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Living with ADR: Evolving Perceptions and Use of
Mediation, Arbitration, and Conflict Management in
Fortune 1000 Corporations

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Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations

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CONTENTS

I. Introduction	2
II. The First Fortune 1000 Corporate Counsel Survey (1997).....	7
A. Backdrop for the 1997 Survey	7
1. The “Business Arbitration Era”	7
2. The “Quiet Revolution”	9
B. The 1997 Fortune 1000 Survey	14
III. The 2011 Fortune 1000 Corporate Counsel Survey	18
A. Backdrop: The Quiet Revolution Continues	18
1. Mediation.....	19
2. Arbitration	19
3. Systematic Approaches; Workplace Conflict Management Programs	22
B. A New Fortune 1000 Survey: Purpose, Research Questions	24
C. Implementation of the Survey	27
D. Cautionary Notes	30

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IV. Conflict Resolution Policies, Perspectives on and Experience with	
ADR.....	32
A. Conflict Resolution Policies of Companies	32
B. “Triggers” for ADR.....	34
C. Reasons for Using ADR.....	36
D. Use of Different Approaches for Resolving Conflict	40
V. Corporate Experience with and Perspectives on Mediation and	
Arbitration.....	45
A. Present and Future Use of Mediation and Arbitration	45
B. Why More Companies Use Mediation, and Fewer Use	
Arbitration: A Tipping Point	52
VI. Sources of and Perceptions of Quality of Third-Party Neutrals	55
A. Sources of Nominees for Neutral Roles.....	55
B. Perceptions of Quality of Neutrals.....	57
VIII. Looking Ahead: Implications of the Survey for Future	
Corporate Conflict Management, Mediation and Arbitration	
Practice and Research	62
A. Considerations for Counselors and Advocates	62
1. Early Assessment, Intervention, Conflict Management	62
2. Mediation.....	63
3. Arbitration	64
a. Commercial arbitration	64
b. Employment and consumer arbitration.....	67
B. Considerations for Researchers.....	68
IX. Conclusion.....	69

I. INTRODUCTION

In 2011, for the second time in fifteen years, leading counsel at many of the world’s largest corporations participated in a landmark survey of perceptions and experiences with alternative dispute resolution (“ADR”) — mediation, arbitration, and other third-party intervention strategies intended to produce more satisfactory paths to managing and resolving conflict, including approaches that may be more economical, less formal, and more private than court litigation, with more satisfactory and more durable results.¹ Comparing their responses to those of the mid-1990s, substantial evolutionary trends are observable. As a group, corporate attorneys have

1. See Thomas J. Stipanowich, *ADR and “The Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 845 (2004) [hereinafter *Vanishing Trial*], available at <http://ssrn.com/abstract=1380922>; see also Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 1 (1995).

Season 201x]

3

moderated their expectations for ADR.² At the same time, more corporations have embraced mediation and foresee its continuing use for a wide spectrum of disputes.³ Many companies are also employing other informal approaches to early resolution of conflict⁴ and integrated systems for addressing workplace conflict.⁵ Binding arbitration has reached its tipping point: while some longstanding concerns about arbitration processes have lessened, fewer major companies are relying on arbitration to resolve many kinds of disputes (important exceptions being consumer and products liability disputes) and are evenly divided regarding its future use.⁶

During the “Quiet Revolution” that transformed American conflict resolution in the final decades of the twentieth century,⁷ legal counsel for major corporations played a significant role.⁸ Corporate attorneys, along with courts,⁹ community programs,¹⁰ and government agencies¹¹ provided key leadership in promoting the use of mediation and other intervention strategies for more effective resolution of disputes.¹² Given their relative significance as participants in conflict of many different kinds and their importance as clients of leading law firms, corporate counsel were uniquely placed to help bring about a sea change in the culture of conflict.¹³

In 1997, a survey of Fortune 1000 corporate counsel provided the first broad-based picture of conflict resolution processes within large companies

2. See *infra* Part III.C, Chart E.

3. See *infra* Part IV.A.

4. See *infra* Part III.D.

5. See *infra* Part VI.

6. See *infra* Part IV.A.

7. See *infra* Part I.A.2.

8. See Harry N. Mazadoorian, *At a Crossroad: Will the Corporate ADR Movement Be a Revolution, or Just Rhetoric?*, 6 DISP. RESOL. MAG., Summer 2000, at 4; see also *Vanishing Trial*, *supra* note 1, at 876 (describing evolution of ADR and conflict management in business realm).

9. See David I. Tevelin, *The Future of Alternative Dispute Resolution*, NIDR FORUM, Winter 1992, at 15 (according to the National Center for State Courts, nearly 1100 programs were being operated by state courts or assisting state tribunals in handling disputes in 1990).

10. *Id.*

11. See JEFFREY M. SENGER, *FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT* (2004) (discussing how government agencies helped transform conflict resolution); see also, e.g., *Vanishing Trial*, *supra* note 1, at 866 (discussing developments in the U.S. Justice Department).

12. See Mazadoorian, *supra* note 8, at 4–5.

13. Cf. MARC GERZON, *LEADING THROUGH CONFLICT: HOW SUCCESSFUL LEADERS TRANSFORM DIFFERENCES INTO OPPORTUNITIES* 217 (2006) (discussing how the corporate world has been using ADR innovations to transform conflicts).

after the advent of the Quiet Revolution.¹⁴ The more than six hundred responses offered a tantalizing glimpse of how and why businesses employed mediation, arbitration and other approaches collectively known by the term “ADR.” Coupled with follow-on investigations at representative companies,¹⁵ the Fortune 1000 survey presented a highly variegated picture of corporate perceptions and experiences. The survey identified perceived potential benefits of mediation or of arbitration, usage patterns within different industries and corporate sectors, and concerns that acted as barriers to the use of ADR.¹⁶ It also demonstrated that, despite companies being widely exposed to ADR and tending to appreciate the potential benefits of purposeful choice in managing conflict, their approaches to conflict were very mixed, with many still relying on litigation as their preferred approach of first resort.¹⁷

Since that time, corporate dispute resolution policies and practices have received considerable attention in public tribunals, among practicing attorneys and scholars, and in the media.¹⁸ In addition to encouraging or directing companies to mediate cases in litigation, courts are regularly being called upon to interpret and enforce varied, often complex contractual dispute resolution schemes.¹⁹ The Supreme Court and other

14. DAVID B. LIPSKY & RONALD L. SEEBER, CORNELL/PERC INST. ON CONFLICT RESOL., *THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS* (1998) [hereinafter *REPORT ON THE GROWING USE OF ADR*]; see also *infra* Part I.B.

15. See *infra* text accompanying notes 153–163.

16. See *REPORT ON THE GROWING USE OF ADR*, *supra* note 14, at 8–28.

17. See *infra* text accompanying notes 82–83.

18. See *Vanishing Trial*, *supra* note 1, at 875–97 (discussing various studies on corporate dispute resolution); Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 *BUS. LAW.* 147 (2004) (discussing the establishment of business and commercial courts around the country for the purpose of increasing confidence in the courts’ ability to handle business litigation); Deborah L. Jacobs, *To Rein in Litigation Costs, Try Mediation and Arbitration*, *AM. BANKER*, Feb. 28, 1991, available at 1991 WLNR 1990588 (“Units of BankAmerica Corp., Chase, Chemical Banking Corp, and Bankers Trust New York Corp. are among 500 companies that have signed a corporate pledge: They agree to try alternative dispute resolution . . .”); Dan Rafter, *Best Decision May be to Avoid Court/Many Firms Use Alternative Dispute Resolution to Avoid the Hassle and Expense of Litigation*, *CHI. TRIB.* Mar. 17, 2003, available at 2003 WLNR 15386174 (noting that “large corporations have long known the benefits of settling potential litigation outside the courtroom”); U.S. DEP’T OF LABOR, EMPLOYMENT LITIGATION AND DISPUTE RESOLUTION, http://www.dol.gov/_sec/media/reports/dunlop/section4.htm (discussing the need of dispute resolution programs in companies to prevent dissatisfaction with litigation).

19. See generally Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law in the Changing Landscape of Dispute Resolution*, 8 *NEV. L. REV.* 427 (2007) [hereinafter *Arbitration Penumbra*], available at <http://ssrn.com/abstract=1007490> (describing a variety of dispute resolution approaches, including stepped and “hybrid” processes).

Season 201x]

5

courts have tended to accord broad enforcement to binding arbitration agreements, giving rise to controversy between some companies and consumer and employee advocates over questions of procedural fairness.²⁰ Although framed quite differently, there is also lively debate over the effectiveness of arbitration as a substitute for litigation of business-to-business disputes.²¹ There are, moreover, indications that although companies' policies regarding arbitration and other conflict management approaches vary considerably, a good number employ approaches aimed at early or "real-time" resolution of conflict.²² All of these indicators have stoked interest in empirical research on corporate policies and practices.²³

In 2011, Cornell University's Scheinman Institute on Conflict Resolution, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution ("CPR") co-sponsored a second landmark survey of corporate counsel in Fortune 1000 companies.²⁴ The Cornell University Survey Research Institute administered the survey. The new survey, which is the focus of this article, offers important new insights regarding changes in the way large companies handle conflict. It evidences key trends, including a general shift in corporate orientation away from litigation and toward ADR.²⁵ It enhances understanding of variations in ADR usage patterns in three major transactional settings: corporate/commercial, consumer, and employment. Most importantly, it presents dramatically contrasting pictures of the evolution of the two primary ADR choices: mediation and arbitration.

Mediation appears to be even more widely used than in 1997 and is today virtually ubiquitous among major companies.²⁶ However, the survey

20. See, e.g., Thomas J. Stipanowich, *The Third Arbitration Trilogy*: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration, 22 AMER. REV. INT'L ARB. 323, 396-400 (2011) [hereinafter *Trilogy*] (summarizing recent key Supreme Court cases dealing with enforcement of arbitration agreements and Congressional and regulatory responses).

21. See generally Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1 (2010) [hereinafter *New Litigation*], available at <http://ssrn.com/abstract=1297526> (discussing evolution of arbitration along lines of litigation).

22. See Thomas J. Stipanowich, 'Real-Time' Strategies for Relational Conflict, IBA LEG. PRAC. DIV. MEDIATION COMM. NWSL., July 2007, at 6, available at <http://ssrn.com/abstract=1980792>.

23. See, e.g., *infra* Part II.A (touching on developments in business-related dispute resolution and related empirical studies).

24. Cornell University Survey Research Institute: Fortune 1000 and Federal Agencies Survey on Alternative Dispute Resolution (ADR) (2011) (survey form on file with author). CPR is a 501(c)(3) organization focused primarily on professional educational initiatives. See *infra* text accompanying notes 54-55.

25. See *infra* Part III.A.

26. See *infra* Part III.D, Chart F.

indicates a dramatic fall-off in the use of arbitration in most types of disputes: commercial, employment, environmental, intellectual property, real estate, and construction, among other categories, with notable exceptions of consumer disputes and products liability cases.²⁷ At the same time, the survey offers tangible evidence of corporations' growing sophistication and increasing emphasis on control of the process of managing conflict. Indications of corporations' newfound attention include reliance on early neutral evaluation ("ENE") and early case assessment ("ECA") — approaches aimed at deliberate management of conflict in the early stages²⁸ — as well as control over the selection of third-party neutrals and increasing sophistication in the use of ADR.²⁹ This enhanced sophistication and attention is also reflected in the growing use of integrated approaches to managing conflict, particularly in the employment sphere.³⁰ Finally, the new data afford an understanding of the expectations and the concerns that drive these choices, raising questions about the origins and viability of corporate attorneys' perceptions — notably those regarding arbitration — and suggesting potential ways of addressing underlying concerns.

Part I of this article provides a retrospective on the modern evolution of ADR among corporations and summarizes the developments leading up to the original (1997) Fortune 1000 survey of corporate counsel, and the central findings of that landmark study. Part II describes the further evolutionary events giving rise to the current Fortune 1000 survey as well as our working hypotheses and methodology. Parts III–VI summarize and analyze different aspects of the current survey data and offer comparisons to the 1997 results and other studies. Part III examines conflict resolution policies among corporations, the circumstances that “trigger” the use of ADR, the reasons companies choose to use ADR, and the relative usage of different forms of ADR in the three years prior to the survey. Part IV focuses on the two most important process options, mediation and arbitration, examining their relative usage for different kinds of disputes (with special emphasis on corporate/commercial, employment, and consumer disputes) and expectations regarding their future use. Part V scrutinizes what is, for most users, the single most important element in mediation and arbitration: the individuals employed to facilitate or adjudicate the dispute.³¹ It explores current methods of “neutral” selection

27. See *infra* Part IV.A–B.

28. See *infra* Part III.D, for a discussion of ENE and ECA.

29. See *infra* Part V.

30. See *infra* Part VI.

31. Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, 60 DISP. RESOL. J., OCT. 2005, at 24.

Season 201x]

7

as well as current perceptions of quality. Part VI briefly examines the growth of integrated conflict resolution systems addressing issues and conflicts in employment relationships. Part VII offers final reflections on the future of mediation, arbitration, and conflict management practice and research, positing opportunities for corporations to take full advantage of the choices inherent in ADR and for researchers to build on the foundation of broad-based surveys.

II. THE FIRST FORTUNE 1000 CORPORATE COUNSEL SURVEY (1997)

A. *Backdrop for the 1997 Survey*

1. *The “Business Arbitration Era”*

For much of the latter half of the twentieth century, out-of-court dispute resolution centered on binding arbitration³² as an alternative to litigation of commercial disputes.³³ Empirical studies from the fifties through the mid-eighties portrayed a wide array of procedural options available to arbitrating parties,³⁴ indicating how arbitration processes might be tailored to many different kinds of commercial disputes. Results reflected perceptions among most users that arbitration promoted faster resolution³⁵ and cost-savings,³⁶ especially in cases involving smaller

32. Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 839 (2001) [hereinafter *Contract and Conflict Management*], available at <http://ssrn.com/abstract=1377917> (binding arbitration is defined as “the submission of a dispute to one or more impartial persons for a final and binding decision.”).

33. See generally Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L. REV. 425 (1987) [hereinafter *Rethinking American Arbitration*], available at <http://ssrn.com/abstract=2061822> (analyzing results of national survey by the ABA Forum on the Construction Industry regarding arbitration of construction disputes, and summarizing and comparing prior empirical studies of commercial arbitration). A notable exception to this orientation was the labor arena, in which mediation was also an important element. See WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (2d ed. 1986); Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 65 (2012).

34. Some forms of arbitration were pure business tribunals, with no advocacy or adjudicative role for legal counsel. See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 859 (1961) (discussing problem of attorney participation in arbitration process which causes inadequacy and delay); see also, e.g., *Rethinking American Arbitration*, *supra* note 33, at 434 (stating that some trade associations do not require attorney involvement in arbitration process).

35. See *Rethinking American Arbitration*, *supra* note 33, at 460–61 (ABA Forum survey), 473 (University of Chicago survey of AAA cases), 474 (Harvard Business School survey), 475 (Kritzer-Anderson study), 475–77 (AAA user rating survey, survey of closed cases).

36. See *id.*, at 461–62.

amounts at issue.³⁷ Most respondents positively assessed the abilities and effectiveness of arbitrators, comparing them favorably to judges and juries.³⁸ While generally favorable to arbitration, these studies also revealed undercurrents of concern regarding arbitration processes. Respondents often expressed negative views about the quality of arbitrators³⁹ and the sufficiency of information provided by administering institutions to aid in arbitrator selection.⁴⁰ Some respondents also had concerns about the fairness of arbitral decisions (awards)⁴¹ and the standards which governed such decision-making, including conformity to applicable law.⁴² Unease about arbitrators often underpinned broader concerns about arbitration, including the relative lack of judicial oversight of arbitration awards.⁴³ Business people and corporate counsel sometimes harbored very different views on these subjects, but often shared concerns about the impact of attorneys on the arbitration process — particularly in contributing to delays.⁴⁴ At the same time, lawyers expressed views that arbitration might be improved by introducing elements analogous to litigation.⁴⁵ As reflected in the ABA Forum Committee on the Construction Industry's intensive study of lawyer perspectives on arbitration, however, such opinions were sometimes qualified by concerns about arbitration becoming a carbon copy of litigation.⁴⁶ All of these expectations and concerns would figure in the evolution of arbitration and other process choices.⁴⁷

2. The "Quiet Revolution"⁴⁸

By the time of the ABA Forum study, the world of conflict resolution was experiencing unprecedented changes.⁴⁹ Spurred by the need to develop

37. *See id.* at 460–62.

38. *See id.* at 454–58.

39. *See id.* at 454–56.

40. *See id.* at 456.

41. *See id.* at 457–58.

42. *See id.* at 458–59.

43. *See id.*

44. *See id.* at 477.

45. Such elements include express arbitral authority to direct exchange of pertinent documents in advance of hearings and the ability to award attorney fees as a sanction for failure to comply with applicable arbitration procedures; these views evinced a general desire to see arbitrators exert greater control over the arbitration process and promote party cooperation in moving the case forward. *See id.* at 467.

46. *See, e.g., id.* at 465 (majority of responding construction attorneys favored keeping discovery in arbitration more limited in scope than discovery in litigation).

47. *See infra* Part II.A.

48. Portions of this part were adapted from *Vanishing Trial*, *supra* note 1, at 875–79.

Season 201x]

9

alternatives to the high costs and risks associated with litigation, businesses began exploring new alternatives for managing and resolving disputes, including mediation and other approaches aimed at settling disputes short of trial.⁵⁰ Businesses were motivated, not only by the risk of excessive judgments or settlements, but also by significant transaction costs, including the expenses of legal counsel, supporting experts, preparation time and discovery — costs that were often a multiple of the settlement amount.⁵¹ Businesses became frustrated with dramatic increases in the hourly billing rates at most law firms, even as the law firms failed to manage discovery and related costs, waned in professionalism, and increased “Rambo”-style tactics.⁵² Businesses also believed that jury verdicts were becoming more unpredictable.⁵³ A 1998 study found that one company “reported a nine-fold increase in legal costs over the ten years prior to the study, while another reported a ten-fold increase.”⁵⁴ In addition to the costs of outside counsel, litigation often entailed an unacceptable drain on internal human resources⁵⁵ and consequent lost opportunities.

The collaboration of leading corporate counsel exemplified this emphasis on more actively managing conflict in 1979 by creating the non-profit Center for Public Resources, later renamed the CPR Institute for Dispute Resolution, and, eventually, the International Institute for Conflict Prevention & Resolution.⁵⁶ The organization developed a variety of tools to promote and inform lawyers about constructive alternatives to court trial.

49. See *Vanishing Trial*, *supra* note 1, at 849–50 (discussing Congressional passage of the Civil Justice Reform Act and the evolution of federal and state court ADR programs), 875–909 (discussing evolution of ADR and conflict management in business, employment and consumer arenas); see also Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 856–61 (1993) [hereinafter *The Quiet Revolution*] (describing “quiet revolution” in dispute resolution in 1980s and early 1990s).

50. See generally Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65 (1996) [hereinafter *Beyond Arbitration*], available at <http://ssrn.com/abstract=2060438> (summarizing and analyzing results of major national survey of construction ADR).

51. David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL., 1, 7–8 (1998); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 35–36 (1998).

52. McEwen, *supra* note 51, at 4.

53. Lande, *supra* note 51, at 34..

54. McEwen, *supra* note 51, at 7.

55. *Id.* at 8–9.

56. In between academic appointments, Professor Stipanowich served as the second President and CEO of CPR, from 2001 to 2006.

In order to encourage a new problem-solving culture among lawyers, CPR sponsored conferences and developed an extensive array of publications, procedures and protocols for dispute resolution⁵⁷ including, notably, the CPR Commitment or “Pledge” to attempt to resolve disputes without litigation.⁵⁸

By the mid-1990s, corporate counsel and other advisors to businesses found themselves challenged for the first time to choose from (or be steered into) a diverse array of dispute resolution options including mediation,⁵⁹ mini-trial,⁶⁰ fact-finding,⁶¹ court-annexed non-binding arbitration,⁶² and

57. *Resources*, INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, <http://www.cpradr.org/Resources.aspx> (last visited Mar. 5, 2014).

58. The CPR Commitment, or “Pledge,” was signed by corporate general counsel and managing partners on behalf of major corporations and law firms. Representatives of a total of more than 4000 corporations, including subsidiaries, and hundreds of law firms have signed some version of the CPR Commitment, including industry-specific commitments. See Mazadoorian, *supra* note 8, at 4; *CPR Pledges*, INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, <http://www.cpradr.org/About/CPRPledges.aspx> (last visited Mar. 5, 2014). Some of CPR’s initiatives were aimed at concerns about the quality of arbitrators and administration of arbitration; CPR fielded a list of distinguished neutrals including former cabinet officers and retired federal appellate judges to credential arbitration and out-of-court dispute resolution, and established a new set of “nonadministered” rules for arbitration of complex commercial cases. See Stipanowich, *Beyond Arbitration*, *supra* note 50, at 79; CENTER FOR PUBLIC RESOURCES, RULES AND COMMENTARY FOR NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES (1990). CPR also helped develop guidance for court-connected ADR. ELIZABETH PLAPINGER & DONNA STEINSTRAS, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS 61–62 (1996) (extensively describing various ADR programs in the federal district courts).

59. Mediation came into wide use as a species of private, informal processes in which disputing parties were assisted by third parties who “advise[d] and consult[ed] impartially with the parties [in their efforts] to bring about a mutually acceptable resolution of disputes.” See *Beyond Arbitration*, *supra* note 50, at 84. Mediation became the mainstay of court-connected and community programs throughout the U.S. in the 1980s and 1990s. See *id.* at 85. It came to be viewed as a particularly flexible tool for efficiently and effectively settling disputes. See Lisa Brennan, *What Lawyers Like: Mediation*, NAT’L L.J. (Nov. 9, 1999), <http://www.law.com/jsp/article.jsp?id=900005513472&slreturn=20130816185040> (reporting that four out of five outside lawyers and in-house counsel responding to survey used mediation because it saves time and money; approximately half reported that mediation preserves relationships).

60. Mini-trial (Minitrial) is a process in which counsel for the opposing parties present their “best cases” in condensed form before representatives of each side who are authorized to settle the dispute. Usually, a neutral third-party advisor presides over the process. After the presentation, the parties’ representatives meet to discuss settlement prospects. The advisor may offer certain non-binding conclusions regarding the probably adjudicated outcome of the case and may assist in negotiations. Thomas J. Stipanowich & Leslie King O’Neal, *Charting the Course: The 1994 Construction Industry Survey on Dispute Avoidance and Resolution — Part I*, 15 CONSTR. LAW. 5, 9 n.14 (1995) [hereinafter *Construction Survey*] (quoting Thomas J. Stipanowich & Douglas A. Henderson, *Settling Disputes by Mediation, Minitrial and Other Processes—The ABA Forum Survey*, 12 CONSTR. LAW. 6, 8 (1992)). Limited discovery may precede each presentation in order to allow each side to put

Season 201x]

11

ENE.⁶³ In the construction and employment arenas, there was even more ambitious experimentation with approaches aimed at proactive management of conflict.⁶⁴

In 1994, linked nationwide surveys of construction and public contracts attorneys, business persons, and industry professionals⁶⁵ depicted an industry rapidly moving beyond reliance on binding arbitration and actively exploring a range of new approaches to construction conflict.⁶⁶

on its best evidence and present a concise version of its case. Albert H. Dib, *EPA Alternative Dispute Resolution Guidance*, 4 FORMS & AGREEMENTS FOR ARCHITECTS, ENGINEERS & CONTRACTORS § 38:29 (2013); see also Robert M. Smith, *Alternative Dispute Resolution for Banks and Other Financial Institutions*, 46 AM. JUR. TRIALS 231, § 34 Minitrial (1993). The mini-trial format may be tailored in various ways, including authorizing the third party neutral to making a legally binding decision. H. Warren Knight, CAL. PRAC. GUIDE: ALT. DISP. RESOL., Ch. 3-F (2013).

61. Fact-finding processes engage neutral parties — lay or expert — in determining elements of truth in a factual dispute. Smith, *supra* note 60, § 3 Private ADR Processes. Fact-finding has seen use as a free-standing settlement technique, or in support of mediation or other approaches. See Brian Panka, *Use of Neutral Fact-Finding to Preserve Exclusive Rights and Uphold the Disclosure Purpose of the Patent System*, 2003 J. DISP. RESOL. 531, 541 (2003); Robert B. Fitzpatrick, *Shouldn't We Make Full Disclosure to Our Clients of ADR Options?*, SC 59 ALI-ABA 755, 770 (1998); see also Charles P. Lickson, *The Use of Alternative Dispute Resolution in Intellectual Property, Technology-Related, or Innovation-Based Disputes*, 55 AM. JUR. TRIALS 483, § 47 (1995); Smith, *supra* note 60, § 33 Neutral Fact Finding (“Fact-finding is often treated as an element of the services provided by a mediator in the mediation process. In fact, fact-finding is a component of almost all ADR procedures.”). The parties present or submit one or more factual aspects of a dispute to a neutral third party who decides the facts of the case and issues a report based on those facts. Fitzpatrick, *supra*, at 770. “Fact-finding can be undertaken voluntarily by the parties in an attempt to promote settlement discussions, or ordered by a court as part of the narrowing of the issues for either settlement or litigation.” Lickson, *supra*, at § 47. Fact-finders may render advisory opinions or reports, or legally binding conclusions. Tim K. Klintworth, *The Enforceability of an Agreement to Submit to a Non-Arbitral Form of Dispute Resolution: The Rise of Mediation and Neutral Fact-Finding*, 1995 J. DISP. RESOL. 181, 186 (1995).

62. Court-annexed non-binding arbitration is an adjudicatory process involving an expedited adversarial hearing before one or more lawyer arbitrators culminating in a non-binding judgment on the merits on disputed legal issues. Either party might reject the arbitral judgment and seek trial de novo. See, e.g., PLAPINGER & STEINSTRAS, *supra* note 58, at 61–62 (1996).

63. Early neutral evaluation is a non-binding ADR process usually conducted early in litigation, before much discovery has taken place. The neutral evaluator conducts a confidential session with the parties and counsel to hear both sides of the case and offer a non-binding assessment of the case. The evaluator may also help with case planning by helping to clarify arguments and issues, and may even mediate settlement discussions. *Id.* at 63–65.

64. See e.g., Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. DISP. RESOL. 303, 332 (1998) [hereinafter *Multi-Door Contract*].

65. See generally *Beyond Arbitration*, *supra* note 50 (detailing results of two surveys on mediation and other ADR processes).

66. See *id.* Despite the evolution of other alternatives, arbitration continues to be widely embraced as for the resolution of international disputes. See ALAN REDFERN, LAW

Mediation, dispute review boards, and other tailored intervention strategies came to the fore as strategies for early, informal resolution of disputes.⁶⁷ “Partnering” represented an even more ambitious movement toward “upstream,” integrated management of conflict, with facilitated meetings among project team members to discuss and anticipate organizational and individual goals, concerns, and hot-button issues during the course of construction.⁶⁸ But mediation was by far the most widely used of the new approaches,⁶⁹ and construction lawyers tended to view mediation as more effective than arbitration in producing positive results,⁷⁰ such as resolving individual disputes, improving communications, preserving relationships, and reducing the cost and delay associated with dispute resolution.⁷¹ Portending future trends toward “lawyer-driven” or “legal” mediation, reports of 459 individual mediations showed that more than eighty-five percent of mediators were attorneys or retired judges,⁷² that more than seven in ten mediators “express[ed] to the parties . . . their views of the factual and legal issues in dispute,”⁷³ and that there were significantly more full or partial settlements in cases where such evaluations were offered.⁷⁴

Meanwhile, there were signs of a dramatic transformation in the handling of workplace conflict. This development reflected societal tensions between collectivism and individualism, as well as the perception of many organizations that, rather than merely react to conflict, there was a need to become increasingly strategic in managing employment disputes, an inevitable reality of the workplace.⁷⁵ In 1995, the General Accounting Office issued a report on U.S. businesses which indicated that almost all employers used some form of ADR, with negotiations, fact-finding,

AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 62–66 (4th ed. 2004) (discussing the importance of arbitration for international commerce disputes).

67. See generally *Multi-Door Contract*, *supra* note 64 (providing examples of how strategies for informal dispute resolution have evolved over time).

68. See, e.g., *id.* at 378–85.

69. *Beyond Arbitration*, *supra* note 50, at 179.

70. *Id.* at 172 tbl.LL-1.

71. *Id.*

72. *Id.* at 116 tbl.O.

73. *Id.* at 118 tbl.Q.

74. *Id.* at 123. Significantly, although those surveyed tended to view mediation as most effective in achieving key process goals, ENE usually received their second highest collective assessment, and in some cases was rated even higher than mediation. See *id.* at 145–52; see also *Multi-Door Contract*, *supra* note 64, at 366–72 (discussing implications of survey data and similar anecdotal evidence).

75. For a summary of these tensions, and a full analysis of the extent to which the Fortune 1000 survey assesses these, please see David B. Lipsky et al., *Conflict Resolution in the United States*, OXFORD HANDBOOK ON CONFLICT MANAGEMENT 6–9 (2013).

Season 201x]

13

mediation, and peer review being the most common.⁷⁶ Some companies, however, went further and developed integrated systems for the management of conflict in the non-union workplace. Such programs typically embraced a comprehensive and proactive approach to conflict management, a broad scope for handling complaints, and variety of access points for entrance into the system, including an office charged with managing the firm's ADR system.⁷⁷ The Brown & Root Dispute Resolution Program, effective in 1993, included an open door policy and provided the employee with options of internal mediation, mediation by a third party, and independently administered arbitration.⁷⁸ Generally, employer-designed systems were introduced to employees with the assurance that the purpose of the system was to reduce costs and delays of litigation while protecting the rights of the employees.⁷⁹

B. The 1997 Fortune 1000 Survey

All of these developments created the impetus for the first broad-based study of dispute resolution in major companies — the 1997 survey of Fortune 1000 corporate counsel by Cornell University.⁸⁰ Based on responses from more than six hundred companies, the study concluded “that ADR processes are well established in corporate America, widespread in all industries and for nearly all types of disputes,” and that “ADR practice is not haphazard or incidental but rather seems to be integral to a systematic, long-term change in the way corporations resolve disputes.”⁸¹

76. JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 75 (1997). Roughly ten percent of employers used arbitration, making it one of the least common approaches. DUNLOP, *supra*, at 75.

77. See DAVID B. LIPSKY ET AL., *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGER AND DISPUTE RESOLUTION PROFESSIONALS* 3–22 (2003) [hereinafter *EMERGING SYSTEMS*]; see also SOC'Y OF PROF'L S IN DISPUTE RESOLUTION, *DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS: GUIDELINES FOR PRACTITIONERS AND DECISION MAKERS IN ORGANIZATIONS* 13–14 (2001).

78. Report from Joe M. Stevens, Jr., Vice President, Employee Relations & Corporate Affairs, Brown & Root, Inc., to June Ann Robinson, Comm'n on the Future of Worker Mgmt. Relations, Background and Characteristics of Our Dispute Resolution Program (Sept. 28, 1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/436.

79. See, e.g., *id.* at 5–10.

80. See generally REPORT ON THE GROWING USE OF ADR, *supra* note 14.

81. *Id.* at 8. The survey was directed to general counsel or heads of litigation at the Fortune 1000 companies. For the purposes of the survey, ADR was defined 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.” *Id.* at 7. Actually, the survey included queries regarding other forms of ADR as well.

Although the results reflected widespread usage of ADR processes by businesses, these conclusions greatly overstated the degree of systematization in corporate conflict management reflected in the data.⁸² While more than one in ten companies purported to “always try to use ADR,” companies with policies emphasizing litigation or an ad hoc approach to dispute resolution still outnumbered those asserting pro-ADR policies.⁸³

A full eighty-seven percent of respondents reported some use of mediation by their companies in the prior three years, and eighty percent reported using arbitration during the same period.⁸⁴ However, around four-fifths of the respondents said their companies engaged in mediation or arbitration only “occasionally,” “rarely,” or “not at all.”⁸⁵ In-house grievance procedures,⁸⁶ mini-trial,⁸⁷ fact-finding,⁸⁸ and ombuds⁸⁹ were also used by respondents’ companies, although much less widely than mediation or arbitration.⁹⁰

82. As much is acknowledged by the authors in a follow-up study taking a closer look at corporate ADR and conflict management practices. *See infra* text accompanying notes 153–163.

83. REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 9 chart 2, 11 tbl.5.

84. *Id.* at 9 chart 2. A difficulty with the term “arbitration” is that it comprehends the very different systems of binding arbitration pursuant to agreement and court-ordered arbitration, which is rarely binding unless the parties subsequently so agree. The responses appear to have contemplated one or the other or both kinds of “arbitration” — and perhaps private non-binding processes as well. These are all very different species with varied functions: non-binding arbitration is typically a spur to settlement, while binding arbitration is a wholesale substitute for court trial.

85. *Id.* at 10 tbls.3 & 4 (reflecting data for “rights arbitration.” The authors of the study, reflecting their background in the labor field, chose to divide disputes into those involving “rights” — as they defined it, involving “a conflict that arises out of the administration of an already existing agreement”, and “interests” — involving dispute arising “between parties trying to forge a relationship” (as arbitration of collective bargaining issues). These terms are not utilized outside the arena of organized labor/collective bargaining and therefore were not employed in the 2011 corporate survey.

86. “In-house grievance procedures” would generally have been understood to refer to mechanisms established for the resolution of disputes involving individual unionized employees under the terms of a collective bargaining agreement. *See* Michael K. Northrop, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. MIAMI L. REV. 341, 343–44 (1989) (explaining that collective bargaining agreements normally have mandatory in house grievance procedures and systems in place for resolving disputes). Such arrangements were a precursor to mechanisms for managing conflict involving individual non-unionized employees in the workplace.

87. *See supra* text accompanying note 60.

88. *See supra* text accompanying note 61.

89. *See* John E. Sands & Sam Margulies, *ADR in Employment Law: The Concept of Zero Litigation*, N.J. LAW. Aug–Sept. 1993, at 23, 24–25 (discussing integrated ADR systems within an organization and the role of ombudsmen in such systems).

90. REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 10.

Season 201x]

15

The data also reflected the purported use of “mediation-arbitration” by almost forty percent of responding companies.⁹¹ Although the term was not defined in the survey instrument, it might have been interpreted by some respondents to refer to a procedure in which a single individual or team of neutrals acts as a mediator and, if necessary, shifts to an arbitral role.⁹² As discussed below, however, it is probable that respondents generally understood “mediation-arbitration” to include any procedure in which a mediated negotiation process was followed by arbitration.⁹³ Interpreted in this light, the data appear to reflect the emergence of multi-phase or stepped dispute resolution approaches in which binding arbitration is positioned as the adjudicative backstop where mediation fails to resolve disputes.⁹⁴ This is consistent with developments in the construction industry⁹⁵ and other commercial arenas.⁹⁶

Although ADR usage patterns varied by type of dispute and by industry,⁹⁷ mediation was by far the preferred ADR process among survey respondents.⁹⁸ There were numerous reasons for this preference, most notably perceptions that mediation offered potential cost and time savings, enabled parties to retain control over issue resolution, and was generally more satisfying both in term of process and outcomes.⁹⁹ Companies came to mediation in a variety of ways; a small minority of respondents relied on contractual provisions or company policies, while a much larger percentage of companies usually arrived in mediation as the result of ad hoc decisions or court directives.¹⁰⁰

Respondents most often went to arbitration pursuant to a contractual provision, whereas mediation was usually judicially mandated. However, a small percentage of respondents claimed corporate experience with court-mandated arbitration.¹⁰¹ This might reflect companies’ participation in a court-connected non-binding arbitration program (such programs were

91. REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 9 chart 2.

92. In the report of the Fortune 1000 survey, the authors also used the term “med-arb” as a substitute for mediation-arbitration. See EMERGING SYSTEMS, *supra* note 77, at 9. For a fuller discussion of this issue in connection with the 2011 survey data, see *infra* text accompanying notes 233–239.

93. See *id.*

94. See *Contract and Conflict Management*, *supra* note 32, at 853–54 (discussing stepped procedures for company implemented dispute resolution programs).

95. See *Multi-Door Contract*, *supra* note 64, at 320–24.

96. See *Contract and Conflict Management*, *supra* note 32, at 853–54.

97. See REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 11 tbl.6, 12 tbl.7.

98. See *id.* at 12 tbl.7.

99. *Id.* at 16–18.

100. *Id.* at 15 chart 4.

101. *Id.*

relatively common at the time),¹⁰² judicial enforcement of private agreements for binding arbitration, or even judicial pressure to move litigated cases into a binding arbitration despite the absence of prior agreements.

“Because the contract said so” — not any perceived benefit of the process — was by far the most common reason given for going to arbitration.¹⁰³ However, almost seventy percent indicated they chose arbitration because it saved time (68.5%) or saved money (68.6%).¹⁰⁴ A majority — roughly six in ten respondents — said they chose arbitration because it afforded a more satisfactory process than litigation and limited the extent of discovery.¹⁰⁵ A minority cited the preservation of confidentiality or of good relationships, the avoidance of legal precedents and the achievement of more satisfactory settlements or a “more durable resolution.”¹⁰⁶ However, a significantly higher percentage of counsel tended to associate nearly all of these potential benefits with mediation than with arbitration.¹⁰⁷ In this respect, the results were generally consistent with those obtained in the 1994 study of dispute resolution practices in the construction industry.¹⁰⁸

Respondents also identified perceived barriers to the use of mediation and arbitration.¹⁰⁹ Three-quarters of responding counsel thought mediation usage was impeded by the unwillingness of other parties — perhaps reflecting the fact that some business lawyers and clients still lacked experience with mediation.¹¹⁰ Only about one in four, however, saw their company’s lack of experience with mediation as a factor; a slightly higher number cited lack of desire from senior management.¹¹¹ About forty percent of respondents viewed the potential lack of finality (“non-binding”) and “compromised outcomes” as obstacles.¹¹² Significantly, no other concern was shared by more than thirty percent of respondents.¹¹³

102. See PLAPINGER & STEINSTRAS, *supra* note 58 (discussing court-connected arbitration); *Multi-Door Contract*, *supra* note 64, at 310.

103. See REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 17 tbl.15.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* An exception was the presence of an international dispute; respondents were significantly more likely to choose arbitration in such circumstances. *Id.*; see also REDFERN, *supra* note 66, at 63 and accompanying text.

108. See *Beyond Arbitration*, *supra* note 50, at 146 tbls.DD-1 & DD-2.

109. See REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 26 tbl.22.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Season 201x]

17

By nearly every measure the collective response reflected greater levels of concern regarding arbitration.¹¹⁴ A majority of respondents viewed the difficulty of appeal as a barrier to arbitration use, and nearly as many expressed concerns about lack of adherence to legal rules,¹¹⁵ compromised outcomes,¹¹⁶ and lack of confidence in neutrals.¹¹⁷ All of these outstanding concerns were resonant of data from earlier studies of commercial arbitration.¹¹⁸ Relatively few expressed concerns about the costliness or complexity of arbitration, although, tellingly, such concerns were more often expressed about arbitration than about mediation.

Finally, the survey sought to assess the extent to which companies were moving toward more systematic management of workplace conflict.¹¹⁹ Respondents were asked several questions regarding the extent to which companies offered what might be considered component pieces of workplace conflict management systems, including corporate use of an ombudsman or of peer review panels, for instance. Reflecting a generally ad hoc and reactive, rather than strategic, approach to workplace conflict management, only one in ten surveyed companies reported the use of an ombudsman.¹²⁰ An identical percentage of companies also said they offered peer review.¹²¹

III. THE 2011 FORTUNE 1000 CORPORATE COUNSEL SURVEY

A. *Backdrop: The Quiet Revolution Continues*

By the advent of the new millennium, ADR was more or less firmly ensconced in public and private dispute resolution. But as attorneys garnered more experience and familiarity with mediation and arbitration, new stresses and strains were observable. Longstanding concerns by some lawyers about the adequacy of arbitration as a substitute for litigation (including the lack of judicial appeal, the perception that arbitrators seek compromise, and the standards for arbitral decision making)¹²² were reinforced by broader use of arbitration across the spectrum of civil

114. *See id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *See Rethinking American Arbitration, supra* note 33, at 473–77 (comparing the ABA surveys conducted by the University of Chicago and Harvard Business School, among others).

119. *See supra* Part I.A.2, for a discussion of recent developments.

120. REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 9.

121. *Id.*

122. *See supra* text accompanying notes 39–46.

disputes. There was also, paradoxically, more discussion and debate about the role of lawyers and the importation of a reflexive “litigation mentality” into mediation and arbitration. Moreover, while some corporations adopted more sophisticated approaches to proactive conflict management, many adhered to reactive, ad hoc approaches to resolving disputes.

1. Mediation

By the late 1990s, provisions for mediation were being integrated in commercial contract dispute resolution clauses as a preliminary step or precondition for arbitration or litigation, reflecting widespread acknowledgment of the value of mediation and its acceptance as a primary intervention strategy in managing conflict.¹²³ In the ensuing years, meanwhile, the use of mediation to resolve disputes was cited as an important factor in the dramatic drop-off in the incidence of court trial.¹²⁴

As lawyers firmly embraced mediation, their impact on the process was significant. As portended by responses to the 1994 construction survey,¹²⁵ mainstream “legal” mediation typically featured lawyer mediators who at some point in the process employed evaluation techniques — in other words, sharing views on the issues in dispute and their likely disposition in future proceedings.¹²⁶ Commentators expressed concern about the pervasiveness of this model to the exclusion of others, as well as other prevalent practices promoted by attorneys, including excessive adversarialism, the manipulation or “spinning” of mediators and of the mediation process, and an overemphasis on monetary settlements to the exclusion of more integrative and “relational” solutions.¹²⁷

2. Arbitration

During the latter years of the twentieth century and the opening of the twenty-first, binding arbitration was also evolving, in part because Supreme Court decisions promoted broad use of arbitration for all kinds of civil

123. See *Multi-Door Contract*, *supra* note 64, at 373–78 (discussing incorporation of mediation provision in American Institute of Architects contracts and related developments, and their implications).

124. See generally *Vanishing Trial*, *supra* note 1, at 848–50 (reviewing many empirical studies and discussing impact of mediation and other forms of ADR in court system and on incidence of trial).

125. See generally *Construction Survey*, *supra* note 60.

126. See Nolan-Haley, *supra* note 33, at 83–85. Cf. Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887 (2012) (discussing impact of lawyers on divorce and child custody mediation).

127. See generally Nolan Haley, *supra* note 33; see also Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 25–27, 57–58 (2001).

Season 201x]

19

disputes under the aegis of the Federal Arbitration Act.¹²⁸ For businesses, these developments brought to the fore concerns about the utility of arbitration as a substitute for litigation as well as its ability to serve more traditional process goals such as speed, economy and, efficiency.¹²⁹ In 2001, a national commission sponsored by CPR published extensive guidelines for business users of arbitration; the group's recommendations were premised on the notion that the needs and goals parties bring to arbitration "vary by company, by arbitration, and by dispute" — realities underlined by the 1997 Fortune 1000 survey.¹³⁰ Thus, the key to effective use of arbitration was making informed process choices.¹³¹ Accordingly, the recommendations addressed methods for promoting varied goals such as confidentiality, economy, and efficiency while addressing concerns about the quality of arbitrators and guarding against irrational awards. The study also emphasized the importance of utilizing arbitration in the context of an integrated approach to conflict management, including preliminary efforts to resolve conflict informally through negotiation or mediation.¹³²

Despite such efforts, concerns about arbitration persisted. Spurred in part by fairness concerns associated with the use of arbitration in adhesion contracts, increased attention was directed to the lack of appeal from arbitration and other procedural limitations.¹³³ These views resonated with longstanding worries in some quarters about the lack of judicial scrutiny of arbitration awards and the standards for decision-making.¹³⁴ But even as questions continued to be raised about arbitration's sufficiency as a substitute for litigation, there were also voices of concern about the importation of trial elements into arbitration and the potential impact on process costs and cycle time.¹³⁵ Enhanced focus on cost-effectiveness and efficiency drove a number of initiatives, such as *The College of Commercial Arbitrators Protocols for Cost-Effective, Expeditious*

128. See *New Litigation*, *supra* note 21, at 8–11.

129. *Id.* at 24–25.

130. See COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS xxiii–xxv (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST].

131. *Id.* at xxiv–xxv.

132. See *id.* at 10–14.

133. See, e.g., Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 935–36 (2002) (discussing how the lack of appeal of arbitration awards may hinder rights enforcement and how arbitrators have long been thought to involve compromise); Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 705, 710–11 (2001) (critically analyzing academic literature on "unfair" arbitration clauses).

134. See Garth, *supra* note 133, at 933–36.

135. See *New Litigation*, *supra* note 21, at 22–24.

*Commercial Arbitration.*¹³⁶ As to how much businesses were actually using arbitration, the evidence was mixed.¹³⁷ There were, however, indications that increasing reliance on mediation and the incorporation of mediation as a step prior to arbitration in contractual dispute resolution clauses were affecting arbitration use.¹³⁸

All of these realities were reflected in a RAND survey of assorted U.S. corporate counsel on perceptions of business-to-business arbitration.¹³⁹ Most respondents believed arbitration to be “better, faster and cheaper than litigation”¹⁴⁰ — responses reminiscent of earlier surveys.¹⁴¹ Strong majorities also identified four factors favoring a choice of arbitration: the avoidance of “excessive or emotionally driven jury awards,” the ability to choose arbitrators with particular qualifications, the relative confidentiality of arbitration, and the relative ability of arbitrators to cope with complex contractual issues.¹⁴² On the other hand, long-expressed concerns about arbitrator compromise¹⁴³ and loss of the right of judicial appeal were still cited as factors discouraging the use of arbitration.¹⁴⁴ There was also a strong undercurrent of concern among interviewees about arbitration “becoming increasingly like litigation, with greater discovery and pre-hearing motion work,”¹⁴⁵ with negative implications for cycle time and costs. This may be significant, for in 1997 lower costs and cycle time were among the leading reasons why Fortune 1000 corporate counsel opted for arbitration.¹⁴⁶ For many in the RAND study, these concerns were outweighed by pro-arbitration factors.¹⁴⁷ There was, however, a significant split in respondents’ attitudes about whether their experience with

136. See generally THE COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS ON EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS AND ARBITRATION PROVIDER INSTITUTIONS (Thomas J. Stipanowich et al. eds., 2010) [hereinafter PROTOCOLS] (discussing and addressing concerns about excessive delay and cost in arbitration; providing practice guidelines for business users, advocates, arbitrators, and arbitration institutions).

137. See generally DOUGLAS SHONTZ ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL (2011). The RAND Report was based on a relatively small response rate (13%).

138. See *New Litigation*, *supra* note 21, at 25–29.

139. See SHONTZ ET AL., *supra* note 137.

140. See *id.* at ix, 7–9.

141. See *supra* text accompanying notes 35–36.

142. See SHONTZ ET AL., *supra* note 137, at 15–20.

143. *Id.* at 11–13.

144. *Id.* at 20–21.

145. *Id.* at x.

146. See REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 17 tbl.15.

147. See SHONTZ ET AL., *supra* note 137, at 7.

Season 201x]

21

arbitration encouraged (44%) or discouraged (36%) the use of pre-dispute arbitration clauses in commercial contracts.¹⁴⁸

Of course, changing perspectives on business-to-business arbitration were only part of the story. A far more visible — and controversial — evolution was occurring as provisions for binding arbitration appeared with increasing frequency in individual employment and consumer contracts¹⁴⁹ In the context of standardized adhesion contracts, such terms provoked considerable litigation, a variety of legislative initiatives, and ongoing scholarly debate over issues of assent and procedural fairness. Despite a long string of Supreme Court decisions smashing many of the barriers to enforceability of arbitration agreements, however, major companies were far from unitary in their approach to arbitration, and arbitration was often only one among several elements in a corporate program.¹⁵⁰

3. *Systematic Approaches; Workplace Conflict Management Programs*

Besides employing mediation, arbitration, and other third-party intervention strategies, some companies experimented with a variety of other tools comprising integrated or systematic approaches to the management of conflict such as ECA.¹⁵¹ ECA comprises a range of approaches aimed at effectively managing the resolution of business conflict by actively and systematically analyzing all aspects of a case and developing appropriate strategies in accordance with business goals.¹⁵²

148. *Id.* at 10–11. A number of other empirical studies have focused on arbitration terms in different kinds of contracts, resulting in a variety of conclusions about the prevalence of arbitration and agendas of drafters. See Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?* 25 OHIO ST. J. ON DISP. RESOL. 433, 437–46 (2010) (discussing some recent studies of arbitration clauses in business contracts).

149. *Vanishing Trial*, *supra* note 1, at 897–98; see also *Contract and Conflict Management*, *supra* note 32, at 888–16 (discussing consumer and employment arbitration agreements).

150. See, e.g., *Vanishing Trial*, *supra* note 1, at 901–03 (summarizing ADR program elements, including arbitration, in twenty companies in CPR INSTITUTE FOR DISPUTE RESOLUTION, HOW COMPANIES MANAGE EMPLOYMENT DISPUTES: A COMPENDIUM OF LEADING CORPORATE EMPLOYMENT PROGRAMS) (Peter Phillips, ed. 2002).

151. See Stephen M. Prignano, *Early Case Assessment, Rein in Costs and Identify Risks*, IN-HOUSE DEFENSE QUARTERLY, 2008, at 4–5, available at http://www.edwardswildman.com/files/News/6d97c728-395e-49f1-8ed9-174ad537b84d/Presentation/NewsAttachment/ac573809-8ea1-4b12-af4c-17a6bfa172de/Rein%20in%20Costs%20and%20Identify%20Risks_Prignano.pdf; Lisa C. Wood, *Early Case Evaluation (Litigation Efficiency Is Not an Oxymoron)*, 23 ANTITRUST 90, 90 (2009). See generally Eric L. Barnum, *An Introduction to Early Case Assessment*, 17 PRAC. LITIG 21 (2006) (discussing the merits of ECA for resolving corporate disputes).

152. See Prignano, *supra* note 151, at 4–5.

The most intensive focus of such efforts, however, continued to be on workplace conflict. In 2003, a follow-up study looked more closely into the practices of twenty of the companies in the 1997 Fortune 1000 survey.¹⁵³ They found that a relatively small percentage of big companies had a policy of contending most claims and controversies and rigorously employed litigation (or the threat of litigation).¹⁵⁴ In those companies decision makers tend to view dispute resolution as a zero-sum game, and view ADR as undermining their reputation for fighting non-meritorious claims.¹⁵⁵ Another, larger minority of companies employed policies aimed at preventing or resolving some or all kinds of business-related disputes. Some of these companies adopted systemic approaches for workplace conflict management.¹⁵⁶ The latter tended to take proactive approaches to conflict, and developed and implemented these approaches throughout the organization.¹⁵⁷ However, the great majority of companies apparently still relied on ad hoc approaches to the resolution of conflict.¹⁵⁸ Expecting to find a general trend toward systematic and proactive approaches to conflict, the authors instead concluded that the corporate sector's use of ADR tended to be far from "institutional."¹⁵⁹ While a confluence of factors (such as a company's perceived exposure to great risks in litigation, the background and attitude of corporate business leaders and general counsel, and the presence of committed "champions") sometimes produced an institutional commitment to actively managing conflict, the authors "were surprised at the lack of 'integration'" in approach to conflict among

153. See generally EMERGING SYSTEMS, *supra* note 77; David B. Lipsky et al., *An Uncertain Destination: On the Development of Conflict Management Systems in U.S. Corporations*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA, PROCEEDINGS OF NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 109 (Samuel Estreicher & David Sherwyn eds., 2004) [hereinafter *An Uncertain Destination*].

154. *An Uncertain Destination*, *supra* note 153, at 119–20.

155. See EMERGING SYSTEMS, *supra* note 77, at 119–22.

156. *Id.* at 128–32.

157. *Id.* at 130. An outstanding illustration of such practices is revealed in Thomas L. Sager, *Changing Rules, Changing Roles*, 2 LITIG. MGMT. 18 (2004). Cf. AM. ARB. ASS'N, DISPUTE-WISE MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS (2003) (market research firm study on corporate approaches to conflict).

158. Rather than systematically laying the groundwork for avoiding or managing conflict, their approach was reactive. That is, they thought in terms of how to respond when a matter ripens into a dispute. Put another way, their use of ADR was tactical rather than strategic; incremental rather than integrated. Mediation or arbitration was employed experimentally (either post-dispute or in pre-dispute contractual provisions) in the context of specific categories of disputes. See *An Uncertain Destination*, *supra* note 153, at 122–26; see also Mazadoorian, *supra* note 8, at 6.

159. EMERGING SYSTEMS, *supra* note 77, at 142–44.

Season 201x]

23

companies they studied.¹⁶⁰ These conclusions were reinforced by a concurrent study of conflict management practices in Maryland businesses.¹⁶¹ While some companies had embraced some or all of the various elements often associated with more systematic, integrated approaches to conflict management, including corporate ADR policy statements or commitments, ECA, ADR training and education for staff, and other approaches, the great majority had not.¹⁶² Generally, concluded the survey, “[e]ven businesses that have made commitments to use ADR still appear to use it reactively rather than designing a system to prevent conflicts from escalating.”¹⁶³

B. A New Fortune 1000 Survey: Purpose, Research Questions

The continuing evolution of ADR prompted representatives of the Scheinman Institute on Conflict Resolution at Cornell University, the Straus Institute for Dispute Resolution at Pepperdine University School of Law and the International Institute for Conflict Prevention & Resolution (CPR) to confer and plan a full-scale follow-up survey of Fortune 1000 corporate counsel.¹⁶⁴ A primary purpose of the survey was to obtain current information regarding the use of mediation, arbitration, and other ADR approaches by major U.S. corporations. By comparing the results of the new survey with the results obtained in a 1997 Fortune 1000 survey, moreover, it might be possible to identify key trends in corporate dispute resolution practice. In light of recent developments, however, the new survey instrument would need to touch on subjects not addressed in 1997.

Based on prior studies as well as mounting anecdotal evidence, members of the research team identified key questions:

Q: Has the emphasis on ADR increased or decreased since 1997? How will corporate conflict resolution policies have changed, if at all?

In light of the growing emphasis on ADR in legal education and by bar associations, greater use of contractual ADR provisions, continuing referral

160. *An Uncertain Destination*, *supra* note 153, at 147.

161. MARYLAND MEDIATION AND CONFLICT RESOLUTION OFFICE, THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN MARYLAND BUSINESS: A BENCHMARKING STUDY (2004) [hereinafter ADR IN MARYLAND BUSINESS].

162. *An Uncertain Destination*, *supra* note 153, at 148. Unfortunately, the report does not present data by size of organization, so no conclusions can be drawn regarding differences between large, medium-sized, and small companies.

163. See ADR IN MARYLAND BUSINESS, *supra* note 161, at 31.

164. The primary organizational representatives participating in the process of planning the survey were Professor David Lipsky on behalf of the Scheinman Institute, Professor Thomas Stipanowich on behalf of the Straus Institute, and CPR Institute President and CEO Kathleen Bryan. The Cornell Survey Research Institute finalized and implemented the survey.

by courts and administrative agencies of cases to ADR and the growth of a large cadre of professional mediators and arbitrators, it was reasonable to expect that more companies would have embraced ADR, and reliance on litigation would be further diminished. However, it was deemed likely that most companies would still embrace a variety of approaches employing litigation and ADR.¹⁶⁵

Q: Why do companies resort to ADR? Are the reasons the same or different than in 1997?

Although the rationale for employing different approaches varies (as evidenced by data from the 1997 survey),¹⁶⁶ we expected companies to cite the same basic drivers for ADR use: savings of time and money, self-determination, a more satisfying and durable process, limited discovery, relative confidentiality, expertise, and preservation of relationships. We wondered, however, how lawyers' increasing familiarity with and participation in ADR processes¹⁶⁷ might alter perceptions.

Q: What forms of ADR are in use today, and how have usage patterns changed?

In addition to mediation and arbitration, we expected to see continued usage of an array of ADR approaches, including some that were not addressed in the 1997 survey (including ENE, ECA, and elements of workplace conflict management systems). We anticipated some drop-off in the use of mini-trial because of its relative cost.¹⁶⁸

Q: Has mediation usage increased or decreased since 1997?

We expected that more companies would report recent experiences with mediation in different kinds of disputes. This result would be consistent with anecdotal evidence regarding use of contractual provisions for mediation by businesses and continuing emphasis on mediation by courts and administrative agencies.¹⁶⁹

Q: Has arbitration usage increased or decreased since 1997?

Our expectations regarding arbitration were mixed. On the one hand, we anticipated that arbitration use would continue to be widely used in different kinds of disputes, especially given the encouragement of favorable Supreme Court rulings.¹⁷⁰ However, controversies concerning

165. REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 8. The complete final survey instrument is available upon request from the authors.

166. See *supra* text accompanying notes 103–108.

167. See *supra* Part II.A.

168. Mini-trials are “generally not as fast, as informal, or as cheap as mediation” and for that reason are less amenable to wide employment. Douglas Hurt Yarn, *Consideration of the Mini-Trial Option*, 1 ALTERNATIVE DISP. RESOL. PRAC. GUIDE § 38.20 (2012).

169. See *supra* text accompanying notes 123–127, 133–150 (discussing recent trends in use of mediation and arbitration).

170. See, e.g., *Trilogy*, *supra* note 20, at 385–87.

Season 201x]

25

the use of arbitration in consumer and employment contracts,¹⁷¹ ongoing debates over the role of arbitration in business-to-business disputes,¹⁷² and the growing reliance on contractual mediation provisions¹⁷³ might have had a dampening effect on arbitration usage.

Q: How do mediation and arbitration usage vary by type of dispute?

Consistent with the 1997 data, we expected to see variations in the use of mediation and arbitration among different types of disputes. Because of the sharply contrasting policy and practice implications associated with out-of-court resolution (especially binding arbitration) of commercial/corporate, employment, and consumer disputes,¹⁷⁴ we elected to focus additional attention on comparisons of these categories.

Q: What is the likelihood of companies' future use of mediation and arbitration?

For reasons noted above, we expected the great majority of respondents to forecast continuing reliance on mediation by their company. Predictions of future corporate use of arbitration would be more mixed.¹⁷⁵

Q: What are the perceived barriers to the use of arbitration? Have perceptions changed since 1997?

Despite continuing efforts to address user concerns about commercial arbitration,¹⁷⁶ recent evidence led us to believe the new data would reflect continuing anxiety regarding arbitrator compromise and loss of the right of judicial appeal.¹⁷⁷ We also expected to see growing concerns over arbitration-related costs and delays.¹⁷⁸

Q: How are ADR neutrals selected and how qualified are they perceived to be? Have patterns and perceptions changed since 1997?

We expected to see that, to the extent disputing parties had greater control over neutral selection (as, for example, where parties and not courts select mediators), there might be a concomitant increase in the perceived qualifications of neutrals.¹⁷⁹

Q: What percentage of companies employ workplace conflict management systems? Will the percentage have increased or decreased since 1997.

171. *Id.* at 398–99.

172. *See New Litigation*, *supra* note 21, at 22–24.

173. *See supra* text accompanying notes 19, 100.

174. *See Contract and Conflict Management*, *supra* note 32, at 879–87.

175. *See supra* text accompanying notes 6, 133–150.

176. *See supra* text accompanying notes 130–132, 136 (discussing CPR and College of Commercial Arbitrators' initiatives).

177. *See SHONTZ ET AL.*, *supra* note 137, at 20–21.

178. *See id.* at 8–10.

179. *See Beyond Arbitration*, *supra* note 50, at 123 (showing significant direct relationship between party selection of mediators and settlement).

Although we expected that a greater number of companies would report practices associated with systematic management of workplace conflict, we anticipated that such companies would still be very much in the minority.¹⁸⁰

C. Implementation of the Survey

Cornell's Survey Research Institute put the survey in final form and administered it in 2011.¹⁸¹ The objective of the planners was to survey, through a questionnaire completed online or in a phone interview, the general counsel of each corporation in the Fortune 1000. If the general counsel was unavailable to complete the survey, the plan was to have it completed by one of the general counsel's senior deputies.

Respondents included counsel in 368 corporations, as compared to 606 corporations in the 1997 survey.¹⁸² In the current survey, forty-six percent of the respondents were general counsel and fifty-four percent were other counsel. Eighty-five counsel responded by mail, 212 responded online, and sixty-three completed the survey by phone interview. The decline in responses between 1997 and 2011 can be attributed primarily to "survey fatigue" amongst companies.¹⁸³ However, both surveys constitute a robust cross-section of Fortune 1000 firms encompassing a wide spectrum of industries.¹⁸⁴ In comparing the Fortune 1000 in 1997 against the Fortune 1000 in 2011, concerns might be raised as to compositional comparability, since the makeup of the sample in 2011 differs somewhat from that found in 1997.¹⁸⁵ For instance, the 2011 Fortune 1000 list includes a higher number of service-oriented firms (including, most likely, information technology firms) and a smaller number of industrial and manufacturing firms than the 1997 group.¹⁸⁶ However, it is unlikely that any issues in this

180. See *supra* text accompanying notes.

181. Cornell University Survey Research Institute, *supra* note 24.

182. REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 8.

183. See David B. Lipsky et al., *The Strategic Underpinnings of Conflict Management Practices in U.S. Corporations: Evidence from a New Survey of Fortune 1000 Companies* 20 (Working Paper, 2013) [hereinafter *Strategic Underpinnings*].

184. See *id.* at 21.

185. See *infra* Chart A for a comparison of respondents' industrial classifications.

186. In the 1997 survey, approximately half of the respondents were based in durable or non-durable manufacturing or mining/construction industries, while about ten percent were based in service. REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 12 tbl 7. In the 2011 survey, about forty percent of respondents came from manufacturing, mining or construction companies, while fifteen percent are service firms.

The dramatic rise in information technology and IT-oriented companies has been heavily documented within the literature. See, e.g., Bresnahan et al., *Information Technology, Workplace Organization, and the Demand for Skilled Labor: Firm-Level Evidence*, 117 Q.

Season 201x]

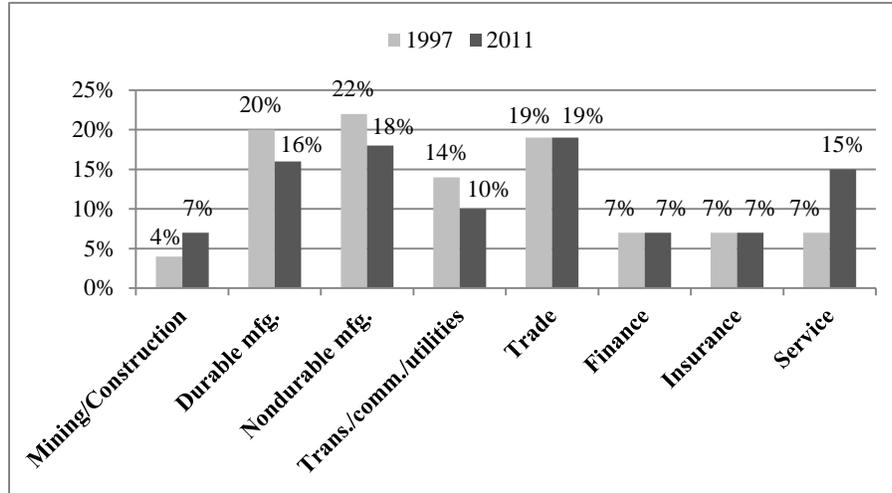
27

regard present a significant problem for our analysis of ADR practices. In other empirical analyses of the Fortune 1000 that use the same data,¹⁸⁷ controls were included for structural factors that might differ between 1997 and 2011 respondents, such as firm size, industry, and regulation status within industries. Importantly, none of these controls was found to significantly affect the firm's responses with regards to its ADR practices and broad dispute resolution behaviors and strategies. Thus, although the nature of the two groups may be slightly different in terms of industry and other compositional factors, as shown in Chart A, this appears to have little or no bearing on responses regarding ADR behaviors within the firms.

J. OF ECON. 339, 342–44 (2002); Luis Garicano & Estaban Rossi-Hansberg, *Organizing Growth*, 147 J. OF ECON. THEORY 623, 624 (2012). Our assumption, therefore, rests on evidence that as demand for IT firms rose over the period 1997 to 2011, so too did the number of firms ranked in the Fortune 1000. For a discussion of the decline of manufacturing and rise of information technology as it relates to ADR and employment relations, see EMERGING SYSTEMS, *supra* note 77, at 56–58.

187. See *Strategic Underpinnings*, *supra* note 183, at 20–21; see also Ariel C. Avgar et al., *Unions and ADR: The Relationship Between Labor Unions and Workplace Dispute Resolution in U.S. Corporations*, 28 OHIO ST. J. ON DISP. RESOL. 63, 65 (2013).

CHART A. FORTUNE 1000 INDUSTRY CHARACTERISTICS (1997, 2011)¹⁸⁸



Another concern in studies of this type is potential survey bias. It may be the case that the firms that chose to respond to the 1997 and 2011 surveys did so because they had strong ADR programs or were proponents of such systems. This would have the effect of overestimating the usage of ADR in the target groups, Fortune 1000 corporations. Since the survey relied on observational data rather than randomized experiments, this is a limitation that must be considered. That said, both the 1997 and the 2011 samples are broadly representative of the Fortune 1000 universe. There is also no reason to suspect that survey bias would be more prevalent in 2011 than in 1997. Although the response rate declined between the two waves of study, there is nothing to suggest that this decline yields higher odds of respondent firms being pro-ADR. Indeed, as the results that follow will show, there is a very mixed picture with regards to differences between 1997 and 2011 in firms' perspectives on ADR, choices of practice, and decisions to not use certain ADR options. Were the 2011 sample more heavily biased in favor of ADR than the 1997 sample, it would show upward trends in a vast array of pro-ADR responses to the questions posed of companies in the more recent study. This is assuredly not the case.

188. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 8 chart 1. Numbers for 1997 are approximate, based on bar charts in original published study.

Season 201x]

29

D. Cautionary Notes

A brief word of caution is in order for those reading and relying upon the following data. First, the survey instrument employed in the present study closely adhered in many respects to the 1997 survey. Many of the questions were identical or very similar to those in the earlier instrument in order to facilitate a side-by-side comparison of present perspectives and experiences with 1997 findings. While this was an important objective for the survey planners, it also meant that a few ambiguous or vague terms or phrases were carried forward into the present survey.

Particular attention should be drawn to issues associated with reliance on the familiar term “alternative dispute resolution” which was employed in this study just as it was in its 1997 precursor. Pervasive reliance on mediation and other out-of-court intervention processes and a commensurate decrease in the rate of trial is a strong argument for abandoning “alternative” as a qualifying adjective. As a California task force observed some years ago, “not only is ‘alternative’ unhelpful — alternative to what? — but ‘appropriate’ better conveys the concept of ‘the method best suited to’ resolving the dispute.”¹⁸⁹ Many commentators now frequently use the adjective “appropriate,”¹⁹⁰ signaling a shift from a litigation default to an emphasis on what techniques are suitable to the circumstances.¹⁹¹ This shift is reflected in the current survey results.¹⁹²

Second, some commentators have argued that grouping widely disparate strategies under the umbrella of “ADR” may be confusing¹⁹³ and impedes effective understanding of individual dispute resolution approaches.¹⁹⁴ In particular, there is debate over whether binding

189. JUSTICE IN THE BALANCE, 2020: REPORT OF THE COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS 40 (1993).

190. See Jeffrey Scott Wolfe, *Across the Ripple of Time: The Future of Alternative (or is it “Appropriate?”) Dispute Resolution*, 36 TULSA L. J. 785, 795 (2001); see also Kenneth L. Jacobs, *Alternative Dispute Resolution: How to Implement an “Appropriate Dispute Resolution” Program in Your Litigation Department*, 76 MICH. B. J. 156, 156 (1997) (noting that “although the ADR movement originated in an effort to promote ‘alternatives’ to court-based dispute resolution, more recently ADR practitioners have emphasized that the process really is about tailoring an ‘appropriate’ means of resolution for a particular case. Hence, court litigation is appropriate dispute resolution for a constitutional question. Mediation is appropriate dispute resolution for many commercial contract conflicts. Arbitration is appropriate dispute resolution for many labor disputes.”).

191. See Wolfe, *supra* note 190, at 795.

192. See *infra* text accompanying notes 202–207.

193. See Jean R. Sternlight, *Is Binding Arbitration a form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 103 (2000).

194. As Professor Sternlight argues,

It makes no more sense to group all these techniques together than it would to group together contracts, torts, property, UCC, etc. in a single three credit course

arbitration should be categorized as a method of ADR, since it is much more closely akin to court adjudication than to mediation and other ADR approaches aimed at facilitating negotiation.¹⁹⁵ In the international commercial context, ADR is generally distinguished from binding arbitration.¹⁹⁶ As we will see, respondents in the present study tend to perceive and treat arbitration very differently from mediation, and have widely disparate views on the future use of these processes.¹⁹⁷

In addition, the term “alternative dispute resolution” is arguably not expansive enough to include approaches aimed at managing issues between parties before they become full-fledged disputes, including open door policies and programs that form early tiers of conflict management schemes for employees and partnering on construction projects.¹⁹⁸ Nevertheless, as the survey data reveal, there is growing emphasis on addressing conflict at its roots, and these broader strategies are a critical and growing part of the landscape.¹⁹⁹

In consideration of the time and attention of busy corporate counsel, the length of the survey instrument was limited. This in turn resulted in the omission or revision in the final version of a few questions that were raised in the 1997 survey. This analysis discusses specific circumstances in which such limitations may raise questions regarding interpretation of the data and we have been careful to limit our conclusions accordingly.²⁰⁰

called “private law.” While this can be done (and perhaps is in some countries) the decision to group diverse subjects inevitably results in less attention being paid to individual components of the group.

Id. at 106.

195. *See id.* at 106–07.

196. Outside the U.S., ADR is generally deemed to comprise all settlement-oriented intervention strategies *other than* litigation and arbitration. Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT’L ARB. 167, 169 (2001) (ADR in its “European context . . . does not include arbitration.”); Virginia A. Greiman, *The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships*, 32 WHITTIER L. REV. 395, 402 n.31 (2011). *See generally* Andrea Kupfer Schneider, *Public and Private International Dispute Resolution in THE HANDBOOK OF DISPUTE RESOLUTION* 438, 446–47 (Michael L. Moffitt & Robert C. Bordone eds., 2005). This is in part because arbitration is so widely accepted as a method for resolving cross-border business conflicts. Greiman, *supra* note 196, at 402 n.31.

197. *See infra* Part III.C, Chart E (reviewing reasons companies use mediation or arbitration according to the 1997 survey); Part IV.A, Tables L & M (comparing likelihood of using arbitration or mediation for future disputes).

198. *Vanishing Trial*, *supra* note 1, at 845–46; *see also Multi-Door Contract*, *supra* note 64, at 378–403 (discussing project partnering and other approaches involving facilitative intervention from the beginning of ongoing relationships to address the roots of conflict).

199. *See infra* text accompanying notes 245–250 (discussing ENE and ECA); *see also infra* Part VI (discussing use of integrated conflict management systems).

200. Through apparent inadvertence or an effort to shorten the survey instrument, a few regrettable departures were made from the 1997 template in the final draft of the survey. For

Season 201x]

31

IV. CONFLICT RESOLUTION POLICIES, PERSPECTIVES ON AND EXPERIENCE WITH ADR

A. *Conflict Resolution Policies of Companies*

As in 1997, corporate counsel were asked, “How would you describe your company’s policy toward dispute resolution?” and given a list of possible options. As before, the results provide a broad impressionistic view of major companies’ general orientations toward litigation and ADR.

TABLE B. CONFLICT RESOLUTION POLICIES OF FORTUNE 1000 RESPONDENTS (1997, 2011)²⁰¹

Corporate Policy	1997		2011
	Defending Party	Initiating Party	
Always litigate	5.0%	6.1%	0.6%
Litigate first, then move to ADR for those cases where appropriate	24.7%	21.4%	18.8%
Litigate only in cases that seem appropriate, use ADR for all others	25.2%	27.0%	38.2%
Tries to move to ADR always	11.7%	11.3%	11.1%
No company policy	20.8%	22.1%	25.2%
Other	12.6%	12.1%	6.1%

When compared to the collective response of the 1997 survey group, the 2011 response reflects an important shift toward ADR.²⁰² As shown in Table B, less than one percent of respondents’ companies espouse an “always litigate” posture — as compared to roughly ten times that percentage in 1997. There is also a dramatic drop in the percentage of companies that purport to “litigate first” before moving to ADR. This probably means that companies are much less likely to follow the

example, some questions which originally treated mediation and arbitration discretely were modified to focus on the aggregate term “ADR,” limiting our ability to interpret and compare data. In these circumstances we were careful to make comparisons and draw conclusions only where we believed we were on firm ground. *See supra* text accompanying notes 193–194.

201. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 11 tbl.5.

202. Each of the responses in the 2011 survey has been compared against the others using sample t-tests to measure whether the differences in responses are statistically significant. Regarding corporate policy, all answers are statistically different from each other.

“hardball” practice of filing a lawsuit without prior negotiation,²⁰³ or at least without prior resort to mediation or other third-party intervention.

The data also show a corresponding increase in companies that purport to “litigate only in cases that seem appropriate, us[ing] ADR for all others.” It is reasonable to conclude that counsel indicating their company adheres to such a policy are reflecting an appreciation of the primacy of ADR tools and techniques in the “dispute filtering” process, with litigation (or, at least, trial) being a backstop or last resort.²⁰⁴ Of course, the notion of what cases are “appropriate” for litigation may vary considerably among companies and senior counsel, as may the kinds of dispute resolution approaches employed in the “filtering” process.²⁰⁵ In commercial contracts, for example, more elaborate arrangements may include a stepped approach including negotiation at one or more levels followed if necessary by mediation and, eventually, arbitration or litigation.²⁰⁶ As discussed below, there are also integrated systems for managing workplace disputes.²⁰⁷

The percentage of respondents who said their corporate policy is “try to move to ADR always” was virtually the same as in 1997. The lack of upward movement in this category may reflect general recognition that there are limits inherent in all of the approaches that collectively comprise ADR, and that in some cases litigation may be necessary and unavoidable.²⁰⁸

A full quarter of respondents indicated that their company had *no policy* respecting resolution of conflict — a slight increase from the corresponding data in the 1997 survey. Although the apparent lack of a policy respecting conflict management might appear to be a failure of strategic vision at the corporate level, it could also mirror the reality that in some large companies that deal with many different kinds of disputes, decisions about how to manage conflict are not made in the office of general counsel, but at a lower level. In such companies, conflict management is not treated as a global matter, but is instead addressed in the context of specific departments, functions, and relational or transactional settings.²⁰⁹

203. See JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE AND LAW* 98 (2d ed. 2011).

204. *Multi-Door Contract*, *supra* note 64, at 376–77.

205. See *supra* text accompanying note 97 (discussing different ADR usage patterns).

206. *Arbitration Penumbra*, *supra* note 19, at 427–28.

207. See *infra* Part VI.

208. See Drahozal & Ware, *supra* note 148, at 450 (discussing circumstances in which companies may prefer litigation over arbitration).

209. See EMERGING SYSTEMS, *supra* note 77, at 67–69.

Season 201x]

33

B. “Triggers” for ADR

In light of perceptible differences in underlying policies and practices, the 2011 survey sought discrete information regarding the handling of corporate/commercial, employment and consumer disputes. As we expected, the data confirm significant distinctions among these arenas, beginning with the “triggers” for the use of ADR.²¹⁰

TABLE C. TRIGGERS FOR ADR USE IN COMPANIES (1997, 2011)²¹¹

	1997		2011		
	For use of mediation	For use of arbitration	Corporate/ Commercial Disputes	Employment Disputes	Consumer Disputes
Part of contract	10%	67%	54.2%	19.4%	41.2%
Ad hoc, voluntary	40%	10%	26.6%	43.1%	36.1%
Company policy	9%	5%	3.9%	12.7%	2.1%
Court mandate	29%	7%	13.5%	19.8%	20.6%
Other	17%	9%	1.8%	4.9%	0.0%

As in 1997, respondents were asked to identify which one of several mechanisms “most often triggered the use of ADR.” Unlike in 1997, however, the current survey instrument did not seek to differentiate between triggers for mediation and those for arbitration. This is unfortunate because, as the earlier data show, there are important differences in the way mediation and arbitration are triggered.²¹² Data from the current survey thus incorporate a “blended” approach in which counsel may reflect on their company’s experience with mediation, with arbitration, or both.²¹³

210. Paired samples t-tests indicate statistically significant differences in ADR triggers between corporate and consumer disputes ($p < .05$) and between employment and consumer disputes ($p < .01$). The difference in triggers between corporate and employment triggers is significant at the .109 level.

211. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 15 chart 4. Numbers for 1997 are approximate, based on bar charts in original published study.

212. See *supra* Table C.

213. It is conceivable but not likely that the term “ADR” would provoke responses that do not reflect experience with either mediation or arbitration. Those processes tend to be by far the most visible and widely used approaches traditionally associated with the term ADR. See *supra* Part II.A.

Moreover, respondents were required to limit their choice to a single most-frequently-used “trigger” even though multiple triggers might be identified. Nevertheless, some worthwhile conclusions can be drawn from the data.

More than half of the companies surveyed indicated that the predominant trigger for the use of ADR in corporate/commercial disputes was a contractual provision. Because this figure blends experiences with mediation and arbitration, it is not possible to do a meaningful comparison with the 1997 data. However, contractually-triggered ADR appears to play a much more significant role in the corporate/commercial arena than in either the consumer or the employment context. On the other hand, ad hoc or voluntary approaches are most common in workplace conflict, as is ADR pursuant to a corporate policy.²¹⁴ This latter result is surprising. It runs counter to the notion that employers are using contracts to force individual employees into ADR processes (notably binding arbitration).²¹⁵ Assuming the data do not simply reflect hyper-technical distinctions based on the difference between the terms of individual employment contracts and employee handbooks, the result may reflect a tendency toward voluntary choice in workplace process options among the Fortune 1000.²¹⁶ Fortunately, the survey provided some more specific data on the use of binding arbitration in employment contracts.²¹⁷

C. Reasons for Using ADR

The 2011 survey sought to determine why companies resorted to ADR.²¹⁸ The results are summarized in Table D, along with corresponding results from 1997. The list of reasons included external causes (“required by contract”; “court mandated”; “desired by senior management”) as well as perceived intrinsic benefits or attributes of ADR. Perceived intrinsic benefits may be grouped for discussion purposes into the following categories:

214. See *supra* Table C.

215. Miriam A. Cherry, *A Negotiation Analysis of Mandatory Arbitration Contracts*, 4 HARV. NEGOT. L. REV. 269, 277–78 (1999).

216. Cf. *Vanishing Trial*, *supra* note 1, at 901–03 (reflecting variety of corporate employment dispute resolution programs).

217. See *infra* Table J. The question read, “When your company has decided to use ADR instead of litigation, which of the following reasons generally help to explain that decision?” A list of possible reasons followed.

218. In the 1997 survey, respondents were asked to identify reasons their company used mediation, and, separately, the reasons for using arbitration. REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 17 tbl.15. For unclear reasons, the 2011 survey substituted a single series of queries focusing on the use of “ADR” in lieu of two series of questions focusing on mediation and arbitration, respectively.

Season 201x]

35

general efficiency and process control (comprised of the elements “saves time,” “saves money,” “allows parties to resolve disputes themselves,” “provides a more satisfactory process” and “has limited discovery”);

privacy and confidentiality (including the elements “has limited discovery,” “preserves confidentiality”);

control over results (“avoids establishing legal precedents,” “gives more satisfactory settlements,” “provides a more durable resolution (compared to litigation)”);

preserving relationships (“preserves good relationships between disputing parties”); and

neutral expertise (“uses expertise of third party neutral”).

TABLE D. REASONS COMPANIES USED ADR INSTEAD OF LITIGATION
(1997, 2011)²¹⁹

Reason		1997		2011
		...to use mediation	...to use arbitration	...to use ADR
External	Is required by contract	43.4%	91.6%	75.3%
	Is court mandated	63.1%	41.9%	55.1%
	Is desired by senior management	—	—	26.0%
General Efficiency and Process Control	Saves time	80.1%	68.5%	70.9%
	Saves money	89.2%	68.6%	68.7%
	Allows parties to resolve disputes themselves	82.9%	—	52.4%
	Provides a more satisfactory process	81.1%	60.5%	38.2%
	Has limited discovery	—	59.3%	51.5%
Privacy and Confidentiality	Preserves confidentiality	44.9%	43.2%	46.8%
	Avoids establishing legal precedents	44.4%	36.9%	31.9%
Control Over Results	Gives more satisfactory settlements	67.1%	34.8%	26.0%
	Provides more durable resolution (compared to litigation)	31.7%	28.3%	18.6%
	Preserves good relationships between disputing parties	58.7%	41.3%	43.5%
Neutral Expertise	Uses expertise of third party neutral	53.2%	49.9%	42.9%

219. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 17 tbl.15.

Season 201x]

37

The data suggest that companies use ADR instead of litigation, first and foremost, to save time and money and to exert control over the dispute resolution process.²²⁰ Concerns about cost and time loom large in discussions and debates over dispute resolution choices.²²¹

More than half the respondents said their companies were motivated to use ADR as a way of limiting discovery because discovery is typically the most significant source of expense and delay in litigation,²²² and the scope of discovery is closely linked to concerns about process time and cost, noted above.²²³ Limitations on discovery may also be responses to concerns about confidentiality, another frequent stimulus for ADR.²²⁴ The push for confidentiality is most intense with regard to contractual disputes involving intellectual property and other proprietary information.²²⁵

More than four in ten respondents also emphasized concerns about the preservation of relationships as a motive for ADR use. Roughly the same number identified their motivation as a desire for expertise in third-party intervention.

220. This correlates to 1997 data on the reasons why companies used mediation and arbitration. *See supra* Table D; *see also* Mazadoorian, *supra* note 8, at 4 (“[C]orporate managers found that ADR, particularly mediative processes, protected one of the most sacrosanct of all corporate objectives — retaining control of the decision-making process.”).

221. *See supra* Table D; notes 50–54, 129 and accompanying text; *see also Beyond Arbitration*, *supra* note 50, at 176–78.

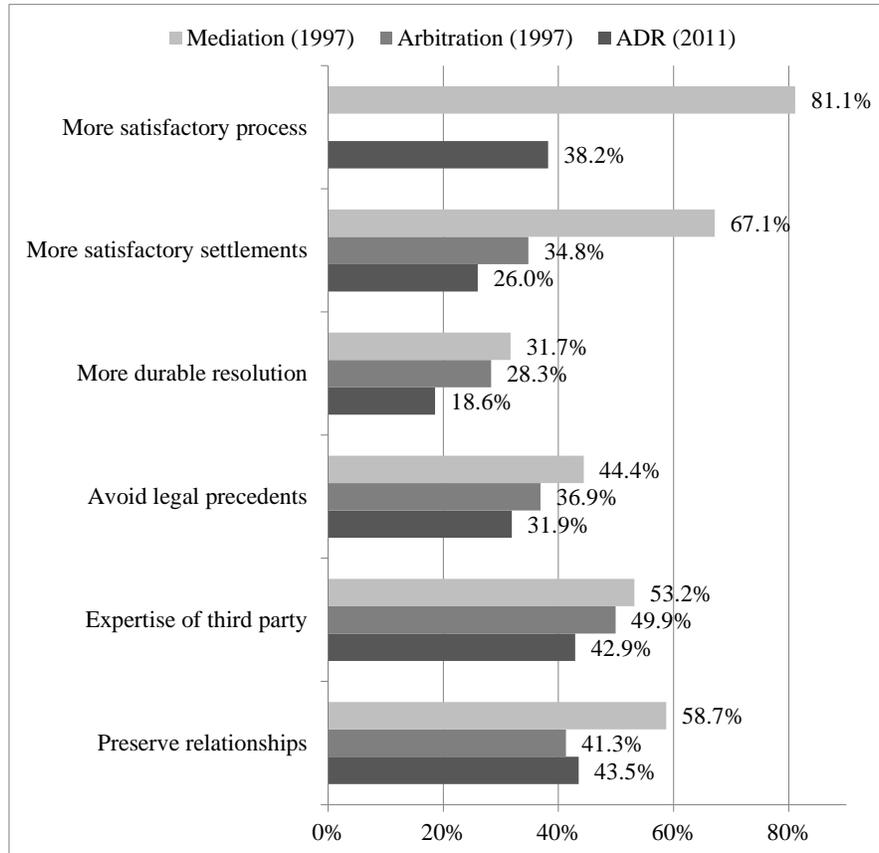
222. PROTOCOLS, *supra* note 136, at 6.

223. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 130, at 48.

224. *Id.* at 251, 254.

225. *Cf.* at 258.

CHART E. REASONS COMPANIES USE ADR (OR SPECIFIC ADR PROCESSES) INSTEAD OF LITIGATION (1997, 2011)²²⁶



At the same time, it appears many corporate counsel have moderated their appraisal of some of the benefits traditionally associated with ADR. Companies' expectations for ADR have tangibly diminished when compared to the 1997 data for *both* mediation and arbitration. In 2011, as highlighted in Chart E, considerably fewer respondents (around thirty-eight percent) believed their company used ADR because it "provides a more satisfactory process." Similarly, there was a substantial drop-off in the percentage of counsel indicating their company favored ADR because it "gives more satisfactory settlements" or because it "provides a more durable resolution."

226. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14.

Season 201x]

39

Moreover, fewer saw “avoid[ing] establishing legal precedents” or even the “expertise of a third party neutral” as a basis for embracing ADR. Finally, the percent choosing ADR because it “preserves good relationships between dispute parties” was much lower than the 1997 figure associated with mediation, and approximates the 1997 figure for arbitration.

There was, on the other hand, a slight increase in the percentage of counsel who believed the preservation of confidentiality stimulated use of ADR; and as noted above, expectations of time- and money-savings still motivated a large majority of companies.

Why are fewer corporate counsel signaling corporate optimism about the ability of ADR to achieve satisfactory processes and effective, durable settlements, or to provide other touted benefits? One possible explanation is that champions of mediation and other forms of ADR initially promoted these alternatives as many-faceted improvements on court process — in some eyes, a panacea.²²⁷ In living and working with these processes, however, companies have found that each one presents its own limitations, problems and pitfalls.²²⁸ Today’s less heady perspectives, in other words, may simply be realism borne of long experience. Another explanation, more intriguing, is that during the course of repeatedly using and participating in ADR processes, attorneys have actually changed those processes.²²⁹ In some cases the transformation has made alternatives to litigation more like the very thing they were designed to replace — more formal, more adversarial, lengthier and more expensive.²³⁰ In the context of mediation, manipulation sometimes frustrates one primary goal: timely settlement.²³¹

D. Use of Different Approaches for Resolving Conflict

Corporate respondents were asked to indicate whether or not their company had used each of several different dispute resolution approaches during the three years prior to the survey. Chart F summarizes data regarding the relative use of different processes in 1997 and 2011.

227. See, e.g., Antony M.D. Willis, *Mediation in a Cold Climate*, 19 ALTERNATIVES TO HIGH COST LITIG. 21, 21 (2001).

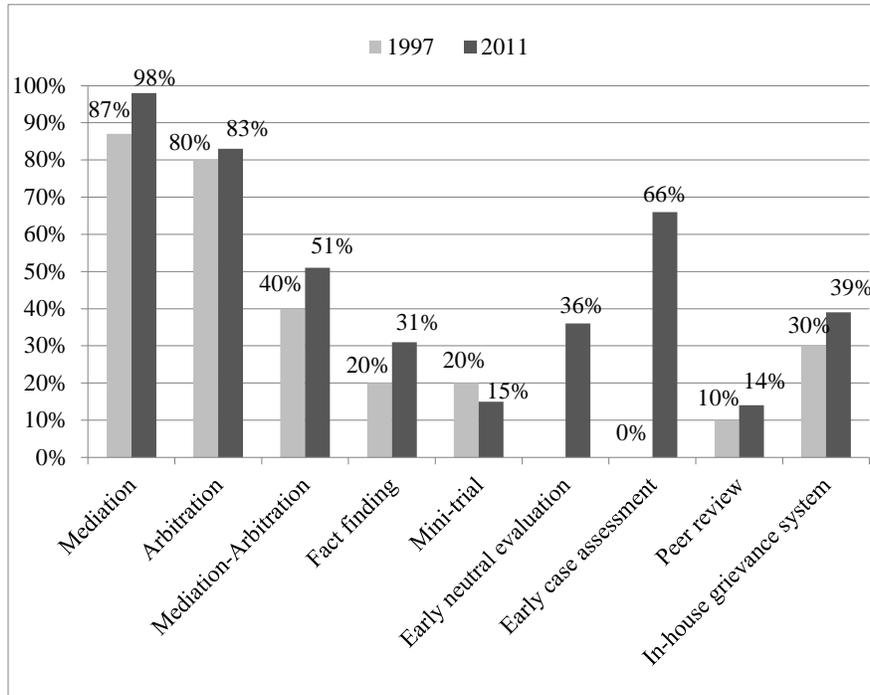
228. See *supra* text accompanying notes 109–118.

229. See e.g., *supra* Part II.A; see also text accompanying notes 125–127.

230. See *supra* text accompanying notes 135–136, 145.

231. See *supra* text accompanying note 99.

CHART F. FORTUNE 1000 USE OF FORMS OF ADR IN PRIOR THREE YEARS (1997, 2011)²³²



Mediation. The 2011 responses suggest that today corporate experience with mediation is virtually universal. Ninety-eight percent of respondents indicated their company had used mediation at least once in the prior three years, a ten percent jump from the 1997 figure. This number resonates with other data showing increases in the number of companies using mediation in many different kinds of disputes, discussed below.

Arbitration. More counsel also represented that their company had had at least one experience with arbitration in the prior three years. However, the jump was very slight, from eighty percent to eighty-three percent. More significantly, as we will see, arbitration usage has actually dropped — in some cases precipitously — for most categories of disputes in the corporate experience. This phenomenon is addressed in Part IV below.

“Mediation-arbitration.” As in 1997, “mediation-arbitration” was presented as a discrete approach to conflict resolution in the 2011 survey, and fifty-one percent of respondents claimed corporate experience with the

232. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 9 chart 2.

Season 201x]

41

approach. Respondents might have interpreted the term at least three different ways.²³³ First, “mediation-arbitration” might be understood to refer to the circumstance in which a single dispute resolution professional first attempts to mediate a conflict and, if unsuccessful, switches hats and assumes the role of arbitrator of the dispute.²³⁴ This approach, often referred to as “med-arb,”²³⁵ is a controversial practice among American lawyers.²³⁶ While frequently discussed, it is highly doubtful that almost half of U.S. corporations, which are not disposed to experiment with innovative approaches to conflict,²³⁷ have employed a “same neutral/multiple role” procedure.²³⁸ Another, much more likely interpretation of “mediation-arbitration” is the more conventional (and increasingly popular) approach where mediation is utilized alongside (that is, prior to or during) the arbitration process, with separate neutrals acting as mediator and arbitrator(s).²³⁹ A third, related possibility is that those who indicated that their company used “mediation-arbitration” meant that they included a “stepped” dispute resolution provision in their contract which called for mediation and, failing resolution through mediation, arbitration, but did not necessarily employ either or both processes. However, since the question asks about processes actually “used . . . in the past three years,” it would seem logical to conclude that the respondents were referring to scenarios in which both mediation and arbitration were actually employed.

Fact finding. Twenty percent of respondents reported recent use of fact-finding by their company in 1997; that number rose to thirty-one percent in 2011. This jump in reported usage of a third-party evaluation technique is consistent with the apparent emphasis on evaluative techniques

233. Cf. *supra* text accompanying notes 91–96.

234. Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 663–65 (1991).

235. *Id.* at 663.

236. See *id.* at 678–79; see also Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues For Parties and Neutrals*, 65 DISP. RESOL. J., May–Oct. 2010, at 61; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938–48 (1997).

237. See Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation: The Delaware Arbitration Program*, 6 J. BUS. , ENTREPRENEURSHIP & L. 349, 357 (2013), available at <http://ssrn.com/abstract=2271359> (discussing caution of corporate clients in embracing novel approaches to dispute resolution).

238. Fullerton, *supra* note 236, at 58–60.

239. See *supra* text accompanying notes 93–94; see also James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT’L ARB. 83, 101 (1997) (discussing co-med-arb, where the mediator and arbitrator are different persons).

by mediators in facilitating negotiation of litigated cases.²⁴⁰ It also resonates with data on the use of ENE and ECA, discussed below.

Mini-trial. Reported corporate use of “mini-trial” dropped from twenty percent in 1997 to fifteen percent in 2011. This drop-off contrasts with the expectations of mini-trial in the 1980s, when it was heavily touted as an important alternative to litigation.²⁴¹ In addition, mini-trials have been criticized as “encouraging the disputants to increase adversarialism and to further entrench their positions by developing a ‘best case’ presentation.”²⁴² Another barrier to the use of mini-trials is that they usually require the investment of significantly greater resources than negotiation or mediation; moreover, mini-trial agreements are often tough to negotiate.²⁴³ The mini-trial format “makes the most sense after unstructured negotiations have clearly broken down or reached an impasse, mediation has been tried or rejected, and the parties already have a considerable investment in pending litigation.”²⁴⁴

Early neutral evaluation. Although no reference was made to ENE in the 1997 survey, thirty-six percent of respondents in the 2011 survey indicated that their company had recent experience with such an approach. Today ENE remains an important element of various court ADR programs,²⁴⁵ and may be used to facilitate early case management as well as settlement.²⁴⁶ The current data may also indicate the use of ENE in private, out-of-court contexts.²⁴⁷ However framed, the emphasis on ENE appears to reflect corporate efforts to invest additional resources further upstream in the dispute resolution process, using third-party expertise as

240. See *supra* notes 125–126 and accompanying text.

241. See, e.g., ABA SUB-COMMITTEE ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, *THE EFFECTIVENESS OF THE MINI-TRIAL IN RESOLVING COMPLEX COMMERCIAL DISPUTES: A SURVEY* (1986). Other less widely used approaches include summary jury trial and non-binding evaluation or assessment. See *The Quiet Revolution*, *supra* note 49, at 865–68 (describing approaches, their uses and attributes).

242. Yarn, *supra* note 168.

243. *Id.*

244. *Id.*

245. See Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?*, 14 *DISP. RESOL. MAG.*, Fall 2007, at 10, 10–12; Elizabeth S. Stong, *Some Reflections from the Bench on Alternative Dispute Resolution in Business Bankruptcy Cases*, 17 *AM. BANKR. INST. L. REV.* 387, 396–97 (2009).

246. John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 *OHIO ST. J. ON DISP. RESOL.* 81, 99–101, 126 (2008).

247. See Allan van Gestal, *The ADR Case Evaluator’s Role in Contemplated and Pending Litigation*, 14 *DISP. RESOL. MAG.*, Spring/Summer 2008, at 40, 40–42; Robert L. Ebe, *A Different Approach to Conducting Med-Arb in Complex Commercial Litigation Matters*, 29 *ALTERNATIVES TO HIGH COST LITIG.* 65, 65–71 (2011); see also Dwight Golann, *The Changing Role of Evaluation in Commercial ADR*, 14 *DISP. RESOL. MAG.*, Fall 2007, at 16, 16–19.

Season 201x]

43

the lynchpin of selective fact-finding and case preparation. This kind of intervention may help settle the case or set the stage for its further development.

Early case assessment. Of similar import are new data regarding corporate reliance on ECA. More than six in ten respondents (66%) affirmed recent experience with ECA, which has currency as a catch-phrase for forms of proactive case management in which disputes are systematically analyzed in order to formulate a strategy for their handling in a manner consistent with business goals.²⁴⁸ Respondents' ECA experiences might refer to a broad formal corporate protocol that is regularly used for assessing and managing cases, like that at DuPont,²⁴⁹ or a solitary effort. Like ENE, ECA exemplifies recognition of the need to approach conflict early and affirmatively rather than reflexively and reactively, and in a manner consistent with specific circumstances, as well as with broader business goals such as economy and efficiency.²⁵⁰

Peer review and in-house grievance systems. In 1997, firms were asked about two aspects of ADR traditionally confined to workplace disputes: to what extent they had used peer-review panels in the past three years, and whether they offered their non-union employees an in-house grievance system. One in ten firms (10%) had used peer review in the recent past, and thirty percent indicated the usage of an in-house grievance system. The same questions were asked in 2011, with respondents indicating an increase in the usage of both mechanisms for handling workplace conflict. Peer review usage rose to fourteen percent in 2011, while the employment of in-house grievance systems increased to thirty-nine percent of companies. Part VI returns to these subjects in a discussion of workplace conflict management systems.

V. CORPORATE EXPERIENCE WITH AND PERSPECTIVES ON MEDIATION AND ARBITRATION

A. *Present and Future Use of Mediation and Arbitration*

In comparing the 1997 and 2011 survey responses, the most salient data relate to recent experiences with mediation and arbitration. In both surveys, counsel were asked, "In the past three years, has your company

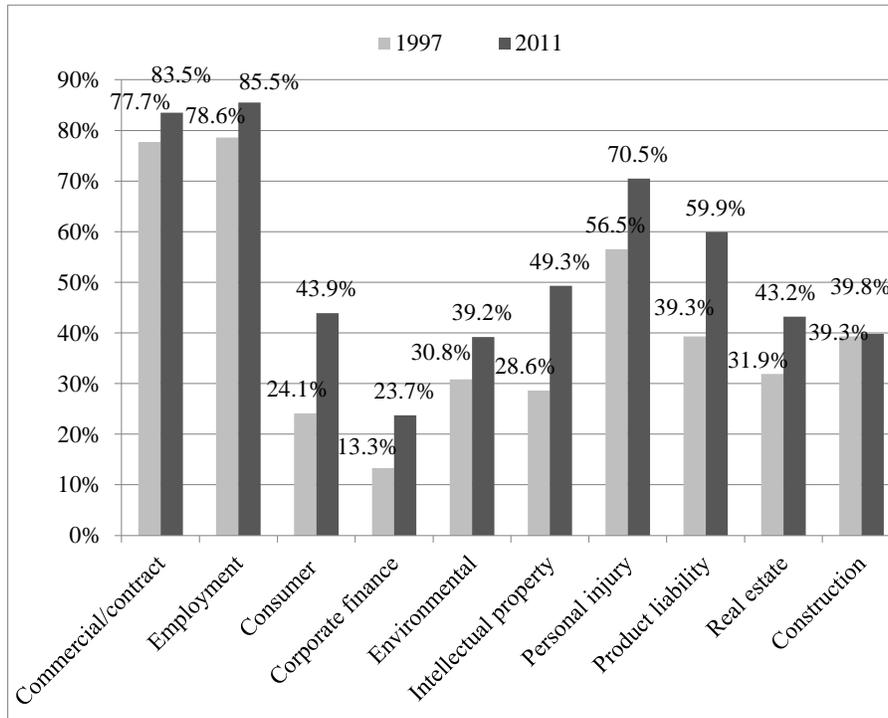
248. See *supra* note 132 and accompanying text (noting that an integrated approach "includ[es] preliminary efforts to resolve conflict informally").

249. Thomas L. Sager & Richard L. Horwitz, *Early Case Assessment — DuPont's Experience*, in 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 75:19 (Robert Haig ed., 2012).

250. See Lande, *supra* note 246, at 109–12.

used mediation and/or arbitration for any of the following [listed] types of disputes?”²⁵¹ As illustrated by Chart G, many more companies reported using mediation for nearly all kinds of disputes;²⁵² however, many fewer companies reported arbitrating in key categories (Chart H).

CHART G. USE OF MEDIATION IN PRIOR THREE YEARS FOR DIFFERENT KINDS OF DISPUTES (1997, 2011)²⁵³



In 2011, more companies employed mediation in the following arenas of conflict: commercial/contract, individual employment, consumer, corporate finance, environmental, intellectual property, personal injury, products liability, and real estate. The sole exception to the pattern of increasing mediation is that the number of companies mediating construction disputes was virtually unchanged. However, given anecdotal evidence that mediation continues to be widely used in construction

251. Cornell University Survey Research Institute, *supra* note 24.

252. *Cf. supra* text accompanying notes 97–100.

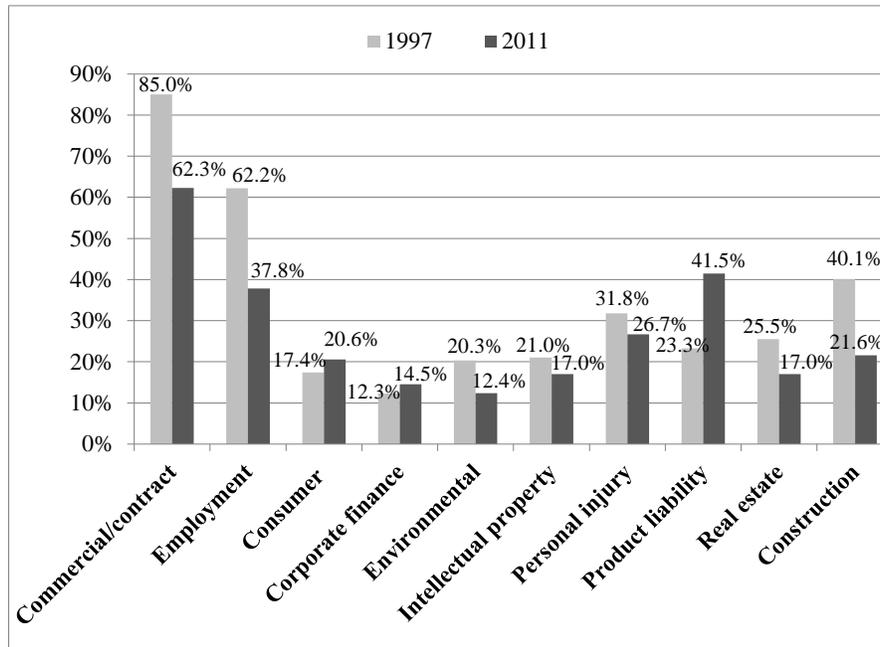
253. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 11 tbl.6.

Season 201x]

45

disputes,²⁵⁴ the data probably reflect the severe and sustained impact of recent economic downturns on all forms of construction in recent years.²⁵⁵ In other words, fewer construction projects means fewer construction disputes and fewer opportunities to use mediation.

CHART H. USE OF ARBITRATION IN PRIOR THREE YEARS FOR DIFFERENT KINDS OF DISPUTES (1997, 2011)²⁵⁶



The comparative data on arbitration present a dramatically contrasting picture (Chart H). Substantial drops were reported in the number of companies reporting arbitration usage in commercial/contract disputes (from 85% in 1997 to 62.3% in 2011) and other categories of disputes: employment (62.2–37.8%), environmental disputes (20.3–12.4%), intellectual property disputes (21.0–17.0%), real estate disputes (25.5–17.0%) and construction disputes (40.1–21.6%). Notable exceptions were

254. See Dean B. Thomson, *Construction Attorneys' Mediation Preferences Surveyed — Is There a Gap Between Supply and Demand?*, in AAA HANDBOOK ON CONSTRUCTION ARBITRATION AND ADR 247, 247 (2d ed. 2010).

255. See Matt McKinnon, *Construction Insights: Record Drop in Construction Spending*, SCHNEIDER DOWNS (Oct. 25, 2012), <http://www.schneiderdowns.com/record-drop-in-construction-spending>.

256. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 11 tbl.6.

consumer disputes, which recorded a slight increase (17.4–20.6%) and products liability disputes, for which the usage of arbitration jumped from 23.3–41.5% of respondents).

Taken as a whole, the results suggest very different trends in mediation and arbitration. Mediation usage is expanding and arbitration usage contracting in most conflict settings. Key exceptions to the downward trend for arbitration are consumer disputes and products liability cases, which probably reflect expanded use of binding arbitration agreements in standardized contracts for consumer goods and services.²⁵⁷

TABLE I. FREQUENCY OF USE, IN CORPORATE/COMMERCIAL DISPUTES, OF MEDIATION AND ARBITRATION PROCEDURES OTHER THAN COURT-MANDATED PROCEDURES (2011)

	Always	Frequently	Occasionally	Rarely	Never
Voluntary mediation	1.8%	45.8%	37.5%	9.2%	5.7%
Non-binding arbitration	0.3%	4.4%	18.7%	28.0%	48.6%
Binding arbitration	1.8%	12.9%	37.2%	28.5%	19.5%

The overall data resonate with other figures on the frequency of use of mediation and arbitration by companies. For example, when asked how frequently they currently use mediation voluntarily — that is, in the absence of court mandate — in corporate/commercial disputes (Table I), nearly half of those responding said they employed mediation “frequently” or “always.” Only about fifteen percent purported to use mediation “rarely” or “never.” The responses regarding use of arbitration were the virtual mirror image of the mediation results. Fewer than fifteen percent of respondents claimed their company used arbitration “frequently” or “always” in corporate/commercial disputes, while almost half said arbitration was used “rarely” or “never.” This result must be a combination of several factors, including (1) companies not employing contractual provisions for binding arbitration; (2) disputes being resolved through

257. See *New Litigation*, *supra* note 21, at 35–39. See generally Thomas Stipanowich et al., *National Roundtable on Consumer and Employment Dispute Resolution: Consumer Arbitration Roundtable Summary Report* (Pepperdine Univ. Legal Studies Research Paper No. 2012/22, Indiana Univ. Sch.Pub. & Envtl. Affairs Research Paper No. 2012-04-01; Penn State Law Research Paper No. 18-2012, April 17, 2012) [hereinafter *National Roundtable Summary*], available at <http://ssrn.com/abstract=2061763> (summarizing intensive facilitated discussion on consumer arbitration and dispute resolution).

Season 201x]

47

negotiation or mediation, prior to the commencement of arbitration; and (3) claims being dropped prior to adjudication.

TABLE J. FREQUENCY OF USE, IN EMPLOYMENT DISPUTES, OF MEDIATION AND ARBITRATION PROCEDURES OTHER THAN COURT-MANDATED PROCEDURES (2011)

	Always	Frequently	Occasionally	Rarely	Never
Voluntary mediation	6.6%	44.0%	35.2%	11.0%	3.3%
Non-binding arbitration	0.4%	3.2%	11.9%	26.1%	58.5%
Binding arbitration	4.4%	12.2%	14.4%	24.0%	45.0%

The contrasts between frequency of use of mediation and of arbitration are even more striking in data relating to employment disputes (Table J). The reported infrequency of arbitration in employment disputes is generally consistent with various reported corporate experiences with multi-step or integrated programs to address workplace complaints. Indications are that the great majority of disputes are resolved informally in the early stages and rarely in arbitration or litigation.²⁵⁸ Furthermore, many employers may be eschewing arbitration altogether.²⁵⁹ Another factor may be claims that are dropped prior to being arbitrated, perhaps because of cost or other barriers.²⁶⁰

TABLE K. FREQUENCY OF USE, IN CONSUMER DISPUTES, OF MEDIATION AND ARBITRATION PROCEDURES OTHER THAN COURT-MANDATED PROCEDURES (2011)

	Always	Frequently	Occasionally	Rarely	Never
Voluntary mediation	3.1%	38.9%	42.1%	13.7%	2.1%
Non-binding	0.0%	4.4%	13.3%	30.0%	52.2%

258. See *Vanishing Trial*, *supra* note 1, at 903 (citing reports).

259. See *infra* Table P (showing almost thirty percent of respondents indicated “no desire from senior management” as a reason for not using arbitration to resolve employment disputes).

260. See *Developments in the Law — Access to Courts: III. Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, 122 HARV. L. REV. 1170, 1172 (2009) (arguing that as a result of class action waiver provisions, “consumer-plaintiff arbitrations . . . essentially never occur”).

arbitration					
Binding arbitration	4.3%	12.0%	25.0%	28.9%	30.4%

Although, as noted above, more companies appear to be resorting to arbitration for consumer cases (Table H), very few companies arbitrate consumer cases more than occasionally (Table K). As with employment disputes, this is due in part to corporate decisions not to use arbitration provisions, and may also reflect resolutions through negotiated settlement. Again, however, another possibility is that consumers are dissuaded from pursuing claims through arbitration because of cost or other barriers.²⁶¹

TABLE L. LIKELIHOOD, COMPARED TO LITIGATION, OF RESPONDENT'S COMPANY TO USE MEDIATION FOR DISPUTES IN THE FUTURE (2011)

	Very likely	Likely	Unlikely	Very unlikely
Corporate/commercial disputes	41.0%	44.6%	12.2%	2.1%
Employment disputes	36.3%	51.1%	9.3%	3.3%
Consumer disputes	24.7%	55.3%	13.8%	6.4%

TABLE M. LIKELIHOOD, COMPARED TO LITIGATION, OF RESPONDENT'S COMPANY TO USE ARBITRATION FOR DISPUTES IN THE FUTURE (2011)

	Very likely	Likely	Unlikely	Very unlikely
Corporate/commercial disputes	12.4%	37.8%	31.3%	18.6%
Employment disputes	14.2%	24.7%	26.6%	34.5%
Consumer disputes	19.8%	24.1%	31.9%	24.2%

A final, emphatic statement of the starkly divergent trends in mediation and arbitration usage is reflected in respondents' predictions of their future use. Almost eighty-six percent of respondents said their

261. *Id.*

Season 201x]

49

company was “likely” or “very likely” to use mediation instead of litigation for future corporate/commercial disputes (Table L). On the other hand, respondents were almost evenly split as to whether their companies were likely or unlikely to use arbitration instead of litigation in future corporate/commercial disputes (Table M).²⁶²

Once again, the contrast between predicted future mediation use and arbitration use was even greater with respect to employment disputes and consumer disputes. This suggests that, despite the Supreme Court’s continuing support for broad enforceability of arbitration agreements in employment and consumer contracts,²⁶³ many companies remain unwilling to incorporate such provisions. This could be the result of a variety of factors specific to a company (which in the employment arena have caused large companies to generate a variety of approaches to conflict management²⁶⁴), as well as concerns about the impact of potential legislation or regulation of employment and consumer arbitration agreements.²⁶⁵ That said, it should be recalled that the number of companies reporting use of arbitration in consumer and product liability disputes increased between 1997 and 2011, as reflected in Table H. Moreover, it is possible that the data in Table M actually indicate that additional companies plan to use arbitration in consumer cases in the future.

TABLE N. COMPARATIVE LIKELIHOOD OF RESPONDENT’S COMPANY TO USE MEDIATION FOR DISPUTES IN THE FUTURE (1997, 2011)²⁶⁶

		Very likely	Likely	Unlikely	Very unlikely
1997	Likelihood of future mediation use	38%	46%	11%	5%
2011	Corporate/commercial disputes	41.0%	44.6%	12.2%	2.1%
	Employment disputes	36.3%	51.1%	9.3%	3.3%
	Consumer disputes	24.7%	55.3%	13.8%	6.4%

262. See *supra* Table M. The divided expectations regarding arbitration use are similar to the results of the recent RAND study. See SHONTZ EL AL., *supra* text accompanying note 137, at 10–11. However, the Fortune 1000 respondents are more evenly divided.

263. See generally *Trilogy*, *supra* note 20.

264. See *supra* Part II.A.3 (discussing integrated or systematic approaches).

265. See *Trilogy*, *supra* note 20, at 396–404.

266. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 30 chart 11.

TABLE O. COMPARATIVE LIKELIHOOD OF RESPONDENT'S COMPANY TO USE ARBITRATION FOR DISPUTES IN THE FUTURE (1997, 2011)²⁶⁷

		Very likely	Likely	Unlikely	Very unlikely
1997	Likelihood of future arbitration use	24%	47%	18%	11%
2011	Corporate/commercial disputes	12.4%	37.8%	31.3%	18.6%
	Employment disputes	14.2%	24.7%	26.6%	34.5%
	Consumer disputes	19.8%	24.1%	31.9%	24.2%

The divergent trends involving future use of mediation and arbitration are underlined when one compares 2011 predictions to those of the 1997 group (Tables N & O). In 2011, as in 1997, eighty percent or more of responding corporate counsel viewed future mediation use by their company as “likely” or “very likely” for all categories of disputes (Table N). But whereas seventy-one percent of 1997 respondents saw their company as “likely” or “very likely” to use arbitration, only about fifty percent of the 2011 group see arbitration of corporate disputes as “likely” or “very likely” (Table O). Once again, the numbers are even lower with respect to arbitration of employment and consumer disputes.

B. Why More Companies Use Mediation, and Fewer Use Arbitration: A Tipping Point

The 2011 Fortune 1000 survey may be remembered as a tipping point in the modern history of mediation and arbitration, because it marks the point at which reliance on mediation contributed to a drop-off in arbitration — a direct parallel to mediation’s role in the reduced incidence of court trial.²⁶⁸

During America’s Quiet Revolution in dispute resolution, mediation took, and for some time has held, center stage. Because it affords parties and counsel several potential advantages — privacy, informality, flexibility and, above all, control — mediation has become a normal adjunct of litigation and usually settles or helps settle cases on the way to court.²⁶⁹

267. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 30 chart 11.

268. See *supra* note 124 and accompanying text.

269. See *New Litigation*, *supra* note 21, at 26–29.

Season 201x]

51

Mediation is a natural response to the cost, length, perceived risks and loss of control associated with litigation.

Experience with mediation in litigated cases led logically to the development of private analogues. In the 1990s, as discussed above, mediation provisions began popping up in commercial contracts, often as a step prior to binding arbitration.²⁷⁰ Anyone who arbitrates frequently knows that as business-to-business arbitration has tended to take on more of the characteristics of court trial,²⁷¹ parties are using mediation in the same way they use mediation during litigation. Mediated resolutions may obviate the need for an arbitration demand, or settle a case along the way to arbitration hearings. This phenomenon alone may account for the observed drop-off in the use of arbitration.

That doesn't fully explain, however, why more businesses appear to be prepared to go a step further and plan to litigate, not arbitrate, if mediation fails to resolve the dispute (such would be the practical result of the removal of provisions for binding arbitration from dispute resolution clauses, as recently happened in the case of standard construction contracts²⁷²). Given the strong reasons to use arbitration in cross-border business disputes (including broad international enforceability of awards and avoidance of foreign courts), the data likely does not reflect international trends.²⁷³ Arbitration in the U.S. domestic market, however, is another matter.

TABLE P. REASONS WHY COMPANIES HAVE NOT USED ARBITRATION
(1997, 2011)²⁷⁴

Barrier	1997	2011		
		Corporate/ Commercial	Consumer	Employment
No desire from senior management	35.0%	24.6%	15.2%	29.7%
Too costly	14.8%	22.9%	28.3%	18.1%
Too complicated	9.9%	9.0%	15.2%	9.6%
Difficult to appeal	54.3%	51.6%	41.4%	41.3%
Not confined to legal	48.6%	44.1%	33.3%	36.2%

270. See *supra* text accompanying note 123; *Multi-Door Contract*, *supra* note 64, at 373–78.

271. See *supra* text accompanying notes 135–136, 145.

272. See *New Litigation*, *supra* note 21, at 29–30.

273. See *supra* text accompanying note 66.

274. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 26 tbl.22.

rules				
Lack of corporate experience	25.9%	11.9%	8.1%	7.2%
Unwillingness of opposing party	62.8%	44.9%	52.5%	43.0%
Results in compromised outcomes	49.7%	47.0%	42.4%	43.0%
Lack of confidence in third party neutrals	48.3%	34.2%	29.3%	24.2%
Lack of qualified third party neutrals	28.4%	11.0%	16.2%	8.2%
Risk of exposing strategy	—	6.4%	5.1%	6.5%
Too time consuming	[Not asked]	11.0%	13.1%	9.9%

These same themes and concerns are reflected in the reasons given by Fortune 1000 survey respondents in 1997 and in 2011 when asked, “When your company has not used arbitration in disputes, which of the following [listed] reasons help to explain that decision?” In 2011, separate queries were aimed at corporate/commercial disputes, employment disputes, and consumer disputes. As reflected in Table P, leading concerns included: the difficulty of appeal, the concern that arbitrators may not follow the law, the perception that arbitrators tend to compromise, lack of confidence in neutrals, and, increasingly, high costs.²⁷⁵ It seems that business lawyers are worried, one way or the other, about not having enough control in arbitration. For some, this means turning to litigation.

At the same time, the 2011 data reflect a number of lowered perceptual barriers to the use of arbitration. The opposition to (or lack of support for) arbitration among senior management appears to be diminished. Similarly, the use of arbitration is today much less likely to be hampered by lack of corporate experience than was the case in 1997.

Concerns about arbitrators, too, appear to be much less of a factor. And while difficulty of appeal, concern about arbitrators not following legal rules, and the unwillingness of opposing parties to arbitrate remain important considerations for corporate counsel, these barriers also affect a smaller percentage of companies than was the case in 1997.

The only clear exception to these trends is perceptions regarding the cost of arbitration. Across the board, more companies (although still a

275. Compare similar results from the recent RAND study. See SHONTZ EL AL., *supra* note 137, at 2, 11, 20, 25.

Season 201x]

53

relatively small minority) viewed cost as a barrier to the use of arbitration.²⁷⁶ This result resonates with recent broadly expressed concerns about the growing costs and inefficiencies in commercial arbitration.²⁷⁷

A final word should be added regarding the data on barriers to the use of arbitration in consumer disputes (which in contrast to the general trend, appears to be on the increase, as discussed above, and which for a variety of reasons should be distinguished from arbitration of commercial disputes²⁷⁸). First of all, there appears to be relatively little resistance to the use of arbitration in consumer cases among Fortune 1000 senior management. Moreover, concerns about the difficulty of appeal of arbitration awards are far less likely to be perceived as a reason not to use arbitration. On the other hand, more than half of those responding (52.5%) perceived the “unwillingness of [the] opposing party” — in this case a consumer or consumer advocate — as a reason not to use arbitration in a consumer contract. In addition, almost three in ten respondents believed the high cost of consumer arbitration might prohibit its use.

VI. SOURCES OF AND PERCEPTIONS OF QUALITY OF THIRD-PARTY NEUTRALS

A. Sources of Nominees for Neutral Roles

Another important basis of comparison between the 1997 and 2011 surveys involves mediators, arbitrators and other third-party “neutrals” — those who act as mediators and arbitrators as well as in other formats for third-party intervention in conflict. In this respect, the 2011 survey offers both more and less than its predecessor: it sought data with respect to the three most important categories of disputes (corporate/commercial, employment, and consumer), but, unlike the 1997 survey, it did not distinguish between mediators and arbitrators (despite the significant differences in these roles and modes of selection).²⁷⁹ However, some useful insights may be gleaned from the current and comparative data.

276. See *supra* text accompanying notes 145–148, for a discussion of the RAND Report and earlier Fortune 1000 survey.

277. See *id.*; see also *Rethinking American Arbitration*, *supra* note 33, at 473–77 (comparing the ABA surveys conducted by the University of Chicago, Harvard Business School, among others).

278. See *supra* text accompanying notes 128, 149–150; see generally *National Roundtable Summary*, *supra* note 257 (discussing the national roundtable on consumer and employment dispute resolution).

279. See REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 28–29.

TABLE Q. SOURCES OF NOMINEES FOR THIRD-PARTY NEUTRAL ROLES (2011)

	Corporate/Commercial Disputes	Employment Disputes	Consumer Disputes
The court	5.2%	6.3%	5.6%
A state or federal agency	0.9%	9.7%	1.1%
A private ADR provider	46.0%	31.2%	56.2%
Within the corporation	1.2%	0.7%	0.0%
Previous experience (word-of-mouth)	39.3%	39.1%	30.3%
Other	7.3%	4.9%	6.7%

In 2011, as indicated in Table Q, the collective response of corporate counsel made clear that regardless of the nature of the dispute (corporate/commercial, employment or consumer), major companies rely overwhelmingly on two major sources for nominees for neutral roles: private ADR provider organizations and their own previous experience (or word-of-mouth). Despite the fact that court-connected mediation and mediation of disputes involving federal or state agencies remain an important component of the landscape for companies,²⁸⁰ relatively few neutrals appear to be appointed by a court or an agency.

TABLE R. COMPARISON OF SOURCES OF NOMINEES FOR THIRD-PARTY NEUTRAL ROLES (1997, 2011)²⁸¹

	1997*		2011		
	Mediators	Arbitrators	Neutrals in Corporate/Commercial Disputes	Neutrals in Employment Disputes	Neutrals in Consumer Disputes
The court	20%	11%	5.2%	6.3%	5.6%
A state or	5%	9%	0.9%	9.7%	1.1%

280. Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, 705 (2008).

281. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 28 chart 10. Numbers for 1997 are approximate, based on bar charts in original published study.

Season 201x]

55

federal agency					
A private ADR provider	30%	48%	46.0%	31.2%	56.2%
Within the corporation	3%	3%	1.2%	0.7%	0.0%
Previous experience (word-of-mouth)	30%	30%	39.3%	39.1%	30.3%
Other	20%	10%	7.3%	4.9%	6.7%

When placed side-by-side with the 1997 responses (Table R), these data reflect a clear drop-off in the role of courts in picking neutrals — notably mediators. Moreover, the activity of agencies in this regard is even more negligible, with the exception of the employment arena (where data probably reflect the impact of mediation programs such as that of the Equal Employment Opportunity Commission²⁸²). There is also greater emphasis on personal experience or word-of-mouth in selecting neutrals for corporate/commercial and employment cases — a development that probably reflects the experience garnered by many companies in the period since the 1997 survey as well as the corporate desire for control, which is a prime motivator for the use of ADR.²⁸³

However great the desire for control of process may be, it is notable that hardly any companies have sought mediators or arbitrators internally — within their own ranks. This is not surprising given concerns about perceptions of bias that tend to accompany such options.²⁸⁴

B. Perceptions of Quality of Neutrals

TABLE S. PERCEPTIONS OF QUALITY OF THIRD-PARTY NEUTRALS (2011)

	Very qualified	Somewhat qualified	Somewhat unqualified	Not qualified at all

282. Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence From the EEOC's Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 31–35 (2008).

283. See *supra* Table D; see also *New Litigation*, *supra* note 21, at 26.

284. See EMERGING SYSTEMS, *supra* note 77, at 335.

Corporate/commercial disputes	37.7%	58.5%	3.5%	0.3%
Employment disputes	29.8%	61.2%	8.1%	0.8%
Consumer disputes	16.7%	72.2%	6.7%	4.4%

Season 201x]

57

TABLE T. COMPARISON OF PERCEPTIONS OF QUALITY OF THIRD-PARTY NEUTRALS (1997, 2011)²⁸⁵

		Very qualified	Somewhat qualified	Somewhat unqualified	Not qualified at all
1997	Mediators	43.1%	55.8%	Not asked	1.0%
	Arbitrators	28.3%	69.9%	Not asked	1.8%
2011	Neutrals in corporate/commercial disputes	37.7%	58.5%	3.5%	0.3%
	Neutrals in employment disputes	29.8%	61.2%	8.1%	0.8%
	Neutrals in consumer disputes	16.7%	72.2%	6.7%	4.4%

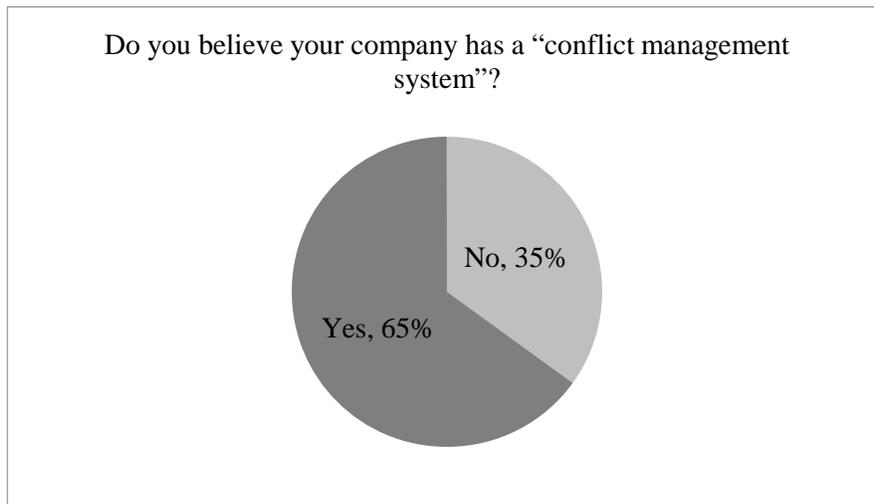
Because the 2011 survey did not ask corporate counsel to offer separate perceptions on the quality of mediators and arbitrators, it is not possible to make a clear comparison between the 1997 data and the present responses. From the 2011 data (Table S), however, it appears that counsel tended to reserve their highest ratings for neutrals in corporate/commercial disputes (with almost thirty-eight percent of respondents perceiving neutrals as “very qualified”). It may be no accident that nearly four in ten corporate counsel controlled the selection of these neutrals, basing their selection on experience, investigation or word-of-mouth. While the same may be said of employment neutrals, courts or agencies selected a much larger percentage of the latter; companies were able to place reliance on private ADR providers (and private selection mechanisms in which they typically had some voice) for a larger percentage of neutrals in corporate/commercial cases.²⁸⁶

285. For the source of the 1997 data, see REPORT ON THE GROWING USE OF ADR, *supra* note 14, 29 tbl.25.

286. It is worth comparing these results to data from the 1994 study of construction disputes which showed a significant direct relationship between party control over mediator selection and the settlement of disputes. See *Beyond Arbitration*, *supra* note 50, at 123.

VII. USE OF INTEGRATED CONFLICT MANAGEMENT IN THE WORKPLACE

FIGURE U. USE OF INTEGRATED CONFLICT MANAGEMENT IN THE WORKPLACE (2011)



The survey explored the usage of integrated conflict management systems in several ways. First, we directly asked respondents whether they believed their company had a “conflict management system.” As indicated in Table U, two-thirds (65%) of respondents indicated that they believed their company did in fact offer such a system. However, this result may be misleading because the question does not define clearly the characteristics of a system. This response is clearly unreliable, given that less than half of those surveyed indicate that their employees were covered by ADR at all.²⁸⁷

We delved more deeply into our assessment of integrated conflict management systems (which can be seen as one proxy for organizational strategy regarding the handling of workplace disputes) by asking a series of follow-up questions to the respondents. First, we considered the extent to which companies indicated that they employed an ombudsman. Fourteen percent of Fortune 1000 firms indicated that their organization employed an ombudsman.²⁸⁸ This percentage is considerably higher than that found

287. Survey respondents were explicitly asked, “What proportion of your employees are covered by either voluntary mediation, non-binding arbitration, binding arbitration and/or other forms of ADR?” Fifty-one percent of respondents indicated that zero percent of their employees were covered by any of these mechanisms.

288. Cornell University Survey Research Institute, *supra* note 24.

Season 201x]

59

during the 1997 survey, where only one in ten respondents answered the question in the affirmative.²⁸⁹ As such, there was a moderate jump in ombudsman presence between 1997 and 2011, even though the absolute number of firms offering that service remained relatively low.

FIGURE V. DOES YOUR COMPANY HAVE AN OFFICE OR FUNCTION DEDICATED TO MANAGING YOUR DISPUTE RESOLUTION PROGRAM? (2011)



The establishment of an office dedicated to managing a dispute resolution program may serve as a direct proxy for the presence of an integrated conflict management system, since such an office is among key criteria for an integrated workplace ADR system.²⁹⁰ In the current survey, thirty-five percent of respondents affirmed that their companies have an office or “function” for managing their ADR program (Table V). This number mirrors the response found when firms were asked if they used an in-house grievance system for non-union employees²⁹¹ and falls more closely in line with our expectations regarding the percentage of companies that offer integrated ADR systems. The results appear to confirm the assertion that no more than about one-third of respondent firms in the

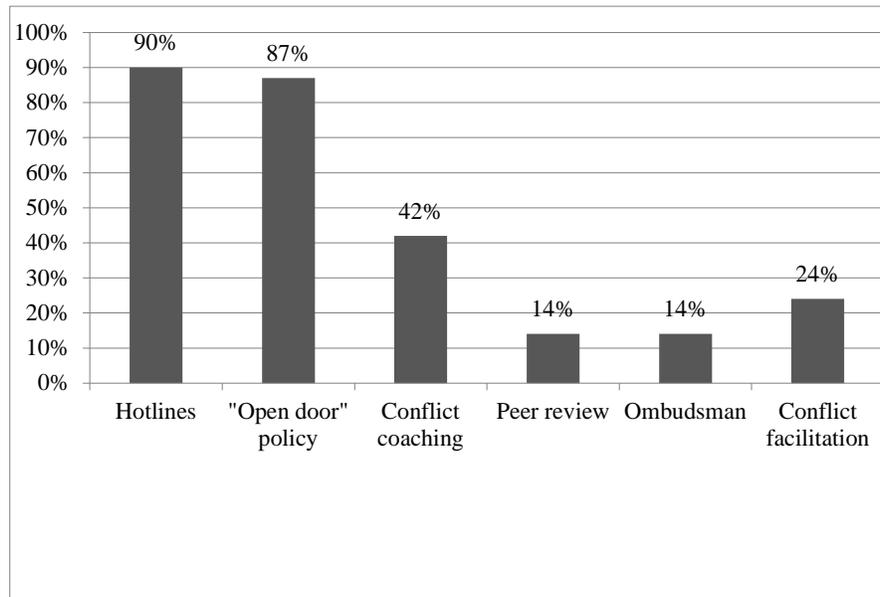
289. See REPORT ON THE GROWING USE OF ADR, *supra* note 14, at 9.

290. See *supra* note 77 and accompanying text.

291. See *supra* Part III.D for a discussion of Chart F and use of in-house grievance systems.

Fortune 1000 actually have integrated conflict management systems for their workforce. This nevertheless represents a substantial advance.

CHART W. CONFLICT MANAGEMENT SYSTEMS: OPTIONS AVAILABLE FOR HANDLING EMPLOYEE COMPLAINTS (2011)



Moreover, many of the respondent corporations revealed a variety of individual practices that are crucial to a conflict management system (Chart W). For instance, nine of every ten firms indicated the presence of hotlines for resolving disputes, and eighty-seven percent had an “open door” policy. However, only forty-two percent of companies offered conflict coaching, twenty-four percent provided conflict facilitation mechanisms, and just fourteen percent offered peer review (though, as noted earlier in the paper, this represents an increase over the ten percent of respondents indicating that they used peer review in 1997). The results suggest that many companies employ various foundational elements of what might be required to build fully integrated conflict management systems, though considerably fewer have actually established these systems for their workers.

VIII. LOOKING AHEAD: IMPLICATIONS OF THE SURVEY FOR FUTURE
CORPORATE CONFLICT MANAGEMENT, MEDIATION, AND ARBITRATION
PRACTICE AND RESEARCH

A. *Considerations for Counselors and Advocates*

1. *Early Assessment, Intervention, Conflict Management*

Our survey reinforces the conclusion that the most common reason for companies to use ADR instead of litigation is to save time and money.²⁹² Other reasons why companies use ADR include party control of the dispute resolution process and result,²⁹³ the maintenance of privacy or confidentiality,²⁹⁴ the preservation of relationships,²⁹⁵ and the desire for expertise in third-party intervention.²⁹⁶ An organization's priorities may vary greatly depending on the circumstances.²⁹⁷

In furtherance of the foregoing ends, many companies today appear to be employing strategies aimed at deliberate, proactive, and systematic assessment of conflicts in the early stages — perhaps even the first sixty days — in order to lay the groundwork for business decisions about their forward management.²⁹⁸ Many others are utilizing targeted expert evaluations to promote early settlement or more efficient case management.²⁹⁹ Such efforts may be furthered by a new initiative unveiled by the International Institute for Conflict Prevention & Resolution aimed at “moving away from case-by-case resolution towards a sustainable system-based process for greater efficiency and improved quality.”³⁰⁰ The mechanism for this effort is a latter-day counterpart of the old CPR Pledge.³⁰¹

In the workplace, there has been considerable growth in the number of companies employing a variety of tools to manage employee relations and address disputes. A substantial number — perhaps more than a third — appear to have developed integrated systems, including offices of dispute

292. See *supra* Table D; see also *Beyond Arbitration*, *supra* note 50, at 176–78.

293. See *supra* Table D; see also *New Litigation*, *supra* note 21, at 26.

294. See *supra* Table D; see also *New Litigation*, *supra* note 21, at 26–28.

295. See *supra* Table D; see also *New Litigation*, *supra* note 21, at 26–28.

296. See *supra* Table D.

297. See *supra* Part III.C for reasons companies use ADR.

298. See *supra* text accompanying notes 133, 245–247, 258.

299. See *supra* Part III.D.

300. Media Alert, Int'l Institute for Conflict Prevention and Resolution, CPR Launches 21st Century Corporate ADR Pledge at Annual Meeting (Jan. 22, 2013), <http://www.cpradr.org/Portals/0/Resources/Press%20Releases/CPR%2021st%20Century%20Pledge%20PRESS%201-22%20FINAL.pdf>

301. See *supra* note 58 and accompanying text (discussing the CPR Pledge).

resolution for conflict management; a range of options for handling complaints; and a variety of access points for entrance into the system.³⁰²

2. *Mediation*

At some stage in the dispute resolution process, corporations often employ mediation. Increasingly, this occurs pursuant to a provision in a contract³⁰³; in any event, the disputing parties are today more likely to have a say in the selection of mediators.³⁰⁴ Mediation affords parties — and their attorneys — a high degree of control over process and result, and this control is exerted to guide mediation along relatively narrow channels. Recent evidence suggests that, in lawyered cases, one “mode” of mediation, in which there is some kind of evaluation by a mediator with background as a legal advocate or judge, predominates.³⁰⁵ Mediation along these lines is firmly ensconced as the form *du jour* of third-party intervention aimed at settlement and will continue to remain so in the immediate future. In the longer term, one wonders how mediation practice will be affected by its own “success,” and the changes that may eventually be wrought by a generation of counsel armed with ever-greater experience in “legal” mediation as an element of the litigation process.³⁰⁶ A very different kind of challenge is presented by the slashing of court budgets, which (along with raising other issues of access to justice) is resulting in the shutdown of some longstanding court-connected mediation programs that were a primary force in the Quiet Revolution in dispute resolution.³⁰⁷

3. *Arbitration*

a. *Commercial arbitration*

The triumph of mediation has been instrumental in bringing binding arbitration to a tipping point — a tangible ebbing of the tide that swept in during the latter half of the nineteenth century.³⁰⁸ Just as mediation was a

302. See *supra* Table V; see also *supra* text accompanying notes 77–78 (noting development of integrated workplace conflict management during the Quiet Revolution).

303. See *supra* text accompanying note 100.

304. See *supra* Part V.A, Table R.

305. See *supra* text accompanying notes 72–74, 125–126 (discussing the 1994 and 1997 survey results portending future trends toward “‘lawyer driven’ or ‘legal’ mediation” and recent commentary).

306. See *id.*

307. See Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 879 (2012).

308. See *supra* Part I.A.1 (discussing the use of and concerns regarding arbitration in the second half of the twentieth century).

Season 201x]

63

key factor in the so-called “vanishing trial,”³⁰⁹ it now factors in the reduced incidence of arbitration.

Nevertheless, binding arbitration is and always will be a critical and essential feature of the landscape of commercial dispute resolution, and not just for international disputes. In an era in which there is broad recognition that the prevailing one-size-fits-all template for litigation is too top-heavy and burdensome,³¹⁰ and the challenges of obtaining civil justice are threatened by the closing of courthouses and reductions in court staff,³¹¹ arbitration as a *choice-based* adjudicative alternative seems a made-to-order option.³¹²

Why, then, do fully half of the survey respondents think it unlikely that their company will use arbitration in the future? Several factors seem to be at play, undoubtedly greatly affected by personal and corporate experience. Ultimately, however, it often comes down to perceptions of *control*. When informed of the reduced usage of arbitration reflected in the Fortune 1000 survey, one corporate general counsel expressed no surprise, explaining that he never uses arbitration because, as he put it, “*I want to control my [company’s] destiny.*”³¹³ This point of view appears to equate control with the perceived features of litigation that work in favor of a “right” result, including a decision maker charged with adhering to legal standards and a right of appeal. Hence, leading concerns about binding arbitration revolve around the lack of judicial review on the merits, the qualifications of arbitrators, and the belief that arbitrators tend to compromise and ignore legal norms.³¹⁴ Given the fact that so many corporate counsel harbor these

309. See *Vanishing Trial*, *supra* note 1 (discussing evolution of mediation as a form of court-connected ADR and as a choice-based alternative).

310. PROTOCOLS, *supra* note 136, at 2.

311. See, e.g., Imran Ghori, *San Bernardino County: Supervisors Discuss Court Closures*, PRESS ENTERPRISE (Jan. 31, 2013, 6:18 PM), <http://www.pe.com/local-news/politics/imran-ghori-headlines/20130131-san-bernardino-county-supervisors-discuss-court-closures.ece>.

312. See generally Thomas Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* (Symposium Keynote Presentation), 7 DEPAUL BUS. & COM. L.J. 383 (2009) [hereinafter *Arbitration and Choice*]. Potential benefits of arbitration include efficient, user friendly case administration, choice of expert decision-makers, finality of the decision; flexibility of the adjudicative process, accessibility of the decision-makers, fair and sensible results, lower cost, cycle time. See generally Hon. Curtis E. von Kann, *A Report Card On the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek*, 7 DEPAUL BUS. & COM. L.J. 499 (2009) (discussing benefits of arbitration). The future of employment and consumer arbitration, in which party choice is often a more problematic notion, is complicated by special concerns. See *Trilogy*, *supra* note 20, at 396–404. These topics are reserved for separate discussion below.

313. Cornell University Survey Research Institute, *supra* note 24.

314. See *supra* notes 39–46, 127 and accompanying text; see also Drahozal & Ware, *supra* note 148, at 436.

concerns, it is not surprising that even if a company is desirous of employing arbitration, the other party may object to its use.

There is another set of perspectives that view choice-based arbitration as offering greater control and assurance of a “right” result. These include several factors identified in one recent study as supporting the use of arbitration, including the avoidance of “excessive or emotionally driven jury awards,” the ability to choose arbitrators with particular qualifications, and the relative capability of arbitrators to cope with complex contractual issues.³¹⁵

There are, moreover, choices available that help parties remedy the leading concerns about arbitration. For example, concerns about arbitrators’ conformance to legal norms may be addressed by selecting experienced lawyers or former judges as arbitrators (now the prevailing norm in commercial arbitration), through competent legal advocacy, including oral argument and briefing, and by imposing contractual standards for award-making in accordance with applicable law. Despite statutory limitations on judicial scrutiny of the merits of arbitration awards, some organizations publish appellate arbitration rules offering different models for review of arbitration awards.³¹⁶ Concerns about arbitrator compromise may be allayed by better information about award-making,³¹⁷ more specific guidance for arbitrators regarding award-making, and relying on single arbitrators in lieu of multi-member panels that might be tempted, for example, to rely on compromise to fix damages.³¹⁸

The ability to make process choices in arbitration offers other potential benefits. These include, notably, the opportunity to cloak proceedings with a degree of privacy and to protect the confidentiality of proprietary information.³¹⁹

315. SHONTZ EL AL., *supra* note 137, at 15–20.

316. See *CPR Arbitration Appeal Procedure and Commentary*, INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION (2007), <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/604/CPR-Arbitration-Appeal-Procedure-and-Commentary.aspx>; *JAMS Optional Arbitration Appeal Procedure*, JAMS (2003), <http://www.jamsadr.com/rules-optional-appeal-procedure/>. There is also the possibility of broadened appeal under the arbitration laws of some states. Johanna G. O’Loughlin, Linda S. Stein, & Thomas J. Stipanowich, *Alternative Dispute Resolution*, 2009 A.B.A. SEC. PUB. UTIL. COMM. & TRANSP. ANN. REP. 5, 7 (2009). However, such alternatives entail potential dramatic increases in process, cost and cycle time and should be approached with caution. *Arbitration and Choice*, *supra* note 312, at 428–30.

317. See Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 412 (1996).

318. Cf. Randall G. Holcombe, *An Empirical Test of the Median Voter Model*, 18 ECON. INQUIRY 260 (1980) (discussing how the middle or median voter may control in a majoritarian system).

319. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 130, at 249–63.

Season 201x]

65

Then there is the matter of time and cost. The longstanding perception of arbitration was of processes entailing lower cost and shorter cycle time than litigation.³²⁰ In the 1997 Fortune 1000 survey, savings of time and cost were the leading reasons (other than “the contract required arbitration”) why companies chose arbitration.³²¹ By the time of the RAND study, however, while most responding counsel still associated cost savings and speed with arbitration, these goals were apparently not high on the list of reasons to use arbitration; rather, costs and delays were a growing concern.³²² Moreover, although the present survey did not permit isolation of reasons why companies elected arbitration, data on present perceptions of barriers to arbitration use are telling: comparing the current survey data to the 1997 results, while in nearly every case a smaller percentage of respondents viewed specific concerns (such as lack of appeal, arbitrator compromise, etc.) as barriers to the use of arbitration, a *higher* percentage of 2011 respondents viewed the relative costs of arbitration as a barrier to its use.³²³

Again, choice comes into play. By the time parties are at the adjudication stage, judging by the recent data, their focus may be very different than at earlier stages. For some, economy and cycle time may be less important than confidence in the process and the result.³²⁴ However, there is evidence that such concerns remain important for many companies, and corporate counsel often closely monitor the “burn rate” on expenditures for adjudication.³²⁵ In a recent article, two corporate counsel explained that companies tend to seek, above all, “fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections.”³²⁶ They bemoaned the loss of speed and cost in the quest for more perfect procedural “due process.”³²⁷ Moreover, recent reductions in U.S. court budgets may dramatically extend the time to public trial and enhance the relative attractiveness of a much more expeditious arbitration proceeding. To the extent that expeditious, cost-effective procedures are (or will again become) a priority for companies, there are now appropriate process choices; significant strides have been made in

320. See *New Litigation*, *supra* note 21, at 4–5.

321. See *supra* Part III.C, Table D.

322. See SHONTZEL AL., *supra* note 137 at 8–10, 15; note 137 and accompanying text.

323. See *supra* text accompanying notes 146–147 (discussing RAND Report and earlier Fortune 1000 survey).

324. *Arbitration and Choice*, *supra* note 312, at 387.

325. The authors thank David Cruikshank for these observations.

326. Michael McIlwrath & Roland Schroeder, *The View From an International Arbitration Customer: In Dire Need of Early Resolution*, 74 ARB: INT’L J. ARB., MEDIATION, & DISP. MGMT. 3, 4 (2008).

327. *Id.*

recent years to enhance and promote key options, presenting opportunities before and during the arbitration process.³²⁸

There are a number of practical barriers to making deliberate choices about arbitration and dispute resolution, but they are not insurmountable.³²⁹ Only by acting reflectively and proactively can corporate counsel and their clients reap the full benefits of binding arbitration and other approaches.

b. Employment and consumer arbitration

Although the issues surrounding the use of binding arbitration in employment and consumer contracts are too varied and complex to treat in this paper,³³⁰ a brief final reflection on our data is appropriate in light of the considerable attention now directed toward these topics. First of all, it is clear that large companies are far from unified in their attitudes and practices. It appears that a majority are unlikely to use arbitration for employment or for consumer disputes in the future, and most rarely arbitrate such cases today.³³¹ In the employment arena, there is more likely to be resistance to its use from senior management,³³² and multi-faceted conflict management systems may increasingly obviate the need for adjudication of any kind.³³³ In the consumer arena, many companies appear to be particularly concerned about consumer opposition to arbitration.³³⁴

It must be remembered, however, that consumer and products liability cases appear to be exceptions to the general fall-off in the use of arbitration.³³⁵ Furthermore, a large minority of respondents indicated that their companies would be likely to arbitrate consumer or employment disputes in the future.³³⁶ In light of recent Supreme Court decisions, some companies may be encouraged to believe that arbitration provisions will now offer corporations significant leverage as a barrier to class actions.³³⁷ Much hinges on future legislative initiatives or regulatory action on the part of the Consumer Financial Protection Bureau or other agencies.³³⁸

328. See, e.g., PROTOCOLS, *supra* note 136, at 44–45; Christine L. Newhall, *The AAA's War on Time and Cost: The Campaign to Restore Arbitration's Benefits*, 67 DISP. RESOL. J., Aug.–Oct. 2012, at 20.

329. *Arbitration and Choice*, *supra* note 312, at 388–93.

330. See *supra* Part II.A.2.

331. See *supra* Tables J, K, & M.

332. See *supra* Table P.

333. See *supra* text accompanying Part VI (discussing integrated conflict management).

334. See *supra* Table P.

335. See *supra* Chart G.

336. See *supra* Table O.

337. See *Trilogy*, *supra* note 20, at 380–96.

338. See *id.* at 396–406.

Season 201x]

67

B. Considerations for Researchers

The present survey raises an assortment of considerations for future research, including subjects to be developed and studied.

As a preliminary matter, it is time to acknowledge the shortcomings of the term “ADR,” a catch-all concept comprising the entire range of diverse alternatives to court trial. While it may be useful as a term of convenience in discussions of conflict management, its utility in research into the dynamics of public and private dispute resolution is inversely related to the very breadth and variety of the approaches it embraces. Wherever possible, queries about attitudes toward “ADR” should give way to more specifically tailored questions.

Broad-based surveys like the present one and its 1997 precursor are useful in helping to identify broad trends and alert us to key “tipping points” such as the recent reduced emphasis on arbitration. They are, however, not designed to provide meaningful insights into the dynamics of individual dispute resolution processes or of conflict management systems; instead, they offer a springboard for research on these issues. The latter include (1) the priorities and expectations of business clients and other parties regarding dispute resolution and conflict management; (2) the performance and effectiveness of multi-step dispute resolution approaches, or of conflict management systems; (3) the dynamics of mediation processes, including mediator styles and strategies and the interplay between mediators and advocates; (4) arbitrator styles and strategies in pre-hearing and hearing management, deliberating and rendering awards; and (5) the impact of neutral experience, education and professional background.

IX. CONCLUSION

The 2011 Fortune 1000 survey reveals an important evolution in corporate sector practices three decades into the Quiet Revolution in dispute resolution. A dwindling few major corporations continue to embrace hardball litigation as a broad policy, while many more are increasing their emphasis on alternatives. Nearly all companies have recent experience with mediation, which is now employed more extensively across the broad swath of civil conflict and the great majority of companies foresee its use in the future. Mediation’s success has contributed to the marked fall-off in the use of binding arbitration, which calls to mind mediation’s earlier role in the reduced incidence of trial. Today, there are also many companies using approaches focused on more strategic management of conflict, in a manner more reflective of business priorities. These include targeted ENEs that promote settlement or more effective

case management, ECA, and integrated systems for managing workplace conflict. Such approaches represent a significant step beyond reactive and reflexive advocacy.

On the other hand, there is reason to believe that many companies continue to employ ad hoc approaches in some or all kinds of conflict, and devote little time to deliberating on the choices they make — often by default — with regard to dispute resolution, both at the time of contracting and after disputes arise. Moreover, much evidence suggests that business mediation is dominated by a single “legal” model with a relatively narrow, litigation-oriented focus. There are also indications that many corporate counsel worry that arbitration is not enough like litigation to be a suitable substitute, while at the same time there are growing concerns that it has become too much like litigation. The evenly divided opinions of corporate counsel regarding the future use of arbitration appear to reflect an underlying divide in perceptions about how to get what they want out of adjudication. Diverging perspectives are also evident in the realms of employment and consumer disputes, portending varied practices in these critical areas in the coming years.

The present survey, like its predecessor, presents a useful backdrop for more focused inquiries aimed at discrete conflict settings. Insights from research may underpin the further evolution of effective approaches to the management of conflict.