



## **INSIGHTS REPORT BY TWO OF THE WORLD'S LEADING ALTERNATIVE DISPUTE RESOLUTION ORGANIZATIONS SHOWS CONSCIOUS, SELECTIVE APPROACH TO USING ADR FOR CONTENTIOUS MATTERS**

New York - Over the past year, the International Institute for Conflict Prevention and Resolution ("CPR") and the Centre for Effective Dispute Resolution ("CEDR") have collaborated to examine the status of modern-day dispute resolution approaches in business.

The research has been summarised in an insights report - that largely consists of two studies conducted over the last 12 month supported by both organizations: a survey of the attitudes and dispute resolution practices of a cross-section of CPR's corporate members and contacts; and a separate survey, undertaken by CEDR, to audit the experience and attitudes of commercial mediators in both the US and UK markets.

The report shows that whilst negotiation is by far the most popular method for early dispute resolution, arbitration and mediation are often being used proactively to achieve resolution and manage conflict. However the report also demonstrates there are areas where there may be barriers to use (for both mediation and arbitration) which will need further consideration.

The full report can be viewed here: <https://www.cpradr.org/news-publications/reports/2019-04-04-cpr-cedr-joint-insights-report-on-the-use-of-adr>

### **ABOUT THE RESEARCH**

Respondents to CPR's corporate counsel survey were predominantly large businesses – average revenues exceeded \$15 billion – while the mediators who responded to CEDR's survey generally described themselves as reasonably or very experienced. Overall, this report is based on responses from 90 individuals – not enough to yield statistically significant results in every instance, but sufficient to produce some useful and interesting insights into the state of the marketplace.

This report is primarily focused on the interaction between arbitration and mediation-based approaches in both domestic and cross-border disputes. Both CPR and CEDR have public missions to encourage and develop the use of ADR in commercial disputes – globally, as well as in the countries where each is headquartered – and are publishing this insights report because understanding the behaviours and needs of the users of ADR (be they in-house counsel or external law firms) is an important part of progressing this work.

### **CPR'S CORPORATE COUNSEL SURVEY**

#### ***Experience of ADR Processes is high***

Unsurprisingly, all of CPR's survey respondents reported having been involved in some forms of dispute over the previous five years, and 88% had gone into litigation. In addition, there were high levels of reported usage of direct negotiation (86%), mediation (82%) and arbitration (82%).

Respondents reported having been involved in an average of 10 arbitrations and 21 mediations per corporation over the past five years, with about 50% of arbitrations and 17% of mediations involving cross-border disputes. Thus, the survey results suggest that companies and corporate counsel around the world are regularly engaging in all of the main dispute resolution processes.

### ***Preference for ADR processes can be a complex picture***

A far more diverse picture emerged when CPR asked corporate counsel about their preferred methods of dispute resolution. Arbitration and mediation were preferred to litigation. For both domestic and cross-border disputes, direct negotiation was the most preferred route (although surprisingly below 60% in each instance). Arbitration was slightly favored over mediation for domestic disputes but there was an overwhelming preference for arbitration over mediation to resolve cross-border disputes.

These findings are similar to those of a CEDR Survey of In-House Use of Commercial Mediation and ADR conducted in 2013.

The most valuable characteristics of cross-border arbitration for in-house counsel were identified as the enforceability of awards and confidentiality of the process. The worst aspects referenced were the cost of the process along with the lack of predictability of fees.

The most valuable characteristic of mediation for in-house counsel was given as the ability of parties to shape a resolution tailored to their needs whereas the main reasons given for not using mediation was the difficulty convincing a counterparty to use it.

### ***Mediating in Arbitration***

Despite a preference for arbitration in cross-border disputes, a meaningful proportion of arbitration cases are settled through mediation before an award is issued. 30% of domestic arbitrations settled through mediation, as did about 20% of cross-border arbitrations. More work could be done to determine whether these particular arbitrations were commenced prematurely (e.g. when arbitration was not in the commercial interest of the parties or the case had not been sufficiently assessed).

## **CEDR'S MEDIATION AUDIT**

### ***Mediation is working***

The overall success rate of mediation remains very high on both sides of the Atlantic. UK mediators report an aggregate settlement rate of 89%, with 74% of cases achieving settlement on the day of mediation and a further 15% settling shortly after mediation. US results reflected corresponding high settlement rates, with similar success on the day of the mediation.

Mediators were asked for their views on the performance of lawyers and clients they encountered in their mediations –and whilst this showed slightly higher performances in the UK than the US – in all

instances two thirds of lawyers and clients were performing well in mediation, which could indicate that ‘the art of mediation advocacy’ is, for the most part, thriving in the US and UK.

### ***Background matters more in the US***

Analysis of why commercial mediators are appointed to cases suggests that, compared to the UK, the US market for mediators is less time and price sensitive, but that there is more repeat business and referrals from lawyers who have worked with a mediator before, and a higher emphasis on mediators’ professional backgrounds. According to this research there is a far higher proportion of lawyer-mediators in the US than the UK.

The survey also indicated that US mediators are more likely to emphasise their profession when promoting themselves; how often it was a significant factor in their securing appointments; and, how often it turned out to be actually relevant and needed in the subsequent mediation, including assisting in reaching settlement. Most mediators reported these situations as occurring “almost always” or “frequently.”

US mediators are ahead of their UK counterparts in terms of their fee income for a typical one-day case. In the UK, the audit reported that their average fee was \$4,715 (£3,627 @ £1=\$1.30) whilst in the US market the average was \$5,375, or 14% higher. A further question that could be asked on this point might be does an over or under-supply of experienced mediators in the marketplace play a role in these fee levels?

## **OVERVIEWS**

### **James South, Managing Director of CEDR commented:**

*“Whilst ADR might once have been regarded as a disrupter it is now very much mainstream in the US and most of the European jurisdictions where it is used. However, when it comes to cross-border international disputes, one can see in this Insights report that confidence in ADR is not uniform; it would appear that mediation is at somewhat of a disadvantage when it comes to concerns over enforcement, presumably due to the different status of mediation across jurisdictions. This is why the work of UNCITRAL on dispute settlement has been so significant and the proposed Singapore Convention due to come into force later this year.”*

### **Noah Hanft, President, CEO, CPR said:**

*“The findings from this research demonstrate that alternative dispute resolution has come a long way, but it still has significant runway ahead. Key to its expansion is for the ADR community to gain an increased understanding of the specific needs of users and for providers to serve those needs. This insights survey is a step in that direction. As both a think-tank and a provider of Dispute Resolution Services, in its period of operation spanning over 40 years, CPR has been dedicated to providing innovation to disputants and their advisers. This must remain our aim to ensure the continued development of the field.”*



**ENDS**

***For more information***

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