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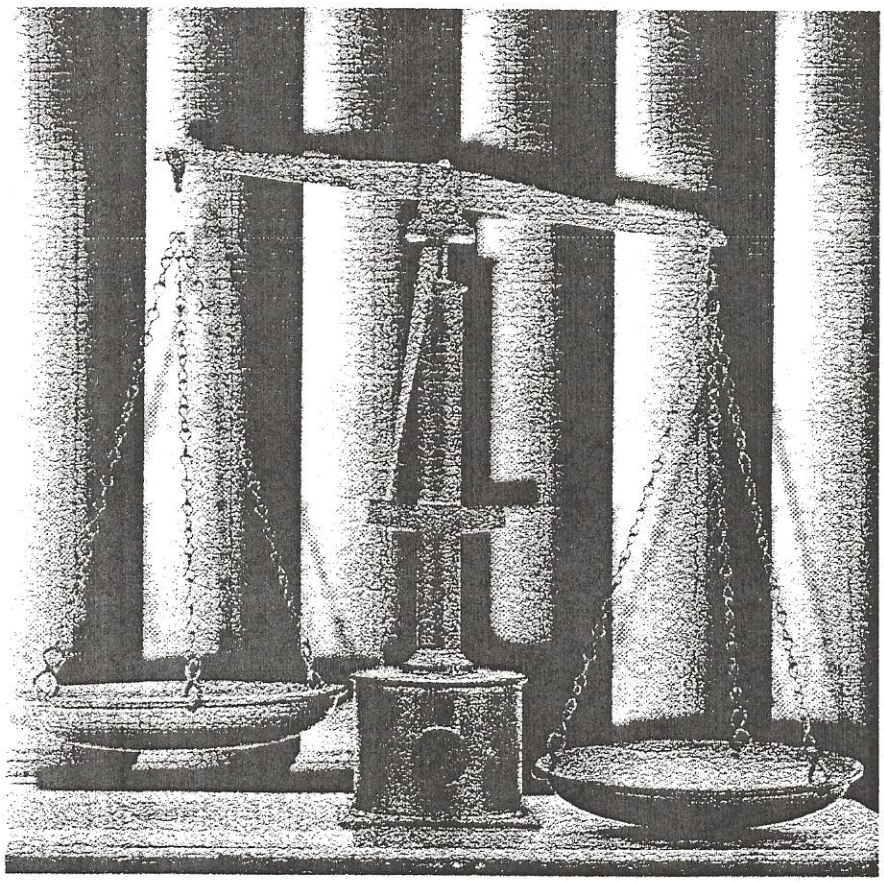
Prevention and Early Resolution of Conflict (PERC) and Price Waterhouse LLP

THE USE OF ADR IN U.S. CORPORATIONS: EXECUTIVE SUMMARY



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In the most comprehensive effort to date, Cornell University conducted a survey of the use of alternative dispute resolution (ADR) among 1,000 of the largest U.S. corporations. The research is the work product of a Price Waterhouse LLP, Cornell University, and PERC project team, formed expressly for this purpose. The findings, which indicate that ADR techniques are widespread and are likely to grow significantly in the foreseeable future, were based on a mail and phone survey of 528 respondents. ADR involves the use of private parties to resolve disputes that might otherwise be litigated, and includes the techniques of mediation, arbitration, fact-finding, mini-trials, and the use of ombudspersons. The primary participants in the survey were the corporate counsel, deputy counsel, and chief litigators for the respective companies.

THE USE OF ADR BY CORPORATE AMERICA

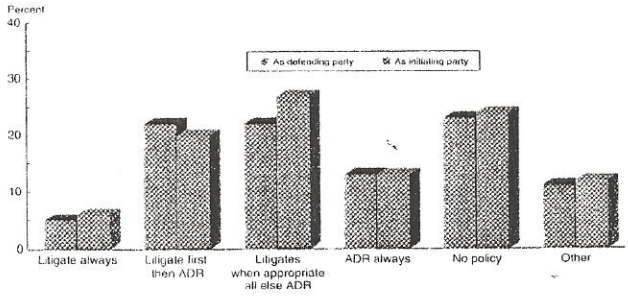
The survey shows that the vast majority of American corporations have used one or more of the ADR procedures in the last three years. For example, 88 percent report using mediation, while 79 percent have used arbitration. Fewer have used mediation-arbitration or "med-arb" (41 percent), and mini-trials (23 percent). There is even less experience with the use of fact-finding (21 percent) and peer review (11 percent). Fifty-five corporations in the sample have an ombudsperson on staff, and 185 use an in-house grievance procedure (as distinguished from grievance procedures that might exist in collective bargaining contracts).

Moreover, survey respondents believe that the use of ADR in their corporations is likely to grow significantly in the future. Over 84 percent say that they are likely or very likely to use mediation in the future, while 69 percent say that about their use of arbitration. Only 17 percent of the respondents say that it is "unlikely" or "very unlikely" that they will use mediation in the future, while 31 percent give those answers for arbitration. These differences reflect the fact that corporate lawyers seem to have a preference for mediation, or other non-binding third-party techniques, rather than arbitration to resolve disputes.

CORPORATE POLICY VARIES, BUT IS GENERALLY SUPPORTIVE OF THE USE OF ADR

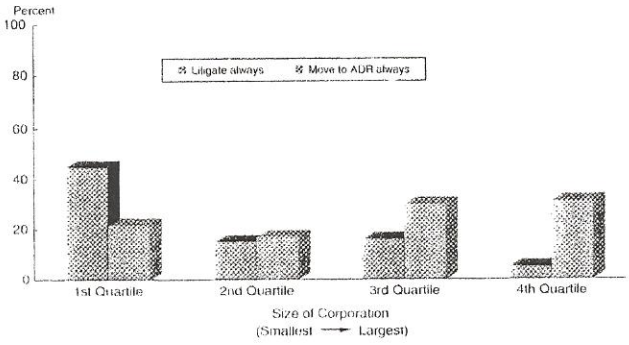
As the chart below ("Corporate Conflict Resolution Strategies) indicates, most respondents report that they either "litigate first and then move to ADR," or that they "litigate only in cases that seem appropriate, and use ADR for all others." Moreover, corporate policy on such matters does not seem to depend on whether the corporation is the defending (or responding) or the initiating (or complaining) party.

Corporate Conflict Resolution Strategies



At the same time, there is another group of corporations, over 60 in number, that always try to use ADR. Analysis of the data suggests that the strongly litigious group of corporations differs significantly from the staunchly pro-ADR group. For example, the former are mostly smaller companies, while the latter are some of the largest corporations in the world and include many that have been under significant cost pressure in recent years and have undertaken major downsizing initiatives (see chart below, "Corporate Conflict Resolution Policy: Strong Litigators vs. Strong ADR").

Corporate Conflict Resolution
Policy Litigators vs Strong ADR



Analysis of the data also reveals that corporate policy on conflict resolution depends on the type of dispute:

- widespread usage of mediation and arbitration in commercial and employment disputes
- limited use of ADR in corporate finance, financial reorganization, and "workout" disputes
- mediation is preferred to arbitration in all types of disputes
- 60 percent have used mediation in personal injury disputes, but only a third have used arbitration
- 40 percent have used mediation in product liability cases, but only 24 percent have used arbitration

Another important factor affecting the use of ADR is whether the dispute involves the negotiation of the terms of a new contract or the administration of an already existing one. The former type of dispute is often referred to as an "interest" dispute, while the latter is called a "rights" dispute. The survey results demonstrate clearly that ADR is much more likely to be used in rights, rather than in interest disputes, and this difference holds for both mediation and arbitration. Of those corporations that use mediation, 92 percent report using it in rights disputes, while 41 percent report using it in interest disputes. (For arbitration the comparable figures are 96 percent and 47 percent.)

The growth of ADR can be attributed to the consequences of cost control, legal mandates, and dispute management.

COST CONTROL

For many corporate executives the use of ADR is a strategy they hope will reduce the costs of their legal disputes. Corporate adoption of an ADR strategy has frequently resulted in additional responsibilities to be carried by the general counsel's office. In many cases the general counsel has often been a strong supporter of an ADR policy; in other cases, the general counsel has given the corporation's chief litigator responsibility for ADR. Survey respondents reported that the change in corporate conflict resolution strategy has caused the corporation to encourage their law firms to develop ADR expertise.

Nearly 90 percent of the respondents report that they view mediation as cost-saving measure for the corporation. Saving money is also an important reason why corporations use arbitration, although it is a somewhat less important reason than it is for mediation. A majority (54 percent) of the respondents report that cost pressures affected their decision to use ADR. There is a strong relationship between those companies that adopted ADR because of cost pressures and those that say it saved them time and money.

LEGAL MANDATES

A growing number of administrative agencies, such as the federal EEOC and state-level workers' compensation boards, are now encouraging the use of ADR to resolve complaints that would otherwise need to be handled by the agency itself. Congress has encouraged the use of ADR in a growing number of statutes, including the Civil Rights Act of 1991 and the Americans with Disabilities Act. The court systems in more than half the states now encourage, or even mandate, the use of ADR to reduce case backlogs and speed up the handling of disputes. The U.S. Supreme Court has been inclined to favor the use of ADR, especially in employment disputes. The Court's Gilmer decision in 1991 has led to employers including provisions in employment contracts that require employees to use arbitration to resolve disputes that might otherwise be heard by the courts. In sum, mandates to use ADR stemming from statutes, the court system, or a private contract have expanded significantly in recent years. Overwhelmingly, contract requirements are the most important factors explaining the growing use of arbitration (93 percent of the respondents who have used arbitration give this reason). Court mandates help explain the growing use of both arbitration and mediation, but especially appear to be important in the case of mediation (64 percent of the respondents who have used mediation say their corporation does so because of court mandates, while 44 percent give this reason for using arbitration).

DISPUTE MANAGEMENT ISSUES

Careful analysis of the survey results suggests that corporations also use ADR techniques to gain greater control over the process and outcome of dispute resolution. The respondents dislike the risk and uncertainty of litigation and especially view mediation as a means of managing control over potentially risky disputes. For example, 81 percent of the respondents say their corporations use mediation because it provides "a more satisfactory process" than litigation; 66 percent say it provides more "satisfactory settlements:" and 59 percent say it "preserves good relationships." Although these factors are clearly more important for mediation than for arbitration, nevertheless respondents believe the use of arbitration also improves their ability to manage disputes.

DIFFERENCES IN THE CORPORATIONS' VIEWS OF MEDIATION AND ARBITRATION

Survey data suggests that the use of mediation appears to be more sensitive to economic and environmental factors

than arbitration. Mediation appears to be much more a tactical, ad hoc choice of the corporation, while arbitration, as noted above, is most often mandated by existing and often long-standing contracts. Interpretation of the survey data suggests that corporate respondents see the use of mediation as widely applicable, while arbitration usage is more targeted to certain types of disputes, especially business disputes and those involving employees.

Important Differences Between Mediation and Arbitration

Mediation	Arbitration
✓ Predominantly 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	✓ Growth will be limited, if at all
✓ 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

RESERVATIONS ABOUT ADR NEUTRALS

A majority of the respondents believe that mediators and arbitrators are only "somewhat qualified." Respondents appear to be especially concerned about the qualifications of the arbitrators: almost half say they have a lack of confidence in arbitrators and close to 30 percent say there is a shortage of qualified arbitrators. Corporate respondents stress that there is not a lack of ADR neutrals, but rather a shortage of qualified neutrals.

Respondents say that about one-fifth of the time the mediators they use are provided by the courts, underscoring again the importance of court mandates in the use of mediation. Also, respondents report that they rely heavily on informal channels (previous experience and word of mouth) to obtain mediators for their ADR disputes. Private ADR providers are another important source of mediators and by far are the most important source of arbitrators.

BARRIERS TO FUTURE GROWTH

One-third of the respondents who do not use ADR say that their senior managers oppose the use of ADR. Also, a large majority say they don't use ADR because opposing parties in disputes are unwilling to consider it. Other concerns include: a majority (54 percent) say that their companies do not use arbitration because arbitrators' decisions are difficult to appeal. Many corporate lawyers worry because there is no discovery in the arbitration process and arbitrators are not confined to standard legal rules, such as those governing the admissibility of evidence.

In sum, these respondents expect that the use of mediation will continue to grow in a wide variety of disputes, but on balance they do not expect arbitration usage to grow except in employment and commercial disputes. Respondents in general have a more favorable view of mediation than of arbitration, believe mediation has more widespread applicability, and is more likely to save time and money. They have more reservations about the use of arbitration in part because of their concerns about arbitrators and the arbitration process, but believe it may be a very useful tool in targeted situations.

ABOUT THE SURVEY

During the first three months of 1997 the Computer-Assisted Survey Team (CAST) at Cornell University conducted a mail and phone survey of the corporate counsel of the 1,000 largest U.S.-based corporations for the Cornell/PERC Institute on Conflict Resolution. The objective of the survey was to obtain comprehensive information about each corporation's use of ADR from the person in the organization responsible for, or most knowledgeable about, ADR. In roughly half the cases, the respondent was the general counsel, and in the other half it was a deputy counsel or chief litigator. Over 60 percent of the 1,000 largest U.S. corporations are included in this survey. An analysis of survey results concludes that the corporations included in the sample are a representative cross-section of large American firms.

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