



American Arbitration Association  
*Dispute Resolution Services Worldwide*

# Dispute-Wise<sup>SM</sup> Business Management

IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES  
IN MANAGING BUSINESS CONFLICTS

An American Arbitration Association-Sponsored Research Study

### About the American Arbitration Association

The global leader in conflict management since 1926, the American Arbitration Association is a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures.

Please visit us at [www.adr.org](http://www.adr.org).

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FOR MORE THAN HALF A  
CENTURY, THERE HAS BEEN  
STEADILY GROWING  
ACCEPTANCE OF AND TRUST  
IN THE PROCESSES OF  
ALTERNATIVE DISPUTE  
RESOLUTION (ADR) –  
PRIMARILY MEDIATION  
AND ARBITRATION.

## Executive Summary

# Dispute-Wise<sup>SM</sup> Business Management

## Improving Economic and Non-Economic Outcomes in Managing Business Conflicts

### Overview

In February of 2003, the American Arbitration Association (AAA) undertook a major research study aimed at examining the attitudes and experiences associated with the use of non-judicial dispute resolution. The study examined how these techniques and practices are employed by a broad sample of businesses, one that included *Fortune* 1000 companies, mid-size public companies, and privately-held businesses.

This study is one of the few important empirical studies in the dispute resolution field since 1998 when David B. Lipsky and Ronald L. Seeber, both professors at Cornell University, published *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*. The 2003 AAA-sponsored study took a fresh look at and updated the arbitration and mediation usage trends discussed in the Cornell study. Most importantly, it went a significant step beyond the earlier study by posing two critical questions:

- Can companies that might be characterized as “dispute-wise<sup>SM</sup>” be identified and, if so, what are their characteristics?
- Is there any relationship between “dispute-wise business management practices” and favorable “outcomes” of both an economic and non-economic nature?

In brief, the study identified an index of eight particular traits that characterize the legal departments of “dispute-wise” companies. In addition, the survey found that there are, indeed, a number of specific benefits associated with dispute-wise business management practices along with some interesting parallels between dispute-wise business management and specific economic benefits.

### The Context for the Research

For more than half a century, there has been steadily growing acceptance of and trust in the processes of alternative dispute resolution (ADR) – primarily mediation and arbitration. Acceptance has been driven by growing executive sensitivity to the importance of preserving valuable business relationships, and an increasing determination to steer clear of costly litigation when dealing with business disputes of virtually every kind.

The growth of ADR has been spurred by the rising burden of U.S. civil litigation, a bill that now approaches \$200 to \$300 billion annually. A stream of evidence has long suggested that there is real business value to the rapid, comparatively inexpensive, and easily-accessed alternative to the judicial system that ADR represents. In fact, the attributes of ADR, by their very nature, encourage the use of a “portfolio approach” to disputes. Such an approach recognizes that “winning” should be measured by how well the organization manages over time the overall total economic and non-economic impact of the full array – or portfolio – of disputes it faces across all facets of its business. Moreover, the utilization of a portfolio

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approach appears to be a differentiating characteristic of well-managed corporate legal departments, one that is very much in tune with other risk management practices in what are generally considered well-managed business organizations.

Typical of the portfolio approach is a willingness to take a more global view of the full spectrum of an organization's disputes – addressing each of them in relation to other disputes in the portfolio with an overall goal of minimizing risk, cost, time spent, and resources expended, while preserving important business relationships. Pragmatic and efficient, this style of conflict management – which the AAA came to think of as “dispute-wise business management” – represents a continuing evolution in attitudes toward conflict management, one that encouraged a very positive reappraisal of the value of ADR techniques among those who have adopted it.

Even in situations where a favorable judicial outcome was likely, winning was not necessarily the primary goal. If the use of ADR methods or outright settlement were likely to lessen risk and expense, conserve scarce corporate legal department resources for higher priority matters, and help maintain good (and expensive to build and sustain) relationships with customers, suppliers, and employees, then resolution through America's contentious, costly, and over-burdened court system was something to be avoided.

While the AAA could clearly see the growing enthusiasm for ADR practices – which were recognized to be a well-managed alternative to judicial processes, one that produced a fair and enforceable result at a reasonable cost – it sought to determine through research whether there are, indeed, characteristics that define dispute-wise corporate legal departments. At the same time, it wanted to explore whether there is any relationship between the emergence of dispute-wise conflict management and measurable benefits, if any, which accrued to its practitioners.

## The Shape of the Survey

Conducted by an independent market research firm<sup>1</sup>, the study involved telephone interviews with 254 corporate general counsel, associate general counsel, or people in similar positions of seniority within legal departments. Interviewees were drawn from:

- 101 *Fortune* 1000 companies with mean revenues of \$9.09 billion,
- 103 mid-size public companies with mean revenues of \$384 million, and
- 50 privately-held companies with mean revenues of \$690 million (most had revenues of less than \$1 billion).

In what the AAA believes is the first attempt to present a conceptual framework for measuring how companies manage disputes, the survey asked each respondent to rank the defining characteristics of dispute-wise behavior in terms of how his or her own legal department handles disputes. Interviewees gave each item a score from one to 10, with 10 indicating “describes my legal department very well.”

Thus, the scores for each respondent's legal department for the eight-item index could run from eight to 80. When the scores were tabulated, the results were divided into three tiers: “most dispute-wise” (35%), “moderate dispute-wise” (32%) and “least dispute-wise” (33%). Interestingly, it was found that each level of dispute-wise behavior was distributed fairly evenly across companies of all sizes and industry types (see Tables 1 and 2).

<sup>1</sup> Clark, Martire, Bartolomeo & Shulman

TABLE 1

**Dispute-Wise Index by Company Size** (Base: Total)

Dispute-wise companies are represented by companies of all sizes and types in roughly equal proportions across the three dispute-wise categories.

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
<i>Fortune</i> 1000 company	40%	35%	46%	39%
Mid-size company	40%	39%	42%	40%
Private company	20%	26%	12%	22%
	100%	100%	100%	100%

TABLE 2

**Industries Represented among Dispute-Wise Companies<sup>2</sup>**

(Base: Total)

Companies that are most dispute-wise represent a broad array of industries, with no single industry emerging as dominant.

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
Technology/industrial technology	16%	24%	9%	14%
Construction/equipment/contracting	11%	16%	10%	6%
Energy/utilities	10%	8%	15%	8%
Retail/food/beverage	10%	11%	10%	8%
Banking/financial/business services	9%	6%	13%	7%
Consumer products	8%	7%	9%	8%
Manufacturing	7%	7%	10%	5%
Investment services/insurance	6%	6%	6%	6%
Media/telecommunications	5%	4%	2%	8%
Health	4%	2%	4%	7%
Real estate	3%	1%	1%	6%
Transportation	3%	2%	2%	4%
Electronics/engineering	2%	3%	1%	2%
Sports franchises	2%	2%	4%	1%
Consulting	1%	0%	2%	1%
Aerospace/defense	1%	0%	1%	1%

<sup>2</sup> Does not add to 100% due to rounding

The 41-question interviews were conducted between February 28 and March 21, 2003, and the sampling error, based on 254 respondents, is plus or minus 6.2%. The price/earnings ratios for publicly-held companies participating in the survey are as of April, 2003 – the most current data available at the time the study was conducted.

## Principal Findings

The study suggests two critical new findings:

- First, it is possible to identify companies that can be described as “dispute-wise.” The composite picture of a dispute-wise company’s legal department is outlined by an eight-item index of key characteristics (see Table 3). Its legal group is more likely to be:
  - > highly integrated into the general corporate planning process,
  - > understanding of the broader business issues facing its company and industry,
  - > spending a lot of time on highly complex and technical issues,
  - > involved in cross-border, international disputes (the apparent goal being to avoid the risk involved in the uncertainty of judicial processes outside the borders of the home country), and

TABLE 3

### Creating a Dispute-Wise Business Management Index<sup>3</sup> (Base: Total)

“THE SURVEY ASKED EACH

RESPONDENT TO RANK

LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT

Total Most Moderate Least

THE DEFINING

#### DESCRIBES LEGAL DEPARTMENT – VERY WELL<sup>4</sup>

CHARACTERISTICS OF

The legal staff has a very good understanding of the broader business issues facing the company and industry 81% 93% 82% 68%

DISPUTE-WISE BEHAVIOR

The legal department is highly integrated into the general corporate planning process 59% 81% 51% 42%

IN TERMS OF HOW

Senior management in this company is focused on preserving relationships and settling cases rather than just winning cases 48% 65% 45% 31%

HIS OR HER OWN

A lot of our time is spent on highly complex and technical issues 41% 62% 37% 21%

LEGAL DEPARTMENT

A lot of our time is spent on international issues 12% 27% 7% –

HANDLES DISPUTES.”

When disputes arise we usually take an aggressive approach 40% 28% 35% 59%

Our primary focus is on reviewing contracts and agreements 23% 14% 19% 36%

We often favor litigation over ADR 15% 3% 11% 31%

<sup>3</sup> This table shows the index cross-tabulated against the items that compose it.

<sup>4</sup> Eight - 10 on a 10-point scale where one means “does not describe at all” and 10 means “describes very well”



- > working in an environment where senior management is focused on preserving relationships and settling disputes rather than just on winning cases and, therefore, less concerned about aggressively litigating every case (see Table 4).

That same dispute-wise legal department is less likely to view its role as:

- > being focused primarily on reviewing contracts and agreements,
- > being part of a culture that favors litigation over ADR, and
- > aggressively litigating every case.

**TABLE 4**

### Rating Importance of Items when Disputes Arise with Customers or Suppliers (Base: Total)<sup>5</sup>

#### LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT

	Total	Most	Moderate	Least
<b>EXTREMELY/VERY IMPORTANT</b>				
Cost	72%	75%	75%	66%
Winning	72%	66%	75%	77%
Predictability	65%	67%	68%	60%
Speed	60%	64%	62%	53%
Fairness	60%	67%	57%	54%
Finality	58%	60%	61%	54%
Maintain relationships	53%	70%	48%	41%
Industry expertise of neutrals/arbitrators	43%	43%	42%	44%
Privacy	37%	39%	38%	34%
The ability to appeal	26%	16%	24%	38%
International capabilities	12%	21%	9%	6%

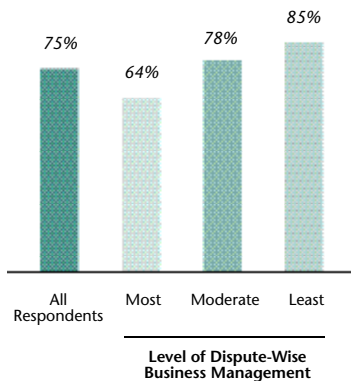
<sup>5</sup> Based on those responding

Figure 1

**DESCRIBES LEGAL DEPARTMENT VERY WELL<sup>6</sup>**

**“The department is quite lean, we often find ourselves stretched to the limit.”**

The legal departments of the “most dispute-wise” companies feel less “stretched” within their budget constraints.



- Second, the survey results make it quite clear that dispute-wise business management practices appear to be associated with positive business outcomes. Among the key benefits of dispute-wise business management techniques, the study found that the “most dispute-wise” companies are more likely to:
  - > have stronger relationships with customers, suppliers, employees, and partners, describing these relationships as excellent/very good,
  - > appreciate and value the fairness and speed of ADR processes in resolving disputes with customers and suppliers while turning away from what, in many instances, had become a single-minded focus on litigating at almost any cost approach,
  - > experience lower legal department budgets (with “least dispute-wise” companies having significantly higher legal department expenses) and manage their in-house legal costs with a higher degree of efficiency, and
  - > utilize legal resources well (A common complaint heard from legal departments is a feeling of being forced to operate lean and being stretched to the limit. However, despite their lower legal department budgets, highly dispute-wise companies are much less likely to describe their departments as “lean” or “stretched to the limit” (see Figure 1).).

Relative to the stronger relationships findings outlined above, it is interesting to note that the price/earnings ratios (often thought of as a measure or indicator of stockholder confidence in the management of a company) for the “most dispute-wise” companies averaged 28% higher than the mean for all the publicly-held companies in this survey and 68% higher than the mean for companies in the “least dispute-wise” category. These outcomes suggest that the “most dispute-wise” companies are particularly concerned with maintaining good relationships with all of their stakeholders.

Lastly, the current study confirms many of the findings of the 1998 Cornell University study of Lipsky and Seeber, which polled legal officers of 606 of the then *Fortune* 1000 companies. In comparing our survey results with theirs, we used only the data contributed by the 101 *Fortune* 1000 companies participating in the AAA-sponsored survey.

The AAA-sponsored survey’s overall findings confirm a consistency in use of both mediation and arbitration among *Fortune* 1000 companies, with slight increases in use in some types of disputes. Both arbitrators and mediators are perceived to be better qualified today than they were in the 1998 study. These findings suggest that satisfaction with ADR processes and neutrals is substantial and continues to grow.

Since the Cornell study in 1998, the reasons for using arbitration, described in Table 5, have remained fairly stable among *Fortune*-ranked companies.

<sup>6</sup> Eight - 10 on a 10-point scale where one means “does not describe at all” and 10 means “describes very well”

TABLE 5

**Trend: Reasons for Using Arbitration**(Base: *Fortune* Companies that Use Arbitration)

	2003	1998
Is required by contract	91%	92%
Saves time	68%	69%
Saves money	65%	69%
Has limited discovery	65%	59%
Allows parties to resolve disputes themselves	61%	N/A
Provides a more satisfactory process	60%	61%
Preserves confidentiality	54%	43%
Is court mandated	49%	42%
Uses expertise of arbitrators	43%	N/A
Gives more satisfactory settlements	39%	35%
Is a managerial or technically complex dispute	38%	N/A
Preserves good relationships between disputing parties	36%	41%
Avoids establishing legal precedents	36%	37%
Is desired by senior management	31%	N/A
Is an international dispute	25%	32%
Provides more durable resolution compared to litigation	20%	28%
Became standard practice in industry	18%	34%

## A Snapshot: The Use of and Attitudes toward Mediation and Arbitration

Beyond the dispute-wise indicators identified, the following were among the key findings regarding the use of and attitudes toward mediation and arbitration for the entire group surveyed:

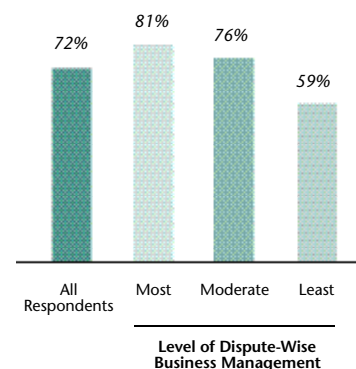
- The overwhelming majority of all companies surveyed say they use both mediation and arbitration, but mediation is favored somewhat over arbitration. The frequency of usage varies.
- “Most dispute-wise” and “moderate dispute-wise” companies tend to use arbitration more than those in the “least dispute-wise” category while the use of mediation is fairly consistent across the three groups (see Figure 2).
- There is greater use of mediation and arbitration among *Fortune* 1000 companies than in mid-size and private companies.
- The primary reasons for using mediation or arbitration include saving money and saving time. Companies also report using mediation because it allows parties to resolve disputes themselves. Arbitration is often used because it is provided for as part of the dispute resolution provisions in contracts between the parties.

Figure 2

### PERCENTAGE USING ARBITRATION

(Base: Total)

While use of mediation is fairly consistent across the board, the “most” and “moderate dispute-wise” companies tend to use arbitration more than the “least dispute-wise” companies.



- The majority of those surveyed believe that both mediation and arbitration reduce the time needed to resolve disputes.
- The majority of those surveyed believe that both mediation and arbitration reduce costs, excluding judgments/awards.
- Respondents are fairly evenly split on whether mediation and arbitration have any effect on the dollar value of final judgments/awards. However, less than one in 10 believes that mediation/arbitration increases judgments/awards.
- Mediation and arbitration are more often used for commercial contract and employment disputes.
- The vast majority of companies are satisfied with their recent experience with both mediation and arbitration. Companies report higher satisfaction with mediation than arbitration, perhaps because the parties themselves reach agreement in mediation.
- The AAA continues to be the preferred private provider of arbitrators. No one source dominates for mediators.

TABLE 6

Where Company Receives Nominees for  
Mediators or Arbitrators (Base: Use Mediation or Arbitration Respectively)

	Mediation	Arbitration
A Private ADR Provider	30%	61%
American Arbitration Association	19%	55%
Other private ADR provider	11%	6%
Previous experience/“word-of-mouth”	24%	16%
The court	19%	6%
Within the legal community/local counsel	9%	4%
Mutual proposal from both parties	5%	2%
A state or federal agency	3%	3%
Within the corporation	1%	N/A
Other	8%	6%
Don’t know/refused	1%	2%

In summation, the survey results serve to confirm a groundswell of appreciation for the value of ADR processes within well-managed corporate legal departments. Those companies falling into the “most dispute-wise” category with respect to their handling of ongoing disputes are also actively engaged in conflict avoidance programs, putting in place a framework that both helps prevent disputes from arising and that deals with disputes in their earliest stages as close as possible to the point of origin.

## Detailed Survey Results: A Road Map

## Introduction

The four-fold purpose of the study was to:

- explore whether there are characteristics that identify a company as “dispute-wise,”
- determine whether companies embracing dispute-wise business management practices derive specific benefits from their approach to conflict resolution – whether, for example, they have stronger relationships with customers, suppliers, and employees and whether other positive economic benefits accrue,
- examine current ADR practices among a broad range of companies – which types of ADR procedures are used and for what purpose, what value is placed upon them, what is the frequency of ADR utilization, how effective are ADR processes, and what are the principal benefits associated with their use, and
- compare the responses of the 101 *Fortune* 1000 participants in the current survey to those of the earlier Cornell study to determine whether the results of the two surveys are consistent with each other and whether any discernible trends or patterns have emerged in the use or the appreciation of ADR techniques.

The eight defining characteristics of dispute-wise behavior and the methodology for determining them are outlined in the Executive Summary, which also offers a brief overview of the principal benefits derived from dispute-wise business management.

The balance of this report is divided into four sections: The first examines more closely survey findings with respect to the advantages attributable to “most dispute-wise” conflict management. The second looks at general trends in dispute management. The third explores how the attitudes and practices of the “most dispute-wise” corporate legal departments differ from those in the “least dispute-wise” category, and the fourth covers the comparison of the current survey with the 1998 Cornell study by Lipsky and Seeber.

As noted in the Executive Summary, representatives of the legal departments of 254 companies participated in the survey – 101 from *Fortune* 1000 companies, 103 from mid-size companies, and 50 from privately-held companies. The annual revenues of participating companies are broken out by company size in Table 7.

TABLE 7

## Company's Annual Revenue

(Base: Total)<sup>7</sup>

	Total	Fortune	Mid-Size	Private
Less Than \$100 million	8%	-	17%	2%
\$100 million to \$200 million	12%	-	17%	31%
\$200 million to \$300 million	5%	-	12%	2%
\$300 million to \$400 million	7%	-	13%	10%
\$400 million to \$500 million	6%	-	12%	3%
\$500 million to \$600 million	4%	-	8%	5%
\$600 million to \$700 million	3%	-	5%	5%
\$700 million to \$800 million	3%	-	6%	5%
\$800 million to \$900 million	2%	-	2%	5%
\$900 million to \$1 billion	2%	-	2%	8%
\$1 billion to \$1.5 billion	14%	21%	6%	15%
\$1.5 billion to \$2 billion	5%	11%	-	3%
\$2 billion to \$3 billion	9%	21%	-	3%
\$3 billion to \$4 billion	3%	7%	-	-
\$4 billion or more	17%	40%	-	3%

## The Benefits of “Most Dispute-Wise” Conflict Management: A Closer Look

The principal benefits associated with dispute-wise conflict management fall into several areas: lower legal costs, improved relationships, timesavings, and better utilization of resources.

Even though their personnel are significantly less likely to say that they find their legal departments “lean” and “stretched to the limit” and appear to feel that their resources are better utilized, the mean legal budgets of companies in the “most” and “moderate” dispute-wise groups are significantly lower than that of companies in the “least dispute-wise” group (see Table 8 on page 14).

It is particularly interesting to note in Table 8 that the principal reason for a lower mean total budget for legal services between the “most” and “least dispute-wise” companies is attributable to lower in-house legal services expenditures. And yet, 72% of the “most dispute-wise” companies reported having three or more full-time attorneys in their legal departments versus only 60% of the “least dispute-wise” companies (see Table 9 on page 14). These two findings strongly suggest that “most dispute-wise” companies – with larger staffs and lower in-house legal costs – are managing their legal departments in a more efficient way.

### CHARACTERISTICS IN THE DISPUTE- WISE BUSINESS MANAGEMENT INDEX

A dispute-wise legal department is:

- in tune with broader business issues facing the company and the industry
- highly integrated into the corporate planning process
- focused on preserving valuable relationships, not just on winning
- spending a good deal of time on highly complex, technical issues
- spending a lot of time on cross-border, international matters
- not as likely to take an aggressive approach to dispute resolution
- not focused primarily on reviewing contracts and agreements
- not as likely to favor litigation over ADR

<sup>7</sup> Based on those responding

TABLE 8

**Legal Department's Annual Budget**(Base: Total)<sup>8</sup>

The “least dispute-wise” companies have significantly higher legal department expenses.

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
Mean legal department's annual budget excluding other legal services	\$ 4,046,000	\$ 3,326,000	\$ 3,692,000	\$ 5,243,000
Mean outside legal services annual budget	\$ 6,260,000	\$ 6,966,000	\$ 4,944,000	\$ 6,978,000
Total budget for legal services	\$ 10,306,000	\$ 10,292,000	\$ 8,636,000	\$ 12,221,000

TABLE 9

**Number of Full-Time Attorneys in Legal Department**(Base: Total)<sup>9</sup>

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
None	1%	1%	–	1%
1-2	32%	27%	30%	39%
3-5	33%	34%	28%	37%
6+	34%	38%	42%	23%
Mean	17.5	17.7	20.1	14.8

The preservation and building of relationships is an important goal and result of dispute-wise conflict management. Across the board, the “most dispute-wise” companies are more likely to describe their customer, business partner, supplier, and employee relationships as excellent/very good. Similarly, the price/earnings ratios for “most dispute-wise” companies averaged 28% higher than the mean for all the publicly-held companies surveyed and 68% higher than the mean for companies in the “least dispute-wise” category. Price/earnings ratios are a measure of stockholder confidence in the management of a company, among other things, and this suggests that the “most dispute-wise” companies are successful in maintaining good relationships with all of their stakeholders (see Figures 3 and 4).

<sup>8</sup> Based on those responding<sup>9</sup> Based on those responding



FIGURE 3

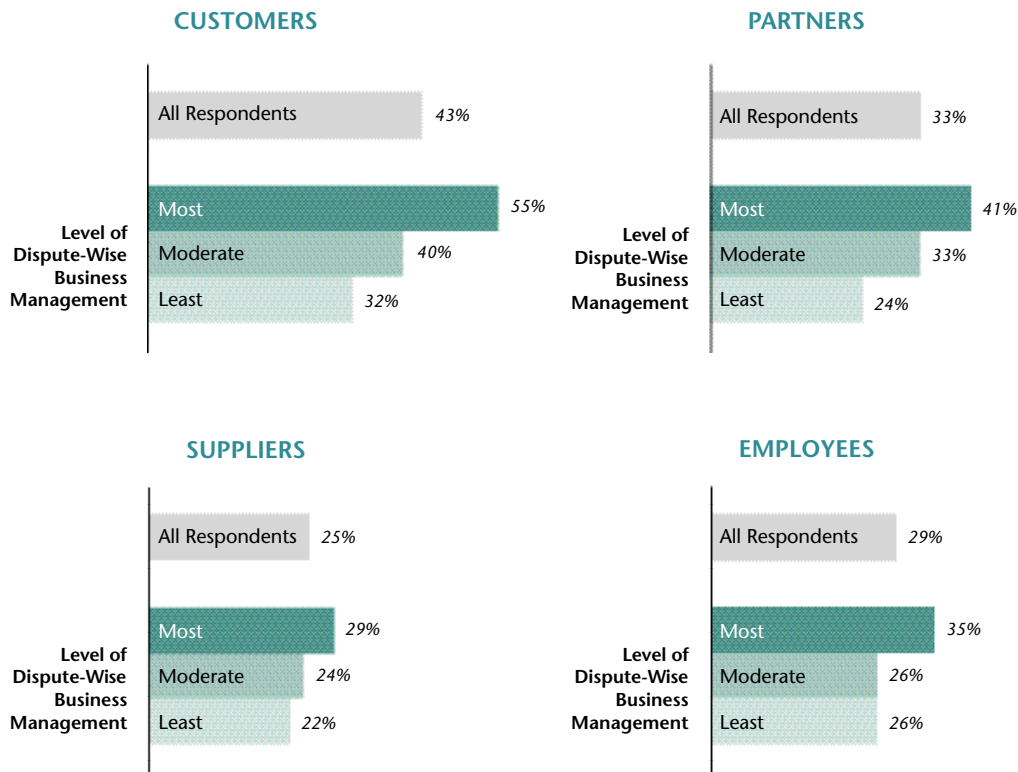
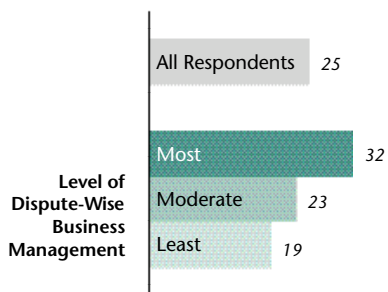
Company's Relationships Rated Excellent/Very Good<sup>10</sup>(Base: Total)<sup>11</sup>

FIGURE 4

## Price/Earnings (P/E) Ratio of Company

(Base: Total)<sup>12</sup><sup>10</sup> Rated nine -10 on a 10-point scale where one means "poor" and 10 means "excellent"<sup>11</sup> Based on those responding<sup>12</sup> Based on public company data available from Hoovers.com

## General Trends in Dispute Management

Fully 95% of survey participants reported that their companies had used some form of ADR procedures during the last three years. The array of dispute resolution techniques used by many of them was quite broad and included, in addition to mediation and arbitration, in-house grievance procedures, a combination of mediation and arbitration, fact finding, mini-trials, peer review, and the use of an ombudsperson (see Table 10).

TABLE 10

### ADR Procedures Used in Past Three Years

(Base: Total)

	Total	Fortune	Mid-Size	Private
Any	95%	95%	95%	94%
Mediation	85%	91%	81%	82%
Arbitration	72%	80%	66%	71%
In-house grievance	23%	27%	20%	22%
“Med-Arb” – combined mediation with arbitration	20%	25%	20%	12%
Fact finding	12%	14%	10%	12%
Mini-trials	11%	20%	6%	4%
Peer review	10%	16%	6%	8%
Ombudsperson	5%	6%	5%	4%
None of the above	5%	4%	5%	6%
Don’t know/refused	*	1%	–	–

\* Equals less than 0.5%

While the overwhelming majority of the companies surveyed responded that they use both mediation and arbitration, respondents were somewhat more likely to use mediation (see Figure 6). In addition, *Fortune* 1000 companies make a greater use of mediation and arbitration than their mid-size or privately-held counterparts (see Figure 7).

FIGURE 6

### Whether or Not Ever Use Mediation or Arbitration

(Base: Total)

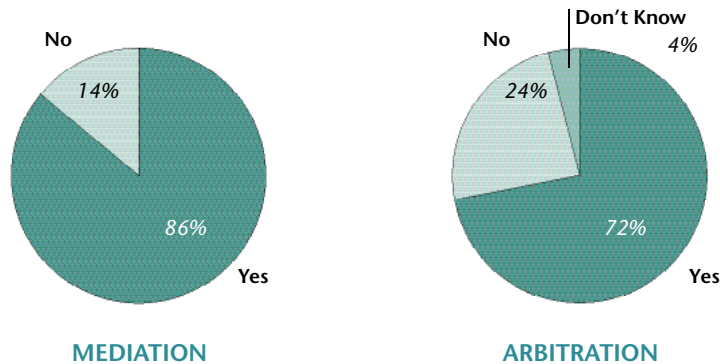
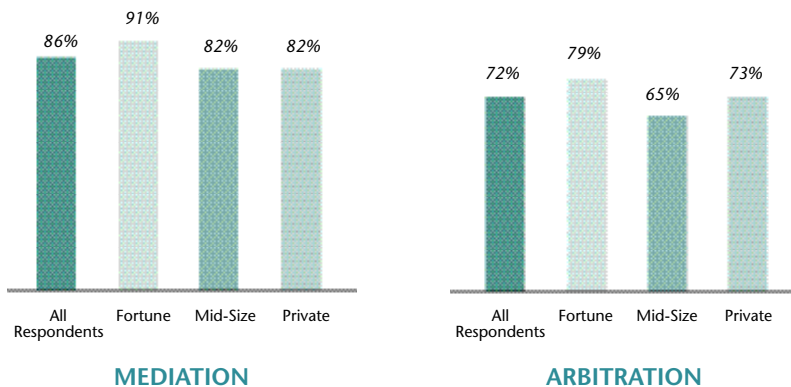


FIGURE 7

### Mediation and Arbitration Usage Comparisons

(Base: Total)

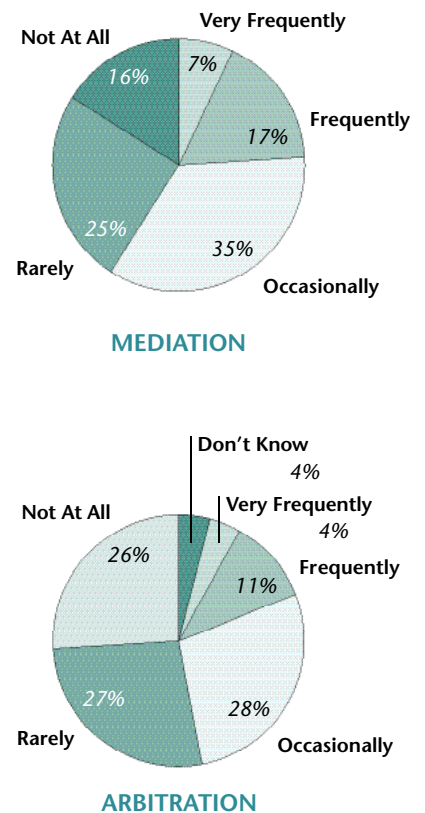
There is greater use of mediation and arbitration among *Fortune* 1000 companies compared to mid-size and private companies.



The frequency of usage of both mediation and arbitration varies. Most companies utilize mediation and arbitration at least occasionally with the frequency of mediation being greater than that of arbitration, due possibly in part to the growing practice of court-mandated, pre-trial mediation (see Figure 8).

Figure 8

### FREQUENCY OF USAGE OF ADR

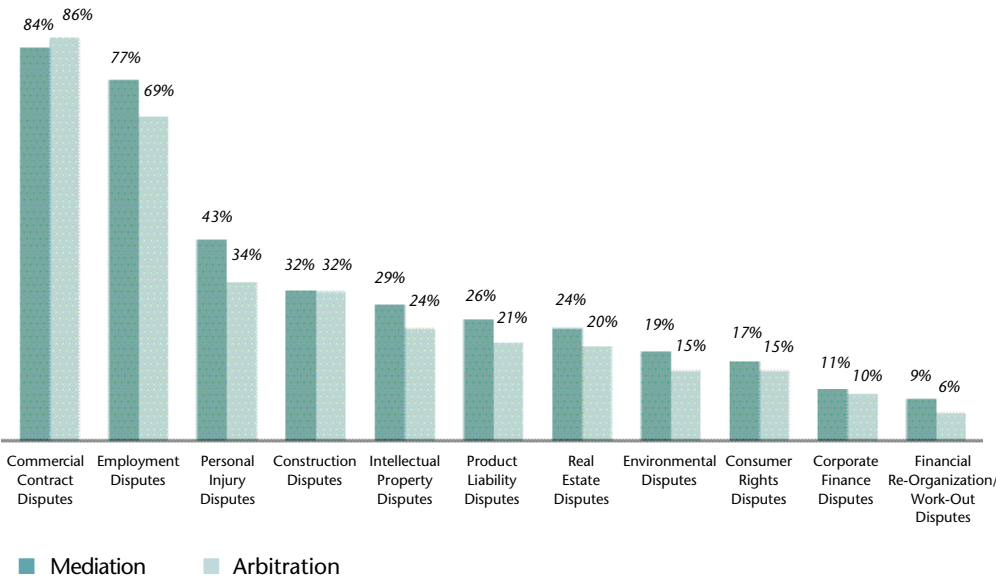


The types of cases for which arbitration and mediation are used tend to be similar and fall primarily into the 11 categories displayed in Figure 9. Mediation and arbitration are used most often in commercial contract disputes and employment disputes, both of which are usually governed by agreements into which ADR provisions have been written. This is also true to a lesser degree of personal injury, construction, intellectual property, product liability, and real estate disputes, all of which are resolved by either arbitration or mediation by at least 20% of the companies surveyed.

FIGURE 9

Types of Disputes in which Mediation or Arbitration are Used

(Base: Use Mediation or Arbitration)



What are the chief reasons for choosing to use mediation and arbitration? The top answer for arbitration – 87% of respondents – was that it was written into contracts, a demonstration of the broad and positive acceptance that arbitration enjoys among participants on both sides of negotiating tables across a wide range of industries and around the world. Other reasons included “saves time” (73%), “saves money” (71%), “has limited discovery” (66%), and “provides a more satisfactory process” (66%).

For mediation, the leading five responses (Table 11) paralleled those for arbitration: “saves money” (91%), “saves time” (84%), “provides a more satisfactory process” (83%), “allows parties to resolve disputes themselves” (81%), and “has limited discovery” (68%) – all characteristics that fuel the steadily growing acceptance of and enthusiasm for ADR procedures (see Table 11).

TABLE 11

## Reasons for Using Mediation and Arbitration

(Base: Use Mediation or Arbitration)

The primary reasons for using mediation or arbitration include saving money and saving time.

	Mediation	Arbitration
Saves money	91%	71%
Saves time	84%	73%
Provides a more satisfactory process	83%	66%
Allows parties to resolve disputes themselves	81%	60%
Has limited discovery	68%	66%
Is court mandated	63%	45%
Uses expertise of mediators/arbitrators	61%	49%
Gives more satisfactory settlements	61%	41%
Preserves good relationships between disputing parties	56%	38%
Is required by contract	54%	87%
Is desired by senior management	48%	37%
Preserves confidentiality	47%	54%
Is a managerial or technically complex dispute	36%	37%
Avoids establishing legal precedents	36%	32%
Provides more durable resolution compared to litigation	31%	25%
Is an international dispute	16%	25%
Became standard practice in industry	14%	21%

Addressing the effectiveness of ADR procedures, a substantial majority of respondents said that they believed that both mediation and arbitration reduced the time needed to resolve disputes (see Figure 10) and lowered the costs of the dispute resolution process itself (i.e., it reduced all costs involved exclusive of judgment or award costs) (see Figure 11).

FIGURE 11

## Effect Mediation and Arbitration Have on Costs to Resolve Disputes Compared to Litigation

(Base: Use Mediation or Arbitration Respectively)<sup>14</sup>

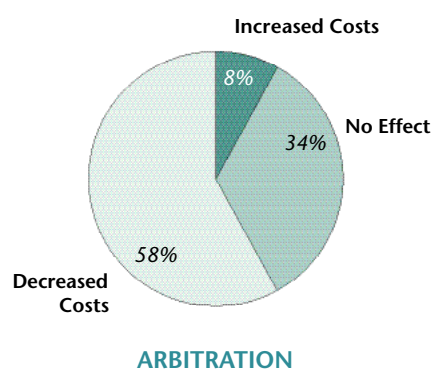
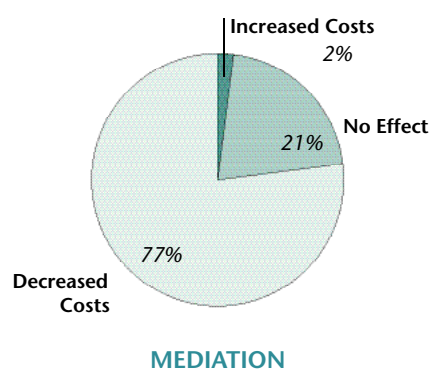
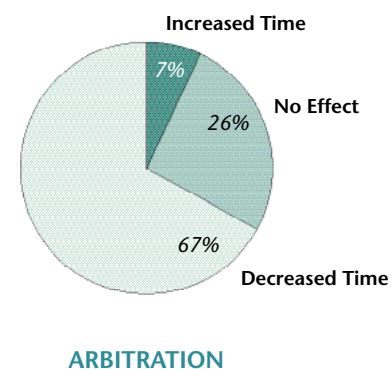
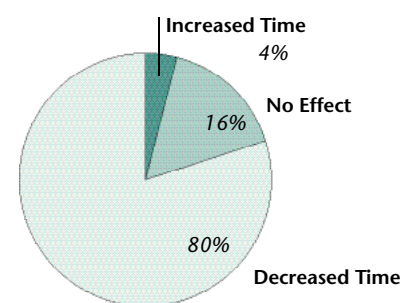


Figure 10

## EFFECT MEDIATION AND ARBITRATION HAVE ON TIME TO RESOLVE DISPUTES COMPARED TO LITIGATION

(Base: Use Mediation or Arbitration Respectively)<sup>13</sup>



<sup>13</sup> Based on those responding

<sup>14</sup> Based on those responding

When asked what effect mediation and arbitration have had on their companies' judgment costs, the respondents were fairly evenly split between responses of "no effect" and "decreased costs," with less than one in 10 saying that he or she thought they increased costs (see Figure 12).

FIGURE 12

### Effect Mediation and Arbitration Have on Judgments/Awards Compared to Litigation for Resolving Disputes

(Base: Use Mediation or Arbitration Respectively)<sup>15</sup>

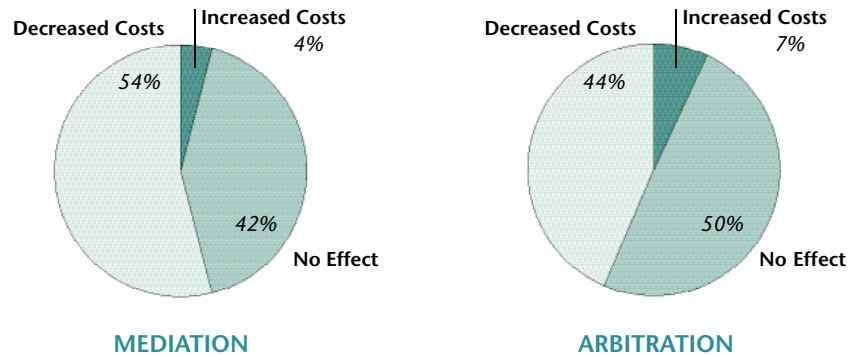
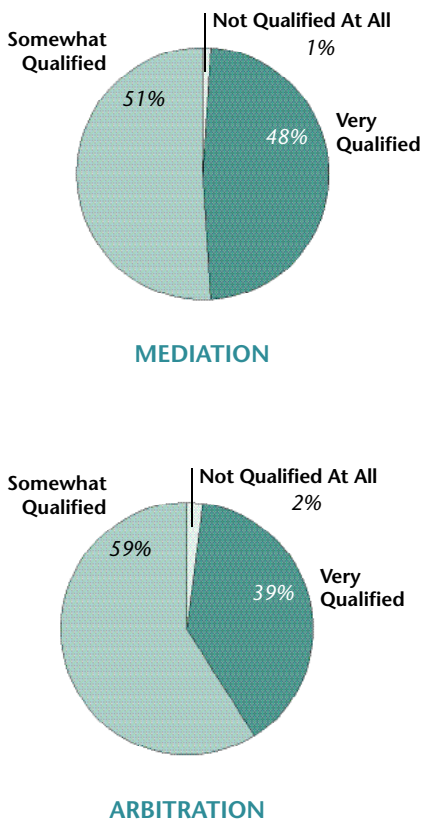


Figure 14

### RATING EXPERIENCE WITH MEDIATORS AND ARBITRATORS

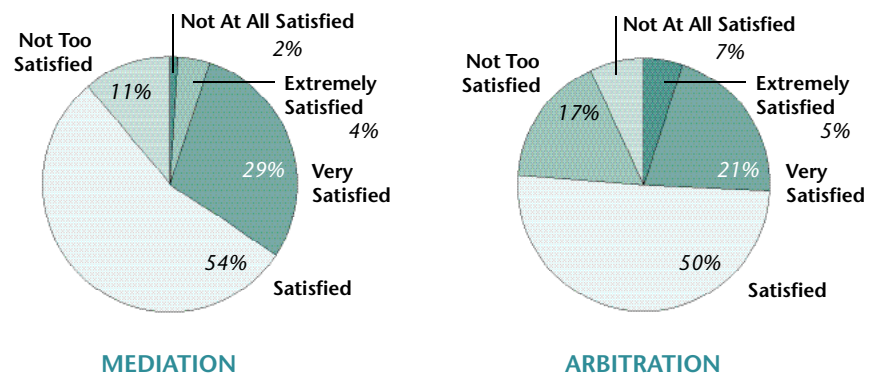
(Base: Use Mediation or Arbitration Respectively)<sup>16</sup>



Qualitatively, the vast majority – 87% and 77% respectively – of companies were satisfied, very satisfied, or extremely satisfied with their recent experiences with both mediation and arbitration (see Figure 13).

FIGURE 13

### Company Satisfaction with Mediation and Arbitration



A higher satisfaction level was reported for mediation, probably because mediation agreements are reached by the parties themselves rather than being imposed by an arbitrator. Similarly, a substantial majority of corporate counsel indicated that they found both mediators and arbitrators to be reasonably well-qualified, with mediators being perceived as more qualified – a difference that may be attributable to the fact that there is a losing party in arbitration (see Figure 14).

<sup>15</sup> Based on those responding

<sup>16</sup> Based on those responding

## Dispute-Wise Conflict Management: Behavior and Attitudes

Among the more interesting pieces of information gathered while conducting this study are data that portray practices and attitudes consistent with “most dispute-wise” behavior. These traits run the gamut from more intensive use of ADR procedures to a conviction that mediation and arbitration do, indeed, reduce costs exclusive of judgments and awards:

- More “most dispute-wise” legal departments have an established policy that favors the use of ADR methods when they are the initiating or defending party in a dispute (Tables 12 and 13).

TABLE 12

### ADR Policy when Company is Initiating Party to a Dispute (Base: Total)

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
Has no company policy	34%	26%	43%	35%
Always tries to move with ADR	10%	15%	7%	8%
Litigates only in cases that it seems appropriate, uses ADR for all others	28%	33%	27%	25%
Litigates first, then moves to ADR for those cases where appropriate	18%	18%	13%	22%
Always litigates	2%	-	5%	2%
Other	7%	9%	5%	6%
Don't know/refused	*	—	—	1%

TABLE 13

### ADR Policy when Company is Defending Party to a Dispute (Base: Total)

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
Has no company policy	35%	29%	42%	35%
Always tries to move with ADR	13%	17%	12%	10%
Litigates only in cases that it seems appropriate, uses ADR for all others	27%	31%	24%	25%
Litigates first, then moves to ADR for those cases where appropriate	15%	17%	12%	17%
Always litigates	2%	1%	4%	2%
Other	7%	5%	6%	10%
Don't know/refused	*	—	—	1%

\* Equals less than 0.5%



- “Most dispute-wise” companies are somewhat more inclined to adopt a “portfolio approach” to their handling of cases. Typical of the portfolio approach is a willingness to take a more global view of the full spectrum of an organization’s disputes – addressing each of them in relation to other disputes in the portfolio with a goal of minimizing risk, cost, time spent, and resources expended (see Table 14).

TABLE 14

### Primary Approach to Handling Disputes (Base: Total)<sup>17</sup>

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
Our primary approach for handling disputes is litigation	6%	1%	7%	8%
We often litigate although sometimes we do use ADR	12%	13%	14%	11%
We look at the whole portfolio of cases and try to manage them in such a way that gets the appropriate results	82%	86%	79%	81%

- Arbitration and mediation are used quite heavily across the board on a fairly even basis although the “most dispute-wise” legal departments tend to utilize both procedures more than those in the “least dispute-wise” group. In total, 17% of the “most dispute-wise” companies indicated very frequent or frequent use of arbitration compared to 11% of those in the “least dispute-wise” group (Table 15). The corresponding figures for mediation (Table 16) were 29% and 22%, respectively.

TABLE 15

### Frequency of Using Arbitration (Base: Total)

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
<b>Very frequently/Frequently</b>	<b>15%</b>	<b>17%</b>	<b>18%</b>	<b>11%</b>
Very frequently	4%	6%	6%	–
Frequently	11%	11%	12%	11%
Occasionally	28%	28%	33%	23%
<b>Rarely/Not at all</b>	<b>53%</b>	<b>51%</b>	<b>46%</b>	<b>61%</b>
Rarely	27%	34%	23%	23%
Not at all	26%	17%	23%	38%
Don't know/refused	4%	4%	3%	5%

<sup>17</sup> Based on those responding



TABLE 16

**Frequency of Using Mediation** (Base: Total)

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
Very frequently/Frequently	24%	29%	22%	22%
Very frequently	7%	9%	6%	6%
Frequently	17%	20%	16%	16%
Occasionally	35%	27%	32%	45%
Rarely /Not at all	41%	44%	46%	33%
Rarely	25%	26%	30%	19%
Not at all	16%	18%	16%	14%
Don't know/refused	—	—	—	—

- Eighty-two percent of the “most dispute-wise” legal departments believe that mediation is more effective in reducing dispute resolution process costs (excluding judgments and awards) than litigation. The perception of arbitration’s ability to lower process costs was uniform across the three groups – an average of 58% expressed a belief that arbitration decreases costs (Table 17).

TABLE 17

**Effect on Costs for Resolving Disputes Compared to Litigation<sup>18</sup>**(Base: Use Mediation or Arbitration Respectively)<sup>19</sup>

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
<b>MEDIATION</b>				
Increased costs	2%	3%	—	4%
No effect	21%	15%	19%	28%
Decreased costs	77%	82%	81%	68%
<b>ARBITRATION</b>				
Increased costs	8%	6%	10%	11%
No effect	34%	37%	32%	32%
Decreased costs	58%	57%	58%	57%

<sup>18</sup> Excluding judgement costs<sup>19</sup> Based on those responding

- Rationales differ greatly about the reasons for using – and therefore about the value of – ADR methods. While there was, for example, a very uniform and high recognition across the entire survey group that mediation saves time and money, 91% of the “most dispute-wise” legal departments expressed the opinion that mediation “provides a more satisfactory process” compared to 74% in the “least dispute-wise” group.

Similar but less extreme differences can be seen in Table 18 for the “gives more satisfactory settlements,” “preserves good relationships between disputing parties,” and “is desired by senior management” responses. Note also that 74% of the “least dispute-wise” found themselves in mediation because of court-mandate compared to 49% of the “most dispute-wise” companies. Table 19 provides a similar snapshot of reasons for using arbitration and reveals parallel differences in perception of value among the respondents.

TABLE 18

## Reasons for Using Mediation (Base: Use Mediation)

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
Saves money	91%	91%	94%	89%
Saves time	84%	85%	84%	81%
Provides a more satisfactory process	83%	91%	84%	74%
Allows parties to resolve disputes themselves	81%	89%	84%	69%
Has limited discovery	68%	66%	74%	65%
Is court mandated	63%	49%	67%	74%
Uses expertise of mediators	61%	60%	61%	61%
Gives more satisfactory settlements	61%	65%	60%	57%
Preserves good relationships between disputing parties	56%	61%	63%	43%
Is required by contract	54%	58%	56%	49%
Is desired by senior management	48%	50%	54%	41%
Preserves confidentiality	47%	53%	56%	34%
Is a managerial or technically complex dispute	36%	42%	37%	30%
Avoids establishing legal precedents	36%	39%	34%	34%
Provides more durable resolution compared to litigation	31%	39%	33%	22%
Is an international dispute	16%	23%	16%	10%
Became standard practice in industry	14%	11%	14%	18%
Other	4%	1%	9%	1%

TABLE 19

**Reasons for Using Arbitration** (Base: Use Arbitration)

	LEVEL OF DISPUTE-WISE BUSINESS MANAGEMENT			
	Total	Most	Moderate	Least
Is required by contract	87%	85%	94%	84%
Saves time	73%	75%	71%	71%
Saves money	71%	69%	71%	71%
Has limited discovery	66%	68%	65%	65%
Provides a more satisfactory process	66%	71%	65%	59%
Allows parties to resolve disputes themselves	60%	60%	61%	57%
Preserves confidentiality	54%	51%	58%	51%
Uses expertise of arbitrators	49%	42%	52%	55%
Is court mandated	45%	39%	45%	55%
Gives more satisfactory settlements	41%	46%	37%	39%
Preserves good relationships between disputing parties	38%	40%	39%	35%
Is desired by senior management	37%	40%	42%	27%
Is a managerial or technically complex dispute	37%	31%	45%	37%
Avoids establishing legal precedents	32%	31%	31%	37%
Provides more durable resolution compared to litigation	25%	32%	23%	18%
Is an international dispute	25%	33%	19%	18%
Became standard practice in industry	21%	14%	24%	29%

## Comparisons to the Cornell Study: A Portrait of Steady Gains for ADR

When Professors David B. Lipsky and Ronald L. Seeber published the 1998 Cornell study, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, they described a scenario in which “...ADR practices are well established in Corporate America, widespread in all industries and for nearly all types of disputes that we considered. Moreover, ADR practice is not haphazard or incidental but rather seems to be integral to a systemic, long-term change in the way corporations resolve disputes. Many corporations see it as a strategic tool for use in all conflicts.”

In designing the current survey, questions were included that built on the earlier research so that results could be better compared with the AAA-sponsored study. The purpose was to see both whether the data collected during this study confirmed the Cornell findings in several areas and whether any new trends or patterns had emerged with respect to ADR usage.

In broad terms, the current study confirms the findings of the Cornell study with respect to the ongoing use of both mediation and arbitration by legal departments of *Fortune* 1000 companies, and it records increases in the use of ADR procedures along with improvement in the perceived qualifications of mediators and arbitrators.

The Cornell survey was based on 606 interviews with leaders of *Fortune* 1000 corporate legal departments, and the comparative data presented in this discussion from the current AAA-sponsored research is based solely on the 101 interviews we conducted with senior legal department representatives of *Fortune* 1000 companies.

The comparison of the usage of arbitration between 1998 and 2003 found in Figure 15 shows an overall pattern of consistent use with most areas being either stable or increasing slightly. There are, however, increases in the usage of arbitration for employment, personal injury, product liability, and intellectual property disputes. Similarly, as Figure 16 indicates, the usage of mediation has edged upward in many categories.

FIGURE 15

## Types of Disputes in which Arbitration is Used

(Base: Fortune Companies that Use Arbitration)

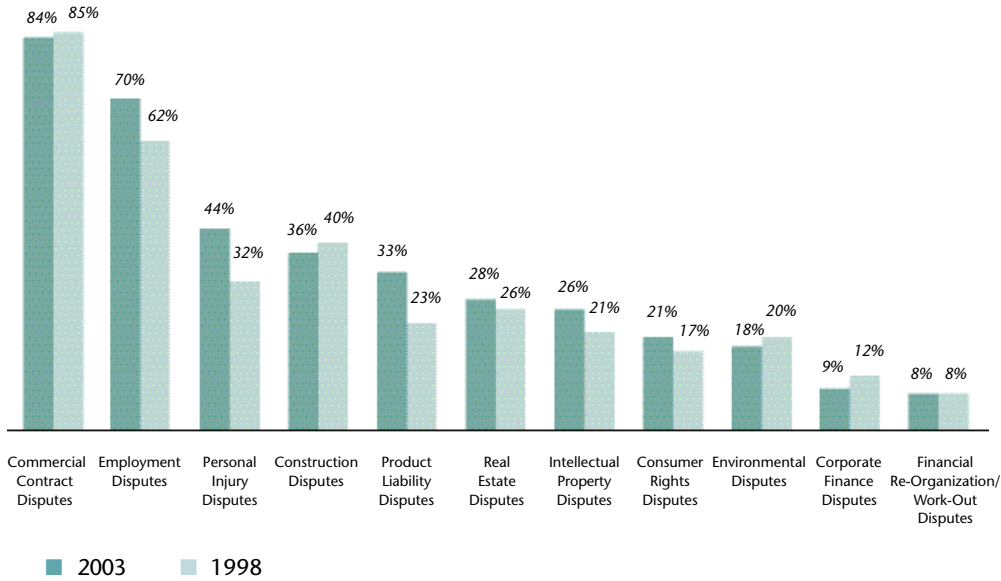
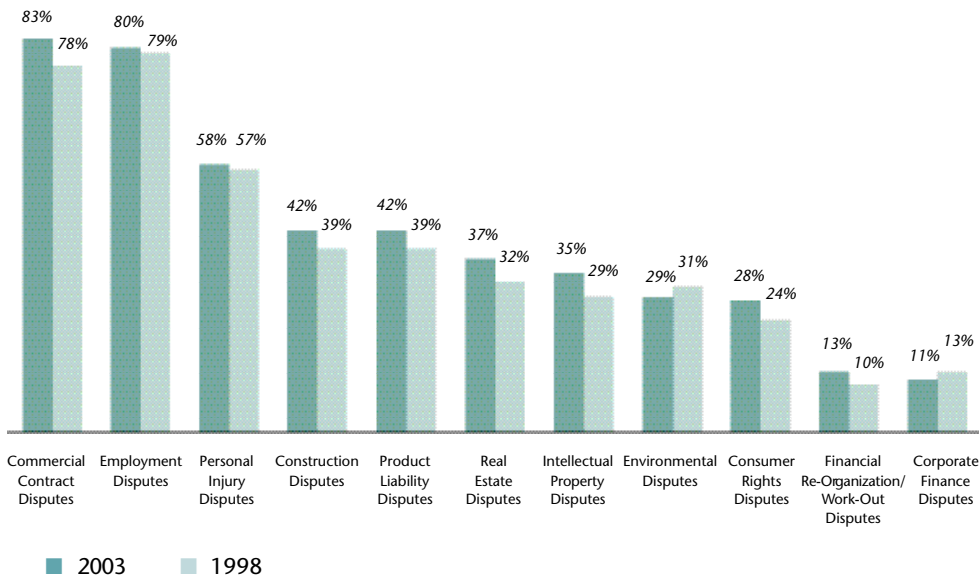


FIGURE 16

## Types of Disputes in which Mediation is Used

(Base: Fortune Companies that Use Mediation)



Among *Fortune* 1000 companies, the reasons for choosing mediation and arbitration have remained fairly consistent over the six-year period. The two areas of change worthy of particular attention in Table 20 are the increased opt-in to mediation through contractual agreements and the growth in court-mandated mediation. Table 5 on page 9 paints a similar picture of the stable and consistent use of arbitration.

**TABLE 20**

### **Trend: Reasons for Using Mediation**

(Base: *Fortune* Companies that Use Mediation)

Among *Fortune* companies, the reasons for using mediation have changed little since the 1998 study. However, in 2003 more *Fortune* companies report increased opt-in to mediation by contractual clauses. They also report increased mediation activity via court mandate.

	2003	1998
Saves money	90%	89%
Saves time	83%	80%
Provides a more satisfactory process	84%	81%
Allows parties to resolve disputes themselves	82%	83%
Has limited discovery	70%	N/A
Is court mandated	73%	63%
Uses expertise of mediators/arbitrators	63%	N/A
Gives more satisfactory settlements	60%	67%
Preserves good relationships between disputing parties	65%	59%
Is required by contract	57%	43%
Is desired by senior management	44%	N/A
Preserves confidentiality	51%	45%
Is a managerial or technically complex dispute	36%	N/A
Avoids establishing legal precedents	39%	44%
Provides more durable resolution compared to litigation	29%	31%
Is an international dispute	17%	15%
Became standard practice in industry	13%	N/A

Lastly, the perceived qualifications of both mediators and arbitrators have shown improvement since the 1998 study (Figures 17 and 18).

FIGURE 17

### Rating Experience with Mediators among *Fortune* Companies

(Base: *Fortune* Companies that Use Mediation)<sup>20</sup>

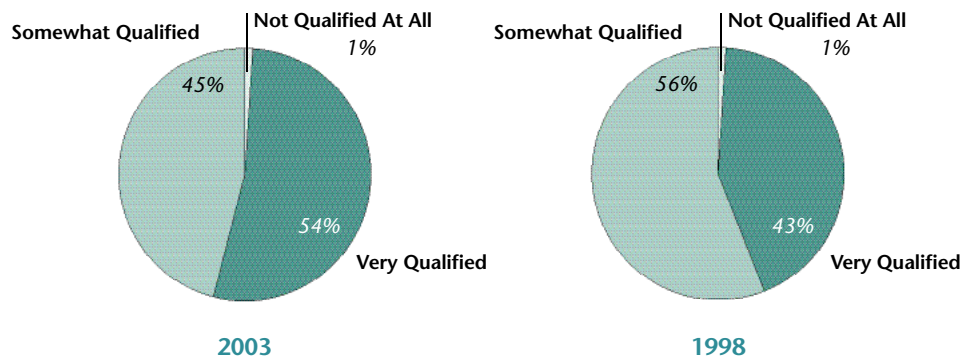
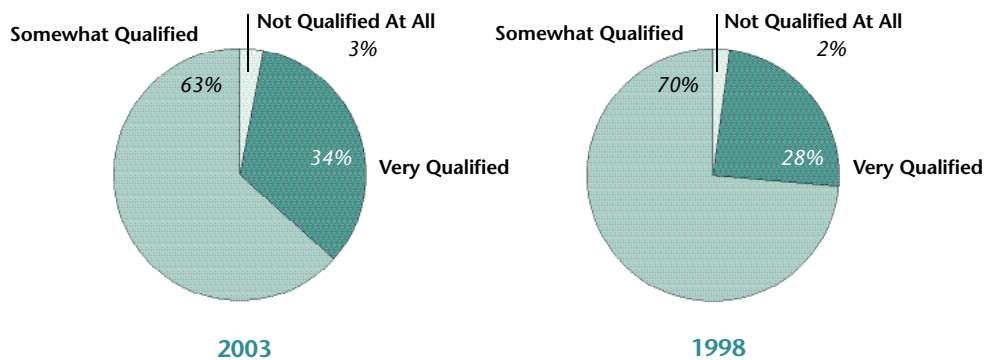


FIGURE 18

### Rating Experience with Arbitrators among *Fortune* Companies

(Base: *Fortune* Companies that Use Arbitration)<sup>21</sup>



<sup>20</sup> Based on those responding

<sup>21</sup> Based on those responding

## Looking into the Future

This research effort is one in a series of planned studies aimed at helping global economies prosper, in part by experiencing the benefits of properly implemented principles of dispute-wise business management. Future efforts will provide additional studies of leading practices in designing and implementing dispute-wise processes.



## Notes

[illegible]

## Notes

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American Arbitration Association  
*Dispute Resolution Services Worldwide*