CPR
International Institute for
Conflict Prevention & Resolution

CEDR
CENTRE for EFFECTIVE
DISPUTE RESOLUTION

Insights into Alternative Dispute Resolution

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Introduction

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 the corporate sector.

Based in New York and London respectively, CPR and CEDR are two of the world's leading bodies in the field of Alternative Dispute Resolution ("ADR"). Both have a strong interest in promoting effective dispute resolution thought leadership backed up by high quality dispute resolution professionals.

The research summarised in this report largely consists of two studies conducted over the last 12 months: 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.

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.

Insights on Dispute Resolution Approaches

Unsurprisingly, all of CPR's responding members 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. However, a far more diverse picture emerged when CPR asked members about their preferred methods of dispute resolution. For both domestic and cross-border disputes, direct negotiation remained the preferred route (although surprisingly below 60% in each instance), but there was a marked difference in the popularity of arbitration compared to mediation as the preferred method to resolve cross-border disputes:

Q: What is your company's preferred method for resolving disputes?

	Domestic	Cross-border
Direct negotiation	57%	59%
Arbitration	16%	27%
Mediation	12%	6%
Litigation	8%	2%
Other	7%	6%

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

Despite this apparent preference for arbitration, rather than mediation, in cross-border disputes, a significant proportion of arbitration cases are settled through mediation before any award is issued. About 30% of domestic arbitrations settled through mediation, as did about 20% of cross-border arbitrations. The survey revealed clear and consistent reasoning for this in both domestic and cross-border cases:

Q: When your company has settled arbitration before an award, what reasons played an important role in the decision to settle?

	Domestic	Cross-border
Preserving business relationships	78%	80%
Substantive issues in the case	56%	50%
Costs	44%	50%
Time	44%	40%
Other	6%	-

This result highlights the role mediation can play to resolve disputes at any point while an arbitration is pending, not necessarily at the beginning but also perhaps after the parties have exchanged their pleadings or disclosures. CPR's arbitration rules expressly provide that either party may propose settlement negotiations to the other party at any time during the arbitration. They also provide that the Tribunal may suggest that the

parties explore settlement at such times that the Tribunal deems appropriate, or that the Tribunal at any stage of the proceeding may request CPR to arrange for mediation of the claims asserted in the arbitration. To further promote the use of mediation in arbitration, the 2019 Administered Arbitration Rules (both domestic and international versions) now go one step further providing that CPR may *sua sponte* invite the parties to mediate under the CPR International Mediation Procedure or under any mediation procedure acceptable to the parties. In order not to delay the arbitration, such mediation is to take place concurrently with the arbitration.

The varying popularity of domestic and cross-border arbitration can be explained by CPR corporate respondents' responses as to the most valuable and worst characteristics of cross-border arbitration:

Q: What are the three most valuable characteristics of arbitration for cross-border disputes?

1. Enforceability of awards
2. Confidentiality
3. Selection of arbitrators
4. Neutrality
5. Finality

Q: What are the three worst characteristics of arbitration for cross-border disputes?

1. Cost
2. Lack of predictability of fees
3. Lack of speed
4. Too much discovery
5. Lack of effective sanctions during process

As shown above, confidentiality remains one of the most valuable characteristics of arbitration. CPR Arbitration Rules address this concern heads on, providing for some of the strongest confidentiality provisions, requiring confidentiality not only on the part of CPR and the arbitrators, but also the parties themselves.

Respondents to the Survey also indicated that they would welcome the possibility of choosing simplified arbitration procedures where appropriate to increase cost savings and efficiency. The new 2019 CPR administered arbitration rules introduce a new default selection mechanism which provides that, absent any other agreement of the parties, disputes below $3 million will be resolved by a sole arbitrator, as opposed to a three-arbitrator tribunal. This new provision is aimed at expediting and streamlining the arbitral process, as well as decreasing its overall cost.

The Survey also showed that companies are concerned about diversity. While almost 65% of respondents indicated that their companies have diversity supplier programs, only one third indicate that these programs also apply to the selection of arbitrators and mediators. Much remains to be done to diversify pools of arbitrators and mediators available to users and to encourage the use of diverse neutrals. In addition to a variety of other initiatives undertaken to promote diversity, CPR Dispute Resolution added in 2018 a Diversity Statement to the nomination letters sent to parties. The language of the diversity statement reinforces CPR's commitment to diversity and inclusion in ADR, reminds ADR users of the benefits of diversity for the quality of decision-making, and encourages them to remain cognizant of the role that implicit bias can play in the selection process.

ADR is only successful when we listen to the users – A view from CPR

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 providers. The result of this purpose and dedication means that CPR has, by listening to the needs of its constituent users, created Alternative Dispute Resolution processes that are practical, effective and efficient – especially in regard to Arbitration and Mediation. CPR also recognizes that not all ADR neutrals are the same and therefore selecting the right individual from its extensive qualified panel for a particular dispute can be critically important.

Nowhere is this innovation more clearly expressed that in CPR's different sets of ADR Rules, especially its Administered Arbitration Rules which were created with the integral involvement of its users. For example, CPR's Rules have been designed to increase efficiencies – lowering overall costs, benefitting all parties with an easy commencement process and no cumbersome paper filing requirements. Appointment of the Arbitral Tribunal typically takes 3-4 weeks from the time of filing, but can also be expedited. Settlement opportunities are highlighted with tribunals encouraged to suggest mediation/settlement at any stage; it is not just limited to parties' initiative.

Listening to users also means that CPR recognizes the importance of facilitating early dispute resolution when possible. CPR offers tools, such as its Dispute Resolution Clause Selection Tool (which allows selection of the appropriate existing model clause for particular needs) and The Complete Clause Tool for CPR Administered Arbitration (which tailors the standard CPR clause for the CPR Administered Arbitration Rules or International Rules to business needs).

CPR corporate respondents' comments on the most valuable and worst characteristics of mediation are also interesting:

Q: What are the three most valuable characteristics of mediation?

1. Ability of parties to shape a resolution tailored to their needs
2. Avoidance of courts
3. Confidentiality
4. Neutral perspective on the issues
5. Flexibility

Q: What are the three most common reasons for not using mediation to resolve a dispute?

1. Difficulty convincing counterparty to use mediation
2. Perception that it is waste of time and money
3. Perception of appearing as weak to other party
4. Absence of contractual mediation clause
5. Difficulty identifying qualified mediator

Although mediation is frequently characterised as being a voluntary process and thereby presenting more problems with compliance than does arbitration, only one respondent from CPR's survey reported ever having any difficulties in enforcing a contractual agreement to mediate, and one other reported any difficulties in procuring their opponent's compliance with a mediated settlement agreement.

Confidence is critical to the continued international expansion of ADR – A view from CEDR

Whilst ADR might once have been regarded as a disrupter (particularly mediation – the arrival of which in the UK thirty years ago coincided with the creation of CEDR), it is now very much mainstream in the US and most of the European jurisdictions where it is used. Indeed, what CEDR sees from the many users of ADR (businesses, governments and law firms) is a real sophistication where there is thought put into what a path to resolution might look like for a dispute and how a process might be customized to ensure the best chance of success. Given the flexible nature of mediation, this is something we particularly observe with this process. Like CPR, CEDR has model rules and contract clauses, but we do see that these are frequently adapted.

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. At the heart of this project is whether mediated outcomes should have a similar status to arbitral awards under the New York Convention ratified by 153 countries. Some in the mediation world might query whether such an instrument is necessary given that the most mediated settlements are reached and implemented on a consensual basis, thus making mediation very different from imposed arbitral awards. However, on the contrary, all commercial parties want their hard-fought outcomes to be legally binding and would normally be concerned if it was otherwise.

An international instrument recognising the legal status of mediation is yet another foundation stone in the credibility and acceptance of mediation in the international order, just as courts and arbitration.

Insights on Mediation Study

Amongst the US mediators who responded to CEDR's survey, 69% described themselves as full-time mediators, and 83% were legally qualified. These figures are notably higher than in the UK where the results were 41% full-time and 49% legally qualified. There is also a disparity in their activity levels – in the US, 63% of the mediators reported handling more than 10 cases a year, but in the UK only 41% have attained that level of activity.

There was also a difference in the proportions of cases being referred directly to mediators as opposed to getting to them through service providers. In the UK, 70 % of ad hoc cases are handled on a direct referral basis while in the US the figure is 64%.

US mediators are also ahead of their UK counterparts in terms of their fee income for a typical one-day case. In the UK, our 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.

There were also some interesting differences when we asked mediators to assess the relative significance of a number of factors in determining why they secured their commercial mediation appointments:

	US	UK
Professional background/qualifications	1	4
Professional reputation - experience/status	2	1
Recommendation - by lawyer in previous case	3	6
Availability	4	2
Fee levels	5	3
Repeat business - with lawyer	6	10
Sector experience	7	5
Professional reputation - mediation style	8	7
Recommendation - by provider	9	8
Location	10	9
Professional reputation - settlement rate	11	15
Repeat business - with client	12	13
Recommendation - by directories	13	16
Marketing activity (e.g. mailshots, website)	14	12
Recommendation - by other mediators	15	17
Recommendation - by client in previous case	16	11
PR activity (e.g. articles, speeches)	17	14

This analysis might suggest 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.

These results seem to be consistent with our earlier finding that there is a far higher proportion of lawyer-mediators in the US. Our 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. The table below indicates the respective proportions of mediators reporting these situations as occurring "almost always" or "frequently":

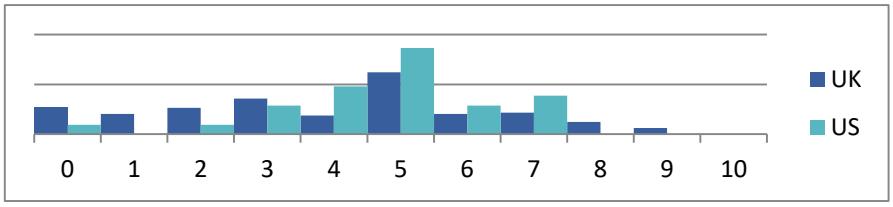
	US	UK
Used in self-promotion	73%	59%
Influential in getting work	80%	62%
Relevant in practice	83%	59%
Factor in getting settlement	73%	56%

These differences are also highlighted in the comments received from two mediators:

> *"Since lawyers are usually more comfortable dealing with fellow lawyers, there is an ingrained tendency for lawyers to choose lawyers over non-lawyers. I think they think that non-lawyers do not have the necessary legal knowledge to assist in reaching settlement. It tends to be only where complicated numbers or technical issues are involved that they will look beyond this to other professions".* - UK mediator

> *"In my marketplace, you do not get hired without being an attorney. It helps you to connect with the lawyers, who are one of the two most important people affecting settlement negotiating decisions. A significant portion of the time, if you cannot speak to the legal analysis, you will have difficulty in helping the parties to reach settlement".* – US mediator

This US emphasis on mediators providing legal analysis was also evident when we asked them about their personal philosophy for mediation (on the basis that a score of 0 means fully facilitative, 10 means fully evaluative and 5 is 50/50):



The overall success rate of mediation remains very high in both jurisdictions. 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. .

We asked mediators to provide a breakdown of the number of hours they spent on a typical mediation. This did not reveal any significant differences between the jurisdictions although, consistent with the above results, US mediators are spending slightly more time after the day of the mediation, but about 10% less time overall.

	US	**UK**
Preparation		
Reading briefing materials	3.9	4.8
Client contact	2.0	2.2
Mediation		
Working with clients on the day	6.1	7.4
Post-mediation		
Follow-up / on-going involvement	2.5	1.9
Total	**14.5**	**16.3**

Finally, we asked mediators for their views on the performance of lawyers and clients they encountered in their mediations – this showed slightly higher performances in the UK than the US:

	US	UK
Lawyers		
Very well or quite well	65%	63%
Adequate	19%	23%
Less than adequate	16%	14%
Clients		
Very well or quite well	64%	61%
Adequate	19%	24%
Less than adequate	17%	15%

Conclusions by CPR and CEDR

CPR and CEDR are using these recent instances of primary research to listen to the users of ADR – who are our clients working at the 'coal face' of dispute management and resolution – In-House Corporate Counsel and their external Legal Advisors, as well as the neutrals who conduct ADR processes.

The findings from this research, coming from these sources, can form the start of an on-going discussion which CPR and CEDR intend to continue to conduct with these stakeholders. The subject of this discussion must remain what the Dispute Resolution field continues to need and want, whether it be wholesale reform of processes that are no longer relevant or more subtle innovation to get the best out of methods of resolution, such as arbitration or mediation, that are working but that could perform better with further change.

This Insight report provides an initial glimpse into the pressures of those responsible for dispute resolution and how they choose (or do not choose) to use arbitration or mediation to help meet the demands of their clients or organizations.

We take away from this report that, whilst negotiation is by far the most popular method for early dispute resolution, arbitration and mediation are often being used in a conscious and selective way to achieve resolution and manage conflict. However, this report leads us to believe that there are areas where there may definitely be barriers to use (for both mediation and arbitration) and therefore this deserves further consideration in future work.

The public and charitable missions of both CPR and CEDR make their continued dedication to understanding and improving dispute resolution practice clear. We firmly believe that dispute resolution practices can be developed and enhanced, and we hope that you will join us in our on-going discussions about how we can make this happen.