

How Blue Chips are using ADR - The Inside Track on Mediation for Asian Companies

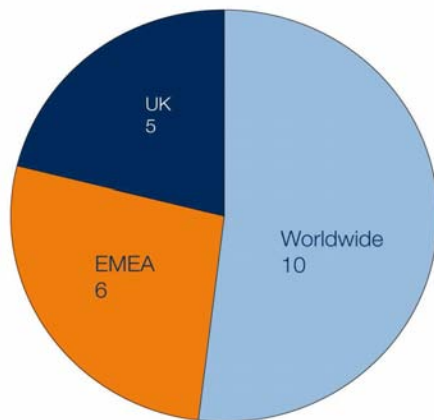
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The research: why, who and how?

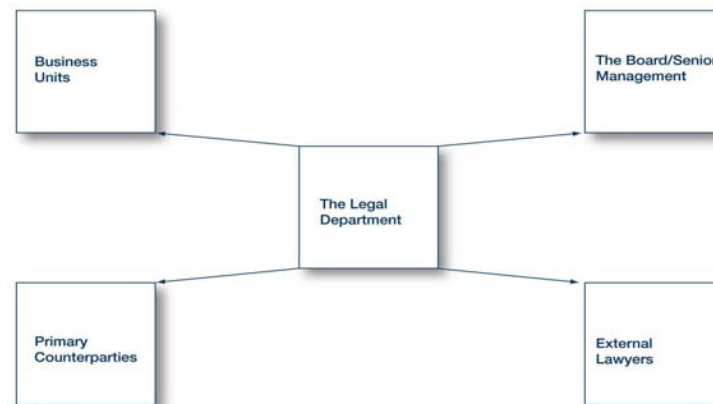
- **A need to focus on users: ADR processes are tools to resolve disputes.**
- **Surveyed in-house lawyers at twenty one organisations across industry sectors.**
- **The organisations had a combined turnover in excess of £400 billion.**

Geographic regions of responsibility



Methodology

- Detailed interviews with General Counsel, Heads of Litigation, Senior Litigation Lawyers.
- Considered ADR use primarily in the context of “material disputes”.
- Framed our questions around five stakeholders to ADR success:



The twenty one organisations

Arup	Morgan Stanley	Shell
BP	Northrop Grumman	Standard Chartered
Fujitsu	PricewaterhouseCoopers	UBS
GE	QinetiQ	Vodafone
ICI	Reuters	Virgin
KPMG	Royal Bank of Scotland	Yell
Merrill Lynch	Royal & Sun Alliance	Zurich

Attitudes to ADR: the key to ADR use

- **All the organisations understood the benefits of ADR, but what they did in practice varied widely.**
- **No industry sector particularly favoured ADR – there were wide variations of use within sectors.**
- **The key differentiator to behaviour was the attitude of the in-house legal team, taking account of the structure and culture of the organisation itself.**

Four categories of ADR user

- **Embedded Users, Ad Hoc Users, Negotiators, Non-Users.**
- **User categories are not rigidly defined, but organisations showed significant numbers of identifying characteristics.**
- **Categorisation does not imply a pecking order. Attitudes of in-house lawyers are shaped by business realities: necessity, time, resources.**

Embedded Users

- **7 of the 21 organisations were Embedded Users.**
- **ADR plays a central role in the organisation's dispute resolution culture.**
- **Use an Early Case Assessment system or less formal internal guidelines to embed ADR use.**
- **Use ADR processes more frequently and at an earlier stage in the dispute cycle.**
- **Report the highest ADR skill levels amongst in-house lawyers surveyed.**
- **Enjoyed the most constructive relationship with external dispute resolution lawyers in relation to ADR.**

Embedded Users

- **The Embedded Users favoured using ADR at an earlier stage than all other categories of user:**

“We generally lean towards having ADR and mediation at an early stage because we see no downside to it. Even if it’s not successful, there’s nothing preventing you from having another mediation further down the road. It allows parties to prepare earlier and it focuses management much earlier. Senior management don’t focus on the issues until they are actually confronted with them – attending the mediation focuses their attention.”

Legal Director, Manufacturing/Industrial

Embedded Users

- **Embedded Users were clear that even unsuccessful mediations were valuable in achieving their dispute resolution objectives.**

“I would argue that there is no bad experience in mediation. Even if you don’t have a settlement, it still forced the parties to focus on the issues. You’ve had a chance to hear the other side, you’ve a chance to prepare, and I think just for that purpose alone it can’t be a wasted day.”

Legal Director, Industrial/Manufacturing

Early Case Assessment (“ECA”) systems

- **3 of the 7 Embedded Users used ECA systems in their legal departments.**
- **An ECA system is a project management based tool to ensure early investigation of the facts and law, early analysis of costs and dispute resolution options, and a considered choice of dispute resolution method (including ADR).**

“ECA really is nothing more than saying I want to make sure that each of our cases is getting an early look and we have a plan for resolution and that plan for resolution includes a careful assessment of whether mediation or other early settlement techniques will be appropriate. I think that’s what it boils down to and there’s a thousand ways to get to that.”

Senior Litigation Counsel, Manufacturing/Industrial

Early Case Assessment (“ECA”) Systems

- **The emphasis is on simple processes that address critical actions for the in-house legal department.**
- **Why use an ECA system?**

“All of us as good litigators like to think that we analyse facts early and assess thoroughly the dispute resolution options but that’s not the reality. There will be cases that simply because of other burdens – time and resource issues – are allowed to slide. So the process is in place essentially as a forcing mechanism.”

Senior Litigation Counsel, Manufacturing/Industrial

Non-ECA Embedded Users

- 4 of the 7 Embedded Users did not use ECA systems: they had already achieved a culture of early ADR use in the legal department.
- ECA systems considered unnecessary given the number of disputes they handled. So how did they establish a culture of early ADR use?
- Used internal guidelines or policies approved by the General Counsel which in practice achieved similar outcomes to an ECA system: early analysis of suitability for ADR and regular review of the possibility of settlement through ADR.

“There are guidelines which all our in-house lawyers are expected to observe around the world. The guidelines say that you should start with the assumption that mediation is something that is desirable.”

Senior Litigation Counsel, Investment Bank

To ECA or not to ECA?

- **The Embedded Users were clear – it did not matter how they got ADR on the agenda early in the dispute cycle; it mattered that they did it.**
- **ECA systems are likely to be more suitable for large dispute volumes where a consistent approach among in-house lawyers/case handlers is harder to police.**
- **Particular benefits with a large portfolio of US litigation.**
- **But the approach must suit the culture of the organisation.**

Ad Hoc Users

- 6 of the 21 organisations were Ad Hoc Users.
- They had positive views of ADR but considered that a consistent approach to ADR use was unworkable or unnecessary.

“We have not got sufficient disputes on the roster to justify using an ECA process. I don’t think the business would applaud me for putting in place a system which could have a cost impact when actually there is no need for it.”

General Counsel, Manufacturing/Industrial

Ad Hoc Users

- **Ad Hoc Users valued flexibility in dispute resolution options highly.**

“We don’t have a group-wide policy on ADR because we don’t think one size fits all. We tend to approach all our disputes on the particular merits, circumstances, counterparties and the business unit involved. So we would not want to have a diktat on ADR use. We tend to prefer flexibility.”

Managing Counsel for Dispute Resolution, Multinational

Ad Hoc Users

- **Wide range of dispute volumes, but generally used ADR somewhat less frequently than Embedded Users.**
- **Unlike Embedded Users, an unsuccessful mediation could have a negative effect on the organisation's view of ADR.**
- **Ad Hoc Users were most likely to be concerned whether external dispute resolution lawyers were acting in their interests when considering ADR.**
- **Ad Hoc Users reported some very creative thinking in ADR terms – designed bespoke processes for particular types of disputes.**

The Negotiators

- **6 of the 21 organisations were Negotiators.**
- **Positive about ADR and used it in an ad hoc way, but had a strong preference for using direct settlement negotiations to resolve disputes.**
- **Typically the business personnel were highly skilled deal makers and negotiators, so mediation was considered as a formal process only to be invoked when direct discussions had failed.**

“I am not sure where we have had valuable relationships at stake that we’ve ever allowed a dispute to escalate to the extent that we have gone to mediation. Typically we would try to resolve it without a process as formal as mediation. And in respect of mediation, once we have got to that stage the relationship is gone.”

General Counsel, Service Sector

The Negotiators

- **The Negotiators were usually defendants in litigation and concerned about sending negative messages through early settlement discussions.**
- **Tended to perceive less tension with their external dispute resolution lawyers over the timing of ADR.**
- **Reported difficulties getting business personnel to commit to the process.**

“Our experience has been that business people find the ADR process irritating sometimes because it is a set piece day where they end up sitting around, out of the office, not being able to do what they do, and they get impatient. It is an extraordinary waste of time for the principals to be there at the beginning of it when nothing really happens until later in the afternoon. It is not a good PR exercise for mediation in some ways.”

Head of Litigation, EMEA, Investment Bank

Non-Users

- **2 of the 21 organisations (9%) were Non-Users. They reported no ADR use at all.**
- **In one case this reflected a company policy prohibiting ADR use following an historic bad experience of arbitration in the US – the prohibition had extended through usage to all forms of ADR.**
- **This Non-User was actively reviewing its approach to ADR use.**
- **The other Non-User viewed ADR positively but was not using it, although it had a portfolio of commercial disputes in the English courts.**
- **The Non-Users reported the least favourable experiences of external lawyers using ADR.**

ADR Metrics

- 8** operated a case-tracking system requiring regular data gathering and reporting to the General Counsel.
- 7** monitored litigation spend in a systematic way through databases.
- 7** operated a formal process of analysing “lessons learned” from disputes.
- 5** generated metrics in which they analysed the type of ADR process that had been used.
- 5** maintained records on mediators that they used.

External lawyers and ADR use

“ADR processes tend to separate those lawyers willing to put themselves in our shoes and accept the risk of making a real call on imperfect information from those who will forever say “we cannot predict the outcome on the present facts” or “it depends”. If a lawyer has a commercial orientation, then it’s pretty much a given that they will be ahead of the curve on ADR.”

Senior Litigation Counsel, Manufacturing/Industrial

- **Organisations were generally positive about external lawyers proposing ADR and in their skill levels conducting ADR processes.**
- **There was a clear correlation between the attitude of the organisations to ADR and the nature of their relationship with external lawyers when it came to ADR use.**
- **External lawyers generally align their behaviour to their clients’ expectations.**

Embedded Users

- **Embedded Users took positive steps to make clear to external lawyers their expectations in relation to ADR use in the retainer and in dialogue.**

“We have built into our programme for our panel firms the responsibility for all of us to assess the prospects of reaching a commercial settlement. We expect them to be familiar with and to support mediation. We have imposed an obligation on our firms to consider settlement proactively at every stage.”

Head of Worldwide Litigation, Investment Bank

Ad Hoc Users

- **Ad Hoc Users were most likely to be influenced by the approach of their external lawyers.**

“I think that the attitude of the external firms towards mediation – which has been quite conservative – has influenced the amount of use of mediation made by us.”

UK General Counsel, Financial Services

- **And they were most likely to consider the external lawyers were not recommending ADR as early as they could have done.**

“The sad fact is that some lawyers appear more interested in fees than settling cases. It is less true of the firms at the higher level than it is of the lower level.”

Head of UK Litigation, Financial Services

Negotiators

- **Negotiators relied heavily on external lawyers to suggest ADR and to assist them through all stages of preparing for and attending mediation.**
- **Because Negotiators expected to use mediation much later in the life of a dispute, they tended not to perceive any tension between their own interests and the interests of their external law firms.**

Non-Users

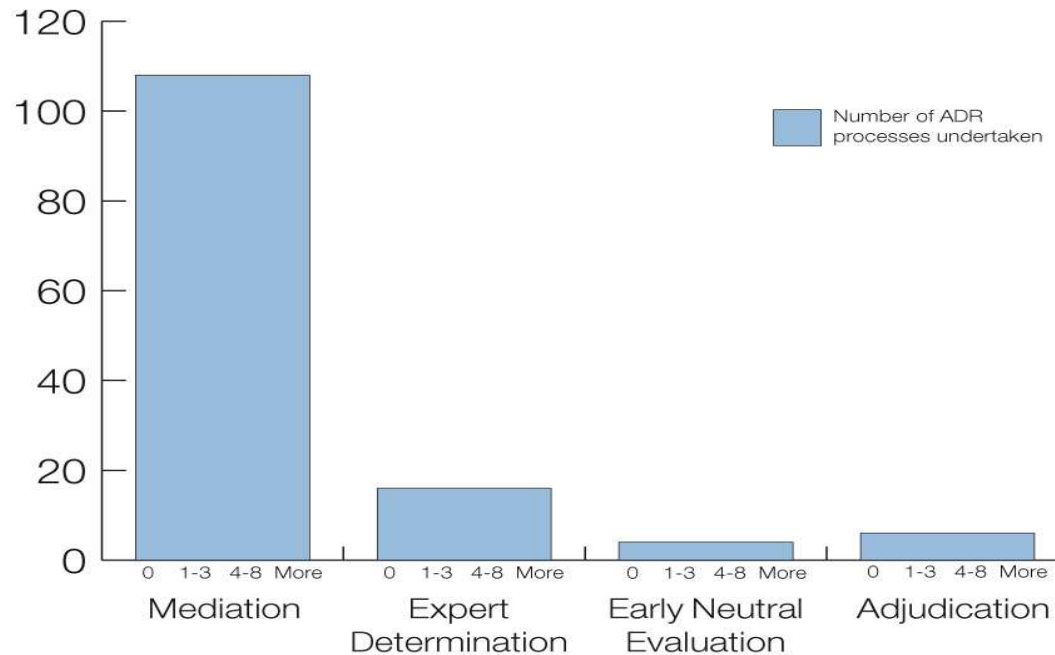
“Our external lawyers do not give any kind of constructive advice on when and how to actually pursue mediation even if we want it.”

Senior Litigation Counsel, EMEA

- **This Non-User was taking active steps to address its approach to ADR and the approach of its external lawyers.**

Types and frequency of ADR use

The average number of ADR processes undertaken*



*Delegates were asked to score process use in a range and we have assumed averages of 2, 6 and 10 respectively for each category

- **Mediation is overwhelmingly the preferred ADR process and the most transportable across jurisdictions.**
- **Expert Determination is the next most popular process.**
- **Early Neutral Evaluation and Adjudication are used rarely.**

At what point in the dispute cycle do organisations use ADR?

- **In hindsight, some Ad Hoc Users and Negotiators wished they had pushed their external lawyers harder to consider early mediation.**

“I've looked back at a couple of cases I have had, one with UK lawyers and the other with US lawyers and thought I should perhaps have shouted a bit louder about mediation.”

Senior Litigation Lawyer, Financial Services

Strategic use of ADR

- **Almost all organisations have experienced the “strategic” use of mediation.**
- **Mediations undertaken solely to comply with court orders or as ‘fishing’ expeditions.**

“The difference is going with no intention to settle and going with no belief it is going to settle.”

Head of Litigation, EMEA, Investment Bank

The Mediation Map

“The further south and the further east you travel from London and Paris, the worse it gets. Business people have no patience with the mediation process. They see their lawyers as there only to win the case for them in court.”

General Counsel, EMEA, Financial Services



Roles, skills and training

- **6 of the 21 organisations had attended mediation as the lead advocate without the assistance of external lawyers.**
- **In all other cases, organisations always attended with external lawyers.**

Assessing skills in ADR processes

Skill level			
1	non-existent skills	4	confident in conducting processes as legal representative
2	some familiarity but not confident	5	highly skilled (trained mediator, other specialist training, or extensive practical experience)
3	confident in the basic processes but rely on external lawyers for guidance		

ADR training for in-house lawyers

- **6 of the 21 organisations had trained mediators among their ranks.**
- **Just over half the organisations had some ADR training by ADR providers or law firms.**
- **Just under half of the organisations had no ADR training, and gained any experience "on the job".**
- **Embedded Users considered it an important part of their role to deliver ADR training to business units.**

Incentives to use ADR

- **While many organisations appraised in-house lawyer performance taking into account effective use of ADR, only one incentivised individuals financially to use ADR processes.**
- **Overwhelmingly the costs of litigation or arbitration were borne directly by the business unit.**
- **5 Embedded Users had offered to bear the costs of a mediation to encourage a counterparty to participate.**

ADR contract clauses – challenging conventional wisdom

- **Most participants surveyed believed that ADR/Mediation clauses were unnecessary.**
- **The priority for most organisations was to retain maximum flexibility in their dispute resolution options at point of dispute.**
- **Organisations contracting with international counterparties often avoided ADR clauses because of insufficient understanding of ADR.**
- **Organisations with a substantial exposure to US disputes were more likely to use and support mandatory ADR clauses.**

The ADR Community

- **The 21 organisations reported polarised views in their support for an engagement with the wider ADR community.**
- **6 of the 7 Embedded Users were members and active supporters of at least one ADR organisation.**
- **Their rationale was enlightened self-interest. They perceived that the work of the ADR organisations enhanced the environment within which business disputes were resolved by educating counterparties about the benefits of ADR.**
- **Only 1 of the 14 Ad Hoc Users, Negotiators and Non-Users supported an ADR organisation through membership. They remain to be persuaded of the value proposition of membership.**

Mediation in Asia

- **Organisations surveyed include global businesses operating across Asia.**
- **Structured mediation has spread west from US but mediation was already in Asia.**
- **Momentum to re-assess role of mediation as method of ADR in Asia. In light of alternative litigation / arbitration process.**
- **Establishment of mediation centres (independent and court sponsored).**

Organisations surveyed

Arup

BP

Fujitsu

GE

ICI

KPMG

Merrill Lynch

Morgan Stanley

Northrop Grumman

PricewaterhouseCoopers

QinetiQ

Reuters

Royal Bank of Scotland

Royal & Sun Alliance

Shell

Standard Chartered

UBS

Vodafone

Virgin

Yell

Zurich

Lessons for Asian companies

- **No single approach to mediation. But almost all organisations took a deliberate, informed stance regarding mediation use.**
- **Approach to mediation must fit with corporate culture, and wider business culture.**
- **Formal processes are not essential, but may be helpful prompts.**
- **Be open-minded about, and during, the mediation process. But experience counts!**

How can organisations enhance the way they use ADR?

- **The ADR toolkit sets out the questions an organisation can ask and the issues to consider.**
- **We do not attempt to tell organisations what they need to do: each organisation must work out for itself what it needs to do.**
- **The considerations and challenges we identify in the toolkit reflect the learning and experience of those organisations we interviewed, so the suggested actions are based firmly in reality.**
- **We believe that incremental changes in behaviour can lead to significant benefits to organisations.**

Questions?

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