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Alternative Dispute Resolution in the Public Sector: The American Experience.

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1 - Introduction

This study intent describes and analyzes recent experience of American government with the use of Alternative Dispute Resolution (ADR) to solve conflicts. The use of ADR has been showing a good way for the government time and money savings, reaches creativity solution for litigation problems and increase relationships and satisfaction with suppliers, dealers, civil servants and so on. The uses of ADR increase the efficiency of the government as whole, including the Judicial Branch.

Among Brazilian institutions, the Judicial Branch is one of the most resistant to change. A recent constitutional amendment that changed some aspects of the Judicial System took almost 12 years to be approved¹. The constitutional changes were important and may result in better and faster legal services, but they are still insufficient. There has been a lack of incentives for alternative methods of solving disputes. In other words, theses changes did little to break the Judicial Branch's quasi-monopoly over conflict resolution.

The efficiency of the Judicial Branch could increase considerably if the Brazilian government, which is the largest user of the judiciary, decides to give preference to mechanisms of ADR solutions in the legal disputes in which it is involved. A large number of lawsuits that are currently submitted to the Judicial Branch could be solved by alternative means, including the use of arbitration. Beyond reducing the number of lawsuits, another advantage is the reduction of public expenditures. The use of the judicial system always implies an increase in public spending due to expenses with judges, civil servants, government lawyers, overhead expenses, and so on. In sum, it means an increase in government bureaucracy and public spending without generating new benefits for society.

¹ Constitutional emend number 45.

A study about the Brazilian Judiciary Power was conducted by the Fundação Getúlio² Vargas at the request of the Ministry of the Brazilian Justice in 2004, and reached the following conclusions:

A) The Federal Government is responsible for nearly 43% of the country's judicial expenses;

B) there is a direct correlation between the numbers of law suits brought into Supreme Courts (STF) and the number of economic or tax measures enacted by the federal government;

C) the stock of suits in the instance of the Federal Justice system increased 22,5% from 2002 to 2003.

D) the growing numbers of suits coming from states that reach the first instance of Federal Justice indicates that public policies that improve public access to the judicial system can create an increase in demand;

E) in 2003, Brazil had 7.7 judges for every 100,000 inhabitants, which is just slightly above the international average, of 7.3 judges for every 100,000 inhabitants;

F) World Bank data for 2000 places the wages of federal judges in Brazil at the top of the ranking, when compared to other countries, adjusting for purchasing power parity ;

G) the expenses the of Judiciary grew from R\$ (Reais) 25.3 billion of in 1995, to R\$ 32.9 billion in 1998, and then to R\$ 28.6 billion in 2002;

All this information leads to the following conclusions: a) Brazil already spends enough on the Judicial Branch; b) the country has not been successful in

² www.mj.gov.br/reforma (diagnostico do Poder Judiciario)

allocating new resources, because the main issue is not a financial one; c) the users or clients of the Judicial Branch, and especially the Central Government, should be responsible for finding solutions to the problem.

The Brazilian federal government can contribute vastly to the improvement of services of the Judiciary Power. One promising strategy would be to reduce demand for services. A search for mechanisms to solve disputes without involving the Judicial Branch, leads to which ADR, could be undertaken by the Federal government in order to reduce the taxing on the Judiciary. The government of the United States has a program that stimulates the use of ADR that has achieved enormous success, and that may serve as reference for Brazil.

2 - Definitions

2.1 - What is ADR

Alternative Dispute Resolution means solving the disputes without intervention of the State: judges, juries, and the like of the State legal system. However, for some practioners suggests that “ADR” represents the usual conflict resolution processes. Others have suggested that the “A” in ADR should stand for “appropriate”, since in ADR the parties choose the process they feel is most appropriate for their needs and interests. Still other say conflict resolution (CR) should replace ADR. Others offer “collaborative problem solving” (CPR), as the best term³.

The ADR, according to the specialized⁴ literature, is based on five elements: (1) the parties agree to participate in the process; (2) the parties or their representatives directly participate; (3) a third-party neutral helps the parties reach agreement but has no

³ Barret, Jerome T. A history of alternative resolution: the story of a political, cultural, and social movement/Jerome T. Barret, Joseph P. Barret;foreword by William J. Ursey – 1st ed.

⁴ O’Leary R. and Raines S : Lessons Learned from Two Decades Of Alternative Dispute Resolution Programs and Process at the U.S. Environmental Protection Agency. Public Administration Review, November 2001, vol. 61, n. 6, pp. 682-692.

authority to impose a solution; (4) the parties must be able to agree on the outcome; and (5) any participant may withdraw and seek a resolution elsewhere.

ADR is not one single form or process of dispute resolution, but rather a concept that embraces and offers a variety of methods from which disputing parties may choose. There is a great variety of ADR techniques: negotiation, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombuds, or any combination.

2.2 - Types of ADR

2.2.1 - Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute). The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter.

The facilitator generally works with all of the meeting's participants at once and provides procedural directions as to how the group can move efficiently through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. The facilitator may be a member of one of the parties to the dispute or may be an external consultant. Facilitators focus on procedural assistance and remain impartial to the topics or issues under discussion.

The method of facilitating is most appropriate when: (1) the intensity of the parties' emotions about the issues in dispute are low to moderate; (2) the parties or issues are not extremely polarized; (3) the parties have enough trust in each other that they can work together to develop a mutually acceptable solution; or (4) the parties are in a common predicament and need or will benefit from a jointly-acceptable outcome.

2.2.2 - Mediation is the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party who has no decision-making authority. The objective of this intervention is to assist the parties in voluntarily reaching an acceptable resolution of issues in dispute. Mediation is useful in highly-polarized disputes where the parties have either been unable to initiate a productive dialogue, or where the parties have been talking and have reached a seemingly insuperable impasse.

A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution.

Mediators differ in their degree of directiveness or control while assisting disputing parties. Regardless of how directive the mediator is, the mediator performs the role of catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute.

2.2.3 – Fact-finding is the use of an impartial expert (or group) selected by the parties, an agency, or by an individual with the authority to appoint a factfinder in order to determine what the "facts" are in a dispute. The rationale behind the efficacy of factfinding is the expectation that the opinion of a trusted and impartial neutral will carry weight with the parties. Factfinding was originally used in the attempt to resolve labor disputes, but variations of the procedure have been applied to a wide variety of problems in other areas as well. Factfinders generally are not permitted to resolve or decide policy issues.

2.2.4 - Arbitration involves the presentation of a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of a binding decision. Unless arranged otherwise, the parties usually have the ability to decide who the individuals are that will serve as arbitrators. In some cases, the parties may retain a

particular arbitrator (often from a list of arbitrators) to decide a number of cases or to serve the parties for a specified length of time (this is common when a panel is involved). A common understanding by the parties in all cases, however, is that they will be bound by the opinion of the decision maker rather than simply be obligated to "consider" an opinion or recommendation. Under this method, the third party's decision generally has the force of law but does not set a legal precedent. It is usually not reviewable by the courts.

2.2.5 - Dispute panels use one or more neutral or impartial individuals who are available to the parties as a means of clarifying misperceptions, filling in information gaps, or resolving differences over data or facts. The panel reviews conflicting data or facts and suggests ways for the parties to reconcile their differences. These recommendations may be procedural in nature or they may involve specific substantive recommendations, depending on the authority of the panel and the needs or desires of the parties. Information analyses and suggestions made by the panel may be used by the parties in other processes such as negotiations.

This method is generally an informal process and the parties have considerable freedom about how the panel is used. It is particularly useful in those organizations where the panel is non-threatening, and has established a reputation for helping parties work through and resolve their own disputes.

2.2.6 - Early neutral evaluation uses a neutral or impartial third party to provide a non-binding evaluation, sometimes in writing, which gives the parties to a dispute an objective perspective on the strengths and weaknesses of their cases. Under this method, the parties will usually make informal presentations to the neutral party to highlight the parties' cases or positions. The process is used in a number of courts across the country, including U.S. District Courts.

Early neutral evaluation is appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases, and when the top decision makers of

one or more of the parties could be better informed about the real strengths and weaknesses of their cases. Finally, it is used when the parties are seeking an alternative to the expensive and time-consuming process of following discovery procedures.

2.2.7 - Minitrials involve a structured settlement process in which each side to a dispute presents abbreviated summaries of its cases before the major decision makers for the parties who have authority to settle the dispute. The summaries contain explicit data about the legal basis and the merits of a case. The rationale behind a minitrial is that if the decision makers are fully informed as to the merits of their cases and that of the opposing parties, they will be better prepared to successfully engage in settlement discussions. The process generally follows more relaxed rules for discovery and case presentation than might be found in the court or other proceedings, and usually the parties agree on specific limited periods of time for presentations and arguments.

A third party who is often a former judge or individual versed in the relevant law is the individual who oversees a minitrial. That individual is responsible for explaining and maintaining an orderly process of case presentation and usually makes an advisory ruling regarding a settlement range, rather than offering a specific solution for the parties to consider. The parties can use such an advisory opinion to narrow the range of their discussions and to focus in on acceptable settlement options--settlement being the ultimate objective of a minitrial.

The minitrial method is a particularly efficient and cost effective means for settling contract disputes and can be used in other cases where some or all of the following characteristics are present: (1) it is important to get facts and positions before high-level decision makers; (2) the parties are looking for a substantial level of control over the resolution of the dispute; (3) some or all of the issues are of a technical nature; and (4) a trial (USA) on the merits of the case would be very long and/or complex.

2.2.8 - Ombudsmen are individuals who rely on a number of techniques to resolve disputes. These techniques include counseling, mediating, conciliating, and factfinding. Usually, when an ombudsman receives a complaint, he or she interviews

parties, reviews files, and makes recommendations to the disputants. Typically, ombudsmen do not impose solutions. The power of the ombudsman lies in his or her ability to persuade the parties involved to accept his or her recommendations. Generally, an individual not accepting the proposed solution of the ombudsman is free to pursue a remedy in other forums for dispute resolution.

3 - The ADR in U.S.A

3.1- History of the ADR in U.S.A

ADR arrived with colonists, principally merchants. Commercial arbitration was in widespread use throughout the Dutch Colonial period (1624-1664) and, the British Colonial period (1664-1776) in New York City. Merchants in other colonies also had brought their commercial arbitration experience and skills to the New World.

Pilgrims avoided lawyers and courts, convinced that they threatened Christian harmony, preferring to use mediation processes to deal with community conflicts or use the local church. In church, the goal was not simply an abstract form of justice, but a desire to encourage the disputants leaves aside the dispute, to forgive each other and come to a mutual agreement about old differences⁵.

After independence, Thomas Jefferson believed that arbitration offered a better approach to conflict resolution than the courts, he justified: “Continuances, appeals, demurrers, defaults and appeals there from, are chiefly all the work of the Attorneys: from motives of interests. By these means, the honest creditor is either delayed, forced to a sacrifice, or utterly deterred from seeking that justice of which our laws have become only a pretense”⁶.

⁵ Barret, Jerome T. A history of alternative resolution: the story of a political, cultural, and social movement/Jerome T. Barret, Joseph P. Barret;foreword by William J. Ursey – 1st ed.

⁶ Barret, Jerome T. A history of alternative resolution: the story of a political, cultural, and social movement/Jerome T. Barret, Joseph P. Barret;foreword by William J. Ursey – 1st ed.

The Patent Act of 1790 was the first Law that explicitly dealt with ADR, and it provided for an arbitration board to solve the dispute. In the board, one member was appointed by each patent applicant and another was appointed by the government, to make the decision. If an applicant refused to use arbitration, the patent application of the other would be approved.

During the last third of the 1800s, business trade groups began to support ADR as matter of policy. In New Orleans in 1871, buyers and cotton sellers called for mediation and arbitration to resolve disputes among its members. The New York Stock Exchange in 1872 went even further by amending its constitution to provide arbitration of disputes between exchange members and their costumers.

The federal government also used arbitration with third parties. In 1871, the Green Bay & Mississippi Canal Company refused to turn over to the federal government, a canal on which it had done repairs until the government paid the amount owed. The company claimed the government owed \$2 million, but the government refused to pay anything. To resolve the dispute, three arbitrators were appointed, and they decided that the government should pay \$144,000. This was accepted by both parties.

In 1920, through the initiative of the New York Bar Association and the New York Chamber of Commerce, the first modern arbitration law was approved in New York. By 1925, fifteen other states had done the same, and Congress had enacted the U.S Arbitration Law, which remains the basic commercial and maritime arbitration law. This law authorized courts to enforce arbitration awards.

After a series of railroad strikes, coal mining strikes (like the famous West Virginia Coal Wars), Congress passed the first federal labor dispute law: the Arbitration Act of 1888. The act provided two methods of dispute resolution: voluntary arbitration and the appointment of a commission to investigate the cause of a specific dispute. Ten years later, because of the poor performance of the Arbitration Act, Congress passed the

Erdman Act retaining arbitration and eliminating the investigative provision. That Act did not work very well either.

A more effective labor dispute law was the Railway Labor Act of 1926. The basic features of the 1926 Railway Labor Act remain in place today: collective bargaining assisted by prompt mediation of disputes on rates of pay, work rules, and working conditions; for disputes not resolved by mediation, use of voluntary arbitration. The National Mediation Board was created to administer the act.

The National Mediation Board is the forerunner of the Federal Conciliation Mediation Service (FMCS), created in 1947. The FCMS has promoted sound and stable labor-management relation by providing mediation assistance in contract negotiation disputes between employers and their unionized employees.

Another American Institution very important in ADR is the American Arbitration Association (AAA). It was established in 1926, and has created a successful niche in providing arbitration for commercial and labor-management disputes. They train futures arbitrators, promote arbitration in new dispute areas: labor-management, commercial, international, insurance, construction, and union representation elections.

In the 1980s many organizations were founded to promote and support ADR (Institute of Conflict Analysis and Resolution, Program On Negotiation, Academy of Family Mediator, Conflict Resolution Education Network and so) . New organizations demonstrated that ADR was not simply an array of activities, but a movement in need of better organization. At this time there was a growing academic interest in ADR. Harvard University and George Mason University began to offer higher education program in dispute resolution and books appeared, beginning with the famous Getting to Yes (Roger Fisher and William Vry, Penguin Books).

In the early 1990s, the government noticed that it could be used of the advantages of ADR, and approved The Administrative Dispute Resolution Act (ADRA).

This act gave federal agencies additional authority to use ADR in most administrative disputes. At the same time Congress approved the Civil Justice Reform Act (CJRA) to reform the federal court system, requiring all federal district courts to develop plans for implementing procedures for ADR to combat cost and delay in civil litigation.

With ADRA the Executive branch started to implement ADR. In 1998, President Clinton issued a presidential memorandum stating: “ As part of an effort to make the Federal Government operate in a more efficient and effective manner, and to encourage, where possible, consensual resolution of dispute and issues in controversy involving the United States, including the prevention and avoidance of disputes, I have determined that each Federal agency must take steps to promote greater use of mediation, arbitration, early neutral valuation, agency ombuds, and other alternative dispute resolution techniques”⁷. At this time ADR begin to growth in federal government.

3.2 - The ADR in the American government: Some cases

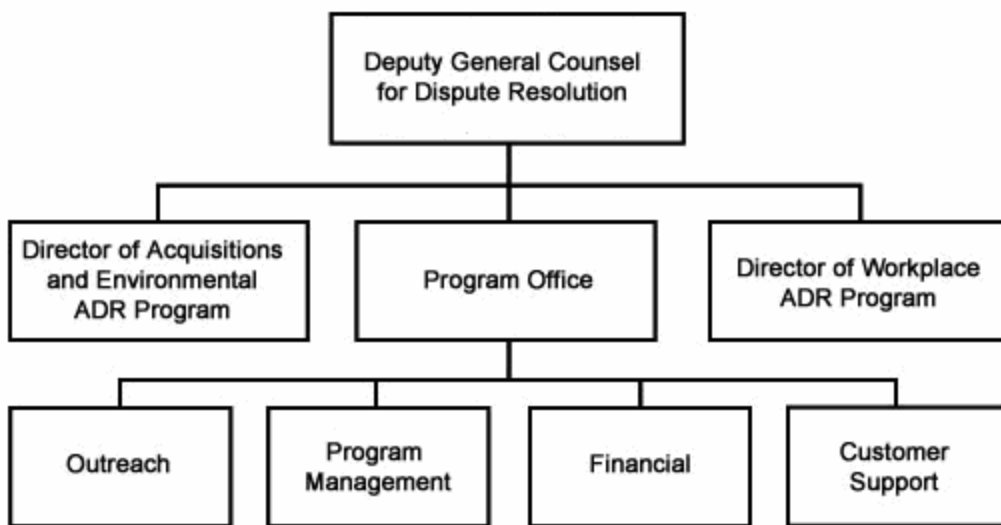
To implement ADR, The Office of Dispute Resolution was created to coordinate the use of Alternative Dispute Resolution (ADR) in the Department of Justice⁸. The office is responsible for ADR policy matters, training, assisting lawyers in selecting the right cases for dispute resolution, and finding appropriate neutrals to serve as mediators, arbitrators, and neutral evaluators. The office also coordinates the Interagency ADR Working Group, an organization that promotes the use of ADR throughout federal executive branch agencies.

Although even before the creation of the Office of Dispute Resolution, some agencies were already gaining experience with ADR.

⁷ Presidential Memorandum on ADR, May 1, 1998

⁸ United States Department of Justice, Attorney General Order Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques, April 6, 1995

In the U.S Air force, for example, has one of the most successful ADR programs of the American government. The program was rewarded in the year 2003 by the American Bar Association as the best 'Lawyer the problem-solver'". In 2002 it was awarded by AFMC as the best program of 'labor-management cooperation.'" The program is formally structured inside of the Air Force organization chart, and it possesses great operational autonomy:



Source: The Air Force Alternative Dispute Resolution program, available at www.adr.af.mil

The Air Force uses mediation as a technique to resolve all types of employment disputes. Emphasis is placed on early intervention, generally during the informal stages of processing. However, mediation is offered at any stage. The Air Force was one of the first federal agencies to use ADR, beginning in 1989 with EEO (Equal Employment Opportunity) complaints. Use has since been expanded to all types of disputes including negotiated and administrative grievances, unfair labor practice charges, and Merit System Protection Board appeals. Over 1,500 mediators have been trained including EEO counselors, personnel specialists, and management and union officials.

In Fiscal Year 1996, of the total 2,269 civilian disputes mediated, 1,690 (74%) were resolved. The Air Force's Military Equal Opportunity Office, which handles military equal opportunity and treatment complaints, uses mediation to resolve these disputes. Air Force participates in the Department of Defense shared neutrals project, which is administered by the Department of Defense Office of Hearings and Appeals.

Participation in mediation is voluntary. Agreements are mutually acceptable to the parties. If no agreement is reached, the original dispute process continues. Discussions and settlement proposals are confidential and are not used to influence a decision if the process goes forward. Settlement agreements are reviewed by civilian personnel and legal staff to assure regulatory and legal sufficiency.

The ADR program was developed to settle grievances, as delineated by the Negotiated Grievance Procedure (NGP) and the Administrative Grievance Procedure (AGP). Eight members of the bargaining unit and eight members of management are selected by their respective leadership. The sixteen-member team receives training in dispute resolution. Team members serve for a minimum of two years. Each ADR request is heard by a four-member panel (2 management/2 labor) from members of the ADR team. Mediation is the primary goal of ADR, however if that fails, arbitration through consensus settles the issue. Mediation/arbitration decisions of the panel are binding on all parties.

In Department of Agriculture, for example, Conflict Prevention and Resolution Center was created in 1996. The Program goals include: (1) creating an environment of open communication, (2) resolving concerns informally within shortened time frames, (3) building the capacity for employees to take responsibility for and learn from the resolution of conflicts, (4) providing opportunities for a wider range of creative solutions in the resolution of disputes, and (5) strengthen the ability of the agency to carry out its mission. About 1,500 people were trained in conflict management and communication skills, and interviews indicate a significant number of complaints and grievances were avoided as a result of mediation. When the parties are available, the CPR Program provides services within 2 weeks of initial contact.

In the Forest Service, the Early Intervention Program (EIP) was created to provide mediation and facilitation services on a nationwide basis to all agency employees. The Forest Service's 35,000 employees are responsible for managing 192 million acres of forest, grassland, and aquatic ecosystems. As the largest agency within the Department of Agriculture, the Forest Service also has the greatest number of discrimination complaints, which number in the hundreds yearly.

The EIP was developed as an alternative method for employees to address working relationship problems, some of which lead to the filing of discrimination complaints. There are both internal and external mediators available. Presently, about 70 Forest Service employees have been trained and have experience in helping resolve a variety of workplace conflicts. Externally, mediators can be obtained from other agencies, Federal Executive Boards, or from private mediation services.

The EIP has been fully implemented nationwide. The resolution rate for the EIP has consistently been over 80%, and the time elapsed from intake to mediation has averaged 21 days. The average cost for a mediation that lasts from 4-6 hours is about \$1,000 when an internal mediator is used, and about \$1,500 for an external mediator. In the Fiscal Year 1999, 459 contacts were made to the EIP. Of that number, 183 mediations were held.

The program of ADR of the Environmental Protection Agency (EPA) it has also been having great success. The Environmental Protection Agency used a variety of ADR processes to facilitate settlement of the General Electric Pittsfield case, involving the cleanup of widespread contamination of the Housatonic River in Massachusetts. The agency used mediation to facilitate settlement discussions between eleven parties including the EPA, General Electric, and other state and federal regulatory agencies. The team of mediators assisted the parties in reaching agreement on a wide range of difficult issues, including the cleanup of contaminated sediments and restoration of natural resources. Through ADR the case was settled with GE paying \$200 million in damages. Without the use of ADR, according to the EPA, negotiations among this large group of parties would have been very difficult.

ADR has also permitted the parties to fashion their own remedy, including elements that a court would not have been able to order on its own. For example, in order to ensure meaningful public input, a neutral facilitator organized and is facilitating meetings of a Citizens Coordinating Council. The Council is composed of representatives of local communities affected by the cleanup. Finally, the parties established a neutral peer review process to resolve conflicts regarding technical aspects of the required remedial activities.

The EPA has also used three different types of ADR to resolve the Helen Kramer Landfill federal and state litigation, concerning contamination at a hazardous waste site in New Jersey. EPA provided an internal convening professional to help the parties organize settlement efforts and retain a mediator. Two experienced mediators then assisted the parties in reaching an agreement on the allocation of costs associated with remedial activities at the site. Finally, the parties entered into mediated discussions with EPA to resolve their liability for site contamination. The complex convening and mediations involved more than 200 parties and third-party defendants, including forty-four municipalities. The resulting settlement totaled more than \$95 million.

In an article published in Negotiation Journal, Bourdeaux, O'Leary and Thornburgh concluded about the ADR in EPA: "After nearly two decades of practice, the EPA has elevated alternative dispute resolution from an experiment to a full-fledged program. The results of this study confirm numerous benefits of ADR which have long been purported in theory and espoused by practitioners"⁹.

3.3 The types of cases that are submitted for ADR

One the most important cases in which ADR was used is the Microsoft litigation. In 1998 Microsoft was accused of violations of antitrust laws. This case

⁹ Bourdeaux C; O'Leary; Thornburgh R. Control, Communication, and Power: A Study of the Use of Alternative Dispute Resolution of enforcement Actions at the U.S. Environmental Protection Agency. Negotiation Journal, April 2001, vol 17, pp. 175-191

demanded big resources from all sides. All sides litigated the case through a trial, an unsuccessful attempt by a judge to settle the matter, and, and appeal to the court. In court they agreed use an experienced private mediator. They worked together, under the guidance of the mediator, to explore possible settlement options. After two weeks, they emerged with a settlement, which the judge approved, although some states objected¹⁰.

Another example of successful ADR took place in U.S. Air Force. One dispute with Boeing had been pending for more than ten years before ADR was used. The claim involved \$785 million, and the interest charges also grew by thousands of dollar every day the dispute continued. They settled the case with ADR. The Air Force also used ADR to settle a contract claim against the Northrop Grumman Corporation involving \$195 million.

In the government contract area, ADR is important because these matters involve continuing relationship. Maintaining harmonious relations between the Defense Department and major supplier can be more important than the outcome of any single disputes between them. The Contract Disputes Act (CDA) specifically authorizes ADR in federal contract matters: “Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under chapter IV of chapter 5 of title 5, or other mutually agreeable procedures, for resolving claims”.

ADR has been applied in workplace cases too. There are more than 2.5 million federal civilian employees in the United States, so it is inevitable that many complaints against the government. In workplace case ADR is more appropriate than litigation, because they involve personal relationships. The ADR process requires the parties to work with each other to search for a solution to their common problems. This fosters cooperation between parties and offers a far greater chance of preserving a workplace relationship rather than litigation.

¹⁰ Senger, Jeffrey M, Federal dispute resolution: using ADR with the United States government. 1st ed. By Jossey-Bass

In the federal government, parties use ADR more in workplace cases than in any other type of dispute. Adjudication of workplace disputes is very expensive. Processing a simple workplace case costs the government a minimum of \$5,000 in administrative expenses, and a more complicated case that the agency formally adjudicates can cost up to \$77,000. When the government uses mediation in an employment case it is only \$1,077. Justice Department attorneys estimate that this expenditure saves the government an average of more than \$17,000 in litigation costs in each case. The Air Force estimates that it achieves cost saving of \$14,000 and a labor hour savings of 276 hours per case resolved.

An indicator of the success of ADR in handling workplace conflict is the finding that fewer new complaints arise once an ADR program is implemented. The year after the Postal Service instituted its ADR program, for example, complaints dropped by 24 percent. The following year, complaints dropped by another 20 percent. The Air Force experienced the same drops in its workplace complaints once it began using ADR.

3.5 – When ADR does not work

In spite of being applicable to the big number of cases, Office of Dispute Resolution establishes some criteria to select the cases for use of ADR:

When the government needs a precedent: Sometimes the government needs an appellate court to issue a precedent in case, perhaps because there are dozens more just like it coming along and you need a court to determine what the law is. It's very common in tax law.

Inflexible government policy: In certain cases, the government has an absolute, fixed rule that governs its actions. Disputes involving immigration laws fall into this category. ADR has little value when negotiation is impossible.

The government is pursuing a criminal investigation involving the same matter: In some cases the government may initiate both civil and criminal investigations

at the same time. ADR may be inappropriate in these matters until the criminal case is resolved.

A party is proposing ADR in bad faith: Sometimes parties seek to use ADR to obtain a tactical advantage, to delay the matter, “free discovery” or insight into the other side’s case.

3.6- Why the American government decided to use ADR

3.6.1 - Time and money savings: In American Government, while a traditional adjudicatory process in workplace case is resolved in an average of 465 days, using ADR this time goes down to 115 days. In federal civil court cases, Justice Department attorneys estimated time savings averages six months per case and 89 hours of staff and attorney time, where ADR was used. At the Department of the Air Force, the amount of time required to process an Armed Services Board of Contract Appeals case dropped by 50 percent after the agency started using a ADR program ¹¹.

3.6.2 - Creativity: The parties understand their needs better than anyone else, and they can develop options that may be worth much more to one party than they cost the other to provide. It’s possible create solutions that make both parties better off. By focusing on problem-solving rather than fault-assignment, the parties keep in mind a settlement frame rather than an adversarial one.

3.6.3 - Increase relationships and satisfaction: The litigation process forces people to attack each other’s positions and prove that they are right and other side is wrong. ADR allow parties to preserve their relationships by working together to resolve their disputes. After the U.S. Postal Service introduced ADR, the number of new workplace complaints dropped by 24 percent in the first year and continued to drop during the following year by an additional 20 percent. The U.S Postal Service believes

¹¹ Senger, Jeffrey M, Federal dispute resolution: using ADR with the United States government. 1st ed. By Jossey-Bass

this decline is due to increased communication between employees and supervisors as result of ADR. The agency conducted studies that show that close to 90 percent of ADR participants were highly satisfied or satisfied with results, while with adjudication processes only 45 percent were satisfied¹².

4 – The importance of Confidentiality

In ADR, confidentiality has vital importance. If the parties know that their statements will not be used against them later, they can speak freely. With confidentiality, the parties tend to be more secure, and are more willing to share detailed information about their interests, and may engage in the creative generation of option that can make settlement more likely. Without confidentiality protections, parties might be concerned that a neutral would reveal their confidential communications.

Therefore, when the government uses ADR, the confidentiality is not limitless. Citizens have a legitimate interest in knowing that programs are using public funds appropriately. When the American Congress passed the ADRA (The Administrative Dispute Resolution Act), providing for broad confidentiality for federal dispute resolution proceedings, it also passed a number of specific exemptions to ensure that protections are not unbounded.

According the act above, a neutral may disclose dispute resolution communications under one of the following conditions: a) if all parties and the neutral agree in writing to the disclosure; b) if a nonparty provided the dispute resolution communication, then the nonparty must also agree in writing to the disclosure; c) if the communication has already been made public; d) if there is a statute which requires it to be made public. Or a neutral may disclose a dispute resolution communication (or a communication provided in confidence to the neutral) if a court finds that the neutral's

¹² Senger, Jeffrey M, Federal dispute resolution: using ADR with the United States government. 1st ed. By Jossey-Bass

testimony, or the disclosure, is necessary to: a) prevent a manifest injustice; b) help establish a violation of law; or c) prevent harm to the public health and safety.

In order to require disclosure, a court must determine that the need for disclosure is of sufficient magnitude to outweigh the detrimental impact on the integrity of dispute resolution proceedings in general.

5) - The role of FMCS

In collective bargaining in public sector, it's important to talk about the role of the Federal Mediation and Conciliation Service. FMCS is an independent agency created in 1947 to assist in resolving collective disputes in the public and private sectors, and its mission has expanded to provide ADR service outside the workplace arena as well. Currently, more than two hundred mediators serve in seventy-five FMCS offices around the country. The FMCS also offers arbitration. The arbitration program uses approximately fifteen hundred private arbitrators selected based on their qualification, including their expertise in labor relations issues under collective bargaining.

Some data about ADR in American government:

STATISTICS

Components	ADR Processes Completed							
	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
Civil Division	60	90	85	94	116	245	170	269
Civil Rights Division	121	97	86	153	213	249	240	229
Environment & Natural Resources Division	45	23	112	103	99	121	200	129
Tax Division	14	131	85	94	120	142	125	101
Executive Office for U.S. Attorneys	269	890	1211	1356	2114	2058	2000	2138
TOTALS:	509	1231	1579	1805	2662	2815	2735	2866

Source: United States Department of Justice, available at www.usdoj.gov/odr/statistics/htm

The FMCS provides the following services to the public: a) collective bargaining mediation – initial and successor contracts; relationship development and training programs; b) arbitration Services ; c) grants promoting labor-management cooperation; d) training for labor and management by the FMCS Institute for conflict management; e) employment mediation; f) training and exchange programs for International Organizations and Governments.

National labor policy allows for the settlement of contractual disputes by arbitration. When conflicts arise over the interpretation or implementation of a contract provision, FMCS assists through voluntary arbitration. A professional arbitrator, acting in a quasi-judicial capacity, hears arguments, weighs evidence and renders a decision to settle the dispute, usually binding on both parties. On request, FMCS Arbitration Services provides the disputing parties with a “panel” of qualified, private labor arbitrators from which they select the arbitrator to hear their case. The FMCS holds annual Arbitrator Symposia where arbitrators have an opportunity to discuss and share the latest information about their profession.

In collective bargaining, voluntary arbitration is the preferred method of settling disputes over contract interpretation or application. Since its creation, FMCS has provided access to voluntary arbitration services. Rather than using full-time government employees, the agency maintains a roster of the nation’s most experienced private professional arbitrators who meet rigid FMCS qualifications. Upon request, FMCS furnishes a panel of qualified arbitrators from which the parties select a mutually satisfactory individual to hear and render a final and binding decision on the issue or issues in dispute. A roster of over 1400 private arbitrators, knowledgeable practitioners with backgrounds in collective bargaining and labor-management relations is maintained by the FMCS. FMCS charges a nominal fee for the provision of arbitrator lists and panels.

The FMCS computerized retrieval system produces a random panel of potential arbitrators from which the parties may select. Panels also can be compiled

on the basis of geographic location, professional affiliation, occupation, experience with particular industries or issues, or other criteria when specified by the parties. FMCS also furnishes current biographical sketches of arbitrators for parties to establish their own permanent panels.

To join the FMCS Roster, arbitrators must be approved by an Arbitration Review Board, which meets quarterly to consider new applicants for appointment to the roster by the FMCS Director. There is also an “arbitration user focus group,” which reviews and makes recommendations to the FMCS director on changes in Arbitration Service policies and procedures.

Arbitration Data:

Activity	2000	2001	2002	2003	2004
Panel Requests	16,976	16,594	17,282	17,332	16,382
Panels Issued	19,485	18,275	18,891	19,039	18,033
Arbitrators Appointed	9,561	8,706	8,335	8,595	7,875

Source: Federal Mediation and Conciliation Service, available at www.fmcs.gov

Outside the collective bargaining arena, FMCS provides employment mediation services to the federal sector and to state and local governments. These mediation services include resolution of employment-related disputes. The Administrative Dispute Resolution Act of 1990, the Negotiated Rulemaking Act of 1990, and the Administrative Dispute Resolution Act of 1996 expanded FMCS’s role as a provider of these services. FMCS provides consultation, training, dispute resolution systems design and facilitation services to many federal, state and local agencies.

The chart below represents FMCS' most significant employment mediation cases in the Federal sector (2004):

Federal Agency	Purpose of FMCS Involvement	Number of Cases Handled
Internal Revenue Service	Workplace and EEO complaints	158
Department of Homeland Security, Immigration and Customs Enforcement	EEO complaints	57
United States Postal Service	Non bargaining unit disciplinary cases and adverse action appeals and MSPB claims and REDRESS combined	848
Equal Employment Opportunity Commission	Internal and external EEOC cases	114
Health and Human Services, Office of Civil Rights	Age discrimination cases under ADA of 1975	185
Federal Bureau of Investigation	EEO complaints	36

Source: Federal Mediation and Conciliation Service, available at www.fmcs.gov

Employment mediation in the private and public sectors are reimbursable activities. The agency is compensated for travel, delivery and preparation time for each case handled.

Education and training in labor relations and conflict resolution are also an integral part of the Agency's mission. The FMCS Institute's primary mission is to offer training and education to labor and management practitioners in a classroom format that is structured, accessible, and convenient to individuals and small groups than the

site-based relationship development and training programs. The Institute offer classes covering the following topics:

- ? Mediation Skills for the Workplace
- ? Labor-Management Negotiations Skills
- ? Mediation Skills
- ? Workplace Violence Prevention and Response
- ? Becoming a Labor Arbitrator
- ? Arbitration for Advocates

Fees received for delivery of training services fund the Institute. All fees collected are utilized to recover expenses and administrative costs of the Institute. Training fees charged to customers are set at a level that allows the Institute to provide a professionally delivered product from one year to the next.

6 - Conclusion

Despite the improvements that are still necessary for the system, the use of ADR by the United States Government can be considered a success. As the French writer Victor Hugo once said, “*an invasion of armies can be resisted, but not an idea whose time has come*”. The time for the use of ADR has come. If disputes are sometimes unavoidable, this does not mean that the parties should necessarily be opponents. There is always a chance to negotiate and conciliate.

Some findings indicate that ADR in American government has been great success: in civil litigation, ADR resolved complaints in an average of 115 days, while the traditional adjudicatory process required an average of 465 days; Justice Department attorneys estimated time savings averaging six months per case where ADR was used and cost saved \$ 10,700 per case. In the U.S Air Force ADR saved \$ 40,000 per case for contract cases involving less than \$ 1 million and 250.000 for cases over \$ 1 million¹³.

US Federal Government has recognized out that it was wasting time and money on endless litigations and finally made a decision. This paper has shown that instead of advancing the adversarial model and increasing the number of judges and lawyers, the US Government has chosen to the use ADR mechanisms, which are innovative, efficient and cheaper than traditional methods. As it is possible to conclude from this experience, an administrations that insists on litigating at Courts of Law risks losing the focus of its mission. Time and money spent on judicial disputes could be used in other areas such as health care, education and public safety. It is necessary to be creative to manage with scarce resources.

Such experience in the use of ADR shows that it is not worthy to insist on the adversarial model of solving conflicts, and that it is necessary to look for alternative methods. It does not mean that the Brazilian Administration, or any other, should simply

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reproduce the North American experience with ADR. It might not work out. What is always useful, however, is to observe to what extent another country's public policy was successful or not in solving some problem.

Presently, the Brazilian Federal Government is the biggest client of the Brazilian Supreme Courts. The Federal Government is responsible for more than 70% of the judicial actions that reach the *Superior Court of Justice*. The numbers of lawyers in charge of defending the Federal Government in Brazil is incredibly high, reaching 8,000 attorneys. The adversarial model is so taxed that even the Special Federal Judicial Branches ("Juizados Especiais Federais"), which were recently installed to judge small claims, are only capable of doing the first hearing of conciliation a year after the initial request. At the present time, it takes more than two years to have a dispute solved at Brazilian courts. Shortly before the *Special Federal Branches* were installed, it was expected that it would take them no longer than three months to conclude such cases. These facts demonstrate that the solution is not to enlarge the adversarial model, but to avoid it.

Brazil can learn a few lessons from the North American model, even though it does not have a standing tradition with alternative methods of conflicts solution. One feasible approach is to start with a gradual movement to diffuse the culture of ADR inside the Brazilian Federal Government and Brazilian society, while observing the peculiarities of the judicial system in Brazil. We should not expect that ADR will solve all kinds of problems with the Brazilian Judicial System, nor that it will produce miraculous results in the short run. But, as the North American experience demonstrates, if this public policy is implemented consistently, it can produce significant results in the long run, and it could be useful to try it.

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