

# ARTICLES

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## THE ECONOMIC BENEFITS OF BUSINESS MEDIATION IN THE BRAZILIAN SCENARIO

*Benefícios econômicos da mediação empresarial no cenário brasileiro*

*Los beneficios económicos de la mediación empresarial en el escenario brasileño*

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### ABSTRACT

This study aims to measure the economic benefits of business mediation in Brazil compared to lawsuits, investigating whether choosing mediation to resolve a business conflict is more economically advantageous than filing a lawsuit in the judiciary and whether opting for extrajudicial mediation to settle a business dispute is more economically advantageous than reaching an agreement in judicial mediation. The research, conducted in the Southeast region of Brazil after the implementation of the Brazilian Code of Civil Procedure in 2016, employed quantitative methods, analyzing 397 judicial processes. The results indicated that extrajudicial mediation is the most cost-effective option, while the judicial lawsuit is the most costly. This article provides essential information for businesses to make informed decisions in the resolution of business disputes.

**Keywords:** Brazilian Business mediation, economic benefits, conflict resolution, business organization, UND SDG 16, consensual methods, economic analysis of law.

### RESUMO

*Este trabalho visa mensurar os benefícios econômicos da mediação empresarial no Brasil em comparação com a ação judicial, investigando se eleger a mediação para resolver um conflito empresarial é mais vantajoso economicamente do que ajuizar uma ação no Judiciário e se optar pela mediação extrajudicial para encerrar um conflito empresarial é mais vantajoso economicamente do que firmar um acordo na mediação judicial. A pesquisa, conduzida na região Sudeste do Brasil após a implementação do Código de Processo Civil em 2016, utilizou métodos quantitativos, analisando 397 processos judiciais. Os resultados indicaram que a mediação extrajudicial é a opção mais econômica, enquanto a via judicial é a mais dispendiosa. Este artigo oferece às empresas informações essenciais para uma decisão racional na resolução de controvérsias empresariais.*

**Palavras-chave:** mediação empresarial brasileira, benefícios econômicos, resolução de conflitos, organização empresarial, ODS 16 ONU, meios consensuais, análise econômica do Direito.

### RESUMEN

*Este trabajo tiene como objetivo medir los beneficios económicos de la mediación empresarial en Brasil en comparación con la acción legal, investigando si elegir la mediación para resolver un conflicto empresarial es más ventajoso económicamente que presentar una demanda en el Poder Judicial y optar por la mediación extrajudicial para poner fin a un conflicto empresarial es más ventajoso económicamente que firmar un acuerdo a través de mediación judicial. La investigación, realizada en la región sudeste de Brasil después de la implementación del Código de Procedimiento Civil en 2016, utilizó métodos cuantitativos, analizando 397 casos judiciales. Los resultados indicaron que la mediación extrajudicial es la opción más económica, mientras que la vía judicial es la más costosa. Este artículo proporciona a las empresas información esencial para una decisión racional en la resolución de conflictos comerciales.*

**Palabras clave:** mediación empresarial brasileña, beneficios económicos, resolución de conflictos, organización empresarial, ODS 16 ONU, medios consensuales, análisis económico del derecho.

## INTRODUCTION

The culture of alternative dispute resolution has been developing in Brazil for some years, mainly after Resolution n° 125/2010 of the National Council of Justice (CNJ) established the Multi-Door Courthouse concept as public policy. The benefits of using mediation to solve a conflict are known worldwide. However, in Brazil, mediation can still be considered recent compared to the traditional culture of resolving queries in the Judiciary, which is prevalent in the country. At the end of 2017, there were 80.1 million lawsuits in the courts. In 2021, there were 77.3 million. Recent studies divulgated about 2022 indicate an increase in lawsuits.

Moreover, it is not compatible with the 2030 Agenda of the United Nations, which Brazil has adopted, mainly for the objectives of peace, justice, and sustainable development. Despite the fact that current legislation promotes mediation, it is necessary to consider that it takes time to change any culture and general habits. Even at Law Schools, Alternative Dispute Resolution (ADR) disciplines were not taught until December 2018.

Given the current Brazilian scenario in which the Judiciary is overloaded and takes a long time to deliver a definitive answer, the development of extrajudicial business mediation is deemed important for both companies and public institutions. Developing the Multi-Door concept is essential for understanding that the idea is to choose the best way to solve a conflict/problem - to choose the adequate method. The objectives of this study are: (i) to analyze/compare to what extent extrajudicial business mediation is more economical than judicial mediation and the judge's decision (lawsuit) to solve business queries, and (ii) to provide recent data, mainly economic, that the decision-maker can use to visualize the best way of terminating a business controversy.

Business executives and lawyers should exercise the decision process by looking carefully at a decision tree to achieve better and more rational results. As a practical contribution from this research, organizations can contemplate a decision tree with current data to seek an efficient and effective method for dealing with business conflicts.

## METHODOLOGY

Bibliographic and archival studies were carried out. Exploratory research was done in the Southeastern region (due to the economic and business importance of this area) courts after the validity period in 2016 of the Brazilian Civil Procedure Code (CPC - Law n° 13.105/2015) calling for judicial mediation and stimulating ADR in Brazil up to 2017 (the year of data collection. The author did the original research in 2018 during the PhD program) to collect data about the characteristics of lawsuits and agreement to compare with data obtained with ADR private institutions.

For this article, mediation is a form of assisted negotiation (Bercovitch & Jackson, 2001, p. 3). There is “the willingness of the parties to work together cooperatively, rather than adversarially” (Coleman & Carmichael, 2018, p. 1) and to create alternatives for the solution (Almeida, 2014, p. 44). It is worth mentioning that there are studies (Wolkart, 2019) that consider that the method

adopted by the Brazilian Procedure Civil Code does not stimulate an agreement in judicial mediation since asymmetric information prevails: the defendant knows the plaintiff's reasons and documents, but the defendant's strategy is still unrevealed to the plaintiff.

The data presented below indicate the cut-off period of the study carried out in the Judiciary to demonstrate the relevance of the object. Quantitative methods were used to compare mediation with lawsuits. An exploratory, descriptive analysis of the data is necessary.

Preliminarily, it is emphasized that because mediation is a procedure with the principle of confidentiality, the possibility of a detailed analysis of extrajudicial mediation has been ruled out. However, it was possible to obtain generic information directly from private chambers' websites (CAMARB, CBMA, FGV, MEDIARE, ICC, CAM-CCBC, CIESP-FIESP) and reports. These public data (such as time and cost) are sufficient for the comparison.

Therefore, for this research, the option was to analyze in detail only judicial mediations since the Judiciary, as a public institution, allows greater access because lawsuits are public. The elements analyzed are 6 variables on the characteristics of lawsuits and 8 variables on the agreement.

In Brazil, every Tribunal has a NUPEMEC (the Judicial Permanent Nucleus of Conflict Resolution Consensus Methods) engaged in the development of ADRs methods and the CEJUSCs (Judicial Centers for Conflict Resolution and Citizenship – responsible for organizing mediation and conciliation sessions).

The researcher contacted all Judicial ADR centers related to business courts in the Southeast region. Only the ADR center in Rio de Janeiro (CEJUSC-Capital, located at Beco da Música, 121, room T06, Centro, Rio de Janeiro/RJ) offered enough detailed data to be examined in this study (the data was obtained through a written request, administrative process n° 2017-0209390). The ADR center in Rio de Janeiro organized a list containing the number of all lawsuits that were dispatched for mediation in 2016 and 2017 by the business courts (Rio de Janeiro State Law n° 6.956/2015 classifies business matters). In this case, the author was able to research each one of the lawsuits, collecting further data. The list was very simple, containing just the number of the lawsuit.

After receiving the list containing 830 numbers, it was necessary to identify those that could be studied for this research (16 mistakenly indicated in the list – 11 in 2017 database and 5 in 2016 list; 5 classified as confidential (CPC Art. 189) (zero in 2016 and 5 in 2017); 194 lawsuits in which no mediation occurred either because of the absence of a party or because the judge canceled the mediation; 7 mediation sessions were canceled and 10 repeated in the list). The lawsuit can either be electronically (Law n° 11.419/2006) or physically. The author's access to the electronic copies was complete, except for those classified as confidential by the court. A request was made to the court, but authorization was not granted during the analysis period of this research (August 7-21, 2018). 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.

Considering that parties can participate in a mediation session more than once (CPC Art. 334, para. 2), it was necessary to identify lawsuits individually so that its reference was made only in the year in which the agreement occurred (612 lawsuits).

The list received from Rio de Janeiro's ADR court contained 830 lawsuits sent for mediation. Those presenting inconsistencies were removed. Also, the fact that the original list indicated all mediation sessions related to that lawsuit, it was debugged that in 397 occurred mediation session, as it is demonstrated in Table 1. Each lawsuit was analyzed in detail, including the complaint debrief. There were 83 agreements, as demonstrated in Table 2.

**Table 1.** Description of the lawsuits

Information	N2016	N2017	Total
Number of sessions	191	639	830
Total number of lawsuits	136	476	612
Nº of lawsuits mistakenly indicated	5	11	16
Nº of lawsuits classified as confidential	0	5	5
Nº of lawsuits in which any mediation occurred	40	117	157
Nº of lawsuits in which the session was canceled	0	37	37
Final number of lawsuits with mediation sessions	91	306	397

The 397 lawsuits were analyzed and classified according to the settlement of an agreement, which was classified according to the object: "money" (monetary amount) or "without monetary value." Those without an agreement were discarded, as it is not the object of the research to identify the reasons for not reaching an agreement. According to Table 2, 83 agreements were settled in mediation, and only 77 ("with total agreement" and "with partial agreement") were studied because:

- a. 1 lawsuit related to voluntary bankruptcy (the objective of this lawsuit was to declare the bankruptcy of a person/debtor and not the conflict between business partners);
- b. 5 agreements involved the participation of public institutions.

**Table 2.** Classification of all the agreements

Variables	N	%	
Agreement	with total agreement	76	19.14%
	with partial agreement	1	0.25%
	with partial agreement - self-failure	1	0.25%
	with total agreement (public institution)	5	1.26%
	without agreement	303	76.32%
	pre-lawsuit	1	0.25%
	agreement outside mediation	9	2.27%
	still in mediation	1	0.25%

Agreements classified as “without monetary value” are also relevant because they demonstrate that the dominant value in the settlement was not money (monetary amount) but another interest. It is clear that another element was considered, leading the parties to reach an agreement and end the conflict. However, this “dominant value” was not indicated in those agreements to allow for analysis. This characteristic will be discussed in Table 7, which compares all 397 lawsuits containing agreements.

All the detailed data collected for this project are related to parties’ settlements stemming originally from lawsuits. This research compares the costs and time of the mediation procedure in both extrajudicial and judicial scenarios. However, it is necessary to clarify that the settlement data were only obtained in judicial mediation, while the data about companies were obtained in private chambers (reports available on websites containing the elements - time and cost- of this comparison). The institution chosen by the author to explain costs, time, and procedure in extrajudicial mediation was CIESP-FIESP due to its lower costs. The author made a comparison in the chambers’ table of costs available on websites, and CIESP-FIESP had the less expensive costs. Additionally, the author contacted this chamber and further data considered non-confidential were provided.

The costs each party incurred to settle an agreement, for example, maintenance costs of its legal department (staff salaries, administrative expenses, judicial taxes, etc), in a mediation process will not be considered because these data were unavailable to the author. However, this is an important element in the economic equation and should be calculated by the party.

It will be considered that the party made this analysis because it identified that such an agreement would achieve economic benefits – the agreement would save the party’s money. Otherwise, the agreement would not have been settled. The cost for litigating was already measured by the Brazilian Institute of Planning and Taxation (<https://ibpt.com.br/>, captured on 07.12.2018, at 11 am), and it will be considered in this text. The Brazilian Bar Association sets the minimum fee that lawyers can charge. This table will be used whenever necessary during this paper to indicate the equation designing parties’ expected value. Autonomous lawyers usually adopt this table.

Finally, a comparison between the expected value in lawsuit, judicial mediation, and extrajudicial mediation was made to identify which is higher. To exemplify the calculus of the expected value, (a) the amount of BRL 10,000.00 and (b) the percentage of 50% for winning the case were selected due to their simplicity of understanding. This sum was also indicated in the initial requirement of the lawsuit nr. 0198093-42.2016.8.19.0001 studied in the research (Table 11).

## RESULTS

The three most frequent issues discussed in courts were Company (29.2%) (that means the main claim is related to Business matters), Company Dissolution (17.9%), and Contractual Responsibility (12.1%), as demonstrated in Table 3.

**Table 3.** Description of the most frequent subjects – consolidated (397 Lawsuits)

subject	No		Yes	
	N	%	N	%
Society/Company	281	70.8%	116	29.2%
Dissolution	326	82.1%	71	17.9%
Contractual responsibility	349	87.9%	48	12.1%
Acceleration of Court Order	352	88.7%	45	11.3%
Indemnity for moral damages	359	90.4%	38	9.6%
Indemnity for material damage	365	91.9%	32	8.1%
Brand	367	92.4%	30	7.6%
Material damage - other	370	93.2%	27	6.8%
Moral damage - other	371	93.5%	26	6.5%
Verification of goods	372	93.7%	25	6.3%
Moral damage - other Consumer	374	94.2%	23	5.8%
Payment	377	95.0%	20	5.0%
Copyright	378	95.2%	19	4.8%
Vessel Rentals	378	95.2%	19	4.8%
Nullity or nullification	380	95.7%	17	4.3%
Entry and exclusion of members of society	381	96.0%	16	4.0%
Defect	381	96.0%	16	4.0%
Company cc verification of goods	381	96.0%	16	4.0%
Credits	381	96.0%	16	4.0%
Maritime Privileges	381	96.0%	16	4.0%
Association	382	96.2%	15	3.8%
Legal act or business	382	96.2%	15	3.8%
Partner Responsibility	383	96.5%	14	3.5%

Considering all of the 397 lawsuits analyzed, those in which the parties were litigating about Company had the highest rate of 53% for reaching an agreement. The second topic was Dissolution (36%), as demonstrated in Table 4.

**Table 4.** Subjects with agreements – 397 lawsuits

Subject N		No agreement (n=314)		With agreement (n=83)		Valor-p
		N	%	N	%	
Company	No	240	77%	39	47%	<0.001
	Yes	72	23%	44	53%	
Dissolution	No	271	87%	53	64%	<0.001
	Yes	41	13%	30	36%	
Contractual Responsibility	No	265	85%	82	99%	<0.001
	Yes	47	15%	1	1%	
Indemnity for moral damage	No	281	90%	76	92%	0.835
	Yes	31	10%	7	8%	
Acceleration of Court Order	No	291	93%	79	95%	0.621
	Yes	21	7%	4	5%	
Indemnity for material damage	No	283	91%	80	96%	0.113
	Yes	29	9%	3	4%	
Moral Damage – other Consumer	No	296	95%	76	92%	0.290
	Yes	16	5%	7	8%	
Material Damage – other	No	288	92%	80	96%	0.229
	Yes	24	8%	3	4%	
Brand	No	287	92%	78	94%	0.647
	Yes	25	8%	5	6%	
Moral Damage moral – Consumer	No	291	93%	78	94%	1.000
	Yes	21	7%	5	6%	
Vessel rental	No	294	94%	82	99%	0.143
	Yes	18	6%	1	1%	
Verification of goods	No	293	94%	77	93%	0.799
	Yes	19	6%	6	7%	
Copyright	No	296	95%	80	96%	0.775
	Yes	16	5%	3	4%	
Company and verification of goods	No	303	97%	76	92%	0.052
	Yes	9	3%	7	8%	

The research points out, according to Table 6, that in 77 lawsuits with settlements:

- a. 3.6% of agreements made in mediation court can be considered creative because they involved elements other than those included in the parties' legal claims
- b. 44.6% of the agreements made in mediation courts included non-monetary terms
- c. the size (monetary value) of the cases handled in mediation court can vary considerably.

**Table 5.** Lawsuits with agreement – consolidated

Information N		2016		2017		Total		Value-p
		N	%	N	%	N	%	
State	RJ	83	91.2%	294	96.1%	377	95.0%	0.112
	Other	8	8.8%	12	3.9%	20	5.0%	
Agreement	With agreement	21	23.1%	56	18.3%	77	19.4%	0.375
	Without agreement	69	75.8%	240	78.4%	309	77.8%	
	Other	1	1.1%	10	3.3%	11	2.8%	

According to a Brazilian economic newspaper (Jornal Valor, available at <https://www.valor.com.br/valor-data>, captured on 08.28.2018, at 2 pm.): USD 1 = BRL 4,31. (It can also be seen on the Brazilian Central Bank website <https://www.bcb.gov.br/estabilidadefinanceira/historicocotacoes>).

**Table 6.** Comparison between lawsuits containing agreements – 397 Lawsuits

Variables N		2016		2017		Total		Valor-p
		N	%	N	%	N	%	
Value required in the lawsuit – Judicial mediation (C)	Money	13	86.7%	37	88.1%	49	87.5%	0.774
	Money + goods	2	13.3%	3	7.1%	5	8.9%	
	Other	0	0.0%	2	4.8%	2	3.6%	
Value offered 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) – CPC art. 334	15	100.0%	41	97.6%	55	98.2%	
Agreement value – Judicial Mediation (E)	Money	5	33.3%	24	57.1%	29	51.8%	0.186
	Without monetary value	10	66.7%	16	38.1%	25	44.6%	
	Other	0	0.0%	2	4.8%	2	3.6%	
Agreements in installments (L)	Agreements in installments	1	6.6%	16	38.1%	17	30.4%	0.056
	Full payment (once)	4	26.7%	7	16.7%	11	19.6%	
	Without monetary value	10	66.7%	16	38.1%	25	44.6%	
	Other	0	0.0%	3	7.1%	3	5.4%	

Continue



**Table 6.** Comparison between lawsuits containing agreements – 397 lawsuits

Concludes

Variables N		2016		2017		Total		Valor-p
		N	%	N	%	N	%	
Agreement fulfillment (R)	The agreement was not fulfilled	3	20.0%	14	33.3%	17	30.4%	0.039
	Other	3	20.0%	1	2.4%	4	7.1%	
	The agreement was partially fulfilled	2	13.3%	1	2.4%	2	3.6%	
	The agreement was totally fulfilled	7	46.7%	26	61.9%	33	58.9%	
Filing (S)	lawsuit continues	2	13.3%	19	45.2%	21	37.5%	0.037
	filed	13	86.7%	22	52.4%	34	60.7%	
	Other	0	0.0%	1	2.4%	1	1.8%	

The research points out, according to Table 5, Table 7, and Table 8, that:

In 2016, there were 21 agreements in which: At least 50% of the lawsuits demanded (the initial requirement presented by the author's lawyer must indicate a monetary value - CPC, articles 291 to 293), with a minimum value of BRL 1,000.00 and a maximum of BRL 375,000.00.

**Table 7.** Description of 15 agreements in 2016

Variables	N	Média	D.P.	Min.	1ºQ	2ºQ	3ºQ	Máx.
Amount initially required – Judicial Mediation (reais) (C)	15	45586.32	95201.64	1000.00	1500.00	10000.00	40000.00	375000.00
Amount settled – Judicial Mediation (reais) (E)	4	277749.34	259192.43	10997.38	55498.69	300000.0	500000.0	500000.00
Amount settled/ Amount initially required (%) (E/C)	4	15019.17	23788.67	26.67	38.33	5025.00	30000.00	50000.00
Time length – Judicial Mediation (days) (F)	15	140.27	56.69	91.00	100.50	132.00	142.50	305.00
Judiciary Costs (reais) (J)	10	47317.82	57519.04	126.07	779.64	11346.00	90166.00	158852.00
Time length – agreement's homologation (dias) (M)	15	1183.33	710.05	1000.00	1000.00	1000.00	1000.00	3750.00
Number of sections (P)	15	2.97	2.58	1.00	1.25	2.00	3.75	10.00
Amount initially required – Judicial Mediation (reais) (C)	13	87.54	164.86	11.00	17.00	35.00	43.00	611.00
Amount settled – Judicial Mediation (reais) (E)	15	1.93	1.58	1.00	1.00	1.00	2.00	6.00

There were 4 agreements with a monetary value/amount (There were more agreements in 2017 than in 2016). In 2 lawsuits, the amount settled was less than BRL 300,000.00. The minimum value was BRL 10,997.38, and the maximum was BRL 500,000.00.

In 50% of the agreements, the value received was lower than the value demanded. In the other 50%, the initial requirement was not precise (BRL 1.000,00 plus goods). Therefore, the amount settled was higher than what was initially requested.

In 2017, there were 56 agreements in which: At least 50% of the lawsuits demanded less than BRL 31,000.00. The minimum value was BRL 150.00, and the maximum was BRL 2,384,661.80.

There were 26 agreements with a monetary value. In 50% of them, the value of the agreement was less than BRL 20,000.00, with a minimum value of BRL 3.18 and a maximum of BRL 1,200,000.00.

In 50% of the agreements with monetary value, it was less than 50% of the amount demanded, with a minimum value of 0.00 and a maximum of 10,000.00. Considering the value of the demand, the value of the response of the other party, and the value of the agreement, it is estimated that in 28.6% (12) of the lawsuits, the value of the agreement was closer to that of the plaintiff requested, while in 71.4% (30) of the cases, the value of the agreement was closer to that of the defendant offered (Table 8 describes the 42 agreements settled in 2017).

**Table 8.** Description of 42 agreements in 2017

Variables	N	Média	D.P.	Min.	1ºQ	2ºQ	3ºQ	Máx.
Amount initially required – Judicial Mediation (reais) (C)	42	153213.04	463350.22	150.00	10000.00	31000.00	60000.00	2384661.80
Amount settled – Judicial Mediation (reais) (E)	26	150528.09	308884.76	3.18	5856.00	20000.00	60000.00	1200000.00
Amount settled/ Amount initially required (%) (E/C)	25	638.90	2093.74	2.80	17.62	50.00	99.76	10000.00
Time length – Judicial Mediation (days) (F)	42	323.21	387.85	71.00	160.00	255.50	365.00	2637.00
Judiciary Costs (reais) (J)	35	3484.83	8113.83	80.19	566.67	1028.80	2787.90	37000.00
Time length – agreement's homologation (dias) (M)	42	1328.57	949.53	1000.00	1000.00	1000.00	1000.00	5000.00
Number of sections (P)	42	3.07	2.27	1.00	2.00	2.38	3.00	12.50
Amount initially required – Judicial Mediation (reais) (C)	36	66.31	65.87	4.00	19.00	41.50	91.00	253.00
Amount settled – Judicial Mediation (reais) (E)	42	1.93	1.11	1.00	1.00	2.00	2.00	6.00

The analysis of these data needs further deepening and detailing in order to extract the proper understanding. It was not possible to measure it in 2016 due to the low number of monetary agreements.

Considering the same elements studied in a lawsuit, it is possible to create a scenario for extrajudicial mediation using the data collected on judicial mediation and adding the typical elements from this scenario, for example, costs and time that can be collected from the institutions' websites (as mentioned before, CIESP-FIESP was the one chosen). In order to compare the costs in judicial and extrajudicial scenarios, it is possible to obtain the elements "time" and "cost" from the CIESP-FIESP website to simulate the extrajudicial scenario. The amount of BRL 10,000.00 was chosen to facilitate the calculus. The data related to "Lawsuit" and "Judicial Mediation" were collected from the research already detailed.

**Table 9.** Description of the annual value of the lawsuit

Annual Value of the lawsuit – Judicial Mediation (H)	Company size		
	Small	Medium	Large
2014	921.59	2022.66	2897.01
2015 (IPCA = 10.67%)	1019.92	2238.48	3206.12
2016 (IPCA = 6.28%)	1083.97	2379.05	3407.47
2017 (IPCA = 2.94%)	1115.84	2449.00	3507.64
2018 (IPCA = 3.75%)	1157.68	2540.84	3639.18

Table 10, comparing the expected value in lawsuit, judicial mediation, and extrajudicial mediation, demonstrates that the expected value for both parties in an extrajudicial mediation is higher/better than in a lawsuit. The plaintiff receives more in an extrajudicial mediation, and the defendant pays less.

**Table 10.** Comparison of expected value in lawsuit, judicial mediation, and extrajudicial mediation

	Lawsuit (5 years)	Judicial mediation (1 year)	Extrajudicial Mediation (1 month)
The plaintiff will receive at the end	- 1,959.96	1,157.40	3,018.56
The defendant will pay at the end	23,448.44	8,842.60	6,981.44

Comparing a judicial decision in a lawsuit and an agreement settled in mediation, it can be observed that judicial mediation is 80.73% less expensive, and extrajudicial mediation is even 84.41% less expensive, as indicated in Table 11.

**Table 11.** Comparison between lawsuit, judicial mediation, and extrajudicial mediation

	Lawsuit	Judicial Mediation	Extrajudicial Mediation
Amount of issue	R\$ 10,000.00	R\$ 10,000.00	R\$ 10,000.00
Time to reach a result	5 years	1 year	1 month
Direct costs of the process	R\$ 12,704.20	R\$ 2,449.00	R\$ 1,981.44
Possible results	Just the demand in the initial pleading	Creative settlement	Creative settlement

The next topic discusses the characteristics of mediation agreements and the economic benefits achieved by business mediation in the Brazilian scenario.

## DISCUSSION OF FINDINGS

### Characteristics of the mediation agreement in the Brazilian scenario

The “dominant value” is relevant even if it is not indicated. It reinforces that it is not always the monetary value that prevails. The parties will qualify the value of each decision considering many aspects, but in the end, the parties settled an agreement because of a value (Epstein, 1995, p. 71; Kaplow & Shavell, 2006, p. 155). This also indicates that in mediation, the parties can decide differently from what was demanded in the complaint brief. However, the parties must establish a dialogue based on rational debate with plausible reasons to maintain a dialectic environment in which it is possible to review the consensus-conflict movement at any time (Fisher et al., 1991, pp. 11-12; Sica, 2007, p. 63). Furthermore, the parties must consider the consequences of not making an agreement and continuing with a non-collaborative attitude. This is important because of the parties’ reputations (Farnsworth, 2007, p. 141). The company’s image can be damaged if information related to the failure to reach a settlement is posted on the Internet and disseminated. The Courts of Rio de Janeiro identify the companies that are the most frequently sued in the courts and rank them. This ranking is public and is available on the court’s website (The complete ranking (in Portuguese) is available at <http://www4.tjrj.jus.br/MaisAcionadas/>, captured on 05.02.2019, at 11:50 am). A company’s reputation can be damaged depending on its stance on issues. The Board’s attitudes can cause a loss of value for the company in terms of its image.

In creative agreements, the parties maximized their benefits because the settlements were different from the initial requirements. Considering that recent studies indicate that human beings are risk averse when the gain is considered a certainty (Kahneman & Tversky, 1979; Thaler, 2015), the parties can make a rational decision to use it on their behalf and create value for the agreement. These studies demonstrated that human beings are averse to risk only if they consider that the case is a sure win; and that they are willing to incur risk only if there is a possibility of avoiding the initial loss.

As demonstrated in Table 6, which shows the comparison between lawsuits containing agreements on a consolidated basis, the party’s interest is not only financial. 44.6% of the agreements made through judicial mediation did not include a monetary value.

The research confirmed the low percentage of agreements in mediation (19.4%) (Table 5)

In Brazil, the law also encourages settlement (CPC art. 3). However, according to the Justice in Number Reports (Justiça, 2018, p. 137), only 12.1% of the sentences and decisions issued by the Judiciary in 2017 were ratifying agreements made by parties in the judicial lawsuits. Compared to the previous year, this report also indicates that there was only a 0.2% increment

in agreements made after a conciliation meeting/hearing. This report affirms that this increment is not substantial. In 2021 (Justiça, 2022, p. 201), 11.9% of sentences were decisions ratifying agreements between parties.

In the CEJUSC studied (responsible for business matters), the analysis of lawsuits indicates that the average period to settle a lawsuit in a judicial mediation was 323.21 days in 2017 (Table 8 describes the 42 agreements settled in 2017). In 2016, this average was lower (140.86 days) because fewer lawsuits scheduled judicial mediation. There are no recent studies about it.

However, these data are important for demonstrating the average time and percentage of agreements settled in business matters. The research indicates that 19.4% are settled in mediation, according to Table 5. Nelson (2004, p. 5) identifies two main barriers to the effective use of mediation in Europe: (a) the lack of awareness of mediation and (b) mediation's potential applications among business questions. In Brazil, empirical research must be done to confirm this evidence, and that is not the focus of this research. However, it is important to emphasize that ADR disciplines were not mandatory at Law School until December 2018 (Institutional Ordinance n° 1.351/2018, enacted on December 17, 2018). Therefore, lawyers are not familiar with ADR (Carneiro et al., 2022a). Concerning the second barrier, it is worth highlighting Brazilian studies in the business scenario demonstrating the economic benefits of using mediation (Carneiro et al., 2022b).

In this investigation, it was assumed that in business conflicts, the feelings and emotions are low and decisions are rational “after careful consideration of various options” (Broda et al., 2018, p. 2), compared with family or divorce conflicts, in which extremely high levels of emotions are observed. In both scenarios, emotional intelligence can be applied to avoid having emotions interfere with rational decisions (Coleman & Argue, 2017, p. 12; Fontaine, 2015, p. 3; Towfigh, 1990) and achieve the goals as well as possible (Elster, 1940, p. 1; Schafër & Ott, 2004, pp. 51-52).

The research indicates (Table 6) that in business mediation, 3.6% of the agreements contained issues other than those demanded in the complaint brief. Due to a lack of information on lawsuits in which the parties settled directly after negotiations, it is not possible to correlate these data. It was only possible to verify that there was fulfillment in 2 agreements, 4 lawsuits were filed, in 7 there is no information about the agreement, and 1 is classified as confidential. The agreement is not annexed to the lawsuit. The agreement remains confidential among the parties. They just informed the judge that they were able to settle and require the end of the lawsuit. However, as demonstrated by Dias (2020, p. 186), after comparing mediation and negotiation, the use of mediation stimulates better results. Bercovitch and Jackson (2001, pp. 3-4) try to identify if the choice between mediation and negotiation is rational. The authors believe that knowing the kinds of conflicts in which the parties are involved enables them to tailor strategies and create value for all parties (Cruikshank et al., 2008; Duzert et al., 2001; Duzert & Spinola, 2018).

As indicated in Table 6, which presents a comparison between lawsuits containing agreements on a consolidated basis indicates characteristics of such legal instruments, 3.6% of

the agreements settled in judicial mediation can be considered creative. Mediation does not affect their quality judgments and evaluations. Besides, the CPC (Art. 334 para. 2) and Mediation Law (Arts. 17 and 18) allow for (a) additional mediation session(s) if the parties desire and (b) suspension of legal procedural periods (the limitation period is a statutory period after which a lawsuit or prosecution cannot be brought to court. Also termed limitation of action) (Garner, 2009, p. 1012).

The game theory applies to mediation because in the ADR method, there are lasting relations - the game (cooperation Vs. no cooperation behavior) will be repeated continuously while the relation still exists. Future interactions are very important for the parties. The strategic negotiation theory focuses on equilibrium and efficiency; characteristics found in mediation (Wall & Dunne, 2012, p. 16). The parties need to measure the value of their forthcoming interactions because a rational player will not employ a strictly dominating “win at all costs” strategy knowing that this could destroy the relationship and poison any possibility for future business or partnerships (Cooter & Ulen, 2008, p. 38; Gibbons, 1958, p. 4). People who cooperate are rational and evolved (Nowak, 2006).

## Economic benefits achieved by mediation in the Brazilian scenario

In Brazil, the costs of a lawsuit can be divided among the parties. It is interesting to identify that in Rio de Janeiro, through the PORTARIA CGJ N° 2.882/2019, the amount of BRL 39.90 must be paid by the parties for mediation session. The CPC (art. 168) determines that judicial mediation can be done in a private mediation institution certified by or listed in the Judiciary, and the costs will be paid by the parties. Nevertheless, this administrative procedure to register these chambers has not yet been finalized.

The cost of a lawsuit was calculated in a research study developed by the Brazilian Institute of Planning and Taxation (The research is available at <http://ayadvogados.com.br/processos-judiciais-de-empresas-em-tr%C3%A2mite-no-brasil-superam-o-pib-de-pa%C3%ADses-como-canad%C3%A1-argentina-e-holanda>, captured on 12.07.2018, at 11 am. This Law Office participated in such research. The methodology of this study includes the study of Justice in Numbers Report, analysis of more than 25.000 lawsuits, Financial Reports of almost 8.000 companies, business billing, and Market Share IBPT), and the conclusion is that companies of all sizes (small, medium, and large) spent about BRL 140 billion in 2016 (1.7% of revenue) to defend themselves in courts (available at <https://www.consumidormoderno.com.br/2017/10/31/quanto-empresas-gastam-justica/>, captured on 12.07.2018, at 11 am.). This amount includes the payment of fees (judicial and extrajudicial), expertise, fines, and legal charges on conviction, personnel, system and lawsuit control advice, attorney’s fees, and travel expenses, that is, the cost of the machine to litigate in the Brazilian court. The expenses with indemnities after the judge’s sentence are not included in this sum. Table 9 describes the annual value of the lawsuit and indicates this updated cost using the IPCA (broad consumer price index). Such an index measures the monthly

inflation in the country with reference to the previous month, so the update was based on the accumulated IPCA of each year, comparing them with the previous year.

The expected value (reserve value) for the parties is defined as the minimum that the rational person seeks to achieve in the process (including the costs spent in the process) and the maximum that the rational defendant imagines that the lawsuit will cost them (including the costs of the proceedings). Considering value claimed ( $W$ ) multiplied by the probability of receiving it calculated by jurimetry ( $P$ ) minus the non-refundable transaction cost ( $C$ ) for the Plaintiff, their expected value ( $EV$ ) can be written as in the following formula:

$$EV = (P.W) - C \quad (1)$$

On the other hand, the expected value ( $EV$ ) for the defendant is the value claimed ( $Wd$ ) multiplied by the probability of not paying ( $Pd$ ) plus the non-refundable transaction cost ( $Cd$ ). The defendant's expected value can be written as in the following formula:

$$EV = (Pd.Wd) + Cd \quad (2)$$

Table 11 shows that the cost to maintain that lawsuit per year should be included in the “non-refundable cost” (for both plaintiff and defendant).

As mentioned before, to exemplify the calculus of the expected value, the amount of BRL 10,000.00 and (b) the percentage of 50% for winning the case were selected due to their simplicity in understanding. This sum was also indicated in the initial requirement of lawsuit no. 0198093-42.2016.8.19.0001 studied in the research. Although there may be differences between conflicts, variables, such as parties, type of companies, and complexity of the conflict, it is important to demonstrate this calculation. A simulation can be made to demonstrate it. Therefore, considering the lawsuit analyzed and the application in extrajudicial scenario:

## CASE 1

### Judicial information (elements obtained in a lawsuit).

The data “ $W$ ” and “ $C$ ” were collected from the lawsuit. The data  $P$  is a simulation:

Demand – BRL 10,000.00

Agreement – BRL 5,000.00

Time in the Judiciary – June 28, 2016 to January 29, 2018 (571 days)

Judicial mediation time – 4 hours

Considering the simulation:

(i) CIESP's fees + mediator's fee (BRL 350.00 per hour) = BRL 1,000.00 + BRL 1,400.00 = BRL 2,400.00 (50% per each party = BRL 1,200.00)

(ii) The cost of the lawsuit for each party, considering a medium company (Table 10) is BRL 3,850.25, which:

a) 6 months in 2016 = (BRL 2,379.05/2) = BRL 1,189.52

b) whole year of 2017 = BRL 2,449.00

c) 1 month in 2018 = (BRL 2,540.84/12) = BRL 211.73

(iii) Lawsuit (judge's decision) time – 5 years = (BRL 2,540.84 x 5) = BRL 12,704.20

(iv) Lawyer's fee for extrajudicial agreement (Table 4, item 4 of OAB's table) - BRL 781.44

Note: The year 2018 was considered because it was the last whole year, and it is not possible to foresee the future actualization.

Plaintiff's expected value – lawsuit

$$EV = (P.W) - C$$

$$EV = (10,000 \times 0.50) - 12,704.20$$

$$EV = 10,744.24 - 12,704.20$$

$$EV = - 1,959.96$$

Notes: (a) For this analysis, considering that it is not possible to foresee the future update, a simulation was made in which the beginning of the lawsuit was January 2014 (to complete the prevision of 5 years in the Judiciary). Therefore, the cost of the lawsuit for each party is BRL 11,630.03 (Table 10).

(b) (P.W) is updated with interest (1% per month) and monetary correction. This calculation can be simulated in a specific system of the Judiciary.

(c) in C, lawyer's fees are included.

Defendant's expected value – lawsuit

$$EV = (Pd.Wd) + Cd$$

$$EV = (10,000 \times 0.50) + 12,704.20$$

$$EV = 10,744.24 + 12,704.20$$

$$EV = 23,448.44$$

Notes: (a) Same explanation as "Plaintiff's expected value – lawsuit" above

(b) (Pd.Wd) - same explanation as "(P.W)" above

(c) In Cd, lawyer's fees are included.

Plaintiff's expected value – judicial mediation

$$EV = (P.U) - C$$

$$EV = (10,000 \times 0.50) - 3,842.60$$

$$EV = 5,000.00 - 3,842.60$$

$$EV = 1,157.40$$



Note: In C, lawyer's fees are included.

Defendant's expected value – judicial mediation

$$EV = (Pd.Wd) + Cd$$

$$EV = (10,000 \times 0.50) + 3,842.60$$

$$EV = 5,000.00 + 3,842.60$$

$$EV = 8,842.60$$

Note: In Cd, lawyer's fees are included.

Plaintiff's expected value – extrajudicial mediation

$$EV = (P.W) - C$$

$$EV = (10,000 \times 0.50) - 1,981.44$$

$$EV = 5,000.00 - 1,981.44$$

$$EV = 3,018.56$$

Note: In C, consider  $(\text{CIESP's fees} + \text{mediator's fee})/2 + \text{lawyer's fee} = [\text{BRL } 1,000.00 + (4 \times \text{BRL } 350.00)]/2 + \text{BRL } 781.44 = \text{BRL } (1,000.00 + \text{BRL } 1,400.00)/2 + \text{BRL } 781.44 = \text{BRL } 2,400.00/2 + \text{BRL } 781.44 = \text{BRL } 1,200.00 + \text{BRL } 781.44 = \text{BRL } 1,981.44$

Defendant's expected value – extrajudicial mediation

$$EV = (Pd.Wd) + Cd$$

$$EV = (10,000 \times 0.50) + 1,981.44$$

$$EV = 5,000.00 + 1,981.44$$

$$EV = 6,981.44$$

Note: In Cd, consider  $(\text{CIESP's fees} + \text{mediator's fee})/2 + \text{lawyer's fee} = [\text{BRL } 1,000.00 + (4 \times \text{BRL } 350.00)]/2 + \text{BRL } 781.44 = \text{BRL } (1,000.00 + \text{BRL } 1,400.00)/2 + \text{BRL } 781.44 = \text{BRL } 2,400.00/2 + \text{BRL } 781.44 = \text{BRL } 1,200.00 + \text{BRL } 781.44 = \text{BRL } 1,981.44$

The expected value for both parties in an extrajudicial mediation is higher/better than in a lawsuit. The plaintiff receives more in an extrajudicial mediation, and the defendant pays less (Table 10).

Comparing a judicial decision in a lawsuit and an agreement settled in mediation, it can be observed that judicial mediation is 80.73% less expensive, and extrajudicial mediation is 84.41% less expensive. Besides, the net present value (“the value of the money and the uncertainties associated with them. In this way, the information analysis and decision-making result in the allocation of scarce resources.” Accounting Pronouncements Committee (CPCO 12, item 8, free translation) can be considered. If the plaintiff settles an agreement now, the value of this money is greater than at the end of the lawsuit (in 5 years).

The Net Present Value method (NPV) was used to calculate the present value of the agreement in the judicial process and in the private chamber. The value was calculated from the amount of the agreement of the judicial mediation in its respective year. The value was reduced by 10% when the time of the judicial process and the chamber were one year later than that indicated in the mediation. When the date was a year before, the value was increased

by 10%. It is worth mentioning that the 10% value was chosen because the SELIC rate, which is the basic interest rate of the Brazilian economy, rotates around 10% per year, in addition to other studies in this area that also used this value. Thus, the Wilcoxon test (Hollander & Wolfe, 1999) was used to compare the present value of the agreement in judicial mediation, in the judicial process, and in the private chamber.

Table 12 demonstrates the comparison of the net present value where it is possible to state that:

- There was a significant difference (p-value <0.001) between the present value of the judicial mediation agreement and the present value of the agreement in the judicial process, and the present value of the judicial process was lower.
- There was a significant difference (p-value <0.001) between the present value of the judicial mediation agreement and the present value of the private chamber agreement, and the present value of judicial mediation was lower.
- There was a significant difference (p-value <0.001) between the present value of the agreement of the private chamber and the present value of the agreement of the judicial process, and the present value of the judicial process was lower.

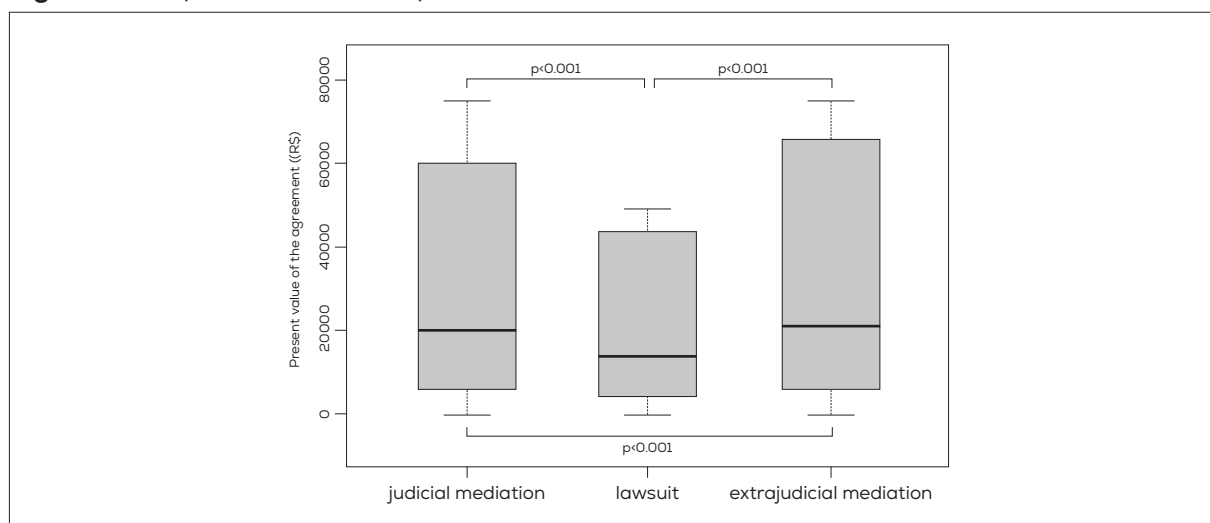
**Table 12.** Comparison of the net present value

Agreement present value	N	Average	E.P.	1º Q	2º Q	3º Q	Value-p <sup>1</sup>		
							1	2	3
Judicial Mediation (1)	26	150528.10	60577.28	5856.00	20000.00	60000.00	-	-	-
Lawsuit (2)	26	103350.70	40311.21	4269.02	13851.00	43740.00	<0.001	-	-
Extrajudicial mediation (3)	26	156821.10	61348.98	6441.60	21000.00	66000.00	<0.001	<0.001	-

<sup>1</sup> Wilcoxon test.

To condense the data, Figure 1 clarifies that in extrajudicial mediation, the Net Present Value is higher than in the other two methods of resolving conflicts.

**Figure 1.** Comparison of the net present value



Consequently, the hypotheses below are confirmed:

H1: In Brazil, electing mediation to resolve a business conflict is more economically advantageous than suing in the Judiciary.

H2: In Brazil, choosing extrajudicial mediation to end a business conflict is more economically advantageous than settling an agreement in judicial mediation.

Therefore, comparing lawsuits (adjudicative procedure) and mediation (judicial and extrajudicial-cooperative procedure), it can be said that mediation is less expensive.

Although it is difficult to change culture and habits, business executives and lawyers (Jackson et al., 2003) need to exercise the decision process by looking carefully at a decision tree to achieve better and more rational results (Lee, 1971). The decision tree is very useful for showing the routes the various possible outcomes can lead to (Magee, 1964; Saunders, 2015) because decision-making is usually associated with high degrees of uncertainty and complexity, attached to limited resources, a diversity of the involved agents and potential conflicts of interest (Nogueira et al., 2017, p. 7). The positive influence of business mediation was confirmed in this study, and the importance and profitability of settling a satisfactory agreement were evident. As a practical contribution from this research, organizations can elaborate a decision tree with current data to seek an efficient and effective method for resolving business conflicts (Lightle, 2016, p. 1; Strong, 2016, p. 1986).

## CONCLUSION

This study fills a literature gap in the empirical data about the economic benefits of business mediation in Brazil.

It was demonstrated that the direct costs in an extrajudicial mediation are less expensive than in a judicial mediation and a lawsuit (being the highest). Comparing a judicial decision in a lawsuit and an agreement settled in mediation, it can be observed that judicial mediation is 80.73% less expensive, and extrajudicial mediation is 84.41% less expensive, as demonstrated in Table 11.

The three most frequent issues discussed in Rio de Janeiro's Court were Company (29.2%) (that means the main claim is related to Business matters), Company Dissolution (17.9%), and Contractual Responsibility (12.1%), as demonstrated in Table 3.

The research confirmed the low percentage of agreements in mediation (19.4%) (Table 5) and, according to Table 6, a) 3.6% of agreements made in mediation court can be considered creative because they involved elements other than those included in the parties' legal claims; b) 44.6% of the agreements made in mediation courts included non-monetary terms; c) the size (monetary value) of the cases handled in mediation court can vary considerably.

Considering the time, the analysis of lawsuits indicates that the average period to settle a lawsuit in a judicial mediation was 323.21 days in 2017 (Table 8 describes the 42 agreements

settled in 2017). In 2016, this average was lower (140.86 days) because fewer lawsuits scheduled judicial mediation. There are no recent studies about it.

The company must consider that the money gained/obtained in an agreement in a business mediation at this moment (present time) is more profitable than the same amount received in the future.

The disputants' choice of a method for conflict management is rational because the parties do calculations that consider their concern for their own and their opponent's outcomes with respect to feasibility, costs, and benefits associated with different methods. The nature of the conflict and its situational context are also considered.

When thinking rationally, the decision-maker can use the decision tree to help them forecast the best strategies for the company to adopt (no matter the situation and the parties' role in this – either plaintiff or defendant). This research demonstrated the economic benefits of extrajudicial and judicial mediation in helping the company's decision-maker select the adequate dispute resolution method.

In conclusion and in response to the proposed problem, it is possible to state that mediation is more economically advantageous than lawsuits, confirming the initial hypotheses of this research. This contributes to the positive long-term economy by enabling the implementation of Sustainable Development Goal 16 of the UN 2030 Agenda, which deals with peace, justice, and the search for effective institutions, which must be fulfilled by the government, civil society, and the private sector.

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## CONFLICTS OF INTEREST

The authors have no conflicts of interest to declare.

## AUTHORS' CONTRIBUTION

Cristiane Dias Carneiro Conceituação, curadoria de dados, análise formal,; Investigação; Metodologia; Administração de projetos; Recursos; ; Validação; Visualização; Redação – rascunho original; Redação – revisão e edição.

Yann Duzert SupervisãoRedação – revisão e edição.

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