

# The inside track – how blue-chips are using ADR

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# Introduction

There has been a sea-change in the dispute resolution landscape in England and Wales since the introduction of the Civil Procedure Rules in 1999. Alternative Dispute Resolution (ADR) processes, particularly mediation, are no longer “alternative”. They are firmly established in the range of mainstream dispute resolution techniques in addition to the traditional processes of litigation and arbitration. Whilst many organisations have become both familiar with and sophisticated in using ADR techniques, we wanted to understand just how leading multinational organisations were using ADR in 2007.

The last few years have seen a relatively benign environment for disputes. There have been no major corporate failures on the scale of Enron or Parmalat that characterised the early years of the Millennium. Equity markets have been consistently buoyant. And notwithstanding the incidence of natural catastrophes such as Californian wildfires, UK flooding and European windstorms, the global insurance markets appear to be recovering from the seismic shocks of 9/11 and hurricanes Katrina, Rita and Wilma in 2005.

On the basis that all markets including the disputes market are cyclical – and the credit crunch serves as a timely reminder of this - we believe that now is the time for organisations to take stock of how they use ADR and consider whether any refinements could and should be made in anticipation of a market correction.

Inhouse lawyers dictate the way in which organisations conduct disputes. They decide whether disputes are handled proactively or reactively. They decide whether ADR processes are used to achieve certainty in disputes, to deliver constructive ways of managing conflict and above all savings in legal costs and management time. We have reviewed how twenty one leading multinational organisations use ADR currently and through this study share the practical experience and learning of leading inhouse lawyers. We hope this study allows organisations to benchmark themselves against peers and competitors and, more importantly, to review their own state of readiness.

We wish to thank the twenty one organisations who supported our research for being generous with their time and with their insights.

Arup	Morgan Stanley	Shell
BP	Northrop Grumman	Standard Chartered Bank
Fujitsu	PricewaterhouseCoopers	UBS
GE	QinetiQ	Vodafone
ICI	Reuters	Virgin
KPMG	Royal Bank of Scotland	Yell
Merrill Lynch	Royal & SunAlliance	Zurich

# Executive summary

We interviewed general counsel and inhouse disputes lawyers at twenty one organisations across a range of industry sectors. These organisations had a combined turnover in excess of £400 billion.

The twenty one organisations we surveyed adopted four distinct approaches in their attitudes to and use of ADR. We characterised seven organisations as Embedded Users of ADR, six organisations as Ad Hoc Users, six organisations as Negotiators and two organisations as Non-Users. No industry sector particularly favoured using ADR above others and within industry sectors organisations showed widely divergent approaches.

## Embedded Users

The use of ADR played a central role in the dispute resolution culture of the Embedded Users. They either used Early Case Assessment processes (project management tools) to ensure that disputes were managed in a systematic and consistent way or less formal internal guidelines for inhouse lawyers to achieve the same objective. Embedded Users used ADR processes (particularly mediation) more frequently than other organisations; they used them earlier in the life of disputes than other organisations and saw value even in unsuccessful mediations which represented opportunities to learn about their opponents. The Embedded Users reported the highest skill levels in conducting ADR processes among their inhouse lawyers. They were also more likely to generate metrics on ADR and their disputes portfolio as a whole to monitor how effectively they were using ADR.

The key benefit for all this effort - Embedded Users achieved greater savings in external legal costs and in management time spent on dispute resolution. They also enjoyed the most constructive relationships with their external dispute resolution lawyers, taking positive steps to align the approach of their external dispute resolution lawyers on ADR with their own views.

## Ad Hoc Users

The Ad Hoc Users generally held positive views of ADR processes but considered that a consistent approach to ADR use within their disputes portfolio was either unworkable or unnecessary. They valued flexibility in their dispute resolution options highly, generally using ADR less than the Embedded Users and somewhat later in the life of disputes.

When mediations were unsuccessful, Ad Hoc Users were more likely to report that this had a negative effect on their organisation's view of ADR. Among all the organisations surveyed, the Ad Hoc Users were most likely to be concerned whether external dispute resolution lawyers were acting in their best interests when considering the use of ADR. Several wished that they had insisted that ADR was attempted earlier in the life of disputes and had challenged advice from external lawyers to delay mediation.

## The Negotiators

Six organisations adopted an ad hoc approach to ADR use but were distinguished from the Ad Hoc Users by their very strong preference for conducting direct negotiations as the primary settlement tool. This often reflected the culture of their business personnel as professional deal makers and negotiators. As a result, the Negotiators, who were typically defendants in disputes, considered mediation to be a formal process to be attempted only when negotiation had failed.

The Negotiators tended to use mediation significantly less often than Embedded Users and usually only when litigation was under way and well advanced. They relied on external lawyers to propose ADR and to guide them through it. Consequently they perceived little or no tension with their external dispute resolution lawyers when it came to discussing when ADR was appropriate.

### **Non-Users**

Two organisations did not use ADR processes at all. For one organisation this was the result of a positive corporate decision following a damaging historical experience in arbitration. This Non-User's approach to ADR was being actively reviewed. The other Non-User simply was not using ADR despite an active litigation portfolio in the English Courts. The Non-Users reported the least favourable experiences of external lawyers in relation to ADR, including some active opposition from external lawyers to a suggestion of mediation.

### **What type of ADR was being undertaken, where and by whom?**

Mediation was overwhelmingly the most frequently used ADR process and most widely used across different jurisdictions. Organisations reported frequent and highly sophisticated use of ADR in the US and England and Wales, with declining levels of uptake and understanding moving East and South from North West Europe across the EMEA region.

Many organisations reported a significant increase in the “strategic” use of ADR in England and the US, with parties attending mediations only to seek information or comply with court orders, rather than attending with a mandate to settle.

Only six of the twenty one organisations (mostly Embedded Users) reported that they had undertaken mediations without the assistance of external lawyers. Six organisations also included trained mediators in their inhouse legal teams. Just under half of the organisations undertook no training at all for their inhouse legal teams in ADR processes.

### **Engagement with Business Units, Counterparties and Senior Management**

Embedded Users considered that the delivery of training by the inhouse lawyers to the business units which included education in ADR processes was an important part of their role. Ad Hoc Users and Negotiators were sceptical as to the value of training business unit colleagues other than when specific disputes arose.

Organisations experienced little resistance from counterparties in England and Wales and the US when ADR was proposed. Indeed the role of ADR in the English civil justice system was observed by some organisations as encouraging unmeritorious claimants who would previously have been deterred from bringing claims by the cost of litigation.

The twenty one organisations reported that their approach to ADR was very much shaped by the General Counsel and inhouse disputes lawyers. Senior management looked to them to manage disputes efficiently and economically.



### **ADR/mediation clauses – a challenge to conventional wisdom**

Most participants surveyed – including some Embedded Users - believed that ADR/mediation clauses were unnecessary in their contracts, which is directly contrary to the received wisdom on how organisations can use ADR more effectively. The priority for most organisations with a focus on disputes in EMEA was to retain maximum flexibility in their dispute resolution options at the point of dispute. Conversely those organisations with substantial exposure to disputes in the US were more likely to endorse compulsory ADR/mediation clauses. This indicated that the burden of US litigation drives organisations to compromise on dispute resolution flexibility in favour of compelling counterparties to use ADR and mitigate litigation costs.

### **The ADR Community and Institutions**

Embedded Users supported the ADR community and institutions through membership and were clear about the important education and training role that these bodies played. Conversely Ad Hoc Users, Negotiators and Non-Users remain to be persuaded what the ADR institutions can do for them before they part with membership pounds or dollars.

### **And for the future?**

20% of the organisations we surveyed were actively reviewing how they used ADR. The development of internal best practice guidance for inhouse lawyers to embed ADR use in managing disputes was the most commonly identified objective. Embedded Users perceived that on-going training for their inhouse lawyers and continuing to educate counterparties were important tasks.

## Methodology

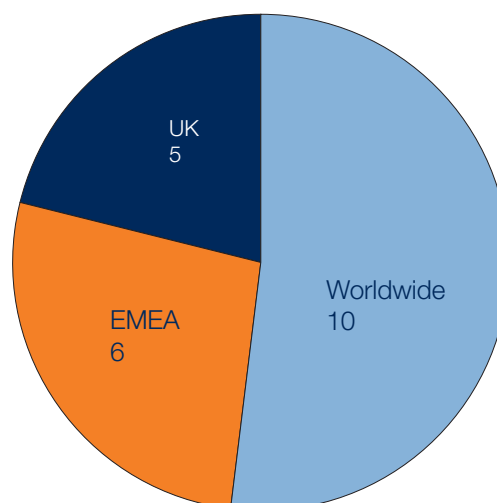
Our objective was straightforward : to find out exactly how twenty one leading international organisations were using ADR in practice, what worked, what did not work and why. The organisations spanned a range of industry sectors including professional services, insurance, banking, energy, defence, manufacturing/industrial and technology media and telecommunications. These organisations had a combined turnover in excess of £400 billion.

The individuals we interviewed were all inhouse lawyers. Three were senior lawyers embedded in business units within very large multinationals, around half handled exclusively contentious work, and nine were General Counsel. As such the insights and experiences of our interviewees varied significantly, reflecting the perspectives of those who dealt exclusively with contentious matters and those for whom oversight of disputes was just one task among a wider role.

Unsurprisingly the organisations operated different models for arranging their legal departments. Some organisations operated centralised legal functions in one location or a few locations with regional responsibility. Others with trading operations in many jurisdictions were heavily decentralised in their approach, relying to a greater extent on lawyers “embedded” within discrete business units around the globe who could draw on inhouse experts in the legal team at the corporate centre. The size of the organisations’ legal departments varied enormously from a few tens of lawyers to several hundreds of lawyers. In practice, however, almost all those we spoke to reported that management of material disputes was centred in the hands of a relatively small number of lawyers, even in those organisations reporting the highest dispute volumes<sup>1</sup>.

Our interviewees covered three geographic regions of responsibility: ten had a worldwide role, six covered Europe, Middle East and Asia (EMEA), and five had domestic responsibility for the UK, although this included conduct of UK based disputes with international counterparties.

Geographic regions of responsibility



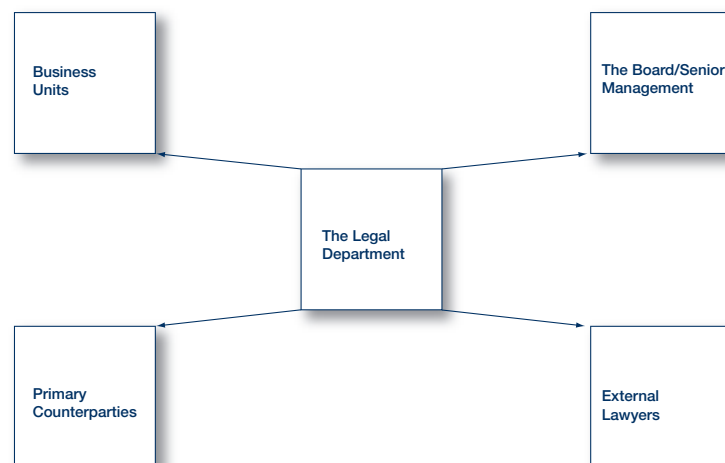
<sup>1</sup>. It should be noted as an exception to this statement that the general insurers interviewed followed the traditional model of a separate claims department and legal department, with claims handlers enjoying considerable autonomy in conducting significant volumes of disputes.



Almost all those interviewed reported that their organisation adopted a materiality threshold in the disputes they managed. In around half the organisations this was expressly defined by financial value, reputational risk, or the possibility of setting a precedent. The remainder had no defined criteria yet remarked that similar issues would apply in recognising whether a dispute was recognised as material and required close oversight by the inhouse legal team. In short, every organisation had its own clear idea on what constituted a material dispute for its business and it was these material disputes that were the primary focus of our discussions on how ADR was used.

We posed a series of questions to our interviewees framed around the five stakeholders we anticipated would impact on an organisation's approach to and use of ADR. Our hypothesis was that the legal department lay at the heart of how any organisation used ADR and that the interaction between the legal department and the organisation's business units, its board/senior management, its primary counterparties and its external counsel would shape the overall approach. The organisations we interviewed overwhelmingly endorsed that model, with only the general insurers identifying their claims departments as another stakeholder and one other organisation identifying a small cadre of business unit personnel performing a quasi-legal role on certain projects.

### Stakeholders to ADR success



Due to the differing roles and geographical responsibilities of those interviewed, we focussed on the practical experience and learning of those individuals and their inhouse teams. Where meaningful quantitative analysis of responses was possible it has been undertaken.

# Attitudes to ADR

- The twenty one organisations we surveyed revealed four distinct approaches in their attitudes to and use of ADR : Embedded Users, Ad Hoc Users, Negotiators and Non-Users.
- No industry sector particularly favoured ADR and within industry sectors organisations showed a wide range of approaches.
- The key differentiator to an organisation's behaviour was the attitude of the inhouse legal team to ADR.

We asked participants to describe how their organisations viewed ADR and how, in practice, their legal departments went about using and promoting ADR to resolve disputes. All but one of the organisations surveyed reported that they were either in favour or strongly in favour of ADR as a tool for resolving business disputes. All the inhouse lawyers we interviewed understood the benefits of ADR in terms of time and cost savings and the potential to achieve both certainty in disputes and more constructive outcomes.

What the legal departments did varied widely. The attitudes and behaviour reported by the organisations identified them as falling into four types, which we characterise in this study as Embedded Users, Ad Hoc Users, Negotiators and Non-Users<sup>2</sup>.

Our research revealed that the industry sector in which a particular organisation operated was irrelevant to its approach to using ADR. Equally sophisticated thinking and behaviour was reported by (for example) investment banks, manufacturing/industrial organisations and service sector organisations. Within individual industry sectors significantly different approaches were reported. Indeed no one industry sector set a benchmark to which other sectors should aspire.

What was crucial was the extent to which an organisation's inhouse legal team was trained in ADR, was motivated to use it and was convinced of its benefits. It was clear that even within large organisations and large inhouse legal teams, senior inhouse lawyers who were highly skilled in ADR disciplines were able to effect positive changes to the way their organisations used ADR. Although most of the organisations did not have a formally designated "ADR Champion" to lead their ADR efforts, in practice the organisations that showed the characteristics of Embedded Users all had one or more individual inhouse lawyers performing that leadership role.

One of the significant challenges to inhouse lawyers that clearly emerged was ensuring that their willingness to use ADR was translated into corresponding behaviour of the organisation when disputes arose. This required inhouse legal teams to find effective ways of communicating with and educating business unit colleagues, counterparties and external counsel taking into account the structure and control systems of their organisation. The ability of the legal department to influence the behaviour of very large organisations was heavily influenced by each organisation's own personality and culture. One size does not fit all when inhouse lawyers seek to establish the use of ADR to manage conflict.

*2. The categories are not rigidly defined. Not every organisation displayed every feature of the category to which it was assigned but displayed at least a significant number of identifying characteristics.*

## The Embedded Users

- ADR plays a central role in their dispute resolution culture, using Early Case Assessment processes or less formal internal guidelines to achieve a consistent approach to dispute management with ADR at its heart.
- Embedded Users used ADR processes more frequently and earlier in the life of disputes than other organisations leading to savings in legal costs and management time devoted to disputes.
- They saw value in mediations even when settlement was not achieved.
- They reported the highest skill levels in ADR processes in their inhouse teams and were more likely to generate metrics on ADR use and their disputes portfolio as a whole.
- Embedded Users enjoyed the most constructive relationships with their external dispute resolution lawyers.

Seven of the twenty one organisations described how ADR played a central role in their dispute resolution systems and culture. We categorised these organisations as Embedded Users. These organisations either used a formal or semi-formal early case assessment process (“ECA”) or through other means had established that ADR was proactively used whenever it was possible subject to the limitations of contractually agreed dispute resolution mechanisms and counterparty engagement. The rationale for this approach was simple. Embedded Users were clear that using ADR processes consistently and at as early a stage in a dispute as was practicable led directly to savings in legal costs and reduced impact on their organisations in terms of diverting management resources. They also saw ADR processes as a means to manage and even enhance damaged relationships with counterparties and to take control of the outcome of disputes, avoiding the inherent uncertainty of litigation and arbitration.

The Embedded Users reported the highest skill levels in conducting ADR processes in terms of their inhouse legal teams with the majority of the Embedded Users counting one or more trained mediators amongst their ranks. All reported that members of their legal team had undergone training in ADR processes, usually to a high degree. The Embedded Users were more likely to collect data on ADR use and generate metrics to monitor ADR use in terms of case tracking, litigation spend, types of ADR process used, mediator performance and structured de-briefing and dissemination of lessons learned.

The Embedded Users reported constructive and collaborative relationships with their external dispute resolution lawyers when it came to using ADR. The nature of this relationship and the steps taken by Embedded Users to establish it are discussed in detail in this report in the section “Stakeholders to ADR Success”.

The key behaviour of the Embedded Users was that they saw real value in attempting mediation at an early stage in the life of a dispute.

“We generally lean towards having ADR and mediation at an early stage because we see no downside to it. Even if it's not successful, there's nothing preventing you from having another mediation further down the road. It allows parties to prepare earlier and it focuses management much earlier. Senior management don't focus on the issues until they are actually confronted with them - attending the mediation focuses their attention.”

European Legal Director, Manufacturing/Industrial

The reasons for doing so were clear. If proper assessments of the case were undertaken and settlements entered into, the Embedded Users saved legal costs, saved management time and achieved certainty of outcome for the organisation. The early assessment and settlement also allowed disputes to be resolved before disputing parties became polarised and entrenched in their views, which typically occurred when proceedings commenced.

"I would argue that there is no bad experience in mediation. Even if you don't have a settlement, it still forced the parties to focus on the issues. You've had a chance to hear the other side, you've a chance to prepare, and I think just for that purpose alone it can't be a wasted day"

European Legal Director, Industrial/Manufacturing

The appetite of the Embedded Users to use ADR earlier in the life of a dispute than other organisations surveyed, was tempered by the recognition that some mediations attempted at an early stage would naturally be unsuccessful but that unsuccessful mediations were not wasted opportunities. The Embedded Users were unanimous in their view that all mediations were valuable learning experiences.

"Even in the mediations where we haven't concluded a settlement on the day, it has always been a helpful thing for us, we have always learned more about the case and about our counterparts and it has usually led to narrowing of the gap which then enables the gap to be bridged."

Head of Worldwide Litigation, Investment Bank

The Embedded Users fell clearly into two camps, those that used an ECA process and those that believed they had succeeded in putting ADR on the their legal department's agenda sufficiently without needing to use an ECA tool. Organisations in both of these sub-categories demonstrated broadly equivalent attitudes to using ADR.

### ECA Users

Early Case Assessment systems are formal or semi-formal project management-based tools designed to ensure that for each dispute the facts and legal position are investigated at an early stage with appropriate input from internal or external experts, that the likely costs and duration of the dispute are analysed in a systematic way and that a considered choice of dispute resolution method or methods is made as early as possible.

"ECA really is nothing more than saying I want to make sure that each of our cases is getting an early look and we have a plan for resolution and that plan for resolution includes a careful assessment of whether mediation or other early settlement techniques will be appropriate. I think that's what it boils down to and there's a thousand ways to get to that."

Senior Litigation Counsel, Manufacturing/Industrial

The rationale for an ECA process is to ensure that a portfolio of disputes is handled in a systematic and consistent way. It can help to ensure that inhouse lawyers in different jurisdictions or focussing on different business streams nevertheless implement the organisation's preferred approach to dispute management including using ADR .

"All of us as good litigators like to think that we analyse facts early and assess thoroughly the dispute resolution options but that's not the reality. There will be cases that simply because of other burdens - time and resource issues - are allowed to slide. So the process is in place essentially as a forcing mechanism."

Senior Litigation Counsel, Manufacturing/Industrial

One of the principal concerns expressed by Embedded Users who did not adopt an ECA process was the perceived burden of complying with a formal or semi-formal process, in particular that unnecessary or time consuming procedural steps would deflect attention from substantive investigation of disputes. In fact, those organisations that used ECA processes reported a trend away from overly formal processes and towards simplification to ensure easier and more consistent use. Even those organisations with a strong process-driven and performance-monitoring culture recognised the need to use ECA processes flexibly or risk internal resistance. They reported that they were developing streamlined processes to ensure that inhouse lawyers and

case handlers took appropriate action at what the organisation regarded as the critical points.

“ECA is just a concept. It’s like mediation for example. It doesn’t matter how you do it, under whose rules. The whole point is that you do it.”

Senior Litigation Counsel, Manufacturing/Industrial

### Non-ECA Embedded Users

So what of those Embedded Users who did not use an ECA process. Perhaps the key feature of these organisations was within their legal departments they had already established a highly skilled inhouse legal team that was culturally attuned to analysing disputes at an early stage and sought to use ADR whenever it was practically possible. How did they achieve this? In one case it was simply through long experience and regular use of ADR since its infancy in the UK. Other organisations reported specific techniques that they found effective in establishing a culture of ADR use.

“One of our “core values” as a team is to advise our business colleagues and senior management about settlement opportunities and the commercial reality of litigation – the worst thing you can do as an inhouse legal function is allow a case to meander its way through a process to the door of the Court and then initiate a settlement discussion.”

Head of Worldwide Litigation, Investment Bank

Non-ECA Embedded Users reported using internal policy statements or guidelines, in some cases endorsed by the General Counsel, to emphasise to inhouse teams the need to consider ADR as a default option. Indeed one organisation encouraged its inhouse lawyers to challenge external counsel to explain why disputes were not suitable for ADR. Organisations reinforced these guidelines or policy statements by regular reporting of disputes which included specific discussion as to what steps had been taken to consider ADR in a particular matter.

“There are guidelines which all our inhouse lawyers are expected to observe around the world. The guidelines say that you should start with the assumption that mediation is something that is desirable.”

Senior Litigation Counsel, Investment Bank

The principal argument raised by Embedded Users and other organisations in the survey against an ECA process was that it was not justified due to the size of the legal team handling litigation inhouse or by the number of material disputes conducted within the geographical area of responsibility of those interviewed. Although participants were variously responsible for disputes worldwide, within EMEA and within the UK only, many of those whose focus was on conducting disputes in the UK and EMEA simply did not feel that they had a sufficient number of material disputes on their roster to merit introducing an ECA process. The economic benefits that could be achieved through greater consistency of case handling using an ECA process were not perceived as sufficient to justify the investment required to establish and operate the ECA process. Conversely those participants dealing with a portfolio of US domestic litigation in addition to non-US disputes were more disposed to see value in the ECA process even if they currently did not use one.

The difference in approach between the ECA and Non-ECA Embedded Users came down to the following factors:

- The number of material disputes handled by the inhouse litigation function;
- Whether those disputes included US domestic litigation;
- Whether the culture of the organisation saw value in the standardisation and “forcing” effect of the ECA process or whether less formal guidelines or policies to promote ADR use was more culturally acceptable to the inhouse legal teams and sufficient to achieve the desired behaviour patterns.

## The Ad Hoc Users

- Ad Hoc Users generally held positive views of ADR processes but considered a consistent approach to ADR use was unworkable or unnecessary in their organisations.
- They valued flexibility in their dispute resolution options highly and generally used ADR somewhat less than the Embedded Users.
- Ad Hoc Users were more likely to report that unsuccessful mediations had a negative effect on the organisation's view of ADR.
- Ad Hoc Users were more likely to be concerned whether external dispute resolution lawyers were acting in their best interests when considering the use of ADR.

Six of the twenty one organisations reported a positive view on ADR and mediation in particular but described themselves as having no consistent approach to using ADR in handling their disputes. These Ad Hoc Users reported some of the highest and lowest volumes of disputes amongst the organisations interviewed. In some cases the volume of disputes was itself cited as the reason which made a consistent approach to ADR use either unworkable (where it was very high) or unnecessary (where it was low).

“We don’t have a group-wide policy on ADR because we don’t think one size fits all. We tend to approach all our disputes on the particular merits, circumstances, counterparties and the business unit involved. So we would not want to have a diktat on ADR use. We tend to prefer flexibility.”

Managing Counsel for Dispute Resolution, Multinational

One multinational indicated that it did not think it was practicable for a centralised legal function to exert control over the organisation given the diverse jurisdictions in which it operated, nor did it wish to fetter its choice of dispute resolution tools. This reflected a clear cultural preference within that organisation since another participant in the same industry sector fell clearly into the Embedded User category, using a mandatory ECA process in some jurisdictions and reporting that it had achieved equivalent alignment to ADR use in jurisdictions where the ECA process was not mandatory.

“We have not got sufficient disputes on the roster to justify using an ECA process. I don’t think the business would applaud me for putting in place a system which could have a cost impact when actually there is no need for it.”

General Counsel, Manufacturing/Industrial

In the case of organisations reporting lower volumes of disputes an ad hoc approach was preferred. Just as some Non-ECA Embedded Users were cautious of the perceived additional burden of using an ECA process, so were Ad Hoc Users

While a number of the Ad Hoc Users reported individuals with high ADR skill levels amongst their inhouse legal teams, they overall self-reported lower skill levels in conducting ADR processes than the Embedded Users. Ad Hoc Users were also more likely to find that a negative experience at mediation affected the organisation's view of the value in the process. This was in notable contrast to the views expressed by Embedded Users who typically viewed even unsuccessful mediations as worthwhile learning experiences.

As we describe below, whilst Ad Hoc Users generally reported positive experiences of the way in which external dispute resolution lawyers conducted ADR processes, they were also the category of organisations most likely to suspect that external lawyers were not proposing ADR as early as they could have done and allowing cases to run on in the interests of their own fee income.

Interestingly three of the seven Ad Hoc Users were actively reviewing their

organisation's approach to using ADR and the means of encouraging ADR use in a more systematic way. These included the development and implementation of internal best practice guidance on dispute handling and the use of ADR. They were in some cases receptive to the concept of an ECA process, but indicated that there were strong cultural barriers within their organisations to be overcome.

The Ad Hoc Users revealed some creative and pragmatic thinking in relation to ADR use. One organisation which reported generally low volumes of material disputes nevertheless identified a particular product line which accounted for a high volume of low value claims. Recognising that such claims followed a standard pattern, the legal team had devised a bespoke methodology for handling these claims efficiently. A questionnaire was sent to prospective claimants to assist them in compiling information necessary to pursue their claim. In practice the effect of this process was to discourage unmeritorious claimants who could not deal with causation issues or prove their alleged losses. It also provided an opportunity for the organisation to re-engage with its customers, discuss how the organisation could overcome the problems and begin rebuilding relationships.

## The Negotiators

- The Negotiators reported positive views of ADR but generally considered mediation to be a formal process to be attempted only when negotiation had failed.
- Typically these organisations were defendants in litigation/arbitration and were often concerned about sending negative messages through agreeing to early mediation.
- They tended to use mediation only when litigation was well advanced and therefore perceived less tension with their external dispute resolution lawyers over the timing of ADR.
- Some Negotiators reported difficulties in persuading commercial personnel to commit time to mediation.

Six of the twenty one organisations were also ad hoc in their approach to using ADR/mediation but were marked out from the Ad Hoc Users by their very strong preference for use of direct negotiation as the primary means of resolving disputes outside of litigation and arbitration. That is not to say that other organisations surveyed did not use direct negotiation as a settlement tool – every one of the twenty one organisations we interviewed did – or that the Negotiators did not use ADR.

What was distinctive about the Negotiators was that these organisations perceived less intrinsic value in ADR processes (particularly mediation), despite reporting generally positive attitudes towards and experiences of mediation.

“I don't see ADR as anything other than a tool that you can use for resolving disputes to achieve as much certainty as to the likely outcome and the likely cost as you can. I think you can run negotiation, ADR processes, and litigation/arbitration altogether or you can move seamlessly from one to another and back again.”

Group Vice President, Legal, Manufacturing/Industrial

A similar perspective from another Negotiator identified ADR as just one choice on the dispute resolution menu.

“Our general approach to ADR is that we are very open minded towards it. I think that our experience is that it is one of a number of tools that we use to resolve disputes.”

Head of Litigation, EMEA, Investment Bank

The strong preference of these organisations for using direct negotiation reflected the profile of their commercial personnel in the business units generating the disputes. These commercial personnel were often themselves



highly skilled negotiators and deal makers who were capable of resolving most if not all disputes through negotiation. This behaviour correlated strongly with a view towards ADR processes and mediation as a “formal” process to be embarked upon where negotiations had failed.

“I am not sure where we have had valuable relationships at stake that we’ve ever allowed a dispute to escalate to the extent that we have gone to mediation. Typically we would try to resolve it without a process as formal as mediation. And in respect of mediation, once we had got to that stage the relationship is gone.”

General Counsel, Service Sector

The views expressed by the Negotiators were strongly influenced by the fact that these organisations were much more frequently defendants than claimants and therefore had firm views as to the messages they wished to send out to counterparties. Whilst supportive of ADR in the right circumstances, it was important to a number of these organisations not to be seen to be in a hurry to settle claims. The Negotiators consistently reported that increasing use of ADR in the UK was in fact encouraging unmeritorious claimants to try their luck where previously such claimants would have been deterred by the high costs of embarking upon litigation.

The inhouse legal teams amongst the Negotiators included many highly experienced litigators but tended to self-report lower skill levels than Embedded Users when it came to conducting ADR processes. Only one of the Negotiators reported having an accredited mediator amongst the ranks of its inhouse legal team.

The Negotiators reported generally positive experiences of external dispute resolution lawyers and did not perceive that their interests were in conflict with their external dispute resolution lawyers when it came to the use of and time for ADR. As we discuss below, the Negotiators were typically using ADR less often than the Ad Hoc Users and generally later in the dispute process. The expectations of the Negotiators and their external dispute resolution lawyers as to when ADR should be attempted were quite closely aligned.

One of the Negotiators made particular reference to the difficulties of securing the time commitment and engagement of their business colleagues which is so critical to the mediation process. It was a challenge to persuade business colleagues that the time invested in the mediation process was worthwhile when long periods of time at the mediation were spent waiting for the mediator and these difficulties were reinforced when the mediation was not ultimately successful.

“Our experience has been that business people find the ADR process irritating sometimes because it is a set piece day where they end up sitting around, out of the office, not being able to do what they do, and they get impatient. It is an extraordinary waste of time for the principals to be there at the beginning of it when nothing really happens until later in the afternoon. It is not a good PR exercise for mediation in some ways.”

Head of Litigation, EMEA, Investment Bank

Of course these very difficulties were acknowledged by the Embedded Users who perceived as a key benefit of mediation that it forced senior business personnel to devote time to resolving disputes rather than delaying and allowing litigation or arbitration to gather momentum and have costs escalate. Other Negotiators encountered little difficulty obtaining the engagement of their commercial colleagues who quickly grasped and engaged with the mediation process in particular.

The conclusion we draw from these divergent experiences is that parties, their advisers and mediators may need to work harder on ADR/mediation process control, communication and expectation management. Put simply, the mediation process needs time to be effective and to give parties an opportunity to understand that there are two sides to every argument, but that time must be spent wisely, with the parties' understanding.

## The Non-Users

- The Non-Users reported no use of ADR processes at all, in one case through positive choice.
- They reported the least favourable experiences of external lawyers in relation to ADR, including active opposition to its use.

Two of the twenty one organisations we interviewed reported a markedly different approach to the other organisations surveyed. Neither of the Non-Users used any form of ADR process at all, although for very different reasons.

"We had a very bad experience with arbitration in the US some years ago which cost a lot of money, took a lot of time and a lot of resource from senior management. The decision was taken at that time that we bundle arbitration together with ADR and that we just did not want to use these processes. We have a policy that does not allow us to put any ADR clauses in our agreements."

Senior Litigation Counsel, EMEA

Whilst this Non-User organisation was not alone in expressing dissatisfaction with arbitration (as we discuss later in this study, many of the organisations surveyed were troubled by the increasing costs and delay in arbitration), it was the only organisation which had extended that antipathy towards ADR processes including mediation. This was so even though the Non-User organisation reported a strong anti-litigation culture given that the business was focussed on valued long term trading relationships.

This sceptical Non-User was, however, taking active steps to re-evaluate its approach to dispute resolution processes and educating its inhouse legal team as to the possibilities offered by ADR processes.

The other Non-User organisation reported a rather different perspective in that it was not opposed to using ADR and viewed ADR quite positively. However, despite a current portfolio of commercial litigation in England, this Non-User reported that it simply was not using any type of ADR process nor was it currently considering doing so.

One of the most striking points to emerge from discussions with the Non-Users was that they both reported some of the few unfavourable experiences of external lawyers recommending and using ADR in the context of English High Court litigation. The sceptical Non-User reported positive resistance from external solicitors to a suggestion of mediation whereas the passive Non-User remarked that none of the external solicitors it was using had raised ADR across a range of different commercial disputes. This contrasted most starkly with the experiences of the Embedded Users, who specifically instructed external lawyers whose attitudes towards and skills in ADR processes were aligned with the legal team of the Embedded Users.

## Types and frequency of ADR use

- Mediation was overwhelmingly the process of choice and the most transportable ADR process across jurisdictions.
- Embedded Users used ADR processes at a consistently earlier stage of disputes than Ad Hoc Users or Negotiators.
- Many organisations reported a significant increase in “strategic” use of ADR in England and the US, with parties attending mediations without a mandate to settle.

### The Organisations

Having explored attitudes towards ADR, it was essential to find out whether the participants were “walking the walk” when it came to using ADR. Given the differing territorial reach of the individuals interviewed it was difficult to generate directly comparable statistics but some clear trends emerged. Those participants with a heavy docket of domestic US litigation naturally reported the highest use of mediation by volume, particularly under the influence of mandatory court-annexed mediation schemes in many US jurisdictions. ADR usage was also high in England and Wales where the Courts’ encouragement for ADR was cited as a key driver. The story outside of the US and the UK was much patchier. The organisations we interviewed reported some encouraging green shoots in terms of ADR uptake in continental Europe after many years of germination but an environment outside of the US and North West Europe that was still relatively poorly educated about ADR and often suspicious of the process. One Embedded User summarised a trend that reflected the experiences of many:

“The further south and the further east you travel from London and Paris, the worse it gets. Business people have no patience with the mediation process. They see their lawyers as there only to win the case for them in court.”

General Counsel, EMEA, Financial Services



## Mediation

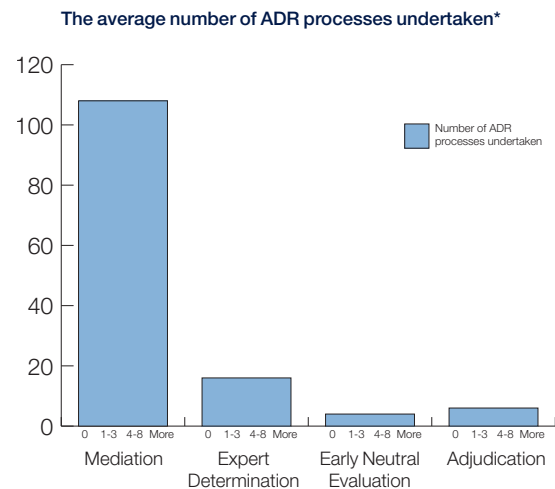
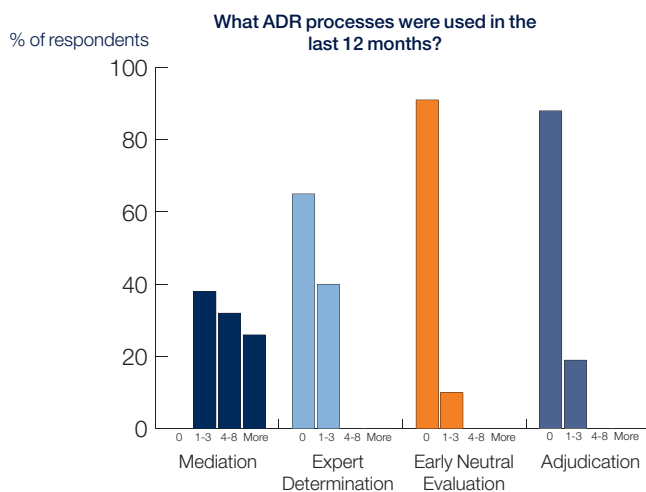
All those interviewed other than the Non-Users rated mediation as the process most frequently used. 55% of the organisations had used mediation at least four to eight times in approximately the last twelve months and some organisations reported far higher numbers than that. All but one of the Embedded Users were at the higher end of the usage figures (four to eight mediations or more) and were materially higher than most Ad Hoc Users and Negotiators, the majority of whom had typically undertaken only one to three mediations over the same period.

It was clear, however, that across industry sectors and geographic boundaries, mediation was and is overwhelmingly the most popular ADR process and the most transportable process across jurisdictions and cultures. Within industry sectors no clear trends could be discerned – some organisations used almost exclusively mediation and others used a range of ADR processes albeit that processes other than mediation were used with lower frequency.

Almost all commented that the Woolf Reforms and the Civil Procedure Rules had precipitated a seismic shift in ADR usage in the English civil justice system.

**“We all like to complain about the high cost of litigation in the UK but one of the things that sells it as a forum is the fact that there is this presumption in favour of mediation for dispute resolution.”**

**Senior Litigation Counsel, Manufacturing/Industrial**



\*Delegates were asked to score process use in a range and we have assumed averages of 2, 6 and 10 respectively for each category

## Expert determination

Expert determination was the second most used ADR process but the level of uptake was far below the level of mediation use. 36% of the organisations had used expert determination between one and three times in the last 12 months spread evenly across Embedded Users, Ad Hoc Users and Negotiators. Expert determination was not universally liked and was notably unpopular when attempted in a non-binding format which, it was reported, tended only to polarise and entrench views. One of the few positive views on expert determination was expressed in the context of resolving technical disputes in the manufacturing sector.

**“When it is a question of interpreting the specification you can get a neutral to take a look at it who is an expert. We have found that that’s a very useful way of dealing with an issue – thus letting the parties get on with completing the contract”.**

**European Legal Director, Manufacturing/Industrial**

On balance however, the views of expert determination were negative.

“Having some expert sit there and tell us what the answer is and that’s that, doesn’t tend to be very attractive”

Office of the General Counsel, Service Sector

### Other ADR Processes

Very little early neutral evaluation (ENE) was used outside the USA with only 9% of those interviewed having used ENE between one and three times in the last year. Adjudication was also infrequently utilised with just 14% of those interviewed having used it in the last 12 months. It was acknowledged that adjudication was a process specific to the UK construction sector so this limited its use. Only one Embedded User indicated that it had attempted to use an adjudication process in a long term contract outside of a UK construction industry context.

### Commercial negotiation

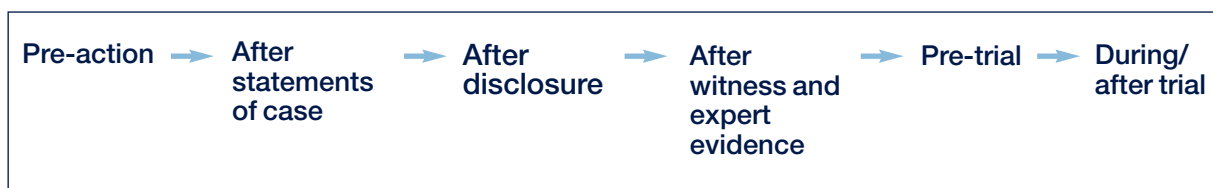
Most organisations treated conventional negotiation as outside the ADR sphere, yet it was still their most commonly used dispute resolution tool. Indeed commercial negotiation was said to have been attempted in almost all cases before ADR was explored. The Negotiators favoured negotiation above other ADR processes which they perceived to be more formal and regarded mediation as a process to be attempted only when negotiations had failed. One of the Negotiators explained how it typically approached the settlement process:

“Senior executive settlement combined with litigation usually is our most common method of resolution. One seeks to give people a very, very difficult time through the litigation process with a view to having another part of your organisation talk sweet reason to them.”

Group Vice President, Legal, Manufacturing/Industrial

### The time for ADR

It was of course important to explore not just what ADR processes the organisations were undertaking but when they were undertaking them. Participants were asked when, by reference to six typical stages in the life of an English High Court dispute, they and their external lawyers attempted ADR or recommended that it be attempted. The six phases were as follows:



The Embedded Users expressed a consistent preference to attempt ADR at an earlier stage to other organisations and their preferences would drive the dialogue with their external lawyers on timing. They were realistic as to the fact that not every dispute would be ripe for mediation pre-action nor that it would succeed. But since the Embedded Users viewed even unsuccessful mediations as worthwhile learning experiences, they had no qualms about trying mediation again when the dispute had matured. They were not dissuaded from consistently advocating early mediation given the potential upside in terms of costs savings.

“I think mediation is something that you talk about in the context of the case pre-action but quite often it isn’t the right point in time. If you have a very wide divergence of views you pick the middle point and you don’t know whether you’re winning or losing.”

Group Vice President, Legal, Manufacturing/Industrial

A small number of the Ad Hoc Users and Negotiators also reported that mediation was usually discussed with external lawyers at the pre-action stage. Those same organisations typically reported much lower levels of mediation use. Other Ad Hoc Users and Negotiators were clear as to the obvious advantages of early resolution in terms of cost savings but were concerned about the risk of not being able to reach an appropriate settlement.

“I’ve looked back at a couple of cases I have had, one with UK lawyers and the other with US lawyers and thought I should perhaps have shouted a bit louder about mediation.”

Senior Litigation Lawyer, Financial Services

However, more than one of the Ad Hoc Users and Negotiators had been persuaded to defer a mediation and, with the benefit of hindsight, wished that they had challenged more robustly advice from external lawyers to delay the process.

The majority of Ad Hoc Users and Negotiators reported that their external lawyers recommended they attempt ADR at a later stage of a dispute once proceedings were well under way. Unsurprisingly the most common timing was after exchange of statements of case given that the parties would at that stage of proceedings be obliged to discuss the matter with the Court at the first Case Management Conference. Mediation post disclosure was also common, with the recognition that by that stage any “smoking guns” should have been identified, but that the opportunity had been lost to avoid what was often the most costly phase of the action, particularly given escalating costs of electronic disclosure. Other Ad Hoc Users and Negotiators typically waited even longer with 15% of organisations reporting that external lawyers usually recommended ADR/mediation after exchange of witness and expert evidence.

“Pre-pleadings the settlement method tends to be a negotiation and it’s only after that you look to a third party to help.”

Head of Litigation, EMEA, Investment Bank

For the Negotiators the factor that clearly influenced them in concluding that it was appropriate for mediation to be attempted later than other types of users was their preference for and expectation of pursuing direct discussion with counterparties. This was coupled with the view that mediation was itself a more formal process closely associated with the progress of litigation through the Courts.

### Strategic Use of ADR

Almost all the organisations with the exception of the Non-Users had encountered mediation being used “strategically” in the sense of appearing to be undertaken solely to comply with a Court order to attempt ADR or for the purposes of gathering information. It was also clear that this was an increasing trend, particularly in the US and in England and Wales, reflecting the sophistication of ADR use in those jurisdictions.

The complaints about strategic behaviour were many. Some felt that opponents had simply been “jumping through the hoops” to satisfy a Court’s order to attempt ADR. Others had been on the receiving end of blatant “fishing expeditions”.

“One thing we are seeing more of recently is people just going through the motions without any real mandate to settle, just to find out what they can.”

Head of Worldwide Litigation, Investment Bank

A small number of organisations acknowledged that they too used mediation with little or any expectation of settlement but that this could be necessary to gain access to the right decision makers and actually assist the prospects for settlement.

“There is an extent to which we use ADR tactically ourselves, certainly in order to send a message or perhaps get a level of engagement from the other side which has been missing hitherto. I think we see it as a valuable tool to use for more than one end sometimes”.

Legal Director, TMT Sector

Other organisations echoed this sentiment, recognising that even “strategic” mediations had the ability to produce positive results and resolve the dispute.

“No doubt people have used the mediation process as a means of gleaning information but ultimately it led to a resolution.”

Senior Litigation Counsel, EMEA, Investment Bank

Whilst the majority of the organisations regarded this behaviour pragmatically, a number of Ad Hoc Users and Negotiators reported reacting adversely to a wasted mediation with a decreased appetite for the process. In contrast the Embedded Users were clear that even those mediations that had failed were still valuable opportunities to learn about the opponents that they faced and to prepare their own case and assess thoroughly their prospects and strategy.

Ultimately the fine line between strategic use of the mediation process which had the possibility to yield a settlement or progress towards settlement and cynical abuse of the process was pithily summarised.

“The difference is going with no intention to settle and going with no belief it is going to settle”.

Head of Litigation, EMEA, Investment Bank



## Roles, skills and ADR training

- Only six of the twenty one organisations reported that they had undertaken mediations without the assistance of external lawyers.
- Six of the twenty one organisations included trained mediators in their inhouse legal teams.
- Just under half of the organisations undertook no training for their inhouse legal teams in ADR processes.

### The role played by inhouse lawyers in ADR processes

Having explored the types and frequency of ADR process used by the twenty one organisations it was important to understand the role that inhouse lawyers at those organisations played in the ADR processes (usually mediation) that they attended.

Just six of the twenty one organisations reported that their inhouse lawyers had attended mediations as lead advocates without the assistance of external lawyers (although on larger, more complex disputes they would usually attend with external lawyers). Four of those six organisations were Embedded Users and two were Ad Hoc Users. Other organisations suggested that they would consider not using external lawyers for a mediation but had not in fact done so.

All the remaining organisations always attended mediations with external lawyers, although many of the participants had played active roles in, for example, presenting their organisation's case at an opening joint meeting. Most said they would rely on external lawyers to draft written mediation submissions for the mediation, advise and prepare them for the mediation day and attend the mediation as lead advocates. A significant number of participants volunteered that they did not find it helpful to have Counsel (barristers) present at the mediation and that this was more likely to lead to confrontational opening sessions and further polarisation of positions.

### How did these organisations assess their own ADR skills?

Participants were asked to rate the skills of their inhouse legal teams in conducting ADR processes by reference to the following scale:

Skill level			
1	non-existent skills	4	confident in conducting processes as legal representative
2	some familiarity but not confident	5	highly skilled (trained mediator, other specialist training, or extensive practical experience)
3	confident in the basic processes but rely on external lawyers for guidance		

The range of responses varied widely. Nine of the twenty one organisations rated their inhouse team as having skills at either a 4 or a 5. The majority of these were Embedded Users. Interestingly almost twice as many organisations rated themselves as either 4 or 5 as had in fact undertaken a mediation as lead advocate without the assistance of external lawyers, suggesting that the

nature of the disputes under consideration were of sufficient size and complexity that external lawyers would have been instructed in any event.

Four organisations rated the skills of their inhouse legal team at 2. The majority rated themselves as “*somewhere between a 3 and a 4*”, with the average rating for the twenty one organisations being 3.7. Those organisations with inhouse lawyers in the US typically reported that their US colleagues were, if not more highly skilled, certainly more experienced given the volumes of disputes and consequently mediations.

Other trends observed were that those organisations that included specialist litigators in their inhouse teams reported higher skill levels, while lawyers that were “embedded” in business units were generally assessed as having somewhat lower skills in ADR processes, usually relying on the expertise of the inhouse litigation specialists in corporate or regional centres.

### **What training had the inhouse lawyers undertaken?**

The picture painted by the twenty one organisations of the ADR-related training that their inhouse lawyers had received varied very widely. Six of the twenty one organisations reported that they had trained mediators among their ranks (three Embedded Users, two Ad Hoc Users and one Negotiator). Just over half of the organisations spread across all four categories of users had had inhouse lawyers undertake training offered by external providers, either ADR providers or law firms.

Just under half of the organisations reported that their inhouse lawyers undertook no specific ADR training, relying on their experience from private practice and “on the job” experience. Indeed a number of Ad Hoc Users and Negotiators who undertook no other training considered that “on the job” training was the most valuable. Three Ad Hoc Users and one Non-User were, however, reviewing the training that was provided in the future.

# Incentives to use ADR

- While many organisations appraised inhouse lawyer performance taking into account effective use of ADR, only one incentivised individual inhouse lawyers financially to use ADR processes.
- Overwhelmingly the costs of litigation or arbitration were borne directly or indirectly by the business unit generating the dispute, so cost savings through settlement went straight to the bottom line of that business unit.
- Five of the Embedded Users had volunteered to bear the costs of an ADR process to encourage a counterparty to engage, but this was exclusively where the counterparties lacked the financial means to share costs in the usual way.

In order to test whether the cultural alignment of an organisation in terms of its view of ADR translated to active use of ADR in practice, we explored with participants the extent to which inhouse lawyers and business units needed to be encouraged to use ADR through incentives.

## Incentivising inhouse lawyers

Those surveyed were asked whether personal incentives existed to encourage members of their legal department to use ADR processes. This approach has historically been associated with inhouse lawyers or claims handlers managing a high volume of low value disputes to incentivise attempts to settle disputes at an earlier stage. We explored whether personal incentives operated by way of formal appraisal targets or bonus-linked criteria.

Almost all the organisations said that they did not operate an incentive scheme in such a direct way but many reported that a qualitative appraisal was conducted which would take account of an individual inhouse lawyer's approach to disputes and whether budget targets had been met. Performance was to a degree measured by how much money they had spent or saved but almost all made clear that the focus was on an assessment of outcomes and not particularly on the process used to achieve that outcome:

"We are appraised by performance and there is a bonus element for excellence and achieving good results at mediation would be one factor but it is not a specifically targeted factor."

Head of Worldwide Litigation, Investment Bank

Only one of the organisations we spoke to operated a system whereby individual inhouse lawyers were given personal financial incentives linked directly to dispute resolution process choices:

"I manage my team in terms of the cost profile of a piece of litigation and that's quite an effective tool: Here are your targets – if you hit them you get X, if you overachieve you get Y, if you don't make target, it can affect your annual bonus."

General Counsel, Manufacturing/Industrial

It was reported that such a system could be "hit and miss", however. The risk of placing a direct link between inhouse lawyers' remuneration and external legal costs was that inhouse lawyers might decide to retain elements of work inhouse in a bid to make external costs savings, diverting their time from other tasks or other disputes which the organisation considered more important. Other concerns included the risk of encouraging settlement at the wrong time or on the wrong terms simply to get the matter off the individual inhouse lawyer's docket. It was recognised that there could be a place for linking ADR use with personal financial performance, particularly where an organisation

wished to alter its behaviour pattern in connection with a particular category of disputes (typically where there was a volume of claims).

“If we decided that as a policy we needed to up from X% to Y% per annum the number of disputes mediated, incentivising our claims handlers financially would be a good idea.”

UK General Counsel, Financial Services

### Incentivising Business Units

When it came to responsibility for the costs of dispute handling, the organisations we surveyed adopted a near uniform approach with the costs of litigation borne by the business unit that generated the dispute, rather than through any central accounting arrangements. To that extent the business units were all indirectly incentivised to settle disputes earlier. The practical effect of this was summarised neatly.

“The business unit leaders will be personally incentivised to hit their year end target so if they are faced with a choice of a dispute costing £50,000 in a mediation but costing £2 million at litigation, then that will hit the bottom line.”

General Counsel, Manufacturing/Industrial

### Incentivising Counterparties

Five of the twenty one organisations had in very limited circumstances agreed to bear the costs of a mediation process in order to encourage a counterparty to engage in the process. All five of the organisations that had done so were Embedded Users, although a number of Ad Hoc Users and Negotiators had considered the possibility. In one case, the resources committed by the Embedded User had been “significant”. Even for the Embedded Users, the proportion of mediations where costs were funded to incentivise counterparty engagement was less than 5% of the mediations entered into overall.

For those that did agree to bear the costs of a counterparty in mediation (in practice the mediator’s fees and venue expenses), the reasons given were either that:

- the counterparty was an individual of limited means; or
- the counterparty had limited knowledge of the mediation process and was therefore reluctant to incur its own costs in participating in an unfamiliar process.

The Embedded Users recognised, however, that funding the mediation process was not without risks. It could impact on the seriousness with which the counterparty engaged in the process. It could also alter the dynamics of the mediation process in a harmful way.

“You have got to be careful because paying for the mediator can create an imbalance within the process which doesn’t necessarily help because neutrality is so very important.”

Head of Worldwide Litigation, Investment Bank

For those participants who had never agreed to bear the mediation costs of a counterparty, the following was a typical response.

“If the counterparty is not even willing to pay half the cost of a mediator, are we going to have a successful mediation? It seems to me that they are not particularly interested, and we don’t just throw money away.”

Senior Litigation Lawyer, EMEA, Investment Bank

# ADR Metrics

- Only a minority of organisations generated metrics which recorded the use of an ADR process and the majority felt that the time and effort of doing so was not worthwhile.
- Less than 25% of the organisations kept any records on mediator use or performance despite the absence of any standardised accreditation or quality assurance for mediators.
- The preferred means of information exchange was informal networking amongst inhouse lawyers within an organisation, with heavy reliance placed on external lawyers for mediator recommendations.

We asked participants whether they generated any metrics on ADR use either standalone or as part of a broader case-tracking or dispute management system. Of the twenty one organisations we surveyed:

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8 operated a case-tracking system requiring regular data gathering by the inhouse lawyers, usually for the purpose of reporting material disputes to the General Counsel or other senior management.

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7 monitored litigation spend in a systematic way through databases.

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7 operated a formal process of analysing “lessons learned” from disputes and disseminating those lessons within the business. This process rarely focussed on the dispute resolution method – whether a case had been resolved by negotiation, an ADR process or a judgment – and was typically directed to the business operational issues that generated the dispute.

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5 generated metrics in which they analysed the type of ADR process that had been used. A consistent response from those that did not do so was that it was unnecessary.

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5 maintained records on mediators that they used.

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The numbers of organisations generating ADR specific or related metrics was low. The explanation tendered was that many organisations simply had insufficient disputes on their docket to merit spending the time and effort generating metrics that were perceived to have little value. Other organisations reported that their inhouse legal teams were sufficiently small and close-knit that a regular exchange of views and discussion of ADR use took place in any event with no need to record that information.

The traditional rationale for generating ADR metrics as a means of persuading an organisation of the wisdom of pursuing an ADR route in favour of litigation or arbitration was challenged by Embedded Users that had already established a strongly pro-ADR culture.

“We don’t need to be persuaded about ADR – we know the benefits of it and here in England it is part of the fabric of the litigation process, so it’s a “no brainer” as far as we are concerned.”

Head of Worldwide Litigation, Investment Bank

Other Embedded Users identified a difference in transatlantic cultural approaches, which resonated with many of the UK-based personnel we interviewed.

“This is probably a bit Anglo-Saxon and informal - we have computer systems and databases from which ADR metrics can be pulled but do we do it as an American corporate might? No, because our team is a relatively small group of people and I have oversight of everything that is going on.”

Office of the General Counsel, Service Sector

Perhaps the most surprising aspect of the metrics discussion was the low proportion of organisations – less than 25% – that recorded any information on mediators they had used or mediator performance. Given the absence of any independent overarching body overseeing accreditation and training or assessing mediator performance in the UK, we would have expected more of the organisations we surveyed to have captured data on this crucial aspect. In fact most relied on word of mouth referrals or experience sharing and on recommendations from their external lawyers. Only some of those surveyed knew whether their external law firms generated metrics on mediator performance.

The percentage of organisations generating ADR metrics – on average just 30% – was notably lower than the percentage of US corporates doing so as reported through recent research by the CPR Institute. In CPR's study 48% of US corporates surveyed reported that they kept ADR metrics whereas 10% of external US law firms reported that they generated ADR metrics<sup>3</sup>. Whilst the burden of domestic US litigation no doubt accounts for much of the discrepancy, we suspect that more widespread understanding and use of ECA processes (which can include some kind of measurement system to monitor compliance) in the US is also a factor.

3. *The CPR Survey on Alternative Dispute Resolution Trends, 2007.*

# Stakeholders to ADR success

Having analysed in detail how the legal departments of these twenty one organisations operated, we explored how the inhouse lawyers interacted with the other four stakeholders that we anticipated would impact on ADR usage: the business units, external lawyers, counterparties and the Board/senior management.

## Business units

- **Embedded Users considered that the delivery of training to the business units which included an introduction to ADR was an important part of their role.**
- **Ad Hoc Users and Negotiators were sceptical as to the value of training business unit personnel other than when specific disputes arose.**

We asked the organisations to explain how their inhouse lawyers interacted with their internal clients – the business units – in relation to using ADR. A number of the organisations explained the important role played by “embedded lawyers” in their business units who inevitably had a much more direct relationship with the internal commercial clients. Indeed some of the Embedded Users that operated a decentralised business model found this arrangement essential to help educate the business units about the dispute resolution processes. Other organisations reported specific non-legal personnel who were regularly engaged in the conduct of disputes and therefore were familiar with ADR processes. Most organisations indicated that business personnel might at best have heard of mediation but otherwise have little understanding of the process.

Several of the Embedded Users had their most highly skilled inhouse lawyers actively engaged in providing training to business colleagues as well as to colleagues in the legal department. Training in ADR processes was typically just one component in a wider dispute resolution training programme which sought to demonstrate the benefits of settlement over resolution through litigation or arbitration and teach ADR process skills in conjunction with negotiation skills.

“The education aspect is very important because early case assessment and early dispute resolution do not come in a void. One of the most important missions of the legal department is to train the business people. If there is a low expectation of a problem arising then you tune your training to whatever the business situation is, but we don’t sit in a litigation free world.”

**General Counsel, EMEA, Financial Services**

However, Embedded Users reported that executing the training mission was not an easy task for the legal department to achieve. It required a range of techniques and real perseverance.

“It is a problem to communicate effectively with the business. We have a huge intranet, we have a legal newsletter, we put on travelling presentations – we’ve tried all those methods. It’s something you’ve got to work at constantly. Direct presentations are the most effective.”

**Group Legal Director, Service Sector**

In contrast to those Embedded Users, many of the organisations reported that they did not have the time, the resources or in some cases the portfolio of disputes to merit greater ADR related training. The Negotiators in particular



saw little benefit in attempting to train business colleagues in dispute resolution including ADR processes in the abstract, preferring to do so as required in the event that disputes arose.

“There will be little appetite for us to go out on a big educating spree for people who haven’t had a dispute for the last ten years and are hoping not to have one for the next ten years.”

**Managing Counsel for Dispute Resolution, Multinational**

Some organisations reported that their inhouse lawyers had experienced resistance from their business unit clients to using ADR. This, it transpired, was largely due to the mistaken assumption that ADR/mediation was another type of formal legal process that was expensive and slow. Some of the Negotiators also reported difficulties in persuading their internal clients – who were skilled negotiators and deal makers – how mediation could assist where direct negotiation had not succeeded. However, most organisations found that they were “knocking at an open door” when they suggested mediation and that business colleagues tended to defer to advice from their inhouse legal team.

“In terms of convincing the business, they are all sensible and they all want to sort it out as quickly as they possibly can. If we say you are going to have to give up a day for a mediation but actually we might get through it all, then they are generally open to that.”

**Senior Litigation Counsel, EMEA, Investment Bank**

The insurers reported that the business model of claims departments staffed substantially by non-lawyer claims handlers gave rise to its own challenges in using ADR. The inhouse lawyers at both insurers were actively engaged with claims department colleagues to promote ADR/mediation use.

## External lawyers

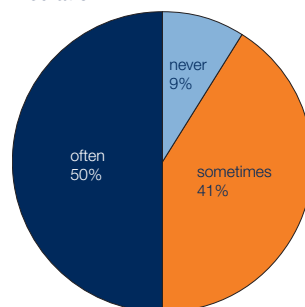
- There is a clear correlation between the attitude of an organisation towards ADR and its experience with external lawyers.
- Embedded Users took positive steps to ensure collaborative relationships with external lawyers and reaped the benefits, although they sought even greater commitment to early ADR use.
- Ad Hoc Users were more likely to question the motivation of external lawyers when ADR was delayed or not suggested.
- Negotiators relied heavily on external lawyers both to suggest ADR and to guide them through the process.
- Non-Users did not receive recommendations from their external lawyers to use ADR and faced active resistance when they suggested it.

We asked participants to describe their experiences of external lawyers in recommending the use of ADR in the absence of a contractually specified process and their support during the ADR process. Did the organisations propose ADR or did this come from their external lawyers? Which types of ADR processes were usually under discussion? The broad range of responses indicated a generally positive assessment of the capabilities of external lawyers. However, a number of specific issues arose depending on the organisation's own attitude and approach towards ADR. What appears to happen is that external lawyers align their approach to ADR to reflect the approach of their clients. Consequently those organisations that required their external lawyers to approach ADR as they did – the Embedded Users – reported significantly better experiences in practice of working with external lawyers than the other organisations.

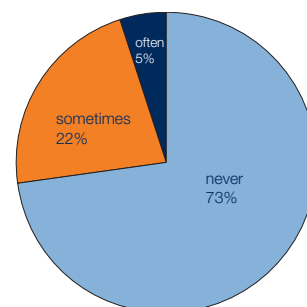
The ADR process undertaken as a result of the discussion with or advice from external lawyers was overwhelmingly mediation. 91% of participants said that external lawyers raised it with them either “sometimes” or “often”. Expert determination had been suggested by external lawyers to around half the organisations, bespoke ADR processes discussed with around 40% of organisations and Early Neutral Evaluation considered with just 25% of organisations.

### Process recommendations from external lawyers

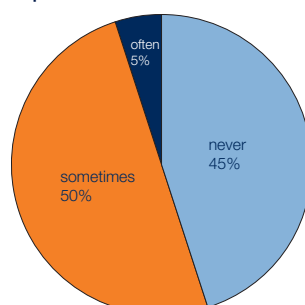
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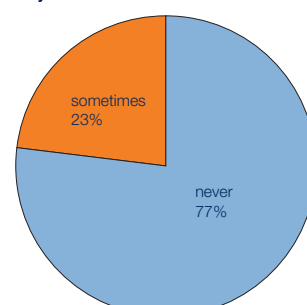
ENE:



Expert Determination:



Adjudication:



## Experience of the Embedded Users

The Embedded Users were all clear that external lawyers did not “advise” them on ADR processes – the consideration of which process to use and when it would be most effective was a collaborative dialogue between the inhouse lawyer and the external lawyer, pooling their shared experience to make the judgment.

“Virtually all of our outside counsel understand very well the multitude of ADR techniques. It is more unusual for them to be promoting the idea of using ADR at an early stage. Sometimes we have a better sense of where the business people are in terms of the willingness to negotiate an outcome and so we are closer to deciding whether or not mediation is a good idea, particularly early on in the case.”

Senior Litigation Counsel, Manufacturing/Industrial

There was an almost universal recognition among the Embedded Users that external lawyers were experienced in the use of ADR processes and made a positive contribution to the process. This acknowledgment was, however, tempered by the suggestion that external lawyers could and should be doing more to suggest ADR solutions at an earlier stage in disputes, reflecting a desire by the Embedded Users to align the culture of their external lawyers even more closely with their own culture of ADR use.

“ADR processes tend to separate those lawyers willing to put themselves in our shoes and accept the risk of making a real call on imperfect information from those who will forever say ‘we cannot predict the outcome on the present facts’ or ‘it depends’. If a lawyer has a commercial orientation, then it’s pretty much a given that they will be ahead of the curve on ADR.”

Senior Litigation Counsel, Manufacturing/Industrial

The consequences of a lack of drive in suggesting ADR processes could have potentially far-reaching consequences for external lawyers. One Embedded User reported dispensing with the services of external lawyers who were not willing to recommend ADR processes with sufficient consistency or who were unable to adapt to the requirements of their role.

“We have built into our programme for our panel firms the responsibility for all of us to assess the prospects of reaching a commercial settlement. We expect them to be familiar with and to support mediation. We have imposed an obligation on our firms to consider settlement proactively at every stage.”

Head of Worldwide Litigation, Investment Bank

Where external lawyers were highly rated, it was common that Embedded Users had made clear their expectations in relation to consideration of ADR at every stage of the dispute cycle.

“Our relationship firms know that they will get more work if they efficiently and economically resolve matters and so they have the incentive to use whatever tools are appropriate to get a good resolution as quickly as possible.”

Head of Worldwide Litigation, Multinational

The consequence of getting this relationship right was a more regular flow of work to the external lawyers.

## Experiences of the Ad Hoc Users

The Ad Hoc Users generally reported good experiences with their external lawyers suggesting the use of ADR and working with them, particularly on large scale disputes. However, the experiences of the Ad Hoc Users were very much less consistent than the experiences reported by the Embedded Users.

“I think that the attitude of the external firms towards mediation - which has been quite conservative - has influenced the amount of use of mediation made by us.”

UK General Counsel, Financial Services

Some Ad Hoc Users felt the onus was on their external lawyers to suggest ADR and consequently reported that the behaviour of their organisation was influenced by the service provided by external lawyers, rather than the Ad Hoc Users themselves dictating the terms of engagement. Indeed a poor experience with mediation had even discouraged some Ad Hoc Users from pressing the idea of ADR with external lawyers in the future, rather than reviewing the performance of their external lawyers.

**“The sad fact is that some lawyers appear more interested in fees than settling cases. It is less true of the firms at the higher level than it is of the lower level.”**

**Head of UK Litigation, Financial Services**

Other Ad Hoc Users had the suspicion that some external litigation lawyers still put their own interests above that of the client. It was observed that this behaviour was more common among firms handling “run of the mill” disputes than among those dealing with high value, complex disputes

### **Experiences of the Negotiators**

The Negotiators reported that their external lawyers had ADR “on the radar screen” and were generally positive about the service they received. Most of the Negotiators tended to rely heavily on external lawyers both to suggest ADR and then to guide them through the process.

**“We always involve external lawyers when we are involved in mediations and they are heavily involved in the strategy, the tactics and the actual delivery of what happens at the mediation.”**

**UK General Counsel, Service Sector**

In fact the Negotiators reported less suspicion of the motivation of their external litigation lawyers than the Ad Hoc Users and very few poor experiences. This appears to reflect a better alignment between the expectations of the Negotiators and the services provided by their external lawyers. The majority of Negotiators were, however, using ADR/mediation significantly less often than the Ad Hoc Users and often at a later stage in the dispute, usually only once litigation was well advanced. Since most Negotiators viewed mediation as a formal process to be attempted when other settlement avenues had been exhausted, and usually only once litigation was underway, this inevitably reduced the perceived tension between the interests of external lawyers and their clients which concerned Ad Hoc Users.

### **Experiences of the Non-Users**

One Non-User reported that the discussion about which ADR process to attempt simply never took place with external lawyers despite an active portfolio of commercial litigation in the English courts.

**“I have not had external firms suggesting ADR. I don’t know whether that is because of the nature of the disputes that we’ve been dealing with recently, or whether it’s just not something that they tend to suggest or think about.”**

**Senior Litigation Solicitor**

When the other Non-User attempted to explore the possibility of an ADR process, it was met with active resistance from external lawyers.

**“Our external lawyers do not give any kind of constructive advice on when and how to actually pursue mediation even if we want it.”**

**Senior Litigation Counsel, EMEA**

## Counterparties

- Organisations experienced far less resistance from counterparties in England and Wales and the US when suggesting ADR than they experienced from counterparties in other jurisdictions.
- Embedded Users persisted in attempts to persuade counterparties to use ADR processes despite frequent resistance.

We asked participants to describe their experiences of proposing ADR to counterparties (or of counterparties suggesting ADR) with particular emphasis on any differences they perceived across jurisdictions. All those organisations that used ADR reported that the level and sophistication of mediation use in the US and England and Wales was not replicated in other jurisdictions. In England and Wales the sea change in the culture of dispute resolution following the Civil Procedure Rules was plain.

“We very rarely come across anyone who is not willing to try mediation. There may be issues of timing, but very rarely do you come across anyone who is willing to reject the process out of hand.”

Head of Worldwide Litigation, Investment Bank

Some organisations were in fact concerned that the ready acceptance of mediation in England and Wales could encourage a rush to embark on the process before the parties were ready, which dynamic was only enhanced by a growing appetite among unmeritorious claimants to propose mediation in the hope of being bought off.

“Sometimes I think there is a desire to set up an ADR procedure prematurely, and that is where we have to put the brakes on.”

Group Legal Director, Service Sector

In fact even organisations that had experienced resistance from counterparties to mediation tended to identify that attitude with tactical considerations rather than any more fundamental rejection of the process. It was, however, alarming to hear that some organisations were still encountering counterparty resistance to mediation based on a perceived weakness in suggesting it.

For those organisations with a more international portfolio of disputes, the frustration experienced with counterparties increased dramatically.

“In most places internationally, my biggest problem is the other side. We would like to try mediation but to them it is just not acceptable – it is not part of the culture. When I propose mediation, I think I get slapped in the face four out of five times.”

Senior Litigation Counsel, Manufacturing/Industrial

The Embedded Users were persistent in proposing mediation despite facing significant challenges in securing counterparty agreement.

“My greatest challenge generally is that I run into a European view that any process that may have had its genesis in the United States is probably not very good. I have to overcome that hurdle before people pay much attention to the idea.”

Head of Worldwide Litigation, Multinational

They also reported encountering active prejudice in some continental European jurisdictions against mediation, based on its origins in the US.

## The board and senior management

- The way in which an organisation uses ADR is determined by the approach and attitude of the senior lawyers charged with managing dispute resolution.
- The twenty one organisations reported little need for engagement from the board or senior management in promoting ADR.

We explored with participants how, if at all, the senior management or board of directors of their organisation showed leadership in or support for ADR. Responses were remarkably consistent: the primary interest of senior management and the board was that disputes were resolved as quickly and economically as possible with minimum disruption to the business. It was up to the legal department under the General Counsel and/or the head of litigation to achieve that objective through whatever means they considered most appropriate.

**“The board don’t show leadership in ADR because to my mind they are not expected to. It is my job to make sure they are appraised of litigation and how we are managing those disputes. They expect me to raise ADR.”**  
**General Counsel, Manufacturing/Industrial**

For most of the participants the only occasion at which the board or senior management were called upon to interface with an ADR process was in terms of approving a request for authority to settle, although a few organisations had experienced more direct intervention from the board including questions as to whether ADR was an appropriate dispute resolution method. Of course where board members were themselves required to attend mediations then more active engagement was reported but this did not translate into any more general interest at board level in promoting ADR or mediation. One Embedded User reported some resistance from senior management who assumed that mediation was another costly and time consuming process akin to litigation or arbitration.

Only two of the twenty one organisations had signed up to any public statement of their commitment to using ADR<sup>4</sup>. The vast majority saw little need for or value in such a public statement. Those organisations which were most strongly motivated by the wish to preserve maximum flexibility in their dispute resolution options – generally either Ad Hoc Users or Negotiators – considered a pledge or public commitment positively undesirable. Others reported that their dispute resolution strategy or any element of it was a private matter.

We believe that the sea change in the culture of dispute resolution in England and Wales following the introduction of the Civil Procedure Rules has challenged the underlying rationale behind a pledge or public commitment to use ADR. A pledge or public statement might be thought unnecessary in the context of litigation in this jurisdiction, although still of value in relation to counterparties in other jurisdictions.

<sup>4</sup>. In both cases they were signatories to the CPR ‘Pledge’ to explore ADR options pre-action whenever a dispute arose with another signatory or organisation similarly willing to do so.

## ADR clauses in contracts – challenging convention

- Most participants surveyed – including some Embedded Users – believed that ADR/mediation clauses were unnecessary.
- The priority for the majority of organisations was to retain maximum flexibility in their dispute resolution options.
- Organisations contracting with international counterparties often avoided ADR clauses because of insufficient understanding of ADR in many jurisdictions.
- Organisations with substantial exposure to disputes in the US were more likely to support compulsory ADR clauses.

We asked participants a series of questions relating to their use of ADR clauses in contracts with counterparties. A very wide range of responses were received and, once again, there were no trends identifiable by industry sectors and little consistency of approach within industry sectors. Many of the organisations were so large and diverse in their lines of business that the approach to the use of ADR clauses necessarily varied significantly depending upon the type of contract involved. It was also clear that nearly all participants considered an ADR clause to be shorthand for a clause that made mediation compulsory prior to litigation or arbitration. Although most of the inhouse lawyers we interviewed were not actively engaged in drafting commercial agreements themselves, they were usually consulted on dispute resolution options and clauses, so in practice influenced the approach of their respective organisations in this area.

One of the most surprising factors to emerge from the whole research study was a strong and consistent challenge to the received wisdom that the use of ADR clauses in contracts should be an integral part of how organisations use ADR. We found that whilst the majority of organisations were strongly in favour of ADR, this did not translate in practice into a desire to use ADR clauses in their contracts. The motivation underlying this position differed between the organisations but the result was a clear rejection of compulsory ADR clauses.

“We would never be wedded to using an ADR clause automatically. We would always want to have the choice to consider it and frankly the mediation is going to be a consensual process anyway so we are not fussed about that type of clause.”

Head of Worldwide Litigation, Investment Bank

Some Embedded Users felt that clauses making mediation mandatory were unnecessary given their own willingness to use and propose ADR. Other Embedded Users and the majority of other participants simply prized flexibility above all else when it came to resolving disputes. They did not wish to be obliged to undertake a mediation (or any other ADR process) simply to jump through the contractual hoops if they did not consider it was the appropriate process at the point of dispute.

“We took the decision not to use compulsory ADR clauses because conceptually I just do not like to pre-judge the situation. If you are minded to resolve something amicably, then you will get there anyway.”

General Counsel, TMT Sector

The organisations most strongly in favour of ADR clauses in contracts were Embedded Users who followed Early Case Assessment processes. For those organisations the use of ADR clauses was consistent with the overall approach they sought to bring to dispute resolution, although even those



Embedded Users also accepted that ADR contract clause usage would vary depending upon the nature of the contracts.

At the other end of the scale was the Non-User that had a formal policy of refusing to use, or accept from counterparties, ADR clauses. This policy was formulated following an historical negative experience of arbitration and extended through practice to all ADR processes.

### The type of contract

High volume/bulk contracts entered into on standard terms and conditions were seen as more amenable to ADR clauses than highly negotiated contracts, when it was more difficult to impose ADR clauses. Many organisations were not prepared to insist that an ADR clause was included in a negotiated agreement when it was not perceived as a critical item.

“Sometimes you want to put forward as few objections to a contract as you can and the ADR clause is one that we might sacrifice.”

Legal Director, EMEA, TMT Sector

### Jurisdictional influences

The most consistent message amongst UK based inhouse lawyers surveyed was the desire to maintain maximum flexibility in their approach to dispute resolution. This was in contrast to the inhouse lawyers who spent a greater proportion of their time on disputes in the US. They were more likely to be convinced of the benefits of compulsory ADR clauses. Whilst this could be characterised as simply a transatlantic difference in dispute resolution perspectives, a credible alternative explanation is that the oppressive cost and burden of US domestic litigation drives organisations to sacrifice the flexibility they prefer in their dispute resolution options in order to force US counterparties to mediate at an early stage and mitigate the prohibitive costs of discovery of documents and depositions.

Those organisations dealing with international counterparties used ADR clauses to a greater or lesser degree depending on the jurisdiction with which they were dealing, focusing in particular on that jurisdiction's experience of ADR.

“We have been in a situation where there is absolutely no understanding of mediation and where there's some suspicion as to why you are putting a mediation clause in there.”

European Legal Director, Manufacturing/Industrial

The consequence was that as the participants entered into contracts with counterparties in less ADR-friendly jurisdictions, they either had to work harder to educate and persuade the counterparties of the benefits of an ADR clause or they had to abandon it in favour of an arbitration clause.

One theme which arose repeatedly was a growing frustration with international arbitration as a dispute resolution process. Whilst it was recognised as a valuable process where the domestic courts of a particular jurisdiction were not considered to be an acceptable forum, the trend for arbitration proceedings to become more like litigation, slower, more expensive and lacking in robust procedural controls were all highlighted as pointing towards an uptake in mediation.

“What's driving mediation in those European jurisdictions where litigation is cheap is, if anything, international arbitration which takes a long time and increasingly costs a lot of money.”

Senior Litigation Counsel, Manufacturing/Industrial

## Counterparties

When ADR clauses were suggested by a counterparty, participants were generally relaxed about agreeing to the clause as part of the negotiations:

“I think if the other side wanted an ADR clause, we would be very happy to put it in, but I don’t think it is often that we are asked that question.”

Managing Counsel for Dispute Resolution, Multinational

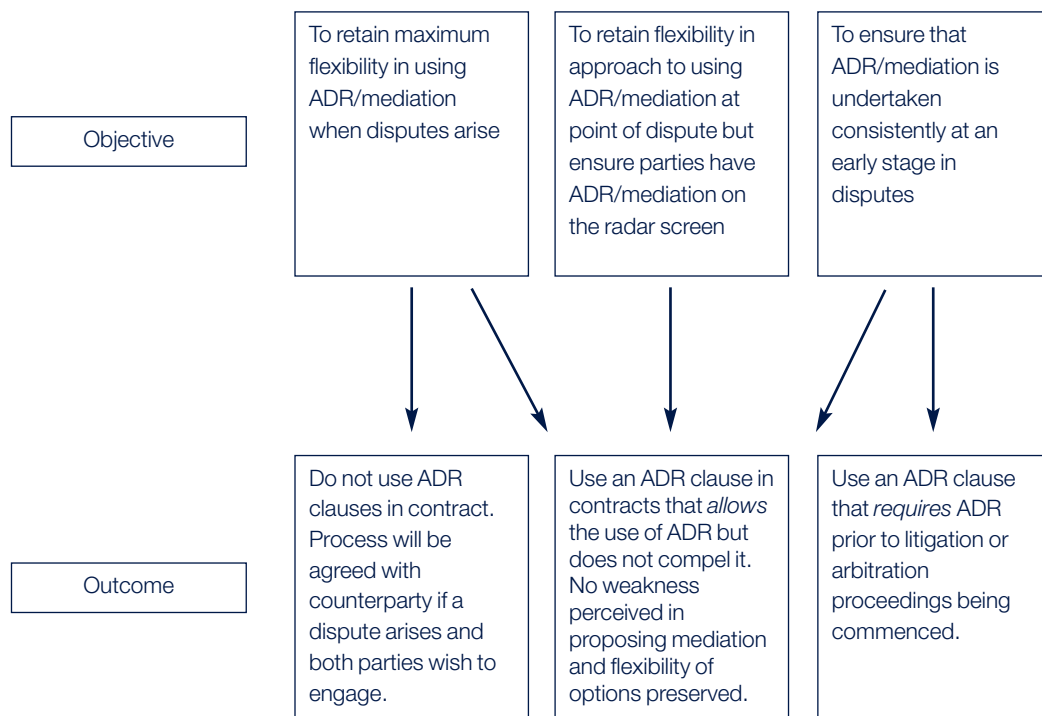
The use of stepped dispute resolution (or escalation) clauses was widespread in those sectors that typically traded in long term project contracts.

“The use of structured escalation dispute resolution clauses is beyond commonplace. I would be very surprised to find a contract that didn’t have it.”

Legal Director, TMT Sector

The attitudes of the twenty one organisations suggested that for many of them the use of non-compulsory ADR/mediation clauses might assist in achieving their varied objectives. Although non-compulsory clauses have been viewed as somewhat “toothless” given the inability to compel a counterparty to undertake the process, we wonder whether they in fact might assist in striking the balance between ensuring that the use of ADR /mediation is on the contractual radar screen whilst also preserving maximum flexibility as to dispute resolution method at the point of dispute, avoiding any perceived risk of weakness in proposing ADR/mediation.

### Summary of possible ADR clause choices



# The ADR community

- Embedded Users supported the ADR community and institutions through membership.
- Ad Hoc Users, Negotiators and Non-Users remain to be persuaded what the ADR institutions can do for them.

When it came to the interaction of these twenty one organisations with the ADR community and in particular the ADR institutions and providers, the difference in approach of the Embedded Users from the other organisations could hardly have been more stark.

With only one exception the Embedded Users all supported ADR organisations through membership pounds or dollars and a number of Embedded Users supported more than one ADR organisation. The reasons for doing so articulated by the Embedded Users included the important role the ADR organisations play in educating the wider business community about ADR processes and mediation. To some organisations the justification for membership fees was enlightened self interest in improving the conditions for dispute resolution.

“I think what all of the ADR organisations have as at least part of their charter is education. One of the things I am keen on is trying to ensure that as many people as possible in roles where they can recommend or suggest ADR have at least that awareness. If we can get out to inhouse counsel and external counsel and make them familiar with the process then of course there is an indirect benefit because we then don’t have to educate people.”

European Legal Director, Manufacturing/Industrial

With only one exception, the Ad Hoc Users, Negotiators and Non-Users did not support ADR organisations. Their reasons were varied. Some did not perceive they would get value for their membership fees. Others felt they would rather spend the money elsewhere. Some had simply not considered membership.

All of those reasons pointed towards significant challenges to the ADR organisations in reaching out beyond their existing core membership and engaging more widely with commercial entities. The single biggest challenge is to persuade those organisations not currently engaged of the value of membership. One Negotiator remarked that it would be willing to sit down with other organisations and discuss experiences of using ADR at General Counsel level, but that it did not perceive the ADR organisations as offering such a forum for discussion.

# What do these organisations want to do differently?

- 20% of the organisations we surveyed were actively reviewing how they used ADR.
- The development of internal best practice guidance on ADR use in managing disputes was the most commonly identified objective.
- Embedded Users reported that training their inhouse lawyers and continuing to educate counterparties were vital on-going tasks.

All the organisations we interviewed were asked what, if anything, they would like to do differently in relation to how their organisations use ADR, given the time and resources to do it. A significant number of participants were entirely satisfied with the way their organisations used ADR. 20% of the organisations were, however, actively engaged at the time of our interviews in reviewing how they used ADR and reported that they were currently undertaking some of the following steps:

- Giving consideration to using an ECA process;
- Gathering ADR metrics on parts of their business and running pilot schemes to monitor and enhance mediation use;
- Reviewing existing policies on dispute resolution use with the General Counsel;
- Drafting internal best practice guidelines on dispute management including ADR use;
- Upgrading internal case tracking systems to monitor costs and dispute resolution process metrics; and
- Refining internal knowledge sharing systems through the organisation's intranet to make ADR learning more accessible to inhouse lawyers and selected business unit personnel.

Those who identified areas on which they saw further scope for development touched on diverse issues ranging from training to engagement with counterparties and from mediator appointment and mediation process control to risk management.

## Some perspectives from Embedded Users

The Embedded Users had contrasting focuses with some looking internally to the skills of the inhouse legal team.

"I have to remind myself to keep the training going for the more junior members of the team. It's easy when you have been trained. You assume that everyone has had the benefit of that and it is the sort of training that can be literally quite life changing."

Head of Worldwide Litigation, Investment Bank

Others turned their attention to the wider community and their counterparties in terms of identifying further work they wished to do:

"There is a great deal of work to be done to try again to expand awareness about the benefits of mediation and facilitated dispute resolution. If we had more time and money there are many jurisdictions in which we would like to do more to improve the environments in which we do our jobs to resolve disputes and lower costs to the company. We sell into some of the most difficult countries on the planet. We don't want to be in disputes with our customers in those places and educating customers about mediation is an important way for us to grow."

Senior Litigation Counsel, Manufacturing/Industrial

### Some perspectives from the Ad Hoc Users and Negotiators

Again the aspirations of those we spoke to were diverse. Some were focussing on dispute prevention.

“What we are looking at is putting in place an early warning system to improve the way in which the business identifies the disputes that need to be brought within the legal department’s domain, rather than equipping the business with the knowledge about how disputes are conducted.”

Legal Director, TMT Sector

Others were focussing on how to make dispute resolution more palatable:

“It would be good to find ways of accelerating the mediation process while the mediator is on the learning curve. If you could just cut through that chaff and get to what is usually happening in the late afternoon or evening that would be a good thing.”

Senior Litigator, Investment Bank

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