precedent.

For decades federal courts have been inclined to defer to decisions made by arbitrators. Most state courts have developed comparable policies. The courts have consistently supported the enforceability of agreements to arbitrate entered into by the disputants. At the same time, they have granted arbitrators broad discretion to decide issues of arbitrability—that is, what matters are or are not arbitrable under arbitration agreements. The courts have also allowed arbitrators considerable latitude in fashioning appropriate remedies. As long as an arbitrator holds a full and fair hearing, allows each party to make a full and complete presentation of its case, and arrives at a decision that is neither arbitrary nor capricious nor "repugnant" to public policy, the courts will normally refuse to consider an appeal. The broad discretion the courts have granted arbitrators and the virtual finality of arbitrators' decisions have made this process a desirable alternative to litigation in many cases. In other cases, however, as our respondents noted, these characteristics of arbitration are reasons corporations may choose not to use it.

Several of our respondents noted that the arbitration process is beginning to match litigation in cost and complexity. The counsel from a large energy company said, "Arbitration is proving to be just as burdensome as litigation. The opposition can use arbitration to elongate the process. It can take over six months simply to agree on an arbitration panel. You can be constantly running back to arbitrators for decisions on discovery. It is a process fraught with potential abuse." This view was echoed by a respondent from a major paper products corporation: "Arbitration oftentimes includes the worst characteristics of litigation without any of the benefits. The arbitrator can let anything into the record, and the process can be every bit as expensive and burdensome as civil litigation." Such abuses can be limited, however, if the parties agree in advance on the procedures to be used by the arbitrator.

For many corporations, the decision to use ADR (or to adopt pro-ADR policies) is apparently a pragmatic one, largely based on a cost/benefit analysis of using ADR versus litigation. As one respondent told us, "In some cases it's simply not appropriate to use mediation, and in other cases it is. In some cases the dollar amount of the claim isn't high enough to waste your time on mediation. We believe the benefit from mediation comes in cases involving multiple claimants and more than a million dollars in claims."

It is widely recognized that the use of either mediation or arbitration tends to result in compromise settlements. Mediators attempt to persuade negotiators to make offers and counteroffers until a compromise agreement is reached. Arbitrators, in the minds of some, consider the positions the parties have presented and then make an award that splits the difference between the two positions. The perceived tendency of ADR to produce compromise settlements can serve as a barrier to the use of mediation and arbitration, according to a significant number of our respondents. As the counsel for a food products corporation told us, "We're reluctant to use binding arbitration. If the matter in dispute is very serious or involves great amounts of money, then we don't use arbitration because arbitrators have a strong tendency to compromise, rather than do what may be right. Minor matters may be arbitrated but not major ones. We may be more likely to use mediation in both major and minor cases, but we don't have a set policy."

Again, when a corporation believes that a dispute involves an important matter of principle, it is less willing to consider a process in which concession and compromise are inherent. A lawyer from a prominent midwestern manufacturing company told us that it avoided ADR because it wanted to establish a reputation for never compromising in critical disputes. In the long run, this company maintained, a reputation for fighting in every major dispute would serve as a deterrent to lawsuits and save it money.

Another respondent, from a corporation based in California, said, "Sometimes we want a total victory in a lawsuit. We want to inflict some pain and suffering on our adversary. In those cases we're not likely to use mediation."

Finally, a surprising number of respondents told us they did not use ADR because they lacked trust and confidence in ADR neutrals, especially arbitrators. Although there is no shortage of individuals available to serve as mediators and arbitrators, many of our respondents believed there is a shortage of neutrals who are truly qualified. For example, a company in the maritime business had trouble finding an arbitrator with special knowledge of both maritime law and the international law of the sea. Under the circumstances, it preferred to litigate the dispute rather than take a chance on an arbitrator lacking the expertise the corporation thought was necessary.

In our survey we asked the respondents to tell us whether various factors were or were not important in their companies' decision not to use ADR (see Table 22). Overwhelmingly, our respondents indicated that the principal reason they did not use either mediation or arbitration was because the opposing party was unwilling to agree to it. Three-quarters of the respondents said they did not use mediation because the opposing party was unwilling; the figure for arbitration was 63 percent. About 40 percent of our respondents said they did not use mediation because it was a nonbinding procedure and (again 40 percent) because it resulted in compromise outcomes. In the case of arbitration, 54 percent said they didn't use it because arbitrators' decisions were difficult to appeal. About 49 percent did not like the fact that arbitration hearings are not confined to legal rules. As previously noted, these features are often viewed as advantages of the arbitration process, and yet many of our respondents view them as barriers to its use. About half our respondents indicated that when they did not use arbitration it was because it resulted in compromise outcomes.

Table 22
Barriers to ADR Use (in percent)

Barrier	Mediation	Arbitration
No desire from senior management	28.6	35.0
Too costly	3.9	14.8
Too complicated	4.6	9.9
Nonbinding	40.9	—
Difficult to appeal	—	54.3
Not confined to legal rules	28.1	48.6
Lack of corporate experience	24.7	25.9
Unwillingness of opposing party	75.7	62.8
Results in compromised outcomes	39.8	49.7
Lack of confidence in neutrals	29.0	48.3
Lack of qualified neutrals	20.2	28.4
Risk of exposing strategy	28.6	—

A significant proportion of our respondents (29 percent in the case of mediation and 35 percent in the case of arbitration) said they did not use ADR techniques because senior management had no desire to do so. As we noted above, the active involvement and support of senior management are especially necessary when important matters of strategy, policy, or principle are involved.

Very few respondents indicated that they did not use mediation because it was "too costly" or "too complicated." As Table 22 shows, these considerations were somewhat more important in the decision not to use arbitration but much

less important than the other barriers listed. A respondent from a corporation headquartered in Indiana told us, "We've decided as a company we don't want to use mediation. We feel in nonbinding situations it's just an added step. It costs us time and money, and it just leads into other steps in the litigation process. We don't think we're achieving anything when we use mediation."

The following negative views reflect the opinions of a small minority of the respondents in our study. Nonetheless, they provide some understanding of why other companies do not use mediation:

> Generally mediation is only used at the end of the long drawn-out part of the discovery process and you're pretty much into trial by then. It really doesn't save time.

> Using mediation can be more complicated than litigation. When it works it avoids costs, but when it doesn't work it is basically going to trial twice.

> We don't use mediation anymore. I can't think of any circumstance where we found mediation to be productive.

> Not a lot of people are familiar with mediation, and it's always a battle to get people to agree to it unless they've been through it before. And lawyers are more afraid of it than the parties.

Barriers Cited by Frequent versus Infrequent ADR Users

In an effort to probe a bit more deeply into the factors impeding the use of ADR, we examined whether the barriers to use differ between frequent and infrequent users of mediation and arbitration. The results are shown in Tables 23 and 24.

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 percent 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 unwillingness of opposing parties was still dominant, but other reasons also were important. The results in Table 23 suggest that the nature of the mediation process (as opposed to the other party's refusal) is a much more important barrier to the use of the technique among corporations that use mediation infrequently than to corporations that use it frequently.

As shown in Table 24, 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.

Another result in Table 24 is worth pondering. Half or more of the respondents who had used arbitration, whether frequently or

Table 23
Barriers Preventing Frequent versus Infrequent Users of Mediation from Using Mediation (in percent)

	Frequency of Mediation Use				
Barrier	Very frequently	Frequently	Occasionally	Rarely	Not at all
No desire from senior management	18	21	27	30	25
Too costly	0	3	4	5	5
Too complicated	4	0	5	6	5
Nonbinding	25	30	41	47	40
Not confined to legal rules	14	15	31	31	28
Lack of corporate experience	11	4	20	33	18
Unwillingness of opposing party	93	94	86	69	70
Results in compromised outcomes	32	27	41	40	48
Lack of confidence in mediator	4	24	31	30	28
Lack of qualified mediators	11	18	21	22	18
Risk of exposing strategy	18	22	33	26	28

Table 24
Barriers Preventing Frequent versus Infrequent Users of Arbitration from Using Arbitration (in percent)

Barrier	Frequency of Arbitration Use				
	Very frequently	Frequently	Occasionally	Rarely	Not at all
No desire from senior management	14	32	32	42	10
Too costly	0	14	14	18	0
Too complicated	3	5	7	15	0
Difficult to appeal	49	64	55	52	40
Lack of corporate experience	6	16	22	32	11
Unwillingness of opposing party	83	70	74	62	65
Results in compromised outcomes	34	55	51	55	48
Lack of confidence in arbitrator	29	44	45	53	48
Lack of qualified arbitrators	20	30	26	29	35

infrequently, told us that when they choose not to use it one reason is that arbitrators' decisions are difficult to appeal. As noted above, some of our respondents told us that they hesitate to use arbitration when they believe a dispute involves important legal principles and a decision may have value as a precedent. They prefer to litigate such cases rather than go to arbitration and face the possibility of an adverse decision that cannot be appealed.

Concerns about Neutrals' Qualifications

The respondents' concerns about the qualifications of neutrals require further elaboration. We asked our respondents where their companies obtained their mediators and arbitrators. As shown in Chart 10, well over half the respondents said they obtained their arbitrators from a "private ADR provider"—primarily the American Arbitration Association (AAA) and JAMS/Endispute. Other providers mentioned include the Center for Public Resources, the Chamber of Commerce, and, in the case of corporations in financial services, the National Association of Securities Dealers. There was apparently much less reliance on other sources, such as the courts or state or federal agencies.

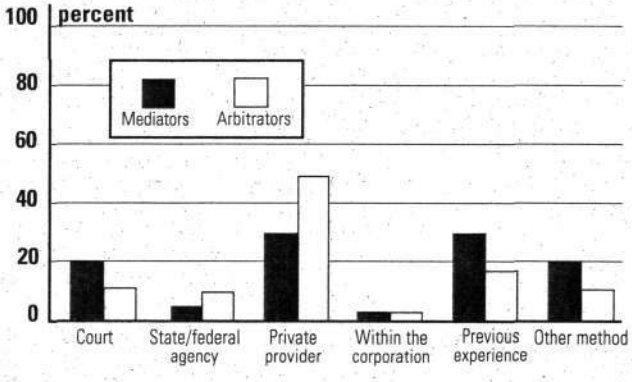

Chart 10. Sources of ADR Neutrals

Most mediators either came from private providers or had previous experience with the corporation (about 30 percent each). About 20 percent of the respondents said their mediators were assigned by the courts, reflecting the growth of court-annexed mediation. The AAA and JAMS/Endispute are also important providers, but our respondents said that word of mouth (the main component of the "other method" category in Chart 10) was equally important in obtaining mediators.

Our respondents generally expressed a high level of satisfaction with the qualifications of the ADR neutrals they dealt with (see Table 25). More than 94 percent of the respondents told us that they thought the mediators they had used were either somewhat qualified or very qualified; the comparable figure for arbitrators was 93 percent. These results should be interpreted carefully, however. As Table 25 shows, only 27 percent of the respondents thought the arbitrators they had used were very qualified, whereas two-thirds thought they were only somewhat qualified. We cannot say with certainty what each respondent actually meant by the term "somewhat qualified," although a comment made by one respondent may provide a clue. He told us that his corporation had been involved in quite a few arbitration cases and that the qualifications of the arbitrators had varied significantly; some were very qualified and others were not. In our survey he answered "somewhat qualified" as a

Table 25
Satisfaction with Qualifications of ADR Neutrals (in percent)

Opinion	Mediators	Arbitrators
Very qualified	41.2	26.8
Somewhat qualified	53.3	66.1
Not qualified	1.0	1.7
Don't know	4.6	5.4
Lack confidence in mediators/arbitrators	29.0	48.3
Perceive a lack of qualified mediators/arbitrators	20.2	28.4

way of suggesting the average quality of the arbitrators his company had used.

That so many respondents thought that arbitrators were only somewhat qualified may be viewed as disturbing, especially given that, as Table 25 shows, nearly half the respondents said they lacked confidence in arbitrators. Overall, it appears that our respondents' evaluations of mediators and arbitrators are mixed. In general, they are satisfied with the qualifications of the neutrals they have used, but they have reservations about some of them, particularly when specialized expertise is required. As one respondent said, "We have a lot of intellectual property disputes, but we don't think arbitrators do a good job with them. There simply aren't any qualified arbitrators in this area." Several of our respondents thought that better training programs for neutrals were needed, and others recommended improving the means of certifying neutrals' expertise.

Summary

There are several important reasons that major U.S. corporations do not use ADR. The difficulty of negotiating ADR agreements with reluctant adversaries appears to be the principal impediment and a threshold issue. This barrier may become less important in the future as the parties in disputes learn more about the benefits of ADR.

But the use of ADR is also impeded in part by certain intrinsic characteristics of mediation and arbitration—for example, the tendency of these processes to result in compromise settlements. As parties in disputes acquire more sophisticated knowledge about the nature of ADR, their future use of ADR processes will depend on whether the potential benefits are greater than the barriers.

5

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 views on this issue (see Chart 11). In general, a large majority of the respondents in our survey believe they are "likely" or "very likely" to use mediation in the future—38 and 46 percent, respectively. They were more cautious about the use of arbitration. Only 24 percent said they were very likely to use it in the future, while 47 percent said they were likely to do so. More than 29 percent said they were unlikely or very unlikely to use arbitration in the future, whereas only 16 percent answered similarly in the case of mediation. Nevertheless, if these projections are accurate, the use of ADR by U.S. corporations will grow significantly. It may also be the case, however, that our respondents' views simply reflect their current levels of satisfaction with these ADR processes. On balance, they are more satisfied with mediation than with arbitration and, accordingly, believe that their companies will use mediation more than arbitration in the future.

Further projections about future trends can be derived from respondents' views about the likelihood that their companies will use ADR to resolve specific types of disputes. The data show that our respondents believe their companies will

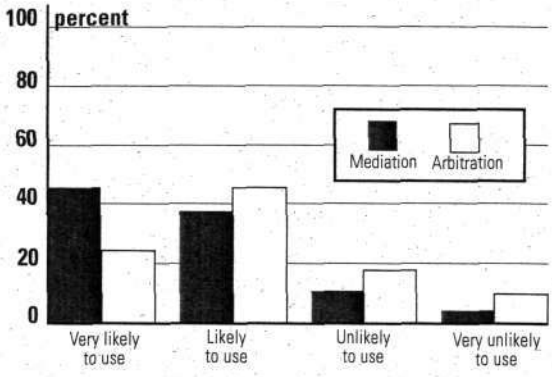

Chart 11. Likelihood of Future ADR Use

use mediation much more frequently in some kinds of disputes than in others. They predict, for example, that the use of mediation will grow significantly in employment and commercial disputes. On balance, they also expect mediation use to grow in disputes involving environmental, intellectual property, personal injury, and real estate and construction issues. They predict more modest growth in the use of mediation in disputes involving consumer rights and product liability. By contrast, they do not anticipate that mediation will be used extensively in disputes involving corporate finance and financial reorganization.

Our respondents' predictions about the future use of arbitration differ markedly from their predictions about mediation. (See Figure 3.) They believe that the use of arbitration will grow significantly in only two areas: commercial disputes and employment disputes. Many of our respondents (40 percent or so) believe that in a variety of disputes arbitration will be used to about the same extent in the future as it is now. Significant proportions (about 20 to 25 percent), however, believe that in most types of disputes arbitration will not be used at all.

If these predictions are taken at face value, then we can expect that the use of arbitration actually will decline significantly in many types of disputes: corporate finance, financial reorganization, consumer rights, environmental, and so forth. Again, these "predictions" may simply be proxies for the attitudes corporate counsel have about the current practice of arbitration.

The significance of these findings is worth considering further. Financial matters are the core responsibility of corporate management. The corporation's survival is more likely to be linked to this area of its business than to other areas in which disputes may arise. We believe our results suggest that where the stakes are very high, corporations prefer to fight their battles in front of judges rather than in front of mediators or arbitrators.

By contrast, the use of mediation and arbitration in employment and commercial disputes has a long, well-established history. Admittedly, potential damages can be in the multimillion dollar range, but usually the stakes are much lower and the survival of the corporation is not an issue. Employment and commercial disputes are further removed from the core of managerial responsibility; they often involve matters handled by the human resource, purchasing, or sales function. In these types of disputes, according to the majority of our respondents, ADR is an attractive alternative to litigation, and nonbinding forms of third-party intervention, such as mediation, are used readily. In addition, the corporation is often willing to delegate decision-making authority to impartial arbitrators.

Predictions	Dispute
Use of both mediation and arbitration will increase	Commercial/contract Employment
Use of mediation will increase; use of arbitration will decline	Personal injury Environmental Construction Product liability Intellectual property Real estate Consumer rights
Use of both mediation and arbitration will decline	Corporate finance Financial reorganization/workout

Figure 3. Summary of Respondents' Views on Future Use of Arbitration and Mediation in Various Disputes

In most types of disputes, however, as Figure 3 shows, mediation is a popular alternative to litigation but arbitration is not. Our respondents seem to be saying that they are willing to use nonbinding, third-party techniques to assist them in personal injury, product liability, environmental, and certain other kinds of disputes but are unwilling to delegate decision-making authority to third parties. We speculate that these attitudes may change as major U.S. corporations become more familiar with the use of ADR.

Summary

Our survey results suggest that there are important differences in the use of mediation and arbitration and in managers' perceptions of these techniques. For example, as Figure 4 shows, the decision to use mediation is predominantly made on a case-by-case basis by the parties to the dispute, whereas arbitration is typically invoked by a contractual requirement, negotiated by the parties beforehand. It can be said that mediation is more tactical in nature, whereas arbitration is more strategic. Mediation is more flexible, arbitration more rigid. Mediation is more like assisted negotiation, whereas arbitration is more like a legal proceeding. Corporate counsel in major U.S. corporations have had very widespread experience in the use of mediation, and familiarity, in this case, has bred affection. They have used the process, and they think it works. They have had slightly less experience with arbitration, and a significant number have never had occasion to try it. Of those who have used arbitration, many like it and plan to use it again. But some do not like it and do not plan to use it again.

Mediation	Arbitration
❑ Predominately triggered by the parties	❑ Predominantly triggered by contract
❑ Widespread experience with process	❑ Slightly less experience with process, although still widespread
❑ Used in most types of disputes	❑ Used in narrow set of disputes
❑ Extensive growth expected	❑ Growth, if any, will be limited
❑ Parties perceive gain in process control	❑ Parties uneasy about control of arbitration
❑ Wide variety of sources for mediators	❑ Arbitrators come primarily from private providers
❑ Some uneasiness about qualifications of mediators	❑ Less confidence in arbitrators
❑ Used in almost all industries	❑ Usage in some industries much higher than others

Figure 4. Important Differences between Mediation and Arbitration

Mediation has been used to resolve all types of disputes in corporate America, whereas the use of arbitration has tended to be confined to certain types of disputes, particularly those involving employment and commercial matters. Our respondents, as noted above, expect the use of mediation to grow significantly across the board. By contrast, they predict that the use of arbitration will be limited to a narrow range of disputes in the future. Our respondents like mediation because they believe it increases their control over the management and resolution of disputes. They are uneasy about arbitration in part because they believe they are less able to control the process.

Our survey results suggest that corporations turn to a variety of sources to obtain mediators. They often rely on word of mouth and like to use mediators they have worked with in the past. By contrast, the channels used to obtain arbitrators are more developed and more limited in number. The AAA, for example, continues to be a major source of arbitrators in a variety of disputes. Although our respondents are generally satisfied with the level of competence among mediators and arbitrators, they express certain concerns about the availability of truly qualified neutrals, especially arbitrators. Finally, mediation is being used in virtually every industry, whereas the use of arbitration is more concentrated in construction, transportation, and utilities.

An accurate understanding of the use of ADR in corporate America is not possible unless one recognizes the critical ways in which the use and perceptions of arbitration and mediation differ. Our corporate respondents in general have more favorable views of mediation than of arbitration, believe mediation has more widespread applicability, and believe it is more likely to save time and money. Although they have greater reservations about arbitration than about mediation, they nevertheless consider arbitration a very useful tool in targeted situations.

We believe our survey results provide important new insights into the use of ADR by major U.S. corporations. At the same time, we recognize the limitations of our survey. We have obtained the views of a significant segment of the corporate community—corporate counsel, deputy counsel, and chief litigators—but it would be interesting to know the views of other key segments of the corporation such as senior managers, middle managers, and employees. Because of the growing importance of ADR in

employment and workplace disputes, it would be especially valuable to explore the views of human resource managers. To conduct a truly comprehensive assessment of the use of ADR in U.S. corporations, it is essential to obtain the views of other parties involved in corporate disputes, such as those who bring suit against or are sued by the corporation and the lawyers who represent them. The view from the corporate counsel's office is very clearly an important one, but it is through a narrow window.

In the next phase of our research on ADR, which is already under way, we are undertaking a series of in-depth case studies in a sample of the corporations included in our Fortune 1,000 survey. Through these case studies, we will be able to examine the views of a more diverse sample of parties involved in ADR. We are especially interested in obtaining more information about, and understanding of, the conflict management systems that are becoming an important part of many major U.S. corporations.

Notes

[1] Speech by Attorney General Janet Reno, Howard University, November 26, 1996.

[2] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Gilmer had registered as a securities representative and in that initial registration had agreed to arbitrate any controversy arising over this employment or its termination. When his employment was terminated, he asserted that it was a matter of age discrimination and thus sought relief through district court and the EEOC. The Supreme Court rejected his claim, saying that the Federal Arbitration Act allowed the pre-hire agreement to arbitrate to stand as the appropriate forum for the resolution of his dispute, thus denying him access to the procedures of the EEOC. In fact, the EEOC itself is now among a wide-ranging group of federal and state agencies encouraging the use of ADR as a substitute for statutorily devised dispute resolution processes. (See also the Equal Employment Opportunity Commission's policy statement on alternative dispute resolution, July 17, 1995.)

[3] "DeLoitte and Touche Litigation Services 1993 survey of General and Outside Counsels: Alternative Dispute Resolution (ADR)," DeLoitte Touche Tohmatsu International, 1993.

[4] Readers who are not familiar with some of the dispute resolution terms used here can find definitions in various sources. Among the most useful are E. Wendy Trachte-Huber and Stephen K. Huber, *Alternative Dispute Resolution: Strategies for Law and Business* (Cincinnati: Anderson, 1996), and CPR Institute for Dispute Resolution, *Employment ADR: A Dispute Resolution Program for Corporate Employers* (New York, 1995). For readers with access to the Internet and the World Wide Web, the web sites of many of the professional organizations in dispute resolution contain useful information, including definitions of the terms used in this report. See the PERC Foundation site, particularly "PERC 101" at http://www2.conflictresolution.org/perc/perc101/perc101.html. See also the American Arbitration Association site, especially "A Guide to Mediation and Arbitration" at http://www.adr.org/guides/guide_for_business_people.html, and the CPR Institute for Dispute Resolution, especially "The ABCs of ADR: A Dispute Resolution Glossary" at http://www.cpradr.org/glossary.htm. ADR, mediation, and arbitration are also defined in the survey instrument located in the Appendix to this report.

[5] See note 2 above.

[6] For example, the Tenth Circuit has applied *Gilmer* to Title VII claims (see *Metz v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1994), but the Fifth Circuit has held that *Gilmer* did not apply to Title VII claims (see *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1992). The Third Circuit, applying *Gilmer*, held that claims arising under ERISA are arbitrable (*Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1993). Various courts have upheld the use of the *Gilmer* principle in cases involving antitrust, malpractice, RICO, disability, trademark, and several federal and state discrimination statutes, and in the communications, electronics, utility, and automobile industries, to mention only a few. A comprehensive and annotated list of court cases is contained in Kaye, Scholer, Fierman, Hays, & Handler, LLP, *Is the Brave New World of Employment ADR Right for My Company?* (New York, 1997).

[7] Although there are many definitions of conflict management systems, one practical approach is described in Cathy A. Costantino and Christina Sickles Merchant, *Designing Conflict Management Systems* (San Francisco: Jossey-Bass, 1996).

Appendix

Survey Announcement Letter

[Date]

[Name]
General Counsel for:
[Company]
[Address]

Dear ———:

The Cornell/PERC Institute on Conflict Resolution, a partnership between Cornell's School of Industrial and Labor Relations and the Foundation for the Prevention and Early Resolution of Conflict (PERC), is embarking on a research project to assess corporations' use of alternative dispute resolution (ADR) as a method for resolving business-related conflicts. With the support of Price Waterhouse, we plan to survey general counsels, or the persons most knowledgeable about a company's ADR activities.

As General Counsel for *[Company]* your participation in this study is crucial to our understanding the scope of ADR activity in the United States. In appreciation for your time, we will provide you with the results of the study before public release. We will also invite you and an associate to a half-day seminar on ADR to be held in New York City after the completion of this study.

We recognize your time is valuable and would like to extend three options to induce your participation: 1) you can wait for one of our interviewers to contact you; 2) you can call us to set up a time to administer the survey; or 3) you can complete the enclosed survey and return it in the accompanying envelope. The survey takes only about 15 minutes to complete whether you choose to fill it out or to be interviewed on the telephone. If you are not the appropriate person to respond, please pass this along to the proper individual.

If you have any questions or concerns, you may contact Lisa Horn at 1-888-367-8404.

Thank you for your help on this important project.

Sincerely,

David B. Lipsky
Director, Cornell/PERC Institute on Conflict Resolution

Survey Instrument

Use of Alternative Dispute Resolution Techniques by Major American Corporations

Section 1: Current Dispute Resolution Techniques Employed

Throughout this survey, the term Alternative Dispute Resolution (ADR) will mean 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. How would you describe your company's policy towards dispute resolution when you are the **defending** party? Would you say your company: *(Please circle ONE response.)*

1 Litigates always
2 Litigates first, then moves to ADR for those cases where appropriate
3 Litigates only in cases that seem appropriate, uses ADR for all others
4 Tries to move to ADR always
5 Has no company policy
6 Other (Please specify_____)

2. How would you describe your company's policy towards dispute resolution when you are the **initiating** party? Would you say your company:*(Please circle ONE response.)*

1 Litigates always
2 Litigates first, then moves to ADR for those cases where appropriate
3 Litigates only in cases that seem appropriate, uses ADR for all others
4 Tries to move to ADR always
5 Has no company policy
6 Other (Please specify_____)

3. What **kinds** of ADR procedures has your company used in the past 3 years?
First, please circle ALL the numbers that apply. Second, place a check in the box beside the one procedure your company prefers to use the most, in general.

☐ 1 Mediation ☐ 3 Fact finding ☐ 5 Arbitration ☐ 7 Mediation-Arbitration
☐ 2 Ombudsperson ☐ 4 Peer review ☐ 6 Mini-trials ☐ 8 In-house grievance (other than union contracts)

Section 2: Experience with Mediation

Mediation is any form of dispute resolution process where one or more impartial persons assist the parties in reaÃòing a settlement, but do not make a binding determination.

1. Does your company use mediation to resolve disputes?*(Please circle ONE response.)*

1 Yes 2 No ➳ *Please go to Question 12*

2. In general, how **frequently** does your company use mediation to resolve disputes:

a) in the administration of ongoing contractual relationships? *(Please circle ONE response.)*
1 Very frequently 2 Frequently 3 Occasionally 4 Rarely 5 Not at all

b) in the negotiation of the terms of contracts? *(Please circle ONE response.)*
1 Very frequently 2 Frequently 3 Occasionally 4 Rarely 5 Not at all

3. Most of the time, your company gets its **nominees** for mediators from: *(Please circle ONE response.)*

1 The court
2 A state or federal agency
3 A private ADR provider (Specify _____)
4 Within the corporation
5 Previous experience (word-of-mouth)
6 Other (Specify_____)

4. In your company's experience with mediators, have you found them to be: *(Please circle ONE response.)*

1 Very qualified 2 Somewhat qualified 3 Not qualified at all 4 Don't know

5. What **mechanism** most often triggers the use of mediation in your company? *(Please circle ONE response.)*

1 Part of contract 3 Company policy 5 Other (Specify_____)
2 Ad-hoc/voluntary basis 4 Court mandate

6. When your company decides to use mediation, is it because it: *(Please circle ONE response for each item.)*

	Yes	No
Saves time	1	2
Saves money	1	2
Is desired by senior management	1	2
Uses expertise of mediators	1	2
Preserves good relationships between disputing parties	1	2
Provides more durable resolution (compared to litigation)	1	2
Is required by contract	1	2
Preserves confidentiality	1	2
Avoids establishing legal precedents	1	2
Gives more satisfactory settlements	1	2
Provides a more satisfactory process	1	2
Is court mandated	1	2
Is an international dispute	1	2
Allows parties to resolve disputes themselves	1	2
Other (Specify_____)	1	2

7. Does your company use mediation for: *(Please circle ONE response for each item.)*

	Yes	No	No experience
Commercial/Contract Disputes	1	2	4
Financial Reorganization/Workout Disputes	1	2	4
Consumer Rights Disputes	1	2	4
Corporate Finance Disputes	1	2	4
Employment Disputes	1	2	4
Environmental Disputes	1	2	4
Intellectual Property Disputes	1	2	4
Personal Injury Disputes	1	2	4
Product Liability Disputes	1	2	4
Real Estate Disputes	1	2	4
Construction Disputes	1	2	4

8. Compared to litigation, what effect has mediation had on the amount of **time** it takes to resolve your company's disputes? *(Please circle ONE response.)*

1 Increases time 2 No effect 3 Decreases time

9. Compared to litigation, what effect has mediation had on your company's **costs** (excluding judgment costs) for resolving disputes? *(Please circle ONE response.)*

1 Increases cost 2 No effect 3 Decreases cost

10. Compared to litigation, how likely is your company to use mediation in international disputes? *(Please circle ONE response.)*

1 Very likely 2 Likely 3 Unlikely 4 Very unlikely
5 Not applicable 9 Don't know

11. Does your company include a mediation provision in any of its contracts?*(Please circle ONE response.)*

1 Yes (Please specify which kinds:_____) 2 No

12. When your company does **NOT** use mediation, it is because: *(Please circle ONE response for each item.)*

	Yes	No		Yes	No
No desire from senior management	1	2	Unwillingness of opposing party	1	2
It's too costly	1	2	It results in compromised outcomes	1	2
It's too complicated	1	2	Lack of confidence in mediators	1	2
It's non-binding	1	2	Lack of qualified mediators	1	2
It's not confined to legal rules	1	2	Risk of exposing strategy	1	2
Lack of corporate experience	1	2	Other (Specify_____)	1	2

13. How likely is your company to use mediation in the **future**?*(Please circle ONE response.)*

1 Very likely 2 Likely 3 Unlikely 4 Very unlikely 9 Don't know

14. Compared to current usage, in the future, does your company expect to use mediation for: *(Please circle ONE response for each item.)*

	More	About the Same	Less	Not at all	Not Applic	Don't Know
Commercial/Contract Disputes	1	2	3	4	5	9
Financial Reorganization/Workout Disputes	1	2	3	4	5	9
Consumer Rights Disputes	1	2	3	4	5	9
Corporate Finance Disputes	1	2	3	4	5	9
Employment Disputes	1	2	3	4	5	9
Environmental Disputes	1	2	3	4	5	9
Intellectual Property Disputes	1	2	3	4	5	9
Personal Injury Disputes	1	2	3	4	5	9
Product Liability Disputes	1	2	3	4	5	9
Real Estate Disputes	1	2	3	4	5	9
Construction Disputes	1	2	3	4	5	9

Section 3: Experience with Arbitration

Arbitration is any form of dispute resolution process that involves the submission of a dispute to one or more impartial persons for a final and binding determination.

1. Does your company use arbitration to resolve disputes? *(Please circle ONE response.)*

1 Yes 2 No ➳ *Please go to Question 12*

2. In general, how **frequently** does your company use arbitration to resolve disputes:

a) in the administration of ongoing contractual relationships? *(Please circle ONE response.)*

1 Very frequently 2 Frequently 3 Occasionally 4 Rarely 5 Not at all

b) in the negotiation of the terms of contracts? *(Please circle ONE response.)*

1 Very frequently 2 Frequently 3 Occasionally 4 Rarely 5 Not at all

3. Most of the time, your company gets its **nominees** for arbitrators from: *(Please circle ONE response.)*

1 The court
2 A state or federal agency
3 A private ADR provider (Specify _____)
4 Within the corporation
5 Previous experience (word-of-mouth)
6 Other (Specify_____)

4. In your company's experience with arbitrators, have you found them to be: *(Please circle ONE response.)*

1 Very qualified 2 Somewhat qualified 3 Not qualified at all 4 Don't know

5. What **mechanism** most often triggers the use of arbitration in your company? *(Please circle ONE response.)*

1 Part of contract
2 Ad-hoc/voluntary basis
3 Company policy
4 Court mandated
5 Other (Specify _____)

6. When your company decides to use arbitration, is it because it: *(Please circle ONE response for each item.)*

	Yes	No		Yes	No
Saves time	1	2	Preserves confidentiality	1	2
Saves money	1	2	Avoids establishing legal precedents	1	2
Is desired by senior management	1	2	Gives more satisfactory settlements	1	2
Uses expertise of arbitrators	1	2	Provides a more satisfactory process	1	
Preserves good relationships between disputing parties	1	2	Is court mandated	1	2
			It is an international dispute	1	2
Provides more durable resolution (compared to litigation)	1	2	Has limited discovery	1	2
			Became standard practice in industry	1	2
Is required by contract	1	2	Other (Specify_____)	1	2

7. Does your company use arbitration for: *(Please circle ONE response for each item.)*

	Yes	No	No Experience
Commercial/Contract Disputes	1	2	4
Financial Reorganization/Workout Disputes	1	2	4
Consumer Rights Disputes	1	2	4
Corporate Finance Disputes	1	2	4
Employment Disputes	1	2	4
Environmental Disputes	1	2	4
Intellectual Property Disputes	1	2	4
Personal Injury Disputes	1	2	4
Product Liability Disputes	1	2	4
Real Estate Disputes	1	2	4
Construction Disputes	1	2	4

8. Compared to litigation, what effect has arbitration had on the amount of **time** it takes to resolve your company's disputes? *(Please circle ONE response .)*

1 Increases time 2 No effect 3 Decreases time

9. Compared to litigation, what effect has arbitration had on your company's **costs** (excluding judgment costs) for resolving disputes? *(Please circle ONE response .)*

1 Increases cost 2 No effect 3 Decreases cost

10. Compared to litigation, how likely is your company to use arbitration in international disputes? *(Please circle ONE response .)*

1 Very likely 2 Likely 3 Unlikely 4 Very unlikely 5 Not applicable
9 Don't know

11. Apart from collective bargaining contracts, does your company include an arbitration provision in any of its contracts? *(Please circle ONE response.)*

1 Yes (Please specify which kinds:_____) 2 No

12. When your company does **NOT** use arbitration, it is because: *(Please circle ONE response for each item.)*

	Yes	No		Yes	No
No desire from senior management	1	2	Unwillingness of opposing party	1	2
It's too costly	1	2	It results in compromised outcomes	1	2
It's too complicated	1	2	Lack of confidence in arbitrators	1	2
It's difficult to appeal	1	2	Lack of qualified arbitrators	1	2
It's not confined to legal rules	1	2	Other (Specify_____)	1	2
Lack of corporate experience	1	2			

13. Apart from collective bargaining contracts, how likely is your company to use arbitration in the **future**? *(Please circle ONE response.)*

1 Very likely 2 Likely 3 Unlikely 4 Very unlikely 9 Don't know

14. Compared to current usage, in the future, does your company expect to use arbitration for: *(Please circle ONE response for each item.)*

	More	About the Same	Less	Not at all	Not Applic	Don't Know
Commercial/Contract Disputes	1	2	3	4	5	9
Financial Reorganization/Workout Disputes	1	2	3	4	5	9
Consumer Rights Disputes	1	2	3	4	5	9
Corporate Finance Disputes	1	2	3	4	5	9
Employment Disputes	1	2	3	4	5	9
Environmental Disputes	1	2	3	4	5	9
Intellectual Property Disputes	1	2	3	4	5	9
Personal Injury Disputes	1	2	3	4	5	9
Product Liability Disputes	1	2	3	4	5	9
Real Estate Disputes	1	2	3	4	5	9
Construction Disputes	1	2	3	4	5	9

Section 4: General Information

1. Are you: *(Please circle ONE response.)*

1 In-house - general counsel
2 In-house - other counsel
3 Law firm attorney - partner
4 Law firm attorney - other

2. How many years have you been with this company? _____ Years

3. How many years of experience do you have with litigation processes?

_____Number of years

4. How many years have you been involved with ADR in any form?

_____ Number of years

5. Is conflict resolution training available in your company? *(Please circle ONE response.)*

1 Yes 2 No ➳ *Please go to Question 7*

6. Who provides this training? *(Please circle ONE response.)*

1 In-house instructors
2 Outside courses (Specify_____)
3 Both (Specify_____)

7. Have cost pressures affected your decision to use ADR? *(Please circle ONE response.)*

1 Yes 2 No 3 Not applicable 9 Don't know

8. Would you like a copy of the results?

1 Yes 2 No

Additional comments:

_____

_____

_____

_____

_____

_____

_____

Thank you for your assistance.

If you have any questions about this study, please contact:

Lisa Horn
CAST, Computer-Assisted Survey Team
School of Industrial and Labor Relations
Cornell University
Ithaca, NY 14853

Phone: 1 (888) 367-8404 (toll-free)
FAX: 1 (607) 255-7774
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About the Authors

David B. Lipsky currently holds three positions at Cornell University. He is Professor of Industrial and Labor Relations, Director of the Cornell/PERC Institute on Conflict Resolution, and Director of the Cornell University Office of Distance Learning. A member of the Cornell University faculty since 1969, Lipsky served as dean of the School of Industrial and Labor Relations from 1988 until 1997. In his research and teaching he primarily focuses on negotiation, conflict resolution, and collective bargaining. He has also served as chairman of the ILR School's Department of Collective Bargaining, Labor Law, and Labor History and as editor and associate editor of the *Industrial and Labor Relations Review.*

He is the author of over forty articles and the author or editor of eleven books, including *Collective Bargaining in American Industry: Contemporary Perspectives and Future Directions* (Lexington Books, 1987) and *Strikers and Subsidies: The Influence of Government Transfer Programs on Strike Activity* (W. E. Upjohn Institute, 1989). He is a member of the New York State Public Employment Relations Board panel of mediators and fact-finders, the Board of Directors of the Industrial Relations Research Association, and the New American Realities Committee of the National Policy Association. He was also a member of the inaugural class of the National Academy of Human Resources. Lipsky serves on the Board of Directors of Experiments in Distance Learning, Inc., and on the Advisory Board of the Foundation for the Prevention and Early Resolution of Conflict.

Ronald L. Seeber is Executive Director of the Cornell/PERC Institute on Conflict Resolution. He is also Associate Professor and Associate Dean at the New York State School of Industrial and Labor Relations at Cornell University. Seeber's research activities have covered a wide range of topics in the field of labor-management relations. All reflect his interest in union and management strategies in the workplace and their connection to collective bargaining in the United States. Seeber has been an active participant in the professional meetings of the Academy of Management, the Industrial Relations Research Association (IRRA), and the University and College Labor Education Association.

Seeber has published extensively in scholarly academic journals. His most recent book, coauthored with Lois Gray, is *Under the Stars: Essays on Labor Relations in Arts and Entertainment* (Cornell University Press, 1995). He is also the coeditor of *Restoring the Promise of American Labor Law* (Cornell University Press, 1994) and *Research in the Sociology of Organizations: Unions and Labor Relations* (JAI Press, 1993). Most recently, he has been involved in a pilot project on ADR in Workers' Compensation in New York.