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The Role of the Government in ADR in the United States*

Richard L. WILLIAMSON†

There has long been an effort in the United States and elsewhere to find and utilize alternatives to litigation as a way to resolve disputes. The expenses and delays of litigation favor the growing use of these alternatives. Moreover, they can help obtain better processes and better outcomes, avoid "all win or all lose" situations, assure confidentiality, and utilize the expertise of the neutral party. Finally, as Asian societies have long recognized, litigation can severely harm existing relationships.

Understanding alternatives to litigation in the United States is complicated by our federal structure. Federal, state, and sometimes even local authorities may be the source of applicable law, have an important role in enforcing the law, or have jurisdiction over a dispute. This paper focuses on the role of government in alternatives to litigation, especially in settlement negotiations, mediation and arbitration. In that regard, a government can have quite different functions with respect to litigation alternatives: encouraging them, providing them, requiring disputing parties to use them, or itself being a participant as a party.

Governments in the U.S. have little role in settlement negotiations involving private civil disputes. In contrast, governments have sometimes provided mediators to assist private disputants, and in an increasing number of states, strongly encourage mediation by assigning trial dates only after mediation has failed. The governments in the U.S. have taken various steps to encourage arbitration, including a requirement in some cases that parties use involuntary, non-binding arbitration.

The situation differs when the government itself is a party. Governments are extensively involved in negotiations in the criminal context through the plea bargaining process. As for civil disputes, governments commonly enter into settlement negotiations and frequently take part in mediation. Outside the labor-management context, however, governments, and particularly the federal

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† Professor, School of Law, the University of Miami, USA. E-mail: rwilliam@law.miami.edu

government, usually avoid compulsory arbitration.

One important development at the federal level has been the use of "negotiated rulemaking". In the hope of obtaining better results and avoiding lawsuits, a neutral expert assembles representatives of a government agency and interested parties to negotiate the content of new regulations. This has proven useful in a number of cases, though it has not been a solution to the near-paralysis that sometimes plagues the regulatory state.

Governments in the U.S. should do more to encourage the use of alternatives to litigation, and in particular to put them on a even financial footing when compared with litigation, which is heavily subsidized. Additionally, governments should be willing to make even greater use of alternatives when they are a party to a dispute.