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Culture of Alternative Dispute Resolution (ADR) in Brazil: An Exploratory Study of Business Mediation from the Theory, Laws and Perception of Lawyers

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Abstract

Purpose: The purpose of this paper is to examine the current Brazilian scenario for resolving queries, the laws enacted and the participation of lawyers, including the studies they undertake in Brazilian law schools. This paper will focus on the extent of an ADR culture in Brazil analyzing the context of ADR's in Southeastern Brazil (São Paulo, Rio de Janeiro, Espírito Santo and Minas Gerais) after the period of the validity in 2016 of the Brazilian Civil Procedure Code (Law No. 13.105/2015) calling for judicial[1] mediation and stimulating ADR in Brazil up to 2017 (the year of data collection). An exploratory research was done. This study also seeks to 1) present the Southeastern Brazil data on the number of mediation sessions in order to identify the growth in the use of this method and 2) check the knowledge of Brazilian lawyers on the topic of ADR's. A bibliographic and an archival research were carried out followed by three field researches using quantitative methods. The first research was implemented on a total of 621 lawyers who responded through a questionnaire with: two variables focused on individual characteristics of the respondent, five variables on the lawyer's studies in negotiation/ADR, and ten variables on his/her professional activities. This questionnaire was designed to identify how lawyers actually negotiate and should serve to shatter the myth that adversarial bargaining is more effective and less risky than problem-solving. It is important to mention that some

[1]Mediation in court. Also called "court-connected mediation" by some authors as Adrian & Mykland, 2014.

elements were adapted to the Brazilian culture. The second inquiry was conducted on a total of 397 lawsuits forwarded to business mediation in Rio de Janeiro court from 2016 (91 lawsuits) through 2017 (306 lawsuits). The variables of this research were completely different from the lawyers' questionnaire. In this one, there were 6 variables on the characteristics of lawsuits and 8 variables on the agreement settled. The third study was also done in this court on a total of 270 lawsuits. This sampling was obtained at the center dedicated to the study of the judiciary at Fundação Getulio Vargas (FGV) that is responsible for doing CNJ's (National Counsel of Justice) reports, such as Supreme in Numbers—this report analyzes the processes in Brazilian Superior Court and Justice in Numbers. The research focused on agreements settled directly by parties without mediation. However, in this group, the data is compiled by sampling. During the study period of this thesis, 2700 lawsuits were initiated. FGV, using the software language MySQL, randomized 270 lawsuits (10%) which were analyzed by the author of this thesis based on the same elements and the previous inquiry. The analysis provided results on how ADR has been developed in Brazil. The possibility for generalizations has been confirmed for both inside and outside the courts. There is a movement for culture change and greater adoption of ADRs in Brazil. However, the paradigm shift has not yet been fully realized. The Brazilian Civil Procedure Code (Law No. 13.105/2015) calling for judicial mediation and stimulating ADR in Brazil increased the number of judicial mediation sessions. Lawyers are not familiar with the adoption of ADR as problem-solving and their acting is not seen as collaborative. This generalized performance measurement can be used in future research and for professional purposes in the ADR environment. The study also presents a comparison of business mediation done inside and outside courts.

Keywords

Business Mediation, ADR Brazilian Scenario, Conflict Resolution, Resolution CNJ nr 125/2010, Brazilian Lawyer, Multi-Door Courthouse in Brazil, Brazilian Law Schools

1. Introduction

Conflicts are innate to human beings (McIntyre, 2007). No matter the initial reason for a conflict (cultural differences, failure in communication, etc.), if it is neither resolved nor managed, the damages can be enormous. Cities can be destroyed, existing relationships can become tumultuous, and companies can be extinguished due to an improper policy or strategy for conflict management. No matter how meticulously a contract is designed, there is always a possibility that a conflict could arise (Jackson et al., 2003). A real-life situation cannot be entirely predicted when drawing up a contract. Therefore, conflicts are quite common in business contracts.

The election of the adequate method for resolving any grievance is extremely important, and the first necessary step to better handle these conflicts is to understand their origins and special features. Furthermore, recognition of the importance of handling conflict, mainly among business partners, can bring forth many benefits to a company, especially at the economic level.

In enacting Resolution No. 125/2010, the National Counsel of Justice (Conselho Nacional de Justiça, CNJ) demonstrated that it is stimulating the use of Alternative Dispute Resolution (ADR) in Brazil. While Brazil has made some substantial progress over the past 10 years elaborating laws and disseminating ADR concepts, it is appropriate to affirm that compared to most European countries[2] and the United States of America[3], Brazil still has a long way to develop the concept of mediation (and other ADRs) among its citizens.

The Constitution of the Federative Republic of Brazil (Brazilian Constitution) (Brazil, 2010) was promulgated in 1988 after a period of military dictatorship (1964-1985). Thus, it is very extensive (more than 300 articles) and details the many individual rights guaranteed to Brazilian citizens and foreign residents. It is considered as a "Citizen Constitution."[4] One of the principles guaranteed in this document is "access to justice". However, for many years, this principle has been interpreted as "access to the Judiciary". Access to the Judiciary can be interpreted as the legal right to make a claim for something in judicial courts. On the other hand, access to justice guarantees that no one will be condemned without the due process of law ensured by the Brazilian Constitution in article 5, LIV.

The interpretation that "justice is only achieved in the Judiciary" guided not only lawyers, but also the parties involved in conflicts, to demand answers/solutions in courts (both at the federal and state levels)[5] without trying to resolve these matters directly with the company/other party first. For this reason, the Brazilian judiciary is overloaded and expensive for society. At the end of 2017, there were 80.1 million lawsuits in courts (De Justiça, 2018: p. 73). Due to this enormous number of lawsuits, a quick and efficient final decision from the courts is exceedingly difficult to obtain, and the parties remain in dispute. In 2017, the total expenditure of the judicial system corresponded to 1.4% of the national Gross Domestic Product (GDP). The cost for the services of justice was R$ 437.47 per inhabitant[6].

This misunderstanding has been reinforced in law schools. Brazilian lawyers have been trained to litigate in courts and not to mediate or negotiate[7]. In gener-

[2]European Union stimulates ADR as identified by Prof Dr. Maud Piers (Piers, 2014).

[3]These countries stimulate ADRs for a long time. United States adopt the Multi-door courthouse, developed by Harvard Law School Professor Frank Sander, since 70's.

[4]As noted by William Prillaman (Prillaman, 2000: p. 8), Brazilian Constitution is "so prescriptive and detailed that it constitutionalized a staggering range of minor issues and flooded the courts—even the Supreme Court—with the most trivial cases."

[5]Brazilian Judiciary was studied in Meissner, 2015 and Dam, 2006.

[6](De Justiça, 2018: p. 56). According to a Brazilian economic newspaper (Journal Valor): US$ 1 = R$ 4,31. Available at https://www.valor.com.br/valor-data, captured on 08.28.2018, at 2pm.

[7]An interesting examine was done by Mariana Carvalho Alves in Rio de Janeiro, Brazil, in 2016, and the conclusion was that the great majority of lawyers did not study ADR in Law School (Alves, 2016).

al, the Brazilian culture has not encouraged the solution of a conflict without a judicial decision. However, this scenario started to change in December of 2018 due to a modification in Law Schools curriculum.

Since 2004, and in order to seek solutions, the CNJ has been organizing the main source of official statistics on the Judiciary, the Justice in Numbers Report. This report has been revealing the reality of the Brazilian courts, with many details of their structure and litigation, as well as the essential indicators and analyses to subsidize the Brazilian Judicial Management.

This misunderstanding related to the principle of access to justice has stimulated countless new lawsuits every year and the results, both in regard to the resolution of conflicts and satisfaction of the parties, have been deemed unsatisfactory.

The Justice in Numbers Report has demonstrated the critical situation of the Brazilian Judiciary; and the National Counsel of Justice, responsible for the management of the Brazilian judicial system, has had to implement a new strategy to avoid the continued increase in the number of lawsuits and to try to seek greater satisfaction for the parties involved.

This paper will focus on the extent of an ADR culture in Brazil analyzing the context of ADR's in Southeastern Brazil after the period of the validity in 2016 of the Brazilian Civil Procedure Code calling for judicial mediation and stimulating ADR in Brazil up to 2017 (the year of data collection). In consideration of the entire Brazilian scenario, this paper is divided into seven sections. Section 1 describes the theoretical background and development of the hypothesis H.1. There is a Brazilian ADR culture, H.2. Brazilian Civil Procedure Code (Law nº 13.105/2015) is causing an impact in the paradigm shift, H.3. Brazilian lawyers are actors who influence the use of ADRs Section 2 is dedicated to the research methodology. Section 3 represents the analysis and results. Section 4 discusses study findings. Section 5 presents implications for research and practice, denotes limitations and suggestions for further research and focuses on the author's conclusions. Finally, Appendixes present the measures used to collect lawsuit data, the questionnaire used in the survey directed exclusively at Brazilian lawyers, figures and tables.

2. Brazilian ADR Scenario

In this topic it will be studied the Brazilian Legal System, the implementation of Brazilian Multi-Door Courthouse and the legal education in Law Schools. It is important to examine how the Brazilian Legal System influences in legal education in Law Schools and consequently the relation between lawyer and Judiciary, that is, the primary mentality to litigate and initiate lawsuits.

2.1. Brazilian Legal System

Brazil is ruled by a Civil Law system[8]. Therefore, in order to implement the idea

[8]Considering that Brazil follows Civil Law, precedents are not used. However, mechanisms were created to try to standardize indemnity matters and values. It is clearly seen in the research done by Fernando Leal and Leandro Molhano Ribeiro (Leal & Ribeiro, 2016: p. 281).

of developing a new strategy to avoid the continued increase in the number of lawsuits and to seek a more effective way to achieve satisfaction for the parties involved, it was necessary to enact a specific law to implement the concept of the Multi-door Courthouse. Over the past twenty years, Brazilian professors and lawmakers have been particular interested in extrajudicial dispute resolution methods as part of a broader effort to better promote and guarantee the fundamental/constitutional right to access to justice.

It is necessary to clarify that ADR is not a new topic in Brazil; however, it is not completely prevalent.[9]

In November 2010, CNJ enacted Resolution No. 125 in order to establish this system in Brazil. In fact, this Resolution provides a National Judicial Policy for the adequate management of conflict of interests within the scope of the Judiciary[10]. All Brazilian Courts (at both state and federal levels) shall hereafter follow such dispositions.

This Resolution is important because it reinforces the idea that the constitutional principle of "access to justice" does not mean "access to the Judiciary" and provide the third wave of law renewal identified by Mauro Cappelletti and Bryan Garth (Cappelletti & Garth, 1988).

On the contrary, it stimulates the consolidation of an adequate dispute resolution system. Furthermore, this Resolution indicates that this appropriate dispute resolution system is considered public policy because of the results it can achieve, that is, social peace, the reduction in number of lawsuits, the improvement of personal and businesses relationships, and the resolution of conflicts between parties for the benefit of the whole society[11]. Further, Kenneth Dam's analysis (Dam, 2006), corroborating Prillaman's research (Prillaman, 2000), indicates that the "unfettered access for everyone had produced, not surprisingly, access for no one." (Dam, 2006)[12]

As mentioned before, Resolution No. 125/2010 was not the first law to mention ADR in Brazil. However, it was the first to treat the whole system of conflict resolution as a unit and consider it a matter of public policy and to introduce the Multi-door Courthouse concept in Brazil, as it will be seen in the next topic. This is the reason for its significance. The constitutional principle of "access to justice" was well applied in this Resolution.

In 2015, Law No. 13.140 was published presenting two types of mediations: judicial and extrajudicial. The new Brazilian Procedural Civil Code also regulates mediation in lawsuits. In fact, the year of 2015 can be considered a benchmark

[9]Brazilian Constitution, enacted in 1824; Law No. 556, enacted in 1850; Law No. 9.307/1996; Law No. 9.099/95; Law No. 5.869/1973; National Counsel of Justice Resolution No. 70/2009.

[10]As observed by Steven Shavell (Shavell, 1997: p. 576), "alternative dispute resolution has been widely promoted as a general and desirable substitute for litigation."

[11]An interesting study to identify why traditional (that is, not judicial) methods have continued to be relevant in the administration of justice in Nigeria can be seen in Igwe, Udube, & Constance, 2020. Another interesting investigation was done in Portugal (Mesquita & Cebola, 2020).

[12]p. 14. This phenomenon is also described by Patoari, Nor, Awang, Chowdhury and Talukder (Patoari, Mohd Nor, Bin Awang, Chowdhury, & Talukder, 2020).

year for the development of ADR in Brazil. In addition to the enactment of these two laws, there was another Law No. 13.129/2015 which provided improvements to the Arbitration Law enacted in 1996.

All these statutes can be seen as the enforcement of this public policy implemented by the CNJ in Brazil. The Brazilian legal system, that is, the Civil Law system, demands the enactment of laws in order to compel people to practice certain actions and to create a culture. Besides, it is necessary to promote these regulations throughout society and with one of the principal players in courts: lawyers.

2.2. The Brazilian Multi-Door Courthouse

The University of St. Thomas ("UST") International ADR Research Network sponsored a study related to ADR and Brazil was selected to participate. UST created a forum for a meaningful participation on the subject of how conflict is resolved at both the public and private spheres in Brazil (Crespo, 2009).

This research study was done in 2006 and was significant in developing the concept of the Multi-Door Courthouse in Brazil and realizing the need for its implementation. Resolution No. 125/2010 is a direct consequence of such research.

In 2010, the concept of the Multi-Door Courthouse, developed by Harvard Law School Professor Frank Sander, was implemented in Brazil through Resolution No. 125, enacted by CNJ. The "multi-door courthouse—a multifaceted dispute-resolution model currently used in several settings in the United States and abroad" (Crespo, 2008) was seen as a necessary methodology to be implemented in Brazil in order to both diminish the number of lawsuits and achieve greater satisfaction among the parties, and to provide welfare to the community, among other things. In its preamble, this Resolution describes the Brazilian scenario in order to reinforce its enactment.

In Professor Frank Sander's concepts (Sander, 1976), the idea is to look at different forms of dispute resolution—mediation, arbitration, negotiation, and med-arb (a blend of mediation and arbitration) and speculate whether it is possible to work out some kind of taxonomy of which disputes ought to go where and which doors are appropriate for what disputes. The multi-door courthouse is a simple idea but it is not easy to execute because it is difficult to decide which cases go to what door.

In order to indicate the best ADR method, it is necessary that the lawyer, one of the main actors in solving problems, be prepared for using the multi-door courthouse. Law Schools must prepare this professional to promote the fundamental right to access to justice.

2.3. III Legal Education in Brazil

A lawyer is one of the main actors in the conflict scenario and, considering the quantity of lawsuits in Brazilian Courts, it has been noticed that he is not pre-

pared to deal with all the potential methods of solving a conflict. In fact, the tendency is to call him when the conflict has been escalated (Ellickson, 1986: p. 683). The majority of Brazilian law schools teach the students (future lawyers) the "traditional law", that is, to continue working with the Estate/Judiciary (Engelmann, 2006: pp. 29-30). Since the Imperial Era[13], the major concern was to support and occupy carrier in public area, instead of creating a market advocacy whose characteristics are independence and opposition of the Estate. The proclamation of the Republic was not enough to formally break with the imperial model of this pattern of social and political insertion by jurists. It was also not enough to change the characteristics of legal education adopted in imperial law schools (Engelmann, 2006).

In Brazil, law firms do not proceed in a major way to redefine the rules of operation of the legal world, as in the United States where the wide use of justice "outside the state" is visible, with the use of arbitration being carried out by lawyers who are not linked to the traditional institutions of the Judiciary. Consequently, this change implies the recruitment of "new lawyers" disconnected from the traditional practice of law (Engelmann, 2006: pp. 29-30). Due to the Brazilian tradition of political dominance of law graduates and the construction of state justice strongly based on positive law (Civil Law), the legitimation of practices and ideas related to arbitration involves a strong political and symbolic battle.

This change in professional habits in the legal world, that is, the willingness to also seek justice "outside the state", creates tension in relation to groups of traditional lawyers (those used to litigate in courts), because it is necessary to redefine the profession and the legal deontology.

The historical pattern of overlapping the public and private spheres makes it difficult to visualize an autonomous advocacy scenario capable of redefining the traditional rules of its practice and consequently of the legal order (Engelmann, 2006: pp. 30-31). In Latin America, there is no American-style law firm that is independent from the state (Engelmann, 2006: pp. 30-31). In Brazil, ADR disciplines became mandatory in law schools lately in December, 2018[14]. Since 1827 (first law school in Brazil) till the end of 2018, there was a more traditional training trend for law students in Brazil: to litigate in courts instead of mediate or negotiate.

Changes in the teaching of law began to emerge in the 70s and 90s due to the promulgation of the new Brazilian Constitution and the emergence of "new rights" (such as consumer rights, human rights, environmental law, etc.); thus, generating a "judicialization of social life" (Engelmann, 2006: p. 42).

The professionalization of the university career in the Brazilian legal universe became visible in the 90's, since it is required that there are scholars/professors (PhDs and Masters) and not only militants in the Judiciary, whose main focus is

[13]First Brazilian law schools: Universidade de São Paulo and Universidade de Olinda (August, 11th, 1827).

[14]Resolution No. 5 of December 17, 2018 establishes the National Curricular Guidelines of the Undergraduate Course in Law and other measures.

the lawsuit and procedural civil law since Brazilian structure adjudicative dispute resolution is based on an adversarial approach (Engelmann, 2006: pp. 78-79). The lawsuit context for lawyering practice assumes a win/lose outcomes depending on a lawyer's attitude. The types of strategies and attitudes implicated by the pit bull and bulldog analogies are still widely regarded as appropriate and even as the normative lawyering behavior (Macfarlane, 2008: p. 13).

As mentioned, in Brazil, the wide use of justice "outside the state" is not visible, with the use of ADR being carried out by lawyers who are not linked to the traditional institutions of the Judiciary.

Julie Macfarlane (Macfarlane, 2008) confirms that in order to satisfy client expectations, which focus on value for money and practical problem solving rather than on expensive legal arguments and arcane procedures/language, the traditional idea of the lawyer as a "client's rights warrior" must change. The author identified that the role of the lawyer was dramatically altered by some reasons, such as the increasing use of negotiation, mediation, and collaboration in resolving lawsuits. She also added to these reasons a 98 percent civil settlements rate.

This author (Macfarlane, 2002: p. 4) also highlights that a "lawyer's role is itself continuously shaped and reshaped by the social and economic interests served by law." Besides, lawyers must adapt to survive. And on the other hand, lawyers play a critical role in legitimizing new ideas and practices because they are the clients' link of trust.

Julie Macfarlane (Macfarlane, 2002: p. 10) emphasizes that "local legal culture is more than simply differences in formal rules or practices but reflects a 'how we do things here' perception in relation to particular rules and practices." Considering that one of the main factors involved in conflicts is the lawyer, mainly in courts because of Brazilian Civil Procedure Code, his culture must be studied.

Considering that the discussion and studies about ADR are recent in Brazil, the most four known ADR methods used in business scenario and with legal norms are arbitration, conciliation[15], mediation, and dispute boards[16].

2.4. The Dissemination of Brazilian Multi-Door Culture

Most of the time, lawyers are the first professionals to be consulted by those who are seeking a solution to a problem. These professionals are "the dominant players in the adversary system" (Nolan-Haley, 1998).

The last Undergraduate Report published by the Brazilian Ministry of Education, which monitors this area, showed that there are almost 1010 law schools[17] in Brazil, and there are more than 1 million lawyers registered in the Brazilian Bar Association. However, ADR disciplines only became mandatory in law

[15]It can be seen that, in Brazil, the distinction made by James Wall and TC Dunne (Wall & Dunne, 2012) has been adopted.

[16]A municipal law in São Paulo (Law No. 16.873/2018).

[17]Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira. Sinopse Estatística de Educação Superior 2018. Brasília: Inep, 2019. Available at http://portal.inep.gov.br/basica-censo-escolar-sinopse-sinopse, in 08.04.2020.

schools in December, 2018. The Brazilian Ministry of Education did not require ADR disciplines for those who would be consulted to help clients seek solutions until recently. On the contrary, while there were many mandatory disciplines detailing how to litigate and go to courts, there were no mandatory disciplines encouraging negotiation or resolution of queries outside of judicial courts[18].

Some law schools were offering ADR disciplines, but as elective courses. Sometimes lawyers would become familiar with the Multi-Door Courthouse concept years later, during a post-graduate course. This gap in lawyers' education did not incentive the development of an ADR culture in Brazil.

In order to stimulate the dissemination of the Brazilian Multi-Door Courthouse concept, some procedures are being developed, such as: 1) Some law schools were promoting ADR in their undergraduate courses even before the Brazilian Ministry of Education determination[19]. 2) Many Brazilian institutions are offering ADR courses for those who want to study these institutes. There are courses offered by private institutions and by the Judiciary for those who want to be judicial mediators. 3) Moots competitions[20]. 4) ADR committees[21] to exchange knowledge and to study the possibilities for implementing ADR institutes in the Brazilian scenario. 5) There are many good quality independent initiatives/ projects posted on the internet. Many university professors, judges, and ADR professionals are posting their projects on the internet to promote ADR institutes and spread knowledge[22]. 6) Mediation Pledge (Pacto de Mediação)—it reflects the commitment of its signatories (actors of various segments of the economy) to prioritize consensual mechanisms in addressing conflicts, such as mediation, conciliation, and negotiation[23]. Lastly, 7) ADR campaigns and booklets advocating these institutes[24].

Once the necessary context for understanding the ADR's in the international and national context (Brazil) has been carried out, it is time to present the empirical research carried out, since based on the collected reality data it will be possible to relate the collected bibliographic base and to analyze in practice how

[18]A recent study published indicates that the third (mediator and conciliator) recognizes that the client trusts in his/her lawyer. This same study concludes that lawyers are not prepare for ADR and it is important to teach in Law School (Ventura, 2019: p. 170). Available at https://www.migalhas.com.br/arquivos/2019/7/art20190717-05.pdf, captured on 07.24.2019, at 11:50 pm.

[19]Example: FGV DIREITO RIO, PUC-Rio.

[20]This is a competition among universities. Greg Bond (Bond, 2013) participated as a collaborator in the ICC Mediation Competition in 2013, and passed along the experience, identifying the importance of such an event.

[21]Such as: Brazilian Arbitration Committee, created in 2001 (Available at http://cbar.org.br/site/en/objetivos-do-cbar/, captured on 06.19.2018, at 5 pm) and National Council of Mediation and Arbitration Institutions (CONIMA), created in 1997 (Available at http://www.conima.org.br/quem_somos, captured on 06.19.2018, at 5 pm).

[22]Example: In this lecture, Robert Bordone from Harvard Law School was invited to talk about design system disputes for Brazilian Courts (available at https://www.youtube.com/watch?v=aEFHz154mpw&t=2196s, captured on 20.02.2019.

[23]More information about it at available at http://cbma.com.br/us/, captured on 09.05.2018, at 4 pm.

[24]Examples: http://www.oabrj.org.br/arquivos/files/-Comissao/cartilha_mediacao.pdf; http://www.conima.org.br/arquivos/4224 (this one is especially for lawyers);

the ADR culture in Brazil is developing.

3. Methodology

This topic presents the methodology used in this research for the purposes of analysis of the data collected in empirical research.

An exploratory study was done. A bibliographic (national and international authors) and an archival (public and private reports) researches were carried out followed by three field inquiries in Southeastern Brazil after the period of the validity in 2016 of the Brazilian Civil Procedure Code calling for judicial mediation and stimulating ADR in Brazil up to 2017 (the year prior to data collection). Quantitative methods were used to measure the use of ADR, as explained below.

Two studies were done in Southeastern region courts. The first one was related to lawsuits that were sent to judicial mediation. The second inquiry was lawsuits which agreements settled directly by parties without mediation. The third research with Brazilian lawyers was conducted on a total of 621 respondents during the period stretching from January 28 to March 31, 2019, using an online questionnaire.

We used the software R (version 3.5.0) for the analyses. An exploratory descriptive analysis of the data is necessary.

Further details about methodology used in these researches will be presented in the next items.

3.1. Data Collection and Sample Characteristics—Empirical Research in Brazilian Courts

1) *The first research: lawsuits that were sent to judicial mediation*

Preliminarily, it is emphasized that because mediation is a procedure that has the principle of confidentiality, the possibility of a detailed analysis of extrajudicial mediations has been ruled out. However, it was possible to obtain generic information directly in private chambers' website and reports.

Therefore, for the purposes of this research, the option was to analyze only judicial mediations because lawyers have access[25] to lawsuits. The elements analyzed are detailed in Appendix 1, which are: 6 variables on the characteristics of lawsuits and 8 variables on the agreement.

Therefore, the research restricted its analysis to the courts of the Southeastern region, which covers the states of Minas Gerais, São Paulo, Rio de Janeiro and Espírito Santo due to the economic and business importance of this Brazilian area, as mentioned before. The researcher contacted all four of the Judicial ADR centers of Southeast Region, but just the one in Rio de Janeiro (CEJUSC-Capital, located at Beco da Música, 121, room T06, Centro, Rio de Janeiro/RJ) provided data that was detailed enough to allow for study[26]. Rio de Janeiro's ADR center organized a list containing the number of all lawsuits (capital and counties) that were dispatched to mediation in 2016 and 2017 by the business courts[27].

[25]Brazilian Civil Procedure CodeArt. 11 (Alvim & Didier Jr., 2017) and Law No. 8.906/1994.

[26]A written request was necessary. The administrative process is No. is 2017-0209390.

[27]Rio de Janeiro State Law No. 6.956/2015 classifies business matters.

This period was chosen for this study because of the following reasons:

The Brazilian Civil Procedure Code calling for judicial mediation was enacted in 2015, but its validity started in March 2016 (article 1.045), and

It is necessary to identify if the requirement for mediation has an impact on the judiciary.

After receiving the list, all lawsuits were analyzed. It was necessary to identify those could be studied by the purpose of the research. The lawsuit can be either filed electronically or physically[28]. It is possible to see the lawsuit's status through the court's website[29], except for those classified as confidential by the court (Brazilian Procedure Civil Code Art. 189).

Considering that parties can participate in a mediation session more than once[30], it was necessary to identify lawsuits individually. Furthermore, 11 lawsuits were excluded from the 2017 database because of some inconsistency (an incorrect number was mentioned on the list granted by the Judicial Center). In the 2016 list, the excluded number of cases was 5. In total, 16 lawsuits were disregarded.

As 5 lawsuits (zero in 2016 and 5 in 2017) were classified as confidential, it was not possible to analyze them. Therefore, they also had to be excluded from the database. Another group of cases had to be excluded: 194 lawsuits in which no mediation occurred either because of the absence of a party or because the mediation was cancelled by the judge. This study did not focus on the reasons for such a cancellation.

2) ***The second research*: *lawsuits which agreements settled directly by parties without mediation***

Another study was done in these courts: the agreements settled directly by parties without mediation. However, in this group, the data is compiled by sampling. This sampling was obtained at the center dedicated to the study of the judiciary at Fundação Getulio Vargas (FGV) that is responsible for doing CNJ's reports, such as Supreme in Numbers—this report analyzes the processes in Brazilian Superior Court and Justice in Numbers[31]. During the study period of this thesis, 2700 lawsuits were initiated. FGV, using the software language MySQL, randomized 270 lawsuits (10%) which were analyzed by the author of this thesis based on the same elements (**Appendix 1**).

[28]Law No. 11.419/2006—regulates electronic lawsuits in Brazil. The author's access was complete to the electronic copies, except to those classified as confidential. A request was made to the court, but the authorization was not granted during the period of the analysis of this research. On the other hand, just one physical lawsuit with an agreement was available for analysis (9 lawsuits were sent to court files (the matter was resolved) and 6 lawsuits were in judges' chambers for analysis. This research was done for the period of August 7-21, 2018.

[29]http://www.tjrj.jus.br/.

[30]Brazilian Code of Civil Procedure. Article 334, paragraph 2. It was observed that the average per lawsuit in 2017 was 1.34 sessions before settling on an agreement. In fact, in 122 lawsuits the parties met more than once. In 2016, it was 2 sessions before settling on an agreement. In fact, in 8 lawsuits the parties met more than once.

[31]Information about this report is available at https://www.cnj.jus.br/pesquisas-judiciarias/justica-em-numeros/, captured on 03.08.2019, at 3 pm.

3.2. Data Collection and Sample Characteristics—Lawyers' Questionnaire

The research with Brazilian lawyers was conducted on a total of 621 respondents during the period stretching from January 28 to March 31, 2019, the following methodological path was followed:

The first step was to find out how many lawyers had registered in Brazil. The number enrolled in the Brazilian Bar Association is 1,117,056 and this information is available on the official website[32]. It is noteworthy that in this item it was possible to have a larger sample, not just from the Southeastern region. Knowing the number of lawyers, it was necessary to stipulate the number for the sample to be reliable (as second pace). Absolute and relative frequencies were used to describe the categorical variables. The mean, standard deviation, and 95% confidence intervals were used to describe the quantitative variables (Triola, 2008).

For the sample calculation, the proportional estimation method was used for infinite populations (Bolfarine & Bussab, 2005). The expression for the sample size for estimation of proportions for finite populations is given by:

$$n = \frac{p(1-p)z_{\alpha}^{2}}{B^{2}}$$

To obtain a sampling error of 4%, the determined N was 600. Accordingly:

a) z_{α} is the percentile of the normal distribution corresponding to the level of significance α;

b) p is the proportion of answers to a given question;

c) B is the margin of error.

The third step was sending the questionnaire to lawyers across the country through Brazilian Bar Association. This questionnaire 1) was designed based on research done by Andrea Kupfer Schneider to identify how lawyers actually negotiate and should serve to shatter the myth that adversarial bargaining is more effective and less risky than problem-solving (Schneider, 2002) and 2) contains 2 variables on the characteristics of responding individuals, 5 variables on a lawyer's studies in negotiation/ADR, and 10 variables on his/her professional activities (detailed in **Appendix 2**). The last variable[33] was based on the profiles identified by Yann Duzert and Ana Tereza Spinola (Duzert & Spinola, 2018: pp. 41-50).

621 lawyers from several Brazilian states answered the questionnaire, ratifying the validity of the research, as described above.

4. Data Analysis

4.1. Empirical Research in Brazilian Courts

The object of the present research was the Courts of the southern region of Bra-

[32]Available at https://www.oab.org.br/institucionalconselhofederal/quadroadvogados, captured on 02.07.2019, at 3 pm.

[33](Considering your experience as an impartial third party, how do the lawyers participating in these methods behave? For this question, consider the last case in which you acted as an impartial third party).

zil. According to Resolution CNJ No. 125/2010 (chapter III) and the Brazilian Civil Procedure Code (article 165) each court must create ADR centers. In 2017, there were 982 centers in Brazil (De Justiça, 2018: p. 137) as seen in **Figure A1 Appendix 3**. In the Southeast Region, the number was 380, as seen in **Table A1 Appendix 4**. This number is increasing each year, according to CNJ's annual report.

The researcher contacted all four Southeastern region Judicial ADR centers, but just the one in Rio de Janeiro (CEJUSC-Capital, located at Beco da Música, 121, room T06, Centro, Rio de Janeiro/RJ) provided data that was detailed enough to allow for study, as mentioned before.

In 2016, a total of 191 sessions were held in the state of Rio de Janeiro corresponding to 136 lawsuits. Out of these cases, 8 had more than one session. In addition, 5 lawsuits were declared non-existent and 40 were not mediated. Therefore, the number of final proceedings, that is, the number of cases that had mediation was 9.

In 2017, a total of 639 sessions were held in the state of Rio de Janeiro corresponding to 476 lawsuits. Out of these cases, 122 had more than one session. In addition, 11 lawsuits were declared non-existent, 9 had out-of-mediation agreement (it is not the focus of this paper), 1 was still in mediation, 1 resulted in a personal bankruptcy, 5 were in court (judge's chamber for analysis), 117 were not mediated, 37 were withdrawn from the agenda, and 5 involved public administrations (it is not the focus of this paper). Therefore, the number of final proceedings, that is, the number of cases that had mediation was 290.

It was necessary to select the lawsuits in which the agreement was settled in mediation. In 2016, out of 91 lawsuits, agreement in mediation occurred in 20 (70% electronic and 30% physical). In 2017, out of 290 lawsuits, agreement in mediation occurred in 52 (78.8% electronic and 21.2% physical). These lawsuits are the object of the research as observed in **Table A2** further presented in **Appendix 4**.

The agreements in which public institutions (Government Attorneys Office and Public Defense) participated (5 lawsuits, 1.6%) were excluded from the economic data base because these institutions cannot seek profits. Their objective is to guarantee citizens' rights. They file public-interest civil actions to make claims for it. However, it is remarkably interesting to observe that these institutions are actually settling agreements. This can be a subject for future research.

One lawsuit related to self-failure was also excluded because the objective of this lawsuit was to declare the failure of a person.

Another group was analyzed separately: those agreements (44.6%) classified as "without monetary value" as demonstrated in **Table A1**, **Appendix 4**, that is, an agreement was settled without monetary value. However, this group will be considered later on because it demonstrates that there was another value that was dominant in the settlement, otherwise, the parties would not have agreed and ended the conflict. Unfortunately, this "dominant value" was not indicated in

those agreements to allow for analysis.

Despite the absence of an indication of the "dominant value", this is relevant because it reinforces what was mentioned earlier: it is not always that a monetary value prevails. The parties will contemplate the value of each decision considering many aspects, but in the end, the parties settled on an agreement due to some perceived value. This also indicates that in mediation, the parties can decide differently from what was claimed in the complaint brief.

The impact in Rio de Janeiro's court—It can be observed that the article in Brazilian Civil Procedure Code establishing mandatory judicial mediation caused an impact in Brazilian courts. As it can be seen in Table A2 and Table A3 **Appendix 4**, which indicate the number of lawsuits sent to CEJUSC-Capital in the years of 2016 and 2017.

As can be noted, in 2016 only 191 lawsuits were dispatched to Rio de Janeiro's Judicial ADR Center, while in 2017, the number was 639. The increase was 334.5% after the law determined that judicial mediation was mandatory. In the first year of the new Civil Procedure Code, the number of mediation sessions has considerably increased. The direct impact of the article 334 can be observed.

Therefore, H.2. Brazilian Civil Procedure Code (Law No. 13.105/2015) is causing an impact in the paradigm shift is valid.

The type of lawsuit containing a settled agreement—Another characteristic that must be mentioned is the type of lawsuit containing a settled agreement: electronic or physical (paper). 76.4% of lawsuits were electronic and 23.6% were on paper. Table A4 **Appendix 4** indicates this percentage by year.

It is interesting to highlight that since 2007, the Brazilian lawsuits are submitted in an electronic format. Considering that, this data indicates that **the highest chances to settle an agreement are not in lawsuits that are on paper, that is, those initiated before 2007, but in the electronic.**

Extrajudicial mediation

As mentioned before, the confidentiality principle in business mediation is a delimitation of this research. However, the generic information obtained in websites and directly in the private chambers exemplify the actual scenario.

It can be observed in Table A5 **Appendix 4** that the number of extrajudicial mediation has also been increasing in private chambers[34].

These data demonstrate the lack of an ADR culture in Brazil. Regarding the extrajudicial scenario, mediation institutions, as seen in Table A5 **Appendix 4** still have little data to share on the subject. The research done in the three prestigious chambers in São Paulo by Daniela Gabbay (Gabbay, 2018: p. 4) indicated that 51 mediation procedures occurred in 2016 and 45 in 2017 in these chambers. These numbers demonstrate a timid move by the business sector to resolve conflicts without seeking the Judiciary.

Due to the impossibility of a direct and effective survey in the private mediation chambers, it was necessary to conduct a survey that could present more data

[34]Information available at https://www.camaradearbitragemsp.com.br/pt/mediacao.html and https:/www.camarb.com.br, captured on 07.05.2019 and by email.

to compose the empirical understanding of the culture of ADRs in Brazil, so a questionnaire was made, as already outlined in the section methodology, and the results will be presented next.

Despite the fact that it is not possible to know the exact number of extrajudicial mediations (institutional and *ad hoc*), relevant information that can be used to understand this scenario can be found in lawyers' participation. According to the research, the annual average percentage per lawyer's participation is extremely low, as it will be demonstrated in the next items in Table A8 **Appendix 4**: 2.43% extrajudicial institution and 1.81% *ad hoc*.

4.2. Lawyers' Questionnaire

As mentioned before, confidentiality is a delimitation to obtain direct and effective survey in the private mediation chambers; therefore, it was necessary to conduct a survey that could present more data to compose the empirical understanding of the culture of ADRs in Brazil. The results of the lawyers' questionnaire are presented below.

It is worth highlighting that according to Table A6 and Table A7 **Appendix 4**:

1) 96% were 20 to 59 years old, and the majority (65%) with 6 to 25 years of practicing experience

2) 57% were females

3) The most frequent types of practicing were represented: external lawyer (42%), sole practitioner (31%), internal lawyer (16%), and public lawyer (8%)

4) All five Brazilian Regions were represented in the research, mainly the Southeast (72%) which is the object of this research

5) Only 66% of the respondents had negotiation training

6) 88% of the respondents did not study negotiation at law school

7) 49% of the respondents studied negotiation in another ADR course (for instance, there was a topic about negotiation in a mediation course)

8) Just 12% took negotiation classes at law school

9) 99% of those who did not take negotiation classes at law school responded that these classes were not offered

10) 66% of the lawyers had a technical background in negotiation out of college (17% was specifically on negotiation)

11) 39% of the respondents had no interest in acquiring negotiation training

12) 47% of the respondents never participated, as lawyers, in an institutional extrajudicial mediation

13) 55% of the respondents never participated, as lawyers, in an ad hoc extrajudicial mediation

14) 35% of the respondents never participated, as lawyers, in a judicial mediation

15) 72% of the respondents never participated, as lawyers, in an arbitration

16) 87% of the respondents never participated, as lawyers, in a dispute board

17) 47% of the respondents, when acting as an impartial third party in an ADR process, identified that lawyers did not act in a "win-win" approach.

From the data collected it was possible to notice that lawyers are not resolving clients' conflicts by ADR. This can be understood as a reflection of legal education, since there is no stimulus in initial training in Brazilian Law Schools there is a probability of teaching lawyers to be competitive and mostly litigious for almost 200 years now. In Table A8 **Appendix 4**, it can be noticed that the average percentage of a lawyer's participation per year is incredibly low.

To corroborate the data collected, the researcher considered the specialties of the respondent lawyers, as shown in Table A9 **Appendix 4**. It was possible to conclude that 77% were focused into four main specialties: business (34%), civil (24%), family (10%), and labor (9%). An additional 41 specialties were identified, but due to the objectives of this research, they were not considered.

An interesting finding was the lawyer's objective in a negotiation and his/her attitude as observed by the impartial third party (mediator, arbitrator, etc.). As described in Table A10 **Appendix 4**, 71% of the respondents indicated that their primary objective was to achieve a fair agreement. However, in the opinion of lawyers acting as an impartial third party, 47% had the impression that the lawyer adopted a win-lose policy, as demonstrated in Table A6 **Appendix 4** that presents a descriptive analysis off lawyers' characterization.

As seen, it was possible to notice that lawyers are not resolving many clients' conflicts by ADR and one of reasons is the lack of knowledge of those methods and the appropriate use of them. **Therefore, it is not valid to affirm that: H.3. Brazilian lawyers are actors who influence the use of ADRs.**

The item below studies the method most known in business scenario in Brazil.

4.3. The Application of the Brazilian Multi-Door Concept

In this topic, the methods that will be studied are: Arbitration, Mediation (judicial and extrajudicial) and Dispute Board due to the validity of legislative norms, mentioned in this paper. The conciliation will not be studied because it is already studied in the Justice in Numbers report.

It is important to present research carried out on the application of the Brazilian concept for Multi-doors Courthouse, such as the Global Pound report[35]. According to this report, 64% of research participants in Latin America believe that the main obstacle/challenge parties face when seeking to resolve commercial disputes is insufficient knowledge of the options available (Global Pound Organization, 2018: p. 25). As identified by Robert Ellickson (Ellickson, 1986: pp. 667-668), "legal knowledge is imperfect because legal research is costly and human cognitive capacities are limited".

The first method to be analyzed will be arbitration due to its recognition in Brazil, as demonstrated below.

Analyzing a recent research study (period of data collection: 2010-2016) done

[35]Available at https://www.globalpound.org/, captured on 07.18.2018, at 5 pm.

by an arbitrator (Lemes, 2017), it can be observed that arbitration is recognized in Brazil mainly because of the constitutional declaration of the Arbitration Law. The six most prestigious[36] Brazilian ADR Chambers were surveyed and the conclusions were:

1) In 2010, the number of arbitrations in the 6 chambers surveyed totaled 128 new cases. In 2016, there were 249 new arbitrations, representing an increase of almost 95% in the number of new incoming cases.

2) For the entire 7 years period between 2010-2016, the number of arbitrations in the six chambers surveyed came to a total of 1292 new incoming cases.

3) In 2010, the monetary values involved in arbitration in the six chambers surveyed totaled R$ 2.8 billion and in 2016 reached R$ 24.27 billion. It is noted that the values involved in arbitrations increased exponentially (almost 9 times). During this seven years period, the total monetary values calculated in these 6 chambers were more than R$ 62 billion.

In the arbitration field, Brazil stands out and is internationally recognized. The International Chamber of Commerce—ICC released its 2017 statistics detailing the Latin American results[37], and it can be observed that "Brazil rose to 7th place in case rankings worldwide, with 51 cases compared with 36 in 2016."

São Paulo, a Brazilian city and the financial center of the country, was elected to hold one of ICC's offices because of the Brazilian scenario. This city was also elected to hold a Global Pound Conference in 2017, an essential conference about ADR.

These research studies confirm Brazil's importance in the international ADR scenario, mainly in Latin America. Even with the existence of a specific law for arbitration, the proliferation of cameras specialized in ADR and the transfer of internationally standardized organization models, the monopoly of jurisdiction in the case of arbitration remains with those who own the legal capital that, for definition, is strongly certified by the State. Perhaps the antagonism between the paths that contribute to the reputation of the referees, the notoriety of lawyers, and other conditions, help explain the difficulties in consolidating the practice of arbitration in the Brazilian context (Engelmann, 2006: p. 172).

The second method to be analyzed will be conciliation due to the number of cases in Brazilian Courts. However, some comments with judicial mediation will be done considering both as a phase in lawsuit.

In regard to self-composition methods, according to the Justice in Numbers Report (De Justiça, 2018), just 12.1% of the sentences and decisions handed down by the Judiciary in 2017 were ratification agreements made by parties in lawsuits[38]. Compared to the previous year, this report also indicates that there was

[36]The ranking is available at https://www.leadersleague.com/en/rankings/dispute-resolution-ranking-2020-arbitration-centers-brazil, captured at 08.28.2020, at 6 am.

[37]Available at https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/, captured on 28.05.2018, at 4:30 pm.

[38]In 2015, this was 11.1% and in 2016, 11.9%.

only a 0.2% increment in agreements made after a conciliation/judicial mediation meeting/hearing. This report affirms that this incremental change is not substantial.

In order to comply with Resolution No. 125/2010, the physical structure of the Judiciary is also being rebuilt. The judicial centers for consensual dispute resolution are being developed to embrace mediation/conciliation meetings. Brazilian states are obliged to both create these centers and stimulate parties to participate (Brazilian Procedural Civil Code Arts. 3˚ and 165).

As part of the CNJ's strategy, there is a movement in favor of conciliation, and one of the tasks is to promote conciliation meetings for a whole week (generally in December) in an attempt to achieve an agreement between the parties. This has been a national campaign. During this specified week, almost all of the courts in the Judiciary (Family, Civil, Business, Labor, etc.) of every Brazilian state dedicate efforts to this activity. The mission of this movement is "tocontribute to the effective pacification of conflicts, as well as to the modernization, speed, and efficiency of the Brazilian Justice System".

The Justice in Numbers Report does not specify the numbers of business mediation sessions/hearings realized. However, it clarifies that an increase is expected in mediation/conciliation hearings because article 334 of the Brazilian Procedural Civil Code determines that a mediation/conciliation phase is mandatory before a question is designated to a judge. The research done by the author of this paper already demonstrates the increase in number of the lawsuits dispatched to judicial mediation, as observed in Table A2 and Table A3 **Appendix 4** that indicate the number of lawsuits in 2016 and 2017;

The agreements were also analyzed in this research to identify monetary aspects.

Upon analyzing Table A11 **Appendix 4**, the author of this paper came to the following conclusions:

1) parties are not only looking for money ("monetary value") in a lawsuit. It is not always the monetary value that prevails. The parties will appreciate the value of each decision considering many aspects, but at the end, the parties settled an agreement because of some major value for each decision ("dominant value"). This also indicates that in mediation, the parties can decide differently from what was claimed in the complaint brief written by his/her lawyer (C and E of the Table A11 **Appendix 5**).

2) almost 100% of the agreements settled were accomplished in the initial phase (article 334 Brazilian Civil Procedure Code), that is, before the defendant's response. Only in one lawsuit the parties were required to hold mediation sessions (D and N of the Table A11 **Appendix 4**).

3) the mediator has been elected by courts, and not by the parties as predicted in the Brazilian Civil Procedure Code (article 168). In 100% of the cases, the mediator was elected directly by the courts. The parties did not have the option to elect him/her (O of the Table A11 **Appendix 4**).

4) the settlement done in mediation is closing of the lawsuit (S of the **Table A11 Appendix 4**).

As mentioned previously, article 334 of the Brazilian Procedural Civil Code determines that a mediation/conciliation phase is mandatory before the question is designated to the judge. In paragraph 8, a penalty is levied if any party misses the hearing unjustifiably. It has been seen that courts are applying this penalty in the Brazilian Southeast Region[39].

The obligation predicted in article 334 of the Brazilian Civil Procedure Code indicates that the legislator is trying to stimulate the use of ADR in Brazil, especially within the Judiciary. It is important to clarify that it is the parties' duty to be present at the mediation session/hearing; however, they are not required to make/sign an agreement. They can end the mediation anytime. In the extrajudicial scenario, mediation is also mandatory whenever there is a mediation clause in the contract (Law No. 13.140/2015 - Article 2).

São Paulo is the Brazilian state that has the highest number of lawsuits: 26.240.079 (De Justiça, 2018). In 2017, there were 105,596 judicial[40] mediation sessions/hearings (NUPEMEC-SP, 2017: p. 13). As identified by Julie Macfarlane (Macfarlane, 2002: p. 321), culture change demands more than reforms in civil procedure. This might be a necessary first step in order to expose litigators to mediation process, mainly in a Civil Law country as Brazil. However, to change the culture of commercial litigation to accept consensus-building solution, an environment of acceptance and legitimization for mediation should be created. Just changing the structure of conflict resolution processes and reorganizing the business of lawyering to protect profits and growth will not be enough. It is necessary to develop a "new lawyer" with evolved beliefs and new habits practice. The elevation of negotiation skills is fundamental to achieve such a level (Macfarlane, 2008: p. 23).

The third method to be analyzed will be mediation. As mentioned above, the judicial type was analyzed with conciliation. In further paragraphs, the extrajudicial (realized in private chambers) due to the specific scenario to embrace business conflicts will be described.

Concerning extrajudicial mediation, six mediation and arbitration chambers in Brazil are considered to be the most prestigious. Three are located in São Paulo, two in Rio de Janeiro, and one in Minas Gerais.

[39]Rio de Janeiro, Available at http://www1.tjrj.jus.br/gedcacheweb/default.aspx?UZIP=1&GEDID=0004BB9232C9748CC6951D1A5CF3A8121825C50744226456, captured on 07.19.2018, at 3 pm. Espírito Santo, Available at http://aplicativos.tjes.jus.br/sistemaspublicos/consulta_jurisprudencia/cons_jurisp.cfm?StartRow=11&edProcesso=&edPesquisaJuris=334&seOrgaoJulgador=&seDes=&edIni=19/07/2016&edFim=19/07/2018&tipo=A&Justica=Comum, captured on 07.19.2018, at 3 pm. Minas Gerais, Available at https://www5.tjmg.jus.br/jurisprudencia/pesquisaNumeroCNJEspelhoAcordao.do;jsessionid=6B6A8A18AB467D00A53032106D0B5191.juri_node2?numeroRegistro=1&totalLinhas=1&linhasPorPagina=10&numeroUnico=1.0000.18.030899-1%2F001&pesquisaNumeroCNJ=Pesquisar, captured in 19.07.2018, at 3 pm. São Paulo, Available at https://esaj.tjsp.jus.br/cjsg/resultadoCompleta.do, captured in 07.19.2018, at 3 pm.

[40]This number includes all subjects: family, civil… The object of this research is just business.

According to the research done by Daniela Gabbay (Gabbay, 2018: p. 4), which was done on the three prestigious chambers in São Paulo that organize extra-judicial mediation, the result was that 51 mediation procedures occurred in 2016 in these chambers. While in 2017, this number was lower at 45. The focus of the aforementioned research was only at São Paulo as this city is number one on the Gross Domestic Product (GDP)[41] scale in the country. The average duration of the longest mediation procedure was four and a half months (Gabbay, 2018: p. 4).

As seen above, the obligation predicted in article 334 of the Brazilian Civil Procedure Code indicates that the legislator is trying to stimulate the use of ADR in Brazil, especially within the Judiciary. In extrajudicial mediation, there is also a penalty if any party misses the hearing (Mediation Law, article 22, paragraph 2, IV).

The forth and last method to be analyzed will be dispute boards realized in private chambers due to the specific scenario to embrace business conflicts.

Concerning the Dispute Boards, according to the Dispute Resolution Board Foundation[42], there were no Dispute Boards in Brazil in 2017. The lawyer questionnaire (**Table A6 Appendix 4**) performed by the author of this paper, corroborates the low number of Brazilian lawyers participating in Dispute Boards.

This item detailing the application of the Brazilian Multi-Door Concept, the data collected in the studies done by the author, CNJ's Report (revealing that 12.1% of the lawsuits end in agreement, which indicates that the number of trials is huge in Brazil) corroborate that **it is not valid to affirm that: H.1. There is a Brazilian ADR culture.** As it can be seen, there are movements being done (doctrine, laws and Judiciary), but it is not completely implemented in Brazil.

This section presented data to corroborate that a culture of ADR in Brazil is being developed. The Brazilian Civil Procedure Code caused an impact in stimulating parties do participate in mediation. The study done with Brazilian lawyers reveled that these professionals are not prepared to settle in mediation because they have not been trained in Law Schools.

Multi-door Concept is being spread in Brazil and Judiciary is supporting this movement. In the next topic, the findings will be discussed.

5. Discussion of Findings

The objective of this research was to study the current Brazilian culture for resolving conflicts in business area analyzing the Brazilian lawyer's participation in ADRs. In order to do so, we used an exploratory approach in a first moment through bibliographic survey recognizing the theoretical space of the research and in a second moment, empirical data was presented through: 1) research in Rio de Janeiro's court; 2) lawyers' questionnaire; 3) collection of data about the application of Multi-doors courthouse concept in Brazil.

Brazil started the movement more intensely in 2010 with the publication of Resolution CNJ No. 125 and has already been cultivating good results out of

[41]Available at https://cidades.ibge.gov.br/brasil/sp/sao-paulo/panorama, on 06.12.2018, at 4:30 pm.
[42]http://www.drb.org/publications-data/drb-database/, captured on 2018.06.28, at 1:30 pm.

this initiative. This Resolution providing a National Judicial Policy for the adequate treatment of conflict of interests within the scope of the Judiciary emanated a signal that it was initiating a change in the realm of conflict resolution. More than an invitation to all actors, this meant the effective search for making the principle of access viable to the Judiciary. All Brazilian courts (at both state and federal levels) shall hereafter follow such dispositions. At the same time, initiatives to publish specific ADR laws have also reinforced this movement for the private sector.

Furthermore, we studied the Brazilian judicial scenario. Brazilian courts are obliged to compute the number of lawsuits in each court in addition to other elements. It can be observed that the number of agreements is currently low (just 12.1% of lawsuits). In a sample of 270 lawsuits, just 14 agreements were settled (5.1%)[43]. Additionally, the private sector was already studied. The few researches already developed in Brazil on this sector were also analyzed. There was a slight increase in cases of extrajudicial mediation and the consolidation of Brazil in arbitration since the enactment of these specific laws. Arbitration is already well developed in the business sector and we are now looking forward to following this path for the other ADRs.

This research indicated that the Brazilian lawyer, who is an actor in conflict resolution, does not have the expertise to deal with ADR methods. A huge number of Brazilian lawyers have never participated in conflict resolution (47% of the respondents never participated, as lawyers, in an institutional extrajudicial mediation, 55% of the respondents never participated, as lawyers, in an *ad hoc* extrajudicial mediation, 35% of the respondents never participated, as lawyers, in a judicial mediation, 72% of the respondents never participated, as lawyers, in an Arbitration, and 87% of the respondents never participated, as lawyers, in a dispute board), and only 17% of the respondents took a negotiation course (exclusively negotiation). Furthermore, these professionals did not learn elementary negotiation skills in order to participate in mediation or in the construction of an agreement electing an ADR method.

This lack of expertise reflects in the way the lawyers behave. The perception of the third parties, such as mediators, arbitrators, etc. (47% of the respondents) is that a lawyer's behavior is not a win-win attitude. On the contrary, he/she behaves with a win-lose mindset.

However, a change can be observed in the ADR scenario. Brazilian law schools reformulated their curricula to include a mandatory ADR subject. Future lawyers are studying in Law Schools to adopt a role other than a litigious one. In addition to studying ADR in colleges, there are moots that they can train with other colleges, and Brazil has also been standing out in this scenario.

This research also examined law schools, ADR institutions, and videos posted on the internet. It can be observed that there are many initiatives directed at the development of ADR in Brazil. As seen in item III (The dissemination of Brazil-

[43]A simple rule of 3 was applied here. 270 lawsuits = 100%; 14 lawsuits = 5.1%.

ian Multi-Door Culture) many law schools have programs to encourage students to participate in the situational thinking of the Multi-Door Courthouse concept, including the Moots Competitions.

Besides, it can also be noted that the "new lawyer" described by Macfarlane (2008: p. 23) is being developed in Brazil. This new approach will help reduce the number of lawsuits filed in judicial courts. However, the current status is still considered inefficient due to the high volume of lawsuits (80 millions), the high cost to maintain them (1.4% of Brazilian GDP), and the high citizens' dissatisfaction (5 years for a final decision by the courts plus 2 years for searching defendants' goods to enforce judge sentence).

The use of ADR in Brazil is increasing, but the need to "hear the judge's decision" (Grinover et al., 2013: p. 10) continues to be powerful for many parties. The effect of the request is higher when issued by someone in authority (Ellickson, 1986: pp. 679-680). As identified by James Wall and Timothy Dunne (Wall & Dune, 2012: p. 19), sometimes mediation is viewed as an inferior alternative once the mediator does not have the status of a judge who would be in the courtroom. The reasons for not choosing mediation to resolve conflicts were not the focus of the present research.

Nancy Nelson (Nelson, 2004: p. 3) indicates that in many countries around the world, the encouragement granted by courts to ADR techniques is essential to spread awareness and the use of such processes. In Brazil, the Judiciary supports ADR methods[44] and there are specific laws related to this area. One of the ways is to increase the number of judicial ADR centers each year, according to CNJ's annual report.

6. Conclusion

The data demonstrates the lack of an ADR culture in Brazil. However, through an examination of recent research studies developed in Brazil regarding these institutes, it can be observed/inferred that Brazil is expanding on its ADR culture. The Multi-Door Courthouse concept is not very widespread, but its dissemination is in progress.

There are certain limitations as the judicial sample consisted exclusively of the courts of Rio de Janeiro. This demographic characteristic of the sample could carry numerical bias affecting the results. Therefore, the same study should be conducted in all Brazilian states before theoretical generalization can be made.

Furthermore, most of the data related to the Judiciary were collected by CNJ to elaborate the annual report for Judiciary management, which is a secondary resource. This reference of measure and the questionnaire can be applied in future research studies to compare differences in the Brazilian scenario and the development (or not) of an ADR culture.

Besides, the confidentiality limited the research in extrajudicial mediation scenario. In 2010, the concept of the Multi-door Courthouse, developed by Har-

[44]There are many initiatives, such as: rewards and Resolutions No. s 8 and 50 stimulating the use.

vard law school Professor Frank Sander, was implemented in Brazil through Resolution No. 125, which was enacted by the CNJ. This Resolution provides a National Judicial Policy for the adequate treatment of conflict of interests within the scope of the Judiciary. All courts in all Brazilian states must follow such orientation.

This Resolution reframed the interpretation that "justice is only achieved in the Judiciary". This concept guided for a long time not only lawyers, but also the parties involved in conflicts, to demand answers/solutions to their conflicts in the courts. The first and direct outcome is that the Brazilian Judiciary is overloaded. Due to the great number of lawsuits, a quick final decision by the courts is impossible and the parties carry on unsatisfied.

Brazil is ruled by a civil law system. This means that written law is strong over custom, and case law. Therefore, in order to make the idea of the Multi-Door Courthouse concept more effective, it was necessary to enact a specific legal rule to implement it. That is why Resolution No. 125 is so important.

In 2015, three important laws were enacted promoting for ADR: 1) Law No. 13.140/2015 on mediation in both types: judicial and extrajudicial; 2) the new Brazilian Procedural Civil Code (Law No. 13.105/2015), which also regulates mediation in lawsuits; and 3) Law No. 13.129/2015, which made improvements to the Arbitration Law enacted in 1996. All this legislation can be seen as a stimulus of this public policy implemented by the National Counsel of Justice in Brazil.

The ADR methods in Brazilian business scenario studied for this paper were: arbitration, conciliation, mediation, and dispute boards. As noticed, arbitration is developed in Brazil. Conciliation is mostly adopted in lawsuits mainly in Small Claims Courts. Because the Brazilian Procedural Civil Code determined mandatory mediation for some cases, this type occurs with greater frequency. Due to the confidentiality, it is difficult to precise the number of extrajudicial mediations. The dispute board is not applied frequently.

In order to stimulate the dissemination of the Brazilian Multi-Door Courthouse concept, some actions are being developed after the enactment of Resolution CNJ No. 125/2010:

1) Undergraduate courses—some law schools are stimulating ADR in their undergraduate courses and basic law school curriculum changed to include ADR this subject in December 2018.

2) ADR courses—many Brazilian institutions are offering ADR courses for those who want to study these institutes. There are courses offered by private institutions and by the Judiciary (for those who want to become a judicial mediator).

3) Moot Competitions—moot courts, another effort to disseminate ADR culture, is a competition among universities. A mediation/arbitration chamber organizes such moots and the universities enroll their students to participate. They simulate a case following the rules of this host chamber.

4) ADR Committees—in order to change knowledge and to study the possibilities for spreading ADR institutes across the Brazilian scenario, some ADR committees were created.

5) Independent initiatives—there are many good quality independent initiatives/projects posted on the internet. Many university professors, judges, and ADR professionals are posting their projects on the internet to promote ADR institutes and spread knowledge.

Furthermore, 1) researchers are studying the ADR field and their conclusions will support the dissemination of ADR culture, and 2) it is clear that the Judiciary is lending its support in order to stimulate an ADR culture among judges, lawyers, and parties.

Considering the economic aspect, this research provides researchers, lawyers, and company decision-makers with a body of current information to decide on the best method for resolving a conflict.

Companies, most of the time, turn to their lawyers to resolve a conflict; thus, knowing ADR methods is essential for these professionals and the change in a lawyer's attitude/concepts to embrace ADR (instead of litigating most of the time).

In conclusion and in response to the proposed problem, it is possible to state that Brazil does not have an ADR culture yet, refuting two initial hypotheses of this research: H.1. There is a Brazilian ADR culture and H.3. Brazilian lawyers are actors who influence the use of ADRs. On the other hand, it is confirmed that H.2. Brazilian Civil Procedure Code (Law No. 13.105/2015) is causing an impact in the paradigm shift.

Declaration

Future research will be necessary to verify if all these initiatives were successful.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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Appendix

Appendix 1—Items Analyzed in the Empirical Research

Data Collected in Lawsuits

1) Number of lawsuit
2) Type
3) Amount required in the beginning of the lawsuit
4) Amount offered by the other party
5) Amount settled in an agreement
6) Time until the settlement in judicial mediation
7) Costs
8) Agreement's payment
9) Time until judge's homologation
10) The person who required the judicial mediation
11) The person who indicated the judicial mediator
12) Number of judicial mediation sessions
13) Fulfillment of the agreement
14) Electronic or physic lawsuit

CNJ's Report

Time until judge's decision

ADR Institution's Statistic

Time until the final agreement
Costs

Appendix 2—Questionnaire

The lawyer in the consensus methods of resolving conflicts

1) GENERAL INFORMATION

First of all, I would like to thank you for your participation in this research, which aims to obtain a PhD in business administration from the Rennes School of Business.

The filling takes about 5 - 10 minutes. Your anonymity will be completely preserved.

This questionnaire aims to identify the participation of the lawyer as a negotiator here in Brazil and his participation in methods of conflict resolution, excluding the Judiciary.

The public of this research is the Brazilian lawyer.

To select the case/transaction, please use the following criteria:

a) Select the most recent completed case/transaction in which negotiations occurred, regardless of whether it was settled by agreement, bargaining, judgment or otherwise.

b) We are also interested in your experiences in any branch of Law, so do not hesitate to select a case from any area.

II) INFORMATION ABOUT YOU (Question Type: Multiple choice, Re-

quired) (Mark only one oval).

1) Age

2) Gender

3) What is your expertise area?

4) Check one item below that most characterizes your practice:

internal attorney; public lawyer; external lawyer (law firm); sole practitioner; other…

5) How long do you have for legal practice?

6) Approximately how many lawyers work in your office/department?

7) Which state is your predominant area?

III) PERSONAL EVALUTION IN NEGOTIATION (Mark only one oval per row. 0 1 2 3 4 5)

Use the list below to analyze YOUR goals in the trading indicating the importance to you.

8) Indicate the degree of each statement. Do this by selecting a number between 0 and 5 for each affirmation. The zero indicates that it was not important. The 5 indicates that it was extremely important.

Get a fair deal

Get attorney fees advantageous for you

Improve your own reputation before the members of office/department in which do you work

Improve your own reputation before the other lawyer

Maximize the agreement for your client

To overcome another lawyer

To see if the needs personal or psychological customer were fulfilled

Have satisfaction by practicing skills that require knowledge of law

IV) TRAINING IN NEGOTIATION (Mark only one oval.)

9) Did you take negotiation classes at law school? (Required question): Yes/No

10) If not, why? There was no interest/Not offered

11) Did you have a technical background in negotiating out of college? (during or after the University graduate) (Required question)

Yes, only about negotiation; Yes, as part of another course (mediation, arbitration…); No

12) If so, do you believe that the negotiation classes helped you improve your performance? Yes/No

13) If you did not have this technical training, why? There was no interest/Lack of time

V) EXPERIENCE ON CONSENSUS METHODS OF RESOLUTION CONFLICTS

14) As a lawyer, on average per year, how often do you participate in other methods of conflict resolution, excluding the Judiciary (decision of the judge)? (Mark only one oval per row 0 1 2 3 4 5 6 7 8 9 10 11+. Required question)

Extrajudicial institutional mediation; extrajudicial ad hoc mediation; judicial mediation; arbitration; dispute board resolution of disputes

15) Have you served as an impartial third party in conflicts? (Mark only one oval. Required question) Yes/No

16) If yes, please check all that apply and give an estimate of quantity in the year (Mark only one oval per row 0 1 2 3 4 5 6 7 8 9 10 11+. Required question)

Extrajudicial institutional mediation; Extrajudicial ad hoc mediation; judicial mediation; arbitration; dispute board resolution of disputes

17) Considering your experience as an impartial third party, how the lawyers that participate in these methods behave? For this question, consider the last case in which you acted as an impartial third party. (Mark only one oval)

Risk averse, do not like change, win-lose approach.

Their security comes from the data, metrics, standards, clear objectives, and the routine that confidence.

Prefer cooperation rather than competition

Think about the organization/client as a whole—"WE", wishing to participate

Make concessions, have social responsibility, make long-term decisions

VI) OPTIONAL

18) Please enter email below if you have interest in knowing the result of this search. _____

Thank you for your participation in this survey!

The data collected, as well as the research, have no commercial purpose. The goal is purely academic. The secrecy of the answers is assured.

Appendix 3—Figures

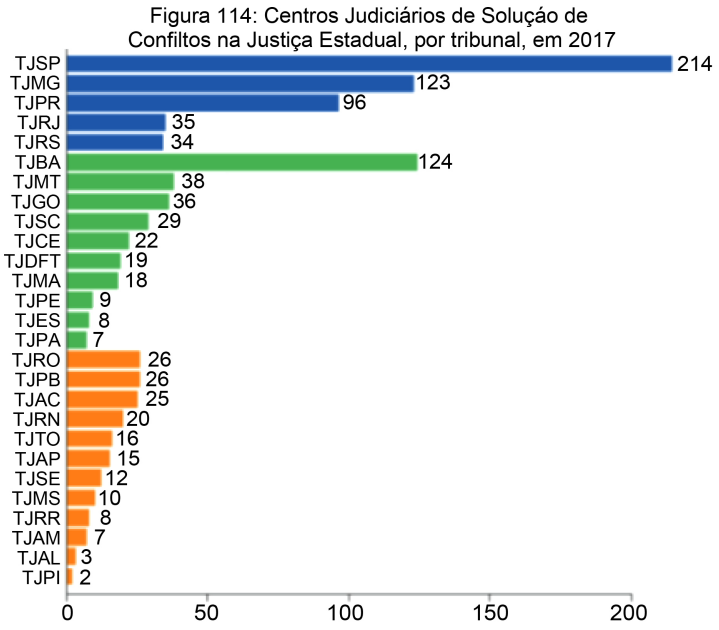

Figure A1. Total of ADR Judicial Centers in Brazil. [Note: translation of Figure 114: Judicial centers for conflict resolution in state justice systems, by court, in 2017]. Source: Justiça, 2018.

Appendix 4—Tables

Table A1. ADR judicial centers in the southeast region.

Brazilian State	Number
Espírito Santo	8
Minas Gerais	123
Rio de janeiro	35
São Paulo	214
Total	**380**

Table A2. The monthly number of lawsuits in 2016.

Month	Number
January	3
February	4
March	16
April	6
May	2
June	1
July	1
August	7
September	45
October	53
November	36
December	17
Total	**191**

Table A3. The monthly number of lawsuits in 2017.

Month	Number
January	28
February	29
March	71
April	47
May	48
June	62
July	68
August	53
September	56
October	85
November	46
December	49
Total	**639**

Table A4. Comparison of variables according to county and type of lawsuits for the bases 2016 and 2017.

Variables		2016		2017		Total		Valor-p
		N	%	N	%	N	%	
Agreements in lawsuit	Electronic	14	70.0%	41	78.8%	55	76.4%	0.630
	Physical	6	30.0%	11	21.2%	17	23.6%	
County	RJ	18	90.0%	48	92.3%	66	91.7%	1.000
	Others	2	10.0%	4	7.7%	6	8.3%	

Table A5. Numbers of Mediation per year.

	2015	2016	2017	2018
CIESP/FIESP	2	3	6	7
CAMARB	1	0	0	5

Table A6. Descriptive analysis of the characterization.

Variables		N	%
Age	20 - 29	114	18%
	30 - 39	225	36%
	40 - 49	180	29%
	50 - 59	78	13%
	60 - 69	23	4%
	70+	1	0%
Gender	Female	353	57%
	Male	262	43%
Law practice	External lawyer (law office)	262	42%
	Sole practitioner (independent lawyer)	193	31%
	Internal lawyer	99	16%
	Public lawyer	48	8%
	Others	19	0%
Time of law practice	Less than 5 years	149	24%
	From 6 to 15 years	252	41%
	From 16 to 25 years	146	24%
	From 26 to 35 years	60	10%
	More than 36 years	14	2%
How many lawyers work in your office/department?	1	150	69%
	51 - 100	27	12%
	More than 101	41	19%
State of practice	RJ	224	36%
	ES	114	18%
	SP	79	13%
	MA	40	6%

Continued

State of practice	MG	34	5%
	DF	31	5%
	SC	18	3%
	RO	16	3%
	PA	14	2%
	RS	14	2%
	PE	11	2%
	BA	6	1%
	GO	4	1%
	PR	4	1%
	CE	3	0%
	MS	2	0%
	PI	2	0%
	RR	2	0%
	AL	1	0%
	MT	1	0%
	TO	1	0%
Did you take negotiation classes at law school?	No	546	88%
	Yes	75	12%
If negative, why?	It was not offered	548	99%
	I was not interested	5	1%
Did you have a technical background in negotiating out of college? (during or after the University graduate)	No	211	34%
	Yes, but in another course (mediation, arbitration…)	304	49%
	Yes, specifically on negotiation	106	17%
Did you have a technical background in negotiating out of college? (during or after the University graduate)	No	211	34%
	Yes	410	66%
If you did not have this technical training, why?	Lack of time	105	61%
	Lack of interest	85	39%
Have you served as an impartial third party in conflicts?	No	395	64%
	Yes	226	36%
Considering your experience as an impartial third party, how do the lawyers participating in these methods behave? For this question, consider the last case in which you acted as an impartial third party	risk averse, do not like change, win-lose approach	162	47%
	their security comes from the data, metrics, standards…	38	11%
	prefer cooperation rather than competition	25	7%
	think about the organization/client as a whole…	44	13%
	make concessions, have social responsibility…	75	22%

Table A7. ADR methods description.

Variables		N	%
Extrajudicial Institutional Mediation	0	290	47%
	1	51	8%
	2	68	11%
	3	53	9%
	4	25	4%
	5	33	5%
	6	19	3%
	7	6	1%
	8	29	5%
	9	2	0%
	10	4	1%
	11	41	7%
Extrajudicial Ad Hoc Mediation	0	344	55%
	1	59	10%
	2	56	9%
	3	46	7%
	4	20	3%
	5	25	4%
	6	15	2%
	7	7	1%
	8	21	3%
	9	0	0%
	10	3	0%
	11	25	4%
Judicial Mediation	0	218	35%
	1	69	11%
	2	61	10%
	3	51	8%
	4	32	5%
	5	41	7%
	6	16	3%
	7	8	1%
	8	42	7%

Continued

Judicial Mediation	9	3	0%
	10	8	1%
	11	72	12%
Arbitration	0	445	72%
	1	50	8%
	2	31	5%
	3	25	4%
	4	16	3%
	5	9	1%
	6	10	2%
	7	7	1%
	8	16	3%
	9	0	0%
	10	2	0%
	11	10	2%
Variables		**N**	**%**
Dispute Board	0	539	87%
	1	30	5%
	2	14	2%
	3	12	2%
	4	5	1%
	5	5	1%
	6	4	1%
	7	6	1%
	8	1	0%
	9	0	0%
	10	0	0%
	11	5	1%

Table A8. Average percentage of a lawyer's participation in conflict resolution methods.

Variables (n = 621)	Average	D.P.	IC (96%)
Extrajudicial institutional mediation	2.43	3.29	(2.18; 2.72)
Extrajudicial ad hoc mediation	1.81	2.88	(1.60; 2.06)
Judicial Mediation	3.32	3.78	(3.04; 3.63)
Arbitration	1.07	2.31	(0.89; 1.25)
Dispute Board	0.43	1.50	(0.32; 0.55)

Table A9. Description of law practice.

Expertise	N	%
Business (including contracts)	209	34%
Civil (except contracts)	147	24%
Family	65	10%
Labor	58	9%
Tax	19	3%
Real Estate	17	3%
Corporate	17	3%
Administrative	14	2%
Criminal	13	2%
Public Law	10	2%
Social Security	9	1%
Trademarks and patents	6	1%
Environmental	5	1%
Others	32	5%

Table A10. Importance of lawyers' attitudes.

Variable (n = 621)	Média	D.P.	IC (95%)	0	1	2	3	4	5
Getting a fair agreement	4.38	1.19	(4.28; 4.47)	1%	7%	2%	5%	14%	71%
Obtaining profitable fees for self	2.74	1.64	(2.61; 2.87)	14%	13%	14%	23%	21%	17%
Improving own reputation among members	3.00	1.82	(2.86; 3.13)	15%	11%	9%	17%	17%	30%
Improving own reputation with other lawyers	2.77	1.79	(2.63; 2.91)	17%	12%	12%	17%	19%	23%
Maximizing the settlement for the client	4.21	1.31	(4.11; 4.31)	2%	8%	3%	8%	17%	63%
Outdoing or outmaneuvering the opponent	1.45	1.58	(1.32; 1.58)	43%	14%	16%	14%	7%	6%
Seeing that the client's necessity was met	4.33	1.24	(4.23; 4.43)	1%	7%	2%	6%	16%	68%
Taking satisfaction in exercise of legal skills	3.91	1.46	(3.79; 4.02)	3%	9%	4%	11%	21%	51%

Table A11. Comparison between lawsuits resulting in agreements.

Variables		2016		2017		Total		Valor-p
		N	%	N	%	N	%	
Value required in the lawsuit—Judicial mediation (C)	money	12	85.7%	37	88.1%	49	87.5%	0.774
	money + goods	2	14.3%	3	7.1%	5	8.9%	
	other	0	0.0%	2	4.8%	2	3.6%	
Value answered by the other party—Judicial mediation (D)	dissolution and determination of goods	0	0.0%	1	2.4%	1	1.8%	1.000
	no proposal (zero)	14	100.0%	41	97.6%	55	98.2%	
Agreement value—Judicial Mediation (E)	money	5	35.7%	24	57.1%	29	51.8%	0.176
	without monetary value	9	64.3%	16	38.1%	25	44.6%	
	other	0	0.0%	2	4.8%	2	3.6%	
Who required the judicial mediation? (N)	plaintiff and defendant	0	0.0%	1	2.4%	1	1.8%	1.000
	judge	14	100.0%	41	97.6%	55	98.2%	
Who indicated the mediator? (O)	judge	14	100.0%	42	100.0%	56	100.0%	-
	other	0	0.0%	0	0.0%	0	0.0%	
Filing (S)	lawsuit continues	2	14.2%	19	45.2%	21	37.5%	0.066
	filed	12	85.8%	22	52.4%	34	60.7%	
	other	0	0.0%	1	2.4%	1	1.8%	