

# Corporate Alternative Dispute Resolution

Eric D. Green\*

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\*J.D. 1972, Harvard University; A.B. 1968, Brown University.

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\*Associate Professor of Law, Boston University School of Law; Vice President, EnDispute, Inc. Revision of this Article was significantly aided by the contemporaneous work I was doing with my co-authors Professors Steven B. Goldberg and Frank. E. A. Sander on our book *DISPUTE RESOLUTION* (1985). Portions of this Article are adapted from that volume.

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## A. Introduction: The Corporate Dispute Resolution Revolution

Disputes involving corporations and other private institutions such as hospitals, universities, and professional organizations constitute a significant percentage of disputes in America. These kinds of disputes are worth separate study because special opportunities for the successful use of dispute avoidance, mitigation, and resolution techniques are present in these cases that generally do not exist in disputes involving only individuals. Such disputes also create special problems. The institutional nature of one or both parties affects the dispute at all points in its life—during the creation of the initial perception of injury or grievance, the maturation of the grievance into a dispute, the development of the dispute into a formal type of dispute, such as litigation or arbitration, and the processing and eventual resolution of the dispute.<sup>1</sup>

In recent years, increased awareness by corporations of the costs of disputing and the potential savings that could be realized by improving the handling of their disputes has fueled the growing movement towards alternative forms of dispute resolution (ADR). This essay describes and assesses the impact of this corporate embrace of alternative mechanisms for preventing, managing, and resolving disputes. The remainder of this Introductory section briefly sets the context within which these alternative corporate approaches have emerged and analyzes underlying corporate motivations for taking such a course. The next section surveys the world of corporate litigation<sup>2</sup> by (1) presenting a rough typology of corporate disputes and estimating their frequency; and (2) analyzing the quantitative and qualitative impact these disputes have on the dispute resolution problems of society. Subsequent sections describe various novel dispute prevention, management, and resolution techniques developed for or often applied to disputes involving corporations, and looks at ways these alternatives can be more fully integrated into the corporate legal function. A final section explores the particular opportunities and problems cor-

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1. This description of the maturation of a perceived injury into a dispute is similar to the dispute transformation process described in Felstiner, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 *LAW & Soc. REV.* 631 (1980-81) and Miller, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 *LAW & Soc. REV.* 525 (1980-81).

2. The remainder of this Article focuses on "corporate" rather than "institutional" disputes, but much of its analysis is equally relevant to the disputing world of non-profit and government institutions.

porate use of alternatives poses for the justice system. These include the potential problems of severe power disparities between adverse parties, possible excesses and lapses in the regulatory relationship, and policy aspects of private justice procedures, including problems of secrecy and class-based justice.

### 1. *Setting the Corporate Context*

The influence of the corporate sector on the alternatives movement has been channeled mostly through relatively new institutions formed explicitly for this purpose. The most prominent of these groups are organizations of corporate counsel, such as the Association of Corporate Counsel of America (ACCA), the Center for Public Resources (CPR), and various ADR committees of bar association business litigation sections, and foundations, such as the National Institute for Dispute Resolution (NIDR), founded and supported by other large corporate foundations. This corporate interest in ADR has had a significant influence on the direction the alternatives movement has taken, which is important to recognize both for what it means for the future of the alternatives movement, and for what it means for the way business (particularly business disputing) will be conducted in the future.

To a large extent, corporate interest in ADR constitutes a consumer movement at the upper end of the legal market. The expressed objective of the organizations of corporate counsel working to promote greater use of alternatives is to find ways to reduce the costs and delays of dispute resolution by identifying, creating, implementing, and promoting more effective (*i.e.* cheaper), forms of dispute resolution. For example, in 1979 the Center for Public Resources initiated its "Legal Program to Reduce the Costs of Business Disputes" with leading general counsel of Fortune 500 companies (today totaling well over 100 members), on the premise that "the corporation, particularly corporate counsel, has strong incentives to reduce the cost of litigation and has the resources to do so." The "agenda" of the CPR Legal Program is the "development of private processes and practices that reduce the cost of litigation and regulatory disputes" by (1) identification and development of alternative dispute resolution and management techniques; (2) "communication of pragmatic information to business, the bar, the judiciary, law and business schools; and public institutions"; and (3) "implementation of experiments and new resources to decrease the costs of litigation and regulatory disputes" (CENTER FOR PUBLIC RESOURCES, CPR LEGAL PROGRAM).

ACCA, CPR, and bar committees of corporate counsel have sponsored numerous seminars on ADR and "cost-effective litigation management." They have also created their own publications, such as *Alternatives* and *Corporate Dispute Management* to promote greater awareness and use of alternatives. Another of the major efforts of the CPR Legal Program has been the creation of the CPR Judicial Panel and the initiation of the ADR Corporate Policy Statement. Funded by a grant from the Aetna Life & Casualty Foundation, the Judicial Panel is a private dispute resolution program utilizing the services of high-profile figures, including many former judges, who are available to act as neutral third parties or consultants in private dispute resolution (CENTER FOR PUBLIC RESOURCES, JUDICIAL PANEL PROSPECTUS). The ADR Corporate Policy Statement (formerly the "ADR Pledge") states that a subscribing company will explore ADR first when in a dispute with any other company or institution that has also subscribed to the pledge (ALTERNATIVES, *Judge Keeton* 3). As of March 1985, 96 corporations had subscribed to the pledge (ALTERNATIVES, *Corporate Policy* 6).

One effect of this corporate interest in alternatives has been a push towards greater privatization of the dispute resolution process (TOLCHIN). The CPR Legal Program is only one example of many attempts by institutions to develop private dispute resolution processes and free themselves from what they generally regard as over-dependence on the public dispute processing systems. Corporations have been in the forefront in the use of the private "rent-a-judge." According to the legal press, there is a real market for private judging. "At least seven states permit private judges to resolve disputes with binding decisions, and in almost every major city, former judges and lawyers have founded companies that offer private judging services" (NATIONAL LAW JOURNAL, *New Panel*; TOLCHIN).

Other elements of this new consumerism by corporations have stemmed from their being the largest purchasers of legal services in our society. One element has been the tremendous growth of in-house law departments and the creation of a new "gospel of the corporate counsel." Central tenets of this gospel are the desirability of internalizing the corporate legal function as much as possible and increasing the "professionalism" of the corporate attorney (AMERICAN BAR ASSOCIATION JOURNAL, *Saving a Buck* 523). Luther McKinney, vice president of law and corporate affairs for Quaker Oats Company, states, "The reason for the expansion [of corporate

law departments] boils down to money” (STATES; WESSEL, *Management*). A 1981 National Law Journal survey (NATIONAL LAW JOURNAL, *Boardroom; In-house*) reported that among 70 corporations that responded to questions about overall outside legal costs, the average expenditure on outside lawyers in the prior year was \$3.43 million. Estimated savings from using in-house instead of outside counsel ranged from one-third to one-half of legal bills. Not surprisingly, many of the general counsel surveyed stated that they intended to refer fewer cases to outside counsel and to bring as much of the legal work as possible inside.<sup>3</sup> Thus, even while lawfirms have grown larger and larger, there seems to have been a major shift in the past five years in the “make or buy” outlook of corporations toward legal services. Citing an estimate by Philadelphia “legal consultant” Daniel Cantor, the National Law Journal survey stated that (as of 1981) about 71,500 attorneys, or 13% of the nation’s lawyers, are now employed by corporations, an increase of roughly 500% over the 12,500 lawyers employed by corporations as recently as 1950. According to the survey, one company, AT&T, employs over 900 lawyers, and eighteen other companies employ over 100. All indications are that this trend is continuing. A 1985 survey found that the number of attorneys working for corporations has doubled over the past fifteen years, with in-house counsel now accounting for 15% of the nation’s attorneys (FOX 11).

The establishment of ACCA is directly traceable to this internalization movement. The new wave of second and third level corporate counsel—equivalent in professional standing to mid-career partners in private firms—found no room for them in the existing organizations for corporate counsel, which were based on the old model of a corporate law department consisting of a distinguished General Counsel and a bunch of salaried employees who were neither encouraged nor permitted to join elite bar association committees made up of a limited number of general counsel.

Although the reduction of costs is an important reason for internalization of the legal function, Milton Wessel, one of the earliest and strongest advocates of internalization of the corporate legal function, contends that

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3. Despite these proclamations of austerity, another study conducted by the S.E.C. reported that corporations with an outside lawyer on the board of directors paid out more than \$230 million in legal fees in 1980. One corporation, Data General, paid more than \$5 million to a law firm in which one of the members of its Board was a partner. NATIONAL LAW JOURNAL, Jan. 25, 1982, at 1, col. 4.

internalization is by no means strictly or even mainly for cost control purposes. Its critical primary function is to insure that the quality of legal representation is consistent with the quality of the product of the other segments of the organization's business, and that all relevant inputs are included in the corporate decision process (WESSEL, *THE RULE OF REASON: Management*).

Wessel continues:

"Internalization" of the corporate legal function means that all corporate legal affairs are either handled or strictly administered by persons who are full-time corporate employees, and who have commercial loyalties exclusively to the company. Internalization should include even complex antitrust and environmental litigation, and specialized interstate or international tax advice.

Where the volume of legal affairs justifies it, recurring matters, no matter how specialized, should be handled by staff attorneys alone. Where exclusive internal handling is impractical, either because a specific matter requires a specialized talent not otherwise sufficiently useful to justify developing the needed expertise internally or because it involves a major special staff effort for which company personnel are not available, tight control by internal attorneys is mandated.

For the smaller corporation, where the volume of legal business is not large enough to justify even a single skilled in-house attorney, internalization means strict control of the legal function by a full-time lay company employee. As earlier stated, such control is fully within the competence of any skilled manager, given proper instructions (WESSEL, *Management*).

## 2. *Evaluating Corporate Motivations*

What are the real reasons why corporations have enlisted in the alternative dispute resolution movement with such vigor? Two driving forces behind the alternative dispute resolution movement (GOLDBERG, GREEN, & SANDER 3) have been: (1) the desire to increase access to justice for individuals and groups perceived to have been excluded from the public dispute resolution process by its costs or formalism (NADER & SINGER); and (2) the desire to foster community empowerment in the dispute resolution process (*e.g.*, SHONHOLTZ; GOLDBECK). Presumably, corporations and other large institutions have both sufficient access to courts and other dispute resolution processes and possess at least their share of community power. Moreover, it is not readily apparent why corporations would want those who may bring claims against them to have greater access to justice than they do now. Thus, it is not likely that access and community empowerment are the primary motivations for the recent interest in alternative dispute resolution shown by corporations.

One critical explanation is that the existing "power elite," through its corporate and other institutional organizations, sees

the movement toward alternatives as a way to take over a larger part of the dispute processing system by avoiding or subverting the courts, which tend to equalize power disparities (ABEL). Those who advance this view tend to see the discussion about dispute processing alternatives as a battle for power between the powerless and an organized corporate "power-elite." For this group, it is the power of courts that has advanced the rights of the powerless underclass; judicial power, even judicial monopoly, over the resolution of disputes must be preserved, and all efforts to siphon off disputes to other forums are viewed with great suspicion (FISS; CARLIN & HOWARD; cf. GALANTER, *Why the 'HAVES'*).

The view of the alternatives movement that sees it as an attempt to push the powerless out of the courts and into second-class justice forums is curiously inconsistent with another view, also held by many of its proponents, that the courts have been one of the primary institutional tools of the power elite in perpetuating class-based justice. In fact, the corporate establishment's embracing of alternatives for corporate disputes for disputes between themselves is some evidence that the most powerful users of alternatives do not regard non-judicial, private, and "softer" forms of dispute resolution as "second-class" justice to be reported to only by those too powerless to resist them, but rather as forums of choice.

Thus, a more plausible explanation for the corporate community's leadership role in the alternatives movement is that even these resourceful organizations are feeling the effects of "hyperlexis" (MANNING). From this point of view, one could concede that the myriad and numerous disputes involving organizations are a natural by-product of life in a pluralistic, democratic and capitalistic society with strong individualistic, competitive, and materialistic forces, yet still be of the opinion that there is "too much litigation" today. Also, tangible and intangible costs of disputing are simply unacceptable both from a societal (BOK) and organizational perspective. There is little empirical proof to substantiate the "hyperlexis" claim nationally. However, what is more clearly supported by data from individual jurisdictions is that the delay and costs associated with the adjudication of some types of cases, in some jurisdictions, have made full adjudication (trial) of disputes an unaffordable luxury for many disputants, even institutional ones. In this view, then, the motivation behind corporate support for the alternatives movement is the ostensible one—a search for more efficient, more effective ways of processing disputes so as to reduce overall dispute resolution transaction costs. The more



thoughtful adherents of this point of view supplement this definition of the purposes of ADR to include better and fairer resolutions without sacrifice of important societal values that are now protected (or ought to be protected) by the formal adjudicative system. This view sees corporate support for the alternatives movement as part of a national response to a dispute resolution system that has become out of date and in need of diversification and new products. The Center for Public Resources' prospectus states:

The counterproductive costs of legal and regulatory conflicts are enormous in social and economic terms. The courts are not dealing effectively with the litigation explosion. The regulatory system is generating an unmanageable number of disputes . . . The Legal Program is part of CPR's larger public mission to utilize business resources and professionals more effectively in meeting public needs—in ways consistent with business objectives . . . The Program is a coalition of leading corporate counsel, together with academics, organizations working in areas of legal reform and regulatory officials, that was organized to develop and communicate pragmatic methods to reduce the social and economic costs of legal and regulatory conflict while preserving the rights of all parties. In addition to communicating pragmatic information on models of practices, here and abroad, the CPR Legal Program is committed to ongoing research and experimentation that will lead to new methods of avoiding and resolving disputes. With the outstanding expertise involved, the Program has been organized to counsel corporate and non-corporate institutions to reduce the costs of conflict and to resolve specific disputes privately . . . The Legal Program is predicated on the supposition that business-oriented conflict predominates and the fact that the corporation, particularly corporate counsel, has strong incentives to reduce the litigation explosion and the requisite resources to address the problem. That premise has proved to be sound. While some of the models originated in the public organizations involved in the Program, the corporations have supplied the most promising innovations (CENTER FOR PUBLIC RESOURCES, *Judicial Panel*).

Group motives are difficult to discern, much less prove, especially where a cohesive group with shared values (the so-called "power-elite" or "corporate establishment") may not really even exist. Given the dearth of data regarding institutional disputes and the lack of theoretical constructs to explain and understand institutional goals, actions and values in this context, it probably is impossible to completely establish or demolish the "power-elite—underclass conflict" explanation of corporate support for the alternatives movement. However, by examining the alternatives that have been developed, implemented, and advocated by corporations and other institutions, it may be possible to formulate tentative answers to some of the more manageable policy issues (including questions of how to deal with power disparities and guarantee fairness in outcomes), raised by the use of the new alternative pro-

cesses described below. Without attempting to answer Professor Galanter's ultimate but concededly unanswerable question of whether we have too much, too little, or just the right amount of litigation involving institutions, we may begin to formulate an answer to the question of whether we are handling what we have in the most fair, efficient, and effective manner, and, if not, what we ought to do about it.

## B. The World of Corporate Disputes

### 1. *The Corporate Society*

We are a corporate society. We work in corporations, we obtain our shelter, food, clothing, entertainment, education, and culture from corporations, and we share our neighborhoods with corporations. We also do a lot of our disputing with corporations.

This is not a new phenomenon, though it is more true today than ever. As William Whyte pointed out nearly thirty years ago in *The Organization Man* and as William Ouchi observed more recently in *Theory Z*, the corporate nature of our society exists in tension with the strong individualism of American culture. Since World War II the tendency has been more than ever in the direction of increasing corporate size and power. The 1985 *Fortune* magazine directory of the 500 largest United States industrial corporations lists eighteen companies with more than 100,000 employees; in 1955 there were seven. Only four companies on the 1985 500 list had fewer than 1,000 employees and the 500 companies together employed a total of 14,195,792 people in 1985 compared to 7,850,000 in 1955. In 1985, 255 companies had more than one billion dollars in assets in 1985 compared to nineteen in 1955, and thirty-two companies made over ten billion dollars in sales in 1981; there were none in 1955. This, of course, is only the top of the corporate pyramid, and may reflect in part the conglomeration of smaller corporations into larger units over the last thirty years.

### 2. *The Number and Nature of Corporate Disputes*

Data on the incidence of corporate disputes is scant. Although the Civil Litigation Research Project (CLRP) study gathered some data on cases involving organizations, it did not fully analyze the data along this specific dimension. Also, the CLRP study of litigation rates focused on what it refers to as "the world of ordinary

litigation." This world excludes extraordinarily complex or large cases, described variously as "mega-cases," "monster cases," or "elephants," even though the CLRP authors recognize that such cases are important because they "involve vast resources and major issues" (TRUBEK).

One part of the CLRP study does provide a snapshot, albeit underexposed, of organizational disputes. In addition to its survey of households, CLRP did a limited telephone survey of organizations (respondents having a business-use phone) to ascertain the level of organizational disputes (TRUBEK). Of the 1,516 organizations surveyed, 21.9% reported having in the previous twelve months settled with another nongovernmental organization some dispute that involved at least \$1,000. Nearly half of the larger organizations (those with 100 or more employees) reported having settled such disputes. The percentage was much lower—16%—for organizations with less than 100 employees.<sup>4</sup> The incidence of disputes varied considerably by type of industry, from about 10% for industries in the health services and retail trades to over 30% for industries in the communications, electric, gas, construction, manufacturing, and wholesale trades. Over 90% of all disputes were "bilateral," *i.e.*, settled without resort to any third-party (although possibly with the help of outside lawyers). The median respondent estimated that only four or five percent of disputes with other organizations went to court. And those organizations that had bilateral disputes had few. The median number of bilateral disputes known to the respondents who had any was 1.5, and 85% of the respondents who had disputes reported having ten or fewer settled bilateral disputes in the previous twelve months. However, ten of 263 respondents reported having 100 or more such disputes within the prior year.

The CLRP study shows that most disputes (based on the most recently terminated bilateral dispute of companies that reported having had any settled bilateral disputes in the prior twelve months) involved credit and lending transactions (34.3%) or other contract or commercial law (37.7%). 13.1% involved torts; 6.8% involved business and corporate law (however, these tended to be larger cases [more than \$10,000 at stake] and involved the use of outside lawyers more than in most other types of cases); 5.1% involved

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4. The CLRP report cautions that the apparently low incidence of settled organizational disputes reported may be attributable to uninformed or reluctant respondents or to the protracted nature of such cases so that few cases arising in the past twelve months were settled and therefore collected in the survey.

real property; and 3.0% involved business regulation law. Slightly more than half of the sampled disputes involved \$10,000 or less, but, not surprisingly, large organizations (more than 100 employees) tended to have a far greater number of large disputes (over \$10,000 at stake) than smaller organizations.

Apart from the CLRP study, there is not much data on corporate disputes and what there is tends to be spotty, unreliable, and unorganized. A Justice Department study of numbers and types of caseloads in five general jurisdiction courts (by county) during six periods in this century discloses that from 1903 to 1976 commercial cases have declined dramatically as a percentage of all types of cases. However, several explanations other than a reduction in the overall quantity of these types of cases might explain this finding. Lieberman's report of the Justice Department study indicates that in about one-third of all cases at least one party was a private or public institution—a relatively high percentage given that in most tort and virtually all domestic relations cases (the most numerous types of cases), both parties were individuals. Lieberman's conclusion from the Justice Department study is that "businesses sue businesses infrequently, but they do appear with some regularity as plaintiffs in commercial cases . . . or as defendants in tort actions."

The Annual Report of the Director of the Administrative Office of the United States Courts does not give data on size, number, and type of dispute by nature of disputant. The Report for 1984 shows a continuing sharp increase in products liability cases (which tend to involve at least one organization), a trend which began in 1974. In the last four years, the number of such cases has more than doubled. But the 1984 report also shows a decline from 1980 in private anti-trust cases. This may be a result of a shift in government anti-trust enforcement practices, which tend to directly effect private anti-trust, piggy-back actions.

Hard data on the costs of corporate disputes is even harder to find than data on the number, size, or type of dispute. The American Bar Association estimates the cost of intercorporate litigation and associated discovery to be anywhere from \$40 to \$88 billion per year (CORPORATE DISPUTE MANAGEMENT), but the accuracy of this estimate is open to question.

Thus, the available data fails to substantiate the claim that corporations are facing an avalanche of litigation. This is not to say that such an onslaught is not occurring, just that the primitive state of our knowledge in this area may simply prevent us from demon-

strating it. The CLRP study is the only organized study of the scope and cost of modern civil litigation. It tells the story only for the jurisdictions surveyed, and we know from court administrative office reports that litigation rates, disposition rates, and delays vary tremendously from jurisdiction to jurisdiction.

Even if an increase in the incidence of corporate disputes is not demonstrable, it may be that litigation has become larger and more complex so that the time and money demands in contending with each dispute have grown, causing a litigation crisis for corporations. Leonard Janofsky points to the impact of the "big case" as contributing to the current problems of cost and delay. According to Janofsky, the big case "is ultracomplex in its factual and legal issues and consumes a good deal of time in pretrial and trial" (JANOFSKY). This is just the kind of extraordinary case excluded from the CLRP survey as outside the world of ordinary litigation.

Janofsky claims that the number of big cases is "growing rapidly", but again the data is scanty. It is true, as he points out, that litigation lasting three or more years in the federal courts has increased at the rate far exceeding the filings in general, but there is no evidence to indicate how many of these extended cases are "big cases" rather than neglected cases. A former director of the Federal Judicial Center, states that the number of complex cases filed in the federal courts increased at a rate five times that of all civil cases from 1968 to 1977 (EBERSOLE).

Any increase in big cases would be cause for concern. The horrors of the monster case are well documented in the popular legal press. And as Janofsky points out:

By its nature the big case has a special impact upon the judicial system and a special impact upon the parties. A court in which a big case is pending must devote resources to it out of proportion to the remainder of its docket, with consequent increases in the delay and also in the cost of litigating the remaining cases. By its highly complex nature, the big case is likely to impose upon one of the parties a disproportionate amount of the litigation risk unrelated to the merits, to skew the balance of factors involved in consideration of the wisdom of a particular settlement, and to substitute a battle of attrition for the process of trial. If a jury is demanded, the big case may well be determined without the analytical evaluation of evidence required by its complexity (JANOFSKY).

Despite the difficulty of substantiating a litigation explosion with numbers or proving that litigation is too expensive for what the litigants receive from it, it does seem true that *in many jurisdictions*, delay in the disposition of judicial cases is a major problem.

Over the last ten to twenty years, the Annual Reports of the Director of the Administrative Office of the United States Courts have shown a continuing increase in the median time to dispose of federal civil cases and in the pending civil caseload per judge. The 1984 median time to dispose of federal civil cases remained the same as it was in 1983, yet there was a 7.9% increase in the number of civil cases pending in the U.S. district courts from June of 1983 to June of 1984. Moreover, the volume of civil cases pending three years or more—a good measure of adjudicative delay—increased 7.5% from 1983 to 1984 and has more than doubled since 1975.

Leaders of the bar point to congestion and delay in some courts as the major problem facing the system of civil litigation today. Former President of the California Bar Association Seth Hufstедler states:

Delay is a problem throughout most of the country, although many of the fifty-two major jurisdictions in the United States (fifty states, the District of Columbia and the federal system) are current and deal with cases as rapidly as they mature. Generally, the large metropolitan courts suffer the most from delay. Litigants may wait for up to five years to have their cases tried in large metropolitan courts. They may have to wait an additional two or three years for their cases to be resolved on appeal. Thus, litigants can sometimes expect to have their suits concluded in three or four years at best and they may have to wait six or eight years or even longer to get a final resolution.

The costs to society of delay in the judicial system are tremendous. Parties must wait several years to have wrongs redressed and wrongs will thus endure. A person badly in need of funds who has a legitimate claim to a substantial amount of money may have his or her life completely destroyed while waiting years for recompense. The system is further loaded with the resolution of disputes about temporary rules that govern rights during the delay period. Inevitably, disputes arise that consume valuable court time in dealing with the delay rather than the merits of the case. Parties may deliberately use the delay available within the system for economic reasons. For example, if appeals take two or three years and commercial interest rates are high, appeals may be taken merely to obtain delay in payment. Thus, the volume of matters in the courts are increased by delay itself, contributing even further to delay of the overall court process.

Delay in litigation is costly to the litigants as well. It has become common to say that the costs of litigation are a middle class problem: the poor and near poor are aided by legal service programs and the rich can afford litigation. This answer is too easy. If the costs of litigation are unreasonably high for the poor and near poor, changes need to be made to reduce them, even though the government bears much of the cost. If the costs of litigation are unreasonably for the middle class and the rich, those costs should be reduced (HUFSTEDLER).

### 3. *A Typology of Traditional Corporate Dispute Resolution Processes.*

In spite of a lack of hard data on the quantity or costs of corporate disputes, it is possible to classify such disputes qualitatively so that we can think about whether we are handling those disputes that exist in the most effective manner. One way to do this is according to *the type of other disputant* and *the other disputant's relationship* to the institution. These types (and relationships) include: (1) employees (internal); (2) consumers (external-objects of institutional activities); (3) members or representatives of the general community (external-neighbors); (4) government (external-regulators); and (5) other private organizations (external-competitors or co-venturers). Obviously, this classification is not exhaustive. For example, it omits one obvious and important institutional actor/disputant—owners (shareholders)—but the five subgroups listed above include the most numerous kinds of corporate disputants.

Corporate disputes may also be classified according to the different *types of substantive issues* they raise. These tend to depend on the nature of the relationship between the “other disputant” and the corporation. The types of substantive disputes corresponding to the five types of disputants and relationships listed above are: (1) employment; (2) product related; (3) environmental; (4) regulatory; and (5) commercial.

The nature of the other disputant and the substantive issues raised tend to channel types of disputes into certain traditional dispute resolution processes. When one considers whether some alternative dispute resolution process should be applied to a particular kind of dispute involving a certain kind of disputant, it is necessary to compare the costs and benefits (intangible as well as tangible) of the proposed process' to the process that would typically be used if the dispute were handled traditionally.

The following typology (Table I) portrays the landscape of corporate disputes, according to the criteria of type of disputant, type of dispute, and traditional dispute resolution process. Admittedly, the picture presented here is a rough one—like a picture of the earth from a satellite 200 miles in space rather than from a balloon a few thousand feet above ground or from the earth itself. But, as with the earth itself, some interesting things about the disputing landscape may be seen from each of these perspectives.

**TABLE I**  
**TYPOLGY OF TRADITIONAL**  
**CORPORATE DISPUTE RESOLUTION PROCESSES**

<i>Other Disputant</i>	<i>Types of Issues</i>	<i>Traditional Dispute Resolution Processes</i>
Employee	Terms and conditions of employment	NLRB/arbitration/negotiation/union and non-union grievance procedures/litigation/exit
Consumer	Quality, price and harmfulness of product or service	Negotiation with consumer relations departments/FTC and state counterpart enforcement/small claims courts/"lumping it"
Community groups or individuals	Environmental; land use	Regulation by EPA and state and local counterparts/zoning process/political action/class action litigation
Government	Regulatory	Rule-making/enforcement proceedings
Private institution	Commercial (contract, patent, unfair competition, anti-trust, etc.)	Litigation/arbitration/negotiation

#### *4. A Typology of Alternative Corporate Dispute Resolution and Management Processes*

Litigants, lawyers, and academics have developed a large number of alternative processes and techniques to prevent, anticipate, mitigate, manage, and resolve disputes either outside the courts entirely or more effectively and efficiently inside the courts. Many of these processes and techniques are addressed directly to the problems of cost and delay that are perceived to plague the courts and traditional arbitration. Others appear to be motivated by a desire to obtain "better" outcomes, perhaps by having a more experienced or expert third party decide the dispute than might occur in court, or by substituting a process that allows for a greater variety of results, or which leads to a better long-term relationship



between the parties. Thus, many of the alternative processes and techniques attempt to shift a dispute from the "win-lose," adversarial context associated with adjudication to a less adversarial, bargaining situation in which the disputants have more outcome options and control.

Some organizations of corporate disputants initially focused on purely private alternative dispute resolution processes on the theory that private processes could be more expeditiously put in place by an organization or contesting parties than reforms directed at the court system, which is less free to experiment than are private parties. Another reason for this initial focus on private alternatives was the belief that such processes not only redirect corporate resources to productive activities by promoting quicker dispute resolution than the courts can provide, they also help to reduce the large public cost of maintaining the regulatory and judicial system. It was soon realized, however, that purely private processes were inadequate to the size of the problem and that it would be necessary to utilize alternatives that modify, but which are located within or next to, more traditional public processes. Thus, the alternative processes and techniques described below span the spectrum from those that are located wholly within the institutional disputant and involve no outside third-party (*e.g.* litigation management systems, dispute audits), to those that (1) involve both disputants yet no public participation, but may require the participation of a third-party neutral (*e.g.* ombudsman, the mini-trial); (2) consist of a mixture of private and public in that a private process is grafted onto or incorporated into a public process (*e.g.* private arbitration, rent-a-judge); or (3) which are located completely within the public context (*e.g.* court-ordered arbitration, regulatory bargaining; joint fact-finding with a regulatory agency; joint permitting procedures).

Like the traditional processes listed in Table I, the alternative processes and techniques may also be classified according to the *types of cases* in which they are most often utilized, employing the "other disputant" and "types of issues" categories of Table I. Table II does this for the alternative process by expanding Table I to include another column which lists the alternative dispute resolution processes used most frequently by corporations to prevent, manage, or resolve (1) employee; (2) consumer; (3) community; (4) government; and (5) inter-institutional disputes, respectively.

Many of the early efforts by corporations to develop alternative dispute resolution and management processes also focused on the

last category—inter-corporate or inter-institutional disputes—for reasons similar to the early focus on internal and purely private processes. Inter-corporate disputes usually involve issues of private rather than public law and pose fewer public policy problems in bypassing formal procedures. ADR processes in this context are simply an extension of the settlement negotiation process carried on between parties of roughly equal power and can be quickly and easily implemented solely by agreement of the parties. The other categories of disputes, especially those involving employee, consumer, and community disputes, often involve individuals whose relatively weaker position is buttressed by statutes, such as anti-discrimination, warranty, and environmental laws, that can make the use of private alternatives more complicated. In addition, in the early phases of the alternatives movement, there were doubts that government parties could, should, or would be willing to engage in informal processes that did not involve all of the administrative protections of traditional processes. Nonetheless, as the alternatives movement has gathered steam, there has been a broadening application of alternatives to all of these kinds of disputes. Examples of ADR in each of these areas, together with a critical examination of their potential, are collected in separate chapters on intra-institutional, consumer, environmental, intergovernmental, and international disputes in *DISPUTE RESOLUTION*. (GOLDBERG, GREEN, & SANDER 371, 389, 403, 437, 443).

TABLE II  
*Typology of Alternative Corporate  
 Dispute Resolution and Management Processes*

<i>Other Disputant</i>	<i>Types of Issues</i>	<i>Traditional Dispute Resolution Processes</i>	<i>Alternative Processes and Techniques</i>
Employee	Terms and conditions of employment	NLRB/arbitration/negotiation union and non-union grievance procedures/litigation/exit	Ombudsmen/private grievance system/private judging/Mini-Trial/arbitration
Consumer	Quality, price and harmfulness of product or service	Negotiation with consumer relations departments/FTC and state counterpart enforcement/small claims courts/"lumping it"	Specialized arbitration panels, dispute management audit
Community groups or individuals	Environmental; land use	Regulation by EPA and state and local counterparts/zoning process/political action/class action litigation	Consensus building programs/environmental mediation
Government	Regulatory	Rule-making/enforcement proceedings	Private judging/Mini-Trial/structured negotiation (joint permitting processes)/joint fact-finding/bargaining/consensus building

Private institution	Commercial (contract, patent, unfair competition, anti-trust, etc.)	Litigation/arbitration/ negotiation	Mini-Trial/private judging/ arbitration/fact-finding/ specialized courts/dispute management audit/corporate ambassador
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Another way to classify alternative processes and techniques is by where they fall chronologically in the dispute creation, recognition, assertion, maturation, processing, and resolution process (DAUER). Table III categorizes the techniques and processes into three rough, overlapping categories along this dimension. (Some processes are listed in more than one category.) The next three sections describe some of these processes, and discuss some of the issues raised by their use.

**TABLE III**  
***Typology of Corporate Dispute  
Resolution and Management Techniques  
and Processes by Dispute State***

- I. *Dispute Anticipation and Prevention*
  - Dispute management audit
  - Environmental compliance and consumer relations programs
  - Corporate ambassador
  - Internal employee grievance mechanisms
  - Consensus building
  - Ombudsman
  
- II. *Dispute Management*
  - Litigation risk analysis
  - Litigation budgeting
  - Aggregate caseload management
  - "Dataclaim"
  
- III. *Dispute Resolution*
  - Mini-Trial
  - Summary jury trial
  - Neutral expert fact-finding
  - Ombudsman
  - Settlement special masters
  - Private judging ("rent-a-judge")
  - Industry-wide self-regulatory dispute resolution
  - Mediation
  - Med-arb
  - Negotiated development
  - Regulatory bargaining ("reg-neg")
  - Arbitration (private and court-ordered)

*a. Dispute Anticipation and Prevention Techniques*

These processes attempt either to (1) predict what people will do in a given situation and steer the institution away from dispute-producing behavior; (2) involve parties with interests possibly adverse to the institution early in the decision-making process so as to accommodate their point-of-view and head off later disputes; or (3) create an outlet for the airing, accommodation, and resolution of grievances before they mature into disputes (*see generally* FINE).

*i. Dispute Management Audit*

A good example of the first type of anticipation and prevention technique is the dispute management audit. Akin to the American Arbitration Association's Arbitration Audit (AKSEN), the dispute management audit consists of a systematic and independent review of an institution's activities to identify and analyze dispute sources, with particular attention to those that produce the most troublesome, recurrent, and expensive disputes. The audit provides a detailed tracing of the processes by which disputes mature (or do not) into formal confrontations, and recommends ways in which they can be avoided, mitigated, or resolved before maturation. Often recommendations will include standard use of a dispute resolution contract clause specifying one of the alternative dispute resolution techniques described below (GREEN & JACOBS).

A full-blown dispute management audit might go beyond the anticipation and prevention stages and provide cost/benefit analysis of the ways in which the institution handles disputes, probable outcomes if the disputes are handled in different ways, and a description of what information, if available, might have induced the timely use of more efficient or effective mitigation or resolution techniques (HAMILTON).

For example, a dispute management audit tailored for a consumer service company that receives numerous complaints as a natural by-product of its business would attempt to reveal:

- (a) how, and how well, consumer relations employees absorb information material to a consumer request;
- (b) how employees conceptualize problems presented by consumer requests;
- (c) what procedures and rules of thumb employees actually follow to handle consumer requests;

- (d) which of many possible changes in the facts of the situation would cause a change in the handling procedure;
- (e) what relations, if any, *actual* handling procedures bear to corporate policies governing consumer relations problems;
- (f) why employees believe it desirable and/or necessary to deviate from established corporate policy; and
- (g) what happens when a problem is handed up the line, through the point that it reaches the courtroom.

With modern electronic data processing technology, it is possible to quantify much of this information and to create models to depict behavior patterns and choices. Highly sophisticated dispute management procedures employing computer-aided analysis have been developed and used successfully to analyze and improve the ways that insurance claims adjusters deal with casualty claims (HAMILTON; GOSNER & WILHELM). Obviously, these management systems also can serve an anticipation/prevention function.

#### *ii. Consumer Relations Programs*

As a result of a comprehensive task force study which, in essence, performed a dispute management audit, the Bank of America established an apparently effective dispute prevention and mitigation program to handle routine consumer complaints (DAUER, *Preface*). After identifying the typical reasons why bank customers complain and the major problems in how those complaints were handled, the task force came up with an eight-point dispute prevention program for the bank:

1. Determine areas in which consumer problems may arise and attempt to *prevent* such problems.
2. Elicit *consumer opinion* concerning the bank's procedures.
3. Provide continuing *training* for bank employees who deal with the public.
4. Provide *incentives* for employees to develop sensitivity towards consumer issues.
5. *Educate the consumer* about the services that he can—and cannot—expect from the bank, including the complaint system and procedures for utilizing it.
6. Provide reference, if necessary, to a *third party* decision-maker.

7. Provide a *central location* for consumers to relate problems.
8. Assure that written responses to complaints are *simple and clear* and avoid the appearance of form letters.

Each unit dealing with the public should appoint one or more employees (preferably, in the case of bank branches, the manager) to handle customer disputes. The first employee contacted should, while the customer listens, explain the customer's complaint to the decision-maker so that the customer is not obliged to explain again. If the decision-maker is unable to resolve the dispute to the customer's satisfaction, the customer should be told about *The Consumer Relations Program*. Brochures about this service should be available in each branch.

A Consumer Relations office, should be established and have broad authority to resolve consumer disputes. The Consumer Relations office should be provided with an ample and experienced staff (a permanent director and a rotating staff of experienced bankers). It should be given investigative authority to enable it to arrive at an accurate assessment and a reasonable recommendation. The office should be separately funded and have separate settlement authority for amounts up to \$1,000, so it may more objectively review and settle consumer disputes. The region, branch or department involved should be notified of the dispute and the office's recommendation, and some financial incentive should be developed to cause employees at the branch to want to perform the resolution function (DAUER, *The Consumer Relations Program*).

### *iii. Environmental Compliance Programs*

An example of a dispute identification and prevention program in the environmental/regulatory area is Allied Chemical's Environmental Organizational Program (PLAUT & WALLUM). Allied Chemical's program includes the establishment of a Corporate Environmental Affairs Department (CEAD) responsible for policies, overall programs, and coordination in the environmental assurance area, including surveillance activities, review of environmental financial matters and the regulatory interface. To keep abreast of changing federal, state, and local environmental laws and regulations, Allied's CEAD maintains daily communications among operating staff responsible for environmental problems, requires regular reports from managers, and conducts periodic seminars on topics of general environmental interest. The CEAD prepares and dis-



tributes numerous guidelines on environmental requirements to operating personnel and actively attempts to identify and manage risks that are (1) known; (2) known but unquantified; and (3) unknown. Allied also maintains a Toxic Risk Assessment Committee to ensure compliance in a coherent and organized manner with its responsibilities under the Toxic Substances Control Act of 1976. This Committee is made up of six representatives of CEAD and a corporation lawyer who together receive the reports of operating staff and decide whether information should be reported to EPA. This is a subject which itself can be the source of disputes within the corporation because of the civil and criminal penalties attaching to the corporation *and its employees* for failure to report required information.

#### *iv. Corporate Ambassador*

A dispute anticipation and prevention program famous in the high-tech world was IBM's "corporate ambassador" program. Designed to respond to potential disputes with IBM customers who also were its competitors, the aim of the program was to avoid contention by opening up broader avenues of communication, establishing wider and earlier collaboration among potential adversaries who needed each other, and enhancing relationships that were continuing and long term (DAUER, *Preface*).

#### *v. Internal Employee Grievance Mechanisms*

Professor Alan Westin has studied a number of corporations that have established internal complaint mechanisms to mitigate or prevent employee disputes (WESTIN). A survey of employee complaints undertaken by Westin for the Center for Public Resources, in collaboration with the Educational Fund for Individual Rights reported a strong trend toward increasing employee disputes and rising costs for institutions in coping with these disputes. A later, more extensive study conducted by Westin and Michael Baker under a grant from Xerox Corp. identified a large number and variety of internal complaint mechanisms in corporations and universities that successfully prevent a large number of employment related disputes from escalating into lawsuits.

#### *vi. Consensus Building*

Examples of the use of consensus building to avoid or mitigate disputes are the National Coal Policy Project (CENTER FOR

STRATEGIC AND INTERNATIONAL STUDIES; MURRAY), and the Wisconsin Mining program (PESHEK). Both of these programs brought together diverse groups of interests, including industry representatives and environmentalists, to try to resolve difficult environmental policy issues in a cooperative way. The participants in these projects enthusiastically describe them as a superior method of reaching a reasonable solution to difficult problems that often provoke disputes that take years to resolve.

Another example is the "negotiated investment strategy" (NIS) developed by the Charles Kettering Foundation to bring about a coordinated plan for the allocation of public and private resources to achieving mutually agreed-on objectives. It does this by offering a substitute for exhortations to cooperate: a multi-group negotiation process orchestrated by an experienced mediator (WATTS 14-15). This process has been applied successfully in a number of projects in Ohio, Connecticut, and Massachusetts (SUSSKIND & OZAWA).

#### *vii. Ombudsman*

Examples of this type of preventive mechanism are M.I.T.'s and Control Data Corporation's (REED) ombudsman programs. The MIT program is described as "an upward-feedback-mediation model" (ROWE; ROWE & BAKER), designed in part to bring employee concerns to line managers in an orderly, timely and supportive fashion so that changes in university policies can be made to eliminate the sources of recurring problems. The procedure explicitly encourages a reasonable expression, as early as possible, of inquiries, concerns, complaints, and grievances in an informal as well as formal context. The process is designed to be consumer-driven with a stated purpose of encouraging employees to air problems early so that they can be corrected before complaints harden into grievances, and grievances into disputes.

#### *b. Dispute Management Processes and Techniques*

In the past few years there has been a great outpouring of literature on the management of disputes. Schemes ranging from simple budgeting plans to sophisticated computerized litigation management programs have been promoted as a way for institutions to contain their dispute-related costs (*see generally* TAYLOR, FINE, & MOUKAD).

On a conceptual level, this development represents a reversal of the traditional view that litigation is an intrusive event and an

exceptional corporate output. Under the traditional view, disputes were unusual and unwelcome events to be handled by outside professionals, not managed like the rest of the business. The new dispute management models start from the assumption that disputes are a normal (if unintended) corporate by-product capable of being managed by the same tools the corporation uses to manage its other profit centers—cost accounting, analysis by teams of experts, and exercise of business judgment. In the modern model, litigation is an investment problem and the general counsel is the manager of these investments rather than a detached legal professional involved mostly in purchasing litigation services from outside firms. The general counsel today is expected to manage a large law office, apply the skills and tools of the business manager, and make business judgments about cases the same way as other managers make judgments about other corporate investments (DAUER).

### *i. Litigation Risk Analysis*

Mark Victor, Director of the Center for Litigation Risk Analysis, has been one of the earliest and most vigorous proponents of the use of risk analysis in valuing litigation and making dispute resolution decisions. For several years now, Victor has held intensive, one-day briefing sessions at various locations around the country for general counsel, private lawyers, and managers on the subject of “litigation risk analysis,” which he describes as a “procedure for placing a dollar value on actual and potential legal problems.” Victor’s method consists essentially of using a decision tree to assess the probabilities of certain litigation outcomes and their dollar values (VICTOR).

Similar techniques, although in a more sophisticated format, are described by Bodily (BODILY). Bodily’s model uses the same decision tree and decision analysis approach that Victor uses to determine the efficacy of litigation choices, such as litigate or settle, and the dollar value of each of these choices. It also explains how to compute the average monetary outcome of decisions made with current information and quantify the expected value of perfect information. This last datum can then be used to decide how much to invest in discovery and legal research.

Bodily cautions that the application of decision analysis to litigation is subject to a number of obstructions and pitfalls. “The problems chiefly center around human limitations in processing information, organizational weaknesses, and the complex nature of the

competitive situation.” Nonetheless, he contends that lawyers have much to gain from the use of decision analysis and that executives have much to gain from actively managing litigation rather than relying on the lawyers as the experts on any legal matters. “Legal counsel should be used like other high-priced experts: for advice, not as a substitute for good management. Settlement and litigation strategy decisions, like other strategy decisions, should not be delegated but kept in the hands of the chief executive officer or board of directors.”

Bodily denies that the unknowns and uncertainties of litigation are too great to be quantified. “The possible results of any litigation are no more difficult to forecast and analyze than, say, the possible success of any new product on the drawing board.” He advises that a case may be a good candidate for decision analysis if a good deal of uncertainty exists, the case is complex and a number of factors render a seat-of-the-pants judgment difficult, if a case has a potentially large financial impact on a company, or if neither a company nor its decision maker has fully formed goals or preferences.

### *ii. Litigation Budgeting*

Not all the proponents of litigation risk analysis and cost control are MBA's. Robert Banks, vice president and general counsel of Xerox Corporation, has long championed the virtues of budgetary planning in litigation (BANKS). Borrowing from procedures and practices that the corporation had been following for years in other areas of its business operations, Banks has the lawyers in his law department draw up a one year plan for each case. The plan is updated with a monthly outlook and periodically compared to actual results. Senior managers of the law department are responsible for drafting their own litigation budgets, and a total budget for the law department is put together on a quarterly basis.

Banks contends that the Xerox litigation cost control system produces many benefits without imposing any burdens. He claims that its implementation required no increment in manpower and provides an invaluable planning tool and benchmark against which to measure progress and problems. Banks also contends that the use of case budgets promotes more realistic settlement evaluation and permits continuing management review of litigation strategy and tactics. Most important, he says, “The system creates a cost-conscious atmosphere. Considerable expense is saved by the simple

awareness by house counsel that his budget will be reviewed. Outside counsel also is put on notice that we do not have a spare-no-expense attitude." (BANKS).

### *iii. Aggregate Case Load Management*

Boise Cascade Corporation has gone Xerox one better and developed an automated litigation management program that provides "aggregate case load management" and "computer-assisted techniques for individual case analysis" (GONSER). The aggregate case load management system is designed to capture all pertinent data on every lawsuit in which the company is a party. This data base is used not only to provide each attorney with updates of her case management responsibilities, but also to alert the attorney to "runaway" cases—those which have accumulated disproportionate fees or those in which progress is slower than anticipated. Such cases are investigated to see what policy reasons justify continuing legal costs that appear disproportionate to the potential outcome. The data base is also used to identify cases relating to particular corporate divisions responsible for production of particular products so as to identify possible increases or decreases in disputes relating to product quality or claims handling procedures. The data base can also generate computer graphics showing the total case load for the company over the past year with a projected trend analysis for the next one to five years.

Boise Cascade's individual case analysis system is entirely distinct from the aggregate caseload management system. The individual case analysis program attempts to value the total economic impact of a lawsuit upon the company, which it labels the "investment value" ("INVALUE") of a lawsuit. The system is an interactive and self-instructive program which poses a series of questions concerning the lawsuit to the responsible lawyer. All the questions require numeric responses, some in dollars and others in the form of numerical ratings on the applicability of various factors which may or may not be pertinent to a specific lawsuit. These questions fall into three general categories: (1) exposure factors; (2) the direct and indirect financial costs of the lawsuit; and (3) subjective factors that may be applicable to any defense strategy. After obtaining answers to these questions, the computer produces a statement of the investment value of the case, *i.e.*, "the net aggregate economic impact of all factors pertinent to the lawsuit."

According to Gonser, the use of computerized case analysis insures that all relevant factors will be considered by the responsible

attorney in reaching an opinion as to the value of the case. In addition, a printout of the program provides an historic record of how the case was initially and subsequently appraised. The model also insures that all cases will be evaluated consistently so that the company can establish priority among lawsuits and direct its resources to those cases that have the greatest overall economic impact on the company. Finally, by comparing the investment value calculation to anticipated costs, an early cost-effective defense strategy can be formulated.

*iv. "Dataclaim"*

Hamilton, Rabinovitz, Szanton and Alschuler's "Dataclaim" in many ways is the insurance claim management analogue to Xerox's litigation cost control system and Boise Cascade automated litigation management systems (HAMILTON). Employing many of the same data gathering and computer analysis techniques as the other systems, the Dataclaim program is designed to explain to insurers how, and in what amount, standardized claims are valued, how much valuation is influenced by up to 50 specialized factors, how claim reserves are set and adjusted, how claims are negotiated, and how these factors vary with the personal and professional experience of the claim handler.

Since insurance companies handle more claims and disputes than any other type of enterprise, one would expect that sophisticated dispute management tools would have developed in that industry. This appears not to be the case, however. Aside from Dataclaim, insurance company claims departments seem to be using the same ad hoc approaches to dispute valuation and management as most lawyers.

*c. Resolution Processes and Techniques.*

A large number of novel alternative dispute resolution processes and techniques have been applied with successful results to settle institutional disputes that have not been anticipated or prevented and which may or may not have been managed well (*see generally* TAYLOR). Many of these techniques are hybrids combining various characteristics of the primary dispute resolution processes (adjudication, arbitration, mediation, and negotiation) in new combinations. These alternative processes and techniques range from the purely private to the purely public, with some processes employing both private and public parts. They run the

gamut from binding to nonbinding. Although some of the processes were created as a custom-tailored response to a particular dispute, they share certain common characteristics. For example, they tend:

1. to *re-translate* the dispute from a legalistic fight into a problem to be dealt with on its original terms;
2. to be *co-operative* rather than aggressively adversarial, at least to the extent of depending on the parties' willingness to discuss the dispute openly and in good faith;
3. to involve a *neutral third party* of the disputants' own selection at least as a facilitator; and
4. to involve *new representatives* of the parties—often non-lawyers— with authority to resolve the dispute (DAUER).

To understand how these new processes differ from the more familiar primary processes of adjudication, arbitration, mediation, and pure negotiation, and from each other, their salient characteristics are set forth in Table IV (GOLDBERG, GREEN, & SANDER 8-9).<sup>5</sup> The more important of these new processes are described in more detail below, together with other processes that have particular significance to institutional disputes.

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5. The original version of this Table first appeared in Green, *A Comprehensive Approach to the Theory and Practice of Dispute Resolution*, 34 J. OF LEGAL EDUC. 245, 257 (1984) and Green, *Getting Out of Court—Private Resolution of Civil Disputes*, 28 BOSTON BAR J. 11,11 (1984).

TABLE IV  
 "Primary" Dispute Resolution Processes

	Adjudication	Arbitration *	Mediation	Negotiation
Voluntary/ Involuntary	Involuntary	Voluntary	Voluntary	Voluntary
Binding/ Nonbinding	Binding, subject to appeal	Binding, subject to review on limited grounds	If agreement, enforce-able as contract	If agreement, enforce-able as contract
Third party	Imposed, third-party neutral decision-maker, generally with no specialized expertise in dispute subject	Party-selected third-party decision-maker, usually with specialized subject expertise	Party-selected outside facilitator, usually with specialized subject expertise	No third-party facilitator
Degree of formality	Formalized and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured
Nature of Proceeding	Opportunity for each party to present proofs and arguments	Opportunity for each party to present proofs and arguments	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests



Outcome	Principled decision, supported by reasoned opinion	Sometimes principled decision supported by reasoned opinion; sometimes compromise without opinion	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Private/ Public	Public	Private, unless judicial review sought	Private	Private

\* court-ordered arbitration is involuntary, nonbinding, and public

“Hybrid” Dispute Resolution Processes

Private Judging Voluntary	<i>Neutral Expert Fact-Finding</i> Voluntary or involuntary under FRE 706	<i>Mini-Trail</i> Voluntary	<i>Ombudsman</i> Voluntary	<i>Summary Jury Trial</i> Involuntary
Binding, subject to appeal	Nonbinding but results may be admissible	If agreement, enforce- able as contract	Nonbinding	Nonbinding

<p>Party-selected third-party decision-maker, may have to be former judge or lawyer</p>	<p>Third-party neutral with specialized subject matter expertise; may be selected by the parties or the court</p>	<p>Party-selected neutral advisor sometimes with specialized subject expertise</p>	<p>Third-party selected by institution</p>	<p>Mock jury empaneled by court</p>
<p>Statutory procedure but highly flexible as to timing, place and procedures</p>	<p>Informal</p>	<p>Less formal than adjudication; procedural rules may be set by parties</p>	<p>Informal</p>	<p>Procedural rules fixed; less formal than adjudication</p>
<p>Opportunity for each party to present proofs and arguments</p>	<p>Investigatory</p>	<p>Opportunity and responsibility to present summary proofs and arguments</p>	<p>Investigatory</p>	<p>Opportunity for each side to present summary proofs and arguments</p>

Principled decision, sometimes supported by findings of fact and conclusions of law	Report or testimony	Mutually acceptable agreement sought	Report	Advisory verdict
Private, unless judicial enforcement sought	Private, unless disclosed in court	Private	Private	Usually public

*i. Mini-Trial.*

The mini-trial is the leading example of the new hybrid corporate private dispute resolution processes (GOLDBERG, GREEN & SANDER 271; BUTLER; GREEN, *Avoiding the Legal Log Jam, Resolution, CPR Legal Program, Growth, Proceedings*; GREEN, MARKS & OLSON; JANICKS; WRAY; ZAMPANO). It essentially structures private negotiation by combining elements of negotiation, mediation, and adjudication in a new way. The mini-trial is used most often in business disputes when the parties are at an impasse because of a good faith disagreement about the likely outcome if the dispute is litigated, the existence of emotional barriers to resolution caused by the parties' (or, sometimes, the lawyers') personal antagonism, or the parties' inability to fashion a settlement that is responsive to all of their needs and rights.

A mini-trial can overcome a negotiation impasse by doing the following:

(a) Focusing the negotiation on the legal merits at the heart of the dispute, thus overcoming the barrier to resolution caused by the parties' differing assessments of the likely outcome of the case in court; and

(b) Reverting into a business problem what has often been transformed by the litigation process into a technical, lawyers' fight. This reversion is achieved by bringing in new negotiators—usually high level, nonlegal managers who are not emotionally involved in the dispute, but who have authority to settle the case and who can view the dispute in a broader context in which imaginative, integrative solutions are more likely to be found. The presence of these nonlegal representatives of the clients also brings together the true parties in interest, who often are better able than the legal representatives to assess the strategic risks and overall importance of the case to the client.

Although the specific procedures of a mini-trial may vary depending on the case and the parties' desires, most mini-trials contain these key elements:

(1) The parties *voluntarily agree* to conduct a mini-trial. There is no statutory, regulatory, or (usually) contractual obligation to participate in a mini-trial. Parties may terminate the mini-trial at any time.

(2) The parties negotiate and sign a "protocol" or *procedural agreement* that spells out the steps and timing of the mini-trial process. This agreement usually specifies the parties' obligations and responsibilities in the mini-trial process, their right to terminate

the process, and certain legal matters such as confidentiality of the proceedings and the effect of the process on any pending or future litigation. This agreement may be quite short and simple or it may resemble ad hoc, private rules of civil procedure.

(3) Prior to the mini-trial, the parties *informally exchange key documents*, exhibits, summaries of witnesses' testimony, and short introductory statements in the nature of briefs. If necessary, the parties may engage in shortened, expedited depositions and other discovery without prejudice to their right to take full discovery later if the mini-trial does not settle the case.

(4) The parties select a mutually acceptable neutral advisor to preside over the mini-trial. Unlike an arbitrator or judge, the neutral advisor has no authority to make a binding decision, but at the mini-trial, the neutral advisor may ask questions that probe the strengths and weaknesses of each party's case. Also, after the mini-trial the neutral advisor may be asked by the parties' representatives to advise them on what the likely outcome would be if the case went to trial. Selection of a respected neutral advisor with credibility is very important for each side. One of the principal goals of the participants if they cannot obtain a favorable settlement in direct negotiations is to persuade the neutral advisor to advise the opponent that it would be better off settling than taking the case to trial.

In most mini-trials, the parties select a former judge as the neutral advisor because they believe that a person with prior judicial experience is best able to give them sound advice on likely trial outcomes. But parties generally try to select a former judge who recognizes the difference between the adjudicative function and the advisory role the neutral advisor plays at a mini-trial. In some mini-trials, especially those that turn on the resolution of a technical or economic issue, the parties may select a nonjudicial expert in the subject matter as the neutral advisor. In other mini-trials, the parties dispense with the neutral advisor altogether and rely solely on their business representatives to preside over the mini-trial and to conduct the negotiations privately. Another approach used at some mini-trials is to have a less active facilitator set up the mini-trial and chair it, but not advise the parties as to likely trial outcomes. In still other cases, the parties want the neutral advisor to attempt to mediate a resolution of the dispute. The function the neutral advisor is expected to perform will determine the kind of person best suited for the role. As a practical matter, however, it may be difficult to know in advance what will

be required of the neutral advisor. Thus, the most successful neutral advisors have been those who are capable of playing the roles of advisor, mediator, and facilitator as the situation dictates and the parties ultimately determine.

(5) At the mini-trial itself, the parties' *lawyers make concise, summary presentations of their best case*. Mini-trials may last from half a day to three or four days (two days is average). Thus, presentations are usually limited to from one to six hours for each side, depending on the complexity of the issues. Generally, each party retains complete discretion over how it will use its allotted time. In some cases, the entire presentation is made by the lawyers, similar to an appellate or closing argument. In others, the lawyers call key witnesses to explain parts of the case. Often, key documents are used to explain the case. Quite often, the parties' experts testify on technical issues. At other mini-trials, parties have used movies, views of the scene, and other imaginative devices to communicate the essence of a case in the short time allotted.

At the mini-trial, rules of evidence do not apply. Thus, if there is testimony by witnesses, it tends to be in a narrative form under informal questioning by counsel rather than in the precise question and answer form of trial examination. In most mini-trials, time is set aside for rebuttal. This may include an opportunity for questions to opposing counsel, witnesses, and experts, again in an informal, modified cross-examination format. It may also include an open question and answer session in which expert may question expert, lawyer may question lawyer, and client may question client, or any variation of these combinations.

Although mini-trial formats may vary considerably, the common goal is to employ a procedure that effectively draws out the strengths and weaknesses of each side, including the persuasiveness of counsel and witnesses, in a short time.

(6) Mini-trial *presentations are made to high-level representatives of the parties* who have clear settlement authority. In most cases, the representatives are nonlawyers who have not been involved in creating or trying to resolve the underlying dispute, but who have authority or at least persuasive power over the decision of whether to settle. In cases involving businesses, the party representatives are generally at least one level higher in the corporate hierarchy than the business people who have been involved in the case prior to the mini-trial.

At the mini-trial, the nonlegal party representatives listen, observe, and ask questions to clarify points, much like a judge or

arbitrator would, but they do not sit with or assist the advocates. Immediately after the parties' adversarial presentations on the merits of the case, the nonlegal representatives meet privately and attempt to negotiate a resolution. The theory behind the mini-trial is that the party representatives, armed with a crash course on the merits of the dispute (but without any emotional or face-saving motivations) and aware of the larger interests of their side, will be better able than the advocates or lower-level party representatives to appraise their positions and negotiate a mutually beneficial settlement.

(7) If the nonlegal representatives are unable to negotiate a settlement immediately after the mini-trial, they may schedule further talks or presentations. They may also call in the neutral advisor and ask for the advisor's views on likely trial outcomes. In the negotiation terminology of Fisher and Ury, the neutral advisor's opinion gives both sides an expert's view of its BATNA—"best alternative to a negotiated agreement." (FISHER & URY). Armed with this data, the nonlegal representatives may negotiate further. If a settlement is reached, the dispute is over, as with any negotiated settlement, and any pending litigation is dismissed. If the case is not settled, the parties are free to resume any other dispute resolution process including adjudication. Most mini-trial agreements specify, however, that the entire process, including the opinion of the neutral advisor and any statements made in the course of the mini-trial, is confidential and inadmissible in any subsequent proceeding. The parties also agree that the neutral advisor may not testify or consult with any party in that case.

The hybrid nature of the mini-trial should be apparent from this description. For example, the mini-trial provides the parties the opportunity to present proofs and arguments on the merits of the case—Fuller's classic definition of adjudication (FULLER, *The Forms*)—but in a process that has greater capacity to arrive at "win/win" results (negotiation) because the business representatives can work out their own integrative solution. The parties set their own rules of procedure and select a third party to help them resolve the dispute by considering the proper outcome (arbitration). But the third party has no binding decision-making capacity (mediation). The procedure is private (arbitration, mediation, negotiation), but is usually carried on within the structure of an on-going adjudication, and the goal is agreement rather than consistency with substantive law (negotiation and mediation).

The first mini-trial was held in 1977 to resolve a legally and

technically complex patent infringement case. Since then it has been used to settle product liability (GREEN, *CPR Legal Program*), commercial, contract (GORSKE), distributor termination, insurance (ALTERNATIVES, *Judge Keeton*), construction (ALTERNATIVES, *Austin Industries*), employee grievance (WRAY), toxic tort (BUTLER), anti-trust, and trade secret cases (ALTERNATIVES, *Gillette Mini-Trial*). Most of the mini-trials have involved multi-party disputes and some have involved cases between individual plaintiffs and businesses. Others have involved governmental entities. While most mini-trials have been conducted under custom-structured ad hoc procedures, there is a growing tendency to attempt to codify the mini-trial. In 1984, the Zurich, Switzerland Chamber of Commerce established the first public mini-trial forum and panel complete with rules. Shortly thereafter, the Center for Public Resources announced that it would act as an administrator for mini-trials under rules it would promulgate.

The following factors should be considered to determine whether a mini-trial might be employed, and the exact form it might take:

- Stages of the dispute
- Types of issues at the heart of the dispute
- Motivations and relationship of the parties

*Stage of the dispute.* Some mini-trials have occurred prior to commencement of any litigation. More often, however, a mini-trial takes place after enough pretrial discovery and sparring have been conducted to educate the parties somewhat about the disputed issues of the case and bring home to them the cost of continuing litigative combat. Obviously, the earlier in the dispute the mini-trial can occur, the greater are the cost-savings that can be achieved. Deciding when to conduct a mini-trial requires that each party make a cost/benefit analysis of the value of obtaining additional information before talking settlement.

*Types of issues.* Experience to date indicates that best results are obtained in mini-trials of cases involving complex questions of mixed law and fact (*e.g.*, patent, products liability, contract, anti-trust, unfair competition)—the kinds of cases in which litigation is often intractable and costly. For example, the mini-trial seems well-suited to resolving an antitrust case where the stumbling block to settlement is the scope and definition of the relevant market; an unfair competition case where the crucial issue is the propriety of certain disputed business practices; a products liability case where the issue is whether a specially built component part met the required standard of quality; or a contract case where the issues



are whether the terms of the contract were fulfilled or nonfulfillment was excusable.

By contrast, where a case turns solely on legal issues, traditional summary judgment procedures are likely to provide a better means of resolution. In addition, where a case turns primarily on factual disputes involving credibility, the mini-trial may not be any more effective in resolving the case than traditional settlement negotiations or arbitration unless the witness whose credibility is in issue appears at the mini-trial to tell his or her story and to be confronted by the other side. The flexibility of the mini-trial enables the parties to tailor the process to the issues in the case. For instance, where the factual disputes are technical, requiring expert analysis and promising a battle of the experts at trial, a modified mini-trial involving a neutral expert can be employed. If, for example, the performance of a product is at issue, a joint testing procedure carried out by experts for each side and a neutral expert might well provide sufficient data to foster a settlement either before or after a mini-trial. Or, in an antitrust case that turns on complex economic analysis, the parties might agree to appoint an expert to undertake this analysis early in the litigation. The expert's findings, which could be reported at a mini-trial and/or admissible at trial, will at least serve to narrow the issues in the case, and may be a substantial additional spur to settlement.

*Parties.* The motivations and relationship of the parties will have a substantial impact on the possibilities of successfully initiating and implementing a mini-trial. Where the litigation is brought or resisted for tactical reasons rather than out of a good faith sense of a wrong suffered or an accusation wrongly made, a mini-trial is unlikely to succeed. Similarly, where delay greatly favors one side over another, a mini-trial probably cannot be initiated. On the other hand, a long-term relationship between the parties will increase their motivation to conduct a mini-trial.

Motivating influences that might make a mini-trial attractive to management, in-house counsel, or retained lawyers include: (1) business uncertainty caused by the litigation, such as in a patent infringement case where the existence of the dispute casts a shadow over new product development; (2) a rapidly approaching deadline that operates like a short fuse to a potential bomb (often this deadline is a trial date); (3) accumulating costs of litigation, especially as they are projected for the entire trial; (4) internal corporate politics, such as a desire to shift or focus responsibility for the outcome of the litigation; and (5) a sense that the parties are

just not successfully presenting their cases across to the other side—that someone is simply mistaken about the likely outcome if the case goes to trial.

Motivation is a complex issue, however. The five factors mentioned above sometimes operate in contrary or contradictory ways. There is no hornbook approach. Sensitivity and timing are often critical. The fact that the parties are adamant in their positions does not necessarily preclude a mini-trial. The mini-trial has worked even in cases in which communication between the parties had broken down and compromise through traditional settlement negotiations did not appear possible. What was crucial in such cases was that the executives and lawyers on both sides, conscious that there remained some remote possibility of creating an avenue of communication, did not simply throw up their hands and begin to gird for trial but were willing to risk using a novel procedure of their own design. To the extent that some catharsis was necessary to unblock the parties, the mini-trial provided an opportunity for just enough animosity to exist, yet within a cooperative framework. The information exchange portion of the mini-trial permitted the negotiations to be refocused on the merits of the dispute, and the involvement of problem-solving businesspersons who were “above the fray” increased the chances of finding a “win/win” integrative solution.

*Costs.* Mini-trials vary in cost, depending on the amount of preparation required, the duration of the mini-trial, and whether a neutral advisor is used. Even the most elaborate mini-trials appear, however, to cost less than one to three months' worth of the legal fees incurred in moderately active litigation. Moreover, most of the parties who have engaged in mini-trials report that even if the case does not settle after the mini-trial, very little of the money spent is wasted. This is because the mini-trial forces each side to rigorously organize the mass of facts and legal arguments that have been gathered over many years of discovery and legal maneuvering, just as they will have to do to prepare the case for trial. Also, the introductory statements that have to be written and exchanged prior to the mini-trial are short versions of what might ultimately be submitted as trial briefs. The procedure demands preparation by counsel and experts that will be directly useful at trial if the case does not settle.

The only mini-trial expenditures not related to activities that would be incurred in any case for trial, and thus lost if the mini-trial does not lead to a settlement, are those relating to the negotiations concerning the mini-trial's protocol, and those resulting from

the time spent at the mini-trial itself. One party to a mini-trial of a large case estimated that these amounted to twenty-five percent of total mini-trial expenditures, and that total costs to judgment would have been approximately ten times greater.<sup>6</sup> In that case, because management considered that it was risking a relatively small amount to avoid an otherwise certain expenditure of a great deal more, it viewed the investment as well worth the risk.

Because of the necessity for organizing the case in a short time, connections between relevant facts, and between facts and legal theories that might not otherwise be made until pretrial or trial, are made significantly earlier. If the litigation continues, this fosters more focused discovery and pretrial preparation. In sum, even if a mini-trial does not settle the dispute, the time spent by counsel in intensive preparation may be worth significantly more to the client than the same amount of time spent less focused during the long pretrial phase of the case.

Mini-trials are now being used in almost every kind of case in which a corporation could be involved—contract, UCC, securities, land sales, personal injury, government contract, oil and gas sales, patent, trademark, employment, etc. Information on mini-trial experiences is available from organizations which specialize in their design and implementation, such as EnDispute, Inc., or which serve a clearinghouse, educational, and facilitative role, such as the Center for Public Resources.

*ii. Summary Jury Trial*

The summary jury trial, developed by Federal District Judge Thomas Lambros, Northern District of Ohio, seeks to encourage settlements by assisting parties in jury cases to evaluate realistically the strengths and weaknesses of their position. In essence, the summary jury trial is an adaptation of the mini-trial for jury cases in which the parties want more direct information about likely jury reaction. In the summary jury trial, the lawyers present short (generally one to two hours) summaries of their case to a mock jury chosen from the regular venire. The jury deliberates for an hour or less and returns a consensus verdict responsive to inter-

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6. The case reported was one of the very first mini-trials. Considerable time was consumed working out the details of the mini-trial procedure. These costs have been greatly reduced in subsequent mini-trials which have borrowed from the earlier mini-trials. Green, *CPR Legal Program Mini-Trial Handbook*, in *CORPORATE DISPUTE MANAGEMENT 1* (Center for Public Resources ed. 1982) includes instructions on how to do a mini-trial together with boilerplate mini-trial agreements and forms.

rogatories on liability and damages. The lawyers may then question the jury about their verdict and deliberations (Lambros and Shunk, 1980).

A study of this process by the Federal Judicial Center reached the tentative conclusion "that summary jury trial worked well in settling cases that might have gone on to full trials had they not been assigned to such a procedure" (JACOUBOVITCH & MOORE 7). Subsequent analysis has shown that of over eighty cases that were assigned to summary jury trial, more than forty percent settled prior to the summary jury trial and less than three percent went to full trial (LAMBROS 472-473; BEDLIN & NEJELSKI 25). This data, however, is subject to the same criticism that may be made about many other studies of alternatives: the lack of a control group of similar cases makes it impossible to draw valid conclusions about the effect of the process on the settlement rate. Nonetheless, the Federal Judicial Center study reports that a number of the attorneys surveyed believe that assignment of cases to summary jury trial provides a greater impetus to settle than do other pretrial proceedings (JACOUBOVITCH & MOORE 31).

In September 1984, the Judicial Conference of the United States endorsed the experimental use of summary jury trials as potentially effective means of promoting the fair and equitable settlement of civil jury cases likely to be lengthy. In passing this resolution, the Judicial Conference rejected a suggestion that the summary jury trial be employed only where the parties voluntarily agreed to it (ADMINISTRATIVE OFFICE OF U.S. COURTS, *Judicial Conference* 3).

### *iii. Neutral-Expert Fact-Finding*

Many corporate disputes involve complex technical or economic issues. Cases that turn on such facts may be difficult to settle because of widely different assessments by the parties of how that issue will be decided at trial. These assessments may be fueled by disparate expert opinions on the issue. In such a situation, the appointment of a neutral expert to evaluate the key issue may improve the chances for settlement.

This category of cases includes patent litigation where, for example, the infringement and validity of a patent on a computer-based algorithmic model or on a life form is at issue; commercial cases where conformance of a product, say an electronic component, to the specifications of a contract or standards of the industry is at issue; construction cases where, for example, the cause of the

collapse of a bridge is at issue; antitrust cases where the scope of the relevant market and the defendant's control of that market are at issue; and securities cases where the issue is whether the defendant's accounting practices and other actions amounted to violations of the securities laws. It also includes environmental disputes where the issues may include the actual level of pollution, the short- and long-term health effects of such contamination, and the costs of remedying the situation; medical malpractice; and toxic tort, product liability personal injury cases in which the issues are whether a particular product is capable of causing certain types of harm, and whether that harm was caused by the product in a specific instance. Utility rate-making cases and other administrative appeals fall within this category. This is not an exclusive list of cases that fit the generic description; these types of cases make up an increasing percentage of the workload of federal and state courts.

Several factors set such disputes apart from other forms of legal combat. First, their resolution usually requires appraisal of data and analysis of information outside the ken of most people's everyday experience. Indeed, in many cases the dispute turns on an issue that only a person with highly specialized and advanced training or experience can understand. Second, in these cases the "truth" concerning a key issue, such as the degree of harm likely to be caused over an extended period by a contaminant, may itself be in a state of flux or nearly impossible to determine without years of empirical investigation. This may require that any decision be made under conditions of uncertainty that are much greater or are qualitatively different than those faced in other kinds of litigation. Third, development and presentation of proof on scientific issues is likely to be enormously difficult, time-consuming, and expensive and apt to exacerbate the inherent deficiencies and opportunities for abuse present in the adversarial process generally. Fourth, the scientists, engineers, or other experts who will be called to testify on the issues in dispute live in their own cultures and bring their own languages, values, and modes of thought with them. This makes communications between such witnesses, lawyers, judge, and jury difficult (SAKS & VAN DUIZEND 4-9, 92-96). Finally, the experts called by the parties to testify are likely to be carefully selected and prepared to present only the testimony most favorable to the party that called them. This means that in most cases, the fact-finder will be faced with conflicting expert opinion and technical evidence that by definition was beyond the

understanding of the fact-finder in the first place.

There is a particularly pressing need to develop an approach to the resolution of cases raising complex scientific, sociological, technical, economic, and business issues that eliminates or reduces the deficiencies and abuses of the present system. Increased use of neutral experts is one such approach. The neutral expert can promote accurate fact-finding by providing an objective and impartial assessment of the facts, often from a person of higher caliber than is available on a partisan basis to the parties. The neutral expert can also serve as a disincentive to strategic manipulation of the litigation process and, most important, promote fast, fair, and efficient settlement.

Since the adoption of the federal rules in 1975, Rule 706, of the Federal Rules of Evidence (FRE) is the most likely mechanism for appointment by the court of a neutral expert.<sup>7</sup> Rule 706, however, is not the only source of authority under which a federal court can appoint a neutral expert in civil cases. Under Rule 53 of the Federal Rules of Civil Procedure, the court can appoint a master "to report . . . upon particular issues or to do or perform particular acts or to receive and report evidence . . . ." References to masters are limited by the rule to situations in which "exceptional conditions require it" (nonjury cases) or only "when the issues are complicated" (jury cases). The "exceptional" case requirement has limited the number of cases in which masters have been appointed, but in the cases in which they have been appointed, masters have exercised extraordinary powers over pretrial and trial-stage proceedings. In addition to Rule 53, in appointing masters and experts,

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7. Rule 706 states in pertinent part:

*Rule 706. Court Appointed Experts*

(a) *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection . . . . A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness . . . .

(c) *Disclosure of appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

FED. R. EVID. 706.

federal courts have relied on their "inherent authority" over the administration of justice and the consent of the parties.

The characteristics of Rule 706 that make it particularly suitable as an alternative dispute resolution device and inquisitorial adjunct to the adversarial trial system include:

- (1) *It does not require the agreement of the parties.* The court may appoint an expert on its own motion or at the request of one party.
- (2) *It provides for participation of the parties in the selection of the expert and in the forming of instructions.* The court "may" appoint any expert witnesses agreed on by the parties or of its own selections. The expert is informed of his duties in writing by the court or at a conference in which the parties "shall have opportunity to participate."
- (3) *The expert advises the parties of his findings.* This presents an opportunity for the expert to play a mediation/conciliation role. The expert's deposition may also be taken by any party.
- (4) *The procedure is coercive but nonbinding.* The expert's opinion is admissible as the opinion of a neutral expert but it is not conclusive. Jury trial rights are preserved. Cross-examination and the calling of retained experts is permitted, but the court may tell the jury that the expert was court appointed.
- (5) *The expert is entitled to "reasonable compensation" as set by the court.* Costs are apportioned in the court's discretion, and may be taxable to the parties as other litigation costs.
- (6) *Appointment at any phase of the proceeding is allowed.*

Neutral expertise similar to that provided by a Rule 706 court-appointed neutral expert can be applied to complex disputes in other ways also. For example, parties can agree privately, outside the litigation process, to retain a neutral expert to advise them on the complex issues in dispute. Disputants could agree to hire a neutral expert even prior to commencement of litigation. There do not appear to be any barriers that would prevent a privately appointed neutral expert from performing any of the functions specified in Rule 706, such as conducting research, advising the parties of findings, giving a deposition, and testifying in court. The only limitation appears to be that the expert would not be identified to the jury as court-appointed. The parties could agree, however, to disclose to the jury that the expert was jointly selected and retained.

A privately appointed neutral expert may be able to do much more than an expert appointed under FRE 706. For example, if the parties agree, the privately-appointed expert could conduct a far ranging investigation involving examination of documents, persons and things, experiments, and testing. The authority of the Rule 706 expert to conduct such discovery is unclear. Carrying this procedure to its logical conclusion, the parties could agree to submit the dispute to a neutral expert for *binding* resolution. This, of course, is arbitration or reference under a statute or rule providing for a general order of reference (rent-a-judge). Private referral of a dispute to a neutral expert for a *nonbinding* opinion or assistance is a form of mediation or mini-trial, depending on the process and the neutral expert's function. The important distinctions between these other forms of neutral assistance and Rule 706 are that the parties' consent is required to utilize them, and their purposes do not include neutral fact-finding for trial presentation.

To understand how the appointment of a neutral expert will affect the settlement process, it is necessary to understand how litigants decide to settle cases. Many factors influence the decision whether and when to settle a dispute. These include "rational" factors intrinsic and extrinsic to the dispute, such as the likely outcome and the litigants' resources, needs, aversion to risk, and staying power. They also include nonrational factors such as the litigants' emotional condition.

Assuming for purposes of analysis, however, that litigants are rational decisionmakers with relatively equivalent resources, needs, staying power, and aversion to risk, they will not settle when the stakes are significant and where they hold widely divergent views of likely trial outcomes. In complex scientific and technical cases, disparity in the parties' estimates of the plaintiff's probability of success are usually caused by sincere and strongly held divergent views on how a crucial technical issue will be decided. Often each side's high estimate of its probability of success is based principally on the opinions and assurances it has received from its experts. Unless some additional information is provided to the parties that causes them to reevaluate their experts' confidence in their opinion or the parties' confidence in their experts' opinions, the disparity between the parties' estimates of success will prevent settlement.

In some cases, the most effective piece of additional information that might cause one or both parties to modify their estimate of their probability of success is the opinion of a neutral expert on



a key technical issue. Indeed, the mere possibility that a court-appointed neutral expert will testify at trial may be enough to cause the parties to reassess their pretrial estimates of success.

Appointment of a neutral expert may have several other settlement-inducing side-effects. Although Rule 706 does not specify how the expert shall conduct an inquiry and formulate his opinions, contact between the expert and the parties is not prohibited and, except where the court directs that all communication between the expert and the parties pass through the court, is likely to occur. In "instructing" the expert as to duties, the court, certainly with the consent of the parties and possibly even without their consent, may instruct the expert to inspect people, places, and things. This may well include discussions with the parties through their lawyers and experts. These discussions may take a variety of forms, from highly unstructured and informal *ex parte* discussions to a highly structured, on-the-record hearing. Indeed, with the cooperation of the parties the neutral expert can conduct a thorough inquest into the subject matter in dispute. Departing from the "pure" neutral-expert role in this manner, during the course of investigations there may be many opportunities for the neutral expert to assume a mediational role between the adversaries' own experts. The expert may assume some or all of the functions that other kinds of third-party intervenors to a dispute commonly undertake. While this creates danger for an inexperienced or overly ambitious neutral expert, it also provides significant dispute resolution opportunities. In formulating instructions to the neutral expert, the court and parties should clearly delineate the expert's functions, duties, and range of activities. In this way the court can minimize the danger that the neutral expert's role will be overstepped, thereby destroying effectiveness, while at the same time maximizing the possibilities that exist for successful third-party dispute resolution intervention.

If neutral experts are such a readily available palliative to the excesses of adversariness in complex cases, why are they not used more often? The underutilization of neutral experts may be the result of ingrained conceptions about the adjudicatory process and unease on the part of judges and lawyers who believe that the introduction of neutral experts will threaten their roles in this process. The most commonly expressed criticism of the use of neutral experts is that they will influence the jury "excessively." It is unclear what "excessively" means in this context. If the case involves subject matter on which expert testimony is admissible,

then expert testimony *should* influence the jury. Further, when there is a clash of expert testimony from the parties' experts, the opinion of a nonpartisan expert should receive important consideration from the jury because it is at least free from the adversarial bias that affects the parties' experts. "Excessive influence" in this context must mean "giving the evidence more weight than it deserves to be given," but, as explained above, the procedures of Rule 706 and the traditional tools of the adversary process are available to control the impact the neutral expert's testimony will have on the jury. There is no evidence that these procedures are insufficient to limit the impact of neutral expert testimony to its proper level.

What judges (and lawyers) may really be concerned about is the power that they fear the neutral expert will take away from them. In our adversarial system, the judge and parties control the adversary process. There is only one neutral in the courtroom and that neutral is the judge. The only experts in the courtroom are leashed to the parties' lawyers. Bringing a neutral expert into the process destroys the judge's monopoly on neutrality and the parties' control of the expert information and opinion in the case. But in the face of strong evidence that the lawyers' lock on the levers of the adversary process regarding expert testimony can retard accurate fact-finding and hinder settlement, some adjustments seem appropriate. The traditional roles of judges and lawyers should give way slightly if adjustments will rationalize the adjudicatory process and make it fairer and more efficient.

#### *iv. Ombudsman.*

The ombudsman seeks to resolve grievances wholly outside the judicial system by performing a mixture of mediatory and investigatory functions. In the classic Scandinavian model, the ombudsman is a public official appointed to hear citizen complaints and conduct independent fact-finding investigations with the goal of correcting abuses of public administration. While extensively used in Canada, according to Johnson, Kantor and Schwartz only four states and a handful of localities have established public ombudsmen, in spite of the promulgation in 1974 by the American Bar Association of a Model Ombudsman Statute for State Governments (JOHNSON, KANTOR, & SCHWARTZ 58-65). However, in recent years, many nonunion employers, spurred by a variety of motives—the desire to increase employee satisfaction; to avoid unionization; to

discourage litigation based on alleged discrimination or wrongful discharge—have adopted their own internal dispute resolution procedures, separate and distinct from traditional “chain of command” procedures. While some of these new procedures are limited to discrimination complaints and others are available only to employees paid by the hour, excluding higher-level salaried personnel, about one-third of all nonunion employers have a broadly based dispute resolution procedure that is open to all employees for any type of complaint (ROWE & BAKER).

In order to encourage employees to use these procedures, and to increase their objectivity, some companies have designated inhouse “neutrals” who investigate complaints, mediate among disputing parties, and make recommendations to management. These neutrals typically do not have the power to reverse a management decision. Their model is not that of the arbitrator, but rather that of the mediator or the ombudsman (ROWE).

The growth of internal procedures to deal with intra-institutional disputes has not been limited to employer-employee disputes. Other institutions have also implemented internal dispute resolution procedures in an effort to both reduce the frequency of litigation and to improve the quality of institutional life. Among the institutions that have adopted such procedures are high schools, colleges, and universities, as well as a variety of institutions in which people are confined—hospitals, nursing homes, mental institutions, and prisons. At times, an internal dispute resolution procedure has been legislatively imposed. For example, the Older Americans Act of 1981 provides that each state, in order to receive grants for state and community programs on aging, must provide for the establishment of an ombudsman program for all older individuals residing in long-term care facilities. Another example of legislation bearing on internal dispute resolution procedures is the Civil Rights of Institutionalized Persons Act of 1980, which authorized the Attorney General to develop minimum standards for prison dispute resolution procedures. Under that Act, federal courts may continue cases filed under 42 U.S.C. §1983 by prisoners for a period of up to 90 days in order to allow exhaustion of the prison dispute resolution procedure, if that procedure complies with the standards promulgated by the Attorney General.

Wholly apart from legislative requirements, prisons have been active in the development of internal dispute resolution procedures, because prison administrators have sought satisfactory means of responding to prisoner complaints before they result in litigation,

increased tension, and violence. One of the earliest prison dispute resolution procedures was that established in 1973 by the California Youth Authority (KEATING & KOLZE).

A central characteristic of both the employer-employee and the prison-inmate relationship is the existence of a substantial power disparity between the institution and the individual involved in a dispute with it. To be sure, this power disparity is not the same in all institutions. Employees, because of their ability to litigate under antidiscrimination statutes and common law wrongful discharge principles, as well as their freedom to unionize and to terminate the employment relationship, have considerably more power vis-à-vis their employer than do prison inmates vis-à-vis the prison. The power of students relative to schools, colleges, and universities is somewhere between that of employees and that of prison inmates. Nonetheless, in each of these relationships there is a substantial power disparity between the individual and the institution, and this disparity gives rise to a number of issues, such as whether a dispute-resolver who is funded by, and exists at the sufferance of, a powerful institution can be neutral or fair in disputes between the institution and a less powerful individual who is dependent on that institution. If the dispute-resolver does remain fair, will the institution permit the dispute resolution process to survive? Will the institutionally controlled dispute resolution process, by redressing the more egregious excesses of the institution, dissipate the will of the individuals involved to seek meaningful structural change in their relationship with the institution, and thus, in the long run, work against the interest of those individuals? None of the internal grievance procedures utilizing the ombudsman/mediation model have been in existence long enough to provide definitive answers to these questions.

#### *v. Settlement Special Masters*

In large, complex cases, a court may appoint a special master for the purpose of exploring or designing settlement options. Depending on the case, the special master may function as a mediator or as the designer and administrator of an elaborate case management and settlement plan. Special masters are provided for under Rule 53 of the Federal Rules of Civil Procedure; most states have similar rules. But, until recently, perhaps because of hostility by appellate courts to the overuse of masters,<sup>8</sup> their use has been

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8. See, e.g., *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

limited to overseeing discovery in "exceptional cases" or in conducting an accounting. Recently, courts have begun to appoint special masters in complex cases, generally involving corporations, explicitly for the purposes of facilitating settlement.

In the Ohio Asbestos Litigation in the Northern District of Ohio, for example, the special masters developed a detailed case management plan designed to reduce the delay and costs associated with trying multiple asbestos cases. They also created an innovative case evaluation and apportionment plan designed to facilitate mass settlement of asbestos cases. The settlement plan provided for the creation of a data base of all closed asbestos cases in the district that would serve as the starting point for computer assisted negotiation ("CAN") among the parties on the open cases (LAMBROS, GREEN, & MCGOVERN). After adoption of the plan by the court, the special masters assisted in its implementation, and all of the cases in the first eight clusters subject to the plan settled before trial. With the support of the National Institute for Dispute Resolution, the closed case analysis and computer assisted negotiation portion of the plan is being further developed, applied to additional cases in Ohio, and evaluated for potential use in other contexts.

In another case, three months before scheduled trial, Federal District Judge Weinstein, Eastern District of New York, appointed three special masters in the Agent Orange class litigation, which involved 2,400,000 class members and seven defendant companies. Working as mediators, the special masters helped the parties reach a last-minute \$180 million settlement that avoided what appeared to be an almost certain protracted trial (CENTER FOR PUBLIC RESOURCES, *CPR Legal Program* 56-59).

In most cases, special masters are appointed with consent of the parties. In other cases, they are not. These latter cases present the question, not yet addressed by any court, whether appointment of a special master for settlement purposes over the parties' objections is within the court's authority.

*vi. Private Judging ("Rent-a-Judge")<sup>9</sup>*

The nonbinding quality of the mini-trial is both one of its strengths and weaknesses. In recent years, some California litigants in complex commercial cases (and in other types of particularly nasty disputes, such as divorce cases with large amounts of property at

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9. This section is largely taken from Green, *Avoiding the Legal Log Jam—Private Justice, California Style*, in *CORPORATE DISPUTE MANAGEMENT* 65 (Center for Public Resources ed. 1982).

stake) have availed themselves of a binding variation of the mini-trial. This is the use of a private judge or "referee" pursuant to the California general reference statute.<sup>10</sup>

Dubbed by the popular press as "rent-a-judge," the reference procedure is similar in many respects to the mini-trial, but also different in certain important ways. Like the mini-trial, rent-a-judge permits litigants to have their case heard privately and quickly by a third party of their own choosing. Also like the mini-trial, rent-a-judge has established such an impressive track record in the cases in which it has been applied that it has attracted the enthusiastic attention of lawyers, judges, and businessmen nationwide. Since rent-a-judge may be more suitable than a mini-trial in certain types of disputes, it is worth studying its characteristics and requirements and comparing them to those of its cousins: arbitration and the mini-trial.

a. The California Reference Statute—How "Rent-a-Judge" Works

The essence of the California reference procedure is the provision which allows the court, "upon the agreement of the parties," to appoint anyone it deems qualified as "referee" to "try any or all of the issues in an action . . . , whether of fact or of law, and to report a finding and judgment thereon," or "to ascertain a fact necessary to enable the court to determine an action." The parties may stipulate to the choice of a single referee or up to three referees. In certain specified cases, if the parties do not agree on a referee, on the application of either party or on its own motion, the court may appoint a special referee or referees of its choosing "and against whom there is no legal objection" to determine an account or report on a single fact. A legal objection may be based on the referee's bias or interest, or, in environmental cases, "on the ground that he is not technically qualified with respect to the particular subject matter of the proceedings." In most cases in which this device has been employed, however, and in the cases that have most attracted the interest of corporate counsel seeking a way out of crowded public courtrooms, the referee has been appointed under the general reference provisions of Section 638 and the selection was by mutual agreement of the parties. Once appointed, the referee has all the powers of a trial judge except the contempt power and the power to appoint a referee.

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10. All statutory references to the California general reference procedure are to CAL. CIV. PROC. CODE § 638-45 (West 1976 & Supp. 1986).

A case may be referred to a referee at any time, even prior to the filing of the complaint, by the filing of a petition and proposed order. In most cases, the referee is appointed after the answer and any counter-claims have been filed. However, since the referee has all the power of a judge to hear and decide motions and discovery matters, early appointment of a referee can greatly reduce the cost of pretrial conflict.

The procedure at the trial before the referee may range from traditional court proceedings to the more informal procedures of arbitration. Witnesses are sworn, but, if the parties desire, the evidence taken need not be reported or even recorded.<sup>11</sup> The referee is obliged to follow both substantive law and evidentiary rules, but (subject to some limitations) the parties may agree to modify or disregard most formal rules of procedure, evidence, and pleading. The parties and referee may also decide by agreement the date of the "trial" and specify the disputed issues to be tried.

The referee is directed to submit a written report to the appointing court within twenty days of the close of testimony. Generally, this report consists of findings of fact and conclusions of law, that must be stated separately. Apparently, detailed findings and conclusions may be dispensed with by agreement of the parties and referee and only brief findings and conclusions reported—*e.g.*, liability in a certain amount or nonliability. If the similar judge pro tem process<sup>12</sup> is used instead of the general reference statute, findings may be waived altogether.

The California statute provides that "the finding of the referee . . . upon the whole issue *must* stand as the finding of the court, and . . . judgment may be entered thereon in the same manner as if the action had been tried by the court." (Emphasis added). The Code Commissioners Note to this section and several California Supreme Court cases state that the finding of a general referee is "conclusive" and that mandamus lies to compel the court to enter judgment on the report of a referee.<sup>13</sup> Unlike arbitration, however, appeal rights are preserved just as with any judgment. Costs, including the referee's fee, are chargeable to the parties, although the parties may by stipulation make whatever sharing arrangement they desire.

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11. See *Chapman v. Gibson*, 103 Cal. App. 2d 585, 229 P.2d 834 (1951).

12. See CAL. CONST. art. VI, § 21; Rule 224(a) of the California Rules of Court.

13. See, *e.g.*, *Ellsworth v. Ellsworth*, 42 Cal. 2d 719, 269 P.2d 3 (1954); *Lewis v. Grunberg*, 205 Cal. 158, 270 P. 181 (1928).

b. Advantages of the General Reference

1. *Selecting the Judge.* When compared with traditional adjudication, several attractive aspects of the reference procedure stand out. First and most importantly, in the reference procedure the litigants choose the third party who will decide their dispute rather than trusting to the luck of the draw in the assignment of a trial judge. This can be of enormous importance in a complex commercial case, a dispute involving difficult technical questions, or simply a case involving a very large amount of money or a vital aspect of a company's business. Parties are likely to attach greater credibility to a decision handed down by a decisionmaker they had some role in choosing. As the reference procedure is more widely employed, it will be interesting to compare the rate of appeals taken from referee judgments with those taken from traditional trial judgments to test the hypothesis that reference judgments are more accepted, and hence less often appealed by the parties. One would expect fewer appeals from referees' judgments in any case, because they represent a self-selected category of cases in which the disputants have sought a quick resolution and, presumably, chosen a "better" and hence less error-prone judge.

2. *Speed and Convenience.* Other major advantages the reference procedure has over traditional adjudication are speed and convenience. Parties trapped in traditional court litigation have virtually no control over the timing of the trial or the scheduling of hearing dates. In some large jurisdictions, such as Los Angeles Superior Court and Suffolk County (Massachusetts) Superior Court, the time between the filing of a complaint and commencement of trial commonly runs four to five years, or more. It is a maxim that "justice delayed is justice denied." Finding ingenious ways to advance one's case on the calendar has now become an important litigation tactic. Often, there is nothing counsel can do to break out of this legal logjam but wait and hope that witnesses do not die or forget or parties lose interest and give up. Nothing, that is, except get the court to appoint a referee, hire a retired judge, and go to trial whenever the parties are ready. With the reference procedure, the parties can schedule their trial at a place, date, and time convenient to them and be certain of the arrangements. One attorney who has participated in several reference procedures claims, "it has saved 80% of the delays, 80% of the legal fees, and 80% of the aggravation" encountered in the courts.



3. *Flexibility.* Another major advantage which the reference procedure has over adjudication is its flexible rules and procedures. Parties who want the formality and procedures of a trial can have them under the reference provisions—black-robed judge, paneled courtroom, reporter, and all the “tosh.” But, as with the mini-trial, if the parties want, most procedural and evidentiary bets can be called off. By stipulating to waive general rules designed for all cases, the parties can design rules of evidence and procedures which meet their specific needs. Revising the rules is not a revolutionary idea, of course. It is, the essence of arbitration. And in traditional adjudication it is not unusual for all parties, and the court, to agree to dispense with some of the trappings of due process. On the other hand, the obligations of the referee to apply substantive law and the availability of an appeal for errors of law sharply distinguish the reference procedure from arbitration.

4. *Confidentiality.* Another feature of the reference procedure which attracts many disputants is its confidentiality. Once the matter is referred to the referee, nothing more need be reported or made public except the referee’s findings of fact and conclusions of law. Apparently, even these may be waived by the parties. In the event an appeal is taken after a reference of this sort, the parties will have to stipulate to a record on appeal. According to those experienced with the procedure, in practice this has not been a problem. In contrast, a regular trial is a completely public event. Anyone is free to attend, including the parties’ competitors; exhibits and testimony are available to anyone who wants access to them. Even a protective order may not be effective to preserve the confidentiality of discovery materials. In cases involving trade secrets or closely guarded methods of doing business that do not quite rise to the level of trade secrets but which business understandably regards as private, or in cases where the parties may be concerned about bad publicity, confidentiality may be a sufficient reason for parties to “go private.”

5. *Quick Decision.* Another advantage of the reference procedure over traditional litigation is the speed with which a decision is rendered after the trial. Unfortunately, it is not unusual for there to be a delay of many months between the close of a court-tried case and a decision. Under the reference procedure, a decision is expected within twenty days.

The assurance of a final, binding and appealable decision is a major advantage of the reference procedure (over the mini-trial and

other nonbinding processes). The *quid pro quo* for this, however, is that the decision is imposed by a third party rather than designed by the parties themselves. This has some important by-products. For example, since the referee's decision is handed down by a judicial figure and incorporated into a judgment, it is much more likely to partake of the winner-take-all, money-based nature of most common law judgments rather than the more flexible, creative and mutually compensatory character of voluntary settlements.

The reference procedure also provides more flexibility in the form of relief than does court adjudication. This is mostly a result of the opportunities it provides for mediation, negotiation, and voluntary settlement to occur prior to judgment. Of course, these opportunities should not be understated. A reference proceeding conducted by an experienced former judge or attorney sensitive to the mediational possibilities of his role provides the next best settlement forum to a mini-trial. The main point is that the result of an adjudication before a referee is much more likely to resemble the result of a traditional adjudication than the result of an arbitration, negotiation, mediation, or mini-trial. Of course, this, and the right of appeal, may be just what the parties want.

### c. Rent-a-Judge Experiences

Actual experience with the binding reference procedure has been primarily confined to California. The procedure has been on the books in that state for over a hundred years, but apparently the first time it was consciously used as an alternative dispute resolution mechanism was in 1976. Since then it has been used in Los Angeles County alone in 150-200 cases per year, most of which were very large, time-consuming matters (CHRISTENSEN 102).

A typical example of the use of the reference procedure was a breach of contract, defective product case involving a major automobile manufacturer, the designer, and the manufacturer of a component part. Five suits and countersuits were filed when the product allegedly failed and the auto manufacturer cancelled the contracts. Unable to obtain a trial in the public courts, the parties had a referee appointed. After fifteen days of trial, scheduled at the convenience of the parties and witnesses, a judgment was handed down. Reportedly, even the losing party praised the process.

### d. Criticisms of the Reference Procedure

With all of these advantages over traditional adjudication, what

points can be made against expanded use of the reference procedure? Paradoxically, most criticism seems to be based precisely on the assumption that adjudication by referee is better than adjudication by the court.

1. "*Rich Man's Justice.*" Critics claim that since the litigants must pay the referee themselves, whereas the court system is almost completely supported by taxes, the availability of private judging creates two kinds of justice—"rich man's justice" and "poor man's justice" (HARVARD LAW REVIEW).

This criticism is understandable but wrong. First of all, use by some litigants of the reference process does not deprive any other litigants of anything they now have. The quality of justice available to everyone in the courts is not adversely affected by the diversion of some cases to referees. On the contrary, removing complex business disputes from the courts can only have a positive impact on court calendars and improve access to justice for everyone else. Indeed, some believe that the commercial disputes between private litigants which are the staple of the reference process should not be allowed in court at all. These cases, some critics claim, unfairly consume the scarce judicial resources of the court system at the expense of criminal defendants and individuals claimants awaiting trial (BIRD). Under this view, the public dispute resolution system should be reserved for disputes in which the public has a more substantial interest—criminal cases, civil rights cases, and individual grievances that require the leverage of the state to resolve.

Although this is an extreme view, in some ways the present system reflects it. Speedy trial provisions for criminal cases and priority treatment for other types of cases involving public law issues seek to assure greater access to the courts for these disputes at the expense of commercial litigants. But it pushes the point too far to claim that the public has *no* interest in the efficient and fair resolution of private commercial disputes or that such disputants do not have a right of access to the public system when necessary.

Guaranteeing a right of access is different, however, from saying that commercial disputants *must* adjudicate their disputes in court even though they believe that they have found a better way in a better forum. After all, resolution of commercial litigation, whether by negotiation between the principals alone, or by their agreement to seek a decision from a referee, in some respects is simply the continuation of the business dealings that led up to the dispute in the first place. Viewed in this light, why should those

who wish to employ the services of a referee and who are willing to pay what amounts to a "user's fee" for the services of the referee be denied that option? Even taxpayers benefit by the private parties' decision to use the reference process—the state saves the cost of the judge and all the other court personnel. Thus, to the extent use of referees works a reallocation of resources, the reallocation, in economists terms, is "Pareto-superior." In everyday language, this means that it "makes no one worse off and at least one person better off."

In addition, the underlying assumptions of the "rich-man's justice" criticism are questionable. Experience indicates that it is only the wealthy who can afford justice as presently dispensed by the public system and the private bar. Although disputants using the reference procedure must pay the referee's salary while they would receive the services of a judge at no cost, in most cases they will save so much in reduced delay, inconvenience, disruption, and unnecessary formality to make the reference procedure more than pay for itself. In truth, too often it is the public justice system that dispenses "rich-man's justice," and this is what reference disputants seek to avoid.

A more valid concern along these same lines is that if private judging becomes commonplace for businesses, it could result in a withdrawal from the public system of powerful, private interests. This could drain off resources necessary for reform and improvement of the courts. This is very unlikely to happen. No matter how attractive reference and mini-trials become, even the most powerful and resourceful classes of society will still have occasion to resort to the public system. All alternative dispute resolution mechanisms depend on a strong, open court system for their existence. And even the most powerful companies and individuals cannot prevent themselves from being summoned into court and kept there by a complainant. Reference takes two to tango and in many cases there will be one party which, for a variety of reasons, does not want to dance.

2. *Secrecy.* Another criticism lodged against the reference process relates to its confidentiality. "Secret trials" offend our notion of open government and public courts. This is a serious consideration. Secrecy may offend the public's "first amendment right to know" about the conduct of government, including the courts. The parties to these disputes would deny that there is any public interest protected by the first amendment in knowing the details of their business disputes and how they are resolved. To them, the dispute

is the continuation of a private transaction that went awry. They would contend that straightening out the transaction need not be any more public than the making of it.

The weak point in this reasoning is that at least one of the parties to the dispute has invoked the assistance of a public agency (the court), and both have then agreed to employ an officially sanctioned dispute resolution procedure. The parties' claim to privacy is more convincing when they have resolved their dispute without the aid of the court through negotiation or a mini-trial. But, under the reference procedure, the parties obtain a judgment enforceable with all the power of the state that is normally available to victorious litigants. If the parties want the imprimatur and power of a judgment, the critics of privacy would say, the trade-off is openness. When one considers the possible antitrust implications of a referee-ordered judgment, this argument has some force. However, it does not account for the fact that parties to a lawsuit generally can settle a case themselves privately and ask the court to enter a judgment incorporating the terms of the settlement. If there is no right of access to settlement negotiations in this situation, why need there be in the reference?

#### *vii. Industry-wide Self-regulatory Dispute Resolution*

Another strategy for avoiding or resolving institutional litigation is the development of specialized dispute resolution courts and processes within clearly defined industries or institutions. Examples of such programs include the American Stock Exchange's program for security disputes, the dispute resolution program of the Council of Better Business Bureau's Advertising Division, and insurance industry arbitration. (GREEN, *Avoiding the Legal Log Jam* 339).

These programs tend to share certain characteristics. First, they generally provide for speedy arbitration before industry experts. Within the insurance industry, Insurance Arbitration Forums are available to resolve quickly intercompany coverage disputes. Also, virtually all re-insurance treaties contain arbitration clauses requiring arbitration before panels composed of insurance executives. Within the securities industry, arbitration before an exchange panel is mandatory for member companies and optional to customers. For internal disputes, these panels are composed exclusively of industry experts. If customers are involved, they contain public representatives who are also experts. The BBB's National Advertising Division's trial boards are also composed of career professionals who investigate and try to resolve misleading advertising

claims. They employ adjudication, fact-finding, and mediation.

Another common feature of these programs is that they are custom-designed for relatively self-contained industries in which failure to abide by the procedure can result in banishment from the industry association or marketplace. This is a sufficiently severe sanction to assure compliance. Another interesting attribute common to each of these industry-wide dispute resolution mechanisms is that virtually no discovery is permitted except perhaps for the voluntary exchange of documents.

Industry members find these procedures attractive because they allow them to have their disputes heard by an expert in their business. These industries employ a particular business terminology and operate within their own standards of conduct and with their own business expectations. Arbitration before a neutral decision maker familiar with the terminology and the standards of conduct of the business saves time and money and assures that reasonable business expectations will be understood.

The factors that make these procedures work in some industries may also define the limits of their effectiveness. They are most likely to be effective where: (1) there is some degree of consensus among the parties over the rules of the game; (2) the disputes that arise are amenable to resolution by industry experts; (3) speedy resolution of the disputes is important; and (4) there is a sufficiently large number of disputes among industry members to warrant the establishment and maintenance of specialized procedures (GREEN, *Avoiding the Legal Log Jam*).

#### *viii. Mediation*

Mediation has been increasingly used by institutions to arrive at negotiated rather than adjudicated resolutions of organizational disputes. An example of a corporate mediation program to handle consumer disputes is The Ford Motor Company's Consumer Appeals Board (SMITH 219). Begun in 1977, the third party mediation program provides Ford customers with an opportunity to have their service complaints judged by an independent authority without going through costly and time-consuming court action. Under this program, any owner of a Ford whose dealer is in a state represented in the program, and who has a service complaint, can request review of the problem by a five member board composed of three consumer and two company representatives. Presentations are generally in writing, but oral arguments may be made by invitation. Ford and its dealers are bound by the decisions of the

Board, but customers are not and remain free to go to court if they are dissatisfied with the decision. Only service related complaints that are not in litigation may be brought to the Board.

According to Smith, out of 5,360 cases opened, 1,417 (26%) were resolved to the customer's satisfaction prior to board action. Of the 3,346 cases decided by the Board, 1,313 (39%) resulted in full or partial adjustment to customers. The customers' complaint was denied in 1,527 (46%) of the cases, and previously offered adjustments were ratified in the remaining 15% of the cases. In total, the customer was offered some kind of assistance in 68% of the cases closed either prior to or following board action. Of those customers who failed to win any relief from the mediation board, only twenty-three subsequently went on to seek relief in court.

Smith states that the mediation program has the benefits of providing an alternative to litigation, thus leading to savings for all parties and an improvement in Ford's relations with the public and private consumer protection organizations. It also provides Ford with a positive marketing tool that can influence buying considerations. Chrysler and General Motors have established similar programs.

Institutional mediation of environmental disputes has received widespread attention in recent years. A leading example is the 1982 mediated solution to the proposed Storm King Mountain Consolidated Edison Pumped-Storage Plant (TRAIN 163). This dispute was in litigation for fifteen years. Numerous governmental agencies and public interest groups were involved and approval of any agreement was needed from a variety of regulatory bodies at the federal, state, and local levels. The Storm King mediation consumed fourteen months during which twenty meetings of principals and a number of technical meetings designed primarily to narrow the differences among the scientists occurred. Russell Train, the former administrator of the Environmental Protection Agency, mediated the conflict.

Train cautions against attempting to deduce a formal set of rules from the Storm King mediation that would permit replication of the experience in other circumstances. Specifically, he points to the fact that litigation and administrative proceedings had dragged on for years and doubtless would have continued for more years as an important factor in successfully resolving the case. He also points to the necessity of there being a reasonable balance of power among the parties and room for granting major concessions on both sides. As Train points out, when governmental agencies are in-

volved, this is not always the case. In the Storm King case, long after the utilities and citizen environmental groups had reached a basis for settlement, the EPA refused to go along.

*ix. Med-Arb*

A variant on mediation that is sometimes applied to intercorporate disputes uses mediation followed by an arbitration process directed by the mediator. Any issues the parties have been unable to settle by agreement are thus resolved. An example of a case in which this process was successfully used involved the division of an architectural firm into two separate firms. The two new entities agreed to have a mediator help them resolve financial and occupancy differences as far as he could, and then to decide definitively whatever they could not resolve.

This process, dubbed "med-arb," has two main advantages. First, it achieves voluntary resolution of as many issues as possible. As in all of the nonbinding processes, this permits a wider range of solutions to the dispute, leads to greater party satisfaction with the result, and hence improves the chances that the result will be accepted and implemented without further costly disputes. Second, if issues must be arbitrated the mediator already will be familiar with the parties, facts, legal issues, and contentions. Armed with this knowledge, the mediator turned arbitrator should be able to make a decision quicker and at less expense to the parties than could a new third party brought in to arbitrate.

There are also certain dangers associated with the combination of the roles of mediator and arbitrator in one person. Professor Fuller criticized med-arb on the grounds that if the arbitrator's efforts at mediation fail and there must be an arbitrated decision of the case, the arbitrator will have fatally compromised the integrity of the adjudicative role. (FULLER, *Collective Bargaining*). Fuller argues that the arbitrator is likely to have acquired information in attempting to bring about a settlement that should have no bearing on a decision as an adjudicator. If the arbitrator fails to mediate a settlement, it will be difficult to block this information out in reaching a decision; consequently, it will be even more difficult for the parties to believe that this has been done.<sup>14</sup>

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14. Tripartite arbitration, in which one "arbitrator" appointed by each party serves together with a neutral arbitrator as a board of arbitration, is sometimes used in an effort to combine elements of both arbitration and mediation. However, Fuller *Collective Bargaining and the Arbitrator*, 1962 Wis. L. REV. 3 rejects that process also, as a distortion of both arbitration and mediation. Fuller's conclusion is that there is no need for the arbitrator to abandon a purely adjudicative role, even in those cases that appear most difficult for adjudication, because there exists a variety of methods by which such cases can be resolved while keeping the arbitrator's role within the strictest limits of judicial propriety.



In an effort to retain the advantages of the med-arb process, including the inducement to settle that is generated by the arbitrator's hints as to the likely outcome if the case is not settled, while avoiding the confusion of roles that Fuller criticizes, Professors Goldberg and Brett designed a dispute resolution procedure in which a neutral party first acts as a mediator, then as an advisory arbitrator (GOLDBERG; GOLDBERG & BRETT). The neutral party is empowered to advise the disputing parties as to the likely outcome if they go to arbitration, but not to arbitrate the dispute. If the parties cannot resolve their differences in the first phase of this process, they must then go to another person for final and binding arbitration.

Reporting on the success of this med-arb program to a 1985 New York University Conference on Labor (GOLDBERG, GREEN, & SANDER 262), Professor Goldberg stated:

In order to test the mediation procedure, we began in November, 1980 what was at that time intended to be a six-month experiment in grievance mediation in the bituminous coal industry. Well, the six months has stretched out to three and one half years, we have mediated 458 grievances in the coal industry, and another thirty-six in other industries (USWA, IAM, IBEW, ATU). The results have been as follows:

Of the 494 cases which have been to mediation, 415, or eighty-four per cent have been finally resolved without resort to arbitration. Approximately fifty per cent of the settlements have been compromises, in which each side walked away with something. Another twenty-five per cent have been non-compromise settlements—that is, either the company granted the grievance in its entirety or the union withdrew the grievance in its entirety. In about twenty-five per cent of the grievances, the mediator has given an advisory opinion. Approximately half of those advisory opinions have been accepted and the other half have gone to arbitration. Of those which have gone to arbitration, the arbitrator's award has been predicted in seventy-nine per cent of the cases.

We have, in fact, been able to mediate an average of three grievances per day. The cost of mediation has averaged \$200 per grievance, \$100 per party. This does not include travel expenses, but since those expenses are apportioned among the three cases the mediator hears in a day, they haven't amounted to much. The financial savings to the parties have been enormous. In the coal industry alone, the parties have already saved half a million dollars over the costs of arbitrating a like number of cases. The average time from the request for mediation to the final resolution in mediation has been 15 days. Finally, there has not been, on the whole, any substantial diminution in the internal settlement rate—the rate at which the parties resolve grievances.

The quality of outcomes in mediation has been impressive. While I do not have time to describe some of the interesting settlements that have been reached, I can say that those settlements have been very creative, and have been settlements of a sort that typically could not be reached in arbitration because of the limitations on the arbitrator's power.

We are beginning to find some evidence of improvement in settlement skills. There are no statistical data on this, but both company and union

representatives in some relationships report a change in the approach to grievances at the earlier steps of the grievance procedure. They report a change from an exclusive focus on who is right and who is wrong to an effort to work out a mutually acceptable settlement. Indeed, some report statements such as "When we get to mediation, the mediator is going to try to make us work out a solution we both can live with. So why don't we do it right here, and save money, and not have to go to the mediator?" Well, that of course, is just what we are hoping for.

Perhaps the acid test of any innovative approach to grievance resolution is whether it meets the needs of the participants. In post-mediation surveys, company operating personnel have preferred mediation over arbitration by a ratio of six to one, and union local officers and committeemen have preferred mediation over arbitration by a ratio of seven to one. The grievants themselves have preferred mediation over arbitration by a ratio of two to one—less than the others because they tend to be more concerned with the outcome of their particular grievance than with the grievance resolution process. Still, the grievants have preferred mediation over arbitration two to one. In explaining why they prefer mediation to arbitration, members of each group refer to time and cost savings, but what they focus on primarily tends to be the informality and problem-solving approach of mediation. Thus, one company representative said, "I like the informality. It creates an atmosphere of people trying to solve problems through talk rather than being enemies in a legal process. This is a much better way to approach these problems."

#### *x. Negotiated Development*

The negotiated development of land use projects described by Livermore and Sutton, (LIVERMORE & SUTTON) appears to be a response to the difficulties, frustration, and cost of resolving differences over land use issues between developers, regulatory agencies, and environmental groups. According to Livermore and Sutton, "new" negotiated development focuses on the early involvement of all parties capable of affecting the final decision to proceed and an expansion in the number of parties involved in the process to insure that the perspectives of the varied interests are included. In addition, "new" development negotiation extends to almost every element of technical, environmental, economic, and cultural impact, rather than just the narrow issue of whether the project meets certain technological criteria. Finally, "new" negotiated development processes often involve the use of a neutral intervenor with expertise at counselling parties on process alternatives to the court system. In this procedure, *all* parties interested in the land development negotiate the timing, shape, and external effects of the project. Livermore and Sutton report several successful negotiated developments, including the White Flint Mall in Montgomery County, Maryland, the Whiskey Shoals project in Mendocino County, California, and the Stanford University Faculty

### Housing Project on Peter Coutts Hill.

The Colorado Joint Review Process applied to the AMAX, Inc.'s Mt. Emmons mining project is an example of a large-scale negotiated development or environmental mediation. As described by Biddle, Livermore, and Poe, the process involved the creation of a voluntary intragovernmental process to coordinate the environmental and land use decision-making process among federal, state, and local levels of the government, encourage cooperation and understanding among industry, government, the public, and special interest groups, provide a rational, systematic alternative to the pre-existing fragmented governmental review processes, and enhance and improve public participation in governmental decision-making to identify and minimize conflict, delays, and associated costs (BIDDLE, LIVERMORE & POE).

### *xi. Regulatory Bargaining ("Reg-Neg")*

Since decisions on major land use development projects require the exercise of considerable discretion by regulators, a large amount of bargaining inevitably occurs during the course of the decision-making process. One of the latest innovations in the environmental field involves the negotiation of regulations prior to their formal issuance by an administrative agency (HARTER 1). In lieu of the usual procedure—issuance of a proposed regulation, extensive comment, promulgation of the final rules, and then, often, litigation—a facilitator convenes all the interested parties in order to help them negotiate a mutually acceptable rule, which is then routinely promulgated. Thus, "reg-neg," as it has been dubbed, involves a substitution of accommodative problem-solving for adversarial jousting—the same technique used in environmental dispute resolution and in certain policy dialogues between environmentalists and industry, such as the National Coal Policy Project. Although this technique is not limited to environmental issues, it is peculiarly appropriate for them.

An example of "reg-neg" is the EPA's "bubble policy" which, for the first time, allows industries to trade emissions among points within an imaginary bubble surrounding the plant. As long as the area affected by the plant's emissions continues to attain and maintain the ambient air quality standards, the plant is allowed to relax controls at emission points where control costs are high in exchange for increasing controls at points where costs are lower (KOK).

The EPA claims that replacing controls on emission points where the marginal cost of control was high with additional controls on points with low marginal costs can reduce the cost of controlling pollution sometimes by as much as fifty percent. Refinements of the initial bubble policy have led to inter-industry trading of emission allowances, offset trading between old and new facilities, and the banking of pollution credits (DRAYTON).

*xii. Arbitration—Private and Court-Ordered*

Lest we forget, arbitration is still considered by many institutional litigants as the primary dispute resolution alternative. In spite of the widespread criticism of arbitration as being slow, unreliable, expensive and time-consuming (LYONS), it is used to resolve thousands of labor management and commercial disputes each year (COULSON). Moreover, most studies show that arbitration continues to be faster and less expensive than adjudication.

Recent developments in arbitration have focussed on identifying the situations, other than labor/management, where arbitration has greatest potential. An interesting use of arbitration to resolve a complex patent infringement dispute is described by Janicke and Borovoy. (JANICKE & BOROVOY). A workshop at the Harvard Law School in July 1982, organized in response to the Chief Justice's call for further research by the Bar on the use of arbitration, identified several promising areas for reform and extension of arbitration.

The development of court-annexed, mandatory arbitration has been one of the most far-reaching results of this resurgence of interest in arbitration (GOLDBERG, GREEN, & SANDER 225; ROLPH). Court-ordered arbitration was originally conceived as a device to relieve court congestion by diverting relatively modest collection and automobile personal injury and property damage claims. Thus, the jurisdictional limits used to assign cases to court-ordered arbitration were low, generally \$5,000 to \$10,000 or less, and excluded most corporate disputes. Today, however, success with these programs has inspired proposals to raise the jurisdictional limits to \$100,000 and higher. If such proposals are widely adopted, many corporate disputes will be captured by these programs.

Although the specific elements of court-ordered arbitration programs vary widely, the hearings usually take place before volunteer arbitrators and are generally private, informal, and brief. Unlike traditional, voluntary arbitration, however, neither party is bound by the arbitrator's decision. If the parties accept the arbitrator's

award, it is entered as a court judgment and is enforceable as such. But if one party does not accept the arbitrator's award, the case returns to the normal adjudicative process for a trial de novo in which no evidence of the arbitration proceeding is admissible. In short, because of concerns that failure to provide a trial de novo will be considered a denial of due process, the compulsory nature of arbitration is offset by its nonbinding quality. In order to discourage frivolous requests for a trial de novo, most court-annexed arbitration programs impose sanctions on a party that asks for a trial de novo and is unsuccessful in improving the arbitration result.

Today over one hundred trial courts, in at least twelve states, have adopted such programs, and experimental programs have been implemented in three federal district courts. These programs have been the subject of research projects by the American Bar Association, the Federal Judicial Center, and the Rand Corporation's Institute for Civil Justice. Although these studies have not conclusively established that court-ordered arbitration has met the goals of its proponents, judicial and legislative enthusiasm for such programs is high, and rules or legislation designed to establish or encourage such programs have been proposed in many jurisdictions. In 1984, Congress passed and the President signed P.L. 98-411 to appropriate \$500,000 in fiscal year 1985 for eight additional federal court pilot programs. The National Institute for Dispute Resolution has also given top priority to the encouragement, coordination, and study of court-ordered arbitration.

A detailed study of the one court-annexed arbitration program concluded that court administrators, individual litigants, and institutional litigants were satisfied with the quality of justice in the program (ADLER, HENSON, & NELSON 60). The report concludes:

Institutional litigants who depend upon the arbitration program for routine resolution of large numbers of civil suits also have rather simple requirements. They too want a speedy, inexpensive procedure, but they are less sensitive than individual litigants to the qualitative aspects of the hearing process. They judge arbitration primarily on the basis of the outcomes it delivers. They attribute unfavorable outcomes to the judgment of the arbitrators, not to the lack of opportunity for discovery or for cross-examining witnesses, or to the absence of other attributes of the trial process. Most institutional litigants whom we interviewed find that arbitration awards are generally within a predictable, acceptable range. They deal with the occasional unsatisfactory award through the appeals process, which they view as an essential "fail-safe" feature of the arbitration program (ADLER, HENSON, & NELSON 76).

### C. Integrating Alternatives into the Corporate Legal Culture

Despite the development and wide-spread dissemination during the last five to ten years of many potentially useful alternative dispute resolution models, such models still are utilized, or even considered, in few cases. ADR pledges and policy statements, numerous bar conferences on ADR, and exhortations by the Chief Justice and the Presidents of the ABA and Harvard University have had a marginal effect. Corporations and other institutions, are particularly well-suited to realize more of the benefits of alternative dispute resolution processes by integrating alternatives into their normal business and legal practices. This can be done:

- *prospectively*, through the use of dispute resolution clauses in agreements;
- *contemporaneously*, through the use of systematic procedures to evaluate the “ADR potential” of every case;
- *retrospectively*, but with an eye to the future, through the use of systematized conflict management systems that monitor the origins, costs, and results of both open and closed cases.

#### 1. Dispute Resolution Contract Clauses

At the time a dispute arises, it is often difficult for the disputing parties to agree on a procedure for resolving that dispute other than negotiation or adjudication. At that time, any proposal to attempt a novel procedure, however well-intentioned or well-designed, is apt to be viewed with the suspicion that it is an effort to gain a tactical advantage. This suggests that parties who are entering into a business relationship in which there is a substantial likelihood of future disputes should focus at that time, before any concrete dispute exists, on developing a sound procedure by which to resolve future disputes. In this way, they can avoid drifting into litigation, which could be avoided, solely because they failed to focus in a timely fashion on developing an alternative.

Despite this, the use of dispute resolution contract clauses is limited. Many people find it psychologically difficult to think about possible future conflict when entering into what they hope will be a harmonious relationship. Contracting parties are often reluctant to create a potential conflict over the terms of a dispute resolution clause in order to achieve the uncertain benefits of efficiently resolving those conflicts that may arise in the future. Another deterrent to raising the possibility of future disputes is that it may be seen as indicating a lack of commitment to the relationship.

As the probability or likely severity of future conflict increases, these psychological barriers to discussing a dispute resolution clause diminish. Thus, virtually every collective bargaining contract contains a detailed, and frequently individualized procedure for the resolution of disputes arising under that contract. Similarly, many joint venture agreements contain carefully drafted dispute resolution clauses. Most commercial contracts, however, contain no dispute resolution clause at all, or at best they contain a boilerplate provision for arbitration pursuant to the rules of the American Arbitration Association.

While arbitration is a useful dispute resolution procedure in many cases, it is simply a private form of adjudication and may not always be the best approach. One alternative to an arbitration clause is a provision that requires the contracting parties in the event of a future dispute to negotiate in good faith about its resolution before either party may commence litigation. The existence of such a clause may avoid or reduce the scope of an incipient dispute simply by bringing the parties together. Once they are together and negotiating, the dynamics of the negotiation process and the desire to succeed at negotiation may dispose them toward settlement, rather than turning the dispute over to lawyers or to a third party for decision. One reason that contracting parties may use a negotiate-in-good-faith clause is because they foresee the likelihood of future disputes but are unable to specify what form they may take. Alternatively, they may be unable at the time of contracting to agree on a structured dispute resolution procedure, yet wish to provide some protection against the risk of drifting into litigation.

Where both of the contracting parties are large corporations, there is a possibility that disputes will arise because the individuals charged with implementing the contract are not aware of or do not share the higher level managers' understanding of the transaction. To deal with this eventuality, the contract might provide that future disputes, unresolved at lower levels, be negotiated in good faith by the managers who signed the agreement. Of course, this type of clause requires a willingness on the part of managers to involve themselves in the dispute resolution process. This willingness can be stimulated by ensuring that the economic impact of disputes is accurately targeted. For example, if litigation expenses are charged to the operating unit in which the dispute arises, rather than to the legal department, there is an incentive for senior management to participate in dispute resolution procedures because

the cost of resolving the dispute will have a direct impact on the profitability of its units.

The aspirational command approach of a negotiate-in-good-faith clause may not be sufficient in some situations. Another device for encouraging settlement, sometimes combined with a negotiate-in-good-faith clause, is a cooling-off period. Under this procedure, the complaining party must give notice to the other of its intent to litigate. The recipient of the complaint can then request that a meeting be set to discuss the matter. If the meeting does not lead to resolution, litigation cannot commence until after the expiration of the cooling-off period. This provides one last opportunity for settlement before the freezing of positions that often accompanies the commencement of litigation.

Another litigation-avoidance approach is a least-favored-choice-of-forum clause, providing that whichever party initiates litigation must proceed in the other party's home forum. Since each may be reluctant to litigate in a location in which the other party has the advantage of an established presence, they have a further incentive to resolve the dispute without litigation. The risk of such a clause is that a party with a valid complaint may find itself forced to litigate in a disfavored forum, which will put it at a disadvantage in settlement negotiations.

A contractual provision for a nonbinding dispute resolution process, such as mediation or a mini-trial, may be attractive to business people because those procedures are simply structured variations of the bargaining that characterizes business relationships. In normal business contexts, bargaining on behalf of the corporation with its suppliers, customers, employees, regulators, and others is frequently structured in a hierarchical manner that moves from negotiation to mediatory or arbitral forms (CLARK). Conflict resolution is first attempted at lower levels without third-party intervention and in a relatively informal atmosphere. If this is unsuccessful, the problem is referred to successively higher levels of authority and, typically, the bargaining process becomes more formal. If the dispute is between subordinates within the corporation, the normal end step is for a senior manager either to mediate or arbitrate a solution (BRETT 674). Viewed in this light, a mediation or mini-trial dispute resolution provision in a contract is simply an extension of normal business practice.

Examples of model mediation and model mini-trial clauses can be found in *Dispute Resolution* (GOLDBERG, GREEN, & SANDER 550 *et seq.*). By necessity, any model clause must be rather general.



But the more details that can be agreed on at contract time, the easier it will be to implement the dispute resolution process when conflict erupts. At the least, the parties should try to specify either a particular person as the third-party neutral, a process to select the neutral, or an institution to convene the process and select the neutral. Prior agreement on this point will ensure the involvement early in the dispute of a third party who can assist the parties in negotiating the other details of the dispute resolution process.

Another way in which alternatives may be integrated into the legal function is by specifying in consent decrees dispute resolution procedures for future disputes. One example is the General Motors arbitration program approved by the FTC to resolve consumer complaints in the "engine switch" case.<sup>15</sup> Another example is a 1983 consent decree in a major trade secrets dispute between IBM and Hitachi Ltd. that provided that any future disputes about the alleged improper use of IBM trade secrets by Hitachi would be resolved by negotiations between designated executives or, failing that, by a special arbitration panel consisting of the two executives and a preselected neutral chairman (*ALTERNATIVES, IBM-Hitachi*).

## 2. Enforceability of Dispute Resolution Clauses

One advantage that arbitration clauses have over other dispute resolution procedures is that over forty jurisdictions have enacted statutes guaranteeing enforcement of such clauses.<sup>16</sup> Courts typically interpret these statutes broadly, citing federal and state policy in favor of arbitration.<sup>17</sup> Similarly, the New York Convention of 1958 provides for the enforceability of most international arbitration awards in the courts of signatory countries. But even in this well-established context enforceability is not automatic. Both domestically and internationally, there are numerous situations in which public policy or conflicting statutory commands have been held to render void agreements to arbitrate future commercial disputes or the awards themselves.

The enforceability of a mediation or mini-trial clause is uncertain. Because of the relative novelty of such clauses, there are no cases directly on point. Some commentators (PHILLIPS & OLSON)

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15. *In the Matter of General Motors*, 102 F.T.C. 1741 (1983).

16. *See, e.g.*, Uniform Arbitration Act § 1; United States Arbitration Act, 9 U.S.C. § 2 (1976).

17. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 53 U.S.L.W. 5069 (July 2, 1985); *Southland Corp. v. Keating*, 104 S.Ct. 852 (1984).

state that a mediation or mini-trial clause would not be specifically enforceable because it does not obligate either party to convey any ultimate benefit on the other. Since such a clause does not obligate either party to settle, the party who is trying to enforce the provision is not damaged by the other side's refusal to participate in the process. In fact, the nonbreaching party is saved money by the other side's refusal to engage in the process when it has determined not to settle. A related argument against the enforceability of dispute resolution clauses providing for nonbinding processes is that if one party is refusing to engage in the process, it must be because it is unwilling to settle, and courts will not order parties to engage in a futile process.

Green and Jacobs argue that dispute resolution clauses that clearly specify the obligations of each party can and should be enforced (GREEN & JACOBS 95). They take issue with the premise that such clauses convey no benefit and are futile, because they do not ensure ultimate agreement when one party is participating involuntarily. For example, in discussing the mini-trial, Green and Jacobs point out:

The mini-trial process begins with rather abstract, non-threatening discussions concerning procedure and evolves slowly toward a resolution of the underlying substantive dispute. By the time the parties actually conduct the mini-trial and the executives meet, they are psychologically oriented toward settlement. Further, once all preparation for the mini-trial has been completed, the lawyers are also looking to settlement. Thus it is not beyond the realm of possibility that a resisting party forced into a mini-trial may be gradually reoriented toward cooperation and eventual settlement.

Green and Jacobs also point out that courts enforce negotiate-in-good-faith obligations under the National Labor Relations Act. Archibald Cox (COX 1412), defending the statutory imposition of this obligation, has stated:

Participation in debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strengths and weaknesses of the several arguments become apparent. Sometimes, the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion.

### *3. Systematic Evaluation of Cases for ADR Potential*

Many disputes occur between parties who have had no prior contact or legal relationship. In such cases there is no opportunity to plan a dispute resolution process for future disputes. Moreover, in many cases in which there is a prior relationship and an oppor-

tunity to plan for the handling of future disputes, the parties fail to do so. In such cases, there is a need to evaluate systematically each case to determine its suitability for alternative dispute resolution. Without a systematic approach, cases that could profitably be diverted to an alternative process may, because of inertia, be left to adjudication.

Allocating particular cases to a specific process is the same task that, on the public level, confronts the designer of any adjudicatory tracking system or diversion program. It is the same task facing the person who operates the doors in the multidoor courthouse. In incorporating alternatives into the corporate legal culture, corporate counsel must themselves develop guidelines to determine not only the suitability of a particular case on their docket for *some* alternative, but also to determine *which* alternative is best for that dispute.

Very little theoretical or empirical progress has been made in this area. The following Table, albeit not empirically tested, draws on the experience of many dispute resolution practitioners, and may be helpful in systematically evaluating cases for their dispute resolution potential:

TABLE V.

I. *Barriers to Negotiation*

- A. Lack of a comprehensive theory of negotiation
- B. Failure of adequate preparation (fact-gathering and analysis as well as strategic planning)
- C. Failure of effective communication
- D. Emotional Factors
- E. Extrinsic factors
  1. Linkage
  2. Preexisting commitments
  3. Time value of money
  4. Tactical use of litigation
- F. Different estimates of alternative to agreement (i.e., likelihood of success)
  1. Different information
  2. Different assessments of the same information
  3. Different legal analyses
- G. Constituency pressures
- H. Stakes not suited to compromise
  1. Intensely held personal values that cannot be voluntarily conceded

2. Economic survival threatened
  - I. Different attitudes to risk
  - J. Different attitudes toward desirability of prompt settlement
  - K. No zone of agreement
- II. *General Case Characteristics*
  - A. Type of issues—law, fact, mixed
  - B. Matter of principle or vital interest
  - C. Routine or novel
  - D. Complex, technical law or facts, or simple, straightforward case
  - E. Linkage (precedent) problems or opportunities
  - F. Amount at stake
  - G. Type of relief sought
- III. *Nature of the Parties*
  - A. Continuing relationship or one-shot
  - B. Power disparities
  - C. Emotional factors
  - D. Other disputes (past, pending, or future)
- IV. *Situational Factors*
  - A. Settlement position gap
  - B. Assessment of outcome gap
  - C. Stakes/transaction costs ratio
  - D. Counsel
  - E. Judge, jury, jurisdiction
  - F. Timing (status of the case)
  - G. Dispositive motion opportunities
  - H. Need to gather more facts
  - I. Need for experts
  - J. History of prior settlement efforts
  - K. Opportunities for integrative solutions
  - L. Strength of case
  - M. Publicity/privacy concerns
  - N. Desire for faster, less expensive dispute resolution method

Assessing disputes for their alternative dispute resolution potential begins with an analysis of why the case has not been settled through negotiation. As the outline indicates, negotiations fail for several reasons, many of which can be addressed by changing or improving the dispute resolution process. For example, if a negotiation impasse is caused by widely different estimates of the

likelihood of success at trial, the give and take on likely trial outcome that takes place during the information exchange portion of the mini-trial, or the opinion of the neutral advisor, may cause one or both parties to reevaluate their estimates of success and thus close the settlement gap between them. The mini-trial's focus on negotiating the underlying business dispute provides an additional basis for settlement. On the other hand, if the impasse to settlement is caused by emotions or poor communication, mediation may be indicated.

After analyzing the factors that have prevented negotiation from being successful, a systematic evaluation of the dispute should focus on general case characteristics, nature of the parties, and special situational factors. For example, if the dispute involves purely factual issues or mixed fact and law issues, alternatives are appropriate. But if it involves purely legal issues, summary judgment procedures may be speedier, less expensive, and provide a more definitive answer than any nonjudicial process. If the parties are involved in a continuing relationship or the relief requested involves continuing interaction between the parties, a mutually acceptable solution is important for both parties, and the chances of devising one voluntarily are increased. On the other hand, if the case involves a deeply held principle or the vital interest of one or both parties, they may be unable to accept any resolution other than a judicial decree.

The existence of power disparities between the parties must also be considered when contemplating the use of an alternative mechanism. Thus, a dispute between an individual consumer and a large manufacturer may not be appropriate for mediation because of the substantial power disparity between them.

Among the situational factors that will influence the choice of a settlement process is the ratio of transaction costs to stakes. Whenever the transaction costs are high relative to the stakes, alternatives have a high probability of succeeding because of the potential cost savings.

#### *4. Clarifying Corporate Objectives*

Guidelines for evaluating cases for their ADR potential are not enough, however, without a procedure for ensuring that they are applied. Thus, corporate law departments should make it part of their standard operating procedure to apply these or other guidelines to each dispute at every stage in its development, from initial assertion through trial and appeal. In addition, the corporate

client must take affirmative steps to inform the outside lawyers that it retains of its commitment to cost-effective dispute resolution including the use of ADR. In many cases, outside lawyers can justify their use of costly but traditional adversarial procedures on the basis that the client wants the most vigorous pursuit of victory that money can buy, regardless of the effect on the court system, the opponent, or even larger but unrelated corporate objectives. The ethics of the legal profession and standards of practice today support the pursuit of a win-at-any cost frame of mind on the part of retained counsel. Unless corporate objectives are more broadly framed and communicated to retained counsel, private lawyers may feel reluctant to suggest a different, more accommodative approach.

Under the leadership of vice president and general counsel Robert Banks, Xerox Corporation has taken positive steps to remedy this situation "by changing the legal culture" in one respect (ALTERNATIVES, *Xerox*). At Banks' suggestion, Xerox President David T. Kearns issued formal instructions to all lawyers representing Xerox that, as a client, Xerox wants all lawsuits waged on its behalf to be conducted with a "regard for the need of an efficient system of justice." Kearns' instructions specified:

We will insist when you appear on our behalf that you have as one of your primary objectives the support and maintenance of an efficient court system as required by the letter and spirit of the recently amended Federal Rules. Since this is consistent with your professional obligations, I do not see it as a direction that you can find objectionable.

However, I am advised that many misuses and abuses of our judicial system are justified by practitioners on the basis of an obligation to the client. The exhaustion of adversarial opportunities is characterized as the epitome of professional dedication to the client. Our system demands dedication to the client but there must always be trade-offs.

To implement Kearns' directive, Banks responded with a set of litigation guidelines prepared by an ACCA committee. These guidelines were sent, with Kearns' statement, to every lawyer representing Xerox, "as an instruction from the client with all of the professional obligations that that implies," that "Xerox attorneys cannot justify extreme advocacy positions on the ground that the client expects it of us."

The ACCA guidelines focus on implementation of Rules 11, 16, and 26 of the Federal Rules of Civil Procedure, but they address aspects of litigation from the filing of the complaint through discovery, trial, and use of sanctions. Two of the guidelines are of particular interest here.

Guideline No. 3 to Rule 11 states:

Upon receipt of a compliant, and if possible prior to the time an answer is due, the attorney having primary responsibility for defending the Company shall initiate discussions with opposing counsel in order to determine the following:

1. The precise nature of the claim;
2. the propriety of the lawyer's client as defendant;
3. *the prospect of using alternative dispute resolution in resolving the claim.*

Guideline No. 1 to Rule 16 states:

Whether or not local rules may exempt the application of Federal Rule 16, lawyers representing the Company shall within 30 days of the commencement of court litigation, prepare a strategy for addressing the case. Such *strategy shall include an assessment of settlement possibilities* and an identification of the key factual and/or legal issues in the case as they then appear to them. Unless early settlement seems likely, the attorneys shall also set forth the particular discovery they propose to take with respect to the issues identified . . . .

The proposed strategy will be reviewed and agreed to by the General Counsel or his or her designee prior to submission of papers for the first pretrial conference.

These guidelines are an example of one leading corporate consumer of legal services attempting to reform the legal culture by: (1) internalizing greater control over the corporate legal function; (2) redefining corporate legal objectives more broadly than "winning;" (3) insisting on accountability for strategic and tactical litigation decisions; and (4) endorsing the use of private and creative nonjudicial dispute resolution techniques. When supported by close monitoring and management techniques, such guidelines form part of an operational system that can integrate alternatives into the corporate legal culture more than is now the case.

#### D. Corporate Litigants, Alternatives, and Public Values

Is it possible to realize the benefits that informal, accommodative dispute resolution promises without sacrificing important values such as fairness, openness, rationality, and predictability which are thought to be now protected by the formal public dispute processing system? Critics of alternatives raise this question generically, but usually with an eye toward alternative resolution of small

claims cases, minor neighborhood disputes, and extended impact cases (GOLDBERG, GREEN, & SANDER 490; FISS; ABEL; AUERBACH; NADER). These issues require special consideration when alternatives are applied to cases in which one or both parties is a large institution such as a major corporation. Where one party is a large corporation and the other is an individual or smaller organization, there is a danger that the weaker party will be at a greater disadvantage in an alternative dispute resolution process than it would be in court. And even where all parties to a dispute are equal in power, there is a danger that the use of private forms of dispute resolution may serve to facilitate arrangements that are not in the public interest and never come to the public's attention.

With regard to the first danger, power disparity between institutional and individual disputants, the problem is that institutions tend to be "repeat players" rather than "one-shotters" in the litigation process (GALANTER, *Why the 'Haves'*). According to Galanter, an "ideal type" repeat player is "a unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long run interests." The "ideal type" one-shotter, "is a unit whose claims are too large (relative to his size) or too small (relative to the cost of remedies) to be managed routinely and rationally." As Galanter points out, the same types, and much of the same analysis regarding the dynamics of disputing, apply to the entire range of dispute processing mechanisms and not just to adjudication.

According to Galanter, repeat players have nine advantages over one-shotters in playing the litigation game:

1. repeat players have advance intelligence and are therefore able to build a record and structure the next transaction according to their likes (i.e. write the form contract);
2. repeat players enjoy economies of scale, have low start up cost for any case, develop expertise, and have ready access to specialists;
3. repeat players have established helpful relationships with people who run the dispute resolution institutions;
4. the repeat player can adopt a tough position by declaring his need to establish commitment to his bargaining position to enhance his bargaining reputation;
5. assuming stakes are relatively small for the repeat player, he can play the odds and adopt strategies calculated to maximize gain over a long series of cases even where this involves the risk of maximum loss in some cases; in contrast, the one-shotter is more likely to adopt a "minimax" strategy;
6. repeat players can expend resources in influencing the making of the relevant rules of the litigation game, such as by lobbying rule makers;
7. repeat players can forego short term results in favor of long term gains in litigation itself, thus creating favorable precedent;



8. repeat players can concentrate their resources on disputes that are likely to make a tangible difference in operative rules;
9. repeat players are better able to invest resources to secure the penetration of rules favorable to them.

Galanter points out that not all repeat players are "haves" in terms of power, wealth, and status. An example of a "have not" repeat player is the alcoholic or repeat criminal defendant. However, most repeat players are larger, richer, and more powerful than most one-shotters. Clearly, most corporations and other large private institutions are not only repeat players, but "haves."

Galanter's taxonomy of litigation by strategic configuration of parties depicts cases in which repeat players sue one-shotters as the most numerous types of cases in our legal system. These are cases, he claims, where the law is used for routine processing of claims by parties for whom the making of such claims is a regular business activity. There are not many cases outside the personal injury area in which one-shotters sue repeat players. When they do, "it usually represents the attempt of some OS (one-shotter) to invoke outside help to create leverage on an organization. . . ."

Litigation between repeat players (intercorporate disputes) is rare, Galanter contends, because:

the expectation of continued mutually beneficial interaction would give rise to informal bilateral controls. . . . Units with mutually beneficial relations do not adjust their differences in court. Where they rely on third parties in dispute-resolution, it is likely to take a form (such as arbitration or a domestic tribunal) detached from official sanctions and applying domestic rather than official rules.

Exceptions to this rule are litigation involving the government as one of the repeat players and situations where the repeat players do not repeatedly deal with each other. "The large one-time deal that falls through, the marginal enterprise—these are staple sources of litigation."

In any event, it is important to note that when litigation is between a one-shotter and a repeat player, one party is a bureaucratically organized professional who enjoys strategic advantages. When the litigation is between one-shotters or between repeat players on both sides, generally there are continuing "multi-stranded relationships with attendant informal controls. Litigation appears when the relationship loses its future value. . . ."

Because the repeat players' advantages carry over to non-litigation modes of dispute resolution also, Galanter's model of repeat players and one-shotters has obvious meaning for alternative dispute resolution of cases in which an organizational party is also

wealthy, powerful, and equipped with the latest computerized case management techniques and expertise. The advantages of experience and organization in dispute processing are so obvious that one of the reforms suggested by Galanter to equalize the power between the haves and have nots is to organize the have nots into parties "that have the ability to act in a coordinated fashion, play long-run strategies, benefit from high grade legal services, and so forth;" in short, to organize the one-shotters into repeat playing organizations. According to Galanter, this would not only create situations in which both parties were organized to pursue litigation, but it would tend to cause continued dealings between parties, which encourages resort to private systems of dispute settlement. Thus, we would expect our reforms to produce a dual movement: the official systems would be "legalized" while the proliferation of private systems would "delegalize" many relationships.

Many of Galanter's observations are borne out by the CLRP survey (TRUBEK). For example, legal fees are a higher percentage of all litigation costs for individuals than for corporations (88% vs. 72%), suggesting that employees of organizational litigants (repeat players) spend more time on cases than do individuals. Moreover, if the CLRP analysis is correct that litigation involves an investment analysis in a series of decisions made under conditions of uncertainty, it would suggest that repeat players (organizations) are better equipped to handle litigation, because organizations engage in this type of analysis as a regular part of their business. Moreover, as Bodily confirms, corporations have a much different attitude towards risk than do individuals (BODILY).

The CLRP study also shows that although organizational plaintiffs have a higher recovery to fee ratio against individual defendants than do individual plaintiffs against organizational defendants, the differences are not significant. Table 24 of the CLRP study shows the highest recovery to fee ratio is in cases where an organizational plaintiff sued an organizational defendant and the difference appears significant. Finally, the "success" (net recovery/stakes ratio) is much higher for cases in which organizations sue individuals than when individuals sue organizations. Finally, since most of what goes on in adjudication is negotiation and settlement, the implications of this data regarding organizational litigation for alternative dispute resolution is that organizations will have the same advantages and show the same margin of success over individuals in alternative dispute processing forums as they do in court.

Thus, any analysis of institutional dispute resolution must take

into account the peculiar nature of the organization. Corporations and other private institutions have a continuing existence, accumulated capital resources, sophistication, expertise, and access to legal services far exceeding those of individuals. In many cases, the disputes in which organizations are involved are characterized by a continuing relationship with the other disputant. Also, where the other disputant is a smaller organization or individual, significant power disparities may affect the resources each side can devote to the dispute and the staying power of the disputants. Further, organizations tend to take an economic rather than emotional or moral viewpoint of their disputes and conduct them in a strategic way with an eye on long term results, including the generation of norms and rules to govern future action. In contrast, individuals tend to view disputes more as matters of principle, to focus on short-run results, and not to care as much about the generation of long-term rules or norms. Many of these differences result from the organization's perspective that disputes are a natural, anticipated by-product of business to be managed like any other part of the business, rather than an extraordinary event raising questions of personal integrity, principle, and economic survival.

These factors create special opportunities for the resolution of institutional disputes, but they also create special problems. Opportunities are created through the expertise of institutional disputants in the disputing process. Institutions can be expected to act more rationally and to take steps to reduce waste and unnecessary transaction costs. The continuing existence of institutions and the long term perspective they tend to take can encourage the use of anticipation and prevention techniques. Corporate structure can foster accountability for actions and decisions that create or intensify claims, grievances, and disputes.

These same factors also raise problems that must be addressed. Despite criticisms to the contrary, by and large the courts have been an equalizer of power between the large and small. Will the powerless be at a relatively greater disadvantage outside the courts? As long as access to the courts is preserved and not made more difficult by mandatory participation in an alternative process, are power disparities neutralized? In this respect, the non-mandatory alternative dispute resolution processes described above pose fewer problems than the mandatory, court-ordered arbitration programs that are becoming more widespread, although none of the programs go so far as to foreclose access to courts altogether.

The corporate structure that fosters accountability can also lead to buck passing and a lack of responsibility within the corporation for responsible handling of disputes. This same bureaucratic structure and the fact of continuing corporate existence can lead to secrecy, collusion, and combinations in violation of public policy through the use of dispute processing techniques that are less visible than adjudication or other formal dispute processes. The mini-trial, rent-a-judge, and regulatory bargaining approaches are susceptible to criticism on this ground. Finally, the proliferation of alternative dispute resolution processes and techniques could encourage institutions to engage in strategic disputing to preserve tactical advantages.

Cutting across these concerns, an examination of organizational disputes must take into account the peculiar role of the corporate counsel. How will the move towards greater internalization of the corporate legal function affect the resolution of corporate disputes? Will internalization of the corporate legal function make corporations more responsible and responsive to society's needs, or more parochial and self-protective? Are in-house lawyers less independent and objective than outside counsel? If so, will this promote or retard the fair, effective, and efficient resolution of disputes?

Another concern is the increasingly multi-jurisdictional aspect of institutional disputes. Ours is not only a corporate society, but it is a multinational corporate society. Disputes between international corporations today raise questions requiring consideration of the law of foreign nations as well as the law of sister states, and reconciliation of important national policies. What implications does the internationalization of business have for our formal and informal dispute resolution systems?

It would be foolhardy to attempt a definitive answer to these questions now, but an indication of their importance (and possibly the direction of their resolution is last term's decision by the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*<sup>18</sup> In that case, the Supreme Court held an alternative dispute resolution (arbitration) clause in an agreement between a Puerto Rican corporation and a Japanese-American joint venture to be binding and enforceable even with respect to claims of violation of American antitrust laws and even though it meant the elimination of the statutory treble damage provision. In rejecting the view of the Justice Department that the Sherman Act

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18. 53 U.S.L.W. 5069.

“trumped” the arbitration clause, the Court stated, “the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . .” The Court also reiterated what it views as a strong federal policy favoring arbitration. But in abandoning an earlier doctrine based on the primacy of statutory policy and the importance of the treble damage remedy,<sup>19</sup> the Court opened the possibility that a prospective litigant, at least in the international context, might provide in advance for *any* form of mutually acceptable dispute resolution procedure for *any* statutory or common law claim. If this proves true, the prospects for vastly increased use of alternative dispute resolution contract clauses is great.

### *E. Conclusion*

Even less is known about the special world of institutional disputes than is known about the so-called world of ordinary litigation. The dearth of empirical data is extraordinary. Theoretical constructs are primitive. In an effort to cut costs, there has been a surge of interest by institutions in alternative dispute resolution processes and techniques, but the effect of such processes and techniques on the total dispute resolution picture is unclear. Many of the processes and techniques appear to offer important opportunities to achieve not only less expensive, but perhaps better dispute resolution and management. However, the use of such processes also raises problems and concerns. As long as these problems and concerns are addressed, corporate experimentation, development, and use of alternatives should be encouraged.

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19. See *American Safety Equipment Corp. v. J.P. MaGuire & Co.*, 391 F.2d 821 (2d Cir. 1968).

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