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# Resolving Workplace Disputes in the United States: The Growth of Alternative Dispute Resolution in Employment Relations

David B. Lipsky
*Cornell University*, dbl4@cornell.edu

Ronald L. Seeber
*Cornell University*, rs60@cornell.edu

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## Abstract

[Excerpt] For more than a decade a "quiet revolution" has been occurring m the American system of justice. There has been a dramatic growth in the use of alternative dispute resolution (ADR) to resolve disputes that might otherwise be handled through litigation. We define ADR as *the use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute* (Lipsky and Seeber, 1998A}. In the United States mediation, arbitration, and their variants ordinarily are private processes in which the disputants themselves select, hire, and pay the third-party neutral who resolves, or attempts to resolve, their dispute.



## Keywords

alternative dispute resolution, ADR, conflict management, arbitrators, mediation


## Disciplines

Dispute Resolution and Arbitration | Labor Relations

## Comments


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# Resolving workplace disputes in the United States: The growth of alternative dispute resolution in employment relations

By David B. Lipsky and Ronald L. Seeber

## The rise of alternative dispute resolution

For more than a decade a "quiet revolution" has been occurring in the American system of justice. There has been a dramatic growth in the use of alternative dispute resolution (ADR) to resolve disputes that might otherwise be handled through litigation. We define ADR as *the use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute* (Lipsky and Seeber, 1998A). In the United States mediation, arbitration, and their variants ordinarily are private processes in which the disputants themselves select, hire, and pay the third-party neutral who resolves, or attempts to resolve, their dispute.

A principal cause of the rise of ADR in the United States, many observers believe, is the perceived "litigation explosion" that began in the 1960s and, some contend, continues to this day. Between 1960 and 1990, Congress passed at least two dozen major statutes regulating employment conditions, including:

(1) the Civil Rights Act of 1964,
(2) the Occupational Safety and Health Act in 1970,
(3) the Employee Retirement Income Security Act in 1974,
(4) the Americans with Disabilities Act in 1990,
(5) the Civil Rights Act of 1991, and
(6) the Family and Medical Leave Act of 1993.

These statutes and others gave rise to new areas of litigation, ranging from sexual harassment and accommodation of the disabled to age discrimination and wrongful termination. More and more dimensions of the employment relationship were brought under the scrutiny not only of the court system but also of a multitude of regulatory agencies.

An estimated 30 million civil cases are now on the dockets of federal, state, and local courts, a number that has grown dramatically in recent years. In the last two decades, the number of suits filed in federal courts concerning employment matters grew by 400 percent (U.S. Department of Labor, 1994, pp. 25-33). In the decade of the 1990s, the number of civil cases in U.S. federal courts involving charges of dis-

David B. Lipsky, Professor, and Ronald L. Seeber, Associate Professor, are at the School of Industrial and Labor Relations at Cornell University, Ithaca, New York. Professors Lipsky and Seeber also serve, respectively, as Director and Executive Director of the Institute on Conflict Resolution at Cornell University.

crimination nearly tripled. Plaintiffs who won their employment discrimination suits received a median award of $200,000 in 1996, one in nine received an award of $1 million or more (U.S. Department of Justice, January 2000, pp. 1-13). In sum, the litigation explosion clogged the dockets of federal and state courts in the U.S., leading to longer delays and higher costs in the use of traditional means of dispute resolution

> In theory, ADR is a means of circumventing these aspects of conventional litigation.

## The advantages of ADR

Many organizations have adopted ADR because they believe it is a means of circumventing the expensive, time-consuming features of conventional litigation. The use of ADR has the great advantage, when compared to litigation, of providing a faster, cheaper, and more efficient means of resolving disputes. The parties in a conventional court proceeding often invest considerable money and energy from the time of the initial filings in a court suit, through interrogatories and depositions, to the time of the trial itself. They then frequently negotiate a settlement "on the courthouse steps" or in the judge's chambers.

The costs of litigation include, of course, not only the awards or settlements themselves but also the so-called "transaction costs" associated with settling disputes, such as the costs of inside and outside legal counsel, expert witnesses, gathering documents and engaging in discovery, and so forth. The transaction costs of litigation in the United States often are two or three times greater than the settlements themselves (Lipsky and Seeber, 1998B, p. 142). Moreover, this calculation does not include the value to the disputants of the time saved as a consequence of resolving disputes quickly. Reducing these "opportunity costs" may be the largest benefit of using ADR.

In theory, ADR is a means of circumventing these aspects of conventional litigation. ADR processes usually are not confined by the legal rules that govern court proceedings, such as those governing the admissibility of evidence and the examination of witnesses. Arbitrators, for example, may conduct expedited hearings, dispense with pre- or post-hearing briefs, consider hearsay evidence, and allow advocates to lead their witnesses. Discovery is almost never a part of the mediation process and is used only slightly more often in arbitration, usually when the parties request it.

The parties have significantly more control over the ADR process than they would over a court proceeding. Within broad limits, the parties can design the ADR procedure themselves. Because the disputants often jointly select the neutral, they are likely to have more trust and confidence in the neutral's ability than they would in a judge who otherwise would be assigned to hear the case. Moreover, compliance with the eventual settlement is less likely to be a problem when the disputants have controlled the process that produced the outcome.

Although there are many advantages to the use of ADR, some observers contend that it poses a substantial threat to the United States justice system. ADR, in effect, transfers the

dispute resolution function from public forums (the courts, regulatory agencies, etc.) to private ones. Typically, ADR proceedings are private and confidential. Arbitration decisions, for example, are seldom published because they are considered the property of the disputants, in contrast to court decisions. The increasing privatization of the American system of justice, critics maintain, poses serious challenges for the guarantees of due process and equality under the law (Stone, pp. 1036-1049, Delikat and Kathawala, pp. 83-131).

**Grievance and arbitration procedures in collective bargaining relationships are a form of alternative dispute resolution.**

Arbitration, mediation, and other ADR techniques have been around for a century, if not longer. Some observers trace their use to biblical times. As Riskin and Westbrook note, "Arbitration has an ancient lineage and an active present. King Solomon, Phillip II of Macedon and George Washington employed arbitration. Commercial arbitration has been used in England and the United States for hundreds of years" (Riskin and Westbrook, p. 215). Commercial arbitration has proved to be especially effective, for example, in resolving breach-of-contract claims between corporations. International arbitration has been used not only in commercial disputes but also, of course, as a means of settling differences between nations.

## Dispute resolution and labor-management relations

Although the use of arbitration and mediation to resolve labor-management disputes in the United States originated in the second half of the 19th century, it only became an integral part of the American industrial relations system after World War II (see, for example, Elkouri & Elkouri, pp. 1-27). In the U.S. system of industrial relations, a sharp distinction is made between disputes over "interests" and disputes over "rights." Interest disputes, on the one hand, arise over the formation of collective bargaining agreements. Disputes arising out of the application, interpretation, or enforcement of collective bargaining agreements, on the other hand, are rights disputes (for a recent discussion, see Kheel, pp. 83-84).

**Interest disputes.** Negotiations between employers and unions are the principal means of resolving—or avoiding—interest disputes. If the parties reach an impasse in the negotiation of a new collective bargaining agreement, then typically mediation is used to help them resolve their dispute. If the parties are covered by the National Labor Relations Act, then the Federal Mediation and Conciliation Service has jurisdiction over the dispute and provides the parties with a mediator. Arbitration is almost never used to resolve interest disputes. (In a handful of states, interest arbitration is used to settle police and firefighter disputes, but it is almost never used in the private sector.)

**Rights disputes.** In contrast, almost all collective bargaining agreements in the United States incorporate a grievance procedure for handling disputes over rights. The grievance procedure is negotiated by the parties and almost always provides for the use of arbitration to resolve grievances that have not been settled earlier in the

procedure. The arbitrator is a private party, jointly selected and paid by the parties.

If grievance and arbitration provisions were not included in collective bargaining agreements, then presumably unions and employers would need to resolve their rights disputes either by resorting to concerted activity (strikes, lockouts, or other work stoppages) or by suing one another in the courts to enforce their contracts. In large measure, therefore, using grievance procedures and arbitration to resolve disputes over rights is a substitute for using the court system to resolve such disputes In other words, grievance and arbitration procedures in collective bargaining relationships are a form of alternative dispute resolution. Grievance arbitration has been widely considered to be one of the hallmarks of the collective bargaining system. It is reasonable to assume that the successful use of mediation and arbitration in American industrial relations spurred the use of ADR as a means of resolving other types of disputes.

> It becomes apparent that a much smaller number of companies use mediation and arbitration frequently, even in rights disputes.

The U.S. Supreme Court enhanced the significance of grievance arbitration in a series of landmark decisions In the so-called "Steelworkers Trilogy,"[2] three cases decided in 1960 involving the Steelworkers Union, the Court ruled that arbitrator decisions are virtually inviolate and not subject to review in the federal courts except under very special circumstances (Elkouri & Elkouri, pp. 28-47). If the Court had not severely limited the review of arbitrator decisions, then the court system likely would have been flooded with petitions to review thousands of arbitration awards. This practical consideration was explicitly a factor entering into the high court's reasoning. After the Trilogy, grievance arbitration flourished.

**Statutory disputes.** Within a few short years, however, President Lyndon Johnson's "Great Society" triggered a flood of federal legislation matched in volume only by the period of Franklin Roosevelt's New Deal in the 1930s In the area of employment law alone, between 1960 and 1980 Congress passed at least two dozen major statutes regulating employment conditions. Consequently, arbitrators operating under collective bargaining agreements increasingly have been required not only to interpret those agreements but also to apply the various statutes (*i e*, the "external law") that may be linked to grievants' complaints.

This rise in the prevalence and importance of statutory rights in labor-management arbitration has been a source of considerable concern. The need for arbitrators to apply external law in a growing number of cases requires that they be expert in the content and application of these statutes. Questions have arisen about the preparation and expertise of arbitrators who are called upon to resolve statutory claims. Moreover, the increased arbitration of statutory rights makes considerations of due process more important than in the past. For example, concerns have been raised about the adequacy of representation in arbitration cases that involve the application of statutory rights.

In 1999, the National Academy of Arbitrators—the premier organization of labor arbitrators in North America—commissioned the authors to conduct a survey of its membership that it hoped would cast light on these concerns. We found that 82 percent of the 600 Academy members had arbitrated a dispute during the period from 1996-98 that required them to interpret or apply a statute, and that cases involving a claim of statutory rights now constitute about 10 percent of their total caseload. We also found that a significant proportion of Academy members had applied statutory law in one or more of their arbitration cases but lacked any discernible knowledge or experience in the applicable statute. Approximately 20 percent of Academy members who have applied Title VII of the U.S. Civil Rights Act of 1964, for example, have neither received training in nor had responsibility for teaching the statute (Picher, Seeber, and Lipsky, pp. 26-28).

**Numerous groups have a vital stake in the design and implementation of fair and effective dispute resolution systems.**

## Dispute resolution in non-union settings

At the same time, a growing number of *non-union* employers, responding in part to the litigation explosion, have adopted dispute resolution procedures to help them manage their employment relations. In their review of research on ADR, Bingham and Chachere conclude that "about half of 'large' private employers have established some sort of formal dispute resolution procedure for their nonunion employees" (Bingham and Chachere 1999, p. 99). In 1997, we conducted a survey of the *Fortune* 1000—the 1000 largest corporations based in the U.S.—to gather data on their use of ADR. (Our target respondent was the general counsel or chief litigator in each of the corporations we surveyed, and we succeeded in obtaining a response rate of well over 60 percent. Given that surveys of high-level corporate populations usually generate response rates of less than 20 percent, this is a very high rate for this population.) (Lipsky and Seeber, 1998A and 1998B)

We asked respondents about their experiences not just with the commonly applied forms of ADR—mediation and arbitration—but also with other processes and techniques that we suspected were less widely used. Chart 1 reports respondents' experiences with the eight forms of ADR we asked about. As the table indicates, nearly all our respondents reported some experience with ADR. They overwhelmingly reported having used mediation (88 percent) and arbitration (80 percent) at least once during the three-year period preceding the survey.

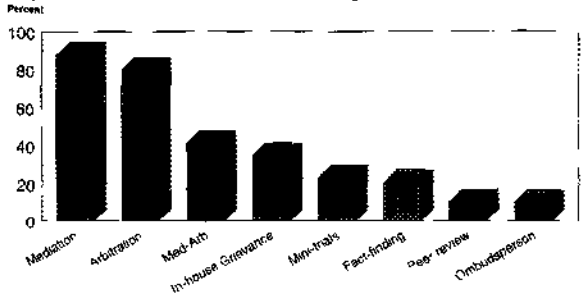
Respondents also had a significant range of experience with other forms of ADR. More than 20 percent said they had used mediation-arbitration ("med-arb"), mini-trials, fact-finding, or employee in-house grievance procedures in the past three years. (In contrast to grievance procedures in collective bargaining relationships, nonunion grievance procedures in these corporations usually do not culminate in arbitration. Rather, management reserves the right to make the final decision.) Further, more than 10 percent of respondents, representing about 60 corporations, even had experience with the least-used forms of ADR—ombudspersons and peer reviews.

Thus, the breadth of penetration of ADR into American business is substantial, even surprisingly so. When asked their favorite form of ADR process, counsel overwhelmingly reported mediation (63 percent); arbitration was a distant second (18 percent) Other forms of ADR clearly have not replaced tried-and-true tactics completely and in fact pale in importance to mediation and arbitration.

We were interested not just in the breadth of ADR use but also with the depth of its

**Chart 1**

**Experience with Forms of ADR among Fortune 1000 Companies**




penetration into corporate dispute resolution. For this reason, we asked respondents how frequently in the prior three years they had used mediation and arbitration. Table 1 provides data on this question. Of those respondents who had used mediation, 19 percent reported using it frequently or very frequently, almost 30 percent said they used it rarely, and the largest group, 43 percent, reported using mediation occasionally

The pattern is similar for arbitration: slightly more than 20 percent reported frequent or very frequent use, 33 percent reported having used the process rarely, and 42 percent reported using arbitration occasionally. Thus, it appears from our data that while most major U S. corporations have used one or more ADR techniques to resolve their disputes, only a smaller group—perhaps a fifth of them—has used ADR intensively. Other data in our survey support the proposition that about 15 to 20 percent of American firms have adopted ADR as a matter of corporate policy (Lipsky and Seeber, 1998A, pp. 21-23).

**Table 1**
**Frequency of ADR use (in percent)***

| Frequency (rights disputes) | Mediation | Arbitration |
|---|---|---|
| *Company uses* | 87 | 78 |
| *Very frequently* | 5 6 | 7 5 |
| *Frequently* | 13 1 | 13 1 |
| *Occasionally* | 43 2 | 41 6 |
| *Rarely* | 29 9 | 33 2 |
| *Not at all* | 8 1 | 4 5 |
| *Company does not use* | 13 | 22 |

** In this and the following two tables, the percentages on frequency of ADR use apply only to the companies that reported that they had used mediation or arbitration at least once in the preceding three years*

We also were curious about the use of corporate ADR in "rights" and "interest" disputes. Our data show significantly different patterns in the forms of ADR used for rights disputes and interest disputes. As Table 2 shows, nearly all of the respondents have used mediation in rights disputes, but more than 60 percent have never used it for interest disputes.

**Table 2**
**Frequency of mediation in rights and interest disputes (in percent)***

| Frequency | Rights Disputes (administration of contracts) | Interest Disputes (negotiation of contracts) |
|---|---|---|
| *Very frequently* | 5 6 | 1 7 |
| *Frequently* | 13 1 | 2 1 |
| *Occasionally* | 43 2 | 7 6 |
| *Rarely* | 29 9 | 25 2 |
| *Not at all* | 8 1 | 60 4 |

Table 3 reports the data for the arbitration of rights and interest disputes. A pattern similar to mediation is found here: Over 95 percent of the respondents reported some use of arbitration in rights disputes, but more than 84 percent reported that they had used arbitration in interest disputes only rarely or not at all.

To summarize, nearly all corporations have had experience with ADR. On closer inspection of the data, however, it becomes apparent that a much smaller number of companies use mediation and arbitration frequently, even in rights disputes.

**Table 3**
**Frequency of arbitration in rights and interest disputes (in percent)***

| Frequency | Rights Disputes | Interest Disputes |
|---|---|---|
| *Very frequently* | 7 5 | 3 0 |
| *Frequently* | 13 1 | 2 1 |
| *Occasionally* | 41 6 | 10 7 |
| *Rarely* | 33 2 | 20 5 |
| *Not at all* | 4 5 | 63 7 |

## Mandatory predispute arbitration

The U.S. Supreme Court has been inclined to favor the use of ADR in employment disputes. Most notably, in *Gilmer v Interstate/Johnson Lane Corp*,[3] the U.S. Supreme Court ruled that a stockbroker who had agreed to the New York Stock Exchange's rule requiring arbitration of employment disputes between brokers and member firms could not sue his employer for an alleged violation of the Age Discrimination in Employment Act but instead must arbitrate the dispute. Since *Gilmer*, most federal appellate courts in the U.S have applied the principle in that case to other industries and a variety of employment statutes. Encouraged by *Gilmer* and its progeny, a growing number of non-union employers have required their employees—*as a condition of their hiring or continued employment*—to agree to use arbitration to resolve statutory complaints rather than resorting to the courts.

This form of *mandatory predispute arbitration* has proven to be very controversial. Professor Katherine Stone has referred to these arbitration agreements as the "yellow dog contracts" of the 1990s (Stone, pp 1017-1050). Although there may be many advantages to the use of mandatory arbitration in employment disputes, some observers contend that this process also presents serious problems in achieving fairness and equity for the disputants. While employment contracts have been arbitrated without great controversy for years, many observers are particularly concerned about the more recent use of mandatory employment arbitration to resolve statute-based employment disputes in the non-union sector. In the absence of unions or other forms of employee representation, it is the employer who designs, implements, and (ordinarily) pays for the dispute resolution procedure

Indeed, in *Coles v Burns Int'l Security Servs*,[4] the court ruled that due process requires that the employer pay the full expenses of the arbitration when the employment contract mandates the arbitration of a statutory dispute. Whether employers, acting entirely at their own discretion, give sufficient regard to due process considerations in their design and use of ADR procedures remains an open question and one which has been the subject of much litigation in recent years.

Indeed, a federal commission appointed by the Clinton administration and headed by former Secretary of Labor John Dunlop condemned the use of mandatory predispute arbitration in 1994 (U S. Department of Labor, 1994, pp. 25-33). Defenders of such agreements argue that, if properly designed, both employers and employees have the advantage of a fast, fair, and inexpensive means of resolving complaints (Sherwyn, Tracey, and Eigen, pp. 73-150)

## Stakeholder motives and objectives

Numerous groups have a vital stake in the design and implementation of fair and effective dispute resolution systems. Stakeholders include employers and employees, corporations, government agencies and unions, civil rights organizations, members of the bar, arbitrators and mediators and the organizations that represent them, and others. Needless to say, society itself has a critical interest in workplace dispute resolution systems because of the close and obvious link between these systems and society's interest in achieving equity and efficiency in the operation of its workplace institutions.

Currently, there is broad support, across most stakeholder groups, for the use of dispute resolution systems in employment relations. The motives underlying their support, however, differ across these vari-

ous groups and are not necessarily compatible. The challenge in establishing fair and effective dispute resolution systems is to take account of the sometimes compatible but often conflicting objectives of the various stakeholders. In this section, we will deal with the motives and objectives of four key stakeholder groups: employers, unions, public agencies, and organizations representing neutrals.

***Employers.*** Employers, various experts have noted, have a "host" of motives for instituting workplace dispute resolution systems (see, for example, Lipsky and Seeber, 1998A, pp. 15-19). Many employers have a sincere desire to provide their employees with a dispute resolution system that is fair and just. The current employer interest in dispute resolution systems may be the consequence, in part, of the sustained economic expansion in the 1990s, which tightened labor markets dramatically. (The U.S. unemployment rate fell to 3.9 percent in April 2000, the lowest rate in over 30 years.) The exceptionally tight U.S. labor market heightened employers' need to offer attractive working conditions to current and prospective employees. Employers who offer fair dispute resolution systems may have a competitive labor market advantage over employers who do not and may find it easier to recruit and retain the employees they desire.

The majority of employers that have instituted dispute resolution systems, however, have been motivated by the desire to reduce the costs and delays associated with conventional litigation. As Bingham and Chachere have noted in their review of ADR research,

> The most commonly stated reasons given by organizations to explain the adoption of ADR are the increased volume of employment claims; lower cost in time, risk, and money relative to more formal dispute resolution processes .; the speed with which ADR can resolve them; changes in the regulatory environment which encouraged (directly and indirectly) workplace ADR; a focus on disputants' underlying interests rather than on the validity of their positions; an effort to maintain and/or enhance productivity (through enhanced long-term working relationships via reduced absenteeism and turnover and increased morale and organizational loyalty); greater degree of confidentiality available from ADR, the expertise of the neutrals superior to that of a jury; and union avoidance. (Bingham and Chachere, 1999, pp. 98-99)

Between 70 and 80 percent of the major corporations in the U.S. reported using various ADR procedures because they believe such procedures saved them time and money. Employers have also noted their strong desire to retain control over the management of conflict, which they believe is enhanced by the use of both ADR procedures and conflict management systems (Lipsky and Seeber, 1998A, pp. 16-17).

Frustration with the growing burden of litigation led many in the business community to oppose various federal measures to regulate the employment relationship and to lobby for tort (or legal) reforms that would limit the ability of one party to sue another. One reform most sought by American business would cap the amount of damages a plaintiff could seek in a civil action. In the 1994 congressional campaign, tort reform was a major provision in the Republican Party's "Contract with America," the party's list of statutory measures it pledged to pass if it gained control of Congress.

But when the Republicans did win a majority in Congress, their effort to enact tort

reform failed in the face of President Clinton's opposition. The failure of federal tort reform is still another factor motivating American employers to adopt ADR; many employers felt that if they could not persuade politicians to constrain the growth of lawsuits or limit their effects, they could at least devise their own cheaper and faster means of managing disputes.

Although the effort to achieve federal tort reform failed, legislators and policy makers were not oblivious to the stresses being felt in the American legal system. In 1990, for example, Congress passed the Civil Justice Reform Act, which encouraged federal courts to experiment with ADR. In 1998, Congress took the next step, requiring federal courts to use ADR. The court systems in more than half the states now encourage, or even mandate, the use of ADR to reduce backlogs and speed up the handling of disputes. Administrative agencies, such as the federal Equal Employment Opportunity Commission, have begun to require the use of ADR to resolve complaints (U.S. Equal Employment Opportunity Commission, 1995; see, also, Miller, 1995, pp. 17 and 87).

***Unions.*** Unions have viewed dispute resolution systems with some skepticism. On the one hand, many unions fear that employers often institute workplace dispute resolution systems as a means of avoiding unionization. Because most employers will not freely admit to anti-union motives, hard evidence on this concern is lacking. There is, however, sufficient anecdotal evidence to suggest that labor's fears, in some cases, are justified.

On the other hand, many unions support the design and implementation of fair and equitable dispute resolution systems. They believe such systems are capable of protecting the best interests of both their organizations and the employees they represent and can be entirely compatible with a collective bargaining agreement. Many unions recognize that certain types of employee complaints cannot readily be handled through traditional collective bargaining channels.

For example, employee concerns ranging from the quality of their relations with supervisors and fellow employees to the adequacy of their computers and office equipment are not usually matters that are easily handled through the grievance procedure. Some unions have discovered that employee complaints that fall outside the purview of the mandatory topics of bargaining may be addressed effectively through a dispute resolution system designed jointly by the parties. Indeed, some unions have embraced ADR with enthusiasm, not only valuing its potential benefits for their members but also recognizing that ADR systems can extend the authority and influence of a union into areas normally considered management prerogatives.

More significant, perhaps, is the manner in which unions and employers handle employee allegations of statutory violations. In some union-management relationships, many, if not all, statutory claims are channeled through the grievance and arbitration procedures contained in the collective bargaining agreement. But an increasing number of unions and employers have established, for certain types of statutory claims, dispute resolution procedures that stand outside the collective bargaining contract. For example, some unions and employers have established special procedures to handle sexual harassment complaints. Also, Employee Assistance Programs, established to deal with employees suffering from alcoholism, drug abuse, and related problems, sometimes contain their own dispute resolution procedures, another form of ADR that can coexist with conventional grievance procedures.

***Public agencies.*** As Bingham and Chachere have noted,

> Adoption of ADR in the public sector is somewhat different from the private sector. In the federal sector, Congress enacted the Administrative Dispute Resolution Act (ADRA) in 1990 to spur agencies to consider using ADR. In a 1994 study [by the GAO], 31% of federal agencies had some form of ADR in place for employee complaints. By 1996 the federal agency rate had increased to 49% (Bingham and Chachere, p. 101).

In the mid-1990s, a task force appointed by the U.S. Secretary of Labor examined employment relations in state and local government and concluded that in some respects the public sector led the private sector in the adoption of ADR systems.

> Overall, it appear[s] that the public workplace might be more receptive to [ADR] systems, particularly to setting them up in a manner that protect[s] the fact and appearance of neutrality and independence, and provid[es] employees['] access to the court if they felt their case was meritorious or [they] did not choose to use the ADR system (U.S. Department of Labor, 1996, p. 81).

A recent survey has shown "that the vast majority of cabinet and non-cabinet-level agencies were experimenting with the use of mediation in personnel and employment disputes." Very few federal agencies, however, made use of arbitration (Bingham and Chachere, p. 102). Apparently the rate of adoption of ADR procedures in some public jurisdictions has been slower than the rate of adoption in major U.S. corporations. For example, some federal agencies, despite the requirements of the ADRA, have lagged behind major private sector employers in part because federal workers have had for many years "multiple avenues for redress" of their complaints and grievances (Kriesky, 1999, p. 250). The Merit Systems Protection Board, established by the Civil Service Reform Act of 1978, adjudicates many types of grievances in the federal sector. Some federal sector managers have been reluctant to establish ADR systems that would constitute yet another "avenue for redress" for the employees of their agencies.

Surveys suggest the adoption of ADR procedures and systems by public sector agencies and their unions in the U.S. apparently quickened in the 1990s. ADR's growth was spurred on by various statutes and regulations and frequently supported by elected officials, who generally were motivated by the same set of factors operating in the private sector.

***Neutrals and their organizations*** Obviously, the professional organizations that represent arbitrators, mediators, and other workplace neutrals in the United States have a vital stake in the evolution of employment dispute resolution systems. These organizations include the National Academy of Arbitrators, the Society of Professionals in Dispute Resolution, the American Arbitration Association, the Dispute Resolution Section of the American Bar Association, among others. The controversies surrounding the rise of employment arbitration, for example, have generated intense debates within the National Academy of Arbitrators

The Academy has responded in a preliminary fashion to the changing realities of employment relations through its endorsement of the "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship." The Due Process Protocol

was developed by a task force consisting of representatives from:

- the Academy,
- the Labor and Employment Law Section of the American Bar Association,
- the American Arbitration Association,
- the Society of Professionals in Dispute Resolution,
- the U S. Federal Mediation and Conciliation Service,
- the National Employment Lawyers Association, and
- the American Civil Liberties Union

The task force debated the question of mandatory predispute arbitration agreements as a condition of employment but did not "achieve consensus on this difficult issue," other than to agree that such agreements should be knowingly made. The task force did, however, agree on a set of "standards ot exemplary due process," including

- the right of employees in arbitration and mediation cases to be represented by a spokesperson of their own choosing,
- employer reimbursement of at least a portion of employees' attorney fees, especially for lower paid employees, and
- "adequate" employee access to "all information reasonably relevant to mediation and/or arbitration of their claims."

The Due Process Protocol also calls for the use of qualified and impartial arbitrators and mediators drawn from rosters that are diversified on the basis of gender, ethnicity, background, and experience To guarantee an adequate supply of qualified neutrals the Protocol also calls for "the development of a training program to educate existing and potential labor and employment mediators and arbitrators" (see the discussion in Dunlop and Zack).

The Academy was concerned that unfair procedures in employment arbitration and the involuntary predispute exclusion of employees from access to the courts and regulatory agencies was tainting the image of all workplace arbitration. Therefore, at its Fiftieth Annual Meeting (May 1997), the Academy went on record as being opposed to the mandatory arbitration of statutory rights of employees as a condition of employment where such schemes preclude recourse to the courts and statutory tribunals.

Recognizing that such arbitrations are nevertheless lawful as confirmed by *Gilmer*, at the same meeting the Academy promulgated guidelines to assist its members in conducting employment arbitrations that involve the adjudication of statutory rights. The guidelines strive to ensure fairness and due process, giving the fullest scope to the procedural protections, evidentiary burdens, and remedies available under the statutes themselves To further its interest in protecting the integrity of the arbitration process the Academy also has intervened as *amicus curiae* in a number of cases before the courts involving the application and refinement of *Gilmer* (Picher, Seeber, and Lipsky, pp 7-8).

## Conclusion

The development of alternative dispute resolution has resulted in a paradox in American employment relations. On the one hand, among unionized employers and employees a functioning ADR system has existed for several decades, but a growing number of federal laws and regulations have put a severe strain on this system Increasingly, grievance arbitrators are required to apply relevant federal statutes in the cases that they hear. Some experts fear that many of these arbitrators lack the training and experience necessary to discharge this responsibility, and that if they cannot perform this function effectively the industrial relations version of ADR will be in jeopardy.

On the other hand, an increasing number of non-union employers are adopting ADR procedures to resolve employee complaints, including those involving statutory claims, precisely because they believe mediation and arbitration are more effective than litigation in resolving such disputes. It is ironic that the rush to adopt ADR to resolve employment disputes in the non-union sector is occurring at the same time that doubts about the effectiveness of the longstanding ADR system in the union sector have never been greater.

We remain optimistic about the prospects for reconciling these contradictions, however. First, there is widespread recognition on the part of employers, unions, public agencies, neutrals, and other stakeholders that legitimate concerns exist, and there is a growing resolve to address them. Second, there is an emerging consensus about the nature of the solutions. For example, virtually all parties agree that steps need to be taken to assure a "level playing field" in both the union and non-union sectors. Employees, whether union or non-union, need to have access to fair procedures that guarantee at least elementary due process. Also, there is nearly unanimous agreement that, if arbitrators and mediators are going to be responsible for the enforcement of statutory rights, they need to have appropriate credentials, including adequate education and training in substantive law. The privatization of the American system of justice through the use of ADR will succeed only if these conditions are fulfilled.

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## Endnotes

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- *Steelworkers v. American Mfg. Co.* [1960] 363 US 564, 46 CCH Labor Cases ¶66,608; *Steelworkers v. Warrior & Gulf Navigation Co.* [1960] 363 US 574, 46 CCH Labor Cases ¶66,609; *Steelworkers v. Enterprise Wheel & Car Corp.* [1960] 363 US 593, 46 CCH Labor Cases ¶66,630.
- 500 U.S. 20 (1991).
- 105 F.3d 146 (3d Cir. 1997).