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What Does the Fortune 1,000 Survey on Mediation, Arbitration and Conflict Management Portend for International Arbitration?

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A new study of dispute resolution practices in Fortune 1,000 corporations shows that many large companies are using binding arbitration less often and relying more on mediated negotiation and other approaches aimed at resolving disputes informally, quickly and inexpensively. The 2011 survey of corporate counsel developed by researchers at Cornell University's Scheinman Institute on Conflict Resolution, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution (CPR) produced results that appear to be strongly reflective of U.S. practices and trends, but thoughtful practitioners and scholars will ponder its implications for the future of international practice.

Although the approaches of large corporations to managing conflict vary widely, their strategies typically boil down to how best to control cost and risk in dispute resolution processes and outcomes. As the U.S. experienced what some have called a "quiet revolution" in dispute resolution in the 1980s, corporate counsel played a critical role. They were in the forefront of efforts to avoid the expense and risk of hardball litigation. They began using settlement-oriented approaches like mini-trial, and, more significantly, negotiation with the help of mediators. They banded together to form the Center for Public Resources (now CPR), which actively promoted corporate and law firm pledges to seek out-of-court solutions before resorting to litigation.

Around the same time, corporate counsel also participated in efforts to address what they perceived to be the limitations or inadequacies of binding arbitration as a substitute for litigation. Although forms of arbitration had been a mainstay of business dispute resolution throughout much of the latter half of the Twentieth Century, arbitration was thrust into an even more prominent role as a substitute for public trial thanks to a series of U.S. Supreme Court decisions strongly promoting the enforcement of arbitration agreements.

When in 1997 Cornell conducted the first survey of Fortune 1,000 corporate counsel on their attitudes and practices regarding dispute resolution, mediation and arbitration were both prominently and positively portrayed. Corporate counsel expressed positive views of many perceived benefits of these options, including savings of time and cost and more satisfactory, durable results. A majority of respondents predicted that their companies would make use of both mediation and arbitration in the future.

The 2011 survey, reflecting the responses of more than 300 Fortune 1,000 corporate counsel, presents a very different, decidedly mixed picture. The respondents, almost half of whom are general counsel, assert that their companies are less likely to employ hardball litigation as a primary strategy, and instead broadly embrace mediation as a tool for resolution of all kinds of disputes now and in the future. They are also becoming more proactive in managing conflict in the early stages of litigation and employing third parties to evaluate and assess different dimensions of a legal dispute. Around two-thirds of responding counsel said their company employ some form of "early case assessment"—an approach that in companies like DuPont is a formalized and systematic method of analyzing all aspects of a dispute in the early stages in order to plot the appropriate course for its resolution.

At the same time, however, corporate counsel tend to be markedly less assured of the potential benefits of "alternative dispute resolution," perhaps reflecting a more realistic (or more cynical) view borne of long experience. As a group, they are less certain that these processes will be deemed satisfactory, or that they will produce satisfactory settlements or durable results. These data may mirror anecdotal evidence that mediation is often subject to manipulation by attorneys seeking to prolong or frustrate the dispute resolution process or "spin" mediators.

When it comes to adjudication, more companies seem to be turning back to litigation in court. Binding arbitration usage has dropped for most kinds of disputes (including commercial, employment, environmental, intellectual property, real estate and construction disputes), and corporate counsel are now evenly divided on the question of their company's future use of arbitration. Notable exceptions to this marked downward trend are consumer and products liability cases, as some companies appear to be taking advantage of U.S. Supreme Court's decisions supporting the use of binding arbitration clauses in standardized consumer contracts, including provisions waiving the right to participate in class actions.

The common theme in these changing patterns appears to be a desire for maximal control of the dispute resolution process. Corporate attorneys logically prefer to manage outcomes, so mediation and other approaches that aim at achieving a mutually acceptable settlement are strongly favored. The evidence suggests that in the U.S. the models they currently embrace are heavily lawyered, with the emphasis on third party predictions or evaluations of a case's chances in adjudication. The great majority of cases are resolved prior to hearings on the merits; thus, the incidence of court trial has fallen dramatically, and there are also fewer cases going to arbitration hearings.

Where settlement cannot be achieved, some large companies—perhaps as many as half the Fortune 1,000—then want to try their commercial cases in court despite the well-known costs and risks, if only because of the traditional "second chance"—the opportunity to overturn a faulty verdict or judgment on appeal. For many corporate counsel, concerns about the inability to overturn arbitration awards that do not comport with applicable law or proven fact, coupled with suspicions about the abilities or motivations of arbitrators, are paramount.

But many other corporate attorneys continue to view the preference for litigation as ironic, since the alternative—binding arbitration—is a choice-based process that affords countervailing advantages such as options for enhanced confidentiality, speed and efficiency, expertise . . . and even, potentially, private appeal to another tier of arbitration! All too often, however, it seems that corporate counsel fail to recognize or take advantage of such options, and instead complain about the shortcomings of arbitration. To make active choices regarding arbitration means overcoming formidable barriers such as the prevalent caution among corporate counsel about leaving traditional

comfort zones, and the low priority assigned to dispute resolution in the negotiation and drafting of business agreements. These are the source of great inertia. As one expert on corporate deal-making recently explained when asked why the companies he advises had not rushed to employ a particular new program for dispute resolution, “My clients prefer to cross the street in a group.”

What do trends among Fortune 1,000 corporations portend for international arbitration and dispute resolution practice? First off, it must be said that because of the unique and critical role played by binding arbitration in the resolution of international commercial disputes, both as an alternative to national courts and as a framework for worldwide enforcement of adjudicated results, one cannot imagine in the international arena the kind of market competition between arbitration and litigation observable in the U.S. and reflected in the 2011 Fortune 1,000 survey. In other words, arbitration will undoubtedly remain the preferred mechanism for adjudication of international business disputes.

But there remains the important question of the future evolution and impact of mediated negotiation and other strategies that afford parties at least the possibility of earlier, quicker, less expensive, less formal, more private, and more appropriately tailored solutions to business conflict. It would be a mistake to assume the U.S. experience with mediation, so reflective of our culture and our system of justice, will be fully replicated internationally. On the other hand, it is reasonable to expect that over time international businesses will increasingly probe the opportunities to enhance their control and active management of conflict, including intervention strategies that help to promote greater cross-cultural and cross-border communication and which reduce the need for arbitration hearings. Such developments are likely to be stimulated to the extent that businesses perceive international arbitration is becoming more costly and less efficient—a perception that has factored significantly in recent years on the American scene.

What are your perspectives on the future of international commercial arbitration and dispute resolution? What questions or concerns, if any, are raised by observed trends among Fortune 1,000 corporations? The complete study, “Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations” by Thomas J. Stipanowich and J. Ryan Lamare may be found at https://ssrn.com/abstract=2221471.

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