New Horizons in Workplace

Dispute Resolution:

ADR and the Development of Conflict

Management Systems in U.S. Corporations

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NEW HORIZONS IN WORKPLACE DISPUTE RESOLUTION ADR AND THE DEVELOPMENT OF CONFLICT MANAGEMENT SYSTEMS IN U.S. CORPORATIONS

INTRODUCTION

For nearly three decades, a quiet revolution has been occurring in the U.S. system of justice: a dramatic growth in the use of alternative dispute resolution (ADR) to resolve disputes that might otherwise have to be handled through litigation. ADR techniques (arbitration, mediation, and so forth) probably have their roots in antiquity. According to Riskin and Westbrook, "Arbitration has an ancient lineage and an active present. King Solomon, Phillip II of Macedon and George Washington employed arbitration. Commercial arbitration has been used in England and the United States for hundreds of years."[1]

Although ADR has had a long history, the contemporary growth in its use developed as a consequence of increasing dissatisfaction with the U.S. judicial system in the 1960s and 1970s. Complaints about the excessive costs and delays associated with litigation are not new, of course. Charles Dickens included a vivid depiction of the never-ending civil suit Jarndyce v. Jarndyce in Bleak House. A seminal event in the more recent development of ADR, though, was the Pound Conference on "The Causes of Popular Dissatisfaction with the Administration of Justice" held in April 1976. At that conference, attended by more than 200 judges, scholars, and leaders of the bar, Chief Justice Warren Burger called for the development of informal dispute resolution processes.[2]

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[1] Leonard L. Riskin & James E. Westbrook, DISPUTE RESOLUTION AND LAWYERS 215 (1987).
[2] Warren Burger, *Agenda for 2000 A.D.,* Presentation at the POUND CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE (April 1976). *See also Symposium on the Impact of Mediation: 25 Years after the Pound Conference*, 1 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 142 (1998).

Many observers believe that the so-called "litigation explosion," which they believe started in the 1960s and may be continuing even today, was widely perceived as a principal cause of the rise of ADR. Over a thirty-year period, from 1963 to 1993, Congress passed at least two dozen major statutes regulating employment conditions, including the Civil Rights Act of 1964, the Occupational Safety and Health Act in 1970, the Employee Retirement Income Security Act in 1974, the Americans with Disabilities Act in 1990, the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993. These statutes gave rise to new areas of litigation, ranging from sexual harassment and accommodation of the disabled to age discrimination and wrongful termination. More and more dimensions of the employment relationship were brought under the scrutiny of the court system and of a multitude of regulatory agencies.[3]

Over time, litigants (especially employers) expressed increasing frustration with the legal system because of the long delays in resolving disputes, the expenses associated with the delays, and the often unsatisfactory outcomes. Increasingly they turned to ADR as a means of avoiding these costs and delays. As critical actors in this changing milieu, corporations have recently been promoting the use of ADR in a wide range of conflicts with businesses, clients, customers, and their own employees. The time and cost associated with traditional litigation in each of these areas have been important factors pushing corporations toward the growing use of ADR processes.[4]

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[3] U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS: THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 25-33 (1994); John T. Dunlop & Arnold M. Zack, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES (1997).

[4] U.S. DEP'T OF LABOR, *supra* note 1 and Dunlop & Zack, *supra* note 1. *See also* David W. Hartwell & Michael E. Weinzierl, *Alternatives to Business Lawsuits*, BUSINESS AND ECONOMIC REVIEW 40 (October-December 1995); U.S. GENERAL ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION (1995); U.S. GENERAL ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WTH ADR IN THE WORKPLACE (1997); Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment:*

For the past seven years the authors of this paper have been conducting research on the use of ADR (particularly in employment disputes) by major U.S. corporations.[5] In our research we discovered that an increasing number of American corporations are moving beyond ADR to the adoption of so-called "integrated conflict management systems."[6] Although considerable research on the operation of various ADR procedures exists, very little has been done on the formation of conflict management strategies, including the use of conflict management systems.[7] In this paper we examine a) reasons for the rise of ADR in the United States, b) patterns of ADR usage by American corporations, c) the concept of an integrated conflict management system, d) the conflict management strategies used by American corporations, and finally e) the factors that account for the evolution of corporate conflict management strategies from traditional approaches (including heavy dependence on litigation) to the widespread adoption of various ADR techniques and finally on to the adoption by a vanguard of U.S. organizations of full-blown

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The Need for Research, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 95 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999).

[5] *See for example,* David B. Lipsky & Ronald L. Seeber, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS (1998a); David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR,* 1 U. PENN. J. LABOR & EMP. LAW 133 (1998b); David B. Lipsky & Ronald L. Seeber, *Resolving Workplace Disputes in the United States: The Growth of Alternative Dispute Resolution in Employment Relations,* 2 J. ALT. DISP. RES. EMP. 37 (2000).

[6] Lipsky & Seeber (1998a), *supra* note 5. The term "integrated conflict management system" is defined in a report prepared for the Society for Professionals in Dispute Resolution (SPIDR) by an ad hoc committee and published by the Institute on Conflict Resolution at Cornell. *See* Ann Gosline, et al., DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS: GUIDELINES FOR PRACTITIONERS AND DECISION MAKERS IN ORGANIZATIONS (2001). Ann Gosline was the chair and the senior author of this article was a member of the SPIDR committee. It should be noted that in 2001 SPIDR, the Academy of Family Mediators, and CRENet (Conflict Resolution Education Network) merged to become the Association for Conflict Resolution (ACR). Subsequently, we will refer to the report as the "ACR report."

[7] Previous works on conflict management systems include William L. Ury, Jeanne M. Brett, & Stephen B. Goldberg, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT (1993); Cathy A. Costantino & Christina Sickles Merchant, DESIGNING CONFLICT MANAGEMENT SYSTEMS (1996); Karl A. Slaikeu & Ralph H. Hasson, CONTROLLING THE COSTS OF CONFLICT (1996); Allan J. Stitt, ALTERNATIVE DISPUTE RESOLUTION FOR ORGANIZATIONS: HOW TO DESIGN A SYSTEM FOR EFFECTIVE CONFLICT RESOLUTION (1998); and Alexander James Colvin, Citizens and Citadels: Dispute Resolution and the Governance of Employment Relations (1999) (unpublished Ph.D. dissertation, Cornell University) (on file at the Martin P. Catherwood Library, School of Industrial and Labor Relations, Cornell University).

conflict management systems. In our discussion we draw heavily on interviews we conducted with top managers and corporate lawyers in more than fifty corporations across the U.S.

I. METHODOLOGY AND DATA

A. A SURVEY OF THE FORTUNE 1000

This article is based on data the authors have gathered from two separate but related research efforts. First, in the spring of 1997, we surveyed the general counsel or chief litigators of the Fortune 1000 on topics related to ADR.[8] We were interested in whether the trend toward ADR and away from the courts was as widespread as we thought by ad hoc observation. This survey and two others remain the only source of empirical data on ADR usage by U.S. corporations.[9] The objective of the survey was to obtain comprehensive information about each corporation's use of ADR from the person in the organization responsible for, or most knowledgeable about, the processes. Interviews were completed with 606 respondents. Given that surveys of high-level corporate populations usually generate response rates of less than 20 percent, this is a very high rate.[10]

Although several years have passed since we conducted that survey, it remains the only comprehensive survey of the use of ADR in the U. S. corporate world. We are quite confident that the evidence revealed in our data on the patterns of ADR usage, levels of satisfaction, and emerging ADR trends continues to have validity. Our faith in the validity of our survey results is buttressed by several years of conducting field studies in some of the corporations we surveyed.

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[8] Lipsky & Seeber (1998a), *supra* note 5.
[9] DeLoitte Touche Tohmatsu International, DELOITTE & TOUCHE LITIGATION SERVICES 1993 SURVEY OF GENERAL AND OUTSIDE COUNSELS: ALTERNATIVE DISPUTE RESOLUTION (ADR) (1993); AMERICAN ARBITRATION ASSOCIATION, DISPUTE-WISE MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS (2003); *see also*, U.S. GENERAL ACCOUNTING OFFICE (1995), *supra* note 4.
[10] Lipsky & Seeber (1998a), *supra* note 5.

In fact, based on subsequent research and evidence, we believe that corporate use of ADR has increased since we conducted the 1997 survey.[11]

B. CASE STUDIES IN U.S. CORPORATIONS

The empirical results from that survey were the springboard that led to the next phase of our research. Although we did not directly ask the question, several respondents volunteered the information that their corporations had adopted comprehensive dispute resolution systems. The survey results underscored our realization that a number of corporations had moved beyond the use of ADR techniques and toward a more proactive, strategic approach to conflict management. This realization motivated us to undertake case studies of workplace dispute resolution and conflict management systems in a large sample of organizations. Over the course of 1999 to 2002, we visited and conducted interviews at more than fifty corporations across the U.S. The organizations we studied cover a broad spectrum of industries and represent a cross-section of approaches and philosophies to ADR and conflict management.[12]

We should also note that these firms do not represent a random sample of the Fortune 1000, and they are not all drawn from that group. The sample consists not only of large private sector corporations but also of several public sector and nonprofit organizations. All of the organizations we have studied, however, are large by almost any standard, and accordingly their experience with conflict management systems does not necessarily represent the experience of medium-size and small employers. For each of the firms we visited, we tried to schedule interviews with corporate CEOs, CFOs, general counsel, human resource executives, and managers at corporate headquarters or one or more of their sites. In only a couple of cases did

[11] David B. Lipsky, Ronald L. Seeber, & Richard D. Fincher, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003).
[12] *Id*. at 22-25.

we succeed in interviewing the CEO of the firm; usually we were able to interview a handful of top human resource executives and in-house attorneys. We also compiled dossiers on each company we studied, consisting of annual reports, financial statements, press releases, and the like. In the end, we built a detailed understanding of the experience with ADR and conflict management systems of well over fifty large organizations.

II. THE PROS AND CONS OF ADR

From its inception, ADR has been controversial. On the one hand, it has been embraced by a coterie of champions who have always believed that its advantages over litigation were so obvious and compelling it would only be a matter of time before it was adopted universally. These champions have also been missionaries, proselytizing their faith in all quarters and making numerous converts. Like all true believers, ADR champions cannot understand why others have not yet "got the faith."[13] On the other hand, there has always been a group of ADR opponents who believe ADR undercuts our system of justice and must be resisted.[14] ADR champions believe in the inevitability of ADR, while ADR opponents believe the movement to ADR can be stopped and even reversed.

A. THE ADVANTAGES OF ADR

Compared to litigation, the use of ADR has the great advantage of providing a faster, cheaper, and more efficient means of resolving disputes. The parties in a conventional court proceeding often invest considerable funds and energy from the time of the initial filings in court, through interrogatories, depositions, and preparation for the trial itself and then, 90 percent

[13] Lipsky, Seeber, & Fincher, *supra* note 5, particularly at 135-137 (describing the role of the "champion" in developing conflict management systems). *See also*, Dave Ulrich, HUMAN RESOURCE CHAMPIONS: THE NEXT AGENDA FOR ADDING VALUE AND DELIVERING RESULTS (1997).

[14] *See for example,* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s,* 73 DENVER U. L.REV. 1017 (1996); Jean R. Sternlight, *Mandatory Binding*

of the time, negotiate a settlement on the courthouse steps or in the judge's chambers.[15] So the costs of litigation include not only the awards or settlements themselves but also the so-called "transaction costs" of inside and outside legal counsel, expert witnesses, gathering documents and engaging in discovery, and so forth. In the United States the transaction costs of litigation are often two or three times greater than the settlements themselves. Moreover, this calculation does not include the value of the time saved as a consequence of resolving disputes quickly—reducing these "opportunity costs" may be the largest benefit of using ADR.[16]

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

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Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial, 16 OHIO ST. J. DISP. RES. 669 (2001).

[15] M. Galanter & M. Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlement* 46 STANFORD L. REV. 1339 (1993-94).

[16] Lipsky & Seeber (1998a), *supra* note 5, particularly at 15-19.

likely to be a problem when the disputants have controlled the process that produced that outcome.[17]

B. THE DISADVANTAGES OF ADR

Although there are many advantages in using ADR, some observers contend that it poses a substantial threat to the system of justice in the United States. In effect, ADR transfers the dispute resolution function from public forums (the courts or regulatory agencies, for example) to private ones. Typically, ADR proceedings are private and confidential. In contrast to court decisions, for example, arbitration decisions are seldom published because they are considered the property of the disputants. Proponents of ADR view the private and confidential nature of various ADR procedures as advantageous, but opponents worry that critical employment matters, often involving statutory claims and matters of public rights, are being resolved behind closed doors, beyond the scrutiny of public authority.[18]

Critics also dislike arbitration because arbitrators' decisions are difficult to appeal. Courts will defer to an arbitrator's award as long as the arbitrator holds a full and fair hearing, is impartial and unbiased, and issues a decision that is consistent with relevant statutes. If these conditions are met, arbitrators' decisions are truly final and binding. Although many employers believe the finality of arbitration is one of its advantages, over half of the respondents in our Fortune 1000 survey criticized arbitration because of the difficulty of appealing arbitrators' decisions.[19]

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[17] There are numerous sources on the advantages of ADR. *See for example,* Lucille M. Ponte & Thomas D. Cavenagh, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS (1998), at 31-34; E. Wendy Trachte-Huber & Stephen K. Huber, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS (1996), particularly at 6-29; Laura J. Cooper, Dennis R. Nolan, & Richard A. Bales, ADR IN THE WORKPLACE (2000), particularly at 621-639.

[18] The disadvantages are also described in the sources in note 16. *See also,* Stone, *supra* note 14 and Sternlight, *supra* note 14

[19] Lipsky and Seeber (1998a), *supra* note 5 at 24-29.

Critics are also concerned about the difficulty of achieving a level playing field when ADR techniques are used. In fact, an increasing number of employers are requiring their employees, *as a condition of continued employment,* to waive their right to sue and to accept arbitration as a substitute means of resolving future disputes. In a nutshell, ADR opponents maintain that there is an imbalance of power between employers and most employees, so employees have little choice but to accept a mandatory arbitration provision even if they would prefer not to. Stone has called mandatory pre-dispute arbitration the "yellow dog contract" of contemporary employment relations.[20]

Another concern revolves around the question of representation in ADR proceedings. In arbitration and mediation cases, employees are not necessarily represented by attorneys or advocates of their own choosing. Employers, on the other hand, are almost always represented by experienced attorneys and skilled professionals. Many employees cannot afford to hire attorneys, while most employers can. Even if an employee can retain an attorney, critics purport, the quality of their representation is likely to be inferior to the quality of the representation on the employer's side of the table. Furthermore, critics say, employers have more experience and skill in selecting their legal counsel than do employees.[21]

One line of research on employment arbitration has focused on the so-called repeat player effect. Bingham analyzed a large sample of employment arbitration awards and discovered that employers who made repeated use of arbitration won the great majority of their cases, while employers who used arbitration only once lost most of their cases. Her research raises the possibility that repeat players—normally employers—have advantages in ADR because of their experience and expertise that one-shot players—normally employees—lack. Bingham's research

[20] Stone, *supra* note 14. *See also,* U.S. DEP'T OF LABOR, *supra* note 3 and Dunlop & Zack, *supra* note 3.
[21] *See supra* note 16.

has been highly controversial, but if she is right, the repeat-player phenomenon makes it all the more difficult to achieve a level playing field in employment ADR.[22] According to ADR critics, the increasing privatization of the U.S. system of justice poses serious challenges for the guarantees of due process and equality under the law.[23]

III. EXPERIENCE WITH FORMS OF ADR

We asked respondents in our Fortune 1000 survey about eight forms of ADR we suspected were in wide use. Five of the forms involved the use of a process or procedure *external* to the organization (mediation, arbitration, mediation-arbitration (med-arb), mini-trials, and fact finding). Three of the forms involved the use of an *in-house* (or *internal*) process (in-house nonunion grievance procedure, peer review, and ombudsperson). It might be noted that, in contrast to grievance procedures in collective bargaining relationships, the majority of the nonunion grievance procedures in these corporations did not culminate in arbitration. Rather, management reserved the right to make the final decision.[24]

Figure 1 reports respondents' use of the eight forms of ADR we asked about in the three years preceding our survey. Nearly all our respondents reported some experience with ADR, with an overwhelming 87 percent having used mediation and 80 percent having used arbitration at least once in the three previous years. More than 20 percent said they had used med-arb, mini-trials, factfinding, or employee in-house grievance procedures in the three prior years. Finally, respondents from about sixty corporations (10 percent) had had experience with ombudspersons and peer reviews.

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[22] Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics and Judicial Review of Arbitration Awards*, 29 MCGEORGE L. REV. (1998) 222-260. *See also*, Bingham & Chachere, *supra* at note 4.

[23] Lipsky, Seeber, & Fincher, *supra* note 11, particularly 331-339.

[24] Definitions of these ADR techniques appear in various sources. *See for example*, Trachte-Huber & Huber, *supra* note 16, particularly 10-15 and Ponte & Cavenagh, *supra* note 16, particularly 29-31.

Figure 1 about here

Thus the breadth of penetration of ADR into U.S. business was substantial, even surprisingly so. When asked their favorite form of ADR process, respondents overwhelmingly reported mediation (63 percent), with arbitration a distant second at 18 percent. Other forms of ADR appeared to remain significant choices in the corporation's tool kit although they had clearly not replaced tried-and-true tactics.

We also sought to learn about the depth of the penetration of ADR into the dispute resolution procedures of individual firms. Our survey asked respondents about the frequency of their use of mediation and arbitration in the prior three years (see Table 1). Only 19 percent of those who had used mediation reported using it frequently or very frequently, almost 30 percent said they used it rarely, and the largest group (43 percent) reported that they used it occasionally. The pattern is similar for arbitration: 21 percent reported frequent or very frequent use, 33 percent rare use, and 42 percent occasional use. These numbers are significantly smaller than the responses to the question simply about use, indicating that a much smaller group of firms had what could be called extensive ADR experience. Thus, the reality of corporate ADR experience was one of significant breadth but little depth.[25]

Table 1 about here

Table 1 shows the frequency of ADR use in so-called "rights disputes." We were also interested in the frequency of ADR use in so-called "interest disputes." These two terms, which

[25] For a more extended discussion, *see* Lipsky, Seeber, & Fincher, *supra* note 11, particularly 80-105.

are commonly applied in such fields as employment, have different meanings in different arenas. We define a rights dispute as a dispute that arises out of the administration, application, and interpretation of an existing statute, contract, or agreement. We define an interest dispute as a dispute that arises out of an effort by parties in a relationship to form, negotiate, or revise a contract or agreement. In practical terms, interest disputes arise between parties trying to forge a relationship, whereas rights disputes arise between parties already in a relationship.[26]

We found significantly different patterns in the forms of ADR used for rights disputes and interest disputes. To make it easy to compare results, Table 2 compares the use of mediation and arbitration in rights disputes (repeating data in Table 1) with the use of these techniques in interest disputes. Table 2 shows that almost 92 percent of the respondents had used mediation in rights disputes, but more than 60 percent had never used it for interest disputes. The table indicates a similar pattern for arbitration, with over 95 percent of the respondents reporting some use of arbitration in rights disputes, but nearly 64 percent having never used it in interest disputes.

Table 2 about here

In sum, nearly all U.S. corporations have had some experience with the basic ADR processes of arbitration and mediation. A much smaller number of companies have had extensive experience with ADR, and our research reveals that some have tried to use it as a general mechanism for dispute resolution. We found that there is a great deal of variance in the choice of conflict management strategy by U.S. corporations, ranging from traditional reliance

[26] Theodore W. Kheel, THE KEYS TO CONFLICT RESOLUTION: PROVEN METHODS OF RESOLVING DISPUTES VOLUNTARILY (1999), 83-84.

on litigation to experimentation with various ADR techniques to the adoption of a conflict management system. In the next section of the paper we discuss the emergence of workplace conflict management systems and describe three conflict management systems that U.S. corporations and other organizations use, illustrating the discussion with examples based on our field work.

IV. INCLINATION TO CHANGE

Organizations do not set in motion a process of wholesale shift to new systems unless there is substantial dissatisfaction with the old. That is the case with dispute resolution. A number of different trends have converged to produce motivation for corporations to change from conventional methods of dispute resolution to the use of ADR and, beyond ADR, to the adoption of conflict management systems.

A. DISSATISFACTION WITH CONVENTIONAL APPROACHES TO DISPUTE RESOLUTION

First, the traditional approaches of organizations to disputes have been largely reactive, reflecting compliance with systems imposed on the organizations by outside institutions. Disputes with consumers, governmental agencies, and other organizations have generally been resolved either in the courts and other public forums established for that purpose. The dissatisfaction with these public forums, which has been growing for some time, reached a crisis point in the last ten years. Litigation is seen as time-consuming, often to ludicrous lengths, and costly. It is also often viewed as producing results unacceptable to either party to the dispute. Organizations view compliance with court-ordered settlements with barely concealed hostility and at a minimum, judicial and administrative agency decisions are seen as less than perfect. In sum, the courts and administrative agencies set up to resolve disputes are viewed with

antipathy--if not hostility--by nearly all except members of the legal profession, which is an integral part of the system.[27]

A second trend in U.S. corporate life has been the long-term decline in the labor movement and thus in the use of collective bargaining and its attendant processes to resolve employee complaints. Collective bargaining as an institution reached its high-water mark covering about a third of the U.S. private sector in the 1950s. Since that time, the labor movement has been on a steady decline to its current point, with less than ten percent now represented by unions.[28] Collective bargaining provided explicit channels for the resolution of employee–employer disputes. Strikes were the means by which collective interest disputes were resolved and, while never viewed as positive, they were effective for that purpose. Collective bargaining nearly always established elaborate grievance systems, usually culminating in a binding arbitration procedure for the final resolution of disputes of rights.[29]

U.S. corporations never embraced collective bargaining and tried to limit its influence by fighting the existence of unions wherever they emerged. Some corporate leaders held the naïve view that when unions did not exist, conflict would disappear. More sophisticated corporations recognized that workplaces produce conflict and that if unions and collective bargaining were not the vehicle for dispute resolution, another means would have to be substituted. Elaborate human resource systems designed to surface and channel employee dissatisfaction generally did

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[27] Walter K. Olson, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT? (1991); *see also*, Patrick M. Garry, A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA (1997). *Cf.* Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 LAW AND SOCIAL INQUIRY 498 (1996) (concluding that the so-called litigation explosion is largely a myth).

[28] For statistics on trends in union membership, *see* U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES (1970); U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS (January 2001). Updated data on union membership are available in U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, issued annually.

[29] ELKOURI AND ELKOURI: HOW ARBITRATION WORKS (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

not produce an effective substitute for this important function of unionism. Minor conflicts with employees often did not surface at all, and those that did came through unwanted, expensive litigation under the ever-growing system of individual legal rights in the workplace. Thus, employers in the 1990s found themselves facing the Hobson's choice of unions they did not want or alternative but ineffective means of dealing with employee conflict.[30]

A third source of dissatisfaction came from the changes made by organizations to deal with the increased competition from globalization and deregulation in the latter part of the twentieth century. Especially at a time when organizations were being forced to reinvent themselves, organizational effectiveness was critically dependent upon a committed, well-trained, well-organized work force. Efficient work forces offered a potential competitive advantage. Conflicts that remained unresolved or that did not surface in a productive fashion severely compromised organizational effectiveness and the quality of the good or service produced.[31]

Although conflict was seen as a natural outgrowth of contemporary organizational life, turnover of employees due to conflicts was viewed as an unproductive waste of talent and organizational resources. The fact was, a smooth-functioning organization demanded a smooth-functioning system of dispute resolution. Yet many businesses found themselves without such a system even after they had made the other organizational adjustments necessary for survival.[32]

The total effect of these forces of dissatisfaction was a powerful motivation for organizational change. Faced with the realization that conflict is inevitable, and without effective means of dealing with that conflict, one business after another attempted to create a

[30] Lipsky, Seeber, & Fincher, *supra* note 11, particularly 301-309.
[31] *Id.* at 54-58.
[32] These observations, and others contained in this section, are based primarily on the interviews we conducted with corporate managers and attorneys.

new system of dispute resolution. Many went well beyond that, however, into a new realm of conflict management.

B. LITIGATION, DISPUTE, AND CONFLICT MANAGEMENT

The terms "dispute management" and "conflict management" are often used interchangeably. It is important, however, to reflect on the differences between the two terms. The lawyers we interviewed sometimes told us that they engage in ADR routinely, by trying to negotiate rather than litigate in appropriate cases. This happens post-filing, however, and rarely involves trying to resolve disputes before they become litigation, much less trying to prevent conflicts from even becoming disputes.[33]

Conceptually, we believe that conflict management is much more comprehensive than dispute management. At the root of this concept is a distinction between conflicts and disputes. Conflicts can be seen as nearly any organizational friction that produces a mismatch in expectations of the proper course of action for an employee or a group of employees. Conflicts do not always lead to disputes--sometimes they are ignored, sometimes suppressed, and sometimes deemed unimportant enough to be left alone. Disputes, on the other hand, are a subset of the conflicts that require resolution, activated by the filing of a grievance, a lawsuit against an organization, or even a simple written complaint.[34]

Accepting this distinction between conflicts and disputes allows the argument naturally to progress to a divergence in the attempt to manage them. The management of disputes, which after all represent only the tip of the iceberg of conflict, is a significantly less-complex problem.

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[33] *Id.*

[34] There is a long literature, particularly in sociology and social psychology, that deals with the concept of conflict. *See for example*, Samuel B. Bacharach & Edward J. Lawler, POWER AND POLITICS IN ORGANIZATIONS (1980); Hubert M. Blalock, Jr., POWER AND CONFLICT: TOWARD A GENERAL THEORY (1989); Lewis A. Coser, THE FUNCTIONS OF CONFLICT (1956); J. S. Himes, CONFLICT AND CONFLICT MANAGEMENT

To manage disputes successfully, the organization need only maneuver the dispute into a forum most to its advantage to attain lower costs (transactional and outcome), a quicker speed of resolution, or simply a higher probability of a better outcome. Such activities would be seen as effective management of disputes. Thus, much of what we see of dispute management looks like forum shopping.

Organizations that desire to manage conflict must go well beyond this smaller set of processes and into more facets of organizational life, encompassing a much wider range of questions, the involvement of more parts of the organization, and a more complex system. The goals of a conflict management system are broader and more numerous. Conflict management systems attempt to channel conflict in productive directions, for example, not just to manage their resolution. Conflict management systems spread the responsibility for conflict and its resolution to the lowest levels of the organization. Thus they require training to be widespread. They seek to transform the organization, not just a set of processes. Because of their complexity and the potential rewards they offer an organization, conflict management systems are a much more fruitful arena for inquiry and exploration. This distinction among dispute and conflict management systems, and litigation, is graphically depicted in Figure 2. These three systems differ in terms of the depth of their involvement in the organization, the people responsible for the management of the system, and the functions involved in the creation and maintenance of the system. Dispute management is always more complex than litigation management, and conflict management more complicated than both.[35]

(1980); Morton Deutsch, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES (1973), particularly 3-19.

V. CONFLICT MANAGEMENT SYSTEMS

A. THE DIMENSIONS OF A CONFLICT MANAGEMENT SYSTEM

The study of conflict management systems requires a comparison of multiple features. Systems differ on many important dimensions, each containing the potential to lead to unique outcomes. There are variations in the process of the design of a system, for example: Who is involved? How is the system created? How is the system implemented? These design features are not trivial because the values implicit in the design process are often reflected eventually in the system itself. Next, conflict management systems vary in the way they are structured: Who controls the system? Is the system centralized or decentralized? What are the goals of the system? Who is responsible?

Systems also vary in the procedures they employ for conflict resolution. In our field research we have investigated systems that include ombudspersons, peer-review panels, facilitated discussions, mediation, arbitration, and multiple variations on these basic procedures. The choice of procedures can reflect the values underlying the system itself. Some conflict management systems place value on participation in the conflict resolution process, some on having any disputes that occur be resolved as quickly as possible, some value simply surfacing conflict. The solutions created to reach these fundamental goals will be reflected in the procedures utilized within the system.

It is also important to identify and analyze the participants in the conflict management system. One simple distinction is the amount the system relies on outsiders--neutrals and consultants, for example--to feed and maintain it. But it is important to go beyond the use of

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[35] Lipsky, Seeber, & Fincher, *supra* note 11, particularly 8-19.

outsiders and into the organization itself. The extent to which line managers are involved and responsible for conflict resolving conflict is an important distinction between systems.

Finally, since (as one of our colleagues has repeatedly told us) "we are what we measure," it is important to analyze what is judged by an organization to be critically important by looking at the features of the system they choose to measure and evaluate.

B. A DEFINITION OF A CONFLICT MANAGEMENT SYSTEM

There is no general agreement on the precise definition of a conflict management system, even among experts.[36] Clearly, though, an authentic system is *not* merely a practice, a procedure, or a policy. It is something more encompassing, which may incorporate all three--practice, procedure, and policy. Our understanding of systems is rooted in the classic works on the system concept.[37] We prefer the definition contained in the ACR report.[38] The report says that an integrated conflict management system has five characteristics. (See the box on the following page.)

The ACR committee elaborated on the five essential characteristics of an integrated conflict management system. Below we quote at length from the report, with the permission of ACR:

1. **Scope**

> An effective integrated conflict management system provides options for preventing, identifying, and resolving all types of problems, including those disputes that do not fall into a category protected by statute, contract, or specific policy (such as interpersonal disputes). Its purview includes "non-hierarchical" disputes between employees

[36] *Supra* note 7.
[37] Ludwig Von Bertalanffy, GENERAL SYSTEM THEORY: FOUNDATIONS, DEVELOPMENT, APPLICATIONS (rev. ed. 1976); *see also* Jamshid Gharajedaghi, SYSTEMS THINKING: MANAGING CHAOS AND COMPLEXITY—A PLATFORM FOR DESIGNING BUSINESS ARCHITECTURE (1999); Michael C. Jackson, SYSTEMS APPROACHES TO MANAGEMENT (2000); Gerald M. Weinberg, AN INTRODUCTION TO GENERAL SYSTEMS THINKING (2001); Kenneth E. Boulding, *General Systems—The Skeleton of Science,* 2 MANAGEMENT SCIENCE 197 (1956).
[38] Gosline, et al., s*upra* at note 6.

or between managers. Such an integrated system is available to all persons in the workplace -- workers, managers, professionals, groups, teams involved in disputes, and those close by ("bystanders") who are affected...

The Five Characteristics of an Integrated Conflict Management System

- **Scope:** A system should have the broadest feasible scope, providing options for all people in the workplace, including employees, supervisors, professionals, and managers to have all types of problems considered.

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

- **Multiple Access Points:** Users of a system should be able to identify, and have access to, the person, department, or entity most capable (in terms of authority, knowledge, and experience) of advising the individual about the conflict management system and managing the problem in question.

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

- **Support Structures:** A system requires support structures that are capable of coordinating and managing the multiple access points and multiple options; the structure should integrate effective conflict management into the organization's daily operations.

2. **Culture**

To manage conflict effectively, an organization must accept conflict as inevitable. Many organizations discourage the constructive management of conflict by sending the message that those who raise concerns are themselves the problem. Effective integrated conflict management systems communicate the propriety of raising concerns and encourage employees and managers to address these concerns as early as possible and at the lowest possible level. An integrated conflict management system provides an environment in which people can voice a concern or dispute without fear of retaliation. Employees, supervisors, and leaders are all trained to address conflict constructively, are supported in their efforts to do so, and are held accountable for results. Persons who are access points for the system may also serve as coaches for the disputants, helping them to resolve their dispute without proceeding to other options within the system. For example, Polaroid Corporation's policy stresses a commitment to create an environment that recognizes disputes as a natural cultural process and communicates to employees that they can expect to air their issues with full assurance of "safe harbor" and without adverse repercussions.

3. **Multiple access points**

An integrated conflict management system allows employees to enter the system through many access points, such as supervisors, union stewards, workplace leaders, employee assistance practitioners, human resources officers, ethics officers, conflict management coordinators, ombudspersons, internal legal counsel, health care providers, religious counselors, and equal employment opportunity personnel. Employees are not bounced from one department to another. The availability of multiple access points significantly reduces barriers to entering the system and encourages employees to address problems early and constructively.

4. **Multiple options**

An integrated conflict management system gives employees the opportunity to choose a problem-solving approach to conflict resolution, to seek determination and enforcement of rights, or to do both. Employees have the opportunity in appropriate cases to move between rights-based grievance procedures and interest-based processes; within existing statutory and contractual restraints, they are not required to choose prematurely between the two. For example, an employee who files a grievance may also be able to pursue mediation if all disputants agree. Effective systems minimize red tape so that employees may access multiple options and resources.

Rights-based processes, such as grievance procedures, arbitration, adjudication, and appellate processes, provide the opportunity to seek a determination of whether legal or contractual rights have been violated. These rights may arise from employer policy, individual or collective bargaining contracts, statute, or common law.

Interest-based options, such as direct negotiation and mediation, use problem-solving techniques to address the perceived needs of the complainant or other parties. Interest-based options are essential to an effective integrated conflict management system because…they are flexible, enabling disputants to maintain more control over the process and the outcome, which results in greater satisfaction. They can be used at the lowest level and when the conflict first surfaces, resulting in faster, more cost-effective solutions, often with less damage to workplace relationships. They can boost morale by providing the potential for healing and strengthening workplace relationships between employees, and for helping bystanders whose morale or working conditions may have been damaged by the dispute. They allow for creative solutions not available through rights-based processes. Disputants may be more satisfied with the result and the process, which leads to more voluntary compliance with the settlement. They can be used by disputants who are unwilling to use rights-based processes… Multiple options provide the greatest opportunity to resolve concerns early and

easily, before they escalate into more destructive, time-consuming, and costly disputes.

5. **Support structures**

> To develop an effective integrated system, an organization must provide necessary systemic support and structures that coordinate access to multiple options and promote competence in dealing with conflict throughout the organization. These structures nurture systemic change. They make interest-based language and behavior an everyday practice and change the way employees deal with both dissent and conflict. By integrating these structures and options, the organization moves towards "conflict competency."[39]
>
> To successfully implement an integrated conflict management system, an organization must develop support throughout its infrastructure. People at all levels of the organization must believe and communicate the same message: that conflict can and should be actively managed through one of the many channels of the integrated conflict management system.

Designers of systems need to pay particular attention to questions of fairness. The ACR committee, after considerable debate, reached agreement on eight essential elements of a fair conflict management system: 1) to the extent possible, participation in a system should be voluntary; 2) the privacy and confidentiality of the processes should be protected to the fullest extent allowed by law; 3) neutrals (mediators, arbitrators, ombudspersons, and so forth) should be truly neutral and impartial; 4) neutrals should be adequately trained and qualified; 5) the legitimacy of a system will be enhanced to the extent that it is "characterized by diversity in [its] core of neutrals, including mediators and arbitrators"; 6) a system should have policies that specifically prohibit any form of reprisal or retaliation.; 7) a system must be consistent with an

[39] Gosline, et al., *supra* note 6 at 9-16.

organization's existing contracts, including collective bargaining agreements; and 8) a system must not undermine the statutory or constitutional rights of the disputants.[40]

Our own research has shown that some organizations that claim to have conflict management systems could not meet all the criteria prescribed by the ACR committee. In fact, in U.S. organizations today, a system as prescribed by ACR is more the ideal than the reality. Our studies of organizations that we believe have systems, even though they may fall short of the ideal recommended by ACR, reveal several other characteristics these organizations share: 1) **Proactive.** The organization's approach to conflict management is *proactive* rather than *reactive*: the organization has moved from waiting for disputes to occur to preventing (if possible) or anticipating them before they arise. 2) **Shared responsibility.** The responsibility for conflict (or litigation) management is not confined to the counsel's office or to an outside law firm, but is shared by all levels of management. 3) **Delegation of authority.** The authority for preventing and resolving conflict is, therefore, delegated to the lowest feasible level of the organization. 4) **Accountability.** Managers are held accountable for the successful prevention or resolution of conflict; the reward and performance review systems in the organization reflect this managerial duty. 5) **Ongoing training.** Education and training in relevant conflict management skills are an ongoing activity of the organization. 6) **Feedback loop.** Managers use the

[40] Gosline, et al., *supra* note 6 at 16-19. Concerns about the fairness of employer-promulgated dispute resolution systems led to a group of national ADR organizations, including the National Academy of Arbitrators, the American Bar Association, the American Arbitration Association, the Society of Professionals in Dispute Resolution, the Federal Mediation and Conciliation Service, and the National Employment Lawyers Association to form a task force for the purpose of developing the so-called "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship." The task force issued the Due Process Protocol on May 9, 1995. The Protocol called for the use of a set of due-process standards in the arbitration and mediation of employment disputes that included the right to representation, adequate discovery, employer reimbursement of attorney fees, and the use of qualified and impartial neutrals. The task force debated the issue of mandatory pre-dispute arbitration but failed to reach a consensus. The American Arbitration Association declared that it would refuse to administer any cases whose procedural rules did not comply with the Due Process Protocol. *See* Dunlop & Zack, *supra* note 3, particularly at 93-118.

experience they have gained in preventing or resolving conflict to improve the policies and performance of the organization.[41]

VI. AN ANALYTICAL MODEL OF THE CHOICE OF CONFLICT MANAGEMENT STRATEGY

ADR and conflict management systems seem to have arisen largely as a response to changes--some long-term and some short-term--in the organizational environment that made their use an effective alternative to conventional litigation. These environmental changes were filtered through a set of the organizations' motivations, resulting in some organizations' choice of a conflict management strategy.

A. THREE STRATEGIES OF CONFLICT MANAGEMENT

As the model depicted in Figure 3 shows, we divide the dependent variable in our model—the organization's choice of conflict management strategy—into three categories: *contend, settle,* and *prevent.* These categories are obviously somewhat arbitrary. In truth, organizational strategy ranges across a spectrum and grouping large numbers of organizations in a particular category may blur important differences across organizations within that category. To some degree each organization we have studied had its own unique conflict management strategy, tailored to fit its own objectives and circumstances. Yet we defend our three-part categorization because we believe it captures the most fundamental differences in organizational strategy that we observed in our research.[42]

[41] Lipsky, Seeber, & Fincher, *supra* note 11 at 18-19. *See also* David B. Lipsky, Ronald L. Seeber, & Lavinia Hall, *An Uncertain Destination: On the Development of Conflict Management Systems in U.S. Corporations* (2003) (forthcoming in volume edited by Samuel Estreicher and David Sherwyn).
[42] Lipsky, Seeber, & Fincher, *supra* note 11 at 117-119.

Figure 3 about here

In the *contend* category we include those organizations that clearly prefer litigation to ADR. These are organizations that never or rarely use any ADR technique to resolve a dispute. They reject the use of ADR as a matter of organizational policy, although occasionally some of them will accept the use of mediation or arbitration in a particular dispute.

In the *settle* category, we include a majority of the major corporations in the United States. Again, we recognize that there are critical differences in organizational strategy across this large group of companies, but in general these corporations, and most large organizations, use ADR either as a matter of policy or on an ad hoc basis in a variety of different types of disputes.

In the *prevent* category we include organizations that apparently use ADR in *all* types of disputes as a matter of policy. In this category are the organizations that have developed conflict management systems, that is, they do not merely use a particular dispute resolution technique as a matter of practice or even policy, but have instead developed a comprehensive set of policies designed to prevent (if possible) or to manage conflict.[43]

B. THE OPERATION OF THE MODEL

As Figure 3 shows, we believe an organization's choice of conflict management strategy is a function of two types of factors: e*nvironmental* and *organizational*. In the environmental category we hypothesize that several exogenous variables influence the organization's choice of strategy. For example, we hypothesize that market factors influence the organization's choice: Corporations operating in more competitive, global markets tend to rely on ADR more heavily than do organizations in less competitive markets. The underlying logic supporting this

[43] *Id.* at 118.

proposition is straightforward: Corporations in competitive markets need to be more diligent about controlling and reducing their costs, and ADR is a means of controlling and reducing the costs of dispute resolution. Corporations in less competitive markets have less need to be concerned with the costs of litigation.[44]

Our model postulates that these environmental variables operate through a set of organizational motivations. We hypothesize, for example, that an organization that has experienced a "precipitating event," such as a major multi-million dollar lawsuit, is more likely to rely on ADR than one that has not. Exogenous environmental factors may be necessary conditions for an organization to adopt a pro-ADR policy, but they are not sufficient conditions. The growth of government regulation, for example, might cause a company to adopt pro-ADR policies, but the influence of this environmental factor is filtered through organizational factors such as culture and management commitment. As another example of how our model operates, we hypothesize that an organization that both operates in a competitive market and has been a defendant in a major lawsuit is much more likely to have a pro-ADR policy than an organization that operates in a competitive market but has not experienced that type of "precipitating event." Thus, it is the interaction of environmental and organizational (or exogenous and endogenous) variables in our model that influence an organization's choice of strategy.[45]

The model does not suggest that environmental factors invariably lead to a particular conflict management strategy. Many organizations experienced rising litigation costs in the 1970s and 1980s, but not all responded to that factor by adopting pro-ADR policies. An organization that faces an escalation in litigation costs presumably considers how it might reduce

[44] *Id.* at 123-124. For non-profit and public sector organizations, the analog to the market factors is probably the condition of the organization's budget. We would hypothesize that public sector agencies that face budget constraints would be more likely to adopt ADR and conflict management strategies than agencies that do not face such constraints.

or minimize those costs. It might choose ADR as a cost-saving measure. Or it might respond in a different fashion, such as by seeking other means of more efficiently managing litigation. Indeed, if the organization has reason to believe the rise of litigation costs is a transient phenomenon, it may decide to do nothing in response. How an organization makes decisions in the face of changing environmental conditions is a complex phenomenon. Clearly, organizational culture plays a critical role, but culture is an amorphous term requiring definition. The culture of an organization reflects the values, experiences, and belief structures of the organization's decision makers.[46]

Similar organizations faced with a common set of environmental challenges might choose very different conflict management strategies and, in fact, this is the situation we observed in our research. One of the companies in our study (PECO Energy), for example, had adopted a sophisticated conflict management system, whereas most other utility companies had not. After PECO merged with the Unicom Corporation, headquartered in Illinois, to form the Exelon Corporation, it discovered that managers at Unicom resisted the adoption of the conflict management system favored by PECO managers. The two utilities were similar, if not identical, in most characteristics, but one strongly favored a prevent strategy and the other did not.[47]

Another company in our study, Halliburton (and its construction subsidiary, Kellogg, Brown and Root), pioneered the use of mandatory pre-dispute arbitration agreements in employment, but most other companies in the construction business have not. The Zachry Construction Company, a large contractor also headquartered in Texas, has consciously

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[45] *Id.* at 124. For a discussion of the influence of "precipitating events," *see Id.* at 137-138.
[46] *Id.* at 124-125. For a discussion of the role of organizational culture in conflict management systems, *see Id.* at 133-144; *see also* Gosline, et al., *supra* note 6 at 20-21 (describing four causal factors that act as catalysts for the establishment of an integrated conflict management system: a supportive culture, the high costs of disputes, a crisis, and legislation or other mandates requiring an organization to retool its compliance practices).
[47] *Id.* at 125. *See also Id.* at 149.

considered Kellogg, Brown and Root's approach and decided not to adopt it. Conversations one of the authors had with Zachry managers revealed that they were not only aware of Halliburton's approach but had tracked Halliburton's experience with it carefully. Zachry had consciously chosen the *contend* strategy but was continually benchmarking its key competitors, including Halliburton, and was prepared to consider an alternative conflict management strategy under the right circumstances. In sum, the decision to adopt a particular conflict management strategy is strongly influenced by the environmental factors listed in Figure 3, but the organization's actual choice of strategy is ultimately determined by organizational motivations.[48]

C. SOME CORRELATES OF THE CHOICE OF STRATEGY

In our 1997 survey of corporate counsels, we asked a series of questions regarding how the respondents would characterize their organizations' conflict management strategies. On the basis of their responses, we were able to group the corporations into the *contend*, *settle*, and *prevent* categories (see Table 3). The proportions listed, which must be considered rough estimates subject to the caveats previously discussed, are constantly shifting. Presumably, though, the number of corporations in the *contend* category is shrinking and the number in the *prevent* category is growing, but this is by no means certain. We estimate, nevertheless, that in 1997 about 9 percent of the major U.S. corporations studied rejected ADR and elected to be in the *contend* category, 74 percent fit in the broad *settle* category, and 17 percent strongly favored ADR, had some form of a system, and accordingly belonged in the *prevent* category.[49]

Table 3 about here

[48] *Id.* at 125.
[49] *Id.* at 126.

After we grouped the corporations in our sample into the three conflict management strategies, we were able to perform some simple analyses to determine the correlates of the organization's choice of strategy. Although we had not collected sufficient data in our survey to be able do a test of the model depicted in Figure 3, we had collected enough on the basic characteristics of the corporations in our sample to perform a few elementary tests.

Size. The corporation's choice of conflict management strategy was highly correlated with size, as measured by either revenue or number of employees. Corporations in the *prevent* category tended to be significantly larger than corporations in the *contend* category (albeit all corporations in the Fortune 1000 have revenues greater than a billion dollars) and corporations in the *settle* category tended to fall in the middle range.

Industry concentration. We used a measure of industry concentration as a proxy for market pressure, and it proved to be related to the corporation's choice of strategy. Corporations in less-concentrated industries, which presumably face greater market pressure, tended to choose the *prevent* (or system) strategy, while corporations in more concentrated industries, facing less market pressure, tended to choose the *contend* (or traditional litigation) strategy. Corporations in the *settle* category once again tended to fall in the middle.

Industry. Finally, we found a pattern between choice of strategy and the industry in which the corporation operated (specifically, the two-digit SIC industry in which the corporation conducted its primary business). Corporations choosing the *prevent* strategy tended, for example, to cluster in financial services, insurance, construction, and non-durable manufacturing. Industry patterns in organizational strategy are harder to discern than Table 3 might suggest, however. As the PECO and Halliburton examples suggest, the variance within an industry can be very great. Construction, for instance, is listed in both the *contend* and *prevent* categories in Table 3,

because there are corporations, such as Halliburton and Zachry, in the construction industry that fall at either end of the spectrum.[50]

VII. THE ORGANIZATION'S CHOICE: SOME EXAMPLES

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

A. CONTEND

In both our organizational survey and our field studies, we discovered that some organizations—albeit a shrinking minority—have chosen to reject almost any use of ADR and instead have decided to *contend* any claim or charge brought against them. The *contend* group in Figure 3 consists of those organizations that, in the light of their own environmental setting and organizational characteristics, have chosen to continue their traditional approach to litigation. In our 1997 survey, these corporations responded that when their organization is either a defendant or plaintiff in a lawsuit, they prefer to "litigate always." We categorize them as *contenders* because the top managers and lawyers in these corporations, as a matter of conscious policy, rigorously defend their interests in virtually every lawsuit or proceeding in which they are involved. Decision makers in these organizations put a heavy premium on winning legal contests. They often dislike negotiation because they understand that negotiators usually need to compromise and therefore they cannot win all the time.[51]

We talked to the senior vice chairman and chief administrative officer of the Emerson Electric Corporation, a successful multi-billion dollar international organization headquartered in St. Louis, Missouri, and later invited him to participate in a session we were asked to organize for the 1998 *Forbes Magazine* "superconference" on ADR. The vice chairman began his

[50] *Id.* at 127-128.
[51] *Id.* at 138-139.

presentation on that occasion by showing a slide that reproduced the American Revolutionary War flag that has a rendering of a coiled snake and the warning, "Don't Tread on Me." He used the flag as a symbol of Emerson's strategy on litigation management. On any given claim, the vice chairman explained, Emerson will decide whether the company is right or wrong. If the company believes it is wrong, it will readily concede the issue and attempt to settle the case. Such cases are relatively rare, according to the vice chairman. When the company decides it is right, however, it will make every effort to defend its position and will be unwilling to make compromises or concessions to an opposing party. It has been important to Emerson to establish a reputation as a company that will fight all claims that (in its view) lack merit. The use of mediation, arbitration, or any other form of ADR, in Emerson's view, undercuts the company's conflict management strategy. Over time, the vice chairman maintained, this policy of *contending* almost every claim has had the effect of deterring lawsuits and reducing the company's legal costs.[52]

Not every organization that we place in the *contend* category has adopted such a stringent, if principled, approach to conflict management. Some *contenders* are, somewhat more pragmatic and flexible. For example, the Schering-Plough Corporation, which is one of the largest pharmaceutical companies in the world, produces the best-selling allergy medication, Claritin. Like other manufacturers of pharmaceuticals, Schering-Plough is often sued by users of its products who claim the drugs they used did not have the intended effects. Schering-Plough has also been the defendant in several expensive lawsuits involving claims by current or former employees. The corporation's litigation experience led it to undertake a comprehensive study of the use of ADR as a substitute for the company's strategy of *contending*. The vice president of

[52] *Id.* at 139.

human resources and the company's deputy counsel conducted a thorough year-long study and concluded that the systematic use of ADR might, indeed, save the corporation time and money. Nevertheless they did not recommend that the corporation adopt the use of ADR as a matter of policy because, in the course of their study, they discovered that their middle managers thought any use of ADR threatened their authority. Middle managers and supervisors are responsible for making decisions that are the source of many employment disputes. It is important to them that their decisions be supported by the corporation. If top management uses ADR to arrive at negotiated agreements that compromise these decisions, middle managers may feel their authority is undermined—as at Schering-Plough. Thus Schering-Plough's decision not to adopt the use of ADR as a matter of policy (although it will use mediation in selected cases) was based on its middle managers' firm belief that such a policy would undercut their authority.[53]

Hewlett Packard, another firm we studied, also belongs in the *contend* category. Our research suggests that Hewlett Packard is typical of the high-tech firms in Silicon Valley. The success of these firms depends in part on their ability to innovate new technologies, and they attempt to retain control of their innovations through the use of patents and copyrights. Because intellectual property is in many ways the lifeblood of these corporations, they are prepared to fight anyone who threatens their intellectual property rights. For Hewlett Packard and many other Silicon Valley firms, the stakes in many lawsuits are so high that the idea of negotiating or mediating a compromise settlement cannot be considered. The use of ADR in the Silicon Valley also seems to run counter to the entrepreneurial culture prevalent there. Bill Gates was reluctant

[53] *Id.* at 140.

to negotiate a settlement of the government's antitrust case against Microsoft, and the effort by federal judge Richard Posner to mediate a settlement failed.[54]

The firms we examined in the *contend* category have little interest in ADR, formally or informally. They may express some discontent with the U.S. legal system, but in general they are quite prepared to litigate when they believe it is necessary and in some cases they even relish the opportunity.

B. SETTLE

Based on our research, we believe the overwhelming majority of U.S. corporations routinely attempt to *settle* almost all complaints and claims against them. Some corporations may do this as a matter of conscious policy and some as a matter of established practice. These corporations have neither wholeheartedly adopted nor categorically rejected the use of ADR. Instead, they usually approach conflict management in a pragmatic and flexible fashion (while, at the same time, adhering to their own core values and principles). They tend to view conflict management less in strategic terms and more in terms of tactical choice. The tactics and techniques they use in a particular case are normally chosen on an ad hoc basis and depend on the specific circumstances of the case. They view the techniques of ADR as part of a toolkit that includes other options, including contending.[55]

To the extent that a corporation in this category pursues a deliberate litigation or conflict management strategy, it is ordinarily driven by counsel's office, often working collaboratively with outside counsel, the chief financial officer, the human resource function, or another appropriate part of the corporation. The counsel's office seldom needs to involve top

[54] *Id.* at 140-141. Ken Auletta reports that Gates was prepared to make some significant concessions, however, and that Posner came very close to mediating a settlement in the case. *See* Ken Auletta, WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES (2001).
[55] *Id.* at 141-142.

management directly in its day-to-day handling of claims and complaints, unless the company's lawyers find themselves in a situation that potentially represents a significant financial liability for the corporation or a critical matter of principle and precedent.[56]

Corporations in the *settle* category can choose to use ADR on a post-dispute basis or on a pre-dispute basis. A corporation that uses ADR on a post-dispute basis will attempt to use mediation, arbitration, or one of their variants after a dispute between the organization and another party has arisen. These corporations are prepared to pursue litigation in a particular case when they believe the stakes involved, either in terms of money or principle, dictate that choice. In the majority of cases, however, they are prepared to negotiate a settlement of a dispute. In a typical corporation, the counsel's office, frequently relying on the advice of outside counsel, decides at each stage of a case whether negotiating an agreement or proceeding to the next stage of the case is the wise course of action. In these corporations the use of ADR is simply part of the litigation manager's toolkit. At some point in the processing of a particular case, the lawyers representing the corporation and the other party (or parties) in the dispute come to believe that the use of mediation or arbitration is a desirable alternative to pursuing the next stage of litigation.[57]

The other approach a corporation can choose is to use ADR on a pre-dispute basis. When a corporation uses ADR on a pre-dispute basis, it identifies certain types of transactions as prone to disputes and decides as a matter of policy to use ADR to resolve such disputes. Typically, corporations using pre-dispute ADR will seek to include an ADR provision in contracts covering the transactions in question. A corporation may include an ADR provision in all of its construction contracts, product warranties, or executive salary agreements. Almost all

[56] *Id.* at 141-142.
[57] *Id.* at 142.

automobile manufacturers include an arbitration provision in the leases signed by their customers, for example. Computer manufacturers routinely include arbitration provisions in their warranties; customers who sign these warranties may or may not realize that if they have a product liability claim against the manufacturer they are required to have the claim arbitrated and cannot pursue a lawsuit.[58] A growing number of employers require their employees to sign mandatory pre-dispute arbitration agreements, a practice sanctioned by the U.S. Supreme Court in *Gilmer* and in *Circuit City*.[59]

In the *settle* category corporate conflict management is *reactive* and *contingent*. In many of the corporations we studied, counsel's office viewed the use of ADR in certain classes of disputes as an experiment. The corporate representatives we interviewed often had an open mind about ADR and wanted to let their experience with its use guide them on the possibility of adopting ADR as a corporate policy. We began to call some of the corporations in the *settle* category *incrementalists*. Their mode of operation was to experiment with ADR in some types of disputes (say, employment cases), and, if they were satisfied with its use in those cases, to extend its use to other types of disputes.[60]

For example, we conducted interviews at Kaufman and Broad, one of the nation's largest home builders. (By some measures Kaufman and Broad is the largest home builder in the United States, although its operations are concentrated in California, where it is headquartered, and the Southwest. In 1999, Kaufman and Broad built 21,000 homes.) Kaufman and Broad routinely includes mediation and arbitration clauses in the home-building contracts it signs with

[58]Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act,* 3 N.C. L. REV 931 (1999) (assessing the recent trend in the use of arbitration in a wide variety of consumer transactions and arguing that the Supreme Court has reinterpreted the Federal Arbitration Act so as to grant great deference to private arbitral tribunals).

[59] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City Stores v. Saint Clair Adams, 532 U.S. 105 (2001).

customers. Customer claims of defects in the homes they have purchased are submitted to mediation and, in some cases, to arbitration. Customers waive their right to sue Kaufman and Broad when a claim is deemed suitable for arbitration. Over the years Kaufman and Broad developed a very favorable view of the use of ADR in its home-building contracts. There came a time when it decided to adopt mandatory pre-dispute arbitration for its sales staff, where disputes over commissions were a frequent occurrence.[61]

We found this pattern of incrementalism in several of the corporations we studied. We observed that ADR was initially an innovation adopted for limited use in one class of disputes, subsequently proved to be successful, and then diffused into other arenas. We entered the field phase of our research with a tentative hypothesis that proved to be incorrect, however. We expected to find that most corporations would use a more-or-less standard corporate-wide approach to conflict management. We found in fact that most organizations do not have a common conflict management strategy but, instead, have a patchwork (more kindly, a pragmatic and flexible) approach to conflict management, using one strategy in one class of disputes and a totally different strategy in other classes.[62]

As a consequence of our fieldwork, we developed a revised hypothesis regarding the integration of an organization's conflict management strategy across classes of disputes, namely, that corporate structure strongly influences the choice of conflict management strategies. In particular, the degree of centralization of authority within the corporation is a significant determinant. All other things equal, a highly centralized corporation tends to have a standard approach for conflict management, while a highly decentralized corporation does not. As an example, consider both Warner Bros. and Universal studios in Los Angeles. Warner Bros. is a

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[60] *Id.* at 144.
[61] *Id.*

subsidiary of AOL Time Warner; at the time of our interviews, Universal was owned by The Seagram Company Ltd. Both studios, however, had considerable autonomy and both had an approach to ADR that was distinctly different from that of their parent organizations. Warner Bros. and Universal had similar conflict management strategies because both studios operated in the same culture—the culture of motion picture and television production. The culture in which they operated had more influence on their approach to conflict resolution than did the culture of their parent companies.[63]

It is a truism that the culture—the traditions, norms, and standards of behavior—of motion picture and television production differs from the culture of publishing magazines or providing internet services. The vast majority of studio employees, including actors, directors, writers, and musicians, are unionized and have a long history of craft bargaining.[64] These traditions have strongly influenced the studios' attitudes toward ADR—and not necessarily in a positive direction. In common with other unionized employers, the experience Warner Bros. and Universal have had with the use of mediation and arbitration in collective bargaining has colored their view of the use of ADR in other types of disputes. Arbitration clauses are routinely included in executive contracts and in many construction contracts in the motion picture industry. But we would characterize the studios' attitude toward ADR as cautious and even wary; by no means has the experience in Hollywood spilled over into other business units in the parent corporations.[65]

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[62] *Id.* at 144-145.
[63] *Id.* at 145.
[64] *See* UNDER THE STARS: LABOR RELATIONS IN ARTS AND ENTERTAINMENT (Ronald L. Seeber & Lois S. Gray eds., 1996).

[65] *Id.* at 145-146.

The perception of a negative experience with ADR can deter its diffusion to other parts of an organization. For example, we conducted interviews at Kaiser Permanente at its headquarters in Oakland, California. Kaiser Permanente is the largest not-for-profit health maintenance organization in the United States. It serves nearly nine million members in seventeen states. It requires patients treated by its doctors and medical facilities to sign mandatory arbitration agreements. Such agreements require patients with medical claims, including allegations of malpractice, to waive their right to sue and submit their complaints to arbitration. Kaiser was highly embarrassed by a couple of arbitration cases, reported extensively by the *San Francisco Chronicle*, that allegedly demonstrated the problems of mandatory arbitration.[66] As a consequence of its experience in arbitration, including the negative publicity, Kaiser revised but did not abandon its mandatory arbitration policy. In 1999, it decided to turn over the administration of the arbitration procedure to the American Arbitration Association instead of managing the procedure itself. By doing so Kaiser clearly hoped to reassure the public that its arbitration procedure was impartial and fair. Kaiser's difficulties in this regard have limited the diffusion of ADR to other types of disputes within the organization, though.[67]

Our respondents at the USX Corporation told us the corporation had a "tradition of litigation" but in recent years it had become more open minded about the use of ADR. USX is apparently one of many corporations experimenting with alternatives to litigation. It has been motivated by the growing burden of statutory employment cases and its potential liability in asbestos lawsuits.[68]

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[66] *See for example*, the SAN FRANCISCO CHRONICLE, Nov. 23, 1998 at 7; NEW TIMES OF LOS ANGELES, Dec. 9, 1999.
[67] Lipsky, Seeber, & Fincher, *supra* note 11 at 146.
[68] *Id.* at 146.

Another organization we studied is Mirage Resorts, Inc.--one of the largest hotel and casino operators in the country. Mirage owns the Bellagio, Golden Nugget, and Treasure Island hotels in Las Vegas, the Beau Rivage in Biloxi, Mississippi, and was developing a large hotel and casino in Atlantic City at the time we conducted our interviews. Mirage was owned by Steve Wynn for many years, until he sold the corporation to MGM Grand in 2000.[69] We were impressed with the apparent extent to which Wynn directed policy in every corner of the corporation. In the gaming industry lawsuits are an everyday occurrence, and under Wynn Mirage had more than its fair share. Wynn's legal battles with Donald Trump were an ongoing saga in the late 1990s.[70] But Wynn, in many ways the quintessential pragmatist, was always prepared to experiment with alternative means of settling disputes. Consequently, Mirage attorneys were disposed to use mediation, particularly in cases where the stakes were not very high. In our view Mirage was a classic example of how top management ultimately drives the choice of a conflict management strategy.[71]

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

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[69] Michael Brick, *MGM Grand to Acquire Mirage Resorts for $4.4 Billion*, NY TIMES, Mar. 6, 2000.
[70] *See for example,* ASSOCIATED PRESS NEWSWIRES, Nov. 2, 1999, and DOW JONES BUSINESS NEWS, Apr. 22, 1999.
[71] Lipsky, Seeber, & Fincher, *supra* note 11 at 146-147.

C. PREVENT

Companies that we have classified as having a prevent strategy have either adopted a full-blown conflict management system or have adopted a policy of using ADR in all types of disputes and have implemented many of the features of a full-blown system. As our model shows in Figure XXX, we believe companies adopting a prevent strategy do so as a consequence of a combination of environmental factors and organizational motivations. Environmental factors, we hypothesize, are necessary but not sufficient conditions for a corporation to adopt a prevent strategy. Based on our field research, we hypothesize that it is essential for a set of permissive organizational factors to be present to cause a corporation to move in the direction of having a conflict management system. We especially think it is essential for the organization to have a supportive culture and strong commitment from top management. In addition, we have not visited an organization that has an integrated conflict management system that did not have a champion who was largely responsible for spearheading the effort to adopt such a system.[72]

Some organizations are well known for their development and use of conflict management systems: General Electric, Nestle USA, the U.S. Postal Service, Johnson and Johnson, and the Bureau of National Affairs have been described in the literature.[73] In our fieldwork we studied several corporations that have all or most of the essential elements of an authentic conflict management system: Alcoa, Chevron, PECO Energy, and Prudential. Alcoa has a program called "Resolve It" that incorporates many of the features of a system previously described, including multiple options and multiple access points, voluntary participation, the

[72] *Id.* at 147-148.

[73] *See for example*, F. Peter Phillips, EMPLOYMENT DISPUTE RESOLUTION SYSTEMS: AN EMPIRICAL SURVEY AND TENTATIVE CONCLUSIONS (2000); CPR INSTITUTE FOR DISPUTE RESOLUTION, HOW COMPANIES MANAGE EMPLOYMENT DISPUTES: A COMPENDIUM OF LEADING CORPORATE EMPLOYMENT PROGRAMS (2002); Lisa B. Bingham et al., MEDIATION AT WORK: THE REPORT OF THE NATIONAL REDRESS EVALUATION PROJECT OF THE UNITED STATES POSTAL SERVICE (2001).

right to representation, protection against retaliation, and an ongoing commitment to training. In our interviews at Alcoa we learned that the development of its system was triggered in large part by the corporation's downsizing in the 1980s, which was accompanied by a rash of lawsuits. Alcoa's success with the use of ADR in employment disputes has led to the corporation exploring ways to incorporate ADR provisions into its commercial contracts. In addition, Alcoa has pioneered the use of a fixed-price contract with its outside counsel: Alcoa and its principal outside law firm negotiate a yearly fee for the firm's services that covers all cases handled by the firm. This arrangement clearly strengthens the law firm's incentive to resolve cases as quickly as possible and, accordingly, predisposes the firm's attorneys to favor ADR.[74]

Chevron has a comprehensive program similar to Alcoa's but also gives employees access to an ombudsperson. A precipitating event--a large class-action sex-discrimination case--was one of the factors motivating Chevron to adopt an employment conflict management system. PECO Energy (now a part of the Exelon Corporation) is a utility company heavily committed to the use of nuclear power.[75] A shutdown at one of the corporation's nuclear facilities, followed by several major lawsuits and a considerable amount of unwanted publicity, was one event that helped to precipitate that corporation's adoption of ADR.[76]

In PECO's conflict management system disputes are divided into two categories: those that involve statutory claims (which the company calls "legal disputes") and those that do not involve such claims ("non-legal disputes"). Ultimately, the principal techniques used to resolve disputes involving statutory claims are mediation and voluntary arbitration. For non-legal disputes, the corporation ultimately relies on a peer review process. A special feature of the PECO conflict management system is its use of a so-called "resolution facilitator," or employees

[74] Lipsky, Seeber, & Fincher, *supra* note 11 at 148-149.
[75] Agis Salpukas, *PECO and Unicom to Merge in Big Bet on Nuclear Power*, N.Y. TIMES, Mar. 6, 2000 at C5.

located in every unit of the corporation who are specially trained to give advice and guidance to employees with non-legal complaints.[77]

Prudential was also the object of a series of embarrassing lawsuits and SEC investigations in the 1990s. One lawsuit resulted in Prudential agreeing to pay $2 billion to over one million policyholders who sought restitution for abuses in the company's life insurance sales practices.[78] Top management responded to this crisis by resolving that the company would adhere strictly to a code of ethics. It established an independent ethics office whose head initially reported directly to the CEO. To improve employment relations, the company came to believe that a comprehensive and fair dispute resolution system was needed, and it viewed such a system as an expression of its renewed commitment to ethical behavior. It hired Ernst & Young to conduct a benchmarking study of dispute resolution systems in other organizations. After a year's work, the consulting firm submitted its report and recommendations to Prudential, which the company adopted and implemented. Prudential's system, called "Roads to Resolution," contains almost all the elements recommended by the ACR committee. Noteworthy is the fact that the system is operated by an autonomous office within the corporation headed by an experienced and respected attorney.[79]

CONCLUSIONS

Our research demonstrates that nearly all major U.S. corporations have some experience with the basic ADR processes of arbitration and mediation. A much smaller number of companies (perhaps 30-40 percent), however, have had extensive experience with ADR or have

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[76] Lipsky, Seeber, & Fincher, *supra* note 11 at 149.
[77] *Id.* at 149-150.
[78] Coverage by the press of Prudential's troubles was extensive: *see for example, Corporate Focus: Uncertainty Clouds Prudential's Settlement Process*, WALL STREET JOURNAL, Dec. 11, 1998.
[79] Lipsky, Seeber, & Fincher, *supra* note 11 at 149-150.

tried to use it as a general mechanism for dispute resolution. An even smaller number (perhaps 10-15 percent) have established integrated conflict management systems.[80]

Our findings show that in most U.S. corporations mediation, arbitration, and other ADR processes are not yet institutionalized.[81] In general, parties are reluctant to agree in advance to mediate and make that decision on a case-by-case basis. Arbitration, although less widely used, is almost always agreed to in advance. The companies that use both mediation and arbitration more frequently seem much more willing to incorporate these processes into contracts and to try ADR processes as a matter of company policy.[82]

The reasons corporations have moved toward using ADR can be divided broadly into cost and process-control reasons. Most of the participants in our study believed that there were instrumental reasons to use ADR processes; compared with conventional dispute resolution processes, they saved their companies time and money. But there was strong support for the notion that regaining control of the dispute resolution process was an important motivation as well. For some corporations, in fact, particularly those that were not under significant cost pressures, the opportunity to regain control may have been their most important motivation.[83]

There were several important reasons major U.S. corporations did not use ADR. The difficulty of negotiating ADR agreements with reluctant adversaries appears to have been the principal impediment. The use of ADR was also impeded in part by certain intrinsic

[80] These percentages are not meant to be precise estimates but our best assessment of the extent of the use of ADR and conflict management systems in major U.S. corporations. They are based on our survey data and field interviews, but have recently been supported by a survey conducted by the American Arbitration Association. *See* AMERICAN ARBITRATION ASSOCIATION, *supra* note 9.

[81] We define institutionalization to mean a system or a function that has become a more or less permanent part of the organization in the same sense as functions such as marketing, finance, human resources, and the counsel's office itself.

[82] Lipsky and Seeber (1998a) *supra* note 6 at 19.

[83] *Id.*

characteristics of mediation and arbitration—like the tendency of these processes to result in compromise settlements.[84]

The ADR policy adopted by a corporation appears to be systematically related to a set of economic and market factors as well as conscious strategies adopted by the corporation. Large corporations that have faced intense competitive pressures and have engaged in downsizing and reengineering appeared more likely to have had strong pro-ADR policies. Corporations that have adopted cutting-edge management strategies also seem likelier to be pro-ADR. Smaller, more profitable corporations, sometimes controlled by one or two families, were more likely to favor litigation. When it comes to choosing between litigation and ADR, these companies would rather fight than switch.[85]

A logical question that follows is whether corporate policies have an effect on the actual disposition and real cost of disputes. Our research does not give us a clear answer to this question nor has there been very much systematic research on these critical questions conducted by other researchers. We do know, however, that our survey respondents believed overwhelmingly that the use of ADR had saved them time and money.[86]

As previously noted, a relatively small proportion of corporations have adopted an authentic conflict management system. The emergence of conflict management systems in U.S. corporations is such a recent phenomenon it is difficult, if not impossible, to gauge the success of such initiatives. Our respondents at these corporations told us that to date their experience had been favorable, by which they usually meant that participants in these systems (managers, employees, customers, suppliers, and so forth) said they had satisfactory experiences using these

[84] *Id.* at 29.
[85] *Id.* at 24.
[86] *Id.* For a summary and assessment of research conducted on ADR and conflict management systems, *see* Lipsky, Seeber, & Fincher, *supra* note 11 at 263-295.

systems. The respondents also reported that most complaints had been resolved early in the procedures and few had ended up being resolved by outside neutrals. Contrary to the expectations of some skeptics, making elaborate procedures available for employees and others does not promote the filing of complaints. On the other hand, we have not been able to quantify the costs and benefits of using systems and cannot provide bottom-line measures of the effectiveness of the systems strategy.[87]

Finally, it is highly significant that no company or organization that has adopted a workplace conflict management system has, to the best of our knowledge, abandoned that system in favor of more traditional methods of managing conflict. The long-term trend toward the privatization of dispute resolution is a social and cultural reality. Given that trend, conflict management by organizations will merely systematize the privatization under a new regime. Contemporary trends seem almost overwhelmingly to favor the continued creation of conflict management systems. It seems unlikely that reversal of those trends will occur in the foreseeable future.[88]

[87] Lipsky, Seeber, & Fincher, *supra* note 11 at 152.
[88] *Id.* at 299-343 (providing a thorough assessment of the future of workplace dispute resolution and conflict management systems).