

# FITTING THE FORUM TO THE FUSS WITH STICKY DEFAULTS: FAILURE IN THE MARKET FOR DISPUTE RESOLUTION SERVICES?<sup>1</sup>

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## INTRODUCTION

“Fitting the forum to the fuss” – i.e., finding the optimal way to deal with every dispute – is an appealing slogan of proponents of alternative dispute resolution (“ADR”). The phrase also summarizes the contract one would expect rational disputants to make once they are embroiled in a conflict they cannot resolve together. Disputants can “buy” dispute resolution services, such as various forms of court intervention, mediation, or arbitration. Agreeing to a contract to buy such services together with an opponent, however, is likely to be difficult. These difficulties are assessed in this article. The barriers to dispute resolution are well researched. These barriers are behavioral regularities that qualify the assumption that rational parties would solve their dispute efficiently through negotiations. Barriers to solving the dispute itself through negotiations, however, may have analogous effects on negotiations regarding a procedure to resolve a dispute. The possible psychological (cognitive) barriers, strategic/tactical barriers, and institutional/structural barriers will be discussed. We will argue that the barriers to jointly deciding on a dispute resolution procedure are likely to be substantial and similar to the barriers of solving the dispute itself.

If our thesis holds, the default rule for dispute resolution is “sticky.” This has important implications. First, defaults will attract the majority of disputes and should be designed carefully.

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<sup>1</sup> We thank Eric van Damme, Carsten de Dreu, Machteld Pel, Andrea Pinna, Thomas Stipanowich, Jan Vranken, Peter van Wijck, Marcel Zeelenberg, and participants in the Center for Liability Law project “Cooperation” for their valuable comments on an earlier version of this article.

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Reformers of civil procedure or other dispute resolution mechanisms should not be deceived by the present use of dispute resolution services; they do not necessarily show what the preferences of disputants are. Second, our thesis may explain why arbitration and mediation are less frequently used than one would expect, considering the preferences for these services expressed in surveys, or on the basis of what one would expect rational parties to do when they optimize decision costs, error costs, deterrence benefits, and the value they attach to the procedure itself. Third, it may be necessary to take a closer look at current attempts to remedy this “market failure,” such as court-annexed mediation and arbitration programs. These mechanisms, however, may not be sufficient to create a level playing field for different dispute resolution services. Lastly, the supply side of the market is likely to be distorted. The providers of default dispute resolution services, such as courts and lawyers, are effectively shielded from competition and may not adapt their services and prices sufficiently to the needs of customers. We offer some suggestions to remedy this market failure and conclude that a better understanding of the market for dispute resolution is needed.

Part I of this paper provides an overview of the current market for dispute resolution services and indications of barriers in that market. Part II deals with the possible difficulties parties may have in choosing the right manner to solve their dispute. We will first mention the general literature on opting out of default rules – in particular, the biases that tend to let parties “stick to the default.” Then we will add the dynamics of a conflict. Literature on conflict management, which has close links to decision theory and cognitive psychology, identifies many barriers to resolution. We will discuss whether these barriers, precluding settlement of the dispute, are also likely to preclude the parties from reaching an *ex post* agreement about the best way to solve their dispute.<sup>3</sup> We found that the support for the hypothesis that parties will opt out of the default dispute resolution regime if it does not suit their interests is weak both empirically and theoretically. Part III explains the possible implications of the current ADR market. First, we stress the importance of the default rules for dispute resolution and explore how they should be designed. We will then discuss the implications for ADR policy and the way the parties could be assisted in choosing the right procedure; the consequences for the supply side of the

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<sup>3</sup> See Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 871 (1998).

market for dispute resolution will be examined as well. Part IV contains our conclusions.

## I. MARKET OVERVIEW

### A. Opting Out of the Default for Dispute Resolution

The default rule for resolution of disputes that the parties cannot resolve themselves is generally adjudication by a court. However, the parties may agree to another mode of dispute resolution, such as mediation or arbitration. In this article, we will explore the difficulties for disputants to opt out of the default and “buy” a neutral dispute resolution service of a type, quality, and price that suits their preferences. One obvious difficulty is that for many ADR options a party needs its counterpart’s consent. For the default, a party does not and can move unilaterally. We will focus on *ex post* dispute resolution agreements formed after the conflict arose.

The market for dispute resolution is rather complex. Dispute resolution is an interaction between disputants in which each may have obtained the assistance of a lawyer or other agent. Choosing a lawyer, or other partisan adviser, is not unproblematic; it is much like buying the services of any expert. The lawyer-client relationship is often studied from the perspective of informational asymmetry. Most commentators on the regulation of legal services are critical of the resulting restraints on competition,<sup>4</sup> and regulators are now considering deregulation.<sup>5</sup>

We will concentrate on dispute resolution services by neutral third parties – persons or institutions not accountable to either party. If a dispute persists, the disputants will have to decide – for themselves, or jointly – which neutral they will “hire” to assist them in dealing with the dispute in a satisfactory manner. Many disputes are settled without the actual intervention of a neutral, which influences the process and the outcome of these negotia-

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<sup>4</sup> Frank H. Stephen & James H. Love, *Regulation of Legal Profession*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* 987 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000).

<sup>5</sup> For efforts in this respect by the European Commission and in the U.K., see Eur. Comm’n, *Report on Competition in Professional Services*, 83 COM (2004); David Clementi (Independent Reviewer), *REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES, FINAL REPORT* (2004), available at <http://www.legal-services-review.org.uk/content/report/report-chap.pdf> (last visited October 2005).

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tions; but such an intervention is always an exit option from settlement negotiations. Selection of an appropriate neutral is, therefore, in itself an important choice, because the neutral is an important element of the 'shadow of the law' under which negotiations take place.

Today, neutral dispute resolution services offer enormous variety.<sup>6</sup> While these services differ across many dimensions, these dimensions drive the very negotiation process:

- Governments offer dispute resolution by courts. Courts may provide a range of options (jury trial, bench trial, summary proceedings, extensive discovery, limited discovery). The market offers mediation (facilitative, evaluative, therapeutic) and arbitration (binding, advisory), as well as combinations of those (med-arb). Mixed government-market solutions exist as well; some courts refer parties to neutrals on the market who operate under court supervision (court-assisted mediation).
- Neutrals may decide or evaluate issues for the parties (courts, arbitrators, evaluative mediators), as well as assist them with negotiations (facilitative mediation, judges in settlement conferences).
- They may focus on establishing legal rights and liabilities, or on the interests of the parties.
- Neutrals may offer extensive fact-finding features (discovery), or more limited ones.
- Legal representation may be required, advisable, or unnecessary.
- The decisions of neutrals may be final, or more or less advisory (evaluative mediation, court decisions subject to appeal).
- Neutrals may vary in number and expertise (lay jurors, legally-trained judges, arbitrators with specific expertise, experts called in by courts).
- They may even vary in neutrality, from strictly neutral (courts), appointed by one of the parties (some varieties of arbitration and mediation), to even accountable to one of them, but committed to take the other party's interests into account (collaborative lawyering).

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<sup>6</sup> For an overview of dispute resolution procedures, see HENRY BROWN & ARTHUR MARRIOTT, *ADR PRINCIPLES AND PRACTISE* (2d ed. 1999); for mediation variants, see Leonard L. Riskin, *Decision-making in Mediation: The New Old Grid and The New New Grid System*, 79 *NOTRE DAME L. REV.* 1 (2003).

- The processes the neutrals offer may be more or less adversarial.
- The neutrals may be more active or leave more to the initiative of the parties.
- Proceedings can have the form of an oral hearing, an exchange of briefs, communication over the internet (online dispute resolution),<sup>7</sup> or a combination of these.
- They can be tailor-made or standard, planned beforehand or managed step-by-step.
- And, finally, they can have different prices. The price of a dispute resolution service includes the costs of the neutral, the costs of the necessary help by lawyers or advisers, the costs of experts, the opportunity costs of time spent (in the actual process but also in preparation), the costs of uncertainty and the costs of delay.

The above processes have been studied intensely. Economists have studied them from various perspectives, in particular the framework of reduction of error costs and dispute resolution costs.<sup>8</sup> Another body of research concentrates on the settlement process in the shadow of intervention by a court.<sup>9</sup> Arbitration is studied mostly as a separate alternative to court intervention.<sup>10</sup> The same goes for mediation and other forms of ADR.<sup>11</sup> The literature usually focuses on the quality and costs of this dispute resolution service in comparison to court action.

In this study, we take the alternative perspective of a “market” for neutral dispute resolution services.<sup>12</sup> Although we acknowledge that courts are government institutions, we focus on how they “compete” with private providers of neutral dispute resolution ser-

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<sup>7</sup> See generally ETHAN KATSH & JANET RIFKIN 2001, *ONLINE DISPUTE RESOLUTION: RESOLVING DISPUTES IN CYBERSPACE* (2001); COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS* (2002); GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* (2004).

<sup>8</sup> This literature started with William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971) and William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD 1 (1975). See also Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* (2004) (offering a recent handbook type treatment of the subject matter).

<sup>9</sup> See overview by Andrew F. Daughety, *Settlement*, in 5 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 95 (Boudewijn Bouckaert & Gerrit de Geest eds.; 2000).

<sup>10</sup> See Bruce L. Benson 2000, *Arbitration*, 5 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 195 (Boudewijn Bouckaert & Gerrit de Geest eds.; 2000).

<sup>11</sup> Riskin, *supra* note 6.

<sup>12</sup> For earlier explorations of this market, see Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 99 MICH. L. REV. 953 (2000).

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vices, and how these private providers compete with each other. When we discuss these services, we often presume that disputants are free to choose them. They can jointly determine the way to resolve their dispute in a manner that suits their needs – namely, they can “fit the forum to the fuss.”<sup>13</sup> The idea of disputants’ choice is widespread in the ADR literature, where self-determination is a core belief.<sup>14</sup> However, it also underlies thinking about civil procedure. The autonomy of the parties is one of the basic values reflected in most civil procedure systems. Economists often assume a market for dispute resolution exists when they study dispute resolution,<sup>15</sup> but is this a realistic view? As we shall see, there are reasons for doubt.

Choosing an appropriate way to resolve a dispute can be done *ex ante* in a contract.<sup>16</sup> The parties can also choose *ex post*, once they find themselves in an actual dispute. For *ex ante* choice, choosing help with dispute resolution before a dispute arises, the problems are rather obvious. Not many disputes occur in the context of a pre-existing (contractual) relationship. Moreover, the transaction costs of envisioning possible disputes and the appropriate procedures to resolve them are likely to be high. Many written contracts do not even contain clauses regarding the means of resolving disputes. Where such clauses do exist, they usually just mention a person or institution who will resolve all disputes between the parties, as well as a general designation of the procedure – e.g., court action, arbitration, or mediation. On most “dimensions” of possible choice, the contract will be silent. Because of the high transaction costs, opting out *ex ante* will mostly occur in standard form contracts, or even adhesive contracts, where an employer or a provider of goods or services opts out individually, taking the other party with him.<sup>17</sup> Not surprisingly, the validity of

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<sup>13</sup> The term is borrowed from Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

<sup>14</sup> See, e.g., Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101 (stressing self-determination as a key design element for dispute resolution systems).

<sup>15</sup> See, e.g., Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. OF LEGAL STUD. 1 (1995); Bruce L. Hay, *Symposium on Alternative Dispute Resolution: Procedural Justice – Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997); Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, S. CT. ECON. REV. 209 (2000).

<sup>16</sup> See SHAVELL, *supra* note 8, chapter 19, at 3 (discussing the desirability of *ex ante* and *ex post* choice of a dispute resolution service).

<sup>17</sup> Sometimes, especially in European consumer contracts, the standard contract limits the choice of the party who wrote the contract *ex ante*, and allows the claimant to choose *ex post* between, for instance, arbitration and litigation. See, e.g., Christopher R. Drahozal & Raymond

pre-dispute arbitration clauses is an intensely debated issue.<sup>18</sup> The general view of economists is that these agreements should be upheld if the parties commit to them knowingly. They are likely to do this if the sum of the deterrence benefits (the benefits or costs of improved or decreased performance under the agreed dispute resolution regime) and the savings in expected dispute resolution costs are positive.<sup>19</sup>

We concentrate on *ex post* choice. How realistic is it that parties in an actual dispute, who may have communication difficulties, and may not trust each other, will agree to a procedure that helps them resolve their differences?

In our discussion of the barriers to *ex post* choice, we depart from the assumption that it is desirable that parties in a conflict try to find a solution together and contract for help to resolve the dispute as they think fit. Some scholars have raised objections to ADR, even against settlement in general, mostly out of concerns with the production of sufficient quantities of court precedents.<sup>20</sup> The general view is that the parties involved in an actual dispute should be free to settle and to choose appropriate dispute resolution procedures.<sup>21</sup> Moreover, we do not know of any jurisdiction that has seriously considered banning settlements, or limiting the use of private dispute resolution mechanisms. Most jurisdictions, to the contrary, have facilitated the use of arbitration by providing for enforcement of arbitration awards and the use of mediation through court-annexed or other mediation programs. But do people actually fit the forum to the fuss *ex post*?

## B. Indications of Barriers in the Market

Unfortunately, it is difficult to obtain data regarding the market for neutral dispute resolution services. Providers of mediation and arbitration, the most common services, sometimes publish the

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J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C.J. INT'L L. & COM. REG. 357 (2002).

<sup>18</sup> Keith N. Hylton, *The Law and Economics of Agreements to Arbitrate Employment Claims*, in NYU WORKING PAPERS ON LABOR AND EMPLOYMENT LAW: 1998-1999 (Michael J. Yelnosky ed., 2001) (providing an overview of the literature).

<sup>19</sup> For the theoretical basis, see Shavell, *supra* note 15; Hylton, *supra* note 15; Keith N. Hylton & Christopher R. Drahozal, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549 (2003).

<sup>20</sup> See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Hay, *supra* note 15.

<sup>21</sup> See, e.g., Hylton, *supra* note 15; Shavell, *supra* note 15.

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numbers of disputes they handle, but they generally do not distinguish between services agreed to *ex ante* and *ex post*. Moreover, the number of providers acting in a jurisdiction is not aggregated. The number of disputes dealt with by courts within a jurisdiction is known, but it is unclear what these figures tell. In some jurisdictions, filing a claim is usually done at an early stage of settlement negotiations, but in others, it is done much later in the process. Many filings just deal with bills left unpaid, not with real disputes.

Still, it is possible to gather some information from the available data. Voluntary *ex post* arbitration and mediation seem to occur, but in negligible proportions of the number of disputes in which a neutral third party intervenes. Voluntary mediation programs in Europe usually attract less than 2% of disputes brought before courts.<sup>22</sup> *Ex post* arbitration is exceptional as well. This is odd, because even courts and other dispute resolution professionals generally advise their “clients” not to use litigation, or only when unavoidable.

In the U.S., opting out of the default dispute resolution mechanism *ex post* may occur somewhat more frequently. A survey of the use of ADR services in Los Angeles showed that around 5% of the disputes were dealt with by an ADR procedure.<sup>23</sup> The majority of ADR use consisted of arbitrations (58%), while just over 20% were mediations. But arbitrations are more commonly agreed to *ex ante*.

Even U.S. corporations, arguably the best informed parties about the drawbacks of litigation, and the ones most able to contract out of it, use ADR sparingly. According to a recent survey conducted by the American Arbitration Association (AAA), only 7% of companies use mediation very frequently and 17% use it frequently – compared to 35% occasionally, 25% rarely, and 16% not at all. For arbitration, the percentages were 4% very frequently, and 11% frequently. Tellingly, many respondents attribute this use of ADR to court-mandated mediation programs (63% of respondents mentioned this as a reason for using mediation) and contractual arbitration clauses (89% of respondents).<sup>24</sup>

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<sup>22</sup> See Annie de Roo & Rob Jagtenberg, *DE PRAKTIJK VAN MEDIATION IN ONS OMRINGENDE LANDEN* (2003) (Research report Erasmus University Rotterdam).

<sup>23</sup> Elizabeth Rolph et al., *Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles*, 1996 J. DISP. RESOL. 277; 285.

<sup>24</sup> See American Arbitration Association, *DISPUTE-WISE MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS* (Research Report 2003) (noting that 63% of respondents mentioned court-mandated mediation programs as a rea-

These figures contrast sharply with the preferences for ADR established in several studies.<sup>25</sup> John Lande surveyed the opinions of lawyers, not the most likely supporters of a service that competes with litigation. He found that majorities of both outside and inside counsel believe that it is appropriate to use mediation in more than half of the lawsuits involving a business. Another 20% believe that it is appropriate in half of the cases. Executives have similar opinions. Both are generally more satisfied with the results of mediation and with its process.<sup>26</sup> The AAA study found that no less than 87% of respondents were either extremely satisfied, very satisfied, or satisfied with their last mediation experience, compared to 77% for arbitration.<sup>27</sup>

These figures seem to support the view that it is difficult to choose ADR *ex post*. If the parties choose ADR, they generally seem to do this because their contract, or a court, tells them to do so. This happens even when they say they prefer ADR over litigation in general.

Do these surveys give a reliable picture of the preferences for ADR? We may assume that preferences for a dispute resolution system are a function of several considerations: costs, the expected value of the outcome (including deterrence value), and the value of the process itself for the disputants.<sup>28</sup> If the ADR procedure does not change the value of the distribution of possible outcomes,<sup>29</sup> costs will stand out as a criterion for choice, and mediation will generally cost less than litigation. The costs of arbitration will be lower than those of litigation in many situations as well.<sup>30</sup> Process interests, such as voice, party control over the procedure, and the decision being based on “true facts,” will also be factored in, but there is no *a priori* reason why they would strongly point either

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son for using mediation and 89% of respondents mentioned contractual arbitration clauses as a reason for using arbitration).

<sup>25</sup> See, e.g., John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137; 172 (2000).

<sup>26</sup> *Id.* at 179.

<sup>27</sup> See AAA Research Report, *supra* note 24.

<sup>28</sup> See, e.g., Shavell, *supra* note 15; Hay, *supra* note 15.

<sup>29</sup> Proponents of mediation will even argue that the distribution of expected outcomes will be more favorable, because the process of mediation can lead to the creation of value that will be left on the table in the litigation with its “fixed-pie assumption.”

<sup>30</sup> Arbitration may reduce the costs of processing information (limited discovery and presentations to professionals instead of lay juries), particularly in common law systems. On the other hand, users of the services of the court are to some extent subsidized by the state.

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way.<sup>31</sup> The preferences for ADR as expressed in surveys can, therefore, be explained in terms of the underlying interests of the parties.

Another reason why *ex post* choice is difficult in this area is the very existence of compulsory arbitration and mandatory mediation schemes, as well as court-annexed ADR programs. The assumption is that without such pressure, the parties would not be able to find an appropriate way to solve their dispute. An alternative explanation for these programs, which we cannot rule out, is that they may merely be intended to diminish court congestion. If this were the main reason for their existence, however, we would expect more opposition from disputants.

The apparent difficulties of choosing a forum are not limited to the choice for opting out of the litigation system altogether. Many civil procedure systems offer options within the system. It is often possible to agree to limit discovery, appeals, or the exchange of written briefs. Although we cannot present hard facts, such agreements seem to be the exception in the legal systems we have experience with. Moreover, lawyers experience at least some difficulties in agreeing on less important procedural issues like time schedules and the number of witnesses to be heard. Negotiations regarding the appointment of neutrals, and the questions to ask these neutrals, can drag on endlessly. Even agreeing to meet for settlement discussions can cause substantial problems.<sup>32</sup>

It is hard to ignore by the many who offer mediation or similar alternative dispute resolution services that the option of *ex post* ADR is not used frequently and attracts little business. The explanation usually given by leaders in the field is that parties lack knowledge of ADR.<sup>33</sup> This, however, fails to explain the discrepancy between reported preferences for ADR and actual use. Other explanations include the interests of lawyers, who have much influence in the way a dispute is handled. ADR could be against lawyers' monetary interests and give them a feeling of loss

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<sup>31</sup> See Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997) (reporting a preference for mediation over litigation; with settlement conferences being least preferred); Tom R. Tyler, *Social Justice*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES (Rupert Brown & Samuel Gaertner eds., 2001).

<sup>32</sup> See Craig A. McEwen & Roselle L. Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation through Research*, 2002 J. DISP. RESOL. 131, 136.

<sup>33</sup> See, e.g., Frank E.A. Sander, *The Future of ADR: The Earl F. Nelson Memorial Lecture*, 2000 J. DISP. RESOL. 3; 5.

of control.<sup>34</sup> This may indeed be part of the picture, but some of the surveys showing the “knowing-doing” gap had corporations as their subjects, a group less likely to be dominated by lawyers’ interests. Something else may be going on as well.

A contrasting reality is that many cases settle. Mediation and, less so, arbitration often compete with “litigotiation” – lawyer-assisted negotiations in the shadow of possible litigation.<sup>35</sup> Why do many disputants succeed in settling their cases – apparently wishing to do so – whereas so few of them agree to participate in mediation or other forms of ADR to help them settle? Could it be that the barriers to settlement and the barriers to agreeing on a neutral dispute resolution process are similar?

## II. BARRIERS TO A JOINT DECISION ON HOW TO PROCESS A CONFLICT

### A. Opting Out of Defaults in General

A contractual clause to determine who will help the parties resolve disputes deviates from the default rule; most rules in the law of contracts are default rules. How often do parties succeed in contracting around these defaults? An obvious reason not to make a contract that deviates from a default is that this involves transaction costs – costs of considering outside options, costs of negotiation, and costs of writing the contract.<sup>36</sup>

Some scholars suggest that contracting parties also view default terms as part of the status quo and, all other things being equal, prefer the status quo to alternative states. These researchers report a “status-quo bias.” Part of the explanation is that defaults are likely to be seen as an entitlement from which it is difficult to part.<sup>37</sup> A related phenomenon that likely stops parties from opting

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<sup>34</sup> *Id.* at 7; Nancy H. Rogers & Craig E. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 840 (1998).

<sup>35</sup> See McEwen & Wissler, *supra* note 32, at 133.

<sup>36</sup> See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 92-93 (1989).

<sup>37</sup> See Russel Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

out of a default is their natural inclination towards inaction instead of action.<sup>38</sup> Defaults, in sum, are “sticky.”<sup>39</sup>

An interesting example of the size of these effects can be seen in a change of automobile insurance rule in New Jersey and Pennsylvania. A new kind of insurance was offered in both states; while having lower rates, it also limited the right to sue. In Pennsylvania, the default was the old policy and the majority of policyholders stuck to it. In New Jersey, the default was the new policy, and 83% chose it by not opting out of the default.<sup>40</sup>

## B. Barriers to Conflict Resolution: Introduction

The status-quo bias, to some extent, explains that people are less likely to jointly choose a dispute resolution process that deviates from the default. In the following paragraphs, we will discuss which cognitive processes and other barriers may also affect these joint decisions. Research in the field of social and cognitive psychology, as well as in negotiation theory, has identified barriers to settlements in negotiation. Many classifications of these barriers exist,<sup>41</sup> but each classification is somewhat arbitrary because of the interrelated nature of most barriers.<sup>42</sup> We will use the categorization of Mnookin & Ross in their introduction to the key publication, *Barriers to Conflict Resolution*.<sup>43</sup> They distinguish three categories: psychological barriers, strategic and tactical barriers, and institutional and structural barriers. The term “barrier” comprises all processes that “stand in the way of successful negotiation and effective resolution of conflict.”<sup>44</sup> The category of the psychological barriers covers several cognitive and motivational biases,

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<sup>38</sup> See also, Russel Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998).

<sup>39</sup> See *id.* at 1585; JONATHAN BARON, THINKING AND DECIDING 288-91 (3d ed. 2000); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002).

<sup>40</sup> The example comes from BARON, *supra* note 39; at 292.

<sup>41</sup> See, e.g., MARGARET A. NEALE & MAX. H. BAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION 41-79 (1991); KENNETH ARROW et al., BARRIERS TO CONFLICT RESOLUTION (1995); 35 Carsten W.K. De Dreu & Peter J. Carnevale, *Motivational Bases of Information Processing and Strategy in Conflict and Negotiation*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 235, 243 (Mark P. Zanna ed., 2003); ROY L. LEWICKI ET AL., NEGOTIATION, 152 (4th ed. 2003).

<sup>42</sup> See Robert H. Mnookin & Lee Ross, *Introduction*, in BARRIERS TO CONFLICT RESOLUTION 3, 7 (Kenneth Arrow et al. eds., 1995).

<sup>43</sup> Arrow et al., *supra* note 41.

<sup>44</sup> See Mnookin & Ross, *supra* note 42, at 5.

which often appear in studies that take the behavioral law and economics approach.<sup>45</sup> These barriers relate to the systematic errors that people tend to make while processing information.<sup>46</sup> The second category explains negotiation failures caused by strategic and tactical barriers that can lead to an impasse.<sup>47</sup> The third category, institutional and structural barriers, refers to the way the negotiation and dispute resolution environment has been organized. These barriers relate to the context in which parties have to manage their conflict. The default dispute resolution mechanism is one of the factors determining this context.

In *Barriers to Conflict Resolution*, the authors discuss the findings of research on barriers to conflict resolution up to 1995. The area is rapidly developing, however, and other barriers, as well as different categorizations, have since been suggested.<sup>48</sup> We think that our analysis is not dependent on the particular classification of Mnookin and Ross, but that similar results would be reached under competing approaches. We will discuss two additional psychological barriers: anticipated regret and the ambiguity effect, because they seem particularly relevant in negotiations selecting an appropriate dispute resolution procedure. Another extension of the framework of Mnookin and Ross is that we discuss the possible impact of individual differences – in particular, differences in social and epistemic motivation.

Our aim is to explore whether the barriers described by Mnookin and Ross (and our two additional barriers) also act to bar agreement on a neutral dispute resolution procedure. First we will introduce each barrier and explain how it operates in the setting of a conflict. Then we will look at the likelihood that the barriers negatively influence the joint decision on how to process a conflict. Is it likely that the barriers to dispute resolution also stand in the way of deciding on the appropriate method of dispute resolution? Unfortunately, we do not know of empirical research answering this question. The barriers to conflict resolution, however, are generally thought to be applicable to a wide range of situations. In essence, they are barriers to successful negotiations, and sometimes

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<sup>45</sup> See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russel B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

<sup>46</sup> See BARON, *supra* note 39 (providing an overview of this area of research).

<sup>47</sup> See LEWICKI ET AL., *supra* note 41, at 80, 425.

<sup>48</sup> See, e.g., De Dreu & Carnevale, *supra* note 41.

they are presented as such.<sup>49</sup> Therefore, we can safely assume that they will also affect the negotiations regarding appropriate procedures to resolve disputes. But we cannot be sure. Negotiations about procedure may differ from negotiations about substance. The decision to address a neutral third-party may pose additional difficulties. For instance, both parties must recognize that they need some kind of (neutral) outside help.

### C. Psychological Barriers

#### i. Reactive Devaluation

Reactive devaluation is the phenomenon in which proposals made by adversaries will be valued lower than identical proposals made by a neutral party or a member of one's own group.<sup>50</sup> Moreover, a proposal made by a partisan is likely to be better valued than the same idea proposed by a neutral.

Probably the first evidence of this phenomenon was found in a street survey regarding the possible arms reduction by the U.S. and the former U.S.S.R. The respondents were asked to give a judgment on a disarmament proposal. In the experiment, the proposal was attributed to either U.S. President Reagan, to a group of unknown analysts, or to Soviet leader Gorbachev. The survey showed that 90% of the respondents – all U.S. citizens – thought that the proposal was either favorable to the US or favorable to both parties if it came from President Reagan. The favorable valuation dropped to 80% if the proposal was attributed to the neutral analysts, and was only 44% when the respondents were told that Gorbachev made the proposal.<sup>51</sup> In a similar study, Jewish students were asked to evaluate peace proposals for the Israeli-Palestinian conflict. Although the proposals were identical in content,

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<sup>49</sup> See, e.g., NEALE & BAZERMAN, *supra* note 41, at 41, 61; LEWICKI ET AL., *supra* note 41, 152-61.

<sup>50</sup> See NEALE & BAZERMAN, *supra* note 41, at 75; Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26, 29-38 (Kenneth Arrow et al. eds., 1995) (for overviews of empirical evidence); see also Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 8 NEGOT. J. 389 (1991); Mark L. Lepper et al., *Preference Reversal in the Reactive Devaluation of Concessions* (unpublished study); ARROW ET AL., *supra* note 41; 35-36; Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, in 27 ADVANCES TO EXPERIMENTAL SOCIAL PSYCHOLOGY 255 (Mark P. Zanna ed., 1995).

<sup>51</sup> Ross, *supra* note 50, at 29 (referencing Constance Stillinger et al., *The 'Reactive Devaluation' Barrier to Conflict Resolution* (unpublished study, Stanford University; 1990)).

the students rated it better if they were told the Israelis made the proposal than if they were told the Palestinians had made it.<sup>52</sup>

In these examples, the respondents likely developed some expectations concerning their “adversaries” that may have influenced their valuation of the proposals. Thus the question arises whether this phenomenon is connected with distrustful pre-conflict behavior. Research by Lepper and others showed that, although pre-conflict experience is a factor connected with the devaluation phenomenon, reactive devaluation is also present in situations lacking previous distrustful behavior.<sup>53</sup> Distrustful behavior does, however, enlarge the devaluation effect. One of the important factors behind reactive devaluation is the lack of knowledge about the actual intentions of an adversary and, consequently a lack of knowledge about the intentions behind an offer.<sup>54</sup> Another possibility is that it relates to the assumption of a “fixed pie” – what is good for them must be bad for us.<sup>55</sup>

An offer to try a non-default dispute resolution method may trigger similar reactions. A party receiving such a proposal is likely to question why the other party made the proposal. There is uncertainty about the intentions of the other party. A party may have good intentions, but the proposed method may also be in the sole interest of that party. It is likely that such a proposal will be devalued. There are even reasons to suspect that a proposal for a certain dispute resolution method will be devalued more than a substantive proposal relating to a settlement. The intentions behind a proposal for a specific process may be more difficult to gauge. Disputants will generally be able to grasp the consequences of a proposal in a negotiation, because they know what the conflict is about. However, disputants will usually not be familiar with dispute resolution processes. In subsection (v.), we will take a closer look at these uncertainties.

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<sup>52</sup> See Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, Research Paper at SSRN (689261) (referring to Ifat Maoz, et al., *Reactive Devaluation of an “Israeli” vs. “Palestinian” Peace Proposal*, 46 J. CONFLICT RES. 515, 528-29 (2002)).

<sup>53</sup> Lepper et al., *supra* note 50, This uncertainty can be overcome by communication, by sharing information concerning the interests of both parties. This is an essential part of a mediation process. If you have more knowledge about the interests of your adversary, you are more likely to trust an adversary’s proposal. In the mediation process, parties try to overcome this barrier.

<sup>54</sup> For several explanations, see NEALE & BAZERMAN, *supra* note 41, at 75-77.

<sup>55</sup> NEALE & BAZERMAN, *supra* note 41, at 76.

## ii. Optimistic Overconfidence

A proposal to use an alternative conflict resolution method may face another barrier – namely, optimistic overconfidence. A party is likely to overestimate its position and thus its chances in a conflict resolution procedure. Kahneman and Tversky refer to this process as optimistic overconfidence.<sup>56</sup> An explanation for this barrier is the phenomenon of confirmatory information search or selective information gathering. Individuals tend to rely on their own initial beliefs and try to find information that confirms their own hypotheses. They tend to gather much less information that supports the other side's position.<sup>57</sup> A consequence of this tendency to search for confirmatory information is that people in conflict situations are likely to develop an overly optimistic assessment of their own position and the possible outcomes of judicial action.

An illustration of this barrier is the situation where a union demands \$8.75 per hour, the management offers \$8.25, and the appropriate wage is \$8.50 per hour. Given their optimistic assessment of the outcomes of the negotiation, the union negotiators expect that a third party will adjudicate somewhat over \$8.50 and the management expects a decision somewhat under this figure.<sup>58</sup> As a consequence, parties may end up at an impasse.

In dispute resolution, optimistic overconfidence will influence the evaluation of the Best Alternative to a Negotiated Agreement (BATNA), which often is litigation.<sup>59</sup> If one of the parties overestimates its BATNA, he or she might not want to negotiate at all.<sup>60</sup> Will optimistic overconfidence influence the decisions of parties whether to opt out of the default? If, as we posited, the value of the distribution of possible outcomes does not change, this seems unlikely. However, disputants may perceive this differently, and, in reality, the distribution of possible outcomes may change with a

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<sup>56</sup> See, e.g., Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in *BARRIERS TO CONFLICT RESOLUTION* 44, 46 (Kenneth Arrow et al. eds., 1995); NEALE & BAZERMAN, *supra* note 41, at 53.

<sup>57</sup> See Kahneman & Tversky, *supra* note 56, at 47; De Dreu and Carnevale, *supra* note 41, at 247. Compare the “Confirming Evidence Trap” and the “Overconfidence Trap” presented by HOWARD RAIFFA ET AL., *NEGOTIATION ANALYSIS: THE SCIENCE AND THE ART OF COLLABORATIVE DECISION MAKING* 36, 40 (2003).

<sup>58</sup> This example comes from NEALE & BAZERMAN, *supra* note 41, at 54.

<sup>59</sup> See, e.g., RAIFFA ET AL., *supra* note 57, at 129.

<sup>60</sup> Divergent expectations about the likely outcomes of trials are the classical explanation for trials occurring at all that is used in the Priest-Klein model of litigation and the literature that is based on this. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1 (1984).

change in procedure. Outcomes of litigation will often have an all or nothing pattern, where the plaintiff gets full compensation if the defendant is held responsible, and nothing if the defendant is not liable. A party that is very optimistic about its legal position may conclude that it will be better off with a procedure in which it is able to make the most of that position. Cooperative procedures such as mediation may be seen as a procedure in which a person cannot fully effectuate the projected potential results. The option of choosing arbitration, where outcomes will generally be similar to those in litigation, is probably less likely to be influenced by this effect.

### iii. Loss Aversion

If people assess a proposal in a negotiation, they have a tendency to avoid solutions that result in a certain loss.<sup>61</sup> This phenomenon is called loss aversion and it refers to what Kahneman and Tversky describe as “the observation that losses generally loom larger than the corresponding gains.”<sup>62</sup> Although a rational valuation of the proposal’s gains and losses would predict otherwise, it is difficult to persuade parties to accept a certain offer if that offer entails a loss compared to the current situation. The current situation is a reference point to which an option is compared. In negotiations, the status quo, if it is an option, is likely to function as a reference point.<sup>63</sup>

Research by Kahneman and Tversky also suggests that, in negotiations in the shadow of arbitration or litigation, plaintiffs are likely to be more risk-averse than standard utility theory would predict and defendants are more risk-seeking.<sup>64</sup> Maintaining the status quo is typically an option for defendants, thus a negotiated settlement is likely to be framed as a gain by the plaintiff but it represents a loss for the defendant. As mentioned earlier, outcomes of litigation (and arbitrations) often have an all or nothing pattern, so a defendant can accept a settlement, which is a sure loss, or the defendant may decide to refuse the proposed settlement and await a trial which entails an uncertain and potentially better or worse outcome. Likewise, a plaintiff has to choose be-

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<sup>61</sup> This barrier is part of Kahneman & Tversky’s prospect theory, described in several publications. For an overview, see Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, in CHOICES, VALUES AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000); THOMAS GILOVICH et al., HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (2002).

<sup>62</sup> See Kahneman & Tversky, *supra* note 56, at 54.

<sup>63</sup> *Id.* at 56.

<sup>64</sup> *Id.* at Ch. 1.

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tween a sure gain and an uncertain but potentially better or worse result in litigation. Although utility theory may predict otherwise, research by Kahneman and Tversky demonstrates that because of loss aversion, a defendant is likely to prefer a larger but uncertain loss to a certain smaller loss, thus resulting in risk-seeking behavior. In contrast, a plaintiff is more risk-averse and prefers a sure gain over an uncertain but larger gain.<sup>65</sup>

Faced with a proposal for an alternative dispute resolution method, the parties will compare the proposed method with the default method of litigation. If defendants tend to risk large but uncertain losses, rather than accept smaller but certain ones, this may also influence the choice between mediation and litigation. Parties that opt for mediation are likely to associate this option with a high probability of having to make concessions. The word mediation suggests this already. Thus, for defendants, a proposal to mediate ensures at the very least a small loss. Consequently, defendants may prefer litigation, although it brings more risk or uncertainty. For plaintiffs, mediation may be preferable because it entails a probable gain and litigation entails more risk, although in litigation the gains can be much higher. In this respect, it is important to note that, if one party has a preference for litigation, its preference prevails. The difference in the way the parties frame the proposal therefore works against opting out of the default. Interestingly, the loss aversion barrier to settlement of the dispute seems to be similar to the barrier to choosing a conciliatory dispute resolution procedure. To put it somewhat bluntly: at the time the parties are ready to make concessions, they are also ready to agree to mediation, but at that point they may no longer need the mediator.

## iv. Anticipated Regret

Loss aversion is related to anticipated regret, a rather complicated psychological phenomenon. The decision whether or not to use an alternative resolution method involves uncertainty about the outcome of that procedure. Parties try to cope with uncertainties by collecting information and making predictions about outcomes. Expectancies form the basis of these decisions under

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<sup>65</sup> See Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996).

uncertainty.<sup>66</sup> If his predictions were not accurate, a person will experience regret and disappointment. These emotions “originate in a comparison process in which the outcome obtained is compared to an outcome that might have been.”<sup>67</sup> Several studies confirm that decisions may be influenced by the anticipation of regret.<sup>68</sup> Anticipated regret generally results in more risk-avoiding behavior.<sup>69</sup>

Are parties who consider an alternative dispute resolution method exposed to anticipated regret? One may speculate that parties tend to avoid conflict resolution methods in which they have more control over the outcome of the procedure. There is evidence that the experienced regret is greater if the outcome is obtained by action than if the same outcome is achieved by inaction.<sup>70</sup> A decision to leave the status quo and opt for ADR may result in more regret as it involves action, whereas sticking with the status quo (and possibly ending up in court) can be seen as inaction.

If we take a look at the process of mediation and compare it with litigation, mediating parties do have more control over procedure, and therefore they may be more likely to attribute the outcomes of the procedures to themselves. This is a consequence of the need for positive self-evaluation. If something goes wrong people try to attribute a failure to something or someone not connected to themselves.<sup>71</sup> If a possible failure is closely connected to the actions of a person it is more difficult to attribute a failure to others. Although most negotiations result in outcomes with both negative and positive aspects, we think that anticipating behavior will try harder to avoid the negative aspects, because, as we have seen, “losses loom larger than corresponding gains.”<sup>72</sup>

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<sup>66</sup> See BARON, *supra* note 39, at 245; Marcel Zeelenberg et al., *On Bad Decisions and Disconfirmed Expectancies: The Psychology of Regret and Disappointment*, 14 COGNITION AND EMOTION 521, 522 (2002).

<sup>67</sup> Compare Zeelenberg et al., *supra* note 66, at 522 with BARON, *supra* note 39, at 263.

<sup>68</sup> See Chris Guthrie, *Better Settle than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43; Zeelenberg et al., *supra* note 66, at 534.

<sup>69</sup> See Marcel Zeelenberg, *Anticipated Regret, Expected Feedback and Behavioral Decision Making*, 12 J. BEHAV. DECISION MAKING 93; 98 (1999).

<sup>70</sup> See Marcel Zeelenberg et al., *Attributions of Responsibility and Affective Reactions to Decision Outcomes*, 104 ACTA PSYCHOLOGICA 303, 304 (2000).

<sup>71</sup> This is described as the fundamental attribution error. See, e.g., Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173 (Leonard Berkowitz ed., 1977); DANIEL KAHNEMAN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 135 (1982).

<sup>72</sup> Kahneman & Tversky, *supra* note 56, at 54.

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Following this line of reasoning, anticipation of regret may influence the parties' behavior in relation to dispute resolution processes in two ways. First, the active decision to opt out of the default may be barred by anticipated regret. This effect is likely to be stronger for procedures where the parties renounce litigation for good, such as binding arbitration, than for procedures in which they do not have to give up the option of litigation, such as non-binding arbitration or mediation.<sup>73</sup> Second, the parties may be less likely to opt for a procedure, in which they have to be active. Mediation is such a procedure. Individuals are probably more likely to choose a procedure that enables them to attribute a possible failure to an unstable external factor, such as a judge or an arbitrator rather than an internal factor, namely, themselves. If this is true, one of the major selling points of mediation, improved disputants control, may not be so attractive for disputants after all.

## v. Ambiguity

Another possible influence on the procedural decisions of the parties is the "ambiguity effect." In situations of uncertainty regarding outcomes, which a third party intervention in a dispute certainly is, most people tend to avoid choices in which the probability of risk is unknown.<sup>74</sup> Typical real life examples are the risks of nuclear power plants or terrorism. This bias is sometimes attributed to the feeling of missing information. If before we make a certain choice there is some salient information about an option that we would like to obtain, but cannot, we are more likely to avoid this option.

This might be relevant for the choice between litigation and alternatives. Because of the much higher frequency of litigation, and vast media coverage, people know much more about litigation than about mediation or arbitration. They are unaware of many procedural details, but at least they will have the general and salient information that litigation involves presenting your case before a court, and that court then decides after careful deliberation and in accordance with legal principles. Mediation may be known as an option, but disputants might feel that they lack knowledge about what is expected from them, and how the interaction between the mediator and the parties leads to an outcome. The probability of

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<sup>73</sup> Compare the prescriptive advice given by many experts that decisions should be tentative and conditional until all elements of the solution are complete. See LEWICKI ET AL., *supra* note 41, at 135.

<sup>74</sup> See, e.g., BARON, *supra* note 39, at 268-73.

failure of mediation will probably stand out as a piece of lacking information as well: litigation appears to have a certain outcome, favorable or unfavorable.<sup>75</sup> Thus, it may not be ignorance about arbitration or mediation that is the problem, but uncertainty about the type and amount of risks involved.

The ambiguity effect might also provide an additional explanation for the high frequency of settlement compared to the low frequency of agreeing to a settlement procedure. As we have noted earlier, the parties to a conflict generally know a great deal about their situation and the consequences of a settlement. Where they will end up if they choose a certain type of dispute resolution may be more difficult for them to predict.

#### vi. Other Psychological Barriers

We have focused on five psychological barriers: reactive devaluation, optimistic overconfidence, loss aversion, anticipated regret, and ambiguity. These barriers probably provide only part of the picture. Mnookin and Ross<sup>76</sup> mention three other psychological barriers. We will now briefly speculate on whether and how they may influence the decisions in negotiations on how to process a conflict.

The first is “equity or justice seeking.” A proposal may be rejected if that proposal violates one or both parties’ sense of fairness or equity.<sup>77</sup> Especially if parties are longstanding adversaries, parties may be very eager to “get what they deserve.” Litigation can be seen as a procedure in which a claim can be awarded fully. In mediation, at least some concessions will have to be made, thus equity seeking serves as possible barrier to opting for conciliatory proceedings.

“Biases in assimilation” or construal relate to the different interpretations – or construal – by the parties of the context of their dispute and of the content of proposals for settlement. Mnookin and Ross illustrate that differences in construal can be a barrier to negotiation with the following example. In an arms reduction negotiation, a party views a proposed settlement that reduces its arsenal as an important concession as it decreases its ability to react to a strike and eliminates the possibility to launch a first strike. This interpretation is based on its own intentions not to launch a first strike and on the view that the other party still has to prove to be

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<sup>75</sup> In reality, the judgment obtained in litigation may be less final than it appears.

<sup>76</sup> Mnookin & Ross; *supra* note 42, at 11-13.

<sup>77</sup> *Id.* at 11.

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trustworthy. The other party is likely to find such a proposal less attractive than expected because that party is also not convinced of the first party's trustworthiness and it also has no intention of striking first. We are not sure how these biases will work out when disputants try to negotiate about a way to resolve their dispute. Moreover, these mental processes are probably also the causes of other barriers, such as reactive devaluation and over-optimism, so we should be careful not to count the same barrier twice.

The third and last psychological barrier is what Mnookin and Ross call "dissonance reduction and avoidance." This phenomenon refers to the discomfort felt at a discrepancy between what you believe and new information or a new interpretation of circumstances pointing in other directions. People try to minimize such "psychic regret" or "cognitive dissonance" by sticking to a position or belief they have taken in the beginning of a conflict. This may for instance result in a conviction that a belief is more justifiable than it actually is.<sup>78</sup> This barrier may operate in two different directions if applied to the choice for a dispute resolution procedure. In mediation, there is more room for different beliefs, so it may provide an opportunity to avoid dissonance. However, litigation and defaults about how to solve a problem probably act as prior beliefs about how to do things which disputants find difficult to change. Again, however, we have to take care that these processes are not already taken into account when we discussed other barriers.

#### D. Strategic and Tactical Barriers

##### i. Revealing or Concealing Information

We now turn to the strategic and tactical barriers to conflict resolution. Disputants will often possess private information. They may strategically disclose information that is not known to the other party in order to obtain an advantage in the negotiations. For instance, they will tell the other party facts they expect to favorably impact decision of the neutral, and withhold facts that are thought to be unfavorable. This strategic interaction is influenced by the dispute resolution process used to resolve the dispute if no settlement is reached. Litigation in the U.S. and U.K. usually entails extensive pre-trial disclosure of all relevant facts under the

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<sup>78</sup> Compare the optimistic overconfidence barrier, which describes similar behavior.

threat of severe sanctions. Continental style litigation, arbitration, and mediation generally have less extensive fact-finding procedures. Another example is that, in mediation, the parties usually have better opportunities to express their real needs and to learn about the needs of the other party. This information can also be used strategically. Conveying your real interests, in a setting where listening is enhanced, may influence the conduct of the other party. Disclosed interests, however, can also be exploited, for instance, by threats to harm these interests.

Strategic disclosure of information may influence the process of agreeing to a specific form of dispute resolution. A proposal to hire a mediator or an arbitrator can be used strategically. If the other party is aware of this and cannot tell the difference between sincere proposals to use ADR and strategic proposals, this may hurt attempts to contract for an appropriate procedure. This strategic barrier might reinforce the psychological barrier of reactive devaluation.

#### ii. Other Strategic and Tactical Barriers

The available tactics in negotiations include threats to hurt the other party's interests and commitments.<sup>79</sup> A common threat where the defendant fails to make a move in the negotiations is that the plaintiff will take a step in legal proceedings that is costly for the other party, such as issuing a formal complaint. It can make this threat stronger by committing to it: sticking to this course of action even if the other party makes some move, but not the desired one.

What impact will this have on negotiations regarding dispute resolution services? Agreeing to ADR will usually imply changing the range of available threats. Threats to burden the other party with costs will often be reduced in number or effectiveness, because ADR usually entails less costly proceedings. On the other hand, access to a faster and less costly decision in a dispute, which may be provided by certain forms of arbitration, may enhance the value of the threat to let the neutral actually decide. We are inclined to think that the change in the range of available "weapons" that comes with a choice for ADR may be an important barrier, particularly when the amount of "disarmament" is not the same for both parties. However, there is also a likely link with the psychological barriers. Giving weapons away may cause loss aversion and

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<sup>79</sup> See, e.g., Mnookin & Ross, *supra* note 42, at 10; LEWICKI ET AL., *supra* note 41, at 103-12.

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anticipated regret. The ambiguity of which threats are actually given up, may play a role as well.

### E. Institutional and Structural Barriers

#### i. Principal/Agent Problems

The first institutional and structural barrier to choosing an optimal dispute resolution procedure is due to the possible conflicting interests of disputants and agents. At the point when parties select a procedure, another person, for instance a lawyer, may assist the disputants. Involving such an adviser has several advantages in helping the parties to make informed and rational choices regarding the way to deal with the dispute. An agent is likely to have better information regarding the benefits and costs of the options. He may be able to dampen some of the psychological barriers to selecting a mechanism for dispute resolution.<sup>80</sup>

However, the drawbacks can be substantial. Depending on the way the agent is rewarded, and other incentives such as the reputation of the agent, he or she may have interests that conflict with that of the client. Lawyers, for instance, are probably more likely to opt for a method of resolving the dispute that maximizes their income. In most legal systems (Germany being the exception), the majority of lawyers work on an hourly fee basis; this may de-align the interests of the lawyers and their clients, in terms of efficient dispute resolution. Lawyers who work on a contingency fee basis, however, will often face opposing counsel working for an hourly fee, diluting the incentives for speedy settlement that comes from the contingent fee. Moreover, the precise terms of the contingent fee agreement will determine whether the contingency fee lawyer will be better off if he bargains in the shadow of litigation, or if he agrees to an ADR procedure. Apart from direct financial rewards, lawyers may find litigation preferable because it gives them more opportunities to use their legal and advocacy skills. Most lawyers will not knowingly let their own preferences interfere with their clients' interests, but may unintentionally do so through cognitive biases very similar to the biases that haunt their clients. They are, for instance, likely to be selective in the way they process informa-

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<sup>80</sup> See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUM. L. REV.* 509 (1994).

tion about which dispute resolution mechanism will work, be appropriate to the dispute, or lead to client satisfaction.

ii. Other Institutional and Structural Barriers

In many disputes, the parties on each side are composed of several persons, or even of large groups.<sup>81</sup> Within these groups, individual interests may differ considerably, as may their views of the other party, of the dispute, and most likely, of the best procedure to resolve the dispute. This is again likely to complicate decision-making regarding the way to resolve the dispute.

Institutional barriers to dispute resolution exist, for instance, when institutions require or induce a certain manner of communication. The legal system, as it operates in most countries, tends to shift communication from verbal, direct, and informal modes towards the direction of written, indirect (through lawyers), and formal modes. Communication is also increasingly oriented towards the way a court will see the dispute when it has to decide. These characteristics may also act as a barrier to discussing potential methods of resolving a dispute.

F. Individual Differences

Much research regarding negotiation behavior has tried to uncover personality traits that can be associated with success in negotiations.<sup>82</sup> Arguably, the best-known model is that of Thomas and Killmann, which consists of five conflict management styles. They distinguish two dimensions, assertiveness and cooperativeness that leads to five conflict management styles: competing (assertive and uncooperative), collaborating (assertive and cooperative), accommodating (unassertive and cooperative), avoiding (unassertive and uncooperative), and compromising (medium assertive and medium cooperative) in between.<sup>83</sup> Other models focus not so much on the willingness to cooperate with others to achieve mutual goals, but on their preferences as to outcome. Parties can differ in their social value orientation. Some people are said to have a pro-self, egoistic orientation: they are primarily concerned with their own outcomes. Others have a pro-social orientation: they prefer outcomes that

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<sup>81</sup> See, e.g., Mnookin & Ross, *supra* note 42, at 20.

<sup>82</sup> See LEWICKI ET AL., *supra* note 41, at 363-93 (for a (very) critical overview of the extensive literature).

<sup>83</sup> *Id.* at 368.

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benefit both the self and others with whom they are interdependent.<sup>84</sup> We will use an adaptation of the three-category typology (competitive, cooperative, individualistic) presented by Deutsch modified by the addition: altruism and avoidance.<sup>85</sup> This model is used as an example of how individual differences may affect choices regarding dispute resolution systems, because our reasoning focuses more on the existence of differences between the disputants than on the exact locus of these differences. We concede, however, that there may be much more to say about this. Other approaches focus on individual differences in the level of trust that negotiators have in others; self-efficacy; self-monitoring; Machiavellianism;<sup>86</sup> or trying to link to mainstream study of personality.<sup>87</sup>

*Table 1 – Social value orientations*

		maximize the other's outcome		
		high	indifferent	low
maximize own outcome	high	cooperator	individualist	competitor
	indifferent	altruist	avoider	

How are individual differences likely to influence the joint decision for a dispute resolution procedure? As Table 1 illustrates, people are competitors if they are eager to maximize their own outcomes and, at the same time, minimize the outcome of the other party in a conflict. Arguably, the parties are more likely to choose the most adversarial option. A court procedure is the most competitive arena to deal with a conflict. Individualists are indifferent to the other party's outcome and are focused on maximizing their own outcome. An individualist will probably choose the dispute resolution method he thinks will be most beneficial to him. The cooperator's motivation is to maximize his own outcome and the outcome of the other party. Cooperators naturally seek win-win solutions and may prefer mediation or even creative, tailor-made,

<sup>84</sup> *Id.* at 369.

<sup>85</sup> See Morton Deutsch, *The Effects of Motivational Orientation upon Trust and Suspicion*, 13 HUM. REL. 123 (1960).

<sup>86</sup> Those scoring high on this scale tend to be cynical about the motives of others, more likely to behave selfishly, inclined to behave unsympathetically towards others, and less willing to change their views. See LEWICKI ET AL., *supra* note 41, at 373.

<sup>87</sup> *Id.* at 375.

dispute resolution processes. The altruist may give in too soon, also on the issue of the appropriate dispute resolution procedure. The avoider may not wish to talk about a way to resolve a dispute at all, so that the default is likely to be used.

In all these cases, their natural inclinations may stop disputants short of making fully rational choices. The pattern becomes even worse when we consider what happens when different personalities have to agree on a dispute resolution procedure. When a competitor and a cooperator meet, they will have a difficult time deciding between litigation and mediation. Individualists and avoiders are also unlikely to agree. We should be careful about the magnitude of these effects, but Table 1 suggests that there are more personality pairings that make it more difficult to opt out of the default dispute resolution system than combinations that makes it easier. Differences in orientations between contracting parties will work in the direction of sticking to the default.

Evidence also shows that some of the social orientations moderate the effects of the psychological barriers described. Recent research, focused on optimistic overconfidence, has shown that the effect of this barrier was stronger with individualistically oriented participants than with cooperatively oriented negotiators.<sup>88</sup> The same may apply for some of the other psychological barriers.<sup>89</sup> De Dreu and Carnevale suggest that the effects of several of the psychological barriers may be reduced when negotiators adopt a more cooperative motive.<sup>90</sup> Research shows that it is possible to solicit a social motivation that is different from a person's initial social orientation. Their social motivation may be prompted, for instance, by instructions from superiors and by the interaction with the other party.<sup>91</sup> A problem in most conflicts is that they have already escalated and parties are likely to have adopted a more competitive orientation, thus enlarging the effects of several barriers.<sup>92</sup>

Another individual difference that moderates the effects of several barriers is epistemic motivation. This motivation relates to the need to develop a "rich and accurate understanding of the world."<sup>93</sup> The extent to which people are motivated to inform

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<sup>88</sup> See De Dreu & Carnevale, *supra* note 41, at 256.

<sup>89</sup> *Id.* at 255-60 (discussing evidence concerning "fixed-pie" beliefs, ego defensiveness, and differences in endowment effects, which are related to loss aversion).

<sup>90</sup> *Id.* at 256.

<sup>91</sup> *Id.* at 260.

<sup>92</sup> *Id.* at 273.

<sup>93</sup> *Id.* at 236 (referring to Arie W. Kruglanski, *The Psychology of Being 'Right': The Problem of Accuracy in Social Perception and Cognition*, 106 *PSYCHOL. BULL.* 395 (1989)).

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themselves of negotiation differs. Epistemic motivation depends on individual differences and on situational cues, such as the extent to which process accountability exists, as well as power differences between the parties.<sup>94</sup> The higher the process accountability and the greater the power differences, the higher the epistemic motivation of negotiators is likely to be. Another influential factor is that when parties become more fatigued, their epistemic motivation is likely to be lower.<sup>95</sup> An important consequence of higher epistemic motivation is that people with such motivation do not rely heavily upon cognitive heuristics, such as loss aversion, because they engage in a more systematic information search and processing. Another consequence of high epistemic motivation is that the impact of barriers related to naïve realism is reduced,<sup>96</sup> because people will not engage in confirmatory information search.<sup>97</sup> Consequently, one of the barriers affected by epistemic motivation is optimistic overconfidence.<sup>98</sup>

## G. Barriers: Conclusions

How bad is the news for someone who hopes to agree with an opponent on a way to resolve a dispute? Adopting a neutral dispute resolution service is like departing from any default rule, and evidence shows that defaults are sticky. This is likely to be more so when parties find themselves in an actual dispute. Consequently, reactive devaluation of a proposal to deal with a dispute in a certain way is likely to occur. Optimistic overconfidence may be less important. Loss aversion and anticipated regret may be relevant, particularly when the option of a cooperative procedure like mediation is considered. A more important factor is the probable ambiguity concerning what the dispute resolution service actually entails. From the strategic and tactical barriers, principal/agent problems are also likely to be significant. Furthermore, almost any other barrier to dispute resolution may play a similar role in negotiations and the ways disputes are resolved.

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<sup>94</sup> *Id.* at 266 (referring to Jennifer S. Lerner & Philip Tetlock, *Accounting for the Effects of Accountability*, 125 *PSYCHOL. BULL.* 255 (1999)).

<sup>95</sup> *Id.* at 273.

<sup>96</sup> Naïve realism relates to “the individual tendency to assume that he or she sees the world as it is.” Dreu & Carnavale, *supra* note 41, at 246.

<sup>97</sup> See De Dreu & Carnavale, *supra* note 41, at 267.

<sup>98</sup> *Id.* at 267 (mentioning the confirmatory information search; which results in optimistic overconfidence).

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It is essential not to overestimate the weight of these results. There lacks significant information about the magnitude of the effects we have described. Most of the empirical studies that established the effects were laboratory experiments, not real life disputes. Moreover, the effects are not isolated phenomena; they interact, and it is unlikely that the effects may simply be added up if we wish to establish their overall impact.

In addition, barriers can be overcome. We discussed how social orientations and motivations may help people to overcome obstacles to discovering a suitable dispute resolution system. Whether disputants will be able to surmount these barriers will also depend on the effort they expend. This effort, in turn, is likely to be related to the gains expected from opting out of the default method of dispute resolution.

On the whole, however, the difficulties of choosing a dispute resolution method seem to be considerable. Moreover, the barriers seem to be rather similar in nature to the barriers to resolution of the conflict itself. Evidence of the low use of *ex post* ADR is consistent with this result.

Although we focused on *ex post* decisions to use ADR, it is likely that most barriers also apply to opting out of an *ex ante* agreed ADR-procedure. In those cases, it is not litigation, but the method agreed upon beforehand that acts as the default.

### III. IMPLICATIONS

Thus, our tentative conclusion is that the parties will usually not opt out of the default dispute resolution system, litigation, or more realistically, negotiation in the shadow of litigation. Perhaps we should not be too surprised because supplying a conflict resolution system has been seen as a core task of the state for centuries. Moreover, courts have learned in the last few decades that cases are to be managed because the disputants often cannot agree on procedural issues. In these ways, the “market failure” of dispute resolution services was discovered long ago, but its implications may be more far-reaching than we assumed.

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## A. Defaults for Dispute Resolution are Crucial

One implication is that default systems for dispute resolution are important because the majority of disputes will be dealt with by application of the default.<sup>99</sup> If fitting the forum to the fuss is as difficult as we assume it is, many disputants will not be able to choose a procedure that best suits their interests. This may lead to a loss of welfare, depending on how the default for dispute resolution fits their preferences. Therefore, the careful design of default rules for dispute resolution is an important government task, which could be organized more systematically. Most scholars agree that a default rule should reflect the preferences of the majority of the parties. There are situations in which this can be inefficient, but they do not seem to apply here.<sup>100</sup>

We need to learn more about the preferences of disputants. Analysts of default rules differ in their opinions of how default rules should be tailored to the parties' situations.<sup>101</sup> Is one set of dispute resolution rules needed or are many different ones? Another important element of the systematic design process, as suggested by our analysis, is an investigation of the barriers to choosing the most appropriate method for dispute resolution and the ways a default dispute resolution system could try to overcome them. In other words, how can a default dispute resolution system help people choose an appropriate way to resolve a dispute?

Currently, designing rules of civil procedure is usually left to specialist lawyers. Experts in the area of civil procedure, for instance, help developing countries to improve their dispute resolution infrastructure. These specialists certainly tend to use information regarding the preferences of disputants and try to build in some mechanisms for cost control.<sup>102</sup> The question is whether they give these preferences sufficient weight. It would be

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<sup>99</sup> This includes disputing in the shadow of this default.

<sup>100</sup> See Korobkin, *supra* note 37, at 613-23. The exceptions are that the transaction costs for those that need to contract away from the majoritarian rule (if it were the default) are much higher than the transaction costs of contracting for the majoritarian rule (if it were not the default) and that one of the parties has private information that will be forced out by a "penalty" default. See Ayres & Gertner, *supra* note 36.

<sup>101</sup> Korobkin, *supra* note 37, opts for tailored default rules (or better: standards).

<sup>102</sup> Compare Rule 1, FED. R. CIV. P. 1 (referring to the objective "to secure the just, speedy, and inexpensive determination of every action") with the overriding objective of Part 1 of the U.K. Civil Procedure Rules that calls for "saving expense" and "dealing with the case in ways which are proportionate (i) to the amount of money involved, (ii) to the importance of the case, (iii) to the complexity of the issues, and (iv) to the financial position of each party".

interesting to speculate how the artificially high demand for disputing in the shadow of the present default rules, and in particular, for disputing in the shadow of litigation, has influenced their thinking as well. A disturbing fact is also that the courts, the providers of the defaults, seem reluctant to use the newest available dispute resolution techniques to improve their own services.<sup>103</sup> Courts, themselves, could start to offer low-cost, mediation-like dispute resolution services. However, most courts keep innovation out of the courthouse and instead, have started referring to innovative providers on the market.

What do we know about preferences for dispute resolution? Scholars suggest that disputants have preferences regarding the expected outcome (including deterrence benefits), process factors,<sup>104</sup> and procedural costs (including the costs of error).<sup>105</sup> The trade-off between deterrence benefits and dispute resolution costs suggests, for instance, that parties expecting benefits from scrutiny of past conduct will prefer procedures that better investigate what happened in the past, such as extensive document production and hearing of witnesses.<sup>106</sup> Other parties will be satisfied with less costly procedures, because they believe that the relevant conduct will not be observable in a tribunal, despite its investigative powers. These parties may be more willing to trade a reduced accuracy of the outcome for a reduction of dispute resolution costs. The research discussed in Part I(B) suggests that the general preference is for low-cost procedures such as arbitration and mediation. The slightly higher ratings for mediation may be explained by a preference for procedures that maximize joint gain or, to put it differently, that avoid the “fixed-pie assumption.” Results from procedural justice research provide some clues as well, but they mainly reflect the process characteristics valued by disputants, such

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<sup>103</sup> See generally Maurits Barendrecht, *Cooperation in Transactions and Disputes: A Problem Solving Legal System*, Tilburg University Discussion Paper, at SSRN (404960) (for the possibilities of developing a legal system that is better tuned to the needs of disputants; using the lessons of negotiation theory).

<sup>104</sup> See, e.g., Tyler, *supra* note 31 (summarizing the literature regarding distributive justice and procedural justice; and the applications to dispute resolution systems), Chris Guthrie & James Levin, “Party Satisfaction” *Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to do With it?*, 79 WASH. U. L. Q. 787 (2001); Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (2002).

<sup>105</sup> See various authors, *supra* note 7.

<sup>106</sup> For a discussion of this point, see *supra* note 29.

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as disputants' control over the procedure,<sup>107</sup> voice, and more recently, neutrality, trustworthiness, and status recognition (treatment with dignity and respect).<sup>108</sup> We should know more about the levels of accuracy and investigative powers the parties value and, more importantly, their willingness to pay for different levels of procedural justice, accuracy, and investigative powers that may contribute to deterrence. Economic models departing from the assumption that disputants will make a cost-benefit analysis may offer useful indications of these preferences.<sup>109</sup>

The opting-out behavior that we observe in practice may, however, give us useful information concerning the preferences of disputants regarding a default dispute resolution system. If a substantial majority of the disputants prefer less thorough, but also less costly, proceedings, we may assume that the default proceedings are too costly. We can also infer that opting-out of the default system entails compromises between the interests of disputants and of the providers of dispute resolution services, or may reflect biases caused by the artificially high number of disputes processed by the present default system. Procedural reform efforts are under way in many countries. They aim at more efficiency, but sometimes they also reflect different trade-offs between costs and accuracy. Mandatory mediation programs exist in many places, which reflects a preference for increased settlement efforts and lower dispute resolution costs, including the costs to relationships of adversarial litigation.

In any event, if our assumption is right, the high number of disputes that are currently dealt with by the court system and in negotiations under the threat of litigation is not to be misunderstood as a preference of disputants for this system. Likewise, the view that ADR is just an alternative possibility for dispute resolution that can prove itself on the market needs to be corrected.

Of course there may be reasons to offer a default litigation system that does not mirror the preferences of the parties, such as the educational value of case law to future disputants, to the population at large, or even to judges or members of juries. A constitutional right to a certain type of dispute resolution may be an independent reason for certain procedural arrangements, at least in the eyes of some commentators. However, if the default system of

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<sup>107</sup> See generally JOHN THIBAUT & W. LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

<sup>108</sup> For a discussion of this point, see *supra* note 30.

<sup>109</sup> Compare LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE*, 275 (2002).

dispute resolution is primarily considered to be a service to parties, a view we tend to agree with, research into the preferences of the parties seems warranted, and should be an important determinant of the default dispute resolution system.

### B. Remedies for Market Failure: Assisted Choice

A way to remedy the difficulties for disputants to choose the right dispute resolution system is to assist the parties with this choice. Court-annexed mediation or ADR programs help people determine the best way to resolve a dispute. However, the concept of a multi-door courthouse and a neutral referral point to appropriate dispute resolution without a default option, is far off.<sup>110</sup> Currently, the best thing disputants can hope for is neutral suggestions by courts to opt out of the default (generally court litigation). Neutral suggestions are useful, because they are likely to help disputants overcome some of the barriers we discussed in Part II, such as reactive devaluation. We could establish how effective this assisted choice will be by systematically looking at the barriers and seeing whether they are lowered by this assisted choice.

Even if other barriers are removed, however, the individual orientations of the parties that we discussed in Part II, Section F, as well as the real preferences of rationally acting parties, may differ. Mere referral will therefore not be sufficient. In an actual dispute, one party may prefer litigation with extensive discovery, because it expects to establish foul play by the other party, or because it has a competitive orientation. The other party may wish to avoid this, or prefer ADR for other reasons, possibly because the other party is a cooperative person. Still, ADR might be efficient if the party sticking to litigation values it less than the other party values ADR. In this type of situation, the parties should be encouraged to opt for ADR. ADR, together with payment of a sum higher than the value of ADR for the litigation-preferring party and lower than the value of ADR for the other party, would be a win-win situation for both parties. This example shows that there is no a priori reason why, in such a situation, the party who prefers litigation should prevail over the party who prefers ADR. What may be needed, there-

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<sup>110</sup> See Frank E.A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65 (Levan and Wheeler eds., 1979); Jeffrey J. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 *OHIO ST. J. ON DISP. RESOL.* 297 (1996).

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fore, is not mere referral, but assistance resolving the dispute and negotiating the dispute resolution process or even a binding neutral decision.<sup>111</sup>

This might be a reason for a system in which a neutral evaluator, having heard the parties, first establishes which type of dispute resolution system is optimal for the parties. Preferably, this would happen early in the dispute resolution process, so that the parties have not yet incurred costs for things that they will not need later in the process.<sup>112</sup> Thus, the default dispute resolution system could be completely tailored according to the parties' wishes.<sup>113</sup> This approach exists within the court (litigation) system, where case management of complex cases can be very specific and tailored to the needs of the parties. Perhaps case management should be extended to all possible choices in dispute resolution services, covering all options within the litigation system, and the options that come from different types of tailor-made ADR.

Because of the high costs of context-specific dispute management for each dispute, a combination of majoritarian default rules and context-specific dispute management could be preferable. Different types of disputes require different default rules (e.g., facilitative mediation backed up by interest arbitration for family disputes; litigation for product liability class actions) with context-specific dispute management if one of the parties so wishes. More sophisticated alternatives could be developed. For example, giving the parties a choice among three or four default options,<sup>114</sup> or arranging for them to choose without knowing the choice of the other party, may avoid reactive devaluation and lower some of the strategic and tactical barriers to agreement.

### C. Consequences for the Supply Side: A Natural Monopoly?

Let us now look at the consequences of our thesis for the supply side of the market for dispute resolution services. In a system with litigation as a default, there will be an excessive demand for

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<sup>111</sup> Anecdotal evidence from mediation practice suggests that the negotiations that a mediator conducts with the parties before they actually sign a mediation agreement are often stressful and time-consuming.

<sup>112</sup> The tendency to require that discovery take place before a decision is made relating to ADR is but one example of a practice that could be more efficient.

<sup>113</sup> Compare Korobkin, *supra* note 37.

<sup>114</sup> Often, in a similar practice, parties in arbitration may choose from a limited list of arbitrators.

litigation and not much spontaneous demand for ADR. The actual transactions that do occur will therefore be tilted towards litigation, and negotiation will be in the shadow of litigation. Neutral dispute resolution service providers, and the lawyers assisting the parties in such procedures, will develop the litigation skills required when the parties stick to the default, and not other skills. Litigation will be taught, learned, and rewarded, rather than the alternatives to the default. In the long run, beliefs and values of suppliers may stick to the default as well.

In countries that have the litigation default, we are likely to see a system of courts and lawyers that is effectively shielded from competition by alternative dispute resolution services. Parties are free to choose their lawyer and, in some situations, the plaintiff has some choice as to which court he addresses, but they are locked in to the services of the court-lawyer litigation combination. As we have seen, the market for legal services is usually evaluated from the perspective of professional services, with a focus on customers having information deficits.<sup>115</sup> Only a few studies explore the initial interaction between lawyers and courts that are typical of the market for legal services,<sup>116</sup> and more such studies are urgently needed. Because the default is sticky, the litigation system may have the properties of a monopoly, with detrimental effects on efficiency and with large rewards for the participating lawyers.

Even more disturbingly, the same result is likely if the default is amended to another system. A hundred years of mandatory mediation may lead to a similar “lock in” situation as we now seem to be in with regard to litigation.

Is there a way out? If the default dispute resolution system is sufficiently similar to a monopoly, it should probably be regulated as other natural monopolies.<sup>117</sup> Price regulation is an option that is considered appropriate in situations where a dominant position caused by high barriers to entry is likely to persist.<sup>118</sup> A quite successful form of price regulation operates in Germany, where lawyers are paid fixed fees and, according to one commentator, court

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<sup>115</sup> See *supra* note 33, and accompanying text.

<sup>116</sup> See generally Hadfield, *supra* note 12.

<sup>117</sup> See SANDFORD V. BERG & JOHN TSCHIRHART, NATURAL MONOPOLY REGULATION: PRINCIPLES AND PRACTISE (1988); Ben Depoorter, *Regulation of Natural Monopolies*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 498 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000).

<sup>118</sup> See Depoorter, *supra* note 117, at 505-08, 510.

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efficiency is astonishing in comparison with other jurisdictions.<sup>119</sup> Another more controversial option, is competition for the market, such as when governments auction licenses for telecommunication services or rail transport.<sup>120</sup> In theory, packages of disputes could be auctioned to providers of neutral dispute resolution services. Mechanisms may be designed to allow the parties to make a joint decision about their desired dispute resolution system, thus creating a level playing field for all providers of dispute resolution services. In any case, the policy for liberalization of legal services emanating from the idea that the only market failure is the one of incomplete information may have to be reconsidered.

## IV. CONCLUSION

In Part II of this article, we provided evidence that disputants face considerable barriers when they attempt to select an appropriate way to resolve their dispute. This explains why ADR services, which are widely available, seem to have extremely low market shares when unaided by court-assisted ADR programs. This scarce use is not consistent with the preferences expressed by informed users of such services. In sum, the default way to resolve disputes, negotiations under the threat of litigation, is sticky.

In Part III, some of the possible implications were discussed. If it is difficult to opt-out of the default, the design of the default system is crucial and the pattern of choice by disputants is not a reliable indication of their preferences. The market for dispute resolution is not akin to the normal market that has been known for centuries. That is why governments started to provide this service in the first place, but this fact was ignored when new ways to deal with disputes started to develop. This market has the characteristics of a natural monopoly, which requires a different type of regulation than a market where the problem is 'merely' that customers are uninformed. Dispute resolution is a very essential service. It will be a cause of concern if innovation cannot take hold in this market and competition cannot have its beneficial effect on quality and price.

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<sup>119</sup> See Adrian A.S. Zuckerman, *The Dimensions of Civil Justice*, in *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE* 5, 45-55 (Adrian A.S. Zuckerman ed., 1999).

<sup>120</sup> See Depoorter, *supra* note 117, at 510-13.