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Managing and Resolving Workplace Conflict in U.S. Corporations: New Survey Results of Emerging Policies and Practices

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The Rise of ADR in the U.S.

- Over the last 40 years an “ADR revolution” has occurred in the U.S.
- In effect, the “ADR revolution” has privatized the American system of justice, transferring the resolution of statutory complaints from the courts to private forums.
- One consequence in the U.S. is the “vanishing trial”
  - The proportion of federal cases resulting in a trial declined from 10% in 1970 to 2.2% in 2001.
- Two types of ADR that handle employment disputes:
  - So-called “court-annexed” ADR, often mandated by statute.
  - Employer-promulgated dispute resolution policies.
Reasons for the Rise of ADR

- **Litigation avoidance**
  - Growing regulation led to the “litigation explosion”
  - Employers sought to avoid the costs and delays of litigation

- **Union substitution**
  - In the U.S., the labor movement declined from 35 percent of the workforce in 1954 to 11.3 percent in 2012 (6.6 percent in the private sector and 35.9 percent in the public sector)
  - Unions fear ADR may be a “union-avoidance” technique

- **Judicial support**
  - The U.S. Supreme Court has strongly supported the use of ADR by employers (e.g., in the *Gilmer* and *Circuit City* cases)
  - It is now clear that U.S. employers can require their employees to waive their right to go to court and instead use ADR
Objectives of the Fortune 1000 Study

- To obtain information regarding the current use of mediation, arbitration, and other ADR techniques used by major U.S. corporations; our survey focuses on commercial, consumer, and employment disputes.

- To identify trends in the use of ADR techniques by comparing the results of our 2011 survey of the Fortune 1000 with the results we obtained in a 1997 Fortune 1000 survey.

- To discover emerging policies and practices in the use of ADR by major U.S. corporations.

- To understand the factors that explain the trends and patterns we have discovered in the use of ADR.
Framework for the Study

- Our first survey of the Fortune 1000 was conducted in 1997; it was the first survey ever conducted on the use of ADR by major U.S. corporations


- Until our 2011 survey, the 1997 survey remained the most comprehensive assessment of the use of ADR by major U.S. corporations

- Our 2011 survey in part replicates the 1997 survey but also covers new territory

- The survey was administered by Cornell’s Survey Research Institute
Our objective was to interview the general counsel (GC) of each corporation; if we could not interview the GC, we interviewed one of the GC’s top deputies.

We succeeded in conducting interviews with top attorneys in 368 corporations; in the 1997 survey we conducted interviews in 606 corporations.

In the current survey, 46 percent of the respondents were GCs and 54 percent were other attorneys in the GC’s office.

Respondents had the choice of completing the survey by phone, by mail, or by web.
Conflict Resolution Policies of U.S. Corporations, 1997 and 2011
Experience with Types of ADR among Fortune 1000 Companies, 1997 and 2011

The Proportion of Corporations that Used the Technique at Least Once in the Previous Three Years

*These options were only included in the 2011 study
Principal Reasons Companies Use ADR, 2011

- Saves time: 71%
- Saves money: 69%
- Preserves good relationships: 44%
- More satisfactory settlements: 26%
- More satisfactory process: 38%
- Court mandated: 55%
- Allows parties to resolve disputes themselves: 52%
The Use of Mediation by Type of Dispute, 1997 and 2011

The Proportion of Corporations that Used Mediation at Least Once in this Type of Dispute in the Previous Three Years

<table>
<thead>
<tr>
<th>Type of Dispute</th>
<th>1997</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Rights</td>
<td>24%</td>
<td>26%</td>
</tr>
<tr>
<td>Employment</td>
<td>79%</td>
<td>81%</td>
</tr>
<tr>
<td>Commercial/Contract</td>
<td>78%</td>
<td>80%</td>
</tr>
<tr>
<td>Corporate Finance</td>
<td>13%</td>
<td>17%</td>
</tr>
<tr>
<td>Environmental</td>
<td>31%</td>
<td>29%</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>57%</td>
<td>58%</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>39%</td>
<td>39%</td>
</tr>
<tr>
<td>Product Liability</td>
<td>32%</td>
<td>32%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>39%</td>
<td>26%</td>
</tr>
<tr>
<td>Construction</td>
<td>10%</td>
<td>14%</td>
</tr>
<tr>
<td>Other</td>
<td>14%</td>
<td>14%</td>
</tr>
</tbody>
</table>
The Use of Arbitration by Type of Dispute, 1997 and 2011

The Proportion of Corporations that Used Arbitration at Least Once in this Type of Dispute in the Previous Three Years

- Consumer Rights: 12% (1997), 8% (2011)
- Employment: 36% (1997), 14% (2011)
- Corporate Finance: 85% (1997), 40% (2011)
- Environmental: 12% (1997), 13% (2011)
- Intellectual Property: 10% (1997), 14% (2011)
- Personal Injury: 9% (1997), 22% (2011)
- Product Liability: 14% (1997), 23% (2011)
- Real Estate: 32% (1997), 26% (2011)
- Construction: 40% (1997), 14% (2011)
- Other: 0% (1997), 8% (2011)
## Principal Reasons Companies Did Not Use Employment Arbitration, 2011

Respondents Could Specify More Than One Reason For Not Using Arbitration

<table>
<thead>
<tr>
<th>Reasons</th>
<th>Percent of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Difficult to appeal</td>
<td>41%</td>
</tr>
<tr>
<td>Not confined to legal rules</td>
<td>36%</td>
</tr>
<tr>
<td>Unwillingness of opposing party</td>
<td>43%</td>
</tr>
<tr>
<td>Results in compromise outcomes</td>
<td>43%</td>
</tr>
<tr>
<td>Lack of confidence in neutrals</td>
<td>24%</td>
</tr>
<tr>
<td>Lack of qualified neutrals</td>
<td>8%</td>
</tr>
<tr>
<td>Too costly</td>
<td>18%</td>
</tr>
</tbody>
</table>
Explaining the Decline in the Use of Arbitration

- Many corporate attorneys believe that arbitration has increasingly become similar to litigation.

- They suggest that “external law” has made arbitration more complex, costly, and time consuming.

- A large majority of the respondents in our survey prefer mediation to arbitration, and in general they prefer interest-based options to rights-based options.

- In employment disputes, about one-third of the corporations in our sample have adopted a so-called “integrated conflict management system” – a more strategic approach to proactively managing workplace conflict.

- A vanguard of corporations now rely on a portfolio of interest-based options to resolve disputes at the earliest possible stage and avoid the use of arbitration and other rights-based options.
Mandatory vs. Voluntary ADR Procedures
In Employment Disputes, 2011

Proportion of Corporations with Mandatory ADR Procedures vs. Proportion of Corporations with Voluntary ADR Procedures

- **Mandatory**: 31%
- **Voluntary**: 69%

About 15 percent of the corporations appear to use mandatory arbitration.
The Five Characteristics of Integrated Conflict Management Systems

① Broad Scope
② Tolerant Culture
③ Multiple Access Points
④ Multiple Options
  ➢ rights-based
  ➢ interest-based
⑤ Systemic Support and Structures

# Traditional v. Systems Approach to Conflict Management

## Traditional Approach
- Reactive
- Counsel’s office is responsible
- Top-down control
- Accountability resides with top managers
- Little emphasis on education/training
- Emphasis on resolving conflict

## Systems Approach
- Proactive
- Responsibility shared by all levels
- Bottom-up control
- Reward and performance systems reflect accountability
- Education and training is an ongoing activity
- Emphasis on managing conflict
Does Your Company Have an Office or “Function” Dedicated to Managing Your Dispute Resolution Program?

- **YES**: 38%
- **NO**: 62%
Conclusions: On the One Hand...

- Over the past 15 years, a growing number of companies – currently about 50 percent – have adopted ADR as their principal approach to resolving consumer, commercial, and employment disputes.

- Many companies have adopted a wider array of ADR techniques, including early neutral evaluation, early case assessment, and conflict coaching.

- Companies have moved from using ADR techniques primarily to avoid litigation to using ADR techniques to resolve disputes at the earliest possible stage.

- It appears that a growing proportion of major corporations are adopting sophisticated conflict management strategies that rely principally on interest-based options.
Conclusions: On the Other Hand...

- Although the use of ADR techniques has generally grown, *a significant proportion of major corporations* – possibly 40 percent – continues to *rely on traditional methods* of resolving disputes.

- Significantly, *the use of arbitration has markedly declined*, especially for employment, commercial, and construction disputes.

- Surprisingly, *four out of ten respondents* report that they do *not use ADR* to resolve employment disputes.

- In the U.S., there is a substantial and possibly growing divide between companies that rely heavily on ADR and companies that do not.
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