Paths of understanding: Dialogue and the vitality of peaceful conflict resolution

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ABSTRACT
This study promotes an analysis of the Extrajudicial Means of Dispute Resolution (MESCs), with emphasis on arbitration, mediation and conciliation, in view of the growing procedural overload in the common justice. The objective is to understand how these means, often considered a private jurisdiction, manifest themselves in the resolution of disputes within the scope of available property law. The research adopted the methodology of bibliographic review, through careful selection of bibliographic materials, aligned with the discussions on MESCs, providing a grounded and contextualized approach to the various areas of law. The analysis reveals that private law, a dynamic area, emerges as one of the most adept at arbitration. The benefits identified corroborate the conscious choice of users for these means, providing valuable insights into the effectiveness and efficiency of these practices in dispute resolution and contributes to the in-depth understanding of Extrajudicial Means of Dispute Resolution, highlighting arbitration as a relevant option in private law. The advantages identified reinforce the importance of these methods, suggesting ways to improve the effectiveness of the legal system in coping with procedural overload and in promoting a more efficient justice system adapted to contemporary demands.

Keywords: Extrajudicial Means of Dispute Resolution, Conciliation, Mediation and Arbitration, Arbitration Law, Private law.

1 INTRODUCTION

This article adopted as a methodological approach the literature review based on the theoretical framework discussed in the discipline of conflict resolution, being selected based on the analysis of the context of alternative means of conflict resolution as one of the appropriate approaches to resolve disputes.

The problem of excessive lawsuits in the Brazilian judicial system is frequently discussed, and one of the fundamental causes is attributed to the principle of inalienability of jurisdiction, as provided for in article 5, item XXXV, of the Federal Constitution of 1988, which establishes that "the law shall not exclude from the appreciation of the Judiciary any injury or threat to a right[1]".

In the context of the implementation of public policies, such as the affirmation of consumer rights, the creation of specialized civil and criminal courts, the arbitration law[2] and the mediation law between private parties[3], the perspective of an agile resolution of conflicts in various situations emerges. It is extremely important to consider the possibility that citizens, before resorting to the Judiciary, seek to resolve their demands through the alternative resources available in their locality.

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[1] Constitution-Compiled (planalto.gov.br)
[2] L9307 (planalto.gov.br)
[3] L13140 (planalto.gov.br)

It is crucial to highlight that there is a more humanized and effective approach to conflict resolution: mediation[4]. This method, by providing a collaborative and facilitating environment, presents itself as an alternative that not only speeds up the process, but also promotes a more satisfactory solution for both parties involved. Encouraging the adoption of mediation as a common practice in society would contribute significantly to the decongestion of the judicial system and to a more efficient and equitable culture of conflict resolution.

> [...] this did not solve the problem, as the Judiciary continued to have intense difficulty in administering the justice system, which has an increasing number of cases in progress.[5]

The Brazilian legal system incorporates alternative dispute resolution strategies from the pre-procedural stage, applicable to all instances, in order to prevent the escalation of recurring situations to the procedural phase. This approach aims to promote a more agile and effective administration of justice. In the context of the labor process, it stands out as a primary condition in the first hearing, involving the participation of the parties and their lawyers.

Currently, the multi-door dispute resolution system is widely discussed as a valuable alternative to access dispute resolution services through agreements that aim to benefit both parties involved. This approach stands out as a flexible and adaptable method, providing customized solutions for different dispute contexts.

Since 2010, the Brazilian Judiciary has expanded its dispute resolution options, introducing additional "doors" more suited to the specific nature of each dispute. Mediation and conciliation stand out as prominent tools in this scenario, providing less adversarial and more collaborative environments[6]. These methods not only contribute to faster justice, but also promote the construction of a legal culture that values the peaceful resolution of conflicts. In this sense, the diversification of means for dispute resolution represents a notable advance in the search for more efficient judicial processes aligned with the specific needs of the parties involved.

In the Brazilian scenario, arbitration is supported by Federal Law No. 9,307/1996, and the Federal Constitution itself recognizes its relevance, especially in the sports context. Mediation, in turn, is regulated by the Law of Mediation between Private Individuals and within the scope of Public Administration, Law 13.140/2015[7], representing another public policy of significant importance. This regulation strengthens the role of mediation as a consensual and effective means for resolving disputes.

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[4] L13140 (planalto.gov.br)

[5] The Crisis of the Judiciary and the Multi-Door Conflict Resolution System (jusbrasil.com.br)

[6] Multi-Door Justice offers adequate ways to resolve conflicts in Mato Grosso - Portal CNJ

[7] https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13140.htm

A prominent public policy that simplifies out-of-court procedures is Law 11.441/2007[8], making it possible to carry out inventory, partition, consensual separation and consensual divorce directly in notary publics. This legislation aims to reduce bureaucracy and streamline such procedures, promoting a more efficient and accessible approach for the citizens involved.

2 HARMONIZING INTERESTS: THE ESSENCE OF MEDIATION

Law 13.140/15 represents a significant advance in introducing the positivity of mediation between private individuals and within the scope of the Public Administration in the context of the Brazilian legal system. In broad terms, mediation is a non-judicial strategy for resolving disputes, mediated by an impartial third party, the mediator, whose primary function is to facilitate understanding between the parties. This approach seeks a viable solution for the mediators, removing the need for a judge's involvement. For Vezzula[9]:

> Mediation is the private technique of conflict resolution that has been demonstrating, in the world, its great efficiency in interpersonal conflicts, because with it, it is the parties themselves who find the solutions. The mediator only helps them to look for them, introducing, with his techniques, the criteria and reasoning that will allow them a better understanding. (VENUZZA, 1998, p. 15).

Mediation, as a time-honored practice, can manifest itself in two distinct modalities: judicial and extrajudicial. In judicial mediation, the process already instituted is the stage for the event to take place, and the parties have the prerogative to settle at any time during this process. On the other hand, out-of-court mediation is characterized as an alternative means of dispute resolution, taking place in environments outside the traditional justice system, often in mediation chambers. In these contexts, the mediator acts as an independent and impartial facilitator, seeking to achieve an amicable settlement between the parties.

According to Bacellar (2012), auditory attention competence manifests itself as a highly relevant dimension. The mediator is compelled to take precautions to avoid unnecessary interventions. In the process of reconstituting communication, the mediator's role should be restricted to conducting the dialogic space, highlighting the converging elements that manifest themselves throughout the dialogue.

The dynamics of mediation is based on the existence of a divergence, involving the central actors of the process: the parties involved, called mediators, and the intervention of an uncommitted and impartial third party, the mediator. The latter aims to assist the parties in identifying the best way to resolve the dispute, promoting a constructive dialogue on interests and needs.

Mediation, as a results-oriented practice, aims not only at the immediate resolution of the dispute, but also at the construction of agreements that can serve as models of conduct for future relationships. In

[8] Law No. 11,441 (planalto.gov.br)
[9] Vezzulla, Juan Carlos. Theory and practice of Mediation. Curitiba, Institute of Mediation and Arbitration, 1998.do Brazil.

this context, the collaborative environment of mediation provides a productive space for the parties to dialogue about their interests, fostering a mutual understanding that transcends the immediate dispute. This approach, aligned with Law 13,140/15, represents a valuable contribution to the promotion of a more effective, collaborative legal culture adapted to the needs of the parties involved[10].

3 THE KEY ROLE OF CONCILIATION

Conciliation, through the intervention of an impartial and disinterested third party in the dispute, is primarily a process of orderly and cordial dialogue, playing the role of facilitating discussions between the parties involved. This third party, called conciliator, not only enables communication between the litigants, but also has the prerogative to suggest paths and actively seek the resolution of the dispute, constituting himself as a mediating agent in the search for a consensual solution.

Conciliation, as an innovative and agile mechanism for judicial provision, is distinguished by leading the parties to a special hearing. In the presence of the conciliator, the parties involved engage in dialogue with each other, presenting proposals that, if accepted, are ratified on the same day by the judge, culminating in the immediate closure of the case[11]. In this context, the absence of additional resources or bureaucracies is highlighted, providing a quick and effective resolution of disputes.

The conciliatory practice can manifest itself both in the judicial and extrajudicial spheres. In the judicial sphere, it is the judge's responsibility to propose conciliation between the parties, ending the process when an agreement is reached. On the other hand, in out-of-court conciliation, the parties deliberate outside the procedural context, being led by the conciliator, who facilitates communication and seeks to effect an understanding between them, providing a more flexible approach to conflict resolution.

Widely adopted in the labor courts and in various judicial areas, conciliation has significant advantages, especially in the initial stages of contacts with the parties, prior to the delivery of a judgment. In addition to reducing the waiting time for a final court decision, the positive impact on the financial aspect is highlighted. It is important to note that the parties are not compelled to reconcile, and may, if there is no consensus, proceed with the process in a conventional manner.

The Code of Civil Procedure (CPC), in its article 165, § 2, outlines that conciliation is conducted by the figure of the conciliator, acting preferably in cases without a previous relationship between the parties. The conciliator, in this context, has the ability to suggest solutions to the dispute, and the use of constraint or intimidation to force conciliation is expressly prohibited. This normative provision emphasizes the importance of the conciliator's impartiality and the encouragement of the search for consensual solutions.

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[10] What is Mediation? - Court of Justice of the State of Rio de Janeiro (tjrj.jus.br)
[11] ConJur - Conciliation sector in SP opens doors of Justice

Throughout the course of the proceedings, the magistrate may make efforts to reconcile at any time in order to speed up the proceedings and bring the case to a close. Article 125, item II, of the CPC grants the judge the autonomy to seek conciliation even after the judgment has been rendered, emphasizing the flexibility of conciliation as an effective tool in the promotion of swift justice adapted to the specific needs of the parties involved.

4 EFFICIENT ARBITRATION: PRIVATE JUSTICE

Arbitration in the Brazilian legal context is regulated by Law 9,307/96, updated by Law 13,129/15, whose constitutionality was confirmed by the Supreme Court in 2001. This mechanism represents a significant tool of heterocomposition, guided by the principles of functionality and procedural speed, allowing the resolution of disputes according to the will of the parties involved.

This method of dispute resolution, known as arbitration, is an effective and viable alternative, in which the parties agree that a third party, called an arbitrator, is responsible for resolving their claims. According to Roque (2009, p. 11), arbitration is a system aimed at the peaceful settlement of disputes, both national and international, characterized by speed and discretion, encompassing both public and private law.

In the arbitration process, by decision of the parties, a judge is appointed and an arbitral entity, the arbitrator, who does not maintain any link with the litigants, providing the impartiality necessary to settle the conflicts. According to Roque (2009, p. 11), arbitration can be considered a private court, playing the role that public justice would have, that is, the resolution of disputes between two or more parties.

Distinctive features of arbitration are highlighted, such as the principle of autonomy of will, allowing the parties to choose arbitrators, judges and the law applicable to the case, whether this is Brazilian or international contract law, according to international treaties. Given that arbitration predominantly focuses on available property rights, as provided for in the arbitration legislation, its recurrent application in contractual contexts is observed, especially in the fulfillment and enforcement of divergent contractual clauses.

It is important to note that the option for arbitration to settle potential disputes is a choice of the parties, either through the inclusion of an arbitration clause in the contract entered into or through the option of the traditional recourse to the common public courts.

Although arbitration can be used in the resolution of disputes in relations between private individuals and public administration, its most frequent application in commercial relations, involving companies, individuals and, notably, in relations between personalities in the sports environment is notable. This phenomenon stands out for its recurrence and naturalness in these specific contexts.

5 FINAL CONSIDERATIONS

The core of this study was the analysis of the application of the main Extrajudicial Means of Dispute Resolution (MESCs). In this context, it is evident that the implementation of these methods in the various areas of law has the potential to significantly accelerate the resolution of conflicts. The in-depth analysis of this application reveals speed as a striking characteristic, thus becoming an effective alternative for the pacification of disputes.

When choosing to file a lawsuit with the judiciary, it is crucial to consider that in Brazil, lawsuits can extend for years until reaching a conclusion. In addition to delay, financial issues must also be considered, since the procedural costs for both the parties and the administration of justice are substantial. This consideration highlights the importance of seeking out-of-court alternatives in the face of conflicts, considering not only the effectiveness, but also the efficiency and costs involved.

Therefore, in recent years in Brazil, there has been a growing adoption of out-of-court procedure options for the resolution of claims, such as out-of-court settlements, divorces and reorganization of business companies. Recently, Law 14,382/2022 was approved, providing a simplified change of civil name directly at notary offices for people over 18 years of age. These initiatives reflect the constant search for more agile and accessible methods for resolving legal issues.

Undoubtedly, there are several public policies in force, and the Extrajudicial Means of Conflict Resolution should be everyone's preference when faced with a disagreement. This preference is justified by the various advantages provided in the processes involving available property rights, thus contributing to the social transformations of the country. These means not only foster speedy conflict resolution, but also promote a culture of dialogue and consensus, strengthening the basis for broader social change.

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