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**THE USE OF INSTITUTIONAL MEDIATION
BY
VENEZUELAN BUSINESS LAWYERS**

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ABSTRACT

In this paper I examine the causes why institutional mediation is so scarcely used by corporate lawyers to solve business disputes in Venezuela, despite the apparent general discontent with the traditional mechanisms used to solve legal conflicts and the growing promotion of mediation as an appropriate dispute resolution instrument. I discuss the opinion of Venezuelan alternative dispute resolution (ADR) advocates that institutional mediation is not being used because of the absence of regulation, the lack of knowledge in the business community about its benefits, the fact that lawyers do not trust in it or its high cost. I argue that the cause of institutional mediation's disuse is that disputants prefer to rely on social relationships and networks to address their conflicts in an informal way, and that these mechanisms have been used for many years aside from the courts which are also frequently utilized despite its alleged congestion and malfunction. I support my argument with the study of the business and the legal profession structures in Venezuela and also with the analysis of empirical data gathered from 85 questionnaires, 11 interviews with Venezuelan lawyers and ADR promoters.

CHAPTER I. INTRODUCTION

The fast growing movement of the *alternative dispute resolution* (ADR) mechanisms during the last 30 years and the numerous advantages attributed to mediation¹ and arbitration² as opposed to the formal adjudication by the courts have led a significant sector of the legal community to believe that ADR are the remedy for some problems of the justice system. A sample of this can be found in the endorsement and promotion of ADR by numerous governments of the western hemisphere, following the trend set by the U.S. government since the late 1970s in order to reduce the congestion of the courts.³

Although the ADR movement was originated in the United States some thirty years ago, its influence over other countries of the region has been most significantly during the last decade.

Despite the fact that there are extremely different motivations and philosophical viewpoints behind the promotion of the various ADR mechanisms, it seems to be generally accepted that in certain areas it can (i) improve access to justice,⁴ (ii) help

¹ *The central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.* Lon F. Fuller, "Mediation-Its Forms and Functions," *Southern California Law Review* 44 (1971). Mediation can be defined as a process in which a third party neutral is brought in to help the parties to a dispute reach a resolution. Basically, a better resolution so all the parties can maximize the gains.

² Arbitration can be labeled as a normative adjudicatory process. Among its advantages are commonly mentioned, that it allows the parties to establish their own norms, select the decision-makers (arbitrators), control the costs and duration of the process and get final decisions to their disputes avoiding the complexity of the judicial process.

³ In 1976, Chief Justice Warren Burger convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice to develop proposals for judicial reform. In his keynote address, Chief Justice Burger discussed the problems with the judicial system, particularly the problems of delay, high costs, and unnecessary technicality. [he] made several suggestions for reform, including giving a greater role to ADR. Katherine Van Wezel Stone, *Private Justice : The Law of Alternative Dispute Resolution* (New York, N.Y.: Foundation Press, 2000).

⁴See, Mauro Cappelletti, Bryant G. Garth, and Klaus-Friedrich Koch, *Access to Justice* (Milan Alphenaaandenrijn: A. Giuffrè ;

Sijthoff and Noordhoff, 1978). When explaining the trends of the access to justice approach, Cappelletti and Garth describe *several approaches that involve the creation of alternatives utilizing simpler procedures and/or more informal decision-makers*. These techniques include *arbitration, conciliation and economic incentives for settling out of court*. Access to justice, they explain, that *the words "access to justice are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system –the system by which people vindicate their rights and/or resolve their*

parties attain speedier,⁵ less expensive⁶ and better solutions,⁷ and (iii) decongest the courts, whose workload has exceeded their capacity.⁸

The corporate sector, which has been affected by the congestion of the Courts, has also embraced the ADR movement. It has also found an additional advantage using ADR: It can help them achieve better resolutions for their disputes than the courts.⁹ Since in mediation the parties are the decision makers instead of a judge, using it might let them determine the outcomes and not depend on a third party to make the decision, it also might better help to preserve the relationship between the parties, keep the process confidential¹⁰ and lead to more creative solutions.¹¹ Some important studies, report that U.S. corporations are using mediation more everyday and that this tendency to resort to mediation more frequently will grow in the near future.(Lipsky, et al. 1998)¹²

disputes under the general auspices of the state. First, the system should be equally efficient to all, and second, it must lead to results that are individually and socially just.

⁵ Due to its informality and its dependence on the parties who are the main decision makers, mediation tend to be speedier than the judicial process that has to follow formal steps.

⁶ A consequence of its simplicity and lack of procedural stages, might make mediation cheaper, as the duration of the process depends on the parties themselves. However, some have contended that when it comes to determine *whether courts or litigants can achieve aggregate costs savings...by substituting ADR for litigation in large classes of disputes* it is unknown if ADR can be efficient. See, Deborah R. Hensler, Rand Corporation., and Institute for Civil Justice (U.S.), *Does ADR Really Save Money? : The Jury's Still Out* (Santa Monica, CA: Rand, 1994). In the same direction it has been argued that the idea of ADR saving money is just a perception derived from the *qualitative benefits of using ADR* and not from the result of empirical analyses. In this respect see, Deborah R. Hensler, "A Research Agenda. What We Need to Know About Court-Connected ADR," *Dispute Resolution Magazine*, Fall 1999 1999.

⁷ Fuller, "Mediation-Its Forms and Functions." *Mediation is commonly directed, not toward achieving conformity to norms but toward the creation of the relevant norms themselves(...)* *Mediation is always, in any event, directed toward bringing about a more harmonious relationship between the parties.* However, there have been fierce critiques to the mediation and its reputed benefits. See, Owen M. Fiss, "Against Settlement," *The Yale Law Journal* 93 (1984). This article was followed by a series of responses. About another critique of mediation see, Trina Grillo, "The Mediation Alternative: Process Dangers for Women," *Yale Law Journal* 100, no. number 6 (1991).

⁸ Carrie Menkel-Meadow, "Introduction: What Will We Do When Adjudication Ends? A Brief History of ADR," *UCLA Law Review* 44, no. 6 (1997). *From the beginning, the multi-door courthouse itself represented the duality purposes associated with ADR-efficiency and docket-clearing potential as well as a claim for a better quality of justice with designated processes providing more tailor-made solutions to legal problems.*

⁹ See, John Lande, "Getting the Faith: Why Business Lawyers and Executives Believe in Mediation?," *Harvard Negotiation Law Review* (2000).

¹⁰ This might be really important when there is a high risk of damage to one or both parties by public exposure of the conflict or their reputation can be damaged.

¹¹ Through mediation the parties can maximize the gains and achieve better solutions than if going to court.

¹² David B. Lipsky, Ronald Leroy Seeber, and Cornell/PERC Institute on Conflict Resolution., *The Appropriate Resolution of Corporate Disputes : A Report on the Growing Use of ADR by U.S. Corporations* (Ithaca, NY: Cornell/PERC Institute on Conflict Resolution, 1998). *The use of ADR by U.S. corporations will grow significantly.*

With the rise of the globalization, multilateral organizations have become concerned with the improvement of the rule of law in Latin American countries.¹³ Those institutions have considered the promotion of ADR as a way to attract foreign private investors to the region(Posada 1999)¹⁴ and as a possible solution for some of the problems related to the use of the Courts.

In this respect, several regional initiatives regarding the promotion of ADR, some of them taken by multilateral entities such as the World Bank (WB) and the Inter-American Development Bank (IADB), have been proposed. This has pushed Latin American governments to implement policies regarding ADR. At the same time, a number of private corporations and chambers of commerce have funded projects and organized ADR providing organizations in order to serve the national business communities and foreign investors.(Wanis-St. John 2000)¹⁵

As a result of this dual pressure from multilateral organizations and the business sector, Latin American governments have passed legislation regulating arbitration and mediation and have also created an important infrastructure for the ADR system.¹⁶

¹³ Anthony Wanis-St. John, "Implementing ADR in Transitioning States: Lessons Learned from Practice," *Harvard Negotiation Law Review* 5 (2000). *Donors such as international organizations and government development agencies have expressed an interest in assisting emerging democracies in their efforts to strengthen rule of law by supporting judicial reform efforts world-wide. One aspect of rule of law programs that continues to grow in importance for both donors and recipients of development assistance is alternative dispute resolution (ADR).*

¹⁴ Ricardo Posada, *Why Companies and Individuals Are Choosing to Solve Conflicts out of Court* (IADB, 1999 [cited May 8th, 2002 2002]); available from <http://www.iadb.org/idbamerica/Archive/stories/1998/eng/e998ee.htm>. *Foreign investors, who have flocked to Latin America as a result of economic reform programs and lower trade barriers, have also stimulated interest in ADR. Eager to avoid lengthy and unpredictable court battles, the majority of foreign investors today require some kind of ADR clause in their contracts with national companies and governments(...).Arbitration plays a very important role for countries that are trying to attract foreign investment, because it gives investors a measure of protection in situations where the legal environment is still evolving or where they are under contract to government entities*

¹⁵ Adriana Polania, "Los ADR En Latinoamérica" (paper presented at the Commercial Alternative Dispute Resolution (ADR) in the XXI Century: The road ahead for Latin America and the Caribbean., Washington, D.C., October 26, 2000 2000). *Since 1992, mainly due to the necessity of modernize the judiciary systems in order to promote the legal certainty that foreign investors require, a reactivation of the so-called Arbitration and Conciliation Centers of the different chambers of commerce took place.*

¹⁶ The ADR infrastructure has two components: special legislation and ADR providing organizations. We will explain them in detail in Chapter II.

Venezuela, like most other Latin American countries, has followed this trend of developing ADR in the business sector.

There is a well-developed ADR infrastructure in Venezuela available for the business sector's use. However, virtually no corporate lawyers use *institutional mediation*,¹⁷ which has caused increasing concern in the legal and business communities. The goal of this paper is to address that concern.

This paper examines the reasons why *institutional mediation* is so scarcely used by corporate lawyers to solve business disputes in Venezuela. The argument is supported with the analysis of empirical data gathered from 85 questionnaires and 10 interviews with Venezuelan lawyers. I have also considered essential to refer to the structure of the Venezuelan business sector and to that of the Venezuelan legal profession in order to understand the settings in which ADR has been promoted and the attitude of lawyers towards dispute resolution.

Regarding the empirical data in which I relied to support my line of argument, it is important to mention that although relatively small in absolute numbers,¹⁸ the questionnaires might represent the real trend of the Venezuelan business lawyers towards the use of mediation.¹⁹

¹⁷ I have called *institutional mediation*, when it is offered in a professional manner either by individual mediators who have dedicated their practice to mediation or by dispute resolution providing organizations (ADR centers) that maintain a roster of mediators who handle the cases. As we will see *infra* in page 46 in Venezuela there are several organizations that provide mediation services and there is also an individual mediator who is dedicated to offer ADR services.

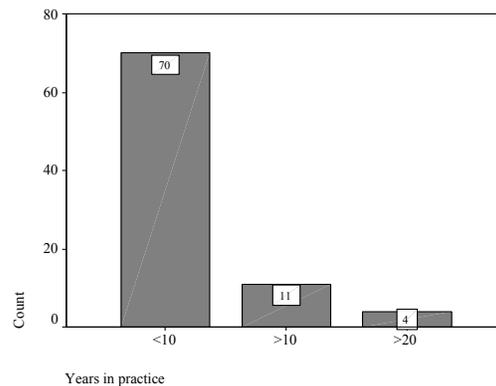
¹⁸ Even though there are no statistics of how many lawyers are currently practicing in Venezuela, and neither of how many can be considered *business lawyers* (dedicated to represent corporate clients), it is possible to obtain an approximate number. As corporations normally retain the services of law firms, the number of lawyer who belong to these firms would be our ideal population. A comprehensive and up-to-date listing of the existing Venezuelan law firms is the one that appears in http://www.latinlawyer.com/venzuela/main_fs.htm (last visited, May 7th 2002) According to this list, in Venezuela, there are 23 law firms, which affiliate 576 lawyers. All these firms have its main offices in the city of Caracas, which is the geographic area where the sample was gathered. We got 85 responses to our survey, but the respondents represent at least half of the firms listed above.

¹⁹ Although the results of a non-parametric test (Chi Square test) performed on the results obtained indicate that the responses to the various questions of the surveys may reflect pure chance, I believe that some other factors may lead us to regard the sample as representative of an important tendency. In this respect it should be mentioned that the majority

In order to reduce bias in the collection of the sample, the questionnaire was distributed through third party institutions²⁰ that in different ways are related to business lawyers, whom were our target population. From one hundred and eighty questionnaires that were distributed, only eighty-five were answered, which represents a level of response of approximately forty seven percent.

Although the sample was collected only among lawyers who practice in the city of Caracas (capital of Venezuela), it may well represent the trend of all Venezuelan business lawyers towards the use of mediation. The reasons for this is that all the resources dedicated to the promotion of ADR and all the main business law firms are located in Caracas and from there serve the rest of the country.²¹ Lets now see in Tables 1, 2 and 3 who are the respondents depending on their years in practice, area and workplace

Table 1. Survey Respondent’s Experience



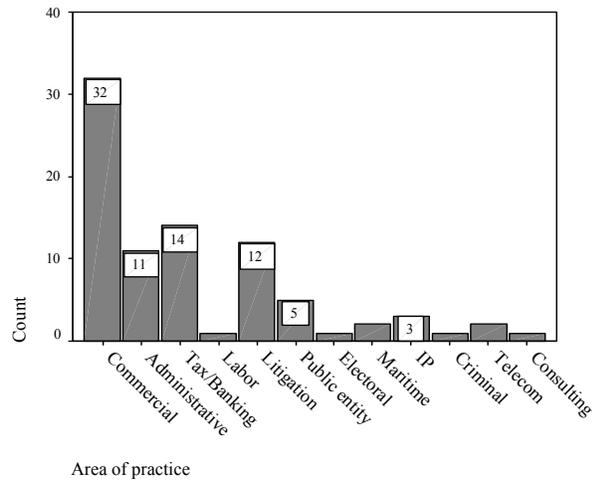
of the respondents of the questionnaire are members of the firms that represent at least half of the total number of Venezuelan business lawyers. Additionally, among the respondents are the principals of 4 of the biggest law firms in the country, and their opinions may well represent the general policy or at least the tendency of the firms to which they belong.

²⁰ Basically, three institutions provided me assistance to distribute the questionnaires. The Venezuelan American Chamber of Commerce (VENAMCHAM), the Instituto de Estudios Superiores de Administración (IESA) and the Center for Graduate Studies of the Universidad Central de Venezuela (UCV). These organizations were selected due to the fact that they have ties to the business sector and to its lawyers.

²¹ Notwithstanding that, we learned that there is an ADR institutional provider in the city of Maracaibo in the western region of Venezuela, but it has not had any cases since its opening in 1999 and there is no activity related to it.

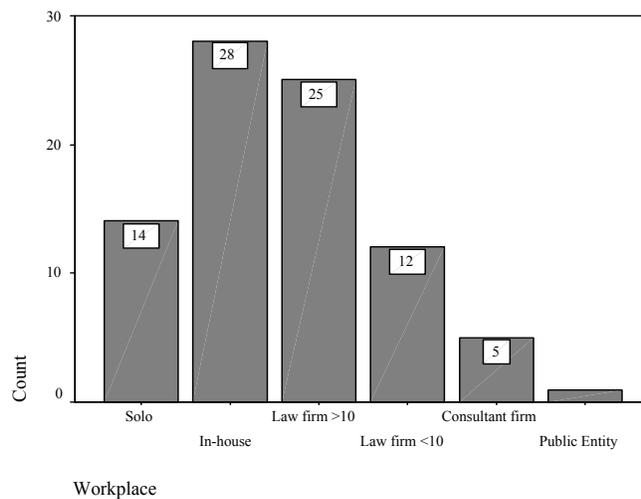
This shows that the wide majority (seventy) of respondents have less than ten years in the practice of law.

Table 2. Survey Respondent's Area Of Practice



In the Table shown above, we can notice that the most representative groups of respondents concentrate their practice in *commercial*, *administrative*, *tax/banking* and *litigation* making representative the sample population as to represent business lawyers.

Table 3. Survey Respondent's Workplace.



In Table 3, is shown that the majority of respondents work as *in-house counsels* and *large law firms* (more than ten members).

To make easier the analysis of the data obtained from the surveys, we decided to collapse the different scales indicated as options in various questions. It was done in a way in which we think does not affect the quality of the responses. The collapsed survey model is shown as *Appendix 2*.

Regarding the interviews, they were conducted in order to obtain an extensive and deeper insight of the reasons why *institutional mediation* is so scarcely used, what other means are being used instead as well as other relevant aspects related to it. The interviewed population was not randomly selected because our need was to know the opinions of the ADR providers²², ADR advocates²³ and promoters and that of some representative members of the business lawyers group²⁴. I used protocols as guides for the interviews, which lasted about two hours each. The interviewees were recorded and then transcribed.

After explaining the opinions expressed by our interviewees I will discuss several reasons indicated by some of them according to which, corporate lawyers do not use *institutional mediation* due to its absence of regulation, the lack of knowledge in the

²² Five of the interviewees represent the only ADR providers that operate in Venezuela. Four of them, are head of the institutional providers and the other is an individual mediator. They are: (Interviewee #1) Diana Droulers, Executive Secretary of the Arbitration Center of the Caracas Chamber of Commerce (CACCC), (Interviewee #2) Bernardo Galavis, Executive Secretary of the Arbitration and Conciliation Center of the Venezuelan American Chamber of Commerce (CEDCA-VENAMCHAM), (Interviewee #3) Luis Cova Arria, President of the Iberian American Center of Maritime Arbitration (CEAMAR), (Interviewee #4) Jaime Porras, President of the Arbitration Center of the Maracaibo Chamber of Commerce (CACCM) and (interviewee #5) Oscar Franco, individual mediator.

²³ In this group are included the interviews of important ADR promoters who are not affiliated to the ADR providers, although can be considered as important players regarding the development of it in Venezuela. These are, Mr. Andres Mezgravis (Interviewee #6), Mr. Hector Falla (Interviewee #7) and Mr. Roland F. Mathies (Interviewee # 8)

²⁴ In order to know the opinion of some business lawyers, I interviewed three important members of this community, one of them is Dr. German Acedo-Payarez (Interviewee #9), and the other two acceded to be interviewed under the condition to not reveal their identities. Therefore, I will refer to them as Interviewee # 10 and Interviewee # 11.

business community about its benefits, its high cost or the fact that it is not considered trustworthy.

This thesis is divided into four chapters: Chapter I contains a general introduction to the topic, an explanation of the methodology that I have used to approach it and its limitations.

Chapter II explains where and when the ADR movement started. This takes us to a brief history of the ADR in the United States. It also elucidates the motivations that led the different sectors in the United States to promote these mechanisms and how it has influenced Latin American countries and among them Venezuela, in which the ADR movement started to grow significantly a decade ago.

In this chapter, I also explain the infrastructure of corporate ADR in Latin American countries, this is, the legal framework and the different ADR providers that serve the business sector, with special attention to Venezuela.

In chapter III, I analyze the role of institutional mechanisms dispute resolution mechanisms in Venezuela, its infrastructure and level of usage by corporate lawyers.

After explaining that the utilization of *institutional mediation* is scarce, in chapter IV, I question the motivations that led to the promotion of mediation and the reasons adduced by Venezuelan ADR promoters to justify the low acceptance of this mechanism by corporate lawyers. I conclude by describing which motives may truly explain the scant use of *institutional mediation*, supported by the analysis of empirical data, the structure of the Venezuelan private sector and its interaction with the government.

I do not regard this paper to be a comprehensive study of ADR in the Venezuelan business sector. Instead, I have just addressed the lawyers' perspective, which I consider

a good starting point in approaching this topic. However, this piece might be a contribution to an interesting debate and will hopefully lead to more extensive research on the subject.

CHAPTER II. THE MOVEMENT TOWARDS THE PROMOTION OF ALTERNATIVE MECHANISMS FOR DISPUTE RESOLUTION (ADR) AND ITS EFFECT IN LATIN AMERICA

Origin and development of ADR.

Certain processes currently known as alternative mechanisms for dispute resolution (ADR) have been used for more than a century.²⁵ However, it was only some 30 years ago that the legal community started to consider their promotion as a possible solution to some problems in the judicial system.²⁶

From the ideological point of view, the modern current of ADR stems from outside the legal system. Its origins are usually linked to the social protest movements of the sixties in the United States. These movements focused on exalting harmonious community relations and opposing formal institutions, which, according to the leaders of these movements, promoted confrontation.²⁷

²⁵ For decades, various forms of dispute settlement in different societies have been the subject of important studies on anthropology of the law. See, Jerold S. Auerbach, *Justice without Law? : Non-Legal Dispute Settlement in American History* (Oxford ; New York: Oxford University Press, 1983). Also see, Laura Nader and Wenner-Gren Foundation for Anthropological Research., *Law in Culture and Society* (Chicago,: Aldine Pub. Co., 1969). Although, the name “alternative dispute resolution” was originally conceived to differentiate some processes from those offered by the judiciary, the Courts have played an important role in their development, to the extent in which the judiciary system (at least in the U.S.) can be considered the main institutional provider of ADR. An adequate definition could be the one that consider ADR “to a large variety of dispute resolution mechanisms or techniques that share one essential characteristic: They all differ from the dispute mechanism of litigation in a federal or a state court”. See, Stone, *Private Justice : The Law of Alternative Dispute Resolution*.Page 5.

²⁶ However, some have explained that mediation and arbitration were already used in the U.S. during the 19th. century See, http://courts.state.de.us/superior/adr/c_hist.htm (last visited: May 7th, 2002) *Beginning in the late nineteenth century, creative efforts to develop the use of arbitration and mediation emerged in response to the disruptive conflicts between labor and management. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorized mediation for collective bargaining disputes. In the ensuing years, special mediation agencies, such as the Board of Mediation and Conciliation for railway labor, (1913) (renamed the National Mediation Board in 1943), and the Federal Mediation and Conciliation Service (1947) were formed and funded to carry out the mediation of collective bargaining disputes. Additional state labor mediation services followed. The 1913 Newlands Act and later legislation reflected the belief that stable industrial peace could be achieved through the settlement of collective bargaining disputes; settlement in turn could be advanced through conciliation, mediation, and voluntary arbitration. Mediation was not conceived as an alternative to adjudication. It was an alternative to strikes and ensuing economic disruption which occurred when unassisted settlement negotiations failed.*

²⁷ One of the characteristics attributed to this movement is the interest in the “ideology of harmony”, which was based on the fact that commitment and agreement were much better than discord. According to its principles is better to

This ideology encouraged the creation of community centers, in which disputes could be resolved by non-adjudicative mechanisms.²⁸

At the same time, the American legal community became concerned because it felt that society was growing increasingly litigious(Rifkind 1976)²⁹ and that this was the cause of congestion in the courts.³⁰ The perceived litigiousness compromised the performance of the overworked judges, which in turn caused great dissatisfaction with the judicial system among the population.³¹ As Bradley and Smith explain:³²

The court-focused movement was largely a response to the perceived inefficiency of the court system. In 1965, a presidential Commission on Law Enforcement and the Administration of Justice focused national attention on our country's overburdened judiciary (President's Commission, 1967). Its findings helped build consensus around the need for reform and experimentation in and around the court system, with particular focus on minor criminal cases involving neighbors, relatives and other acquaintances.

prevent the causes of discord than to fight against its causes. See, Laura Nader, *Essays on Controlling Processes, 1996* (Berkeley, CA: Kroeber Anthropological Society, 1996).

²⁸ <http://www.mnnc.org/pg14.cfm> (last visited, May 7th 2002) *Early community-based models include the Rochester American Arbitration Association Community Dispute Service Project (1973), a broad-based response to conflicts in the community resulting from changing racial balances; the Boston (Dorchester) Urban Court Program (1975), a court-connected but storefront urban neighborhood justice center in a rapidly integrating Irish-American neighborhood with growing racial tensions and fear of crime; and the San Francisco Community Board Program (1977), founded by Ray Shonholtz.*

²⁹ Simon H. Rifkind, "Are We Asking Too Much of Our Courts?" (paper presented at the Conference on the Causes of Popular Dissatisfaction with the administration of justice., St. Paul, Minnesota., 1979 1976). The idea that the cause of dissatisfaction with courts comes from the litigious character of citizens and the consequential "explosion of litigation" has been generally accepted. However, some have refuted it. In this respect see, Marc Galanter, *Reading the Landscape of Disputes : What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society* (Madison, Wis.: University of Wisconsin-Madison Law School Disputes Processing Research Program, 1983).

³⁰ In fact, the reason expressed by Sander to justify his proposal of "multiple door courts" was mainly motivated by the search for dispute-reduction mechanisms. See, Frank E. A. Sander, "Varieties of Dispute Processing" (paper presented at the Conference on the Causes of Popular Dissatisfaction with the administration of justice., St. Paul, Minnesota., 1979 1976). Sander started out his speech by commenting on an article written by Prof. John Barton. See, John Barton, "Behind the Litigation Explosion," *Stanford Law Review* 27 (1975).

³¹ See, American Bar Association, *The Pound Conference: Perspectives on Justice in the Future*, 1 vols., vol. 1 (St. Paul, Minnesota.: West Publishing, Co., 1976).

³² See, <http://www.mnnc.org/pg14.cfm> (last visited: May 7th, 2002)

Alleviating the workload of the courts became a priority and the idea of promoting mechanisms that would allow individuals to resolve their disputes outside the judicial branch of government seemed to be an attractive solution to this problem.³³

The speeches made by Justice Warren Burger (Burger 1976)³⁴ and Professor Frank Sander (Sander 1976)³⁵ during the Pound Conference³⁶ are usually regarded as the first steps toward the institutionalization of ADR in the United States, where the modern ADR tendency was originated.³⁷

Once the possibility of addressing the efficiency problems of the courts by using alternative mechanisms for resolving disputes arose, mediation, arbitration and other similar methods captured the attention of federal and state governments.³⁸ Alternative mechanisms, which had originally been devised as opposed to formal institutions, ironically became controlled by one of its main representatives: the judicial branch of government.³⁹

³³ See, Menkel-Meadow, "Introduction: What Will We Do When Adjudication Ends? A Brief History of Adr."

³⁴ See, Warren Burger, "Agenda for 2000 A.D. A Need for Systematic Anticipation." (paper presented at the Conference on the Causes of Popular Dissatisfaction with the administration of justice., St. Paul, Minnesota., 1979 1976).

³⁵ Prof. Sander actually suggested that courts become true "*Dispute Settlement Centers*", which could offer the proper mechanisms for each type of dispute submitted before it. However, the most interesting part was that this suggestion referred to a solution "*within*" the judicial branch of government, instead of reducing its powers, as some ADR defenders have alleged when they insist that ADR should be kept "*outside*" the courts. See, Sander, "The Pound Conference".

³⁶ Named in honor Justice Roscoe Pound, who in 1906 gave a speech at the Annual Meeting of the American Bar Association, complaining about the causes for popular dissatisfaction with the administration of Justice.

³⁷ See, Nader, *Essays on Controlling Processes, 1996.*, Stone, *Private Justice : The Law of Alternative Dispute Resolution*. And also see, Menkel-Meadow, "Introduction: What Will We Do When Adjudication Ends? A Brief History of Adr."

³⁸ See, American Bar Association, "Report of Pound Conference Follow-up Task Force," (St. Paul, Minnesota.: West Publishing, Co., 1976).

³⁹ It is worth mentioning that the reasons for which the Courts embraced ADR was significantly different from that of the community movements. As those were concerned about decongesting the Courts, the latter were focused toward local empowerment and harmony building among citizens.

The seventies witnessed the creation of arbitration programs annexed to the American courts.(Plapinger, et al. 1996)⁴⁰ Then followed mediation and, later on, early neutral evaluation programs⁴¹ and the like.⁴²

In 1990, the Administrative Dispute Resolution Act was passed⁴³. This law mandated federal agencies (1) to consider ADR mechanisms as options for the resolution of disputes, (2) to review ADR possibilities in connection with all administrative procedures, to designate ADR specialists, (3) to develop ADR training programs and (4) to review contracts and agreements for grants for use of ADR. In the following years, the federal government would encourage and promote ADR at various levels to the point of which today there is an enormous infrastructure of it at all levels, which was recently remarked by Associate Attorney General Jay B. Stephens⁴⁴ when expressing:

Many Boards of Contract Appeals are requiring the use of ADR as well. Thanks to all of these factors, the government ADR effort is substantial and growing. Overall, federal executive agencies now dedicate over 400 full-time positions and 40 million dollars each year to ADR. All agencies

⁴⁰ See, Elizabeth S. Plapinger et al., *Adr and Settlement in the Federal District Courts : A Sourcebook for Judges & Lawyers : A Joint Project of the Federal Judicial Center and the Cpr Institute for Dispute Resolution* (Washington, DC (One Columbus Circle, N.E., Washington, 20002-8003): Federal Judicial Center Thurgood Marshall Federal Judiciary Building, 1996).

⁴¹ <http://www.cpradr.org/adrcourt.htm> (last visited: May 7th, 2002) *Like mediation, early neutral evaluation (ENE) is applicable to many types of civil cases, including complex disputes. In ENE, a neutral evaluator a private attorney expert in the substance of the dispute holds a several-hour confidential session with parties and counsel early in the litigation to hear both sides of the case. Afterwards, the evaluator identifies strengths and weaknesses of the parties' positions, flags areas of agreement and disputes, and issues a non-binding assessment of the merits of the case. Developed during the mid-1980's in the San Francisco federal court, ENE is now used in 18 federal district courts and several state courts. Usually, attorneys trained by the court serve as evaluators; in some courts, including the Southern District of California, magistrate judges conduct ENE sessions. Originally designed to make both case management and settlement more efficient, ENE has evolved into a pure settlement device in some courts. Used this way, ENE resembles evaluative mediation, in which the mediator uses case evaluation as a settlement tool.*

⁴² Other ADR programs include case valuation (Michigan Mediation), court minitrials, Judge-Hosted settlement conferences and summary jury trials. For a comprehensive description of these programs and their development in the U.S. Judiciary until 1996 see, Plapinger et al., *Adr and Settlement in the Federal District Courts : A Sourcebook for Judges & Lawyers : A Joint Project of the Federal Judicial Center and the Cpr Institute for Dispute Resolution*.

⁴³ Pub. L. 101-152, 104 Stat. 2736 at 5 U.S.C. §§571-583. The Administrative Alternative Dispute Resolution Act, was reformed in 1996. See, Pub. L. 104-320, 110 Stat. 3870 at 5 U.S.C. §§571-583

⁴⁴ Remarks By Associate Attorney General Jay B. Stephens Alternative Dispute Resolution In Procurement Awards Office Of Management And Budget/Executive Office Of The President Indian Treaty Room, April 16, 2002. <http://www.usdoj.gov/adr/aag041602.htm> (last visited May 8th, 2002).

have a senior official designated as their dispute resolution specialist, typically at the senior executive service level or higher.

To date, ADR have reached all federal agencies in the U.S. being the most significant examples, the ADR programs of the U.S. Postal Service, the Air Force, the Department of Health and Human Services, the Federal Labor Relations Authority, the Environmental Protection Agency, the Federal Emergency Management Agency and the Department of Energy.(Reno 2000)⁴⁵

Regarding the court-annexed ADR programs, *in the district courts, the first mediation and arbitration programs date from the 1970s* (Plapinger, et al. 1996)⁴⁶ and have been expanding during the next decades up to the level in which today almost every circuit in the U.S. has and ADR program.

This development was motivated by various legislative initiatives like the Judicial Improvement and Access to Justice Act (JIAJA)⁴⁷ *which authorized arbitration programs in twenty districts*,⁴⁸ the Civil Justice Reform Act of 1990 (CJRA),⁴⁹ *which required local experimentation in ADR and case management by the 94 federal district courts*,⁵⁰ as well as the Federal ADR Act of 1998⁵¹, that authorized the use of alternative dispute resolution (ADR) in federal courts and mandated the organization at least one ADR process in each district court⁵² that should be devised and implemented according to the

⁴⁵ See, Janet Reno, "Report to the President on the Inter-Agency Adr Working Group," (Washington, D.C.: U.S. Department of Justice, 2000).

⁴⁶ See, Plapinger et al., *Adr and Settlement in the Federal District Courts : A Sourcebook for Judges & Lawyers : A Joint Project of the Federal Judicial Center and the Cpr Institute for Dispute Resolution*. However in Pennsylvania, a mandatory non binding arbitration program was implemented during the 1950s. See, Deborah R. Hensler, "Court-Ordered Arbitration," *University of Chicago Legal Forum* (1990).

⁴⁷ Pub. L. 100-702, §901 (a), 102 Stat. 4642, 4659-63 (1988) and ammended in 1993 1994 and 1997.

⁴⁸ See,Robert J. Niemic et al., *Guide to Judicial Management of Cases in Adr* (Washington, DC: Federal Judicial Center, 2001).

⁴⁹ Pub. L. 101-650, 104 Stat. 5089.

⁵⁰ See, <http://www.cpradr.org/> (last visited May 8th, 2002).

⁵¹ Pub. L. 105-315, 112 Stat. 2993.

⁵² § 652(a)

court's own rules.⁵³ It also required litigants in civil cases to consider ADR at an appropriate stage in their respective cases.⁵⁴

There is also worth mentioning the existence of ADR-providing government agencies⁵⁵ and an enormous infrastructure at state level.

Even though the American government may be viewed as the main institutional ADR provider, the private sector has also played a key role in its development. Worthy of mention are the broad range of services offered and the dedication of ADR professionals and institutional providers.⁵⁶

American corporations have been using ADR with increasing frequency, especially in the past few years. According to a 1997 *Cornell University/PriceWaterhouseCoopers* study, a significant number of U.S. companies had made use of ADR during the 1990s and apparently a significant number of them are planning to use these mechanisms even more frequently, particularly mediation.(Lipsky, et al. 1998)⁵⁷ Other studies have also revealed the growth in the use of ADR for business conflicts.(Deloitte and Touche 1993)⁵⁸

As explained before, one of the main justifications for promoting ADR in the United States was to clear up congested courts and thus make them more efficient (*clearing-docket devices*).(Menkel-Meadow 1999)⁵⁹ It was not that American courts did not

⁵³ § 651(b)

⁵⁴ § 652(a)

⁵⁵ As an example, we can cite, the EEOC and state-level workers compensation Boards.

⁵⁶ It is worth mentioning the various ADR providers such as , the National Arbitration Forum (NAF), JAMS-Endispute, American Arbitration Association (AAA) and even the on-line dispute resolution services, like CLICK'N'SETTLER and SQUARE TRADE.

⁵⁷ See, Lipsky, Seeber, and Cornell/PERC Institute on Conflict Resolution., *The Appropriate Resolution of Corporate Disputes : A Report on the Growing Use of ADR by U.S. Corporations*.

⁵⁸ In 1993, the Deloitte and Touche Litigation Services Division conducted a survey among the Fortune 1,000 corporations and according to its results, 68% favored the use of mediation.

⁵⁹ See, Carrie Menkel-Meadow, "Do the "Haves" Come out Ahead in Alternative Judicial Systems?:Repeat Players in ADR.," *Ohio State Journal on Dispute Resolution* (1999).

function properly; on the contrary, it was believed, as it is still believed today, that they work well⁶⁰ but congestion was affecting their performance.

ADR were considered instruments to optimize or improve an existing structure. Their implementation and development was part of the renewal process of a system that has functioned with reasonable regularity. As we will see in Section 3 of this chapter, the situation in Venezuela is very different, because the court system has been perceived as functioning improperly.

Due to the fact that ADR have been generally perceived successful in decongesting the American courts,⁶¹ multilateral organizations such as the World Bank and the Inter-American Development Bank were attracted to include ADR in their plans to foster judicial reform in Latin American countries. It was believed that ADR could help solve the malfunction of Latin American courts, restore the rule of law and attract foreign private investors to the region, who otherwise, would not invest in countries with such high levels of legal uncertainty.(Iglesias 2000)⁶²

⁶⁰ Rifkind, "The Pound Conference". *Much of today's dissatisfaction springs not from failure but from conspicuous judicial success. The courts have been displaying a spectacular performance...As far as I know this aggravated condition is conspicuously a problem unique to this country. It is rooted partly in the litigious character of our citizenry, partly in the relative ease access to the courts, and partly in the peculiar character of the American judge which readily distinguishes him from all judges who do not practice in the Anglo-American tradition.* More recently, in 1999, a national survey conducted by the National Center for State Courts about *How the Public views the State Courts*, concluded that overall, the courts received an average rating from the American public. *The core of the courts' positive image is the perception that courts meet their constitutional obligations to protect the rights of defendants, ensure that litigants have adequate legal representation, and that judges are honest and fair in their case decisions. The American public, as represented by the respondents to this survey, also approved of the courtesy and respect with which court staff treat those with business before the courts.* See, National Center for State Courts, "How the Public View the State Courts. A 1999 National Survey.," (Washington, D.C.: National Center for State Courts, 1999).

⁶¹ Although their effectiveness in this respect has been discussed due to the fact that in some cases ADR might encourage claims filing by providing a relatively low-cost means of dispute resolution. See, Hensler, Rand Corporation., and Institute for Civil Justice (U.S.), *Does Adr Really Save Money? : The Jury's Still Out.*

⁶² Enrique Iglesias, "Keynote Speech." (paper presented at the Commercial Alternative Dispute Resolution (ADR) in the XXI Century: The road ahead for Latin America and the Caribbean., Washington, D.C., October 26, 2000 2000). *By the end of the 1980s decade, with the growth of new criteria of commerce and development, the abandonment of protectionist policies, the rise of economic blocs and the economic opening of the region, the need for adapting the different legal instruments in favor of business and private investors arose. ADR become relevant and important in domestic commerce as in international commerce and also useful to foster foreign investment.*

ADR in Latin America

The implementation of ADR and their alleged success in contributing to the efficiency of the US judicial branch have exerted a powerful influence on Latin America, especially during the last decade.⁶³ Reorganizing the courts and solving the judicial crisis became the main priorities of different Latin American governments.⁶⁴

The regional initiatives toward the promotion of ADR.

Although the interest in promoting ADR is fairly recent in the region, the legal regulation of dispute resolution mechanisms other than traditional court adjudication has a long history. In many countries, at least arbitration⁶⁵ and mediation⁶⁶ have been regulated for more than a century. Therefore, we can say that the re-introduction of ADR into Latin American societies can be called a *modernization* of these activities.(Polania 2000)⁶⁷

⁶³ Notwithstanding, the possibility of considering ADR within the judicial reform programs in Latin America was originally suggested during the II Roundtable on Administration of Justice, organized by the National Center for State Courts in Williamsburg, Virginia, 22-26 May, 1966. See, Gladys and Highton Stella, Elena, "La Mediación En El Panorama Latinoamericano," *Sistemas Judiciales* Año 1, Nro. 1 (2001). *[A]lternative dispute resolution systems, especially mediation, have been proposed in our region as the most promising option to reform and improve our judicial systems.* Juan Enrique Vargas, "Problemas De Los Sistemas De Resolución De Conflictos Como Alternativa De Política Pública En El Sector Judicial.," *Sistemas Judiciales* Año 1, Nro. 2 (2002).

⁶⁴ Ibero-American Supreme Justice Courts and Tribunals, "Declaration of Caracas" (paper presented at the Ibero-American Summit Of Presidents Of Supreme Justice Tribunals And Courts, Caracas, Venezuela, March 6, 1998 1998). *We have held this meeting with the awareness that we must seek the effectiveness of the Justice Administration System, for which the adequate training of its officials is essential, and the development of alternate means to resolve the controversies of this new society that will ensure the timely access of the common citizen.*

⁶⁵ Arbitration has been regulated in Latin America for more than a century. In the case of Venezuela, it exists since 1830 when was included in the article 190 of the Constitution in the following terms: *The venezuelans are free to solve their differences through arbitration, even if the trial has been initiated.* In most Latin American countries the provisions related to it were part of the Codes of Civil Procedure establishing an ample judicial control, which made arbitration an appendix of the common judicial procedure. The arbitrators would be appointed by the judges, had to decide following legal rules and their decision could be reviewed by the courts in numerous circumstances. See, Manuel Gomez, "Development and Barriers of International Arbitration in the U.S. And Latin America," (Stanford, CA: 2002).

⁶⁶ In Venezuela, mediation (conciliation) was originally regulated in the Code of Civil Procedure of 1836. In other Latin American countries, the experience is similar. See, Manuel Gomez, "The Conciliatory Powers of the Venezuelan Judges.," (Stanford, CA: 2002).

⁶⁷ See, Polania, "Los Adr En Latinoamérica".

As said before, his *modernization* has garnered the support of multilateral organizations, which are interested in promoting institutional reform in the region.⁶⁸

Table 1 below, provides information about the projects funded by the *Inter American Development Bank (IADB) through the Multilateral Investment Fund (MIF)*⁶⁹ that were intended to finance ADR providing organizations.

TABLE 4. FINANCING PROJECTS FOR ADR CENTERS BY THE INTER-AMERICAN DEVELOPMENT BANK.

<i>Name of Project</i>	<i>Country</i>	<i>ATN Number</i>	<i>Beneficiary</i>	<i>Total Project</i>	<i>IADB</i>
National Network of Mediation and Arbitration Centers	Argentina	(1.) ATN/MT-6953-AR	Cámara Argentina de Comercio	\$2,508,000	\$1,000,000
Conciliation and Arbitration	Bolivia	(1.) ATN/MT=7180-BO		\$501,400	
Strengthening Alternative Dispute Settlements systems	Brazil	(1.) ATN/MT-6378-BR	Confederación de Asociaciones Comerciales de Brasil	\$3,340,360	\$1,599,400
Commercial Mediation and Arbitration Services	Chile	(1.) ATN/MT-6603-BR	Cámara de Comercio de Santiago	\$1,313,000	\$650,000
Alternative Methods of Settling Business Disputes	Colombia	TC9802358	Camara de Comercio de Bogota	\$ 1,808,000	\$1,220,000
Mediation and Arbitration Project	Costa Rica	TC9307332	Chamber of Commerce of Costa Rica	\$ 545,875	\$ 374,000
Mediation and Arbitration Center	Ecuador	TC9503287	Guayaquil Chamber of Commerce	\$ 1,047,618	\$ 720,000
Commercial Mediation and Arbitration Center	Guatemala	TC9711278	Chamber of Commerce	\$ 650,000	\$ 450,000
Mediation and Arbitration Center	Honduras	TC9602427	COHEP	\$ 774,400	\$ 497,000
Program to Strengthen Alternatives for Dispute Resolution in Commercial	Mexico	(1.) ATN/MT-7066-ME	Instituto Tecnológico Autónomo de Mexico	\$2,231,555	\$1,352,500

⁶⁸ The main organizations that have been involved are the World Bank (WB), the Inter-American Development Bank (IADB) and to some extent the Organization of American States (OAS) and the Inter-American Commercial Arbitration Commission (IACAC).

⁶⁹ Polania, "Los ADR En Latinoamérica". *The general characteristics of the projects financed by the IADB in alliance with the Arbitration and Conciliation Centers of the Chambers of Commerce can be summarized as follows: (1) The programs should be financed by both the resources from the MIF and the resources of the executors and beneficiaries of the project (...); (2) The programs should have the participation and approval of the public sector, so that the private sector initiatives are in harmony and are guaranteed by the public sector; (3) The aim of the programs was to turn the centers into self-sufficient bodies; (4) The programs promoted the adaptation of the juridical instruments supporting arbitration and conciliation functions; (5) The programs were designed to address the needs for efficient justice in the business and productive sectors of each country; (6) All the programs included training as one of its components.*

Conflicts					
Mediation and Arbitration in Property Disputes	Nicaragua	(1.) ATN/MT-6669-NI	Corte Suprema de Justicia	\$1,669,626	\$982,456
Program to Strengthen Alternatives for Dispute Resolution in Commercial Conflicts	Paraguay	(1.) ATN/MT-6539-PR	Cámara y Bolsa de Comercio de Asunción	\$830,000	\$503,000
Alternative Dispute Settlement Systems	Peru	TC9405110	APENAC	\$ 1,470,000	\$1,470,000
Mediation and Arbitration Centers	Uruguay	TC9505217	C.Com. De Montevideo	\$ 1,680,000	\$ 835,000
Commercial Mediation and Arbitration Center	Venezuela	(1.) ATN/MT-6585-VE	Centro de Arbitraje, Cámara de Comercio de Caracas	\$1,500,000	\$729,170

Source: D. Droulers. Arbitration Center of the Caracas Chamber of Commerce (CACCC).

One of the salient characteristics of regional programs intended to promote ADR is that they basically focus on the business sector (Iglesias 2000)⁷⁰. As we can see in the Table 1 *supra*, the beneficiaries of eight⁷¹ out of a total of fifteen programs are chambers of commerce. The objective of the funds was to finance the establishment of arbitration and mediation centers to be administered by these organizations. As Polania(Polania 2000) explained:⁷²

The first country to become beneficiary of this initiative of the Bank was Peru, which was quickly followed by the Colombian project in which for the first time the Chambers of Commerce participated. Motivated by the Colombian experience, the Chambers of Commerce of Uruguay and Ecuador also entered into agreements to strengthen their conciliation and arbitration centers. It was followed by Panama, Guatemala, Honduras, Brazil, Chile, Venezuela, Argentina and during this last stage by Bolivia and Mexico. The most important result of this effort can be summarized in the fact that the business sector of more than 90% of Latin America may enjoy the benefits of ADR.

The fact that the main beneficiary of the ADR modernization has been the business community is mainly because, in addition to decongesting the courts, ADR is seen as a

⁷⁰ Iglesias, "Keynote Speech." *The great majority of the partners of the AIDB/MIF in projects related to the promotion, strengthen and offering of high quality mediation and arbitration in Latin America are private sector entities, To date, the Bank through the MIF has supported commercial arbitration and mediation projects in eighteen countries for an approximate total of US\$ 20 Millions.*

⁷¹ Argentina, Chile, Colombia, Costa Rica, Guatemala, Mexico, Paraguay and Venezuela.

⁷² See, Polania, "Los Adr En Latinoamérica".

means to reestablish the legal certainty needed to attract local and foreign investors.⁷³ It has been said that the lack of legal certainty causes significant economic losses to the region. In this respect, according to the World Bank:⁷⁴

The consequences of corruption for economic and social development are detrimental. Corruption deters investment and hinders growth. It spurs inequality and erodes macroeconomic and fiscal stability. It reduces the impact of development assistance and provides an incentive to exploit natural resources, further depleting our environmental assets. It reduces the effectiveness of public administration and distorts public expenditure decisions; channeling urgently needed resources away from sectors such as health and education to corruption-prone sectors or personal enrichment. It erodes the rule of law and harms the reputation of and trust in the state.

It has been said that private investors, mostly from developed countries, consider highly risky the application of the law in a non-uniform way and the malfunctioning of the courts.

ADR infrastructure in Latin America

During a conference sponsored by the Inter-American Development Bank to evaluate the trend of commercial ADR for the twenty-first century, the General Director of the *Inter-American Commercial Arbitration Commission (IACAC)*, Mrs. Adriana Polania (2000) expressed:⁷⁵

Starting in 1992 (...), there was a reactivation of the so-called arbitration and conciliation centers of the chambers of commerce. Following the trend set by the chambers of commerce of Bogotá, Lima and Mexico, which pioneered the idea of modernizing their dispute resolution mechanisms, the Chambers of Commerce of Panama, Uruguay, Bolivia, Guatemala, Chile, Argentina, Brazil, Paraguay and Venezuela decided to

⁷³ See, *Ibid.*

⁷⁴ See, <http://www1.worldbank.org/publicsector/anticorrupt/coraid.htm> (last visited, May 7th, 2002).

⁷⁵ See, Polania, "Los ADR En Latinoamérica".

strengthen and render more effective their arbitration and conciliation services.(Iglesias 2000)

In tandem with the creation of commercial ADR providers, there has been a process of legislative modernization in the region.⁷⁶

New laws have been passed in Mexico, Guatemala, Ecuador, Bolivia, Colombia, Peru, Brazil, Costa Rica, Venezuela and Panama, among others. The new Paraguayan law is now being discussed in Congress⁷⁷, and new draft reform projects are also being discussed in Costa Rica, Ecuador and Bolivia. In general, the modifications have been extracted from the Civil Procedural Code and new Alternative Dispute Resolution Acts have been passed. (Iglesias 2000)

Another important area that has been developed is that of ADR for international commerce, which includes mainly arbitration as. International arbitration has been considered at least since 1889 when the *Treaty of Montevideo on International Procedural Law* was signed and then ratified by several Latin American countries. The treaty provided for the recognition of foreign arbitral awards and was modified in 1940. Thirty-nine years later, in 1928 it was signed in Havana the *Code of International Private Law (Bustamante Code)* ratified by fifteen countries.⁷⁸

During the same decade, in 1923 the *Geneva Protocol* was approved during the meeting of the General Assembly of the League of Nations.⁷⁹ It was signed by three Latin American countries but only ratified by Brazil.⁸⁰

Although all of the aforementioned treaties were intended to ease the use of international arbitration, there were still many obstacles, because they all subjected the

⁷⁶ Ibid.

⁷⁷ The Arbitration Law was passed in April 11th, 2002 by the Paraguayan Congress. See, http://www.latinlawyer.com/usa_eur/main_fs.htm (last visited: April 19th, 2002)

⁷⁸ For a full-text of the Code see, <http://www.oas.org/Juridico/spanish/firmas/a-31.html> (last visited, May 5th, 2002)

⁷⁹ See, http://www.interarb.com/vl/g_pr1923.htm (last visited, May 1st, 2002)

⁸⁰ See, <http://untreaty.un.org/English/sample/EnglishInternetBible/partII/Treaty-6.asp> (last visited, May 5th, 2002).

recognition of the award to the fulfillment of several requisites (i.e. award rendered by a competent tribunal, proof of having summoned the party against whom the award was granted and that the award was final) and permitted the country in which enforcement was sought, to exert discretion and reject to enforce the awards when considering that violates the states' public policy.

In spite of the evident interest of Latin American countries, at least in theory, to promote international arbitration, the treaties posted some important barriers that prevented its use. Arbitration was complicated and dependent from the acceptance by the judiciary, which was reluctant to embrace it. This attitude of the courts also represented an obstacle.

The next step towards the regulation of international arbitration was the *New York Convention* and then the *Panama Convention*. Up to date, the New York Convention has been ratified by fifteen Latin American countries and the Panama by sixteen, as can be seen in the following table:

Table 5. Status Of International Treaties Providing For ADR (Arbitration) In Latin American Countries (As Of Jan. 15, 2002).

Abbreviations:

NY: United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

ICSID: Convention on the Settlement of Investments Disputes.

MIGA: Convention Establishing the Multilateral Investment Guarantee Agency.

PANAMA: Inter-American Convention on International Commercial Arbitration (Panama Convention).

US-Bilateral: United States Bilateral Investment Treaty.

OPIC: Agreements supporting programs of the Overseas Private Investment Corporation.

<i>Country</i>	<i>NY</i>	<i>ICSID</i>	<i>MIGA</i>	<i>PANAMA</i>	<i>US-Bilateral</i>	<i>OPIC</i>
<i>Argentina</i>	Ratified	Ratified	Ratified	Ratified	Ratified	Ratified
<i>Bolivia</i>	Ratified	Ratified	Ratified	Ratified	Ratified	Ratified
<i>Brazil</i>	N/A	N/A	Ratified	Ratified	N/A	Ratified
<i>Chile</i>	Ratified	Ratified	Ratified	Ratified	N/A	Ratified
<i>Colombia</i>	Ratified	Ratified	Ratified	Ratified	N/A	Ratified
<i>Costa Rica</i>	Ratified	Ratified	Ratified	Ratified	N/A	Ratified
<i>Dominican Republic</i>	N/A	Signed	Ratified	Signed	N/A	Ratified
<i>Ecuador</i>	Ratified	Ratified	Ratified	Ratified	Ratified	Ratified
<i>El Salvador</i>	Ratified	Ratified	Ratified	Ratified	Signed	Ratified
<i>Guatemala</i>	Ratified	Signed	Ratified	Ratified	N/A	Ratified
<i>Honduras</i>	Ratified	Ratified	Ratified	Ratified	Ratified	Ratified
<i>Mexico</i>	Ratified	N/A	N/A	Ratified	N/A	Ratified
<i>Nicaragua</i>	N/A	Ratified	Ratified	Signed	Signed	Ratified
<i>Panama</i>	Ratified	Ratified	Ratified	Ratified	Ratified	Ratified
<i>Paraguay</i>	Ratified	Ratified	Ratified	Ratified	N/A	Ratified

<i>Peru</i>	Ratified	Ratified	Ratified	Ratified	N/A	Ratified
<i>Uruguay</i>	Ratified	Ratified	Ratified	Ratified	N/A	Ratified
<i>Venezuela</i>	Ratified	Ratified	Ratified	Ratified	N/A	Ratified

Source: The Institute for Transnational Arbitration.

In the particular case of the *Panama Convention*, it was intended to overcome the formal obstacles faced by international arbitration users and to that end declared the validity of agreements to arbitrate future disputes, established the procedural rules to be applied in the absence of express provision by the parties, provided for the enforcement of arbitral awards and limited the grounds for which courts might refuse to recognize or enforce an award. In that respect, the *Panama Convention* represented a step forward in the promotion of international arbitration.

During the course of the last twenty years, there have been several other important regional and sub-regional treaties that provide for ADR as a means to solve dispute in the international arena. The most significant are, the *Convention on the Settlement of Investments Disputes. (ICSID)*⁸¹, the *Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)*⁸², the *South Cone Commercial Agreement (MERCOSUR)*,⁸³ and the *Cartagena Agreement (Andean Pact)*⁸⁴, among others.

Some countries are part of several treaties that regulate the same aspects of ADR, which may signify a disadvantage due to the possibility of overlap and contradiction between the rules of the various laws.

⁸¹ Although the ICSID was adopted during the 1960s most latin american countries were originally hesitant to become part of it, apparently as a result of the Calvo doctrine. Wa not until two decades ago when ICSID became gradually accepted in the region. Today, fourteen latin american countries have ratified it and some of them have already addressed disputes through the provisions of the treaty.

⁸² The appendix of this treaty provides for international arbitration as a mechanism to solve disputes that may arise in regard to foreign investments between any private foreign investor through MIGA and a host country. It is established that the MIGA subrogates in the rights of the investors covered by MIGA insurance against host countries.

⁸³ The parties of the Mercosur protocol of 1994 are Argentina, Brazil, Paraguay and Uruguay. It provides for IA as a method to solve disputes between any of the MERCOSUR countries and a third non-Mercosur country related to the activities covered by the convention.

⁸⁴ See, http://www.comunidadandina.org/ingles/treaties/trea/ande_trieb1.htm (last visited, May 5th, 2002)

Finally, there is a supranational infrastructure consisting of ADR-regulating agreements between various countries⁸⁵ and organizations that lend their support to local chambers.⁸⁶

The ADR movement in Venezuela

Initiatives for the promotion of ADR

Aside from their perceived advantage in helping to decongest the courts that are slow, costly and inefficient,⁸⁷ in Latin America it has also been said that promoting ADR would help decrease the high level of legal uncertainty that discourages foreign investment and hinders the use of the courts by corporations.⁸⁸ In short, ADR would aid in solving the malfunction of the court system. This adds an economic motivation for the support of these mechanisms and in this respect it has been said: “promoting ADR is something that national and international markets demand”.⁸⁹ Once they are established, “ADR will elevate Venezuela to the level of more developed countries”.⁹⁰

⁸⁵ This is the case of the *Cooperation Agreement regarding the settlement of disputes between the Executive Secretary of the Confederation of Chambers of Commerce of the Andean Group (CONFECAMARAS) and the Arbitration and Mediation Commission of the Mediation Center of the MERCOSUR Council of Chambers of Commerce*. This last agreement was signed on April 8, 2001.

⁸⁶ This is the case of the Inter-American Arbitration Chamber. <http://www.ccb.org.co/ciac/default.htm> (March 10th, 2002).

⁸⁷ ADR are “an answer to the frustration generally felt by individuals and foreign investors in view of the slow, costly, low-quality process.” (Mariolga Quintero: *El Universal*, April 9, 1999)

⁸⁸ “Foreign businessmen do not trust the Venezuelan juridical system, so they prefer to resort to other mechanisms for the settlement of their disputes.” (*El Nacional*, May 20th, 1998)

⁸⁹ “The need to reform legislation and adapt it to the demands of national and international markets, as well as to decongest the civil and mercantile courts, cannot be postponed.” (*El Nacional*, February 10th, 1998)

⁹⁰ “Approval of the Law of Commercial Arbitration constitutes a step forward in the country’s modernization and improvement of judicial security, which is indispensable if we want to attract foreign investors.” (Statements made by Simon Garcia, Minister of State for Parliamentary Relations, in *El Universal*, 19 June, 1998) “CONAPRI expects considerably fewer commercial disputes with the application of arbitration and this will allow Venezuela to compete at an international level.” (*El Universal*, June 20, 1998)

The legal uncertainty.

With respect to this, it is alleged that investors do not trust the judicial system because there is no *legal certainty* (Perez-Perdomo 1996),⁹¹ that is, one cannot predict how the laws will be applied.(Boza and Pérez Perdomo 1996)⁹² According to an important representative of a Venezuelan ADR provider, local investors are not the only ones that are wary of the courts, but that “foreign executives do not trust the Venezuelan judicial system.”⁹³

Furthermore, because there were no ADR providers, many important cases, which could be processed in Venezuela, have been taken to foreign ADR institutions.⁹⁴

When we asked some of our interviewees what they believed could be the reasons for the perceived lack of *legal certainty*, they generally attributed it to the inadequate functioning of the courts stemming from the poor conditions of their facilities, the lack of training of judicial officials, the political leaning of the judges and the corruption reigning among the judiciary.⁹⁵ These are in essence the same reasons cited as the causes of the Venezuelan judicial crisis, which will be discussed in Section *infra*.

⁹¹ For a detailed explanation on the relationship between legal certainty and competitiveness, see, Rogelio Perez-Perdomo, *Seguridad Jurídica Y Competitividad* (Caracas: Ediciones IESA, 1996).

⁹² See, María Eugenia Boza and Rogelio Pérez Perdomo, *Seguridad Jurídica Y Competitividad* (Caracas: Ediciones IESA, 1996).

⁹³ Interview #1, # 2, #10

⁹⁴ According to one attorney’s comments on the advantages of passing a Law on Commercial Arbitration, many of PDVSA’s million-dollar disputes could be resolved by local oil experts instead of taking them before foreign arbitrators. (El Nacional, July 15, 1998). “*For example, the case of Viasa’s commercial routes and and the case of Mexico’s taking over a position to send signals via satellite could have been solved by arbitration if Venezuela had had this law* said another columnist before the passing of the Law on Commercial Arbitration.

⁹⁵ See, Interviews # 9, #10 and #11.

The congestion of the courts.

The judicial reform advocates generally perceive courts as congested. The problem is the result of an enormous number of *cases filed* before the courts each year and the small number of judges assigned to review all these cases.⁹⁶

Although, the perceived *legal uncertainty* and the congestion of the courts are both related to the performance of the judiciary, its causes are different. *Legal uncertainty* exists because of the *malfunctioning* of the courts and congestion for its *lack of efficiency*.⁹⁷

The difference between the concepts of the judicial system's *malfunctioning* and that of its *inefficiency* must be clarified. The former term refers to what happens when the system does not operate normally, when its structural elements do not function adequately. The result is corrupt, politicized judges, improperly trained officials and poorly equipped courts.

By *efficiency of the system* we mean its ability to serve its purpose in the best possible manner and in a satisfactory and successful way.⁹⁸ Courts are efficient when their activities serve the ends of justice for which their proper functioning is necessary, but not sufficient for efficiency to happen. If the judicial system is to be efficient, it must first operate adequately.

⁹⁶ "Commercial jurisdiction is one of the most saturated of all. There are courts that take on more than thirty thousand cases. Even if they were extremely diligent, they would never be able to process them through ordinary channels." (El Nacional, 1.7). In this same order of ideas, one of our interviewees expressed that, *if you want to determine whether the courts are congested or not, you only have to compare the number of cases to the number of judges who are supposed to address them.* (Interview #9)

⁹⁷ As we mentioned before, one of the reasons why the judicial branch of the US government has been very active in promoting ADR is because they (ADR) help to decongest the courts and allow the judges to issue good quality decisions and give sufficient attention to each case. Thus, people can obtain better solutions to their disputes. ADR have been seen as "*clearing-docket devices*." See, footnote 8 *supra*.

⁹⁸ An organization is efficient when it obtains its ends with a minimum of means." See, Rogelio Perez-Perdomo, *Políticas Judiciales En Venezuela, Estudios* (Caracas: Ediciones IESA, 1995).

An oft-repeated idea is that ADR would be beneficial for Venezuela because it has worked well in the United States and in other developed countries.⁹⁹ Given that ADR has received institutional support in the United States to decongest the judicial branch of government, by the same token the Venezuelan government should promote these mechanisms to help in resolving the judicial crisis. It has been also said that given that US corporations continue increasing their use of ADR and have derived great benefits from it, then Venezuelan executives should attain similar results by utilizing ADR *because the problems that caused its promotion are the same* in both countries.¹⁰⁰

These are the motivations for which multilateral entities and Latin American governments have endorsed a process of ADR *modernization*¹⁰¹ and considered it a priority within the reform programs designed to solve the *judiciary crisis* that affects the region.¹⁰² Now then, let us explain what does this so-called *judiciary crisis* entail.

The Judicial Crisis in Venezuela and the Search for Solutions

Origins of the Venezuelan Crisis

Even though some specific criticisms of the Venezuelan judicial branch of government had been made in the sixties, it was not until the mid-eighties that the existence of a judicial crisis in Venezuela gained recognition.(Perez-Perdomo 1985)¹⁰³

⁹⁹ *The arbitration system has been applied for some time in most countries of the world with very positive results as far as efficiency is concerned.* (Interview #2) Another of our interviewees (#6) indicated that *“the positive experience with ADR in the USA tells us that they are highly beneficial.”* It has been also said that *the inconvenience of litigation is a sign of times, not only in Venezuela but in all the world.* (El Universal March 20, 1999)

¹⁰⁰ Interview #11.

¹⁰¹ We refer to “modernization” because, as we mentioned before, some of these mechanisms have been stipulated in Latin American legislation for more than 100 years. Notwithstanding, many of ADR promoters (especially those who support arbitration) refer to them as a totally new institution

¹⁰² See, Tribunals, “Declaration of Caracas”.

¹⁰³ See, Rogelio Perez-Perdomo, “La Administración De Justicia En Venezuela. Evaluación Y Alternativas,” *Revista de Derecho Privado* 2-4 (1985). “*The administration of justice in Venezuela: Evaluation and alternatives.*” He indicates that *“during the past months, many important statements and articles have appeared in the press. These articles refer to a “judicial crisis” and suggest that “the important roles of the (of the judicial branch) do not seem to*

The elements considered typical¹⁰⁴ of this crisis are, (1) the direct influence of political parties on the operation of the judicial branch of government¹⁰⁵ that induce Judges to not decide the cases based on the law or the rights of the parties, but as a result of influence or political pressure¹⁰⁶ (2) corrupt, poorly trained and underpaid judicial officials¹⁰⁷ (3) the high cost of using the courts¹⁰⁸ and (4) the inefficient handling of cases by the courts¹⁰⁹ caused in part by the inadequacy of their facilities.(Perez-Perdomo 1995)¹¹⁰

be played adequately and the system for the administration of justice has been the object of many criticisms in the past 25 years.” This statement can be further proved by the wave of scandals that has swept through Venezuelan courts since that time and by the persistent complaints from the civil society that have appeared in the media.

¹⁰⁴ This is the categorization indicated by Perez-Perdomo when he states that *“the courts are not complying with their expected roles because the judicature is politicized and the judges decide based on the interests of the parties. It is a corrupt institution, given that many decisions are achieved only after judicial officials have received money in payment. It is also inefficient because decisions take an extremely long time, sometimes years, to be effected. It is expensive because attorneys demand exorbitant fees to litigate.”* (Ibid.) Other authors such as Escovar Salom have proposed ways in which judicial reform should take place, to wit *“the judges should be economically and politically independent; justice should not be linked to political parties or to the administration of justice.”* Ramón Escovar León, “Notas Sobre La Reforma Judicial,” *Revista de Derecho Privado* 3-1 (1986).

¹⁰⁵ Not only do political parties have a say in the appointment of the judges, but they also influence the decisions made by those judges.

¹⁰⁶ This has often been linked to the influence exercised by political parties on judges. Another form of corruption is the bribes that users pay in order to get the courts take their cases into consideration. *“Litigating attorneys use the term ‘procedural impulse’, which is nothing else than money ‘donated’ to court bailiffs and secretaries to ‘speed up’ their work...”* (Statement made by Rafael Roversi, Executive Director of the Magistrature).

¹⁰⁷ *“Personnel are badly paid, which has resulted in strikes and the charging of small (and not so small) illegal payments if a certain matter is to be processed or simply attended.”* Ibid.

¹⁰⁸ Even though the Law and the Constitution stipulate that the administration of justice is a free service, in its annual report titled “Venezuelan cost” the *National Council for the Investment Promotion in Venezuela (CONAPRI)* have stated with respect that *“in practice, the only cost that has been eliminated is the payment of judicial (legal) duties, but the cost related to the efficiency of the system are still applicable...these are associated to reputation, specialization, time and money.”* (CONAPRI (2001). *Costo Venezuela*. Caracas, CONAPRI). Using the entities of the judicial branch is a costly process. In addition to lawyer’s fees, there are a series of extraordinary expenses for the users if they want their needs to be satisfied. Many of these expenses include services which the state should provide free of charge (the purchase of court materials, transportation costs for officials, etc.) and payment to court officials for completing a certain transaction related to the process. One of the interviewees expressed that *“the bailiff has to be paid a sum of money in excess of the real transportation costs when a summons must be made, just to name a the smallest expenses, because in addition to that one has to pay to the court’s clerks if wan them to pay attention to a case?”*. (10.1. (2002). Interview #10, M. Gómez, Caracas.

¹⁰⁹ This refers not only to unfounded delays in the transaction of processes, but also to the lack of uniformity in judicial decisions and to their improvisation as to the application of the law.

¹¹⁰ With respect to Venezuelan courts, *“an evaluation of their facilities and equipment made by the Universidad Simon Bolivar determined that there is an acute deficit. There are relatively few buildings expressly dedicated to their use by the courts (pompously called “palaces of justice”) and most courts operate in totally inadequate offices.”* See, Perez-Perdomo, *Políticas Judiciales En Venezuela*.

At first, representatives of the Venezuelan government accepted criticisms of the judiciary with certain reservations. Although they acknowledged that problems did exist, they tended to reject their importance, insisting that the flaws were only “functional”.¹¹¹

They would argue that the problem was not corruption and that political parties did not influence judges. In their view, the problem was the “...*functioning systems, which should be modified by means of legislation. Investment should be made to increase the number of courts, raise the salaries of the judges and other officials and modernize offices and equipment.*”¹¹²

When we apply the previously defined concepts of *malfunction* and *inefficiency* to what is perceived in Venezuela, we find that a common opinion is that the judicial branch of government *does not function adequately*.¹¹³ One of the features included in almost all the agendas¹¹⁴ is the one referring to ADR, which has normally been used to improve “efficiency”, instead¹¹⁵.

Initiatives taken to address the Judicial Crisis

In the early nineties, the World Bank and the Inter-American Development Bank¹¹⁶ began to be concerned about development and economic growth in Latin America. This led them to address the problems related to the judicial branches of

¹¹¹ See, Perez-Perdomo, "La Administración De Justicia En Venezuela. Evaluación Y Alternativas.."

¹¹² Ibid.

¹¹³ Which of course implies that neither is it efficient.

¹¹⁴ In fact, one of the point that was amply discussed during the 1st Iberian-American Summit of Presidents of Supreme Courts and Tribunals of 1998 was “alternative dispute resolution.” In this respect, the following actions were agreed: (i) to prepare studies on the types of conflicts which could be processed by ADR; (ii) to evaluate the efficiency of conciliation, the fair settlement of disputes (judges of the peace) and domestic/international arbitration; (iii) to create an Ibero-American conciliation and arbitration system; and (iv) to educate all those who participate in the process and the public at large in the negotiation of disputes. Similarly, both the World Bank and the IDB have assigned priority status to projects that strengthen the rule of law and, among them, judicial system reforms, given their importance as tools to fight against poverty and underdevelopment. See, Tribunals, "Declaration of Caracas".

¹¹⁵ The congestion of the courts is a problem of efficiency not malfunctioning.

¹¹⁶ Basically, the World Bank (WB), the Organization of American States (OAS) and the Inter American Development Bank (IDB). Since 1993, this last organization has been “designing and executing projects related to the process of judicial reform and modernization being implemented in many countries of the region.” See, Iglesias, "Keynote Speech."

government in several countries of the region, because it was thought that restructuring the judiciary would strengthen the rule of law making those countries safer to invest in.¹¹⁷

In this respect, “*Venezuela was the first country in the world to receive World Bank’s financing for the modernization of its judicial system.*”¹¹⁸

External Assistance: Multilateral Organization Aid

“In 1995 the Venezuelan government launched several projects designed to reform and modernize justice”.(Lander 2002)¹¹⁹ Although some of these plans were the result of domestic initiatives, the *World Bank (WB)* and the *Inter-American Development Bank (IADB)* promoted the most important ones and provided financial support for their implementation.

The projects involving multilateral organizations include, (1) the infrastructure project for the judicial branch of government,¹²⁰ (2) the project for the modernization of the Supreme Court of Justice,¹²¹ (3) the project for the creation of the Arbitration Center of the Caracas Chamber of Commerce,¹²² and (4) the project to reform the criminal justice system.¹²³

Aside from the aforementioned specific tasks, most Latin American governments have agreed to mutually cooperate in the processes of judicial reform and have therefore signed important documents among which can be mentioned: (1) *the Iberian-American*

¹¹⁷ See, Legal Department Legal and Judicial Reform Unit, "Initiatives in Legal and Judicial Reform," (Washington, D.C.: World Bank, 2000).

¹¹⁸ See, <http://www.cajpe.org.pe/RIJ/BASES/REFORMA/ven3.htm> (March 16, 2002)

¹¹⁹ See, Adriana Lander, "Nuevo Escenario Judicial Venezolano," *Sistemas Judiciales* Año 1, Nro. 2 (2002).

¹²⁰ This is the result of “ an agreement that was entered into with the World Bank to develop a modernization program in the courts. The implementation of this project has not yet concluded.” See, *Ibid.*

¹²¹ Project P044325, which was also signed with the World Bank and was successfully completed. *Ibid.* Through this project, the structure and operation of the Supreme Tribunal of Justice were noticeably improved.

¹²² Project (1.) ATN/MT-6585-VE, which resulted from an agreement entered into by the Caracas Chamber of Commerce (CCC) and the IDB through the Multilateral Investment Fund (FOMIN). According to information provided by the CCC, 66% of this project had been executed by February, 2002. The Corporación Andina de Fomento (CAF) also participated in the financing of this project with funds termed as “local contributions.” Droulers, D. (2002). Project of the CCC Arbitration Center. M. Gómez, Caracas.

¹²³ Project 1362/OC-VE approved in November, 2001, and currently in progress.

*Heads of State and Government declaration of 1997 (Margarita Declaration),*¹²⁴ (2) the *Presidents of the Iberian-American Supreme Courts of Justice declaration of 1998 (Caracas Declaration),*¹²⁵ (3) the *Organization of Iberian-American Supreme Courts of Justice (OCSA)*¹²⁶ and (4) the *Organization of American States (OAS) documents of 1996*¹²⁷ and 1999.¹²⁸

The promotion of alternative dispute resolution (ADR) mechanisms has been a common aspect of these agendas.¹²⁹

Domestic Initiatives: Judicial Reform.

The most significant domestic initiative undertaken in Venezuela since the mid-nineties was the passage of legislation intended to restructure the courts and the dispute resolution processes. It includes the *Commercial Arbitration Act (1998),*¹³⁰ the *Organic*

¹²⁴ This is the name commonly given to the VII meeting of Ibero-American Heads of State and Government, which was held in the Island of Margarita (Venezuela) on 8-9 November, 1997. At the closing ceremony of the meeting, an agreement (Margarita Declaration) was signed by twenty two Heads of State. Chapter 3 of the Margarita Declaration refers to the administration of justice. This chapter stipulates that the common objective of all the signatories was the creation of an “*ethical, simple, prompt administration of justice, which would closely related to all citizens and would issue fair decisions.*” In addition, Section 19 of the Declaration states that “*in order to promote actions designed to improve the administration of justice, according to each country’s characteristics and circumstances, we will further the exchange of experiences on judicial reform and judicial policy matters among our states.*” See, Iberian-American Chiefs of States, *The Margarita Declaration: The Ethical Values of Democracy* (VII Summit of Iberian-American Chiefs of State and Governments, 1997 [cited March 9, 2002 2002]); available from <http://www.cumbre.ve/pg11.htm#mar4>. (last visited March 9th, 2002).

¹²⁵ In March 1998, the presidents of the Ibero-American Supreme Courts and Tribunals of Justice signed a document (Caracas Declaration) establishing the promotion of ADR as one of the key activities “*to reinforce the judicial branch, promote its efficiency and reaffirm the basic principles governing judicial activities as the basic instruments to maintain their inherent values.*” Tribunals, “Declaration of Caracas”.

¹²⁶ This organization was created on October 26, 1995, during the meeting of Presidents of Supreme Courts held in Washington, D.C., and has its headquarters in Panama. Its mission is “*to promote judicial independence and the rule of law in the hemisphere, as well as the adequate constitutional treatment corresponding to the judicial branch as a fundamental state organization.*” <http://www.oas.org/juridico/spanish/ag-res96/Res-1407.htm> (March 10, 2002)

¹²⁷ <http://www.oas.org/juridico/spanish/ag-res96/Res-1407.htm> (last visited: March 10, 2002)

¹²⁸ General Cooperation Agreement signed on February 8, 1999, with the aim of promoting cooperation for the modernization of the judicial branches of the governments of the signatory countries.

¹²⁹ the most important aspects of these regional cooperation initiatives are: (i) the autonomy and independence of the judicial branch and the cooperation between public powers; (ii) the promotion, protection and respect for human rights; (iii) the training of judicial officials; (iv); (v) the fight against corruption, (vi) the mechanisms for the solution of the penitentiary crisis; (vii) the protection of the environment and the promotion of sustainable development; and (viii) the fight against drug traffic and its consequences. Even though this categorization is based on the same topics included in the Caracas Declaration, they generally coincide with the agenda of the organizations that participated in the judicial reform.

¹³⁰ Published in the Venezuelan Official Gazette # 36,430 of april 7th, 1998.

Law of the Judicial Branch (1999),¹³¹ the *Organic Law of the Council of the Judicature (1999)*, the *Organic Code of Criminal Procedure (1999)*¹³² and the reform to the *Constitution (1999)*.¹³³

With respect to the Constitution, its reform resulted from a process¹³⁴ whose objective was “to build a vision of the country in which citizens could participate as subjects of this process by transforming the state and creating a new juridical order, which will allow the effective functioning of a social and participative democracy”.(Lander 2002)¹³⁵

In a decree dated August 19, 1999, the National Assembly¹³⁶ declared a state of emergency in the judicial branch of government and ordered its reorganization “*in order to guarantee the adequacy of the judges, provide social public defense services and ensure the celerity and impartiality of all judicial processes, thus cleaning up the judicial system.*”¹³⁷

¹³¹ Published in the Venezuelan Official Gazette # 5,262 of September 11th, 1998.

¹³² Published in the Venezuelan Official Gazette # 5,558 of November 14th, 2001.

¹³³ Approved on December 15th, 1999 and Published in the Venezuelan Official Gazette # 36,860 of December 30th, 1999. It is worth mentioning to note that the constitutional reform of 1999 established a series of important principles regarding the administration of justice, such as (i) the autonomy of the judicial branch of government; (ii) the cost free nature of justice services; (iii) the impartiality and independence of judicial officials; (iv) due process; (v) citizen participation in the administration of justice; (vi) the auxiliary role of lawyers in the judicial system; (vii) the existence of special jurisdictions; and, for the first time, (viii) the need “*to promote alternate mechanisms for dispute resolution...*” (Art. 256), even though, as we shall see below, some of these mechanisms had already been established in Venezuela for a long time.

¹³⁴ During the drafting of the Constitution, the Constituent Assembly, in the exercise of its “supra-constitutional” powers to be later ratified by the Supreme Tribunal of Justice, dictated a series of actions to reorganize the different branches of government. These actions included the “*Decree for the Reorganization of the Judicial Branch of Government*” and the creation of a “*Judicial Emergency Commission*”, which would be in charge of executing the aforementioned decree. See, Decree of August 19th, 1999.

¹³⁵ See, Lander, “Nuevo Escenario Judicial Venezolano.”

¹³⁶ Decree of the Venezuelan National Constituent Assembly.

¹³⁷ Article 1 of the Decree for the Reorganization of the Judicial Branch of Government dated August 19, 1999. In this same act, the Judicial Emergency Commission was created. This commission consisted of nine members, who would (i) propose to the Constituent Assembly the measures needed to reorganize the judicial branch of government and the penitentiary system; (ii) prepare a budget for the Judicial Emergency; (iii) follow up and evaluate the operation and performance of the Supreme Court of Justice and of the Council of the Judicature; (iv) prepare a plan to evaluate the judges; and (v) thoroughly review all multilateral conventions destined for the modernization of the judicial branch that had been executed or were being executed by the Council of the Judicature. This Emergency Commission lasted for six months. Then, the Constitution was amended and the Executive Director of the Magistrature took on its role.

The importance given to ADR in all these reform efforts resulted in a significant growth of its infrastructure. To this effect, laws were passed to provide ADR in areas such as labor¹³⁸, consumer rights¹³⁹, and insurance¹⁴⁰, among others.¹⁴¹

In the next chapter, we will delve into more detail about the current ADR infrastructure in Venezuela and that of the other dispute resolution mechanisms that are in fact available in Venezuela to solve business disputes.

¹³⁸ Its latest reform was passed in 06/17/1997 and published in Official Gazette No. 5,152 (Extra.). It allows a Labor Inspector to mediate between the parties to a dispute.

¹³⁹ Establishes a previous conciliation stage in suits filed by consumers and users of goods and services.

¹⁴⁰ Passed on 05/17/95 and published in Official Gazette No. 4,898 (Extra.)Creates the role of arbitrator for the Insurance Superintendent.

¹⁴¹ The Organic Law for the Protection of Children and Adolescents, passed in 1998 and published in Official Gazette No. 5,266 (Extra.). It provides for auxiliary bodies called the “Public Defender of Children and Adolescents”, who may act as mediators according to the stipulations of Article 308 of that Law.

**CHAPTER III. FORMAL DISPUTE RESOLUTION MECHANISMS TO SOLVE
BUSINESS CONFLICTS IN VENEZUELA: THE COURT SYSTEM AND
INSTITUTIONAL MEDIATION. INFRASTRUCTURE AND USE.**

Up to this point we have explained the motivations that led to the development of ADR in Venezuela, and how it has been embedded in the process of judicial reform. Let's now explain which formal or institutional mechanisms, including ADR, are available to solve business disputes in Venezuela; what are its infrastructure and how our sample population uses it.

The Institutional Mechanisms and its use.

By formal or institutional mechanisms, we mean those either provided for in public laws and organized by the state, such as the Court system, or those organized and offered by private organizations that follow their own standards and which operation is permitted by the laws. It is the case of ADR.

The Courts: Infrastructure and use.

Infrastructure.

The structure of the Venezuelan judicial system is similar to most of those in modern regimes, since the Venezuelan constitution recognizes the existence of independent branches of public power on the basis of the doctrine of the separation of powers.¹⁴² In this respect, the judicial branch is autonomous and is organized as a

¹⁴² Article 136 of the Venezuelan Constitution: *The Public Power is distributed in the Municipal Power, the State Power and the National Power. The National Power is divided in Legislative, Executive, Judiciary, Citizen and Electoral. Each of the Public Power Branches has its own functions, but the agencies involved in its activities shall collaborate in the fulfillment of the ends of the State.*

pyramid, the apex of which is the Supreme Tribunal of Justice.¹⁴³ Beneath it there are several levels of courts, whose jurisdictional power is distributed according to three basic criteria: (1) jurisdiction over the matter, (2) jurisdiction over the territory and (3) jurisdiction over the monetary value of the action.

There are courts whose jurisdictional power includes processing commercial matters, which are, issues dealing with *commercial acts* defined in the *Commerce Code*.¹⁴⁴ There are also courts whose jurisdictional power relates to tax matters and also labor courts that process cases related to employers and workers conflicts. Recently, after the financial crisis of 1993, a special banking jurisdiction was created in order to deal with any disputes in which financial institutions are involved.

The judicial process is governed basically by the rules of the *Code of Civil Procedure*,¹⁴⁵ except bankruptcy and maritime transportation procedures, which are regulated by the *Commerce Code*.¹⁴⁶ As a consequence, we can say that the adjudicatory process in the Venezuelan Judiciary system is clearly regulated.

The use of the courts for business matters.

The Venezuelan *Executive Direction of the Magistrature (EDM)* collects periodical data on a monthly basis among judges to determine the court's level of usage in every jurisdiction. This data is then organized into charts and provided to the *Central Office of Statistics and Informatic (OCEI)*.¹⁴⁷

¹⁴³ Article 254 of the Venezuelan Constitution: *The Judicial Branch is independent and the Supreme Tribunal of Justice will have financial, operational and administrative autonomy.*

¹⁴⁴ Provided in the articles 2 and 3 of the Commercial Code which consider included in the notion of acts of commerce *any contract or duties which are not civil in its essence*, and therefore subject to the jurisdiction of commercial courts pursuant to article 1,090.

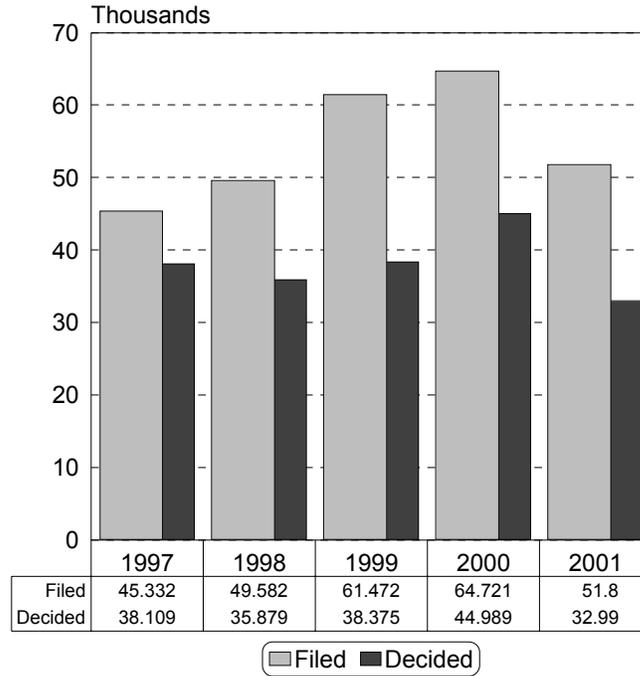
¹⁴⁵ Code of Civil Procedure of 1987. Published in the Venezuelan Official Gazette # 3,970 of March 13th, 1987.

¹⁴⁶ Articles 612 to 626 in the case of maritime transportation and articles 898 to 1,081 in the case of the bankruptcy procedure.

¹⁴⁷ The abbreviation is made after the agency's name in spanish which is *Oficina Central de Estadística e Informática*.

For our purpose we selected the data regarding the level of commercial courts' usage in Caracas during the years 1997 through 2001, which is shown below:

Table 6.
Filed And Decided Cases By Courts With Jurisdiction In Commercial Matters. Metropolitan Area Of Caracas Between 1997 And 2001



Source: Executive Direction of the Magistrature (EDM)

If we read Table 6 in absolute numbers, we see that there have been more *filed* than *decided* cases each year and this is what have lead critics of the Venezuelan judicial system to argue that the courts are congested.¹⁴⁸ However, it must be noted that the category *filed cases*, may be misleading to determine the total number of commercial disputes because it includes not only contentious cases but also any request or non-contentious petition filed in court.¹⁴⁹ The majority of such non-contentious petitions only

¹⁴⁸ See, footnote 96 *supra*.

¹⁴⁹ Pursuant to articles 936 and 937 of the Code of Civil Procedure, venezuelan courts may process non-contentious requests and petitions such as certifications of civil status, inspections and assist in gathering of evidence before trials. This category of petitions are labeled as *gratious* or *voluntary jurisdiction*.

requires administrative work from the courts and is of a *quasi-notarial* nature.¹⁵⁰ Therefore, we assume that the number of disputes is smaller than the number of *filed cases*, but we cannot ascertain their percentage because of the aforementioned limitations.

Another restraint of these figures to determine the congestion of the courts is that not all the “cases” filed in a certain year will have to be decided in the same period. In fact, in most circumstances the law provides the duration of the process to last more than a year.¹⁵¹

ADR: Infrastructure and use.

The Legal Framework: Legislation on ADR.

In Venezuela, conciliation (mediation)¹⁵² and arbitration are the only regulated ADR.

Conciliation (mediation)

Judicial mediation: Mediation was first stipulated as a mechanism to be into the judicial system in 1836¹⁵³ when it was originally included in the *Code of Judicial Procedure*¹⁵⁴ and has preserved the same formal structure until the present date.¹⁵⁵

¹⁵⁰ This means, cases in which the judge does not act as an adjudicator but as a notary in order to certify the identity of the parties to any transaction. See, Perez-Perdomo, *Seguridad Juridica Y Competitividad*.

¹⁵¹ A useful information to determine efficiency and congestion of the courts, would be to know how long do the processes take to be decided since the moment of their filing and compare it with the ideal duration established in the law. But, as noted by Perez-Perdomo, *Unfortunately in Venezuela there is no data about the duration of the judicial processes. The Council of the Judicature ignores if the judges meet the deadlines and does not keep track of the duration of any process although the law requires it in order to evaluate the judge's performance.* Perez-Perdomo, *Políticas Judiciales En Venezuela*.

¹⁵² “*Mediation is a word that is rarely used in Venezuela, where it is more common to use conciliation*”. (See, *Ibid.*) The Code of Civil Procedure urges judges to act as mediators to facilitate settlement (Art. 257). The general trend is to consider that, in Venezuela, conciliation and mediation are the same thing. See, Marcos Carrillo, “La Conciliación Como Procedimiento Alternativo De Resolución De Conflictos,” in *La Justicia De Paz En Venezuela*, ed. Editorial Jurídica Venezolana (Caracas: Editorial Jurídica Venezolana).

¹⁵³ This was the first Civil Procedural Code to be approved in Venezuela in 1836.

The rule stipulates that the judge himself should act as a *mediator* and that this role should be exercised in conjunction with his adjudicatory role¹⁵⁶. It has been said that this is an atypical role,¹⁵⁷ because allows judges to simultaneously serve as both adjudicator and mediator.¹⁵⁸

According to article 260 of the *Code of Civil Procedure* the judge is the only who can propose this form of dispute resolution to the parties, and it does not suspend the course of the litigation.¹⁵⁹ If the parties settle the dispute through this conciliation, then the agreement is valued as a final judgment, which means that it can be enforced without further decision.

The *Commerce Code* as a means to address commercial disputes also provides judicial mediation also appointing the judge as mediator in some cases.¹⁶⁰ Other acts stipulate mediation in the area of family law¹⁶¹ as well as in the case of *small claims*¹⁶² although they do not refer directly to commercial disputes.

¹⁵⁴ However, the first official initiative to consider that “*the peaceful and conciliatory settlement of disputes*” was desirable dated from 1813. This suggestion was made by the then Secretary of State for Grace and Justice, Rafael Diego Merida, when he addressed the Assembly gathered in January, 1814. (Corsi, El Universal, March 21, 1999).

¹⁵⁵ Currently, the general rule on conciliation is the one provided for in Article 257 of the Civil Procedural Code, to wit: “*In any stage or degree of the cause, the judge may urge the parties to conciliate, both on the main issue or on any accessory matter, even though the latter may be of a procedural nature, and shall explain the reasons why this is convenient.*”

¹⁵⁶ This duality in the role of the Venezuelan judges may resemble the mechanism called *MED-ARB*, with the difference that in the Venezuelan case, the third neutral (judge) is the one who decides if the parties are going to mediate, when to start and finish the mediation. The processes depend on the sole power of the judges. His mediator role is an accessory of the adjudicatory power.

¹⁵⁷ Zerpa considers this more a “dysfunction” of jurisdiction and suggests that the judicial function should be limited to the four traditional attributes: (i) of decision, (ii) of execution, (iii) of coercion, and (iv) of instrumentation. See, Levis Ignacio Zerpa, 1996.

¹⁵⁸ On criticisms of this role, see Gómez, M. (2002). Judges as mediators? Does it work?: The Venezuelan experience. Stanford, CA.

¹⁵⁹ Article 260 of the Venezuelan Code of Civil Procedure stipulates that “*the proposal for conciliation shall not suspend the course of the cause*” and Article 262 provides that, *once an agreement has been reached by this means, the process shall end and the agreement shall have “the same effects as the firma and final sentence.”*

¹⁶⁰ Article 1104 stipulates that “*the judge may require ex officio the presence in person of the parties with the end of promoting their conciliation...*” and Article 1110 indicates that, *for the conciliatory act, each party should be accompanied by a friend, who can contribute to the conciliation.* Commerce Code (06.27.55).

¹⁶¹ The *Organic Law for the Protection of Children and Adolescents (LOPNA)* was approved in 1998. This law created the role of the “Defender of Children and Adolescents” and this role included the possibility of mediation. On a detailed study of this role, see, Carrillo, “La Conciliación Como Procedimiento Alternativo De Resolución De Conflictos.”

Extra-judicial mediation: Apart from the aforementioned rules that provide for mediation within the judicial process, in Venezuela there is no special law for mediation.¹⁶³

However, there are common law rules that indicate the value of the agreements reached by the parties to end a dispute that is being tried in the courts (*judicial transaction*)¹⁶⁴ and when is out of court (extra-judicial transaction).¹⁶⁵ In the former case, it is considered as final judgment and in the latter, it is valued as a contract between the parties.¹⁶⁶ If one of them breaches the agreement, it may be enforced immediately in the in the first case¹⁶⁷, but not in the case of the extra-judicial transaction which would have to be decided in court as a breach of contract action.

Labor and consumer cases: Aside from the mechanisms explained above, there are procedures administered by public agencies¹⁶⁸ and termed as *conciliatory*, although

¹⁶² In 1993, the Venezuelan Congress passed the *Peace Justice Act* (PJA), which creates a kind of small claims' court and establishes a conciliatory process that should be used to address some types of disputes. The Venezuelan legal community considered the enactment of this law as a step towards the promotion of ADR. See, Eva Josko de Guéron and Asociación Civil Primero Justicia (Venezuela), *La Justicia De Paz : Manual De Referencia* (Caracas: Asociación Civil Primero Justicia : Universidad Católica Andrés Bello, 1997). See also, Eva Josko de Guéron, "De La Ley Orgánica De Tribunales Y Procedimientos De Paz a La Ley Orgánica De La Justicia De Paz: La Reforma Vista Desde La Perspectiva De Los Procedimientos Alternativos Para La Resolución De Conflictos," in *Ley Orgánica De La Justicia De Paz*, ed. Editorial Jurídica Venezolana (Caracas: Editorial Jurídica Venezolana).

¹⁶³ During our interviews (#1, #2 and #3), we learned that there are currently three draft laws (all of which stem from private initiatives) that are intended to regulate mediation in depth. Two of them have been prepared by the *Business Arbitration and Conciliation Center of the Venezuelan-American Chamber of Commerce (CEDCA-VENAMCHAM)* and the *Caracas Chamber of Commerce (CCC)* and they address commercial matters. The third one was prepared by an individual attorney, Oscar Mago and intends to regulate mediation within the judicial process.

¹⁶⁴ Article 256 of the Venezuelan Code of Civil Procedure: *The parties may terminate a pending process through a transaction made according to the provisions of the Civil Code.*

¹⁶⁵ Article 1713 of the Venezuelan Civil Code: *The transaction is a contract under which the parties, through reciprocal concessions end a pending litigation or prevent a future one.*

¹⁶⁶ The definition of a contract is stipulated in Article 1133 of the Civil Code.

¹⁶⁷ In the case of a contract, this can only be achieved through a trial, in which its validity is discussed. In the case of a judicial decision, the execution can be quicker, given that there is no need to transact the declarative stage.

¹⁶⁸ As far a labor disputes are concerned, the Organic Labor Act establishes that the *Labor Inspector* has the duty to act as "*defenders of those workers' rights that cannot be waived*" and to decide at a non-judicial level over disputes that arise in labor issues. In the case of consumers, it is the *Conciliation Chamber of the Institute for Consumer Defense and Education (INDECU)* the agency in charge of both defending the rights of consumers and deciding the disputes. (Article 73)

they are rather adjudicatory. It is the case of the mechanisms provided in the Venezuelan law to solve labor and consumer rights disputes.¹⁶⁹

In the first case, the *Organic Labor Act* provides some circumstances¹⁷⁰ in which the conflicts that arise between employer and employee may be solved through “*conciliation*”.

In the case of consumer disputes, the *Consumers and Users Protection Act* establishes that all claims between consumers and merchants or service providers shall be resolved through a two-stage process that involves conciliation and arbitration.¹⁷¹

In both circumstances, labor and consumer, the third party (conciliator) is an administrative agent empowered (i) to compel the disputants to participate in the conciliation process,¹⁷² (ii) to make a binding decision and enforce it if the parties do not *conciliate*¹⁷³ and (iii) to impose sanctions to the parties if they refuse to participate in the process or to comply with the decision.¹⁷⁴

In addition, the third party in these processes is neither impartial nor neutral; it acts in order to protect the worker¹⁷⁵ or the consumer,¹⁷⁶ which creates a power imbalance that disfavors the employers and merchants who participate in it.

Arbitration:

Arbitration stipulated in the Code of Civil Procedure (CCP). The first vestiges of its existence in Venezuela go back to the Venezuelan Constitution dated September 24,

¹⁶⁹ Articles 134 to 141 the *Consumers and Users Protection Act*.

¹⁷⁰ In case of collective conflicts (Art. 480) as well as individual conflicts (art. 453).

¹⁷¹ See note 169 *supra*.

¹⁷² Article 642 of the Venezuelan Organic Labor Act and article 135 of the Consumers and Users Protection Act.

¹⁷³ Article 456 of the Venezuelan Organic Labor Act and article 135 of the Consumers and Users Protection Act.

¹⁷⁴ Article 625 *et seq.* Venezuelan Organic Labor Act and article 133 of the Consumers and Users Protection Act

¹⁷⁵ Article 59 of the Organic Labor Act.

¹⁷⁶ Article 72 *et seq.* of the Consumers and Users Protection Act INDECU officials are obliged to preserve the rights of consumers.

1830.¹⁷⁷ Additionally, the concept was included in the 1836 *Code of Judicial Procedure* and did not vary significantly until its latest modification in 1987.¹⁷⁸ Its basic characteristics are (i) judicial control before, during and after the appointment of the arbitration panel;¹⁷⁹ (ii) the absence of regulation of institutional arbitration, meaning that it is to be administered by specialized centers,¹⁸⁰ and (iii) the lack of legal regulation of certain aspects of arbitration.¹⁸¹

The Commercial Arbitration Act (CAA). This law was passed in 1998 and it was modeled after the *United Nations Commission on International Trade Law (UNCITRAL)* rules of 1976.¹⁸² It establishes a series of important aspects concerning arbitration that were not regulated by previous legislation. Members of the private sector did the drafting of the *Commercial Arbitration Act (CAA)*,¹⁸³ which was approved with the group of laws that were part of the “judicial reform” project

At the time, it was said that this Act would promote the use of arbitration thereby reducing the inefficiency of the courts and the obstacles to access the judicial system.¹⁸⁴ But most important, arbitration would help to reestablish legal certainty and would act as an incentive for domestic and foreign investors, by providing them a good alternative to

¹⁷⁷ See, footnote 65 *supra*.

¹⁷⁸ The Venezuelan Code of Civil Procedure is the basic legal framework for the transaction of any trial. The first code was approved on May 12, 1836, and it has been reformed eight times since then (1838, 1863, 1873, 1880, 1897, 1904, 1916 and 1987).

¹⁷⁹ This was one of the obstacles that the 1998 *Commercial Arbitration Act* tried to eradicate. See, Ivor Mogollón, "Trends, Developments and Precedents from the Venezuelan Commercial Arbitration Act," (Mealey Publications, 2001).

¹⁸⁰ We learned during one of our interviews (Interview #1) that, even though the Arbitration Center of the Caracas Chamber of Commerce exists since 1989, it only processed its first case in 1999. The other arbitration centers were founded in 1999 (CEDCA-VENAMCHAM) 1999(CEAMAR) and 1999 (CACCM).

¹⁸¹ These aspects were basically the regulation of the previous arbitration agreement, the competency of the arbitration tribunal, the possibility of executing the decisions of the arbitration tribunal and the appeals that could be filed against those decisions. According to representatives of the Arbitration Center of the Caracas Chamber of Commerce, the lack of clear rules on arbitration was the main reason why no disputes were settled during its first nine years of operation. (El Nacional, 1.5)

¹⁸² See, <http://www.uncitral.org/en-index.htm> (last visited: May 8th, 2002).

¹⁸³ El Universal, 28.3

¹⁸⁴ Vid. Mogollón, I. (2001). “Trends, developments and precedents for the Venezuelan Commercial Act.” *Mealy’s International Arbitration Report* 16 (7) : 1-9.

solve their disputes in a fast and cost-efficient manner that they could not otherwise obtain from the courts.¹⁸⁵

International agreements on arbitration: In addition to its domestic framework, Venezuela has signed at least several international agreements regarding arbitration, to wit:¹⁸⁶ (1) the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*,¹⁸⁷ (2) the *Inter-American Convention on International Commercial Arbitration (Panama Convention)*, (3) The *Bolivarian Agreement on Enforcement of foreign acts*¹⁸⁸, (4) The *Inter-American Convention on extraterritorial efficacy on judicial decisions and arbitral awards*,¹⁸⁹ (5) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)*¹⁹⁰ and (6) *Agreement on Commerce and Investments between Venezuela and the Caribbean Community (CARICOM)*.¹⁹¹

ADR providing organizations:

In Venezuela, mediation and arbitration services for business disputes are provided by private organizations.¹⁹² These can be classified into (i) institutional providers and (ii) individual providers.

¹⁸⁵ Ibid.

¹⁸⁶ The total number of agreements entered in Venezuela that provide for arbitration as a mechanism to address disputes in commercial matters is eighteen. The majority of them are bilateral investment agreements signed with various countries. Therefore, the following list includes only the multilateral treaties.

¹⁸⁷ Approved as Venezuelan Law in 1994. (Official Gazzette # 4,832 of December 29th, 1994) The United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards, widely known as the New York Convention, was the agreement that resulted from the 1958 conference held under the auspices of the United Nations Economic and Social Council in order to overcome the obstacles of international arbitration. Before its existence, international arbitration had been regulated by the Geneva Protocol of 1923 and the Geneva Convention of 1927. As of January 2001, the New York Convention have been entered into 125 countries.

¹⁸⁸ Passed in 1911.

¹⁸⁹ Official Gazette # 33,144 of January 15th, 1985.

¹⁹⁰ Official Gazette # 33,685 of April 3rd., 1995.

¹⁹¹ Official Gazette # 4,508 of December 30th, 1992.

¹⁹² We have not included the courts or the administrative officials who play "conciliatory" roles as ADR providers because these roles are accessory to public adjudication and, therefore, we won't consider them ADR. By institutional ADR we mean those mechanisms which being different from traditional adjudication by the Courts, are governed by pre-established rules and are administered by people or organizations in a permanent manner.

Institutional providers offer ADR services in a professional form, have a permanent administrative structure, follow standards for their operation and maintain a roster of potential arbitrators and mediators.

Currently, there are four of these ADR centers, three of which are linked to various chambers of commerce in Venezuela¹⁹³ and the other is the permanent body belonging to the *Iberian-American Institute of Maritime Law*,¹⁹⁴ which has international jurisdiction. Three of them are located in Caracas and the fourth one is located in the city of Maracaibo in the western part of Venezuela.

While all of the four Centers offer arbitration services, just two of them, The CEDCA and the CACCC also offer mediation. The CEDCA has a list of forty-three arbitrators but does not have a list of mediators, while the CACCC has a list of ninety-nine arbitrators¹⁹⁵ and seven mediators.¹⁹⁶

There is only one individual provider in Venezuela, Mr. Oscar Franco, who offers formal mediation services, both in Caracas and in Broward County (Florida, USA), where he has accreditation from the Florida State Supreme Court.¹⁹⁷

Based on the previous explanation regarding the infrastructure of institutional ADR, we can state that they are in fact available in Venezuela. Undoubtedly, institutional ADR

¹⁹³ Namely, (1) The Business Center for Conciliation and Arbitration (Centro Empresarial de Conciliación y Arbitraje-CEDCA) created by the Venezuelan American Chamber of Commerce (VENAMCHAM), (2) the Arbitration Center of the Caracas Chamber of Commerce (CACCC) and (3) the Arbitration Center of the Maracaibo Chamber of Commerce (CACCM).

¹⁹⁴ The Permanent Center for Maritime Arbitration was created in 1991 and its mission is “to promote, advice, organize and hold maritime arbitration (processes) in the Iberian-American world.” See, <http://www.iidm.net/ceamar.htm> (last visited: March 18, 2002)

¹⁹⁵ Some of which also appear on the CEDCA list. See, http://www.arbitrajeccc.org/lista_arbitros.html (last visited May 8th, 2002) and also see, <http://www.venamcham.org/cedca-ingles/home-cedca-ingles.htm> (last visited, May 8th, 2002).

¹⁹⁶ See, http://www.arbitrajeccc.org/lista_mediadores.html (last visited: May 8th, 2002).

¹⁹⁷ Interview # 5. Mr. Oscar Franco also appears in the list of mediators of the CACCC and also in the list of arbitrators of the CEDCA.

are included in the list of options that corporate lawyers may use when their clients are involved in a dispute.

After learning about its infrastructure, it is important to know how much courts and ADR are being used to solve business disputes in Venezuela, to which we turn now.

The use of institutional ADR.

As we discussed when explaining the infrastructure of ADR in Venezuela, there are four main private institutional providers¹⁹⁸ and one individual mediator, all dedicated exclusively to this activity.

The table below reflects the number of arbitration and mediation cases administered by the institutional providers of ADR during the past three years:

TABLE 7. USE OF FORMAL ADR IN CARACAS DURING THE LAST THREE YEARS. (1999-2001)

Abbreviations:

ACCCC: Arbitration Center of the Caracas Chamber of Commerce.

CEDCA: Business Conciliation and Arbitration Center of the Venezuelan-American Chamber of Commerce.

ACCCM: Arbitration Center of the Maracaibo Chamber of Commerce.

CEAMAR: Iberian-American Maritime Arbitration Center

FRANCO: Oscar Franco, individual mediator

F: Filed cases.

D: Decided cases.

ADR Provider	1999				2000				2001			
	Mediation		Arbitration		Mediation		Arbitration		Mediation		Arbitration	
	F	D	F	D	F	D	F	D	F	D	F	D
ACCCC	-	-	3	1	5	5	9	7	1	1	15	2
CEDECA	-	-	-	-	2	2	2	2	1	1	3	2
CCM	-	-	-	-	-	-	-	-	-	-	-	-
CEAMAR	-	-	-	-	-	-	-	-	-	-	-	-
FRANCO	-	-	-	-	9	7	-	-	10	9	-	-
TOTAL	-	-	3	1	16	14	11	9	12	11	18	4

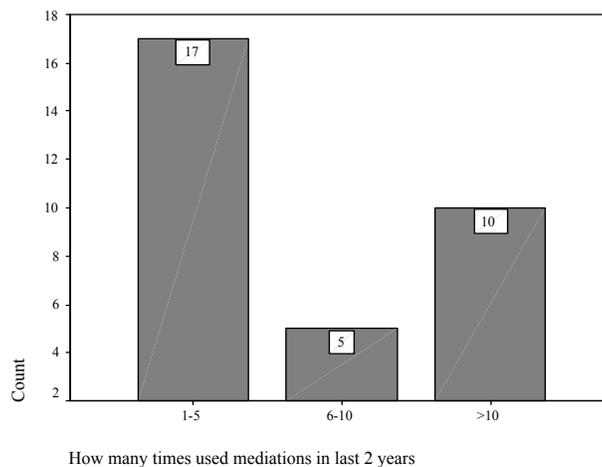
Sources: ACCCC, CEDCA, CCM, CEAMAR and Oscar Franco.

¹⁹⁸ For this analysis, we have not considered the use of “conciliation” administered by public entities, such as the Labor Inspection Office and the Conciliation Chamber of the Institute for Consumer and User Defense and Protection. As we explained when we addressed the topic of ADR infrastructure in Venezuela, these do not act as true “mediators”, it is a compulsory negotiation in which the third party does not act impartially, but as the representative of the disputant who it considers to be in disadvantage. Neither have we considered the conciliatory function of judges. On the problems derived from the latter, see, Manuel Gomez, "Judges as Mediators?, Does It Work?: The Venezuelan Experience.," (Stanford, CA: 2002).

From the information provided above, we can see that ADR providers have handled a total of twenty-eight mediation cases in the last three years, which means an average of fourteen per year.

However, the results from our survey were different because when asked *how many times they had used mediation in the last two years* the respondents reported a higher number of cases (thirty-two) as we can see in Table 8 below, but the difference is minimal.

Table 8. Mediation cases of the last 2 years as reported by survey respondents.



The results obtained in our survey reveal that mediation is also used out of the institutional providers, which we will discuss *infra* in Chapter IV.

In any case, the data shown in Table 7 *supra* obtained from the ADR providers lets us assert that the use of institutional ADR is scarce and the fact that our interviewees also acknowledged that there is a low usage of mediation supports it.¹⁹⁹ In this same respect, we have to take into account the fact that some of the ADR providers²⁰⁰ have

¹⁹⁹ See, interviews #1, #2.

²⁰⁰ That is the case of the Iberoamerican Center for Maritime Arbitration (CEAMAR) and the Arbitration Center of the Maracaibo Chamber of Commerce (CACCM).

never received any cases,²⁰¹ in spite of their having been operating during a few years now.

²⁰¹ It is the case of the CEAMAR and the CACCM

CHAPTER IV. WHY INSTITUTIONAL MEDIATION IS SO SCARCELY USED.

As we have already explained in Chapter II, the Venezuelan government and the representatives of the business community supported by multilateral organizations have regarded the promotion of ADR as an essential step to solve the problems of the courts' malfunction, to restore legal certainty and therefore attract investors to the country, whom otherwise would be discouraged to do business in Venezuela due to the inexistence of reliable dispute resolution mechanisms.

Regardless of years of practice and formation in ADR, our respondents seemed to agree with the idea that the promotion of ADR in Venezuela is necessary. An important majority of respondents totally agreed with the statement that *the promotion of mechanisms different than adjudication by the courts is necessary*. We can see this in the following set of tables.

Table 9. The promotion of dispute resolution mechanisms different than the court is necessary.

The promotion of ADR is necessary-depending by years of practice ²⁰²					
		Totally Agree	Somewhat agree	Totally disagree	
Years of Practice	<10	41	5	2	48
	<20	22			22
	>20	14	1		15
Total		77	6	2	85

The promotion of ADR is necessary-depending by formation in ADR ²⁰³					
		Totally Agree	Somewhat agree	Totally disagree	
Formation in ADR	Significant	26	3		29
	Some	20			20
	Little/None	22	3	2	27
Total		68	6	2	76

²⁰² $\chi^2=0.3752752377375$

²⁰³ $\chi^2=0.1830725782407$

Regarding the same question and in respect to the area in which our sample population practices law, we could notice that *the majority of respondents who consider the promotion of ADR as necessary* concentrate their practice in commercial (thirty), tax (twelve) and litigation (ten). See Table 10, below.

Table 10. The promotion of dispute resolution mechanisms different than the court is necessary. Area of practice

The promotion of ADR is necessary-depending by area of practice ²⁰⁴					
		<i>Totally Agree</i>	<i>Somewhat agree</i>	<i>Totally disagree</i>	
<i>Area of practice</i>	Commercial	30	1	1	32
	<i>Administrative</i>	9	1	1	11
	<i>Tax-Banking</i>	12	2		14
	<i>Labor</i>	1			1
	<i>Litigation</i>	10	2		12
	<i>Public Adm.</i>	5			5
	<i>Electoral</i>	1			1
	<i>Maritime</i>	2			2
	<i>I.P.</i>	3			3
	<i>Criminal</i>	1			1
	<i>Telecom</i>	2			2
	<i>Consult.</i>	1			1
Total		77	6	2	85

Regarding the workplace of the respondents, *the significant majority of those who agreed with the necessity of promoting ADR*, belong to large law firms (23) or work as in-house counsels within a corporation (24), as we can see in Table 11, below.

Table 11. The promotion of dispute resolution mechanisms different than the court is necessary/workplace

The promotion of ADR is necessary-depending by workplace ²⁰⁵					
		<i>Totally Agree</i>	<i>Somewhat agree</i>	<i>Totally disagree</i>	
<i>Where</i>	<i>Solo</i>	12	2		14
	<i>In-house counsel</i>	24	3	1	28
	<i>Large law firm</i>	23	1	1	25
	<i>Small Law firm</i>	12			12
	<i>Consultant</i>	5			5
	<i>Public Entity</i>	1			1
Total		77	6	2	85

²⁰⁴ $\chi^2=0.9969314355348$.

²⁰⁵ $\chi^2=0.911662777751$

We now turn to the question of the causes for the scant use of mediation. During our interviews to the different ADR providers, advocates and other members of the legal community, we asked them to justify the reasons why they believed the use of institutional mediation was so little. As a general result, we could obtain four different motives that we have labeled as *general viewpoints* and explain in the following section.

The General viewpoints

The four basic explanations for the lack of business mediation's use are: (a) Venezuela lacks an appropriate regulatory framework for mediation; (b) there is a lack of information about the advantages of mediation; (c) the legal community does not trust in ADR providers; and (d) Mediation is more expensive than the traditional mechanisms. The first two reasons were given by practically all the interviewees²⁰⁶ and the last two reasons, even though they were not shared by all, seemed important.²⁰⁷ Still, none of the four hypotheses seem to adequately explicate why institutional mediation is so seldom used. We will examine several possible explanations by discussing each of the reasons.

Institutional mediation is not used because Venezuela lacks an appropriate regulatory framework for ADR.

In this regard, interviewees #1 and #2, who are representatives of ADR providers, insisted that the reason for the lack of use is on the need for a special *mediation act* that provides mediation agreements to be final as judicial decisions, and not as a mere contract. They stress that no one will use mediation until people are sure that there are

²⁰⁶ All except interviewee #11.

²⁰⁷ Interviewees #7, #8, #9 and #10.

legal ways to promptly enforce the agreement in the event of non-compliance by one of the parties. In the mediation act draft prepared by the Caracas Chamber of Commerce there is a provision that establishes that the mediation agreement is regarded as a *final decision*, thus enforceable.²⁰⁸

It may be true that the existence of legislation can contribute to increasing the use of mediation or any other ADR because it can establish which cases should be processed by those means (i.e. mandatory mediation). For example, the law could regulate certain situations, which are non-existent until the law is passed, and would mandate the use of mediation to solve certain kinds of conflicts. In this sense, we can say that the law is a determinant factor for the use of the mechanism because, if the law did not mandate it, nobody would use it.

However, even if that law makes mediation mandatory, it may not be effective.²⁰⁹ Legislation can force individuals to use mediation or it can regulate their accessory aspects, thus making them more reliable.²¹⁰ But in the case of voluntary ADR special

²⁰⁸ Mediation Act's draft.

²⁰⁹This is what happens in Venezuela with respect to conciliation in divorce cases. The law establishes that, once the defendant is summoned, two conciliatory acts between the parties should be carried out before the judge. If the claimant does not attend, the suit is extinguished, but if the defendant does not attend, it is assumed that he or she does not want to reconcile. These acts are mandatory steps for the continuation of a suit and their *raison d'être* is to preserve the matrimonial link and to avoid damage to the children and the family in general. However, in practice, these conciliatory acts are mere formalities. The parties attend only "to prevent the suit from being extinguished". During the conciliation act, minutes in the form of a pre-established format are kept. These minutes state that the judge urged the parties to reach an agreement, but the parties decided to continue with the suit. Most of the time, the judge is not even present at the conciliation act (even though the minutes state that he tried to convince the parties to be reconciled). According to one interviewee, (#7) the same happened in Peru and Argentina regarding mandatory conciliation. No wonder that "one of the great ironies of ADR is that they have been made mandatory." See, Menkel-Meadow, "Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR."

²¹⁰ This could be used as an argument in favor of requiring credentials of the mediators and regulating aspects related to their obligations and rights, such as confidentiality, liability, professional ethics, or aspects related to the process, such as the value of agreements, the rules regarding the process, among others. Although there are no empirical data to allow us to determine how much more would ADR be used if confidentiality and other similar aspects were regulated, we could infer that regulating them would make them more reliable for users.

regulations or the finality of the agreement *per se* do not seem to be enough reason to determine their use.²¹¹

In addition, as explained in Chapter III, ADR have been regulated in Venezuela for a long time and even more, the legal framework, has been reformed to comply with international standards.²¹² The closest example is related to domestic arbitration. Before the *Commercial Arbitration Act* was passed in 1998, its advocates frequently complained that the existing legal framework hindered its use and that after reforming the legislation in order to adapt it to modern standards, the use of arbitration would increase considerably.²¹³ Even though the Law was reformed and adapted to those standards, four years later the situation did not change and a proof is that arbitration's level of usage remains as scarce as before the 1998 law was enacted.

Let us now explain our surveyed population's opinion about the sufficiency of the legal framework in order to allow the use of mediation.

Table 12. Sufficiency of legal framework/Years of practice.

The Venezuelan legal framework allows the use of mediation by years of practice					
		<i>Totally Agree</i>	<i>Somewhat agree</i>	<i>Totally disagree</i>	Total
<i>Years of practice</i>	<10	8	23	17	48
	<20	14	3	4	21
	>20	7	6	2	15
Total		29	32	23	84

$\chi^2=0.00100355516742$

As the question was intended to measure a graded opinion, we might collapse the choices *totally agree* and *somewhat agree* and consider that the general tendency of our respondents is favorable; this is, that the legal framework is sufficient to allow the use of

²¹¹ A case in point is the activity of mediation in the United States of America, where despite of the existence of a federal framework that regulates mediation, the value of the agreement as a mere contract does not seem to be affecting its use. Regarding other aspects, most of the states (except for Florida and Texas) do not require credential for mediators and that does not seem to create a negative effect on mediation.

²¹² e.g. *Commercial Arbitration Act*, which was approved in order to adapt the institution to the UNCITRAL model law. In the case of mediation, there is a new constitutional provision that provides for its use (Article 258).

²¹³ Newspaper articles

mediation. But even in the case of not collapsing the categories, the result does not let us conclude that the respondents believe the legal framework to not allow the use of mediation as asserted by the ADR providers during the interviews.

Table 13. Sufficiency of legal framework/formation in ADR.

The Venezuelan legal framework allows the use of mediation by formation in ADR					
		<i>Totally Agree</i>	<i>Somewhat agree</i>	<i>Totally disagree</i>	Total
<i>Formation in ADR</i>	<i>Significant</i>	15	12	2	29
	<i>Some</i>	6	9	5	20
	<i>Little/None</i>	5	8	13	26
Total		26	29	20	75

$$\chi^2=0.005586309772786$$

When crossing the results of the same question about the sufficiency by surveyed population's level of formation in ADR, we can see that the majority of the respondents that consider the legal framework to be sufficient (totally and partially) are those *who have more experience and/or formation in ADR* (fifteen and twelve, respectively), and the majority of the group that considers the framework insufficient does not have formation in ADR.

Table 14. Sufficiency of legal framework/Workplace

The Venezuelan legal framework allows the use of mediation by workplace					
		<i>Totally Agree</i>	<i>Somewhat agree</i>	<i>Totally disagree</i>	Total
Where	<i>Solo</i>	2	8	4	14
	<i>In-house counsel</i>	7	9	12	28
	<i>Large law firm</i>	12	7	6	25
	<i>Small Law firm</i>	8	2	1	11
	<i>Consultant</i>		5		5
	<i>Public Entity</i>		1		1
Total		29	32	23	84

$$\chi^2=0.004596683933582$$

Finally, regarding the same question about the sufficiency of the legal framework and crossing it with the groups of respondents depending on where they work, it is worth noticing that the respondents who consider it to be sufficient practice at *large law firms*, while the group that disagrees with the statement is mainly that of the *in-house counsels*.

Therefore, this reason does not seem to explain why ADR are seldom used.

There is lack of information on mediation and potential users are not aware of its benefits.

Most ADR providers subscribe to the opinion that mediation is not sufficiently used because the legal community is not aware of its advantages, in other words, they do not know what mediation is about, so if there is more publicity about it then its level of use should increase.²¹⁴ Some of those who agree with the prior opinion think that dissemination of information should go hand in hand with regulation. They believe that, although legislation is important, it is still necessary to propagate information on ADR. According to them, the fact that the law allows the use of mediation does not necessarily mean that potential users will know about ADR. *Mediation is like a product and should be advertised*, said one interviewee.

Nevertheless, this argument is not very convincing when we see that not only has the Venezuelan government promoted ADR in general during the past 10 years,²¹⁵ but the business sector has also encouraged its use. The creation of ADR providing organizations²¹⁶, the drafting of the *Commercial Arbitration Act*²¹⁷ and that of the *mediation act*,²¹⁸ are reactions that have basically originated in this segment of society.

²¹⁴ This was the common opinion of four out of the five ADR providers we interviewed. (Interviewees #1, #2, #4, #5)

²¹⁵ See *supra*. Local Initiatives to Promote ADR.

²¹⁶ This, as we mentioned before, has meant the signing of some agreements with multilateral organizations (the Inter-American Development Bank and The Andean Development Corporation in the case of the Arbitration Center of the Caracas Chamber of Commerce).

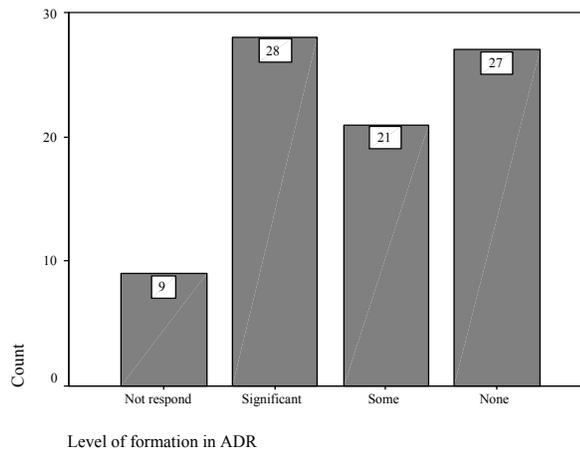
²¹⁷ We learned that each of the two of the institutional providers (the CEDCA and the CACCC) have prepared draft laws with the end of regulating business mediation. We had access to only one of these draft laws (in the Caracas Chamber of Commerce's Arbitration Center). We noticed that it contains norms regulating (i) organization providing mediation, (ii) matters which could require mediation, (iii) standards for the behavior of mediators and (iv) the value of the agreement and the resources that could be exercised against it. To read more on this criticisms of this draft law, see, Gómez, M. (2001). Some Comments on the Caracas Chamber of Commerce's Draft Mediation Law. Caracas, Venezuela.

²¹⁸ See, footnote 163 *supra*.

Then, how is it that corporate lawyers know so little about ADR? The lawyers acknowledge that foreign executives require using ADR when they do business in Venezuela and that Venezuelan executives use ADR abroad.²¹⁹ If the business sector is so keen about the use of ADR, they must be well aware of their benefits.²²⁰

In our survey, awareness of ADR was measured by the response to a question regarding the degree of *experience and/or education on ADR*.

TABLE 15. EXPERIENCE AND/OR FORMATION IN ADR.



In this respect, we can appreciate that the majority of respondents (twenty-eight) reported to have significant experience and/or training on ADR, and those who have *some* formation/experience are twenty-one. Thus, we can assert that the sample population has a fair level of formation in ADR, In light of which, and if we generalize these results and assume that will be the same for the general population then the lack of

²¹⁹ In this respect, some of the representatives of the business community have expressed that the Venezuelan state-owned Oil Corporation (PDVSA) has had to resolve many disputes through foreign arbitration centers due to the inexistence of ADR providers in Venezuela (El Universal).

²²⁰ One of the interviewees (#10) claimed that arbitration has been known for a long time. A significant proportion of the survey respondents answered that they had received training or that has extensive knowledge in ADR. See, Question 12 Chart.

knowledge on ADR does not seem to be the reason for the insufficient use of formal mediation.

Although, when asked if mediation has been sufficiently promoted in Venezuela, the respondents tended to consider that it has not²²¹ as we will see in tables 16 and 17, when comparing this opinion according to the area and the place where the respondents work.²²²

Table 16. Mediation has been sufficiently promoted in Venezuela/area

Mediation has been sufficiently promoted in Venezuela/area ²²³					
		<i>Totally Agree</i>	<i>Somewhat agree</i>	<i>Totally disagree</i>	Total
<i>Area of Practice</i>	Commercial	5	11	15	31
	<i>Administrative</i>	1	2	8	11
	Tax-Banking		4	10	14
	<i>Labor</i>			1	1
	<i>Litigation</i>	1	3	8	12
	<i>Public Adm.</i>	1	1	3	5
	<i>Electoral</i>			1	1
	<i>Maritime</i>			2	2
	<i>I.P.</i>		2	1	3
	<i>Criminal</i>			1	1
	<i>Telecom</i>		1	1	2
	<i>Consult.</i>		1		1
Total		8	25	51	84

As we can see in Table 16, regarding the area of practice, the majority of respondents who consider that mediation has not been sufficiently promoted in Venezuela concentrate its practice of law in the *commercial* (fifteen) and *tax/banking* (ten) areas.

²²¹ 51 out of 85 respondents considered that *mediation has NOT been sufficiently promoted in Venezuela.*

²²² We won't show the crosstables regarding neither *years in practice* nor *formation/experience with ADR*, because it did not show any significant result. Except for small differences, the opinion that mediation has not been sufficiently promoted in Venezuela is equally distributed among all groups regardless of their years in practice and formation in ADR.

²²³ $\chi^2=0.9034246546069$

Table 17. Mediation has been sufficiently promoted in Venezuela/Workplace

Mediation has been sufficiently promoted in Venezuela/Workplace ²²⁴					
		<i>Totally Agree</i>	<i>Somewhat agree</i>	<i>Totally disagree</i>	Total
Where	<i>Solo</i>	3	4	7	14
	<i>In-house counsel</i>	3	6	18	27
	<i>Large law firm</i>	1	8	16	25
	<i>Small Law firm</i>	1	5	6	12
	<i>Consultant</i>		2	3	5
	<i>Public Entity</i>			1	1
Total		8	25	51	84

Regarding the distribution of the respondents according to their workplace we can see that the majority of the segment that considers mediation not to be sufficiently promoted work as *in-house counsel*(eighteen) or in a *large law firm*(sixteen).

People do not trust ADR providers.

According to their advocates, one of the main advantages of ADR is that they contribute to the reestablishment of legal certainty and trust among foreign and domestic investors, which has been lost due to the malfunctioning of the courts. They also stress that solving the disputes through a private body is advantageous because it is a better service than that offered by the courts and the ADR organizations are totally neutral and not inclined to favor any side which is usually what happens in the courts.²²⁵

Nevertheless, two of our interviewees do not agree and believe that some ADR providers do not inspire trust and that they favor certain corporations or the lawyers who are linked to those centers.

Specifically, interviewee #10, a lawyer who represents mostly local investors stated that one of the reasons why he does not use the *CEDCA* is because it is backed by *VENAMCHAM*, a chamber of commerce that groups U.S. companies. These companies

²²⁴ $\chi^2=0.8065507022916$

²²⁵ We must remember that one of the reasons stated for the malfunction of the Venezuelan judiciary is related to the *politization of the judges*, this is, they are easily influenced in their performance by political parties.

not only financed the creation of the Center, but their own lawyers are included in the list of arbitrators and mediators. Therefore, his clients think that, if a *VENAMCHAM* affiliate were to be a party in the process, it would be favored.

Interviewee #11 showed a similar opinion when saying that:

Going to the CEDCA would be like trying to solve the conflict in enemy turf, using the enemy's rules and resources. This clearly puts my client at a disadvantage, especially if he is not a member of that Chamber.

The opinions described above show us that there is a perceived advantage for *repeat players* in some ADR centers. Those who believe this, consider that "repeat players"²²⁶ of those centers are the ones who will come out ahead as the winners of the process.

This concern seems to have some basis and our impression is that *CEDCA* members themselves have thought about this problem. During an interview one of the *CEDCA* representatives stated "our link with US companies does not mean that people or firms outside VenAmCham will not be attended...In fact, we guarantee full impartiality and confidentiality to our clients." (June 19th, 1999 in *El Universal*). They have also pointed out "VenAmCham's arbitration committee includes five people from the industrial and commercial sector and are not linked to law firms. This is done in order to guarantee a fair and impartial treatment of business disputes." (June 22nd in *El Universal*)²²⁷

²²⁶ The concern about the potential advantages for people linked to the institutions in charge of handling the disputes was initially mentioned by *Galanter* in his well known article "Do the haves come out ahead?" With respect to this risk in ADR, *Menkel-Meadow* has also warned about the danger of repeat players. She points out that, even if there are not enough data, either in favor or against, the fact is that one-shooters might be at a disadvantage in institutionalized ADR. There are cases, which show aspects worthy of concern. See, *Menkel-Meadow*, "Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR."

²²⁷ However, we have determined that there are not five but twenty members in the arbitration committee and 14 of them are lawyers who work for the most important law firms in Venezuela. See, http://www.venamcham.org/Ingles/co_arbit.htm (March 14th, 2002)

However, this negative perception seems to exist only with respect to one of the ADR providers (CEDCA) and not with respect to the others, which are not linked with any specific group. In any case, this could explain why the CEDCA is used less frequently, but it doesn't explain why the other centers are not used. When asking our respondents why they do not use the others centers like the ACCCC, they did not respond.

Institutional mediation is more expensive than other mechanisms, including the courts.

Another apparent disincentive to using institutional mediation is the high rates charged by ADR providers.²²⁸ Some of the interviewees²²⁹ believe that their use is only justified for very important cases or when high sums of money are at stake.²³⁰ ADR providers argue that, even though the court process is nominally *free of charge* there are significant costs associated with it.²³¹

Not only are there attorneys' fees, but other costs "outside the law" must also be considered if one wants to obtain *fast* or *favorable* results. They add that, when the disputants use mediation, they obtain quick results and, therefore, greater benefits.²³²

Several of our interviewees as well as the report about the cost of litigating in Venezuela prepared by the *National Council for the Promotions of Investments (CONAPRI)*, indicate that there are extraordinary costs associated with the use of the

²²⁸ The high cost of ADR has been considered as the reason for its scarce use according to some studies. See, Perez-Perdomo, *Seguridad Juridica Y Competitividad*.

²²⁹ Interviewees # 10 and # 11.

²³⁰ Additionally, one of the interviewees (#10) mentioned that fees are set in US dollars and not in the local currency (bolivars). The CEDCA website confirms that the fees are set in U.S. dollars See, <http://www.venamchamorg/cedca/honorarios.htm> (last visited: March 14, 2002). Because of the economic instability reigning in Venezuela and as a hedge against inflation, it is not unusual to charge certain fees, such as lawyers' fees, in hard currency.

²³¹ See, Interview #2.

²³² See, interview #1, #2.

court system,²³³ which could mean a comparative advantage for ADR, instead of an obstacle as our interviewees #10 and #11 asserted. Therefore, the argument that mediation is not used because it is too expensive is not sustainable and does not explain why they are seldom used.

None of the four reasons above appears to explain, either by itself or in conjunction with the others, the lack of use of institutional mediation. It is now clear that (1) there exists a legal framework and that a significant number of respondents of the questionnaire considers it sufficient for the utilization of institutional mediation; (2) corporate lawyers seem to be aware of the advantages of these mechanisms and they, together with the representatives of the business community, have been the promoters of mediation; (3) only one ADR provider is perceived as biased in favor of a certain group; and (4) mediation and other ADR can actually be less costly than the court system.

When analyzing the problems of institutional mediation in Venezuela, ADR providers do not contemplate the possibility that business lawyers do not use it because they prefer resorting to other dispute resolution mechanisms that are proven to be more effective than institutional mediation.

From our interviewees we could notice that ADR providers and advocates assume as facts (1) that Venezuelan commercial courts are really congested, (2) that business lawyers do not use courts because they believe the judiciary to foster uncertainty and inefficiency, and (3) that institutional ADR, mainly mediation and arbitration, are a desire of the members of the business community and its lawyers.

ADR promoters have generally accepted that there was a need to endorse mediation, but no assessment had been made or taken into consideration in order to

²³³ See, CONAPRI, *Costo Venezuela*, 1 vols., vol. 1 (Caracas: CONAPRI, 2001).

determine if the legal community wanted it.²³⁴ Our interviewees, who were involved in ADR promotion, seemed to assume that the need exists and none of them has questioned the motivations. Only Interviewee #1 made a comment about an assessment when saying:

I am not aware of any study (needs assessment) conducted previously to the approval of financial support for any of the ADR projects for Latin America. I know that there are some, the World Bank conducted a needs assessment, but I do not know if the Inter-American Development Bank took it into account or had access to it.(Droulers 2002)²³⁵

The interviewed ADR providers generally believe that the scant use of institutional mediation is part of a *normal evolution* as has happened in other Latin American countries and that the process is slow. As interviewee # 7 pointed out:

In Venezuela there is still a long path to follow, but as has happened in Colombia, first the legislation has to be passed, then the training of mediators and little by little the cases will arrive.(Falla 2001)

This *normal evolution theory* seems improbable too, because not even in other Latin American countries as interviewee #7 pointed out, institutional mediation's use has increased sharply after several years of promotion.

Notwithstanding the above, the data obtained from the interviews to business lawyers and the results of our survey, seems to point to a different direction that might help us confirm the hypothesis that the true reason for which institutional mediation is not used is because business lawyers prefer to address their disputes by using other mechanisms, among which are the courts and informal networks. This challenges the general idea explained above.

Challenging the general viewpoints.

²³⁴ Although, interviewee #1 said: We tried to gain access to this study without success, but although its existence is important, more important is if it was considered or not by the ADR promoters, and according to our sources it was not.

²³⁵ See, Diana Droulers, e-mail, February 25, 2002 2002.

The reasons for the scant use of institutional mediation.

As we will see in the following paragraphs, the available data does not seem to support that courts are congested, our sample population has showed that the court system is frequently used and that contrary to what ADR advocates assert, the results obtained from it are generally positive. In addition to that, we will see that business lawyers also resort to informal mechanisms to solve legal disputes. We believe that these circumstances might explain the scarce use of institutional mediation.

Is the Venezuelan judicial system really congested? If so, does it matter? The use of the courts by Venezuelan business lawyers.

Assuming that Venezuelan courts are congested and that business lawyers do not use them, does not seem accurate. The opposite stems from the data, as we will see in this section.

As said before, mitigating the congestion of American courts has been one of the main motives for promoting ADR in the U.S. It may be possible that they have helped decongest the US court system and helped to lighten the workload of judges, but can we predict the same for Venezuela? The answer seems to be negative.

Firstly, nobody is really sure whether Venezuelan courts are congested to process business disputes. Three reasons are given to assert that the judiciary is congested (1) the ratio between filed and decided cases, (2) the ratio between the number of judges and cases and (3) the ratio between the number of lawyers and judges.

In relation to the filed/decided criteria, as we explained in section 2 *supra* it has significant limitations that do not permit to conclude that congestion exists. It is normal

for the number of *decided cases* to be higher than the number of *filed cases*, mostly because a certain number of the latter are not real disputes and therefore are not even resolved or decided by the judge, it may appear as *filed* but never *decided*.

Regarding the number of judges/cases ratio, It is argued that there are less judges than needed to handle the actual number of cases filed in the courts. Contrary to the prior motive, this one could be certainly used as an indicator of the Judiciary congestion. In this respect, Interviewee #9 asserted:

There is no doubt that the courts are congested if we take into consideration the proportion between the number of cases and the number of judges. In Venezuela there are 1,500 judges when it should be 6,000 if we take into consideration the number of cases filed in courts.(Acedo Payarez 2001)

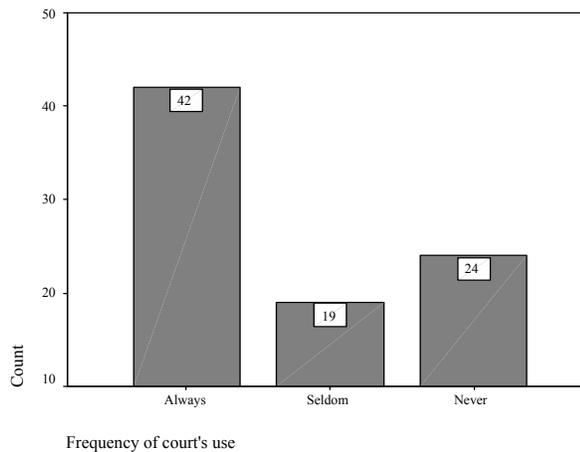
Nonetheless, a significant limitation of such criteria is that it is considering the same number of *filed cases* that we mentioned before as inadequate to determine the amount of disputes that the courts manage. Therefore, it is not reliable to determine congestion either.

The third criteria is to suggest that the level of congestion may be determined by calculating the proportion between the number of lawyers and the number of judges giving as a result that *while the number of judges have diminished the amount of lawyers has been tripled* and assuming that if more lawyers will file more cases, there will be less judges to decide them. However, this method is not consistent either, because *there is a number of people who graduate as lawyers but do not practice* (Perez-Perdomo 1995) and the relationship between the two variables seem to be hard to support.

To this point we can conclude that there is no evidence that supports the congestion of the Venezuelan courts and even if there was any, this hasn't prevented the business lawyers from using it to solve their disputes.²³⁶

As we can appreciate in the following chart, an important number of respondents (forty-two) reported using the courts *always* as a means to solve their disputes.

Table 18. Court's Level Of Usage



As of the distribution of the court users depending on years of practice, area of practice and workplace, there were no significant results except for the last category showing that the more frequent users of the courts within our sample population are those who work as *in house counsels* and in *large law firms*. The results are shown in the following Table.

²³⁶ Notwithstanding that, it has been said that lawyers tend to avoid using the court because of their dissatisfaction with the system. Perez-Perdomo, *Políticas Judiciales En Venezuela*. We disagree with this opinion, at least in the case of business lawyers who seem to use the courts and be satisfied with it.

Table 19. Who Uses The Courts.

<i>Who uses the courts depending on workplace</i>					
<i>Workplace</i>		<i>Always</i>	<i>Seldom</i>	<i>Never</i>	
	<i>Solo</i>	5	3	6	14
	<i>In-house counsel</i>	10	6	12	28
	<i>Large law firm</i>	17	5	3	25
	<i>Small Law firm</i>	9	2	1	12
	<i>Consultant</i>	1	2	2	5
	<i>Public Entity</i>		1		1
Total		42	19	24	85

$\chi^2=0.06074004643524$

It is also worth mentioning that the majority of those who reported using the courts more frequently, have shown a general level of satisfaction with it as we can see in Table 20 below.

Table 20. Level Of Satisfaction With The Courts

<i>Level of satisfaction depending of frequency of use/Courts</i>					
		<i>Excellent</i>	<i>Fair</i>	<i>Bad</i>	
<i>Courts</i>	<i>Always</i>	18	16	8	42
	<i>Seldom</i>	15	3	1	19
	<i>Never</i>	21	3		24
Total		54	22	9	85

$\chi^2=0.002499683390804$

This opinion is important, given that the courts are not always used voluntarily. Sometimes, a plaintiff has no option but to go to court and he cannot pick any mechanism other than the one chosen by his counterpart. In other instances, both parties are unable to choose whether they go to court or not because this is already established by the Law or by contractual obligations. Taking such limitations into consideration signifies that the respondents still consider the courts as satisfactory.

There are other cases in which the use of the courts is the consequence of a voluntary decision of business lawyers, and ergo we can predict that the satisfaction would be high.

Legal uncertainty: What effect does it have on Venezuelan corporate lawyers?

As we said before, aside from the congestion of the Courts, it has been argued that ADR would help to recover the *legal certainty*. Some critics have argued that legal uncertainty hinders foreign investment in Venezuela and erodes the climate of trust in the business environment. (Gonzalez 2002)

It must be pointed out that, from the interviews, we were able to see that, some business lawyers seem to benefit from what has been labeled as *legal uncertainty*. What is a hindrance for some can be a useful tool for others. Certainly, for the furtherance of the common interest, laws should be enforced in a predictable fashion and people should be treated equally. Nonetheless, this sometimes collides with the interests of influential players, who logically prefer having an advantageous position to achieve a favorable enforcement of the Law as far as they are concerned.

We get the impression that impartiality, which is supposed to be one of the main advantages of institutional mediation, is not desirable according to a certain group of corporate lawyers. In this case, resorting to an impartial process such as institutional mediation would represent taking a risk because they wouldn't have "friendly" (meaning "easy-to-manipulate") decision-makers, it so happens with judges or court officials, on their side and wouldn't have the guarantee of a favorable decision. We will examine this matter in more detail when we address why courts are used.

Why business lawyers decide to use the courts.

When interviewing business lawyers we asked them which factors do they normally take into consideration to use the courts despite the idea that the judiciary does

not function properly. Respondents #10 and #11 concurred asserting that the decision is made on a *case-by-case basis*, but mainly based in two reasons: (1) as a tactic, in order to exert pressure on the other party, and (2) to establish a legal precedent or a declaration of rights that can only be made by a court.

In the first case, when the use of the court is the result of a tactical decision, Interviewee #10 indicated that it happens when a lawyer intends to make a surprise attack on the other party and obtain a decision that can affect its rights, such an attachment order or a similar measure. Sometimes this decision might be made in spite of ongoing negotiations with the other party and is used to signal that negotiations have now stopped.

Even though suing someone with whom you are negotiating or with whom you have a longtime relationship could look as if you are not interested in a negotiated solution, this does not apply in all situations.

Interviewee #11 indicated that the courts are sometimes used to "*pressuring the other party into continuing the negotiations, to let them know that this is not a game and that the consequences could be negative for them.*" In this case, the aim is to restructure the negotiation process or the relationship between the parties. Also, as the interviewee himself stated, the reason could be "*to tip the balance in another direction.*"²³⁷

The second reason for using the courts, according to the interviewees #10 and #11, is to obtain a decision determining who is right and to establish a legal precedent, which is the traditional role of the courts so we do not consider necessary to explain it further.

²³⁷ About the use of dispute resolution mechanisms to restructure relationships see, Barbara Yngvesson, "Disputes Processing: Re-Examining Continuing Relations and the Law.," *Wisconsin Law Review* 1985 (1985).

None of the interviewees said that the courts are used to saving time or money; instead, interviewees #10 and #11 asserted that they would never take these reasons into account. "Going to court can be very expensive," said interviewee #10 and added that

The reason is that, even though justice is free of charge in Venezuela, we all know that, in reality, this is not so. You always have to incur several expenses if you want to speed up the process. If you add lawyers fees, sometimes charged on an hourly basis to this, then using the courts is not cheap; just the opposite. But that's the trade off if you want to prevail and have it your way. Making a cost benefit analysis I think it is worth it to do like that and that's what I tell to my clients.

Interviewees #10 and #11 also said that, no matter the reason for using the courts, the main factor to be considered is *gaining ascendancy* (meaning influence) over the judge or the court clerk,²³⁸ thereby assuring, up to a point, that you will obtain a favorable decision. Interviewee # 11 explained it with these words:

When one has the chance of selecting a court, do it, In spite of this, the initial brief is distributed through a lottery system, but if you know who is in charge it is possible to manipulate the results and select the court that you want to hear you case, mostly because you know the Judge or the clerk who might be your friend. In such cases, using the courts can be a very convenient thing. In fact, here at the firm we have concentrated almost all of our cases in few courts in which we are well known and therefore don't have any problems...When we are defendants and cannot pick the judge it is always possible to recuse him and send the case to another court. That's how it works.

Even though this behavior might be questionable from a moral point of view, it is undoubtedly an incentive to use this mechanism instead of any other. That makes us wonder, why would someone use ADR when he can control the outcome of court decisions?²³⁹

²³⁸ Interviewee #9.

²³⁹ It is without any doubts, one of the effects of repeat players in court. See, Marc Galanter, "Why the Haves Come out Ahead: Speculations on the Limits of Legal Change.," *Law & Society Review* 95 (1974). However, according to interviewee #9 with the restructuring of the court system, these advantages are not so anymore. He affirmed that: "In the past, some 20 years ago, one could decide whether to sue or not and whether to use one court instead of another based on the fact that a certain judge was very knowledgeable and dedicated to his work. Even though it is always

Informality.

As we could learn from our interviewees and to some extent from the surveys, aside from the courts there are other ways in which business lawyers rely to solve their disputes. This refers to the use of informal means, that is, those that are not governed by prefixed rules or offered in a permanent manner as occurs with the courts and institutional ADR.

Instead, such mechanisms are the result of the interaction among networks of known people, which in Venezuela have a significant power considering several factors, which we turn now to explain.

Origin of informal networks in Venezuela. The Venezuelan economic environment and business structure. The development of informality.

Predictably, if a community is small and all its members know each other, they will take advantage of these relations to do business and settle their disputes.

Channeling the settlement of business disputes through personal relations is a common practice in many societies.²⁴⁰ When personal connections are frequently used and when this is done within a small circle of people, we refer to “informal networks.”

Often, these networks are based on a common origin (ethnic reasons) or on common ideologies or values (religious reasons).²⁴¹ Nevertheless, in other cases, such as

better to have a good relationship with the judges, this was not the determining factor then. Even if you were a friend of the judge, you could not be sure of obtaining a favorable decision. Those were different times...

²⁴⁰ See, (1) Jane Kaufmann Winn, "Relational Practices and the Marginalization of the Law: Informal Financial Practices of Small Businesses in Taiwan," *Law & Society Review* 28, no. 2 (1994)., (2) Frank Upham, "Speculations on Legal Informality: On Winn's "Relational Practices and the Marginalization of the Law", " *Law & Society Review* 28, no. 2 (1994)., (3) Laura Nader and Harry F. Todd, *The Disputing Process : Law in Ten Societies* (New York: Columbia University Press, 1978)., (4) Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," (Madison, Wis.: 1962)., (5) Larissa Lomnitz, "*Informal Exchange Networks in Formal Systems: A Theoretical Model*" *90 American Anthropologist* 42 (March 1988)., (6) Yves and Garth Dezalay, Bryant, "Law, Lawyers and Social Capital: "Rule of Law" Versus Relational Capital," *Social & Legal Studies* 6, no. 1 (1997)., (7) Robert C. Ellickson, *Order without Law : How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991).

in Venezuela, these informal networks can be attributed to different reasons, namely (1) the economic and political situation of the country and (2) the business structure in Venezuela; and that is why it is given much greater importance to informality than other alternatives to address disputes. As one of our interviewees pointed out, “One of the main peculiarities of practicing law in Venezuela is that everybody knows each other and that saves a lot of time.”²⁴² As we have learned, Venezuelan corporate lawyers dedicate much of their time building up their network of relations and see it as a very useful tool for their profession. This can be explained from a historical point of view.

One important Venezuelan scholar (Naím 1989) who has extensively written about the structure of the Venezuelan business sector has said that “the creation of clan-like groups and other networks that are used for mutual support in the Venezuelan environment” is caused by the need of executives to “replace or protect themselves from an allegedly corrupt, inefficient and even dangerous justice administration system.”

Therefore, “informality is used as a mechanism to reduce risk and increase predictability”(Boza and Pérez Perdomo 1996) so it is an *alternative confidence-generating mechanism*.

These explanations are plausible if its assumed that the judicial system does not work and that the courts are not used. However, we have seen that these premises are not wholly true, given that business lawyers use the courts voluntarily in some instances and that they believe the system does work, at least for their specific purposes.

Informality, then has not entirely replaced formal mechanisms in spite of the perceived collapse of the latter system by ADR advocates and reformers of the judiciary.

²⁴¹ See, Auerbach, *Justice without Law? : Non-Legal Dispute Settlement in American History*.

²⁴² Interviewee #11.

Currently, both systems coexist, although sometimes one may be deemed more appropriate than the other. In fact, both are often used simultaneously.²⁴³

Interviewee #9 stated that:

With judicial crisis or not, lawyers try to solve their clients' disputes by using their colleagues as mediators. Crisis or no crisis, it is easier to solve problems with the help of friends, especially in an environment where everybody knows everybody. It does not make sense to use any other mechanism if it is not going to work. Today it might be my turn and tomorrow it might be theirs.

The above statement demonstrates that the reason for using informal means might not only be a wish to circumvent the malfunctioning or corruption in the judicial system. Informality is considered convenient in some cases and has some advantages, namely: (1) It works within a group of acquaintances. Players know each other well because they belong to the same social, professional or family circles. This degree of trust allows them to act openly and not waste any time when it comes to discussing important matters. (2) It reinforces social relations. The more this mechanism is used, the closer the links among the participating lawyers, and (3) It benefits traditional actors or repeat players who can control the processes and take advantage of their position to prevail.

But in order to understand in a proper way the role of informality in the resolution of business disputes, we must refer to its causes and examine them in the following section.

The economic situation and its contribution to the creation of informal business networks.

The basic features of the Venezuelan government in modern times have been *protectionism* and *interventionism*. The former is related to its tendency to pass

²⁴³ This was stated by several of our interviewees (#3, #9, #10 and #11)

legislation that favors Venezuelan nationals, such as the imports substitution policies that protect domestic production against foreign industries. The latter has to do with the State's participation in various economic activities that are normally carried out by private entities. Especially after the 1960s, the Venezuelan State has expanded its role within several economic sectors (banking, hotels, transport, etc.), creating a large decentralized system of public administration. In addition to guaranteeing legality and institutionalism, the Venezuelan State has been the owner and sponsor of multiple industries.²⁴⁴

It's logical, that the Venezuelan State should protect and intervene the domestic economy in order to foster its growth. This expansion of the Venezuelan State was boosted by a fiscal bonanza, which in turn was generated by the oil industry.(Machado de Acedo 1981)

The transformation of the State and its direct intervention in the economy contributed to the creation of close links between the private and public sectors. It also had a role in the establishment of informal networks, which have been an essential feature of the Venezuelan business environment and which, as we have already seen, are often used to address business disputes.

These essential features of the economy produced a plethora of opportunities for private investment because the government did not have the proper infrastructure to develop some of its projects. "These opportunities were not the outcome of economic planning, but the result of isolated, temporary and personalistic political measures."(Naím 1989)

²⁴⁴ In his analysis, FRANCES (89) distinguishes 6 facets of the Venezuelan state, to wit: guarantor/agent of influence/owner/sponsor/businessman/entrepreneur. See, Antonio Frances, *Las Empresas Venezolanas : Su Gerencia*, ed. Moises Naim, 1a ed. (Caracas: Ediciones IESA, 1989).

In order to benefit from these opportunities, investors had to develop personal relations with public officials. Their objective was to obtain access to information, influence the decisions of officials and attain other related benefits.

At the same time, networks of businessmen were being developed. Many of these connections were made through company attorneys, who have always played an important role within the Venezuelan business sector.²⁴⁵

Structure of the Venezuelan business sector and informal networks.

One of the most salient characteristics of the Venezuelan business sector is the importance given to personal relationships. Personal contacts are paramount. This is due to the small size of the business community and the existence of opportunities provided by the State.

The former has given rise to a relatively small business “class” in which it is unavoidable to have close interaction with their peers.

The latter is due to the fact that, in order to access the opportunities provided by the state, it is necessary to establish contacts with the officials in charge of implementing government plans, with the aim of gathering information and influencing their decisions in favor of a certain group.

The state has tended to make decisions on the basis of these influences. More importance has been given to the “know-who” than to the “know-how.”

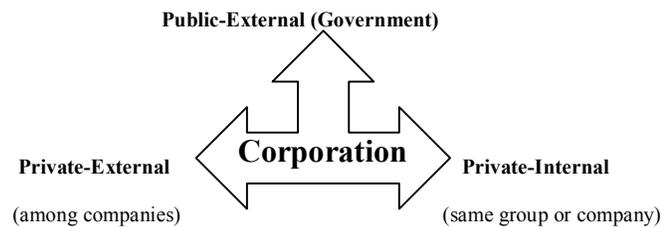
²⁴⁵ See, Manuel Gomez, "The Venezuelan Corporate Lawyers," (Stanford, CA: 2002).

However, personal connections are not only important between businessmen and government officials, but also among the members of the private sector itself, both within and outside the companies and lawyers are usually members of these networks.

The relatively permanent relations within a company develop because its partners are usually related or close friends. Most people only do business with members of their social and personal circle. Relations between companies are usually used for specific transactions, but they can also be used for more lasting alliances or relationships. Most deals are done with people, who have been *referred* or *recommended*, which is very rare in a global economy.

In such a reduced environment, it is natural for personal relations to take on an important role in any business-related dispute that may arise. In spite of its informality, these networks are formed in different levels as explained in the following diagram.

Table 21. The Structure Of Informality In The Venezuelan Business Sector.



In the *private/internal level*, this structure has generated companies that are set up based on a small circle of people who all depend on each other. These are the economic conglomerates. Executives of these groups of companies typically have certain “satellites”, who are their “right-hand men”, enjoy long-standing social, work and family relations with them, and have shown a high degree of personal loyalty to the company or group. At the *private/external level*, personal links can reach such a high degree of

sophistication that they create an “informal network” that works more or less on a regular basis.

Within the economic groups the presence of lawyers is important. Executives consider that their in-house counsels are key members of their organizations. They also consider important to retain the services of external law firms for the more complicated cases.(Gomez 2002)

As referred before, what stands out in Venezuela is not the presence of these networks, but the importance they have been given, since they are frequently used even for a company’s most high-level decisions. Informality does not only play a fundamental role in selecting personnel, assigning responsibilities, allocating resources and making decisions, but it also plays a pivotal role in settling disputes. We may now turn to explain what is the role of business lawyers in these networks.

The role of corporate lawyers: Informal networks and the development of the legal profession in Venezuela

The fact that executives often resort to informality does not mean that they do not use the services of lawyers. On the contrary, business relationships are frequently of a juridical nature and lawyers are very much involved in this process. Lawyers are considered important members of corporate networks and also form their own networks with other colleagues.

One of the characteristics of the legal profession in Venezuela is the importance that attorneys give to connections with government representatives (political

connections). Their personal connections with other lawyers and with members of the private sector – who are usually their clients - are also highly valued.

As interviewee #11 said:

One of the most important characteristics of practicing law in Venezuela is that here we know who is who and that helps us to save a lot of work. When we have good relationships and high confidence with other members of the profession, it is easier to solve the problems

As we could know from our interviewees #9, #10 and #11, business lawyers dedicate significant amounts of time to build networks of personal relationships, which help them in practicing law. The typical role of Venezuelan business lawyers is not limited to act as agents for conflict resolution in formal or institutional proceedings, it is extended to informality.²⁴⁶

It is true that in most every culture, lawyers are social brokers between the state and their clients. In order to achieve success, lawyers need to be able to build relations among individuals and to become familiar with social context.(Dezalay 1997)

However, in Venezuela the personal relations among lawyers usually play a more important role than formality. Besides their legal knowledge, it is essential for lawyers to have the *proper relationships and contacts* , because otherwise it won't be successful.

Informal relationships among lawyers happen in different levels, to wit: (1) the relationships with members of the private sector, who are usually their clients, (2) the relationships with public officials and (3) the relationships with other lawyers.

²⁴⁶ For an explanation about informality in dispute resolution see, Stewart Macaulay and University of Wisconsin--Madison. Disputes Processing Research Program., *An Empirical View of Contract* (Madison, Wis.: Disputes Processing Research Program University of Wisconsin-Madison Law School, 1984). And Stewart Macaulay and University of Wisconsin--Madison. Disputes Processing Research Program., *Long-Term Continuing Relations : The American Experience Regulating Dealerships and Franchises* (Madison, WI: Disputes Processing Research Program University of Wisconsin--Madison, 1990).

Regarding the first level it is important to say that executives consider attorneys to be important members of the Venezuelan private sector.(Perez-Perdomo 1981) The presence of lawyers, however, is not limited to corporate legal departments. They are often appointed as board members of important corporations as well as members of many chambers of commerce and other organizations representing business. As board members, many of these attorneys practice law on the side, for a law firm or on their own.²⁴⁷

As to the level of relationships between the lawyers and the members of the public sector, traditionally, Venezuelan lawyers have been part of an elite group of professionals and contributed to the creation and development of the state. Although the current role of attorneys is different from their role a century ago,²⁴⁸ their influence in the creation and development of Venezuelan state institutions has remained almost unaltered.

“The law is the only profession that has a constitutional monopoly on important state posts”(Perez-Perdomo 1988)²⁴⁹. Therefore, lawyers have a considerable presence in the public sector.

Although there is no statistical data that shows how many lawyers are hired by the government, it could be said that their presence is important.(Perez-Perdomo 1988). It

²⁴⁷ This is a frequent practice in the Banking and insurance sectors. As a way of example see: <http://www.bancomercantil.com/actual/informacion/default.html>, (Last visited, April 2, 2002) o <http://www.unibanca.com.ve/ic/home.asp>.

²⁴⁸ See, (1) Rogelio Perez-Perdomo, *Los Abogados En Venezuela*. (Caracas: Monte Avila Editores, 1981). (2) Rogelio Perez-Perdomo, "The Venezuelan Legal Profession: Lawyers in an Egalitarian Society," in *Lawyers in Society/the Civil Law World*, ed. R. Abel and P. Lewis (University of California Press, 1988).

²⁴⁹ There are several legislative and constitutional provisions that prohibit lawyers from holding a majority of the most important government posts. In addition, lawyers are even appointed for posts that do not require a law degree. In this respect, it has been said that “From 1936 to the present, five of the fourteen presidents of Venezuela were jurist and two were law students who abandoned their studies because of political persecution. Between one-third and two-thirds of all cabinet members have been jurists. Between twenty 25 percent and 40 percent of the members of the National Congress are jurists”.Perez-Perdomo, "The Venezuelan Legal Profession: Lawyers in an Egalitarian Society."

contributes to the strengthening of relations between public officials and business lawyers, who are usually linked by personal relationships.

In many cases, lawyers are retained by executives, depending on the connections that they may have with public officials.²⁵⁰ The fact that there are attorneys in the private and public sectors and that these attorneys usually have family links or have been classmates in law school explains their importance in the development of informal networks.²⁵¹ In many cases, the lawyers exert influence on public officials upon an informal authority, usually originated in politics or corruption.

This is the way in which courts are frequently used, making it a very advantageous mechanism as explained *supra*.

Finally, business lawyers have formed a network with other peers. In such context, it is common for them to solve their client's disputes through direct negotiations or through mediation like processes, as will be explained in the next section.

How Venezuelan business lawyers use informality to address legal disputes.

As explained before, informality plays an important role for business lawyers and for the Venezuelan corporate sector in general. From our collection of data we could identify two informal mechanisms to which lawyers usually resort to solve their disputes. These are: negotiation and some kind of informal mediation.

Negotiation is undoubtedly the mechanism used by most people as their first alternative and it is probable the most common means of dispute resolution in many societies.

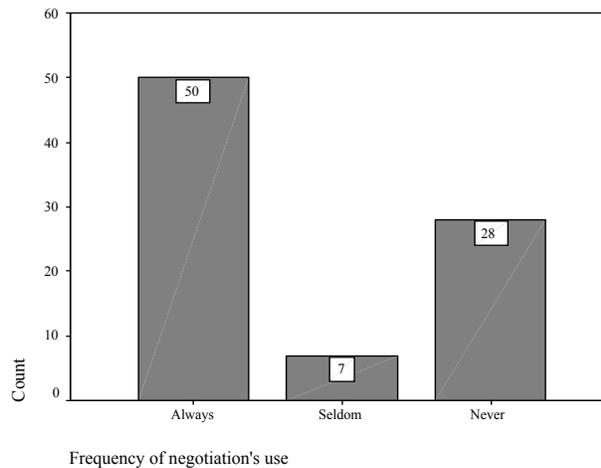
²⁵⁰ See, Interviewee #11.

²⁵¹ It has been stated that "The fact that the lawyers of the economic elite overlap with the political elite and that the two groups share common training and friendships...is important for the study of the legal profession because the political contacts of legal professionals are an important factor in explaining the significance of law practice, especially in a country where the government wields such vast resources" Perez-Perdomo, "The Venezuelan Legal Profession: Lawyers in an Egalitarian Society."

When asked about the mechanisms that they most used, our respondents indicated negotiation in the first place over all other means.

The general level of respondents that use negotiation always is showed in the following table:

Table 22. Use Of Negotiation By Respondents



When comparing the level of usage with the level of satisfaction reported by respondents, we obtained that there is a significant level of respondents (forty) who think that negotiation is highly satisfactory to solve disputes.

Table 23. Level Of Satisfaction With Negotiation

		<i>Level of satisfaction with negotiation</i>			
		<i>Excellent</i>	<i>Fair</i>	<i>Bad</i>	
<i>Negotiation</i>	<i>Always</i>	40	7	3	50
	<i>Seldom</i>	3	1	2	6
	<i>Never</i>	11	14	4	29
	<i>Total</i>	54	22	9	85

$\chi^2=0.001206990309743$

Even though the information obtained through the interviews and questionnaires is predictable, namely that negotiation is a frequent method for the

settling of disputes, none of the interviewees was able to keep track of how many times they had used it. “People negotiate every day,” said one of them.²⁵²

Interviewees #10 and #11 agreed that an important ingredient for negotiations to be successful in Venezuela is in the fact that the lawyers belong to the appropriate group or have the necessary connections with other lawyers. They said that when a lawyer is not familiar with the other side, he frequently has to ask the assistance of another colleague who is acquainted with the other party to help him negotiate. Otherwise, it would not be possible to solve the dispute.

We also learned that another informal means sometimes consists of using the “good offices” of an impartial third party in order to facilitate a solution. This third party is usually an acquaintance of both disputants who seek his or her intervention as a *mediator*.

In most cases, it is the lawyers, not their clients, who have a direct participation in this process. Interviewee #11 indicated that,

When we use the good offices of a friend in trying to solve a problem, the client may not even be aware of it. He trusts our ability to address the matter and authorizes us to make any decisions concerning the most appropriate mechanism.

Nevertheless, according to the same informant there are cases in which the client suggests the use of such means and personally participates in it. This may be because he knows the facilitator or because the matter requires his presence for decision-making purposes.

The *third party* is usually another lawyer who is a trusted friend of lawyers on each side and can be a member of their common social circle.

²⁵² Interviewee #10.

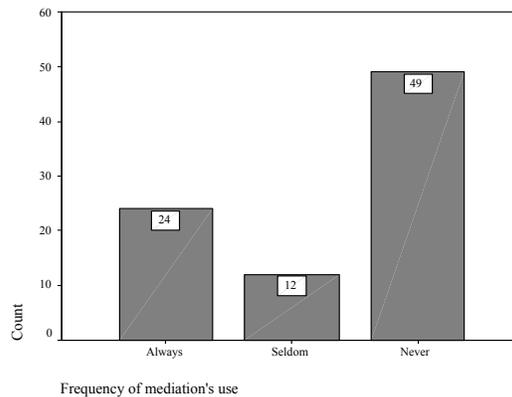
In fact, clients often choose their lawyers based on their connections with other players (lawyers, judges, government officials, etc.). Of course, this requires a high degree of loyalty between clients and lawyers.

Interviewee #3 expressed that “this mechanism is frequently used, particularly in maritime trade disputes. In many instances, shipping agents and not lawyers may be involved, while in others both may be involved”.

The use of this form of solving disputes might explain why some respondents of the survey have reported (1) to solve their dispute through mediation on a regular basis, (2) to act as mediators and (3) to have used mediation a significantly higher number of times than the cases reported by the institutional ADR providers and explained in Table 8 *supra*.

Regarding the frequency in the use of mediation reported by the survey respondents, as we see in Table 23 below, twenty-four people indicated the use of mediation *frequently* to solve their client’s disputes.

Table 24. Frequency of mediation’s usage.



Regarding the categories to which these respondents belong, although there is no significant difference if we compare the ratio of use with other variables like years in

practice, formation in ADR, area or workplace; it just so happens that a majority of mediation users practice in the *commercial area* and are *in-house counsels* as can be appreciated in Table 24 and 25 below.

Table 25. Users Of Mediation By Area

<i>Frequency of mediation's use by area of practice²⁵³</i>					
		<i>Always</i>	<i>Seldom</i>	<i>Never</i>	
<i>Area of Practice</i>	Commercial	12	4	16	32
	<i>Administrative</i>	1	1	9	11
	Tax-Banking	1	2	11	14
	<i>Labor</i>	1			1
	<i>Litigation</i>	2	1	9	12
	<i>Public Adm.</i>	2	2	1	5
	<i>Electoral</i>	1			1
	<i>Maritime</i>		1	1	2
	<i>I.P.</i>	1	1	1	3
	<i>Criminal</i>	1			1
	<i>Telecom</i>	1		1	2
	<i>Consult.</i>	1			1
Total		24	12	49	85

Table 26. Users Of Mediation By Workplace.

<i>Frequency of mediation's use by area of practice²⁵⁴</i>					
		<i>Always</i>	<i>Seldom</i>	<i>Never</i>	
<i>Workplace</i>	<i>Solo</i>	6	4	4	14
	<i>In-house counsel</i>	9	3	16	28
	<i>Large law firm</i>	3	2	20	25
	<i>Small Law firm</i>	3	2	7	12
	<i>Consultant</i>	2	1	2	5
	<i>Public Entity</i>	1			1
Total		24	12	49	85

In regard to the number of respondents who reported acting as mediators, forty-one indicated doing so on a regular basis (*always*) and although there is not consequence if we compare the ratio of acting as a mediator with other variables like, years in practice, formation in ADR, area or workplace; it also happens that a majority of respondents who

²⁵³ $\chi^2=0.2102219649506$

²⁵⁴ $\chi^2=0.1724986658398$

act as mediators practice in the *commercial area*, work *individually* or as *in-house counsels* and have formation or experience in ADR as can be appreciated in Table 26, 27 and 28 below.

Table 27. Responding Acting As Mediators By Area

Respondents acting as mediators by area ²⁵⁵					
		<i>Always</i>	<i>Seldom</i>	<i>Never</i>	
<i>Area of Practice</i>	Commercial	19	4	8	31
	<i>Administrative</i>	4	4	3	11
	Tax-Banking	5		9	14
	<i>Labor</i>	1			1
	<i>Litigation</i>	4	2	6	12
	<i>Public Adm.</i>	3	1	1	5
	<i>Electoral</i>	1			1
	<i>Maritime</i>			2	2
	<i>I.P.</i>	1	1	1	3
	<i>Criminal</i>	1			1
	<i>Telecom</i>	1		1	2
	<i>Consult.</i>	1			1
Total		41	12	31	84

Table 28. Respondents Acting As Mediators By Workplace

Respondents acting as mediators by workplace ²⁵⁶					
		<i>Always</i>	<i>Seldom</i>	<i>Never</i>	
<i>Workplace</i>	Solo	11	1	2	14
	In-house counsel	12	6	9	27
	Large law firm	8	4	13	25
	<i>Small Law firm</i>	6		6	12
	<i>Consultant</i>	3	1	1	5
	<i>Public Entity</i>	1			1
Total		41	12	31	84

²⁵⁵ $\chi^2=0.4294000954053$

²⁵⁶ $\chi^2=0.2038753285905$

Table 29. Respondents Acting As Mediators By Formation In ADR.

Respondents acting as mediators by formation in ADR ²⁵⁷					
		<i>Always</i>	Seldom	Never	
<i>Formation in ADR</i>	<i>Significant</i>	16	2	11	29
	<i>Some</i>	10	5	5	20
	<i>Little/None</i>	9	3	14	26
Total		35	10	30	75

Finally, we must refer to the circumstance shown in Table 8 *supra* showing that seventeen respondents informed using mediation from one to five times in the last two years, five indicated having used it from six to ten times, and ten more than ten times in the same period. The total figure adds up to more than three hundred cases of mediation compared to the twenty-eight reported by institutional providers.²⁵⁸

At first, these results seemed to contradict the numbers given by ADR providers, who had said that mediation was seldom used. However, as we learned during interviews #3, #10 and #11 that among the informal mechanisms business lawyers with some frequency use a mediation-like procedure, we thought that the results of the survey could reflect that.

In spite of the aforementioned, it is not easy to distinguish this *informal mediation* from the negotiation used by business lawyers, because as respondent #3 indicated that

Most of the cases there is no clear line between the moment in which you switch from a diadic negotiation to a mediation-like process and if so, no lawyer that I know keeps record of how many times he uses this method. One might use the good efforts of a colleague on a daily basis, but we have never called it mediation...that is a new label for us.

²⁵⁷ $\chi^2=0.1517850616144$

²⁵⁸ See, TABLE 7 *supra*.

We will not explore further the distinction between the various forms in which business lawyers use informality, either as negotiation or as mediation-like processes. Both mechanisms are informal and as we said before, the line between them is blurred.

But the most important consequence is that they still play an important role in what Venezuelan business lawyers choose to solve their disputes and it seems to be, that alongside the use of courts these are the real roadblocks that impede the growth in the utilization of institutional mediation. We will finish paraphrasing the popular saying by expressing that Venezuelan business lawyers prefer to rely on the devil they know than on the one they don't know.

CHAPTER V. CONCLUSIONS

What have we achieved and what steps are yet to be taken.

These final remarks are called conclusions only in the formal sense of the word because, as I stated in the introduction, ADR and the settlement of business disputes in Venezuela are topics that should be studied in more depth and comprehensive manner.

Nonetheless, the main achievement of this paper is in having let us see how corporate lawyers view institutional mediation and that the reasons for its low usage are different to those sustained by ADR advocates.

As we could see, this study challenges the general idea according to which the scarce use of ADR is (1) due to the lack of an adequate regulatory framework, (2) because ADR are not known, (3) because they are costly or (4) because corporate lawyers do not trust them. We also object to the idea that the courts are not used by corporate lawyers because of their congestion and due to the lack of trust in the judges.

In the case of informality, it is used either in the form of direct negotiation or with the assistance of a third party (usually another lawyer known to both disputants) who acts as a mediator. In such cases, I have labeled this mechanism as “informal mediation”.

I have also explained the reason for the use of informality in the existing networks among businesspersons and their lawyers. Business is normally conducted among known people, among friends or referred persons and this fosters the formation of “clan-like” structures. The importance given to lawyers in the corporate sector makes them vital members of these networks as well.²⁵⁹

In the case of the judiciary, besides the circumstances in which using it is mandated by law, there are cases in which the decision to use the court system is

²⁵⁹ See, Gomez, "The Venezuelan Corporate Lawyers." (paper for Law in Latin America course, Fall 2001)

voluntary. The courts are frequently chosen by corporate lawyers to handle their disputes when it involves a “favorable” application of the law and judges can be influenced.

This form of using the Judiciary, although regarded by some²⁶⁰ as a sample of the high legal uncertainty that affects the country it is perceived as beneficial by the corporate lawyers who frequently resort to the courts and consider that for the most part, it meets their needs. Contrary to what is generally believed, I have found that Venezuelan business courts are not congested, and that corporate lawyers do not perceive them as sources of legal uncertainty.

Numerous members of the legal community believe that relying on informality and using the courts in such manner to address legal disputes have important advantages,²⁶¹ but their success relies on the existence of “informal networks” that at the same time proves to be a disadvantage.²⁶²

The population of corporate lawyers that I studied does not see anything wrong with this form of solving their clients’ conflicts. Although in some cases²⁶³ we could question them from an ethical point of view²⁶⁴, these mechanisms are believed to produce acceptable results and are considered efficient²⁶⁵.

²⁶⁰ In this respect, we can mention the numerous opinions given by analysts of the judicial reform. See, (1) Escovar León, "Notas Sobre La Reforma Judicial." (2) CONAPRI, *Costo Venezuela.*, (3) Perez-Perdomo, "La Administración De Justicia En Venezuela. Evaluación Y Alternativas.."

²⁶¹ This is the general opinion that I got as a result of my research for the SPILS thesis. As advantages of informality, we can mention: (1) It works within a group of acquaintances. Actors know each other well because they belong to the same social, professional or family circles. This degree of trust allows them to act openly and not waste any time when it comes to discussing important matters, (2) It reinforces social relations. The more this mechanism is used, the closer the links among the participating lawyers, and (3) It benefits traditional actors or repeat players. Repeat players derive great benefits from using this form of dispute settlement.

²⁶² Some important disadvantages of informality could be mentioned, such as: (1) It is not permanent and depends on the prevalence of current conditions. The success of informality depends on very particular characteristics, such as the presence of a small business circle in which all the actors know each other, (2) It reduces the spectrum of associations and contracts, (3) It excludes or prevents relations with strangers and (4) It gives precedence to vertical integration mechanisms.

²⁶³ Basically when exerting influence or pressure on judges in order to get benefits.

²⁶⁴ By this, we do not want to imply that corporate lawyers are to be held responsible for corruption or the malfunctioning of the courts. In this respect, one of our interviewees has justified this way of using the system by

I have also explained that informal networks are the result of a timely interaction among members of the Venezuelan business and legal communities. Informality has played an important role in Venezuela for the last fifty years.²⁶⁶ It is successful while the business community remains the same, and while the players know each other and are willing to solve their disputes relying on the network. Under these circumstances it is unlikely that ADR or any other “new” mechanism would be accepted and used.

Notwithstanding the above, this project had an important limitation, because it addressed just one side of the problem: the corporate lawyer’s point of view.

In order to understand the issue in its entirety, it is necessary to approach it analyzing the non-lawyer’s point of view as well, this is, the members of the business community who are the real stakeholders. To address this has motivated me to continue doing research on this topic.

In a next phase, currently underway, I intend to explore how foreign and domestic investors solve their conflicts in Venezuela, this is, which dispute resolution mechanisms are being used, which ones are preferred and why, and also what influence does this exert in the development of formal methods (mainly ADR). It is not a problem about which

saying that they (corporate lawyers) “have learned how to deal with the system and take advantage of their repeat-player’s status on behalf of their client’s interest”.(Interview #7 of SPILS project).

²⁶⁵ At least for the population of corporate lawyers studied in my project, which can be considered representative of the corporate lawyer’s community.

²⁶⁶ As I have explained in my SPILS thesis, although relying in personal relations to resolve disputes is common to many societies, what makes the Venezuelan situation different is the extreme importance given to it and its wide utilization instead or parallel to the formal means. About informal relations in general, See, (1) Winn, "Relational Practices and the Marginalization of the Law: Informal Financial Practices of Small Businesses in Taiwan.", (2) Upham, "Speculations on Legal Informality: On Winn's "Relational Practices and the Marginalization of the Law".", (3) Nader and Todd, *The Disputing Process : Law in Ten Societies.*, (4) Macaulay, "Non-Contractual Relations in Business: A Preliminary Study.", (5) Lomnitz, "*Informal Exchange Networks in Formal Systems: A Theoretical Model*" *90 American Anthropologist* 42 (March 1988)., (6) Dezalay, "Law, Lawyers and Social Capital: "Rule of Law" Versus Relational Capital.", (7) Ellickson, *Order without Law : How Neighbors Settle Disputes.* About the importance of personal relations in Venezuelan business sector, see (1) Moisés Naim, *Las Empresas Venezolanas : Su Gerencia*, 1a ed. (Caracas: Ediciones IESA, 1989)., (2) Perez-Perdomo, *Seguridad Juridica Y Competitividad.*, (3) Perez-Perdomo, *Políticas Judiciales En Venezuela.*

dispute resolution mechanisms are regulated, but instead, about which ones are being used. It is related to the *law in action* rather to the *law on books*.²⁶⁷

Our conclusions should not be interpreted in the sense that we oppose ADR to the contrary it seems to be appropriate in different cases and settings and might have been successful in combating judicial inefficiency in the USA, but this does not necessarily hold true in Venezuela. It could happen that ADR, in the form in which they have been promoted in Venezuela, do not represent the true interests and needs of businessmen and their lawyers, in spite of the fact that judicial reformers and ADR advocates might think otherwise.

Also, it could be that implementing ADR might require a system that operates in an acceptable manner. When there is a “crisis”, however, the frequent practice is (1) to mistrust institutions and to look for other ways out (informality) or (2) to use formal methods in an irregular fashion, such as when court officials are manipulated, etc.

In the latter case, repeat players have greater advantages because they not only are familiar with the system, but can also exert prompt and direct influence on it. So, where is the incentive to change?

²⁶⁷ See, Lee Axelrad and Robert A. Kagan, *Regulatory Encounters : Multinational Corporations and American Adversarial Legalism* (Berkeley: University of California Press, 2000).

APPENDIX 1. MODEL OF QUESTIONNAIRE

Mediation in Venezuela Questionnaire

Guidelines:

1. The information provided in this questionnaire will remain confidential and will be used solely for academic purposes.
2. Please mark one option per question.
3. Don't leave any blank.

Are you:

- Male
 Female

For how many years have you been practicing law?

- less than five (5)
 between five (5) and ten (10) years.
 between eleven (11) and fifteen (15) years.
 between sixteen (16) and twenty (20) years.
 more than twenty (20) years.

What is the area in which you concentrate your practice?

- civil/commercial.
 Administrative.
 Tax/Banking.
 Labor.
 Litigation.
 Other (please specify) _____

4. Where do you practice?

- Solo (individual practice).
 As an in-house counsel.
 In a law firm with 10 or more lawyers.
 In a law firm with less than 10 lawyers.
 In a consultant's firm.

5. You resolve your client's disputes using:

	Always	Frequently	Seldom	Never
Courts				
Arbitration				
Mediation				
Negotiation				

The results that you obtain from the mechanism that you use more frequently to resolve conflicts are generally:

Excellent				Very bad

7. Your direct intervention in solving disputes for your clients is:

Significant				None

8. You act as a mediator:

--	--	--	--	--

Always

Never

9. The promotion of mechanisms different than the traditional judiciary process is necessary:

Totally agree	In total disagreement		

Venezuela's legal framework allows the satisfactory use of mediation:

Totally agree	In total disagreement		

Mediation has been sufficiently promoted in Venezuela.

Totally agree	In total disagreement		

Your formation and/or experience in Alternative Dispute Resolution mechanisms (mediation) is:

Significant				None

During the last two (2) years have you used mediation?

No

Yes. In this case, please answer the following:

a.) How many times did you use mediation? _____

b.) The use of mediation was advantageous

Always				Never

c.) The conflict was resolved.

Always				Never.

d.) Mediation was used:

As the first alternative, prior to the use of any other mechanism.

simultaneously among the use of another mechanism

After the failure of another mechanism. In such case, which? _____

e.) Whose idea was it to use mediation?

You/your client.

The other party or his/her counselor.

Both parties.

A third party, Who? _____

If you wish to make an additional comment, please do so in the following space and thank you in advance for your time.

APPENDIX 2. MODEL OF QUESTIONNAIRE/COLLAPSED CATEGORIES.

For how many years have you been practicing law?

- Less than 10 years.....1
- Less than 20 years.....2
- More than 20 years.....3

You resolve your client’s disputes using:

	Always/Frequently	Seldom	Never
Courts			
Arbitration			
Mediation			
Negotiation			

The results that you obtain from the mechanism that you use more frequently to resolve conflicts are generally:

Excellent	Fair	Bad

Your direct intervention in solving disputes for your clients is:

Significant	Fair	None

You act as a mediator:

Always	Seldom	Never

The promotion of mechanisms different than the traditional judiciary process is necessary:

Totally agree	Somewhat agree	In total disagreement

Venezuela’s legal framework allows the satisfactory use of mediation:

Totally agree	Somewhat agree	In total disagreement

Mediation has been sufficiently promoted in Venezuela.

Totally agree	Somewhat agree	In total disagreement

Your formation and/or experience in Alternative Dispute Resolution mechanisms (mediation) is:

Significant	Some	None

The use of mediation was advantageous

Always	Sometimes	Never

f.) The conflict was resolved.

Always	Sometimes	Never

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