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## Riverboat Courts Provide Access to Justice in Brazil's Remote Amazon Delta



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## *The Expansion of Online Dispute Resolution in Brazil*

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### Abstract:

This article examines Online Dispute Resolution (ODR) by analyzing its primary components (i.e., e-mediation and e-negotiation) and then applying that analysis to the implementation of an ODR system in Brazil. The authors believe that the implementation of ODR in Brazil will be challenging due to legislative constraints and a prevailing pro-litigation sentiment, which is widely perceived as the default resolution option. However, the authors contend that, by systematically demonstrating the benefits of ODR and sharing best practices gleaned from other countries, ODR will slowly take root in Brazil, eventually becoming a preferred option for resolving disputes.

### Introduction

Official legal statistics supplied by the National Justice Council<sup>5</sup> - CNJ shows with numbers<sup>6</sup> what millions of citizens who are waiting for their legal cases to be decided by the courts already know: the Brazilian state court system is facing a crisis<sup>7</sup>. One might even say that the Brazilian legal system is almost in a state of bankruptcy; its slowness is shocking, its lack of efficiency is crippling, and it is proving inadequate to achieve its core mission: delivering timely justice to citizens.

This present situation is perhaps the inheritance of an older Brazil, in which the government was mired in an inefficient, complex and corrupt bureaucracy laden with unenforceable, incongruent, and obsolete laws<sup>8</sup>. Fortunately, new laws introduced in 2015 aimed to overhaul the legal system and address these shortcomings. However, regardless of these legislative changes, without a broader cultural revolution in the legal community, these challenges will continue unabated.

For many years, the court system was the only legal means available for conflict resolution in Brazil.<sup>9</sup> As a result, the courts have received great numbers of legal filings, and the “culture of litigation” has grown deep roots. Furthermore, the re-democratization of Brazil has contributed significantly to an increase in court cases. In this environment, procedural law has forcefully steered disputants toward litigation, which has led to a decreased focus on collaborative approaches.<sup>10</sup>

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5 Created by Constitutional Amendment n. 45/2004, one of the most significant reforms in the Constitution of 1988, the National Justice Council- CNJ is responsible for the management and strategic planning of the Judiciary, as well as its supervision. Its role is strictly administrative and it endeavors to perfect institutions and transparency regarding court management and decisions. (Zampier, D. (2014). *Reforma constitucional que criou CNJ completa 10 anos*. [online] Available at: <http://www.cnj.jus.br/2rdh> [Accessed 19 Dec. 2016].)

6 One of CNJ's duties is the production of the Briefing “Justice in Numbers”, which is basically an annual statistical analysis of the Judiciary's activities. This analysis is public and is sent to the Congress so that the measures may then be taken to better develop the legal system. Available at: <http://www.cnj.jus.br/programas-e-acoas/pj-justica-em-numeros>. (Conselho Nacional de Justiça, (2005). *RESOLUÇÃO No. 4, DE 16 DE AGOSTO DE 2005*. Brasília.) [Accessed 19 Dec. 2016]

7 Approximately 25 million claims are filed every year in Brazilian courts; together with other 74 million pending cases in the court system, resulting in almost 100 million lawsuits pending judgment in 2016. Adding to this massive backlog is the slow processing of cases by the courts. On average, before reaching an appellate court, trial courts take an average of eleven years to render decisions. Expenses related to the maintenance and expansion of this legal apparatus, in 2015, were estimated in R\$ 79.2 billion, a per capita expense of R\$ 387.56 per year. Data further indicates that during the last six years this cost has increased significantly. In addition to paying taxes to help finance the court apparatus, litigants must also pay additional fees if they want to see their case through. Costs to litigants reached R\$ 9.2 billion in court fees in a single year. (In: *Justiça em Números*. (2016). 1st ed. [ebook] Brasília: CNJ, p.33. Access: <http://www.cnj.jus.br/files/conteudo/arquivo/2016/10/b8f46be3d8bbf344931a933579915488.pdf> ).

8 MARINONI, Luiz Guilherme e BECKER, L. A. *Influência das relações pessoais sobre a advocacia e o processo civil brasileiro*. In: BECKER, L.A. (org.). *Qual é o jogo do processo?* Porto Alegre: Sérgio Antônio Fabris Editor, 2012, p. 451.

9 Despite legal provisions authorizing resolution of complaints by Arbitration- e.g., Lei 9307/1996, in practice these alternative forms of conflict resolution have not seen significant use.

10 Adversarial forms of conflict resolution – litigation – are predominant to other forms that prefer the common good and long term relationships. The paradigm of competition as the prime solution to social relations has prevailed; however, in its place was offered a new paradigm of cooperation based on game theory and in other conceptions, such as the Nash equilibrium or the prisoners' dilemma. (Manual de Mediação Judicial. (2015). 5th ed. [ebook] Brasília: Conselho Nacional de Justiça, pp.55-64.)

The obstacles to the access to justice have caused commotion in public administration circles. It is clear to many in government that bold action is required to address these challenges. As a result, alternative dispute resolution (ADR) has been attracting special attention. In 2015, the Law of Mediation was introduced (Lei 13,140/2015) and the enforcement reach of the Law of Arbitration (13,129/2015) was expanded<sup>11</sup>. These legislative reforms, aimed at increasing the efficiency of the Brazilian Justice System, culminated with the introduction of a New Civil Process Code, NCCP (Lei 13,105/2015). Throughout the debates around the formulation of this code, MPs discussed the importance of finding alternatives to judicial conflict resolution. Mediation, arbitration, and conciliation were all reinforced and stimulated in Brazil<sup>12</sup>, based on the mechanisms contained in the legislation.

This effort toward the creation of a more efficient legal system without encroaching on individual rights, has not yet achieved its final objective. It is important to strengthen the measures already underway; and it is also clear now that new ideas are also necessary to fully attain the improvements required.

One such new idea is technology. Improvements in technology and communication networks have had a major impact on many areas of society. A period has started in which disruptive innovations can be applied to the practice of law.<sup>13</sup> The field of Online Dispute Resolution, focuses on the question of how technology can be used to help individuals find fast and fair resolutions to their disputes<sup>14</sup>.

The 46th paragraph of the aforementioned Law of Mediation (Lei 13,140/2015) authorized private mediators and companies to utilize ODR both in judicial and extrajudicial channels. This reform aimed at enabling the private sector to contribute to the overcoming of the challenges related to the access to justice in Brazil.

These initiatives have been successful in promoting the development of ODR in the country. Now, e-mediation and e-negotiation are important conflict resolution tools in Brazil. With the use of ODR, disputes may be resolved both more quickly and cost-effectively than resolutions through the courts. These techniques are now described within the judiciary as constructive processes<sup>15</sup>. It is now the official policy of the Brazilian judiciary to promote online mechanisms for conflict resolution, and this development offers the opportunity of a true transformation of the litigation culture that has so long dominated the Brazilian legal system.

In this article, we intend to analyze the Brazilian conflict resolution system and the initiatives aligning it to global trends promoting ODR. To achieve that, the article is divided into three parts. Part I is dedicated to the global development of ODR. Part II focuses on initiatives in progress around e-mediation and e-negotiation in the Brazilian legal system. To conclude, Part III details the challenges that Brazil faces moving forward in the use of Internet and information technology to expand access to justice.

## Part I: The Global Trend Toward ODR

Online Dispute Resolution first emerged in the late 1990s as a means to resolve disagreements regarding purchases conducted over the Internet. Early pioneers such as the global eBay marketplace and the Internet Corporation for Assigned Names and Numbers (ICANN) were examples of how high volumes of disputes could be resolved in cross-jurisdictional transactions. Since that time ODR has grown into a global movement backed by many dozens of providers around the world, and undergirded by a strong academic and theoretic foundation. The National Center for Technology and Dispute Resolution (odr.info) serves as a hub for this global movement, supporting a global network of ODR Fellows and an Annual Conference that has met more than fifteen times in five continents.<sup>16</sup>

ODR first entered the American market in 1996<sup>17</sup>, and each subsequent project has evolved in terms of reach, technology, and sophistication. By 2010, eBay resolved more than 60 million disputes per year through its ODR platform, more than the entire US Civil Court system. In

11 The Lei 13,129/2015 modifies the letter of the articles 1st, 2nd, 4th, 13th, 19th, 23rd, 30th, 32nd, 33rd, 35th and 39th of the Lei 9,307/1996, thus modifying and enhancing arbitration in Brazil. The main reforms consist of permitting public administration to make use of this mechanism as well as it: a) allows the parties to choose their judges; b) interrupts prescription terms whenever arbitration is instituted; c) concedes precautionary and urgency decisions within the use of arbitration; d) originates the arbitral letter (document); and the arbitral decision. All in all, all of those mechanisms represent the development and growth of arbitration in Brazil. [translated from Portuguese] (Presidência da República, (2015). Lei nº 13.129. Brasília.)

12 As assessed in the first elaborative preview of the New Civil Process Code "The preview stipulation of mediation and arbitration, conceived in the 144th and 153rd articles endeavours answering these conflict resolution mechanisms and all its promising perspectives" SENADO FEDERAL, (2012). *COMISSÃO ESPECIAL DESTINADA A PROFERIR PARECER AO PROJETO DE LEI NO 6.025, DE 2005, AO PROJETO DE LEI NO 8.046, DE 2010, AMBOS DO SENADO FEDERAL, E OUTROS, QUE TRATAM DO "CÓDIGO DE PROCESSO CIVIL" (REVOGAM A LEI No. 5.869, DE 1973). PROJETOS DE LEI Nos. 6.025, DE 2005, E 8.046, DE 2010.* [translated from Portuguese][online] p.24. Available at: <http://s.conjur.com.br/dl/relatorio-cpc-sergio-barradas.pdf> [Accessed 19 Dec. 2016.]

13 "[...] The development of technology, the diffusion of the Internet and the enhancement of recording and transmission devices are indispensable options and operationalize hearings- thus enabling them to be more dynamic and original, shortening distances." [translated from Portuguese] (OLIVEIRA, V. (2016). *O juiz e o novo código de processo civil*. 1st ed. Curitiba: CRV, p.148.)

14 "ODR is the application of information and communications technology to the practice of dispute resolution." (Rule, C. (2015). *Technology and the Future of Dispute Resolution*. Dispute Resolution Magazine, 1(1), p.2.)

15 (Manual de Mediação Judicial. (2015). 5th ed. [ebook] Brasília: Conselho Nacional de Justiça, p.56. Deutsch, M. (1973). *The resolution of conflict*. 1st ed. New Haven: Yale University Press.)

16 "Much of ODR's early development was based in the US for several reasons: (a) the early development of US-based internet, for defense and research projects; (b) the deeply-set roots and early adoption of ADR processes in the US; (c) the competitive and innovative nature of the US ADR market; (d) the high-quality ICT infrastructure; (e) the tech savvy, increasingly wired population; and (f) US corporate culture, demanding instant accessibility of people and information." (Pearlstein, A., Hanson, B. and Ebner, N. (2013). *ODR in North America. Online Dispute Resolution Theory and Practice*, p.19.)

17 "ODR has been available since 1996. Its development can be defined as passing through three broad stages: a "hobbyist" phase where individual enthusiasts started work on ODR, often without formal backing; an "experimental" phase where foundations and international bodies funded academics and non-profit organisations to run pilot programs; an "entrepreneurial" phase where a number of for-profit organisations launched private ODR sites." (Conley Tyler, M. (2004). 115 and Counting: The State of ODR 2004. *Proceedings of the Third Annual Forum on Online Dispute Resolution, University of Melbourne*, p.2.).

2011 eBay spun out some of its ODR technology to start Modria.com, an ODR provider that supports resolutions around the world. Since 2000, ODR mechanisms have resolved more than 400 million disputes globally, and that number continues to grow<sup>18</sup>.

International organizations have promoted ODR as a solution to access to justice challenges since 2002. UNCITRAL, the United Nations organization in charge of harmonizing global laws, convened a Working Group devoted to ODR with more than 66 member nations. As ODR took off in geographies like North America and Europe<sup>19</sup>, the development of ODR in Brazil began in earnest a decade later. An international survey of the growth of ODR by Melissa Conley Tyler indicated that Brazil's use of ODR lagged behind initiatives in other geographies<sup>20</sup>, but the clear potential of ODR approaches in tackling the challenges being experienced in Brazil was clear even before ODR experiments began in earnest. The delay in Brazil's adoption of ODR approaches might have even been a benefit in retrospect, as other geographies tested and refined ODR tools, ensuring that Brazil could learn from best practices prior to beginning their own initiatives. The geographies that were most successful in implementing ODR were those that coordinated its launch between many stakeholders, including governmental organizations, foundations, chambers, private start-ups or individual enthusiasts.

In Europe, the number of private and public ODR start-ups has grown steadily. Certain countries have led the way as early adopters (e.g. England, The Netherlands), but now the more conservative governments on the Continent are following suit<sup>21</sup>. In 2015, the European Union adopted a new regulation requiring all merchants in EU Member States to notify their consumers about the availability of ODR, and the EU launched its own ODR filing form to collect buyer complaints and distribute them to regionally appropriate ODR service providers. An excellent example of the expansion of dispute resolution in Europe is the *Directive 2008/52/CE de le Parlement Européen et de Conseil de 21 Marz, 2008*<sup>22</sup>, which points out some guidelines<sup>23</sup> for the use of mediation in EU member states in certain cases such as torts and contract disputes, where the parties were from different countries.

The Civil Justice Council in the United Kingdom recently convened a working group consisting of experts in the ODR field to study its application in civil cases. The Final Report of this working group recommended that the Ministry of Justice create something called "Her Majesty's Online Court," which would be designed to use ODR approaches to resolve civil cases less than £25,000 without requiring disputants to show up in person at the court, or to be represented by a lawyer. As Lord Justice Fulford, the Senior Presiding Judge of England and Wales, put it, "ODR will be an integral part of the going [court] digitalization process. It is absolutely necessary for the survival of the justice system in the UK." The UK has now earmarked more than £700 million to help fund this modernization of the justice system, and ODR will likely be an integral component.<sup>24</sup>

ODR has shown particular traction within courts and legal service organizations. The provincial government of British Columbia, in Canada, recently created an online resolution process, the Civil Resolution Tribunal, which aims to move most low-dollar value civil disputes from the courts to ODR systems. British Columbia has been on the cutting edge of ODR for some time, and now the British Columbia Legal Services agency has launched MyLawBC.com, which uses ODR to expand services to low-income families in the province. The Dutch Legal Aid Board has also used ODR to support divorce and separation cases, and the Indian government has launched the Online Consumer Mediation Center (OCMC) to resolve disputes between buyers and sellers in India.<sup>25</sup>

If anything, the momentum behind ODR appears to be growing around the world. Those who have seriously considered the problem of access to justice, especially for high volume/low value cross-jurisdictional disputes, have come to the conclusion that ODR is the best option for the future. Judges, Bar Association Presidents, regulators, general counsels, and legal aid attorneys are all faced with shrinking budgets, growing numbers of self-represented litigants, and changing expectations amongst the constituencies they are trying to serve. The track record ODR has already achieved in a wide variety of global applications is encouraging them to think seriously about how ODR can work in their home geographies<sup>26</sup>. With all this momentum, it's no surprise that legal sector leaders in Brazil are asking the same questions.

18 (2013). *Modria raises \$5M to make resolve customer complaints in the cloud*. [online] Reuters.com. Available at: <https://www.reuters.com/article/idUS279454625820130708> [Accessed 17 June 2018].

19 "As of July 2004, at least 115 ODR services had been launched worldwide, settling more than 1.5 million disputes. ODR services offer examples of using technology to resolve everything from eBay disputes to commercial litigation; from family disputes to the Sri Lankan peace process. There are now ODR services in all regions." (Conley Tyler, M. (2004). 115 and Counting: The State of ODR 2004. *Proceedings of the Third Annual Forum on Online Dispute Resolution, University of Melbourne*, p.1.)

20 (Conley Tyler, M. (2004). 115 and Counting: The State of ODR 2004. *Proceedings of the Third Annual Forum on Online Dispute Resolution, University of Melbourne*, p.2.)

21 Ross, G. and Poblet, M. (2013). ODR in Europe.

22 European Parliament and The European Union Council, (2008). DIRECTIVA 2008/52/CE DO PARLAMENTO EUROPEU E DO CONSELHO – May 21st, 2008 relates certain aspects of the civil and commercial mediation. Estrasburgo: Jornal Oficial da União Europeia.

23 "13. The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate." (European Parliament and The European Union Council, (2008). DIRECTIVA 2008/52/CE DO PARLAMENTO EUROPEU E DO CONSELHO)

24 Rule, Colin and Schmitz, Amy. *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, American Bar Association Press, 2017. Page 18.

25 Rule, Colin. "Technology and the Future of Dispute Resolution," in *Dispute Resolution Magazine*, a publication of the American Bar Association, Winter 2015.

26 Katsh, E. and Rule, C. (2015). What we know and need to know about Online Dispute Resolution. *South Carolina Review*, 67(329), pp.5-6.

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## Part II: The Growth of ODR in Brazil: e-negotiation and e-mediation

A truism in dispute resolution is that the best time to resolve a dispute is as early as possible. The longer a dispute goes on, the more distrust can build, making resolution even more elusive. Tackling a dispute early in its lifecycle can optimize the chance that the issue can be resolved by mutual agreement between the parties. And even better than resolving a dispute early is preventing the dispute from arising in the first place. As Louis Kriesberg and Bruce W. Dayton put it:

It is easier to stop a conflict from escalating destructively if the struggle has not persisted for a long time and not escalated greatly. This underlies the high interest among conflict resolution practitioners in the potential of early warning and preventive diplomacy.<sup>27</sup>

In dispute resolution, delays can make disputes escalate and intensify. Therefore, moving quickly to resolve cases is extremely important. The legal system is not optimized around speed, and that generates frustration on the part of disputants<sup>28</sup>. ODR systems need to be easily accessible and fast moving to avoid generating that kind of frustration. In response to this dynamic, important legislative reforms were put into motion in order to improve the timeliness of the Brazilian legal system<sup>29</sup>.

The New Civil Process Code (Lei 13.105/2015) and the Law of Mediation (Lei 13.140/2015), legal bills which enhanced and amplified the usage of ADR, made explicit the acceptability of using technology, including virtual environments, as a permissible form of mediation<sup>30</sup>. The 334th article, 7th paragraph of the NCPC says: "The conciliatory audience or mediation audience may be realized electronically in the terms of the Law" [translated from Portuguese]. In a similar way, the 46th article of the Brazilian Law of Mediation notes: "Mediation may be realized by internet or by any other means of communication that permits distance transactions, since the parties agree." [translated from Portuguese]

These measures signal a strong political will towards modernizing the conflict resolution systems in Brazil, especially through the inclusion of new technologies. These moves have created a fertile environment for the development of ODR in Brazil. Although the changes in the field of conflict resolution are a recent development in Brazil, several private initiatives have quickly emerged to implement ODR in Brazil. The openness of the Brazilian legal system to ODR has signaled to the marketplace that ODR approaches are welcome, and that is causing developments to accelerate.

The expansion of internet access is also fueling the reach of ADR<sup>31</sup>. Brazil is a very large country, with marked differences in income and infrastructure across the different regions of the country. However, the use of communication technology via the internet opens access to redress for many Brazilians who are located in distant or rural locations<sup>32</sup>. Online options for filing cases and communicating with counter parties may make justice possible if the parties are physically separated by these great distances. In addition, the procedural flexibility of ODR, married to the flexibility of online communications, provides conditions that allow conflicts to be resolved faster and, consequentially, more effectively, because haste avoids the aforementioned escalation in complexity and frustration.

Therefore, we now observe in Brazil an acknowledgement of the advantages associated with ODR that have been described by experts in other countries which implemented ODR mechanisms previously. This development is stimulating the development of ODR experiments in the public and private sector aimed at realizing these efficiency, speed, and cost improvements<sup>33</sup>.

According to a study on ODR performed by the group "Law, Research, Innovation and Technology" of the Faculty of Law in the University of Brasilia<sup>34</sup>, the present online platforms existing in Brazil practice of e-negotiation and of e-mediation, focus primarily on the resolution of conflicts involving consumption.

We will now delve into the specifics of e-negotiation and e-mediation systems as deployed in Brazil and examine the services and platforms some of the online dispute resolution providers that have recently launched.

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27 Kriesberg, L. and W. Dayton, (2011). *Constructive Conflicts: From Escalation to Resolution*. (4), p. 198.

28 C. (2002). *Introduction to Online Dispute Resolution for Business*. [online] Mediate.com. Available at: <http://www.mediate.com/articles/rule2.cfm> [Accessed 30 Dec. 2016].

29 Brazilian Law, originated from the Continental-Germanic stream, promote the letter of the Law to an uppermost source of Rights; therefrom one can observe a will of change by the political power.

30 Conflict spires is the name of the social effect- so described by experts in the matter- in which the parties reactions escalate and interpose- thus generating so an intense and damaged conflict as the original issue. Therefore the means of a conflict are as much important as the conflict itself (Manual de Mediação Judicial. (2015). 5th ed. [ebook] Brasília: Conselho Nacional de Justiça, p.48)

31 Despite its limitations due to legal and security issues, ADR offers a greater range of conflict solutions mechanisms than the traditional path, from the perspective of the procedure (Mediation, Arbitration, Conciliation) to the perspective of the third party to assist the parties.

32 The distance between Manaus, Brazilian Northern economic pole, and Porto Alegre, the Southern capital is 3,133km – that is approximately the distance between Barcelona and Moscow plus 100km; or between Washington D.C. and Phoenix, Arizona.

33 Colin Rule Discusses the Intersection between ADR and Online Dispute Resolution (ODR). (2012). *Jams Dispute Resolution Alert*, pp. 4-5.

34 Direito Tec is a research and development group from the Law Faculty of the Universidade of Brasilia based in Brasilia (DF). The group focused on the study of innovation in Law, specifically regarding new technologies (LegalTech) in order to provide Brazilian students with that knowledge and stimulate the development of ODR and even more.

## II. 1. E-negotiation

Negotiation is a form of conflict resolution where the dispute is resolved only between the disputing parties, with no third party neutral involved. Depending on how the e-negotiation is designed, the resulting process can result in an enforceable agreement which may enable one party of the other to compel judicial enforcement if necessary. We will now analyze three e-negotiation providers to call out the variations in their approaches.

The oldest and most used e-negotiation tool in Brazil is called “Reclame Aqui”<sup>35</sup>. In this online platform (i) the consumers are able to register their complaints related to products, services or companies; (ii) then, the companies are summoned to answer the complaints, presenting the available solutions; (iii) and, at last, the consumer registers his evaluation regarding the attitude of the company and informs whether his matter was plainly solved or not. In such procedure the parties are not helped by a third party and the participation of lawyers is dismissed.

“Reclame Aqui” has generated promising results in that it promotes quick communication between the parties. *Reclame Aqui* is an e-negotiation platform created founded in 2001 that answers 30,000 demands per day. There are 120,000 companies and 15 million users registered<sup>36</sup>. The platform is free of cost and its mechanisms maintain high levels of solvency of the negotiated terms, even though they do not generate a judicially-binding executive title. Basically, the developed strategy to bind the negotiators to the result of their deliberation relies on the publicity of the results obtained. It causes, consequently, a concern to the companies regarding the building of a good reputation in the market as well as to their buyers<sup>36</sup>. After all, “reputation systems allow users to make judgments as to which sellers provide the greatest chance of a successful transaction, and therefore lowest risk of dispute”<sup>37</sup>.

Another existing platform is “Sem Processo”<sup>38</sup>. In contrast to Reclame Aqui, the negotiation in this case is practiced by lawyers rather than by the parties themselves. In order to engage the negotiation procedure, (i) one person’s attorney must initiate the process by sending a demand to “Sem Processo” which, in turn, (ii) communicates the demand to the legal team of the involved company. Sem Processo then opens a virtual space for the e-negotiation to take place.

The use of “Sem Processo” is free for the lawyers of consumers, with the costs shifted to the respondent companies. The platform focuses on the creation of an environment that enables the lawyer to solve the consumer’s problems directly with the company. The negotiated terms are signed by both parties’ lawyers, and in line with the terms in the 784th article; item IV of the NCPC<sup>39</sup>, the platform generates an extrajudicial executive title<sup>40</sup> that is enforceable by a court.

The negotiation takes place in a private virtual environment that treats the negotiated agreement as confidential, thus possibly conferring an advantage to the company for the agreement avoids the creation of a precedent. However, some consumers may also appreciate this design, especially those consumers who do not wish to have their issues exposed.

Another e-negotiation tool is called “Dra. Luzia”<sup>41</sup>. Its platform is divided into two stages. In the first stage, it operates as a technological support to lawyers, law firms, and inside counsel by generating documents, pleadings, appeals, etc. – essentially automating the formal legal process. The platform creates petitions in a semi-automatic way by using artificial intelligence techniques focused on two specific legal subareas: analytics and legal research. Dra. Luzia ambitiously intends to be the first platform in the world that can intelligently write legal papers in order to improve lawyer efficiency. It concentrates its energy on automatizing repetitive activities, in order to efficiently unravel complex analysis, thus reducing the need for time consuming manual labor, and avoiding mistakes.

In the second stage, *Dra. Luzia* offers *e-negotiation* similar to sophisticated ODR platforms available outside of Brazil. The *e-negotiation* stage utilizes a cognitive computation system which foresees and advances the ODR process appropriate to each individual dispute. The system gradually learns each specific situation via textual analysis in order to advance the solution via algorithmic tools. Once the system provides a suggested resolution to the parties, the users can rework it as they see fit.

The last platform we will examine is another available e-negotiation mechanism: “E-Conciliar”<sup>42</sup> whose concept involves facilitating the negotiation of an issue involved in a currently active judicial process. According to the 841st article of the NCPC, this form of transaction

35 (Reclame Aqui 2016). [online] Available at: <https://www.reclameaqui.com.br/institucional/> [Accessed 17 Jun. 2016].

36 Every day more than 600,000 people search for companies’ reputation before purchasing, hiring, or contracting.” (Reclame Aqui 2016). [online] Available at: <http://www.reclameaqui.com.br/> [Accessed 30 Dec. 2016].

37 Complain Here” (Reclame Aqui. (2016). [online] Available at: [www.reclameaqui.com.br/](http://www.reclameaqui.com.br/) [Accessed 30 Dec. 2016].

38 “No Process” Semprocesso.com.br. (2016). Sem Processo. [online] Available at: <http://www.semprocesso.com.br/> [Accessed 30 Dec. 2016].

39 Art. 784th . The followings are considered extrajudicial titles: IV – the instrument of transaction demanded by the Parquet, the Public Attorney’s Association, The Public Advocacy, the transactioneers attorneys or by any Court registered conciliator or mediator.” (Presidência da República, (2015). *Código de Processo Civil*, Subchefia para Assuntos Jurídicos.)

40 The executive title is “immediate source of right – independent of any sanctioning rule or consequent legal effects. The abstract efficiency designed to the title explains its role in execution; thus presenting a hasteful instrument able to accomplish execution regardless of any demonstration of existence of the credit” (LIEBMAN, E. (2001). *Processo de execução*. 1st ed. São Paulo: Bestbook, p.39.).

41 Draluzia.com. (2017). Dra Luzia. [online] Available at: <http://draluzia.com/> [Accessed 11 Jan. 2017].

42 The E-conciliar platform intends to use ODR as a model of a “collaborative auction” in which the parties, by means of confidential bids, favors an agreement generated by a virtual mechanism which identifies the fairest value according to the parties’ bids. That is, the platform is redeemed as a forth party, directly interfering in their negotiation with its system. E-Conciliar (2016). *Resolução de Conflitos*. [online] Available at: <http://www.econciliar.com.br/> [Accessed 30 Dec. 2016].

is available only to Torts. An eventual agreement, if certified by the judge in the active judicial process, solves the matter of the cause and generates a judicial executive title<sup>43</sup> which is legally enforceable.

While many of these examples focus on cases within the courts or at risk of being filed in court, there is also a considerable and growing use of e-negotiation as a means of resolution/prevention of conflicts outside of the justice system. The primary application of e-negotiation in this context is the field of consumer relations. The efficiency of ODR is extremely helpful in resolving consumer issues before they undermine customer trust and loyalty, or bubble up in social media. It is not necessary to have the threat of judicial enforcement to make these extrajudicial e-negotiation processes successful, because the parties are more than adequately incentivized by their desire to preserve strong buyer-seller trust<sup>44</sup>.

The use of e-negotiation mechanisms is especially interesting when there is no explicit conflict of interests between the parties, or when the conflict is still in an early stage. These online platforms are intended to smooth communication between the parties at the earliest appearance of a potential problem and to foster mutually-acceptable resolutions in an extrajudicial path. However, disputants do not always possess the psychological or emotional fortitude to engage in a negotiation without the help of a third party. In those situations, e-mediation may be a better process to attain an agreement.

## II.2. E-mediation

E-negotiation is often very informal, but e-mediation is slightly more regulated. The challenge of ensuring the process and true impartiality of neutrals requires a bit more oversight than e-negotiation processes, which are entirely driven by the parties themselves. In Brazil, our research has verified the dynamic of a growing preference for mediation as ODR techniques become more legitimized. The legal changes specifically call out e-mediation as a preferred process, so that may explain why e-mediation has improved its status in such a short period of time.

From this perspective, e-mediation has the highest profile due to its up to date legal authorization (Law 13,105/2015 and 13,140/2015). As such, there are quite a few recent e-mediation initiatives in Brazil: “Dra. Luzia”<sup>45</sup>, “Vamos conciliar”<sup>46</sup>, “Justiça sem processo”<sup>47</sup> and “Juster”<sup>48</sup>. These platforms operate in a straightforward and similar way, facilitating face-to-face mediation via videoconferencing to enable the parties to communicate with the mediator, so there is no need to examine each in turn.

As a rule, e-mediation requires a software platform that assures the confidentiality and privacy of the negotiations. Parties are often quite sensitive to the security of the information shared in these online sessions, though any outcome must be agreed to by both disputants<sup>49</sup>. Adherence to the agreed upon solution is improved because both parties have veto power over any resolution achieved, ensuring that the parties feel ownership over the outcome. However, Brazilian Law (specifically, the NCPC) also confers a judicially binding element to any agreement achieved, ensuring it has executive title and can be enforced in the courts<sup>50</sup>.

One of the pros of e-mediation is that “records are preserved and reviewable, allowing for more seamless processes and joint frames of reference.”<sup>51</sup> Therefore, any future legal challenges to the mediation outcome can be quickly resolved if the parts had previously agreed to give access of their registers<sup>52</sup>. Mediation outcomes cannot be a coercive, so agreements cannot be annulled with the argument that one of the parties did not consent to the outcome achieved. Should such a protest arise, the maintenance of records may be presented to verify that in fact both parties did agree to the outcome. This is one of the most attractive aspects of the mediation process: a cooperative model<sup>53</sup>.

In spite of e-mediation’s relatively recent introduction in Brazil, expectations are rising about its efficacy, and demand is growing due to promotion from recent legal changes and from high expectations drawn from other successful e-mediation programs outside of Brazil. The Law of Mediation (Lei 13,140/2015) created a few mechanisms destined to strengthen extrajudicial mediation practice, and that

43 Art. 515, III, NCPC. (Presidência da República, (2015). LEI No. 13.105, DE 16 DE MARÇO DE 2015. Brasília: Subchefia para Assuntos Jurídicos.)

44 In this perspective, negotiation is looks forward to strengthen the relations buyer-seller. One may say that “If customers do not trust a particular site or service then most likely over time they will scale back their use. Also, they will probably share their negative experience with others, many of whom will have little no direct experience with the site.” (Rule, C. and Friedberg, L. (2005). The appropriate role of dispute resolution in building trust online. *Artificial Intelligence and Law*, 13(2), p.196.)

45 *Dra. Luzia*. [online] Available at: <http://www.draluzia.com/> [Accessed 11 Jan. 2017].

46 Milanez, G. (2016). *Vamos Conciliar*. [online] *Vamosconciliar.com*. Available at: <http://www.vamosconciliar.com/> [Accessed 30 Dec. 2016].

47 *Juspro.com.br*. (2016). *JUSPRO – Justiça sem processo*. [online] Available at: <http://www.juspro.com.br/> [Accessed 30 Dec. 2016].

48 *Juster*. (2016). *Resolução de Conflitos*. [online] Available at: <http://juster.com.br/> [Accessed 30. Dec. 2016].

49 The mediator has no power to issue a decision or impose an outcome on disputing parties. In other words, decision-making authority rests with the parties over both process and substantive issues.” (A. Haloush, H. and H. Malkawi, B. (2008). Internet Characteristics and Online Alternative Dispute Resolution. *Harvard Negotiation Law Review*, 13(327), p. 336.)

50 See note 47.

51 Ebner, N. (2012). e-Mediation. *Online Dispute Resolution: Theory and Practice*, p. 17.

52 Confidentiality may be relativized if the parts consent to disclosing information of their processes for future use, as established in article 30 of law 13,140/2015.

53 Ideal to the common good and to the establishment of long-term relationships. The cooperation as understood based on the game theory and in other conceptions such as Nash equilibrium or the prisoners dilemma influence this way of understanding and dealing with human relationships which may embrace conflict resolution in Brazil. (Manual de Mediação Judicial. (2015) 5th edition [ebook] Brasília: Conselho Nacional de Justiça, pp. 55-64)

law harmonized perfectly with e-mediation. Exemplifying the 22nd article; IV item of the Law of Mediation<sup>54</sup> specifically permits the use of contractual provisions that require mediation as a first alternative to solve any conflicts that may arise, thus strongly urging potentially unwilling parties to fulfill their contractual obligations, even going so far as to establish penalties for non-compliance.

Even if there is no contractual provision requiring the use of mediation, if someone is invited to take part in a session of mediation and subsequently refuses to attend it<sup>55</sup>, The suitor must necessarily pay 50% of the costs and or the total amount of the attorney's fees if he or she eventually wins the case in a future arbitral or judicial process<sup>56</sup>. This goes farther than most mediation acts in places other than Brazil, but it should be noted that such a condition does not damage the principle of disputants' autonomy<sup>57</sup>, because it does not force the parties into an accord, it only requires them to be present for the first meeting, even if only to communicate their disinterest in continuing the mediation.

Another issue that is driving the increase in e-mediation in Brazil comes from the expansion of cross-border transactions, which generate cases that involve parties scattered around the globe. The practice of e-mediation is a perfect fit for these types of issues<sup>58</sup> because the parties need not be in the same place to participate in an e-mediation, and issues of jurisdiction matter less in cases where the parties must agree on the outcome. The expansion of global eCommerce guarantees an increase in the volumes of conflicts that transcend the geographic frontiers of each country, requiring the development of resolution mechanisms able to handle these new kinds of disputes. "ODR is not tied to geography or jurisdiction"<sup>59</sup>. In addition, "parties gain access to mediator expertise beyond that which might be available in any given geographical region"<sup>60</sup>. In this sense, e-mediation fits perfectly into areas where global commerce is evolving.

From this perspective, the expansion of e-mediation in Brazil is a direct result of both legislation promoting mediation and of external influences, such as the expansion of eCommerce and cross-border consumer transactions. The e-mediation initiatives cited here are still in the initial stages, but they are growing fast. This fast growth has already generated significant challenges, which we will explore in the next section of this article.

### III. ODR Challenges faced in Brazil

The promulgation of a new law is not sufficient, in and of itself, to generate the changes in society and commerce. Adequate conditions are necessary if the law is to produce its intended effects<sup>61</sup>. Thus, although meaningful and an important milestone in the expansion of conflict resolution in Brazil, the legislative reforms produced during 2015 will only be effective in promoting ODR if several obstacles are simultaneously overcome. A few of them are described below:

#### a) Brazilian culture

The first overall challenge is the litigation culture that still dominates in Brazil. The judicial model of issue resolution is still quite strong in the way Brazilian people understand their rights and paths to resolution of their demands. A justice's decision is still preferred to consensual accords between the parties. This represents a major obstacle to the expansion of ODR.

Such a fact can be observed in data extracted from State Special Justice reports. These offices, which have been part of the Brazilian legal system since 1995<sup>62</sup>, "are competent to conciliate, process, decide and execute civil cases with limited complexity and crimes of minor damaging potential"<sup>63</sup>. That is, they are granted limited authority to resolve conflicts that both a) involve lower tiers of social repercussions and b) have a higher likelihood of being solved by negotiation inter partem.

The settlement meeting, guided by a conciliator, is held as the first stage of demand processing by a Special Justice Court. If a consensus is not reached, the parties must present their issue to a judge who will decide the matter. However, according to statistics provided by

54 Art. 22, Law 13.140/2015. The contractual forecast of mediation must have at least: I – minimum and maximum time for the first mediation meeting from the date of the invitation received; II – place of the first meeting of mediation; III – criteria of choosing the mediator or the team of mediation; IV – penalty in case of unattendance from the invited party for the first meeting.

55 Art. 21st, Law of Mediation. "The extrajudicial mediation procedure invitation may be presented by any means of communication and must present the negotiation scope, the day and placement of the first meeting. Detached paragraph. The invitation is to be considered dismissed if unanswered in the term of 30 days counting on the day of its receiving".

56 Article 22nd §2nd, IV, Law of Mediation "The first meeting unattended provides the party with 50% of the costs and attorney's fees if the party is to win the case in posterior arbitral or judicial procedure – insofar as it involves the scope of the mediation to which it was invited.

57 Art. 2nd, Law of Mediation is to be guided by the following principles: I - the mediator's impartiality; II – isonomy between the parties; III – orality; IV – informality; V – autonomous will of the parties; VI – guidance towards consensus; VII – confidentiality; VIII – good-faith.

58 The ever quicker and thoroughly scattered insertion of technology in various activities around the globe is already real. ODR is not different – if we observe Asia, Oceania, America and Europe we may find several initiatives in the most embodiment stages. The world, indeed, drifts along the path of making its conflicts resolution praxis something hastier, more intelligent and technological.

59 "A technology-empowered consumer in Brazil can purchase an item from a seller in France to a market in China". (Rule, C. (2016). Technology and the Future of Dispute Resolution. *Dispute Resolution Magazine*, 21(2), p.4.)

60 Ebner, N. (2012), e-Mediation. *Online Dispute Resolution Theory and Practice*.

61 "A rule to be considered socially efficient whenever it finds adequate conditions in reality to produce effects" (Translated from Portuguese). Ferraz Jr., T. (1994). A validade das normas jurídicas. Complexidade, Direito e Sociedade. [online] 15 (28), p. 86. Available at: <https://periodicos.ufsc.br/index.php/sequencia/article/view/15875/14364> [Accessed 5 Jan. 2017]."

62 Presidência da República, (1995). *LEI No. 9.099, DE 26 DE SETEMBRO DE 1995*. Brasília: Casa Civil Subchefia para Assuntos Jurídicos.

63 Justiça em Números. (2016). 1st ed. [ebook] Brasília: CNJ, p.81

the National Justice Council<sup>64</sup> in 2015: “the Special Justice cognizance stages present only a percentage of 16% of conciliatory results”<sup>65</sup>. Therefore, in spite of the existence of a State institution destined to provide the parties an opportunity to resolve their problems via dialogue and conciliation, the vast majority of cases still are resolved by an evaluative, judicial process.

Despite such low percentages of conciliatory results, CNJ has optimistic projections for the future, mostly due to the NCPs enforceability which “foresees the realization of a previous audience of mediation and conciliation as a mandatory stage, previous to the conformation of the litigious case as a general commandment to all Civil Law Processes”<sup>66</sup>. Such a norm envisages the solution of most conflicts via mutual agreement between the parties, thus avoiding litigation as the default resolution option. It is also expected that promotion of these new conflict resolution methods will change social attitudes around which resolution path is most desirable.

In a litigious society the introduction of ODR may face initial resistance and skepticism, and that skepticism will only be overcome if ODR mechanisms can consistently display greater efficiency and satisfaction than court-based processes. The government is very interested in promoting ODR as the default resolution option for civil cases, so it is likely that the government will promulgate norms to stimulate more interest and support of ODR processes. The benefits that ODR may introduce to the parties when compared to litigation may also eventually win over other players within the judiciary. Once the preference, satisfaction, efficacy, and savings data are validated, no one will want to miss out on those benefits.

Leading Brazilian thinkers are already asking these questions and promoting the social change required for Brazilians to embrace ODR. As one article recently noted, “we need a cultural turn toward the dispute resolution field... In our culture, we are used to the idea that it is good and most of the time necessary that our conflicts be settled by a decision maker, and we seek enforceable redress. Now it is time for a cultural turn”<sup>67</sup>.

Another cultural issue is that unlike the USA or Europe, the Brazilian people do not, as a rule, trust private service provider platforms. If ODR is to overcome that resistance, the quality of ODR platforms must be high, and the virtual environment and user experience must be well designed – not clumsy or uncomfortable. Users will stay away unless the ODR services communicate safety, efficiency, and ease of use.

## **b) The education of online mediators**

Regarding e-mediation, an important challenge to be faced relates to the education of professionals who intend to serve as mediators. An ODR mediator must be as neutral and as impartial as possible; he or she must be able to communicate with respectful and constructive language; be competent to guide a dialogue and develop rapport; and be interested in the considerations developed by the parties. All of these requirements must be achieved through effective training and ongoing quality monitoring if the potential of e-mediation is to be realized.

The former Secretary of the Judiciary Reforms, Flávio Caetano, affirmed that Brazil will make use of a “veritable army” of about 17,000 mediators in order to respond to the existing demand for millions of resolutions. This is the first step in this challenge: the education of the mediator<sup>68</sup>.

The required qualifications to be a judicial mediator are rigid. Art. 1 of the Law of Mediation lays them out in great specificity: civil capacity; to be graduated from a course of study for at least two years before the application; education from a training program for mediators that is recognized by governmental entities; training must contain, according to the 1st Annex of the Resolution 125/2010 of the CNJ, (i) theoretical module (at least 40 hours in-class); and (ii) a practical supervised module (60-100 hours).

In contrast, anyone can work as an extrajudicial mediator if he or she demonstrates (art. 9th of the Law of Mediation): civil capacity; trust of the parties; and is able to “present capacity for performing mediation”<sup>69</sup>, even if the mediator is independent of any established mediation panel or formal certification body.

The second important component for education regards continuous training and the recertification of mediators. According to the Professor Ada Pellegrini Grinover, “the future of conciliation and mediation is quite promising; though it depends on a serious political will [...] and on the rigorous education and constant recycling of conciliators and mediators.”<sup>70</sup>.

Therefore, in order to facilitate the expansion of e-mediation throughout Brazil, the continuous education of those intending to play the role of mediator is essential. Even if everything else goes perfectly, low quality mediators may doom the effort to failure.

64 Ibid.

65 Ibid.

66 Justiça em Números. (2016). 1st ed. [ebook] Brasília. CNJ, p. 45.

67 Almeida Montingelli Zanferdini, F. and Tomaz de Oliveira, R. (2015). Online Dispute Resolution in Brazil: Are We Ready for this Cultural Turn? *Revista Paradigma*, 24(1), p. 77.

68 Brazil will have a “true army” with more than 17 thousand mediators from 2015. *Jota*. Available <http://jota.info/justica/brasil-tera-verdadeiro-exercito-de-mais-de-17-mil-mediadores-a-partir-de-2015-29062015>. Accessed in 11.jan.2017.

69 In the First Journey of Mediation of the Federal Justice Council, the line number 47 was approved. Its text interprets the “education of the extrajudicial mediator: “The reference to the education of the extrajudicial mediator in the ninth article of the Law of Mediation makes mandatory previous experience, vocation, the trust of the parties and capacity to mediate as well as knowledge of the principles of mediation; therefore it does not suffice the education in other knowledge areas which relate to the merit of the conflict only.”

70 Fernandes, W. (2015). Conciliation and Mediation Future in Brazil is promising, expert's evaluation. *Agência CNJ de Notícias*. Available at: <http://www.cnj.jus.br/noticias/cnj/81029-futuro-da-conciliacao-e-mediacao-no-brasil-e-promissor-avalia-especialista> [Accessed 5 Jan. 2017].

### c) Enforceability

One major challenge to the expansion of ODR is the lack of mechanisms to ensure adherence to the terms accorded by the parties. Study after study has shown that parties don't want agreements, they want outcomes. If e-mediation delivers millions of agreements that are promptly ignored by the parties, it will have been a waste of time. According to Maxime Hanriot, "the lack of enforceable outcomes constitutes a major hurdle for the development of ODR, and considerably decreases the level of trust of the potential parties to an ODR scheme"<sup>71</sup>.

Despite Brazilian legislation that provides a certain binding strength to the outcomes achieved in e-negotiation and e-mediation (because yes, under the legislation negotiation and mediation outcomes can conform to executive titles, meaning the outcomes are enforceable by a court), there remains a concern that parties will not take negotiation and mediation outcomes as seriously as they take judicial decisions. In Brazil, the competency to execute executive titles is held only by the State, so the State is perceived to have the ultimate enforcement power.

According to data provided by the CNJ, in the Judiciary "half of the almost 74 million cases, in course, processed at the end of 2015 were executive"<sup>72</sup>. Another liable indication is the executive congestion index, which is of 86,6%, i.e., 13,4 processes, among each one hundred that reached executive stages in 2015 received a solution by the Judiciary. This sense that binding judicial outcomes are the only really enforceable resolutions will be a major obstacle to wider adoption of ODR if the public is not disabused of the notion early and often.

### d) Technological challenges

Amongst the technological challenges to the usage of ODR in Brazil, it is interesting to highlight:

(i) the cost of implementation of machine learning processes.

(ii) a lack of common data standards in the Brazilian legal environment: there is no XML standard regarding systems, document species, databases, websites, etc. across all Brazilian courts. For example, each Brazilian State Court has its own PJE (Electronic Judicial Process). That creates enormous difficulties in terms of organization, coherence, and case exchange between systems. For ODR to realize its potential, we may need to convene working groups to standardize the data structures and remove inconsistency. This can take a long time and be quite expensive.

(iii) finding qualified developers who can build ODR tools to our exacting specifications is a major challenge. Development talent is scarce and expensive. The focus in academic computer science programs in universities and in the private employment markets is not on ODR approaches, meaning the pool of qualified developers is likely to be small.

(iv) the necessary hardware infrastructure to support ODR platforms is unexplored in the Brazilian market. Additional exploration is required to ensure the infrastructure exists to deliver these ambitious plans at scale, and to ensure that all Brazilian consumer data is not shared outside of Brazil.

### Conclusion

One may say that Brazil presents a quite promising environment for the development and exploration of ODR. The Brazilian market is large, there is significant support from the judiciary, new laws are creating momentum and visibility, and there is a large backlog of cases that demand resolution. The challenges we have presented in this article are significant barriers to overcome, but we believe the social and economic benefits coming from the deployment of ODR services in Brazil will generate enough enthusiasm for us to be able to do so. In the short and medium term Brazilian ODR may significantly diminish the volume and the costs of litigation and, therefore, reduce the *Custo-Brasil* – Brazilian Cost – of delivering fast and fair resolutions to Brazilian citizens while expanding access to justice.

71 Online Dispute Resolution (ODR) As a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes. (2015). *McGill Journal of Dispute Resolution*, 2(1).

72 *Justiça em Números*. (2016). 1st edition. [ebook] Brasília: CNJ, p. 61