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The role of ADR and judicial agreements: legal analysis and behavioral economics insights

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To my parents, Patricia Mantilla and Guillermo Solano, and my sister, Camila Solano, for their unconditional love and support throughout my life journey.

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Introduction

Throughout history, law and economics have been two different areas of expertise. Even if they have conceptual differences, they share a similar approach to society: they intend to understand and regulate behavior, finding solutions to social, political, and economic problems and establish a structure biased toward cooperation. One strong modern interconnection between the two is behavioral economics and private law.

The study of law and economics has developed rapidly over the past two decades. Scholars have started to realize the importance of having well-established and regulated markets for the creation of capital. A slightly stable and growing economy that allows free competition and the creation of new markets might be one of the tools of modern capitalism to expand wellness. Private law is a mechanism so that markets stay fair and organized.

One of the main issues that I have encountered is the focus of law towards solving social, political, and economic problems rather than preventing them. Incentives, norms, laws, and rules should aim parties to avoid conflicts, however, to do so, a deeper understanding of human behavior is to be mixed with law. The study of how psychological, cognitive, and emotional factors influence decision-making is the root of behavioral economics. Therefore, we must first understand human nature to create the right incentives and properly regulate transactions.

In the base of any transactional legal relation there are humans involved that need better guidelines to self-regulate. The contract, written or oral, is an ancient instrument to avoid

conflicts. Law has made an effort to facilitate parties' legal interaction and protect them in cases where relations are unbalanced, as in the case of consumers. However, there are behavioral economic theories that can deepen the understanding of contracts, in order to write better and more complete agreements. The use of the private autonomy principle to self-regulate relations and even provide solutions when conflicts arise.

Of course, the ultimate aim is to have a society where conflicts do not arise, however, conflict is unavoidable in a society**.** Although a big component of today´s focus should be preventive, it is important to solve conflicts effectively and fairly. The judicial process has proven to not be a perfectly rational institution, therefore, by allowing parties to have more autonomy, through judicial agreements and ADR (alternative dispute resolution) mechanisms, we can create a more satisfactory conflict-solving system. The role of mediation has been expanding as an alternative to litigation. The application of behavioral economics can be helpful to facilitate the techniques of negotiation and increase the satisfaction of the parties when arriving at solutions. Even within the judicial process, party autonomy has a potential to be expanded by judicial agreements. The use of these two tools can be a tangible solution for many modern problems.

Chapter 1: From Rationality to Reality

1.1 The Evolution of Law and Economics through the Behavioral Lens

Law and Economics or the Economic Analysis of Law is based on the idea of using economic theoretical tools, mechanisms, and language to understand the extent of the impact of legal institutions in society. Though econometric methods law can be analyzed as one of the possible variables that affect the market and society[1].

Law and Economics have been related as a unified field of knowledge since the 19th century, however, it was not until the second half of the 20th century that it received major attention from scholars. It grew around the world, as a derivative of law or economic studies. There were noticeable advances in the United States, Europe, and Latin America, although from different perspectives, the idea of the economic analysis of law was being developed[2].

One of the pioneers in the unification of the study of Law and Economics was Victor Mataja, an Austrian scholar. His research focused on civil law, especially on torts; he analyzed how civil liability may impact the behavior of economic agents and social wellness. Mataja concluded that individual incentives and market efficiency have a direct relation with the rules governing civil responsibility and compensation[3].

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[1] E. Mackaay, *History of Law and Economics*, SSRN Electronic Journal, 1999, p. 65-66.
[2] M. Gelter and G. Kristoffel, *History of Law and Economics*, 2014, MPI Collective Goods Preprint, p. 1-2.
[3] V. Mataja, *The Law of Civil Liability from the Perspective of Political Economy*, International Review of Law and Economics,1888.

Despite his innovative analysis, European academia was keener to retake historically important institutions and adapt them to be used in "modern" society. In addition, due to the Second World War, other promising interdisciplinary scholars were disincentivized[4].

Another important thinker of the early era of the economic analysis of law, in America was Oliver Wendell Holmes. He laid a foundation for Institutional Economics and Legal Realism; schools of thought that would later emerge in the 20th century. He was against the "black-letter man" who was the personification of a rigid and formal approach to law. Holmes wanted to encourage lawyers to use economic and statistical methods to truly understand the impact of laws on society[5].

In the first half of the 20th century in America, it was noticeable that the formalistic approach to law was declining among the academia. Thinkers of the moment were against the idea that the law was objective and neutral because it had to be interpreted by judges whose ruling then influenced the law itself. There was a space of human discretion in the law and this was one of the main bases of the Legal Realism school of thought. This can be seen in the New Deal era, when after the great depression, the Supreme Court rulings were inclined towards economic regulation.

[4] M. Gelter and G. Kristoffel, *History of Law and Economics,* MPI Collective Goods Preprint, 2014, p. 2-3

[5] O. W. Jr Holmes, *The Path of the Law,* Harvard Law Review, 1897, p. 457-478: *"For the rational study of the law, the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics".*

Later on, in the 1940s, Aaron Director, member of the University of Chicago gave light again to the idea of merging economics into antitrust law. This led to a foundation for the movement to grow and in 1960 Ronald Coase published **"**The Problem of Social Cost". Coase argued that if there were no transactional costs, people would negotiate and make the most efficient distribution of the resources, regardless of their initial allocation. This is under the concept of allocation efficiency, which means resources are to be naturally distributed in the most beneficial way for society.[6]

As a reaction to Coase´s innovative thinking, several economists became interested in the economic analysis of law, expanding the research to other areas of law like contract law, anti-trust law, liability, and property rights. Figures as Guido Calabresi, who opposed allocation efficiency and presented the idea of distributional efficiency of legal rules. He argued that damaged parties cannot always enforce their rights. In cases where an individual is suffering from another´s activity, the possibility of forcing the externality to stop will depend on the legal framework. Legal property rules may prevent the externality from happening and liability rules may contribute in claims of damages to be more effective after the activity[7].

Other scholars were involved in these discussions, as Henry Manne and Richard Posner. Manne referred to changes in corporate law and securities´ regulation to make the market more efficient. He believed that insider trading should be legal to allow the flow of information be quicker and let the stock prices reflect this new update. Manne also made

[6] M. Gelter and G. Kristoffel, *History of Law and Economics,* MPI Collective Goods Preprint, 2014, p. 4
[7] G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis*. Yale University Press, 1970.

important institutional changes at George Mason University by making the law faculty a center of the economic analysis of the law field. Moreover, Richard Posner was one of the biggest figures of Law and Economics, an area in which he founded the Journal of Legal Studies in 1972 and published Economic Analysis of Law in 1973. In his research, he attempted to apply economics to the whole legal system. One of his most controversial theories was the idea that the common law system would autoregulate toward efficiency, under the premise that inefficient rulings tend to be overturned in time.[8]

The flow of diverse new theories sparked a debate among the scholars of Law and Economics. On the one hand, the neoclassical economists based their theories on two central ideas. First, the conception that the markets are efficient means that resources would naturally accommodate where they should. Second, the idea of rational agents, who would aim to maximize their benefits. On the other hand, scholars developed new approaches that would challenge these traditional views, like Institutional Economics, Neo-institutional Economics and Austrian Economics, which emerged as distinct intellectual traditions within the field.[9]

Institutional Economics was based on the idea that law and economic behavior is the result of institutions such as the government and social norms. This school of thought evolved into Neo-institutional Economics that focused more on the creation of rules for these institutions and their effect. Therefore, there was an important fragmentation and law and economics were understood to be more elaborate and variables such as history, institutions, and actual

[8] M. Gelter and G. Kristoffel, *History of Law and Economics,* 2014, MPI Collective Goods Preprint, p. 4-5
[9] E. Mackaay, *History of Law and Economics,* SSRN Electronic Journal, 1999, p. 65-66

human behavior began to be taken into account. Even the Nobel Prize of 1993 recognized the importance of this new multidisciplinary approach and granted the award to Gougless North and Robert Fogel. Their research analyzed history from an economical viewpoint and highlighted the importance of understanding the past, to understand future events.[10] Law and economics are to be read inside a society, which is a sophisticated model that is shaped not only by history and institutions but also by the complexity of human behavior.

By 1980, the Economic Analysis of Law became very common in the United States, not only in the academia but also in the judicial branch. Even so, federal judges were trained in economics. This can be seen at George Mason University, where they would receive education in microeconomics. However, in Europe, the movement of Law and Economics took more time to be adopted in courts and it was not yet considered as one of the mainstreams of legal studies. One of the causes thereof was the institutional differences with the common law system in the judicial branch. The judges in the United States had more liberty and could be policymakers, whereas, in the civil law system, the judges were only interpreters of the law[11].

In the second half of the 20th century, as economists expanded their analysis beyond traditional theories, merging fields like law and economics, they also were interested in human behavior. This shift led to the formation of Behavioral Economics, which challenged the assumption of perfectly rational decision-making by incorporating insights from

[10] *Ibidem*
[11] M. Gelter and G. Kristoffel, *History of Law and Economics*, MPI Collective Goods Preprint, 2014, p. 4-6.

psychology. Just as Law and Economics tried to understand the legal system through an economic lens, Behavioral Economics aimed to refine economic models by considering cognitive biases, heuristics, and real-world decision-making patterns.

The University of Chicago explains that although Behavioral Economics was popularized in the 1970s and 1980s, its origins can be traced back to as far as Adam Smith in the 18th century. Smith presented three key ideas: overconfidence, loss aversion and self-control, in which he tried to understand human behavior. These are the foundational concepts of Behavioral Economics today. The first, overconfidence, refers to the idea that people are overconfident in their abilities. The second, loss of aversion, means that humans are more afraid of loss than eager to win. The third, self-control, is the notion that a person will prefer a short-term benefit over a long-term one.[12]

Further on, the area of Behavioral Economics would encounter two eras, which scholars would be described as the "Old behavioral economics" and the "New behavioral economics". The Old Era is the not concentrated research programs developed before 1980, and the New Era is the unified movement that began after 1980[13].

Old Behavioral Economics where the spread academic investigation that had different approaches and emerged between 1940 and 1980. Herbert Simon was one of its scholars, he was an American economist and psychologist, a formation that facilitated a more

[12] University of Chicago. *What Is Behavioral Economics?* University of Chicago News. Accessed Feb 8, 2025, https://news.uchicago.edu/explainer/what-is-behavioral-economics.
[13] A. Svorenčík and A.Truc, *A History of Behavioral Economics and Its Applications: What We Know and Future Research Directions*, Université Côte d'Azur, 2022, p 5

interdisciplinary approach. Simons is opposed to the traditional idea of decision-making based on rationality, also known as the Rational Choice Theory. He introduced the notion of bounded rationality, according to which people make decisions with limited information, limited cognitive ability and time constraints. Thus, instead of arriving at the "perfect" solution, people tend to settle for a solution that is good enough, a process Simon called "satisficing" (satisfy + suffice). [14]

George Katona was another academic who applied psychology to economics. His main focus was consumer behavior and macroeconomics, where he studied how factors, such as confidence and expectation, can influence consumer spending tendencies. He gathered his data from surveys; a more empirical approach than just using mathematical models as traditional economists[15].

The innovation of George Katona and Herbert Simon was appreciated by the economics scholarship of the time and Simon won the Nobel Prize in Economics sciences in 1978 for his work on decision-making processes within economic organizations, especially for his theory of bounded rationality. However, their approaches were not fully incorporated into the discipline of economics at that moment. There was still a lack of a unified community, and the work that had been done remained fragmented into diverse research groups. This lack of collaboration can be seen in the University of Michigan, where at the same time four separate programs of the unification of economics and psychology were taking place, distant

[14] H. Simon, *Models of Man: Social and Rational*. 1957.
[15] G. Katona, *Psychological Analysis of Economic Behavior,* 1951.

from each other. It was not until the era of the New Behavioral Economics in the 1980s that a unified community around this matter was created.[16]

The New era of Behavioral Economics is a well-defined community that was finally united by the research of Amos Tversky and Daniel Kahneman. George Katona and Herbert Simon were acknowledged as early figures of the movement, but there were some differences in their research. The New Behavioral Economics focuses its attention on heuristics, biases, and decision-making; whereas the Old one focuses on bounded rationality. Moreover, the New era would gather data with a more experimental approach; meanwhile, the Old era would be based on empirical methods.[17]

The proper movement of behavioral economics is rooted in the studies carried out by Amos Tversky and Daniel Kahneman; two Israeli psychologists.[18] They researched and demonstrated through experiments topics such as the "availability heuristic" and the "prospect theory". In these two, they observed how people were biased when presented with situations of risk (prospect theory)[19] or the likelihood of individuals relying on recalled information (availability heuristic)[20].

[16] A. Svorenčík and A. Truc, *A History of Behavioral Economics and Its Applications: What We Know and Future Research Directions*, Université Côte d'Azur, 2022, p. 6-10.
[17] *Ibidem.*
[18] University of Chicago. *What Is Behavioral Economics?*, University of Chicago News, Accessed Feb 8, 2025, https://news.uchicago.edu/explainer/what-is-behavioral-economics.
[19] D. Kahneman and A. Tversky, *Prospect Theory: An Analysis of Decision under Risk*, Econometrica, 1979, p. 263-291.
[20] D. Kahneman and A. Tversky, *Availability: A Heuristic for Judging Frequency and Probability*, The Hebrew University of Jerusalem and the Oregon Research Institute, 1973, p. 207-232

Through their experimentation, they showed how people´s behavior is not always rational and may be influenced. This contradicts the traditional economics assumptions as maximizing expected utility described by Expected Utility Theory. Tversky and Kahneman showed that people have loss aversion and that they base decisions on how they perceive gains and losses, instead of maximizing the expected utility.

Richard Thaler is another key player in the behavioral economics community. He worked side by side with Tversky and Kahneman and based a big part of his work on their work. Thaler also believed that people can make predictable decisions. He observed, for example, that he felt more compelled to go to an event even during a snowstorm, if he had paid for tickets, rather than if the tickets were given to him for free. This idea is the "sunk cost fallacy"; people are less willing to give up on projects that they have personally invested in, even if there is a risk. He believes that the way people behave, although irrational, may also be predictable. Moreover, Thaler researched and popularized the term "nudge"; which refers to a subtle guide for people to make better decisions[21].

To this day, Richard Thaler and other academics continue their research on this interesting field, developing even more theories to understand and nudge peoples´ behavior towards the united desirable goals. Even the U.S. government has begun to adapt these ideas into policy-making[22].

[21] University of Chicago. n.d. "What Is Behavioral Economics?" University of Chicago News, Accessed Feb 8, 2025; https://news.uchicago.edu/explainer/what-is-behavioral-economics.
[22] *Ibidem.*

1.2 Understanding How We Choose: Foundations of Behavioral Economics

In the following pages the present thesis will lay out some key aspects to understand the essence of Behavioral Economics. As it has already been sketched in the previous chapter, Behavioral Economics is based on the premise of mixing psychological concepts with economic analysis, discovering which are the actual reasons that determine human decision-making. In modern economics, Behavioral Economics has spiked a high interest; at an individual, national, and international level. This field made economics more interesting and tangible for ordinary people.[23]

The main critique of traditional economics, that Behavioral Economics was able to understand, is that humans may not always act as rational beings. “Bounded rationality” was a revolutionary concept that opposed the traditional model of economic man or *homo economicus*, which was based on rationality. This traditional model assumed that people had unlimited access to information, remembered it, could process it and calculated the most optimal choice in a short period of time. This was unrealistic because people have limited information and time, as well as cognitive biases in decision-making, therefore they have bounded rationality. The idea of bounded rationality is that it can make a person not seek the most optimal choice but a satisfactory one, which is a process denominated "satisficing." Therefore, the best outcome is secondary for an individual.[24]

[23] M. Baddeley, *Behavioral Economics: A Very Short Introduction*, Oxford University Press, 2017, p. 24-25.
[24] H. Simon, *Models of Man: Social and Rational*, 1957, p. 180-206.

In addition, two terms that are intertwined with Bounded rationality are**:** "Bounded self-interest" and "Bounded willpower". The first obeys the idea that people may prefer to support others than have a personal positive outcome. And the second one is the idea that people are more likely to choose short-term satisfaction over long-term.[25]

Bounded rationality is one of the bases of behavioral economics as it depicts a deeper understanding of human nature. It considers humans, not as part of a mathematical process, but it approaches the reality of decision-making. Therefore, the concept of rational behavior of the "economic man", should be based on the actual access to information and the ability to process it, taking into account the individual environment.[26]

Furthermore, it has been sketched before in this thesis, the concepts of "Heuristics and biases", are very important for the analysis of human behavior. Heuristics are the mental shortcuts that people use, which can lead to predictable biases. There are three types of heuristics: Availability Heuristic, Representativeness Heuristic and Anchoring and Adjustment:

- *Availability Heuristic:* people are likely to rely on recalled information, rather than actual data, when evaluating the likelihood of a particular outcome [27] For example, if a person has heard about a robbery in a city, he or she will think that robberies are common in that city, even if they are not.

[25] University of Chicago. n.d. *What Is Behavioral Economics?*, University of Chicago News. Accessed Feb 8, 2025, https://news.uchicago.edu/explainer/what-is-behavioral-economics.
[26] H. Simon, *Models of Man: Social and Rational*, 1957, p.180–206.
[27] A.Tversky and D. Kahneman, *Availability: A Heuristic for Judging Frequency and Probability,* The Hebrew University of Jerusalem and the Oregon Research Institute, 1973, p. 207–232.

- *Representativeness Heuristic:* refers to the idea that individuals may judge the probability of an event wrongly if they have a certain stereotype, rather than relying on actual data. For example, people were asked what profession a shy and detail-oriented person is more likely to have: most chose librarian. This is because it fits the stereotype; however, they did not consider that the quantity of farmers is much higher than librarians. [28]
- *Anchoring and Adjustment:* this heuristic is that people tend to rely heavily on the anchor (an initial piece of information or number they have access to) even if it is not logical.[29] For example, in negotiations, persons tend to go down from an initial anchor (starting price proposed by the seller), instead of considering the actual value of the product.

Relying on heuristics may lead to having certain biases when it comes to decision-making under uncertainty. These are not just random misinterpretations but systematic biases, where people are prone to overlook statistical principles in similar ways. Each of the heuristics leads to a specific type of cognitive bias or misjudgment. The Availability bias can create a misestimate of the likelihood of memorable events (corresponding to the availability heuristic). Representativeness bias can make people rely on stereotypes to judge the probability or amount of a situation (corresponding to the Representativeness heuristic). Finally, anchoring bias may lead to overly relying on the anchor and not adjusting their estimates as much as they could (corresponding to Anchoring and Adjustment).[30]

[28] A. Tversky and D. Kahneman, *Judgment under Uncertainty: Heuristics and Biases,* AAA Science, 1974, p. 1124–1131.
[29] *Ibidem.*
[30] *Ibidem.*

Thus, Heuristics and biases contribute to identify specific methods and errors that people may commit in decision-making. Many academics, including Richard Thaler, have built up from these concepts.

Similarly, "Prospect theory" is the idea that when faced with risk, people tend to not act rationally. In an experiment that was conducted where people had to choose between: a sure gain of $1000 or a 50% chance to win $2000, most of the people chose the first option, which showed risk-averse behavior for gains. When people were offered a choice between: a sure loss of $1000 or a 50% chance to lose $2000, most people would gamble on the 50% chance to avoid the loss. Thanks to this experiment it could be concluded that people have "loss aversion"; a person is more likely to feel worse if they lose than the satisfaction they feel if they win. [31]

Consequently, people's behavior is not always rational and may be influenced. This contradicts traditional assumptions of economics like maximizing expected utility described by "Expected Utility Theory". This theory describes the way people make decisions under uncertainty; a normal person would be expected to make rational decisions by maximizing their expected benefit or satisfaction (utility). So, for instance, in the experiment for the Prospect Theory (a sure gain of $1000 or a 50% chance to win $2000) a rational person would be expected to be indifferent between the two choices because, in the end, they represent the same expected value, as explained in the following equation where EV is expected value and B is the second option: EV(B)= (0.5×2000) + (0.5×0) =1000. The expected value of the first

[31] D. Kahneman and A. Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, Econometrica, 1979, p. 263-291.

option would be $1000. [32] The importance of loss aversion is to understand that people act based on how they perceive gains and losses, instead of maximizing expected utility.

The concept of "dual systems of thinking" is relatively modern and in the literature review that has been done for this thesis, it is not typically seen as one of the foundational pillars of behavioral economics. However, it has been considered essential for a deeper understanding of private law. The dual systems of thinking refer to the distinction between two modes of thought that influence decision-making: System 1 and System 2.[33]

On the one hand, System 1: considers a fast way of thinking. It is an effortless and instant mental exercise that relies on heuristics to make quick judgments. It is an automatic reaction that is biased on patterns, emotions, and past experiences rather than analytic thinking. Similarly, the concept developed by Gerd Gigerenzer of practical rationality, states that due to the lack of time there is in the real world, decisions are to be made quickly and frugally. Although this system and practical rationality may provide intuitive insight in familiar situations and can also provide for everyday life decisions, it can also lead to incorrect biases and can be very influenceable. [34]

On the other hand, System 2 is a slower and deliberate analysis of a situation. It is characterized by a conscious effort and attention toward a decision that requires critical thinking and problem-solving skills. This system can be more accurate than System 1, it is

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[32] Idem, p. 264-265

[33] D. Kahneman, *Thinking, Fast and Slow*, Farrar, Straus and Giroux, Available at https://dn790002.ca.archive.org/0/items/DanielKahnemanThinkingFastAndSlow/Daniel%20Kahneman-Thinking%2C%20Fast%20and%20Slow%20%20.pdf 2011, p.30-32

[34] M. Baddeley, *Behavioral Economics: A Very Short Introduction*. Oxford University Press, 2017, p. 25

useful for complex tasks and it helps resist impulsive behavior. This type of thought is comparable to Harvey Lieberstein's concept of *selective rationality;* this is when individuals choose to be super-rational and take into account consciously all the information available.[35] However, this selective rationality, or the System 2 of thought, takes more effort and people may prefer to rely on System 1 because it is easier. In both systems emotions can be a big influence in the rationality of the decisions. [36]

Moving on to one of the basic concepts of modern behavioral economics: "Framing effects". According to this idea, how a certain choice is presented, can impact the decision.[37] Even if the outcome of a decision is the same, the perception of an individual will vary depending on how it was framed. Several academics have researched different framing styles, for instance, framing the question in terms of: gains or losses, short-term or long-term, giving it a positive or a negative attribute, and so on, all of which can affect the decision-making process.

Framing effects can have particular consequences in the legal and financial contexts. For example, if the choice is made in terms of accepting or rejecting an option, the first people tend to focus on the positive aspects of each available option. Whereas, if they had to reject one of the options, they tend to focus on the negative attributes. It was concluded that

[35] *Ibidem.*

[36] D. Kahneman, *Thinking, Fast and Slow*, Farrar, Straus and Giroux, Available at https://dn790002.ca.archive.org/0/items/DanielKahnemanThinkingFastAndSlow/Daniel%20Kahneman-Thinking%2C%20Fast%20and%20Slow%20%20.pdf 2011, p. 30-32.

[37] D. Kahneman,. *Maps of Bounded Rationality: Psychology for Behavioral Economics*, The American Economic Review 2003, p. 1449-1475.

important legal choices can be impacted by this psychological phenomenon, for instance framing; should we convict? or should we reject acquittal?" can affect a verdict. [38]

Furthermore, "Mental accounting" is an important phenomenon, this consists of the different classes into which people may classify money based on their context and source. For example, spending money in cash may feel more painful than paying with a credit card, as the physical act of handing in the cash is psychologically more representative and can create a stronger sense of loss. Similarly, when people receive money in a certain context, they are more likely to spend it in different ways; for example, if a person receives a bonus or a tax refund, he or she is more likely to splurge it rather than slave it, contrary to when they receive their salary. [39]

Another point of opposition between behavioral economics and traditional economics was its "Innovative Data gathering", placing emphasis on experimentation rather than relying solely on econometric or statistical analysis of historical data. There is a challenge when trying to collect data about behavior because it requires measurable forms of the cognitive and emotional process that influence the decision process. Methods like surveys may be useful for collecting data about happiness but can be inaccurate to test rationality. There is a need for innovative and creative experiments to understand the complexity of the human

[38] E. Shafir,. *Choosing Versus Rejecting: Why Some Options Are Both Better and Worse Than Others.* Cognitive Psychology, 1993, p. 557-592.
[39] D. Soman and D. Prelec, *The Mental Accounting of Sunk Time Costs,* Journal of Behavioral Decision Making, 2001, p. 169-185.

mind. Challenges can arise in designing experiments and having the right test subjects (commonly university students) that reflect the reality of decision-making. [40]

A proposition is to use all of these new discoveries of behavioral research to help people be aware of their decision-making processes and nudge their actions in a certain direction. This is precisely what the term "Nudge" in behavioral economics means: a subtle guide for people to make specific decisions. These are considered to be non-coercive interventions that can steer people´ decisions in a certain direction.[41]

Nudges are a way to improve the decision-making of society and lead to greater well-being. It helps to solve a problem highlighted by behavioral economics; this is the obstacle that people may often face when making fully rational decisions. Therefore, using nudges can lead to well-being; people can be pushed towards long-term thought, healthier choices, financial security and other collective goals. All of this is under freedom of choice and preserving individual autonomy.[42]

[40] M. Baddeley, *Behavioral Economics: A Very Short Introduction*, Oxford University Press, 2017, p. 25-27.
[41] R.Thaler and C. R. Sunstein. *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Yale University Press, 2008. p. 8 "The effects of well-chosen default options provide just one illustration of the gentle power of nudges. In accordance with our definition, a nudge is any factor that significantly alters the behavior of Humans"
[42] *Idem*, p. 6-8

Chapter 2: Rethinking Law Through the Lens of Behavioral Economics

2.1 Why Law Needs Behavioral Economic

The law has made an effort to be innovative and mix with other areas of knowledge to reach new understandings of the implications and effects of the law. One of these areas is in fact law and economics. However, similarly to traditional economics, the traditional law and economics were based on the premises of rationality and a behavioral approach is not only helpful but necessary. The obstacles that humans may face when making decisions can have an impact on our society and, therefore, in the legal world.

Law is a tool to regulate human behavior, people are expected to choose legality over illegality. This is a rational decision and considering the number of laws, norms, and rules, each person is expected to make a substantial number of rational decisions. This means that it is expected from people to follow the *homo economicus* model of traditional economics; assuming rationality.

As it has been explained in the second chapter, behavioral economics cannot stress enough how unreliable humans are when it comes to rational decision-making. Several factors will make people behave in a certain way: framing effects, cognitive bias, the system of thought they use (system 1 or 2), mental accounting and among other factors. In addition, in the capitalist economic system, people may find contradictions between legality and the

relentless pursuit of profit. For example, according to the Prospect theory, it can be expected of a person to avoid taxes rather than pay them. This is because of loss aversion; paying taxes is perceived more as a loss rather than a win and people feel more pain losing than satisfaction winning. Thus, it is natural and predictable that a person tries to find ways to avoid taxes, even if it means a risk. It would be less painful to use the power of framing effects, where taxes can be posed not as a loss but as a collective well-being.

The importance of including the behavioral economics perspective in law and economics has been highlighted by many. Bounded rationality, willpower and self-interest are limitations that have legal implications, like influencing legislation, contracts, and judicial decision-making. Bounded rationality can make people have a systematic incorrect judgment of areas like negligence determinations, risk assessments and environmental regulations.[43]This is because the judges or other decision-makers have to estimate probabilities. The role that law can play here is to identify these predictable problems and counteract them.

Moreover, bounded willpower can be targeted by policy-makers, like mandatory retirement plans or taxes on unhealthy products to guide individuals towards long-term decision-making. As well as bounded self-interest can be protected by ensuring fairness, having contract enforcement, or attacking unfair market transactions. This new field of study, in

[43] C. Jolls, C. R. Sunstein, and R. Thaler, *A Behavioral Approach to Law and Economics*, Sandford Law Review, 1998, p. 1477: "Each of these bounds represents a significant way in which most people depart from the standard economic model. While there are instances in which more than one bound comes into play, at this stage we think it is best to conceive of them as separate modeling problems. Nonetheless, each of the three bounds points to systematic (rather than random or arbitrary) departures from conventional economic models, and thus each of the three bears on generating sound predictions and prescriptions for law".

which behavioral economics has been mixed with law has been denominated "Behavioral law and economics". This research school has a more realistic foundation for legal policy making, by considering human cognitive limitations. Instead of assuming rationality, laws should be designed to nudge individuals toward better decisions while respecting personal freedom.[44] The tendency has been to reexamine traditional approaches and build up new theories and strategies when it comes to the market and lawmaking. For instance, in January of 2015, the World Bank stated that there should be procedures to mitigate biases, as this may have an impact in the development of economics.[45]

2.2 The Challenge of Integrating Behavioral Economics into Private Law: Balancing Freedom and Regulation

Private law may represent a higher challenge for an effective integration with behavioral economics. The possibility to have a strong coercive regulation is problematic; as other branches of law may have, such as administrative or criminal law, while in civil and commercial law the autonomy of the parties has a higher standard. It is necessary for the parties to have freedom for them to self- regulate to keep the market innovation and protect their growth. The autonomy of individuals in the frame of private law has a strong association with contract law and principles such as *pacta sunt servanda* (the agreements must be kept).

[44] *Idem*, p. 1476-1480.
[45] World Bank. *World Development Report 2015: Mind, Society, and Behavior*. Washington, DC: World Bank, Available at https://www.worldbank.org/content/dam/Worldbank/Publications/WDR/WDR%202015/WDR-2015-Full-Report.pdf. 2015, p 19.

This freedom, also known as the principle of private autonomy,[46] can be defined as the capacity or right of individuals to freely create, extinguish, or transform their legal relations, making their agreements the law for the parties.[47] However, there are limits to be observed; the law creates a space for parties to self-regulate, but also is because of the law that this space exists.[48]

It is crucial to keep the autonomy principle and in the base of the neo-liberal economic model adopted by several countries. As it has a close relation to fundamental rights such as self-determination, freedom, and dignity[49]. A very strong interventionist government could directly interfere with some of the core principles of the neo-liberal economic model. However, as a result of a behavioral economic approach, where rationality can be limited by certain factors as exposed in the previous chapter, it is natural to raise concerns, and even pose the question; can individuals be trusted to make completely rational agreements and self-regulate?

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[46] S. Muñoz Laverde, *El Postulado de Autonomía Privada y Sus Límites Frente al Constitucionalismo Colombiano Contemporáneo, Homenaje a Fernando de Trazegnies Granda,* Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2009, p. 291 "*la autonomía privada es una prerrogativa (...) que permite a las personas, en sus declaraciones de voluntad, crear sus propias reglas o normas de comportamiento, con el objeto de autorregular sus relaciones jurídicas*".

[47] T. Gutmann, *Some Preliminary Remarks on a Liberal Theory of Contract*, Duke Law Scholarship, 2013, p. 40. "Contracts are tools for realizing individual self-determination by means of voluntarily entering legally binding agreements".

[48] H. L MacQueen and S. Bogle, *Private Autonomy and the Protection of the Weaker Party: A Historical Perspective*, Oxford: Oxford University Press 2017, p. 8-10.

[49] S. Muñoz Laverde, *El Postulado de Autonomía Privada y Sus Límites Frente al Constitucionalismo Colombiano Contemporáneo, Homenaje a Fernando de Trazegnies Granda,* Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2009, p. 292 "Es, pues la autonomía privada, una institución de derecho natural, y, por lo mismo, íntimamente ligada al concepto de dignidad de la persona".

The autonomy principle has necessary limits, which are permitted in a neo-liberal model and are duty in the welfare state; the government has an active role regulating the economy and creating fair market conditions where parties can self-regulate. There is a balance between freedom and government intervention. This implies the existence of different sources that contain these limits; such as law, general principles, public policies, and others, depending on the jurisdiction. In the next part, these boundaries found in the Italian, Colombian, and European Union (EU) legal systems will be analyzed. Although all of these jurisdictions formally recognize the mentioned principle in different forms in positive law, there are noticeable similarities in the balance of contract freedom and the state intervention.

In Colombia and Italy, the private autonomy principle is granted a constitutional rank, as well as a recognition in the civil codes of each country. In Colombia, this principle is portrayed in art. 333 of the Colombian Constitution, which states that the economic activity and private initiative shall be free and shall be exercised within the limits of the *bien común* (general welfare) attributing to corporations a social function. In contrast to the Italian Civil Code, which affirms positively the recognition of the principle, the Colombian Civil Code (art. 16) recognizes it negatively; by stating that the private manifestation of will cannot be contrary to the public order. [50] It affirms its existence by recognizing its limits. The Italian Civil Code in Art. 1322, although in a positive way, it also states that private autonomy must be subject to the law and corporate norms. In addition, art. 41 of the Italian Constitution declares that

[50] *Idem,* p. 297.

the private free initiative is free but must not conflict with social utility or harm health, the environment, public security, freedom, or human dignity.[51]

By opposition, in the EU legal order, the principle is openly recognized but there is not a main article that provides its existence. Instead, there is a group of norms that imply its recognition. It has been selected, for this thesis, some of the most important articles, however, many other norms contain beneath the literality of the words, the principle of private autonomy. Firstly, Art. 16 of the EU Charter of Human Rights, foresees the freedom to conduct a business, which is closely linked to the private autonomy principle. Secondly, Art. 119 of The Treaty on the Functioning of the European Union (TFEU), states that the EU economic policies shall be based on an open market with free competition, which enforces the idea of having an economy based on private initiative. Lastly, Art. 114 of the TFEU, limits the free practice of the private autonomy principle, stating the possibility of creating measures that approximate national laws to ensure the establishment and operation of the internal market.

Despite its undoubted recognition across the three legal systems, private autonomy is not an absolute freedom, as all rights; it has limits. Colombia and Italy have a similar limit that can be qualified as the public order. Art. 1518 of the Colombian Civil Code states that the limits of the contractual object are to be the mandatory law, good moral costumes, and public

[51] Código Civil de Colombia, Art. 16; Constitución Política de Colombia,1991, Art. 333; Codice Civile,1942 Art. 1322; Contituzione Italian Art. 41.

order[52]. This article and other similar ones have been interpreted by the Colombian doctrine as the official boundaries of the private autonomy principle. [53] Nevertheless, there is a line of academia that affirms that the only limit is the public order, as mandatory law and good moral costumes are manifestations of public order. The mandatory law exists to regulate matters of public order. Similarly, moral costumes are the norms that are widely accepted by society and operate inside the same frame of public order, but they are associated with moral standards[54].

From a subjective perspective, it is considered that the limits to the private autonomy principle found in the Italian legal system can also be unified by the concept of public order, applying the same ideal of Colombian doctrine to the Italian order. The main limits are found in the mentioned articles of the Italian Constitution (Art. 4) and in the Italian Civil Code (Art.1322) which states that freedom of the parties is to be restricted by: health, the environment, public security, freedom, human dignity, the law, and business norms. All of these can be encapsulated into the conception of public order, as they are elements whose final goal is, in fact, public order.

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[52] Código Civil de Colombia, Art. 1518.

[53] S. Muñoz Laverde, *El Postulado de Autonomía Privada y Sus Límites Frente al Constitucionalismo Colombiano Contemporáneo, Homenaje a Fernando de Trazegnies Granda*, Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2009, p. 293 "*Aunque es frecuente ver en la doctrina la idea según la cual son tres los límites de la autonomía privada: ley imperativa, orden público y buenas costumbres, y aunque los propios textos legales refieran separadamente estas categorías jurídicas, pienso que es posible, conceptualmente hablando, reducir a uno solo el límite de la autonomía privada: el orden público*".

[54] *Idem*, p. 293-298.

With regard to the EU legal order, a similar analysis may be proposed, suggesting that the limitation to the principle of private autonomy can likewise be framed through the concept of public order. The EU public order concept is strongly focused on the protection of the internal market. The Commission, Parliament and the European Court of Justice (ECJ) will enforce and create norms that prevent the disruption of the economy as stated in Art. 114 of the TFEU. Although it may seem that the Colombian and Italian states have a more moralistic approach to the concept of public order, the EU has also acted to expand its protection beyond the internal market. This can be seen in the Non-discrimination principle, which has further limited contractual autonomy. The Italian-European contract law has increasingly incorporated the non-discrimination principle, prohibiting agreements that discriminate based on gender, religion, nationality, among others.[55]However, even if we take into consideration the non-discrimination principle, the Colombian and Italian conceptions of public order may have a more moralistic approach, as they are welfare-states.

In the framework of private law, public order can be defined as the sum of principles, values and beliefs accepted in a specific society, seen as essential for a harmonic coexistence of its members. [56] This is not just the result of the positive law, but rather an abstract concept that covers more than what can be expressed in the written law. For this reason, there are cases in

[55] G. Carapezza Figlia, *The Prohibition of Discrimination as a Limit on Contractual Autonomy*, The Italian Law Journal, Available at https://theitalianlawjournal.it/data/uploads/4-italj-1-2018/pdf-singoli/5-carapezza-figlia.pdf , 2018, p. 94–98.

[56] S. Muñoz Laverde, *El Postulado de Autonomía Privada y Sus Límites Frente al Constitucionalismo Colombiano Contemporáneo*, *Homenaje a Fernando de Trazegnies Granda*, Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2009, p. 294 "*Definir orden público en las relaciones privadas es tarea difícil. Para nuestros propósitos digamos simplemente que es el conjunto de principios, valores y creencias predominantemente aceptados en una sociedad determinada como indispensables para la convivencia armónica de sus integrantes."*

which the judge and the parties must decide if a certain agreement is contradictory to the public order. Another difficulty faced when defining public order, is the fact that it is a dynamic concept that evolves based on cultural, political, and economic changes. For this reason, the boundaries set by public order may have blurry differences. For example, past societies allowed slavery or gender discrimination, but modern interpretations of public order now reject such practices[57].

2.3 The Double-Edged Sword of Behavioral Economics: Protecting Consumers from Psychological Manipulation

One of the biggest challenges of the rules focused on limiting contractual autonomy is the protection of consumers. As the public order concept evolves to fit into modern society, one of the biggest threats lies beyond legal constraints. New types of psychological tactics can be used in such form that contradict the public order, but still are left partially unregulated due to its newness. As the EU, Italian, Colombian and other legal orders rush to protect the public order and contractual fairness, behavioral economic analysis of the markets may be worrying.

Discovering the insights of behavioral conduct can be a great tool, however, it can also be a big threat if used wrongly. As the modern world advances people are more and more exposed to big quantities of information, especially to advertisements. Behavioral analysis can be

[57] *Idem*, 2009, p. 294-298.

applied and consumers can be tricked into buying products; for instance, the way marketing campaigns are presented or the training a salesperson receives aimed to persuade customers, using the power of psychology.

The digital world is a key facilitator for businesses to advertise and sell their products, as well as for consumers to find the things they want. The internet can be perceived as a win-win situation, where connections are made and needs are fulfilled. However, there is a misconception about the number of cognitive biases a person is exposed to in the web, including a false notion of control. The techniques to market and sell products have evolved and "dark patterns" and "manipulative personalization" are being used constantly. "Dark patterns" are the practices used in the cyber world to steer or manipulate people into a choice that is not in their best interest. "Manipulative personalization" is the idea of using personal content and information to tailor the digital offered experience in a certain way.[58]

Dark patterns have a noticeable presence in the web, as studies show 97% of some of the most popular websites and apps use some form of dark pattern. [59] There are several types of dark patterns and they are employed depending on the platform and type of service or product. For instance, hyper-nagging is the practice of repeated requests to take action is commonly used in e-commerce, using countdowns to give out a sense of urgency. Other

[58]F. Lupiáñez-Villanueva, A. Boluda, F. Bogliacino, G. Liva, L. Lechardoy, and T. Rodríguez de las Heras Ballell, *Behavioural Study on Unfair Commercial Practices in the Digital Environment: Dark Patterns and Manipulative Personalisation. Final Report*, Luxembourg: Publications Office of the European Union, 2022, p. 20 "Dark patterns is a that is generally used to refer to practices in digital interfaces that steer, deceive, coerce, or manipulate consumers into making choices that often are not in their best interests"

[59] *Idem*, p. 20-45.

practices include: making critical information hard to find, difficulties for cancellation, forced registration and so on. In addition, the dark patterns are not used in isolation but rather a combination in a single app or website and, in many cases manipulative personalization is also applied. Manipulative personalization has been proven to be used less than dark patterns, but its use has been highlighted to grow significantly. The personalization techniques target the vulnerabilities of consumers to shape their decisions-making. This practice is highly manipulative as it capitalizes on emotions and cognitive biases. Therefore, it is very problematic. [60]

Another even more concerning aspect that digital ethnography has revealed is the low levels of consumer awareness of these practices (dark patterns and manipulative personalization). People have difficulties identifying that they are being manipulated and when they do; they tend to accept it as part of the normal digital experience. However, when the consumer does have awareness of the use of these manipulative techniques, he or she do consider them as negative, therefore the real problem is the limited ability to recognize them; rather than the lack of opposition to their usage[61].

Moreover, consumers tend to misperceive the level of harm that these practices may cause. People may even have the false notion of immunity, as they are not conscious of their cognitive deficiencies and they trust that their decisions are rational. The reality is that the impact on the consumer can be unpleasant, for instance, spending money they did not intend

[60] *Ibidem*.
[61] *Ibidem.*

to, causing financial harm; or how personalization involves data collection and can infringe privacy; or using emotional manipulation can be a source of feelings of helplessness leading to mental harm. As these practices can misled consumers, they may cause harm to the market and the collective welfare, which can affect competition, reduce price transparency and, ultimately, harm the trust in the online market.[62]

For the foregoing reasons, it has been emphasized that the concerns related to consumer protection have gained increasing importance. The usage of personalization and dark patterns has been proved very effective for selling products. There is an increase in behavioral economic studies to integrate the insides of psychology to enhance manipulation, making the understanding and power of behavioral economics expand and be misused. Consequently, there have been several legal responses have appeared.[63]

Likewise, another risk consumers may face is the poor contract design. As in other traditional schools of research, previously mentioned in this thesis, the traditional consumer theory relies on rational decision-making, where the demand of a product is based on its benefits and its prices. However, behavioral economics considers the consumers as imperfect rational beings that rely on heuristics and are often biased and, therefore, do not base their consumption

[62] *Ibidem.*

[63] *Idem,* p. 20 "For at least two decades, designers of digital online artefacts have embedded the knowledge about heuristics and biases to increase the capacity of such artefacts to capture consumers emotions and neutralise deliberative cognition".

tendencies solely on benefits and prices. This can lead for companies to profit of the systematic irrational consumer' decision making[64].

Firms have found different ways to take advantage of these limitations and strategically design misleading contracts. One of these methods is using the gap between the perception of reality and the actual information. For instance, inflating the perceived benefits of a product without actually increasing them, or playing with the perception of prices, making them seem low but in reality, they are high due to additional fees and/or complex pricing structures. Another example is when firms lead consumers to misjudge the product attributes versus the frequency of use; this can be seen when a person may overestimate the benefits of borrowing money in a credit card because of how frequently they use it and underestimate the high interest rate. Companies can strategically design contracts that can maximize these wrong perceptions of reality.[65]

As it is well known one of the European Union's main goals is to protect the internal market and its consumers. For this reason, the EU has developed a framework to attack these and other unhealthy practices. Italy as a member state has followed this framework and provided regulations. Similarly, in Colombian legislation, although not as advanced, an effort has been made to protect the consumers. However, it may not be enough given the rapid advances and

[64] O. Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets*. Oxford University Press, 2012.
[65] *Ibidem.*

innovative uses of the before mentioned practices. This is why effective legal regulations are still required.

2.4 Balancing Innovation and Consumer Rights: A Global View on Consumer Protection in the EU, Italy and Colombia

In the modern world the digital economy has become one of the main pillars of the global market. The regulation of the online space is one of the biggest concerns for national and supra-national legislators. Mating the balance of innovation, helpful for market growth, and the protection of rights has been a constant challenge for private law, especially consumer law. The EU has made a special effort through the Digital Single Market Strategy to eliminate the digital barriers and take advantage of this cross-border platform, where the EU members can have a fair environment for business and consumers to interact. Italy, as one of the EU member states, has implemented the different directives and develop the legal framework to follow the European standards and stabilize the relation between consumer protection and innovation of the digital economy. Meanwhile in Colombia the regulatory approach has been more gradual and heavily influenced by the industrial capabilities of the country, the level of digital penetration and other socio-economic factors. This section will address the different approaches taken by the Colombian, Italian, and EU legal orders to consumer protection, particularly in contexts where individuals' decisions may be influenced through behavioral economics techniques, as discussed in the previous chapter.

As a result of the Digital Single Market the Italian government enacted the Legislative Decree No. 170/2021, which implemented the EU Directive 2019/771 and amended the Italian Consumer Code by replacing and adding a considerable number of articles.[66] It focused on consumer contracts and introduced an extension of traditional consumer protections to goods with digital elements. Concepts like "conformity" were updated to fit the consumer in the digital economy context. Another important contribution of the directive and later the decree, is recognizing that goods that contain digital elements have a special need to be costumed supported for the expected lifespan of the product, not just the sale, which are related to the consumers' vulnerability in the digital environment.[67] The decree included mandatory provisions of security updates and the imposition of stricter duties, for the seller, of transparency and performance. This lightens the burden of consumers, which are susceptible to being misled by manipulative personalization, dark patterns, poor contract design or other techniques related to behavioral economics. This can also be seen in the Art. 128 of the Italian Consumer Code, which after the decree's reform expanded the scope of application for the consumer protection for goods that rely on software or digital services, also known as goods with digital elements. However, the Art. 128 still makes it clear that the provisions shall not apply to contracts for the supply of digital content or for a digital service.[68]

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[66] Italian decree No. 170/2021 and EU directive 2019/771.

[67] EU directive 2019/771, Art. 7 "the consumer may reasonably expect given the type and purpose of the goods and the digital elements, and taking into account the circumstances and nature of the contract, where the sales contract provides for a single act of supply of the digital content or digital service; or (b) indicated in Article 10(2) or (5), as applicable, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time".

[68] Italian Consumer Code, Art. 128 "Le disposizioni del presente capo non si applicano ai contratti di fornitura di un contenuto digitale o di un servizio digitale, i quali rientrano nel campo di applicazione delle disposizioni di attuazione della direttiva (UE) 2019/770 del Parlamento europeo e del Consiglio, del 20 maggio 2019, relativa a determinati aspetti dei contratti di fornitura di contenuti digitali o servizi digitali. Esse si applicano ai contenuti digitali o ai servizi digitali incorporati o interconnessi con beni, ai sensi del comma 2, lettera e),

Although we can find a regulatory advancement with innovative norms, such as EU directive 2019/771 and thus Decree No. 170/2021, there are still some gaps to fully address all of the problems of the digital world.[69] From the EU directive point of view, it still has some flaws, like that it does not address the role of the online platforms that act as intermediaries. The lack of clarity regarding these websites often results in avoidance of responsibility assigned to the seller. Scholars argue that platforms should be accountable for public claims, such as advertising statements, especially when they facilitate transactions, even if they are not directly a party of the contract. [70] From the Decree No. 170/2021 point of view, as a transposition act it can fill some of the gaps but also fail to properly and fully address the role of online platforms, but did enhance consumer protection and eliminated the consumer's duty to notify the seller of defects within two months. Making sellers liable for any defects that arise within two years or longer for digital goods, and if a defect appears within one year, it is presumed to have existed at delivery. This means a shift in the burden of proof to the seller[71].

Further on, the directive follows the European tendency of treating consumers as informed subjects when purchasing products. Colombian law also embraces the concept of responsible

numero 2), i quali sono forniti con il bene in forza del contratto di vendita, indipendentemente dal fatto che i predetti contenuti digitali o servizi digitali siano forniti dal venditore o da terzi. Quando è dubbio se la fornitura di un contenuto o di un servizio digitale incorporato o interconnesso faccia parte del contratto di vendita, si presume che tale fornitura rientri nel contratto di vendita".

[69] EU directive 2019/771 and Italian decree No. 170/2021.

[70] L. Sposini, *The Italian Implementation Of The Sale Of Goods Directive And The Digital Contents And Services Directive: Between Critical Issues And Novelties*, Information Society Law Center, University of Milan, 2024 p. 799-804.

[71] *Ibidem.*

consumption, Art. 3 of the Colombian Consumer Statute imposes obligations on consumers to act in good faith and follow instructions provided by producers and suppliers.[72] This aligns with the European tendency to view consumers not merely as vulnerable parties but as active decision-makers. As it has been exposed in the last two chapters, consumers can be easily manipulated and misled, which can end up with them making irrational decisions. Nevertheless, the EU directive[73] and the Italian Consumer Code seems to be aware of the possible availability heuristics, limited information and the limited cognitive abilities of consumers. As in Art. 7 of the directive[74] and Art 129 of the Italian Consumer Code[75], it is required that when a product deviates from the standard expectations or requirements, the consumer should accept that deviation, expressly and separately, at the time of the contract. Therefore, in my opinion these articles try to ensure that consumers are equipped with transparent and accessible information, eliminating irrational decisions based on limited information.

[72] Ley 1480 de 2011, *Estatuto del Consumidor de Colombia,* Art. 6 "*Deberes de los consumidores: 2.1. Informarse respecto de la calidad de los productos, así como de las instrucciones que suministre el productor o proveedor en relación con su adecuado uso o consumo, conservación e instalación; 2.2. Obrar de buena fe frente a los productores y proveedores y frente a las autoridades públicas; 2.3. Cumplir con las normas sobre reciclaje y disposición de desechos de bienes consumidos.*

[73] EU directive 2019/771

[74] Idem, 2019 Art.7 "There shall be no lack of conformity within the meaning of paragraph 1 or 3 if, at the time of the conclusion of the sales contract, the consumer was specifically informed that a particular characteristic of the goods was deviating from the objective requirements for conformity laid down in paragraph 1 or 3 and the consumer expressly and separately accepted that deviation when concluding the sales contract".

[75] Italian Consumer Code (Decree No. 170/2021), Art. 129 *"Il consumatore non può far valere la mancanza di conformità se, al momento della conclusione del contratto, era stato specificamente informato che una particolare caratteristica del bene si discostava dai requisiti oggettivi di conformità e il consumatore ha espressamente e separatamente accettato tale scostamento al momento della conclusione del contratto".*

Similarly, Colombia has developed legal reforms and jurisprudence that show the effort to adapt into the protection of nowadays consumer needs. However, it does not have a comprehensive market framework as the European Digital Strategy. Consumer rights protection is primarily governed by the Law 1480 of 2011, which is the Colombian Consumer Statue. [76] This law has lay out principles and with judicial intervention, the legal order has been able to adapt, to a degree, into the modern and digital world.

One of the foundational aspects of consumer regulation that appeared notably flexible is the definition of "consumer" under Colombian legislation. This definition is wider as it includes legal persons, making the consumer protection stronger in this sense. In Art. 5 of the Colombian Consumer Statue the consumer is defined as any person, legal or natural, who is the final recipient or a good or service, for domestic or professional use, as long as that product or service is not resold or somehow incorporated in the supply chain.[77] The definition in its Italian and EU counterpart; the Italian Consumer Code (Art. 3)[78] and the EU Directive 2011/83 (Art. 2) on consumer rights, both exclude legal persons and explicitly make reference only to natural persons as consumers. It is agreed that Decree No. 170/2021 did not take the opportunity to include legal persons within the definition of consumers, and

[76] Ley 1480 de 2011, Estatuto del Consumidor de Colombia

[77] *Idem*, Art.5 *"Consumidor o usuario. Toda persona natural o jurídica que, como destinatario final, adquiera, disfrute o utilice un determinado producto, cualquiera que sea su naturaleza para la satisfacción de una necesidad propia, privada, familiar o doméstica y empresarial cuando no esté ligada intrínsecamente a su actividad económica. Se entenderá incluido en el concepto de consumidor el de usuario."*

[78] Italian Consumer Code, Art. 3 "*Consumatore o utente: la persona fisica che agisce per scopi estranei all'attività imprenditoriale, commerciale, artigianale o professionale eventualmente svolta".*

consequently within the scope of protection, an approach that is, by contrast, adopted in Colombian legislation.

Attention is drawn to the differences between these legal jurisdictions and their respective approaches to addressing certain risks consumers may face when subjected to unfair techniques involving behavioral economics. This is an important process to protect consumers but also to build trust in the online market that represents a strong pillar of the nowadays economy. It is clear that the Colombian regulation is less innovative but it also has flexible principles that may adapt over time. It is also true that the digital economy is less strong in Colombia than in Italy and in general the EU. In addition, the Digital Single Market Strategy has properly understood that over-regulation and over-protection of consumers is a blockage in the market's growth, however there are still high risks for consumers that are left unprotected. I believe there is still awareness to be built; consumers have to be protected by nudging them into more rational decisions. Part of the awareness is by ensuring the disclosure of information as seen in Art. 7 of the mentioned Directive and Art 129 of the Italian Consumer Code. Nevertheless, there are still gaps, as the example expressed before; the lack of clarity of the responsibilities of online platforms, but also there are other more complex gaps like the use of dark patterns and manipulative personalization. Ultimately, each jurisdiction reflects different stages of adaptation to the complexities of digital markets. A continued dialogue between these systems could inspire future reforms that are responsive to the evolving nature of consumption in the modern age.

Chapter 3: Alternative dispute resolution (ADR) mechanisms and the judicial agreements

In this final part, the exploration turns toward one of the most vital dimensions of private law: conflict solving. Bringing insights of behavioral economics that have guided this thesis to better analyze the different dimensions of conflict and how to solve it in a more efficient way. This chapter seeks to examine how cognitive biases, decision-making heuristics, and the limits of rationality affect the behavior of individuals involved in a judicial process and in alternative dispute resolutions (ADR). By analyzing the judicial system and ADR through this interdisciplinary lens, in this part of the thesis it is aimed to uncover how these mechanisms can be of help to rethink the method used to solve problems raised between individuals in private law and address some of the possible conflicts that, especially consumers may encounter in the digital/modern world. This thesis seeks to offer a practical view on how law can integrate this knowledge to create fairer, more efficient, and more people-centered resolution outcomes.

3.1 The justice system seen though behavioral economics

The judicial system is one of the most important institutions of a state; it has played a fundamental role in resolving conflicts and making rights enforceable. Judges have undertaken a trusted role of applying the law, and in some legal systems, they even have the authority to shape it. However, much alike the traditional schools of economic and legal

thought, the judicial system must be reimagined through the integration of other fields of knowledge, such as behavioral economics. The judge is expected to follow legal commands and social expectations to make fair, impartial and overall rational decisions but we must not overlook their human nature and the extent to which their decision-making can be influenced by cognitive biases and bounded rationality.

As some academics would say there are certain illusions often attributed to the courtrooms like; objectivity, predictability, and logic. The reality is that some of the court's legal and social duties are actually unreliable. For instance, most of the legal decisions are based in a flawed reconstruction of facts, which undermines the whole system as it pretends to be based in rules and logic, but actually is supported by human error, guesswork and intuition. [79] Moreover, there are many academics that have also highlighted how the human nature of the parties can get in the way of a rational judgement. The courtroom is more a place of battle between the lawyers than an actual effort to find the truth. This is described as the "fight" theory versus the "truth" theory of justice. Which could turn the judicial process into a confrontation of strategies and emotional manipulation, rather than a quest for justice. [80]

Furthermore, legal realists have suggested that judges are not able to isolate their personal views from the final judgments. They are often influenced by factors like; political opinions,

[79] C.K. Winter, *The Value of Behavioral Economics for EU Judicial Decision-Making*, Published online by Cambridge University Press, Available at https://www.cambridge.org/core/journals/german-law-journal/article/value-of-behavioral-economics-for-eu-judicial-decisionmaking/343127BA41C33A1D96436FFF462D63B3 , 2020.

[80] R. Fred, *Courts On Trial: Myth and Reality in American Justice*, Indiana Law Journal, Article 13, 1949, p. 117-119.

philosophical views, sex, religion, race, or even the potential gain for their personal career. Apart from these personal challenges to be completely objective, judges are proven to make systematic and predictable errors. [81] As behavioral economics have shown, similarly to other human beings faced with decision-making, judges can act irrationally and make decisions influenced by anchoring and adjustment effects, bounded rationality, framing effects and heuristics biases.

The judicial decision can be influenced by the anchoring and adjustment effects, especially those in which the judge has to make a numerical calculation. It has been especially seen in the cases where the decision-maker has to transform a qualitative situation, such as moral damages, into a quantitative amount of money. In some cases, there are guidelines that help the judge decide on a sum, but there are other types of damages that lack a solid reference like a specific emotional suffering, where an arbitrary discretion of the judge can lead to an inconsistent ruling.[82] Experimental studies show striking variability in monetary awards: in one study, the standard deviation of pain and suffering damages was over 300% of the mean. [83] The explanation behind this is the anchoring and adjustment effect, which has been

[81] C.K. Winter, *The Value of Behavioral Economics for EU Judicial Decision-Making*, Published online by Cambridge University Press, Available at https://www.cambridge.org/core/journals/german-law-journal/article/value-of-behavioral-economics-for-eu-judicial-decisionmaking/343127BA41C33A1D96436FFF462D63B3 , 2020.

[82] D. Teichman, and E. Zamir, *Behavioral Economics and Court Decision-Making*, Review of Law and Economics, Hebrew University of Jerusalem Legal Research Paper 21-27, Available at https://ssrn.com/abstract=3935162, 2021, p. 7-11.

[83] Idem, p. 7-8 "For instance, in a large-scale experiment involving more than 1000 jury-eligible participants who viewed a videotape of a product liability trial, the standard deviation of the damages awarded was 138% of the mean for economic damages, and 313% of the mean for pain and suffering damages. When analyzing trimmed values (where values above the 97th percentile were treated as though the jurors favored the award determined by jurors at the 97th percentile), the standard deviation was 75% for economic damages, and 154% for pain and suffering damages".

explained in the second chapter of this thesis, people have the tendency to rely on the first piece of information they have access to, setting an anchor and then adjusting based on it. In the frame of a judicial process a judge can get attached and mentally rely on the suggested amount for compensation of damages. [84] There have been several studies to show the effects of anchoring and adjustment in judicial decisions, for instance in one study in Germany judges were found to be harsher in their decisions after they had been exposed to a rigged die that showed a high number. In another study done in USA showed that judges would increase their damages awards after the plaintiff informed them of a high ruling given on a television program called "Court TV Show"[85].

Another effect that has been related to quantitative ruling are the framing effects. This means the way the legal outcome is presented or framed, can have an impact in the judgement. For instance, when a judge is asked to give out a sentence in months and not in years, this can create a sense of severity in their judgement and because there is a distortion on the perception of the scale, this can influence the final outcome. If we also consider the anchoring effect, it doesn't only affect numeric values but it can also make decision-makers change their standards of evaluation. For instance, framing a question so that the jurors consider a higher degree of fault in a negligence case can lead them to interpret the facts more harshly and

[84] C.K. Winter, *The Value of Behavioral Economics for EU Judicial Decision-Making*, Published online by Cambridge University Press, Available at: https://www.cambridge.org/core/journals/german-law-journal/article/value-of-behavioral-economics-for-eu-judicial-decisionmaking/343127BA41C33A1D96436FFF462D63B3, 2020. "Even more problematic seems that anchors that do not provide any useful information may still influence the judgment. This concept applies even if the decision-maker knows that the initial information does not add any value to the decision-making process"

[85] D. Teichman, and E. Zamir, *Behavioral Economics and Court Decision-Making*, Review of Law and Economics, Hebrew University of Jerusalem Legal Research Paper 21-27, Available at https://ssrn.com/abstract=3935162, 2021, p. 9.

increase the level of blame attributed to the plaintiff. This demonstrates how decision-makers are vulnerable to the power of anchors and framing effects, showing that they can have a significant impact on the outcome of a ruling. [86]

These effects can be even stronger when faced with uncertainty and the judge is not completely aware of all the consequences, probabilities, or outcomes. As mentioned in the second chapter, availability heuristics and representative heuristics are related to decision making under uncertainty, where rational thinking may have even more challenges. For instance, a judge can overestimate the likelihood of an even if recently in the media there had been a memorable event, and decide to take an even stricter measure influenced by availability bias. Or a judge could also rely on stereotypes, more than facts, to assess the probability of a situation and adopt a position moved by representativeness biases.[87] Furthermore, events like terrorist attacks or environmental catastrophes can create strong cognitive illusions and lead to biases.[88]

[86] Ibidem.

[87] A. Tversky and D. Kahneman, *Judgment under Uncertainty: Heuristics and Biases,* Science AAAS, 1974, p. 1124–1131.

[88] C.K. Winter, *The Value of Behavioral Economics for EU Judicial Decision-Making,* Published online by Cambridge University Press, Available at https://www.cambridge.org/core/journals/german-law-journal/article/value-of-behavioral-economics-for-eu-judicial-decisionmaking/343127BA41C33A1D96436FFF462D63B3
,2020. "Individuals, including judges, will overestimate the likelihood of such an event reoccurring and will therefore—especially in the aftermath of the event—overvalue the danger to the environment or public security. This analysis does not suggest that overall environmental protection or public security should be decreased, rather it emphasizes that human intuitions are not accurately reflecting the true probabilities and dangers to the affected goods, which can lead to a false valuation process on the importance of such goods."

Concretely, in decisions where the uncertainty level is higher because the level of judicial discretion is also high, the judge, besides the normal factual uncertainty, has to face legal uncertainty. This can be seen in the Anglo-Saxon legal system when the judge has to create new case law and see eye to eye with the uncertainty from a legal point of view. There are scholars that also suggest the legal uncertainty level is also high in the proportionality test within the EU, as it is a process in which the judge has to decide whether the interference with a fundamental right is appropriate, necessary, and proportionate in a strict sense. In this test the judge has to balance interests that often lack clear, objective criteria and rely heavily on judicial discretion. [89]

Moving on from the availability heuristics and representative heuristics, judges can be also influenced by several external factors. Studies have shown how the ruling of a judge may vary depending on the time of the day.[90] Shai Danziger did a research in which he analyzed the ruling of eight judges during 10 months, he was able to notice how experienced judges in sequential parole decisions would adopt different positions depending on the part of the day. It was also demonstrated how in the morning the judges would approve two thirds of the petitions, but as the initial part of the day passed by the number of approvals would heavily decrease. The most significant change would be after having a lunch break, the judges were found to take more generous decisions and would have the tendency to accept the petition of prole. At the end of the experiment, it was concluded that the humor of the judges

[89] Ibidem

[90] A. Oppenheimer, *Sálvese Quien Pueda: El Futuro Del Trabajo En La Era De La Automatización*, Penguin Random House Grupo Editorial, 2018, p. 33-34.

would vary during the day and this would affect their decisions. It was also speculated that there were two major factors that accepted their humor: first, the level of sugar would decrease and second, the number of cases would increase leading to a fatigue in the judges. At the end of the morning the judges were tired and their bad temper would increase. [91]

In light of all this, it becomes clear that the justice system, while built on ideals of fairness, rationality and impartiality, is far from immune to the human limitations of those who operate within it. Especially judges, despite their efforts to meet these global justice standards, are still human beings and are susceptible to cognitive biases, anchoring and adjustment effects, emotional fluctuations, mental fatigue and many other external factors. Behavioral economics offers us a powerful lens to uncover these often-overlooked flaws and better understand how legal decisions are truly made. Recognizing these imperfections should not be seen as a threat to justice, but rather as an opportunity to rethink and modernize the judicial system. By integrating insights from behavioral economics, we can begin to design structures and safeguards that support better decision-making, reduce systematic error, and ultimately bring us closer to the fair and humane justice system society aspires to.

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[91] S. Danziger, J. Levav, L. Avnaim-Pesso, *Extraneous factors in judicial decisions*, Proceedings of the National Academy of Sciences, 2011, 10.1073/pnas.1018033108 "“We record the judges' two daily food breaks, which result in segmenting the deliberations of the day into three distinct “decision sessions.” We find that the percentage of favorable rulings drops gradually from ≈65% to nearly zero within each decision session and returns abruptly to ≈65% after a break. Our findings suggest that judicial rulings can be swayed by extraneous variables that should have no bearing on legal decisions.”

Another important factor that is often overlooked in the traditional analysis of the judicial process is the party satisfaction. At its core the judicial process is public service provided by the state. Like any service, quality cannot be fully measured without taking into account the level of satisfaction the receiver of that service has. Normally, the legal system is evaluated through internal metrics such as procedural correctness, judicial efficiency or the right application of the law, while the voices of the users that are mostly affected by its decisions are often neglected. When individuals feel heard and treated with dignity, they are more likely to accept the decision, comply with it, and maintain trust in the legal system. Conversely, when the process feels cold, opaque, or overly adversarial, it can deepen resentment, reduce legitimacy, and discourage compliance with the judicial decisions. By understanding the psychology of parties and through behavioral economics we can arrive at new tools and rethink the judicial process.

Judicial party satisfaction is a relatively innovative topic. There are several factors, academics have made reference; like Party Expectations, Process factors and Outcome Factors. The fist, Party Expectations, has to do with the prior expectation the party has of that experience, where the individual tends to compare both. Simply, if the experience exceeds her or his expectations, the user is likely to feel more satisfied than if these are not met. Second, the Process Factors, which have to do with elements of neutrality, transparency and a chance for the party to express its views. Finally, Outcome Factors, of course winning or losing has a huge impact, but also whether the final decision aligns with the individual's sense

of fairness and justice. It is highlighted that when the parties feel the process is just and they are treated with respect the satisfaction level increases.[92]

The fairness of the process has been found to be relative and a difficult concept to settle. The fairness perception can vary in each person and be influenced by external factors. For instance, in an experiment participants rated how fair they thought an official was. The individuals that considered that the authority was respectful, trustworthy, informative and supportive; rated their behavior as fairer than those that described the authority as disrespectful, hostile and suspicious. Which proved that procedural fairness manipulation was possible.[93]

Furthermore, on the effects of fairness perception on the process, it has been shown how it can have an ambiguous impact in party satisfaction and the compliance of judicial decisions. Experiments have studied the correlation between Procedural fairness, Outcome fairness and Outcome favorability with the acceptance tax authority decisions. One of the experiments showed how Procedural and Outcome Fairness influenced the acceptance of new norms and decisions, even if they were unfavorable, when they were implemented through fair and

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[92] J. Levin and C. Guthrie Vanderbilt, *Party Satisfaction: Perspective on a Comprehensive Mediation Statute*, University of Missouri School of Law Scholarship Repository Faculty Publications, 1998, p. 887-897

[93] M. Niesiobędzka and S. Kołodziej, *The fair process effect in taxation: the roles of procedural fairness, outcome favorability and outcome fairness in the acceptance of tax authority decisions*, Current Psychology, available at https://link.springer.com/article/10.1007/s12144-017-9762-x?utm_source=chatgpt.com#Sec18. 2017, p. 249 "A manipulation check confirmed the effectiveness of the procedural fairness manipulation, $t(95) = 16.65$, $p < .001$. Participants who read the scenario describing the tax official as respectful, trustful, informative and supportive considered their behavior as more fair ($M = 3.82$, $SD = .62$) than participants who read the scenario in which the official was presented as being disrespectful, hostile and suspicious ($M = 1.69$, $SD = .66$)

transparent methods. [94] However, a controversial discovery of another experiment was that, even if it was considered unfair, if the decision had Outcome favorability and personally benefited the taxpayer, people were more likely to accept the decision. [95]An important conclusion from both experiments is that Outcome Favorability**,** meaning the personal gain or loss, has a stronger influence on the acceptance of the final decision, than Outcome and Procedural Fairness.[96]Although individuals can recognize when a process is unfair, if the outcome benefits them, they are still willing to accept it. Another conclusion of these studies, pointed out that Procedural Fairness can evoke emotional responses, like guilt or anger, which may also affect how decisions are received.

As previously discussed, fairness is often viewed as a foundational element in the judicial process, particularly for encouraging parties to accept and comply with outcomes. However, it is not necessarily the perception of fairness itself that drives acceptance, but rather the way fairness contributes to party satisfaction**.** [97] The idea of the "fair process effect" is widely supported and suggests that individuals are more likely to accept unfavorable outcomes if they believe the procedures were fair.[98]However, other empirical findings reveal that procedural satisfaction matters more than rigid fairness. In this experiment the procedural satisfaction was studied under the premises described as whether the procedure aligns with a

[94]*Idem*, p. 251-252
[95] *Idem*, p. 249
[96] *Idem*, p. 251-252
[97] V. Mertins, *Procedural Satisfaction Matters - Procedural Fairness Does Not: An Experiment Studying the Effects of Procedural Judgments on Outcome Acceptance*, IAAEG, 2009, p. 28 "However, procedural satisfaction is beyond procedural fairness: Fairness may motivate preferences, but need not to. Many other motives are conceivable but rather elusive."
[98] *Idem*, 25-28.

party's expectations and preferences. It was shown how parties who experience procedures that match their preferences may even resist unfavorable outcomes more strongly than those whose preferences are violated.[99]As mentioned before, it is difficult to compensate for a non-favorable outcome, in terms of satisfaction. This shows us the courts might do well to shift their focus, not just toward ensuring abstract fairness, but toward fostering genuine procedural satisfaction**,** which more directly shapes behavior and acceptance.

Furthermore, there is a strong correlation between the involvement that individuals have in a decision and the positive perception of fairness and legitimacy of the procedure. There was an experiment designed to see how in group negotiation there can be an impact of the perception of justice and satisfaction with the participation of the individuals on the final decision. The participants first chose individually, then discussed and negotiated in groups. If they reached a unanimous agreement, that decision was accepted, if not, another decision was imposed.[100] The participants would rank higher their perception of justice and satisfaction of the decisions in which they actively participated. This experiment confirmed that the more autonomy and involvement parties would have in shaping a decision, the more positively they perceive the fairness of that procedure.[101] This suggests that incorporating a cooperative element of the parties to negotiate can raise their satisfactin and perception of

[99] *Idem*, p. 27 "Our experimental data suggest that the effects of procedural fairness judgments are not as strong as assumed. Indeed, people offer less resistance if a fair procedure is used, but the effect is not significant. By contrast, satisfaction of procedural preferences seem to outrank procedural fairness: The willingness to resist various outcomes differs significantly according to the satisfaction/non-satisfaction of individual and group procedural preferences".

[100] A. Bevilacqua Leoneti and V. Coimbra Ziotti, *Improving Commitment To Agreements: The Role Of Group Decision-Making Methods In The Perception Of Sense Of Justice And Satisfaction As Commitment Predictors*, Brazilian Operations Research Society, 2020 .p. 3-5

[101] *Idem*, p. 10-11

legitimacy. The emphasis on party involvement naturally leads to the discussion of judicial agreements and, even more so, to alternative dispute resolution mechanisms (ADR), where party autonomy plays an even more central role.

Ultimately, what emerges from this analysis is the profound importance of party satisfaction. Central elements like fairness, objectivity, and legal correctness remain essential pillars, but they are not sufficient on their own to ensure that judicial outcomes are totally complied with and accepted. The researches that where mentioned in this chapter have demonstrated that the idea of absolute judicial objectivity is ultimately an illusion because judges, like all humans, are vulnerable to cognitive biases and external influences. In addition, behavioral economics helps reveal how factors like fairness perception, emotional response, and personal expectations deeply influence this experience. Prioritizing party satisfaction is more than just user experience; it's about creating a justice system that resonates with people, and fosters legitimacy, and therefore, democracy. Recognizing this, and designing procedures that center party experience and autonomy, may bring us closer to a justice system that is not only technically fair, but is perceived as so.

3.2 Judicial Agreements: Procedural Autonomy and Enhancing Judicial Cooperation

In the last few pages, it has been stated how judicial system would improve from understanding the complexity of human psychology through the tools that behavioral economics can give us. The judicial system can benefit by promoting the autonomy of the

parties and, by doing so, fulfill their actual needs when approaching this solving conflict entity. This leads to the question of how the justice system can institutionalize such cooperative dynamics and focus more on party satisfaction. Judicial agreements can encourage dialogue, negotiation, and mutual understanding; these tools aim not only to resolve disputes efficiently but also to enhance the participants´ sense of ownership and legitimacy in the process. Therefore, when parties are empowered to shape outcomes collaboratively, this leads to their satisfaction and a significant increase confidence in the system, , which is also beneficial for compliance and acceptance of the judicial outcomes.

Judicial agreements or procedural agreements refer to the possibility of allowing parties to shape aspects of the judicial proceeding, when permitted by law. These agreements can address different elements of the process such as: the selection of evidence, the choice of the competent court, the distribution of procedural deadlines (as hearings), and many other possibilities depending on the different legal systems. These negotiations can allow proceedings to better align with the parties´ needs and interests, enhancing procedural efficiency and most importantly party satisfaction.

Over the past decades the possibilities of the parties to negotiate judicial agreements has expanded rapidly in many jurisdictions. From a traditional point of view academics have attached rigid procedures and court authority as an exclusive domain of the state power, leaving little room for the party autonomy.[102] However, many states have applied the

[102] A.Cabral and F. Didier Jr, *Procedural agreements to shape enforcement proceedings,* Editor: ZZPInt, 2022, p. 219 -220

principle of *in dubio pro libertate*, which refers to: when in moments of doubt, favor freedom, its application has resulted in the expansion of procedural agreements.[103]

Nevertheless, there are certain parts of the judicial process that raise the question whether if they are public acts of the state authority or rather an act that reflects private interest and it should be allowed to be agreed upon. In any case, these agreements do not mean that the judges will lose their ability to be a guardians of the process and thus, public interest will disappeared. Academics agree that the judge has a balancing role to ensure fundamental rights and fairness. There must be a reasonable party autonomy, particularly in regards to the procedural formalities. [104] In addition, the idea of imposition and domination of the state is outdated. This shift aligns with party collaboration and identifies judicial parties as active participants and not as subjects of state power. [105]

There are many legislations that have embraced party autonomy through procedural negotiation. For instance, countries as France, Germany, the UK, and the U.S., are states where judicial agreements have gained legitimacy. However, there are still jurisdictions that are more hesitant to privatize justice, as Italy, where there is still no consensus on whether procedural agreements are broadly admissible. [106] This resistance has a stretch relation with

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[103] *Ibidem.*

[104] *Idem,* p. 224.

[105] *Idem,* p. 225. "Contrary to that perspective of enforcement procedures as the realm of state power and public policy, we understand that in enforcement there is no hierarchy between public and private interests. One should remember that, since the beginning of the Contemporary Age, most legal systems have limited state powers over enforcement, and lead to the gradual abandonment of that authoritarian mindset that used to see individuals as mere objects of state activity rather than people entitled to fundamental procedural guarantees."

[106] A. Fabbi, *New" Sources of Civil Procedure Law: First Notes for a Study,* Italy Rome, Date N.A. p. 4-7.

the strong link between substantive law and procedural law in the Italian legal tradition. For this reason, there is still low regulation around this topic and there are legal uncertainties around crucial aspects such as the judges´ power to revise these agreements and the normative classification of procedural rules, whether they are mandatory or default.[107] Overcoming these obstacles could open the door for Italy to engage with a modern, flexible view of civil procedure that values the parties' ability to shape their own process, as has happened in other jurisdictions.

In the same vein, Colombian regulations have also been slow to accept the possibility of procedural agreements. With a stronger resistance than Italy, Colombian legislation and legal culture remain distant when it comes to recognizing and regulating such agreements. [108]Although the law does permit that parties self-regulate very specific parts of the civil process it is still significantly limited and it has not been a highly debated in the academic field either. [109] Similarly, to Italy there is a strong relation on the perception of substantive law and procedural law. Where procedure is not just seen as merely formal, but rather as an instrument of the service of substantive law. This is because the function of the procedural system is to protect substantive rights. As seen in Art. 13 of the General Code of Proceedings

[107] *Idem,* p. 14-17.
[108] R. J Sanabria Villamizar, *Acuerdos probatorios: un tema pendiente en Colombia,* Vniversitas, Avaliable at https://revistas.javeriana.edu.co/index.php/vnijuri/article/view/38930, 2024.
[109] *Idem*, "Aunque la etiqueta "acuerdo probatorio" no es usual en la cultura jurídica colombiana, existen varias figuras, tanto en el ámbito penal como civil, que pueden ser tildadas bajo este concepto: es el caso de las estipulaciones probatorias en el CPP o la confesión espontánea y las pruebas de común acuerdo en el CGP. Sin embargo, pese a su existencia e importancia para la decisión de los hechos en la sentencia y las implicaciones constitucionales del derecho probatorio, hay pocos estudios sobre sus implicaciones jurídicas y prácticas, menos aún sobre la conveniencia de ampliar los temas susceptibles de acuerdos probatorios por las partes, como la carga de la prueba, la licitud de la prueba, los deber de aportación de prueba o la fijación un determinado estándar de prueba.

of Colombia, the laws that regard judicial proceedings are part of the public order and they must be complied with. This regulation expresses an important limitation to the private autonomy principle, giving the procedural law a superior public order level. As mentioned in the second chapter of the thesis, public order is related to the core principles of a society. However, this article also permits procedural agreements, when the law expressly authorizes them.[110] Likewise, in Italy, although not in a centralized article, this idea is supported by Art. 1322 of the Civil Code, which limits party autonomy with public order, that includes the constitutional guarantee of access to justice[111] Thus, this thesis deems that, both legal systems consider the judicial process as part of their identity and as essential for maintaining harmony in society, which is a challenge for the innovative concept of judicial negotiations.

Although both jurisdictions impose limits on procedural agreements to protect public order and substantive rights, nonetheless it is legally possible to enter into such agreements within the boundaries established by law. In both Colombia and Italy, the legal framework has the potential to expand the use of procedural agreements to various aspects of the judicial process, provided that such agreements do not undermine substantive rights. For instance, in Art. 228 of the Colombian Constitution it is established that the procedural acts must ensure the prevalence of the substantial law. [112] The Colombian Constitutional Court has stated that

[110] General Code of Proceedings of Colombia, Art. 13 "*Las normas procesales son de orden público y, por consiguiente, de obligatorio cumplimiento, y en ningún caso podrán ser derogadas, modificadas o sustituidas por los funcionarios o particulares, salvo autorización expresa de la ley."*

[111] Italian Constitution, Art. 24 "*Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi"*

[112] Colombian Constitution, Art. 228 "*La Administración de Justicia es función pública. Sus decisiones son independientes. Las actuaciones serán públicas y permanentes con las excepciones que establezca la ley y en ellas prevalecerá el derecho sustancial. Los términos procesales se observarán con diligencia y su incumplimiento será sancionado. Su funcionamiento será desconcentrado y autónomo."*

the concept that substantive law shall prevail comes from the idea that the purpose of the judicial process is the realization of rights contained in abstract terms by objective law and, therefore, procedural law is merely a means to this end and rigid procedural rules must not obstruct the fulfillment of substantive rights.[113]This flexibility can be a way to extend procedural autonomy as a tool to improve judicial efficiency and tailor proceedings to the needs of the parties, but also to maintain the essential role of the judiciary in protecting fundamental rights. Accordingly, from a legal perspective, there is room for the development of procedural agreements, as long as they respect the primacy of substantive law and public order principles that underpin the judicial system.

It may be concluded that many scholars believe that the judicial process needs to adapt to the new social realities with the integration of procedural agreements [114] . Countries as Colombia and Italy would benefit from the implementation, promotion and regulation of judicial negotiation. As it has been stated before in this thesis, public order is a concept that is susceptible to change and the idea of it being a limit to the principle of private autonomy within the judicial process, is to be reimagined and presented as a solution to tangible

[113] Sentencia C-029 de 1995, MP Dr. Jorge Arango Mejía, "*Cuando el artículo 228 de la Constitución establece que en las actuaciones de la Administración de Justicia "prevalecerá el derecho sustancial", está reconociendo que el fin de la actividad jurisdiccional, y del proceso, es la realización de los derechos consagrados en abstracto por el derecho objetivo, y, por consiguiente, la solución de los conflictos de intereses. Es evidente que en relación con la realización de los derechos y la solución de los conflictos, el derecho procesal, y específicamente el proceso, es un medio."*

[114] A. Fabbi, *New" Sources of Civil Procedure Law: First Notes for a Study*, Italy Rome, Date N.A, p. 17."In conclusion, observing the solutions provided for in other jurisdictions could perhaps contribute, also in the Italian case, to developing better techniques more useful to an acceptable adaptation of rules to principles, regarding the use of precedents83, or in adopting criterion capable of distinguishing the position of different principles within a precise hierarchy84: all aimed at reinforcing the important realization that civil procedure is not a "sanctuary" which does not need to adapt itself to the evolution of social and legal realities"

problems of our modern world. Granting autonomy to the parties autonomy is a vehicle to increase their satisfaction and contribute to a more efficient and responsive judicial process, allowing proceedings to better reflect the realities and expectations of the individuals involved. This autonomy shall offer a path towards a more humane and participatory form of justice, that does not reduce individuals to passive subjects of the state authority, but instead recognizes them as active collaborators in the resolution of their own disputes. Regarding the cultural and legal boundaries found in the Colombian and Italian jurisdictions, these should not be viewed as obstacles, but rather as guidelines that ensure the protection of fundamental rights and principles. As long as procedural autonomy is exercised within these boundaries, there shall be significant room to expand on this topic and create a system that individuals trust and are satisfied with.[115]

Promoting this kind of advancement in the judicial system is also a way to concretely apply the insights offered by behavioral economics. By acknowledging the psychological and cognitive dimensions of human behavior and translating that understanding into procedural flexibility and party-centered justice, we shall take a step toward building a legal system that adapts to real life.

[115] OECD, *Framework and Good Practice Principles for People-Centred Justice,* OECD Publishing, 2021, p. 3 "The more people-centred a justice system is, the more responsive it will be to the legal and justice needs of individuals, contributing to fair outcomes and helping build just societies. Moving forward, shifting the focus to the people's perspective and making justice systems more accessible, effective and transparent will thus be essential for rekindling the bonds that hold our societies together, and for strengthening trust between people and public institutions."

3.3 Alternative Dispute Resolution (ADR) and Mediation: Legal Frameworks, Party Autonomy and Behavioral Economics

Stepping even further into the concept of party autonomy, ADR, such as mediation, emerges as a powerful tool to address the growing inefficiencies and delays that the judicial system must face. Especially for countries that have a particular excessive caseload, as Colombia and Italy. In addition, these Alternative Dispute Resolution (ADR) mechanisms can significantly increase party´ satisfaction, as multiple studies have shown. In the EU, Italy and Colombia the benefits of mediation have been taken into account; what has resulted in legal initiatives strengthening and promoting this tool, by enacting it as a mandatory pre-judicial step in certain cases. The goal is not to replace procedural justice, but rather reinforce other alternatives to the traditional system; especially in the field of civil law where the disputes often involve interpersonal or consumer-related matters.

As it has been stated in the second chapter, consumers are especially vulnerable to manipulative techniques revealed by behavioral economics; in these small claim cases, ADR such as mediation, provides a more accessible, and even psychologically satisfying resolution for conflict. Which can ultimately enhance the trust in the market and by doing so, protect it. Furthermore, mediation itself can integrate behavioral techniques that shall improve communication, reduce biases, and promote fairer outcomes. This chapter explores how

mediation, rooted in both legal and behavioral economical insight, can become a cornerstone of a more adaptive and real conflict-solving system.

Mediation is an alternative dispute resolution measure, whereby a mediator assists those involved in a dispute to reach an agreement. In this process the parties are autonomous to find the best solution that fits them, they are encouraged to share their point of view. The mediator or conciliator, is an independent third party that helps the individuals involved in the conflict to reach an agreement.[116] The conciliator will not make a judgment or decision, but it will guide and assist the negotiation of the parties, in order that they can reach an agreement to their conflict. He or she is meant to be an objective and neutral figure that will contribute by presenting and exploring several possible solutions that the parties may have not taken into account. [117]The impartiality of the mediator is so important, that he or she cannot derive any personal benefit from the settlement. In this process the parties are autonomous to find the best solution that fits them and they are encouraged to share their point of view. [118]

One of main issues several countries have is the incensement of case-load. Nowadays courts are facing serious challenges of lack of labor force to supply their high demand. This has

[116] Directive 2008/52/EC, Art. 1 *"Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation."*

[117]Office of Civil Rights. *EEO Mediation Guide*, U.S Department of Commerce, n.d. Accessed May 8, 2025, https://www.commerce.gov/cr/reports-and-resources/eeo-mediation-guide/what-mediation .

[118] *Idem*, "The courts of this country should not be the place where resolution of disputes begins. They should be the place where disputes end after alternative methods of resolving disputes have been considered and tried."

resulted in longer waiting periods and legal costs to spike, making the access to justice more complicated.[119] ADR is a solution, especially for countries that have inefficient judicial systems, because it presents faster resolution of cases than ordinary courts, which can lead to the prices to decrease in the value of the conflict-solving process. [120] Due to these reasons there are different incentives in the EU to promote mediation as an alternative dispute mechanism.

Data analysis has been proven the enormous effect that mediation can have in terms of saving time and reducing costs. A study it was analyzed the cost and time saved by mediation.[121] The research focused in finding the "break-even point", this is the minimum success rate at mediation which made it become financially viable and time-efficient. The findings showed that even if success rates were as low 19–24%, mediation still delivered economic and time-saving benefits. This means that high success rates are not necessary to achieve positive results and arrive to the break-even point. Each country had a different break-even point, for instance Italy only required a 4% of success rate to reach it[122]. Additionally, the researchers stated that in Italy when mediation was successful it resulted in a cost reduction of €4.369,5,

[119] European Justice, *Mediation In EU Countries*, European e-Justice Portal, 2024, Accessed May 8, 2025, https://e-justice.europa.eu/topics/taking-legal-action/mediation/mediation-eu-countries_en

[120] *Idem*, "More and more disputes are being brought to court. As a result, this has meant not only longer waiting periods for disputes to be resolved, but it has also pushed up legal costs to such levels that they can often be disproportionate to the value of the dispute."

[121] G. De Palo, A. Feasley and F. Orecchini, Quantifying the cost of not using mediation: A Data Analysis, Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs, 2011, p 14-17

[122] *Idem*, p.15 "Applying the same calculations for Italy, the data shows that the break-even point is even lower. For Italy, a 4% mediation success rate is the break-even point, or the point at which using mediation does not create any time advantage. (As we see in Table 5, any mediation success rate below 4% in Italy, yields no savings in time.)

along with a significant decrease in resolution time. [123] Unfortunately, the study only included EU Member States. However, considering the structural and functional similarities between the Italian and Colombian judicial systems, it is reasonable to infer that implementing mediation in Colombia could have similar high economic and time-related benefits, as would benefit any country.

Beyond the economic advantages, it is also essential to examine how mediation operates in more specific and frequent legal scenarios, such as small claims, which are especially relevant in the field of consumer protection and civil disputes. As mentioned in the second chapter, consumers are vulnerable to behavioral economics techniques, such as manipulative personalization, dark patterns and the design of misleading contracts, that can lead to different types of damages and therefore claims. The courts can receive cases that involve; auto repairs, personal injuries or accidents due to defective products, disputes on construction services, breach in the landlord-tenant relation and small debts matters.[124] Mediation can come across as a helpful tool to solve this issue and even raise awareness in the matter, also because the defendant is likely to negotiate and settle.[125] This can be very useful for the decongestion of justice, as small claim cases represent a very high amount of filed civil cases,

[123] *Idem,* p. 14 "Applying the same calculation described in Section 2.4 to Italy, the results of the Two-step approach are much improved from the results of the One-step approach, as the additional step of attempting mediation saved time and costs. In Italy when mediation is successful, disputes are resolved in 47 days and the costs are reduced to €4.369,5"
[124] H. Jay Folberg, Joshua D. Rosenberg, Susan E. Raitt, and Robert Barrett *The Use of Mediation in Small Claims Courts,* Ohio State Journal on Dispute Resolution, 1993, p 56-58.
[125] *Ibidem.*

for instance, in the U.S it can be around 40%. [126]. Besides these consumer-related claims, a large percentage of small cases are still in the realm of civil law such as, family matters, trespass and conflicts between neighbors.

In small claim, mediation also offers a less formal and a more emotional setting. This can help the parties to express their perspective and get to a satisfying agreement, even when there is an unbalanced relation. Different from the judicial process, in mediation the parties are able, and even encouraged, to uncover their emotional barriers for negotiation and ultimately, arrive to a resolution. This can be helpful when there are balancing power dynamics, in cases that involve a party in a position of power with respect to the other, for instance, a consumer against a big business. [127] Furthermore, specifically for consumer and trade issues, an often case is that they are discouraged by the costly and time-consuming ways of the formal legal proceedings, making ADR a more accessible choice.[128]

After understanding the different economic, social, time-saving advantages, let's explore how beneficial mediation can be for party satisfaction. As it has been stressed before in this chapter, party satisfaction brings great advantages for compliance, justice perception, legitimacy, fairness perception, among others. Conciliation can provide a more satisfactory experience that obeys to different reasons. In the first place, mediation can offer a mean to

[126] *Idem,* p. 56 "Filings in small claims courts are booming. Small claims case filings make up approximately forty percent of all civil case filings in limited jurisdiction state courts".
[127] *Idem,* p. 61-62
[128] European Commission, *Behavioural study on disclosure of ADR information to consumers by traders and ADR entities,* Publications Office of the European Union, 2023, p. 6

negotiate, not only a win or lose situation, but rather a satisfactory settlement for each party[129].As mentioned before, it is hard to compensate for the level of dissatisfaction when a party loses the process. [130] Secondly, party autonomy is much more present, as parties are encouraged to participate in the negation, which make the outcome of the conciliation be perceived fairer and more legitim of that procedure. [131] Thirdly, the prior expectation of the party, depending on whether these are met or exceeded, determines an impact in the satisfaction level of the individual. With mediation parties can construct the process [132]and are likely to save time and money, which can ultimately help them meet their previous expectation [133]

3.4 A Brief comparative Analysis on Mediation: EU, Italy and Colombia

The foundation for mediation within the European Union was laid by Directive 2008/52/EC, also known as the Mediation Directive[134], which aimed to integrate mediation as an alternative dispute resolution (ADR) mechanism into the legal systems of all Member States.

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[129] . Jay Folberg, Joshua D. Rosenberg, Susan E. Raitt, and Robert Barrett *The Use of Mediation in Small Claims Courts,* Ohio State Journal on Dispute Resolution, 1993, p. 61

[130] M. Niesiobędzka and S. Kołodziej, *The fair process effect in taxation: the roles of procedural fairness, outcome favorability and outcome fairness in the acceptance of tax authority decisions,* Current Psychology, available at https://link.springer.com/article/10.1007/s12144-017-9762-x?utm_source=chatgpt.com#Sec18. 2017, p. 249 -252

[131] A. Bevilacqua Leoneti and V. Coimbra Ziotti, *Improving Commitment To Agreements: The Role Of Group Decision-Making Methods In The Perception Of Sense Of Justice And Satisfaction As Commitment Predictors*, Brazilian Operations Research Society, 2020 .p. 3-5

[132] J. Levin and C. Guthrie Vanderbilt, *Party Satisfaction: Perspective on a Comprehensive Mediation Statute*, University of Missouri School of Law Scholarship Repository Faculty Publications, 1998, p. 890 "Rather, the mediator is only authorized to oversee a process in which the parties are responsible for developing their own agreements. Many argue that it is this unique process that is largely responsible for party satisfaction with mediation."

[133] *Idem,* 887-890

[134] Directive 2008/52/EC

This directive primarily applies to civil and commercial matters and encourages states to promote mediation as a viable tool for resolving disputes efficiently and cost-effectively.

To support the implementation of this directive, Member States are expected to actively promote the use of mediation and by doing so protect the internal market.[135] The EU provides funding for national mediation initiatives by supporting institutions involved in mediation activities. Furthermore, the EU promotes research and data collection to measure the effectiveness of mediation, identify challenges and guide improvements. These efforts often lead to awareness campaigns that highlight the advantages of mediation to the general public.[136]

The EU also invests in training programs for mediators, including judges, lawyers and other stakeholders, to ensure a high standard of mediation services across Member States. [137] Most importantly, the Directive includes provisions such as the suspension of the prescription period during the mediation process and guarantees the confidentiality of the topics discussed, which cannot be used in subsequent legal proceedings. [138]

[135] *Idem*, paragraph 5 "The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services"
[136] Dr F. Steffek, Mediation in the European Union: An Introduction, Cambridge, 2012, p 9-10
[137] *Ibidem*
[138] Directive 2008/52/EC, Art. 8 and Art. 7

In response to Directive 2008/52/EC, Italy adopted Law No. 28 of 2010, integrating the EU regulations into its domestic legal system. This law governs mediation in civil and commercial matters and establishes that, in certain cases, such as commercial disputes, medical liability and some family matters, mediation is a mandatory as a pre-condition to initiate litigation. The initiation of mediation under this law also interrupts the prescription period, offering the parties more time to resolve their disputes without losing legal rights.[139] Additionally, Decree No. 180 of 2010 details the accreditation and fee structure for mediators. To be recognized, mediators must be registered with the Ministry of Justice.[140] Italian law also reinforces the principle of confidentiality in mediation, ensuring that discussions held during the process cannot be used in subsequent trials. Moreover, any agreement reached during mediation is enforceable, allowing courts to grant legal effect to settlements when necessary.

Similarly, in Colombia, mediation is also recognized as a formal alternative to judicial proceedings. The General Code of Legal Proceedings establishes that mediation is a prerequisite to file a lawsuit in the courts, in certain types of cases, although it is not universally required across all legal matters. [141]Moreover, the Law 1563 of 2012 of Colombia provides a comprehensive framework for various ADR mechanisms, including mediation, arbitration and friendly settlement. This law establishes mediation centers, both public and private, which facilitate mediation services. An example of such a center is the Pontificia

[139] Law No. 28 of 2010 of Italy
[140] Decree No. 180 of 2010 of Italy
[141] General Code of Legal Proceedings of Colombia, Art. 621.

Universidad Javeriana, which plays a significant role in academic and practical mediation efforts. The author of this thesis participated in mediations myself, especially in family law matters. Colombian law also upholds the confidentiality of mediation proceedings, ensuring that discussions cannot be used in further trials. Mediation settlements are enforceable by courts, giving them strong legal biases.[142]

3.5 Applying behavioral economics in the ADR (mediation)

Moving from a theoretical side to the practical area it becomes essential to integrate practical tools and techniques drawn from psychology and behavioral economics in order to guide the parties towards more rational decisions. Although, there is a solid legal framework to develop mediation, there is still a culture to promote surrounding it. It is important to accompany the users by delivering accessible information and build their rational autonomy in every step of the process. Firstly, it has been detected how there is still a lack of mediation and ADR culture, therefore, nudges could be directed to increase the chances of users considering mediation as conflict-solving mechanism. Secondly, throughout the mediation or ADR processes, it is important to highlight the role of the mediator to have efficient negotiations. Finally, the last step is to reach sustainable and rational agreements.

Regarding consumers and traders, ADR mechanisms are a great tool, however, many users are still unaware of them or do not use ADR. A recent study showed there are different

[142] Law 1563 of 2012 of Colombia.

methods to raise the understanding and willingness to use ADR. [143] For instance, the way information is displayed, if it is found in an easy, accessible and clearly highlighted at the top of the trader´s website, it increases the likelihood of users considering ADR as a solution for their dispute. Meaning that visibility and placement of information can nudge people's behavior. Another conclusion revealed by the study is that it is quite ineffective to include the possibility of ADR in the terms and conditions, given that only 6% of the users actually visit terms and conditions when seeking resolution options. Meanwhile a 43% of users go directly to return and complain sections. [144] In addition, the sole fact of disclosing the possibility of ADR, made a significant change in the users understanding of the message to seek ADR in case of a dispute, especially in the cases where there was a link that directed to an ADR entity.

Once the parties agree to use an ADR method (mediation), both scholars and practitioners who specialize in the art of negotiation have studied how to reach an efficient and successful outcome. [145] It is important to identify which are the positions of the individuals and what are their interests: the first refers to what people say they want, and the latter refers to the deeper needs or desires behind dividing those positions.[146] This makes us reaffirm the idea that individuals may approach the judicial process with a specific position, which in reality is a

[143] European Commission, *Behavioural study on disclosure of ADR information to consumers by traders and ADR entities,* Publications Office of the European Union, 2023, p. 8-11
[144] *Idem,* p.10
[145] K. Tasa and E. Chadha, Conflict Resolution Through Negotiation and Mediation, Wiley**,** 2023, p. 484-498
[146] *Idem,* p. 485 "The word interests has a very important meaning in the domain of negotiation and conflict. Specifically, interests refer to primary needs, imperatives, wants, or desires. In negotiation, people often state their position, saying things like "I want this much," but hide their interests, which is the motivating dynamic that actually lies at the core or beneath what they need, want, or would settle for."

hidden interest that can only be fully satisfied when approaching a more people-centered resolution setting, such as mediation.

Furthermore, choosing between "Distributive Negotiation" and "Integrative Negotiation", selecting the appropriate one can help to have a more effective resolution. The Distributive Negotiation, should only be used when the issue is of such nature that the party that succeeds takes most of the value and it is difficult for the parties interest to align. This should be used in short-term relations and in a small number of cases when Integrative Negotiation is not possible. On the contrary, Integrative Negotiation occurs when the discussion is presented to aim for mutual gain by addressing multiple issues and seeking a creative solution, where the outcome can satisfy both parties. Inexperienced managers tend to adopt the Distributive Negotiation tactics to have quicker resolutions, however, with Integrative Negotiation parties are properly understood and their mutual collaboration is encouraged, this can have a more long-term value, resulting in a more efficient resolution. [147]

Another important feature that the negotiation must have in order to have better results is confidentiality. The confidentiality principle consists in making the mediation sessions private, making the communications protected and inadmissible in court.[148] Unlike the public hearing in the judicial process that can be intimidating for the parties. Confidentiality is a key part of mediation because it helps for the parties to build their trust and encourage an open

[147] *Idem*, p. 486-489.
[148] A, Ball, *Confidentiality within mediation*, Weightmans, Accessed 08/05/2025, Available at https://www.weightmans.com/insights/confidentiality-within-mediation/

discussion. By ensuring that the information shared will not be used, participants are more willing to express their concerns, be transparent and arrive to more creative and mutually beneficial solutions. This can also help the parties to better asses their position. To further ensure this principle, only the parties, the representatives and the meditation are involved in the mediation meeting. [149] As it has been stated before in this thesis, both Colombia and Italy have included this principle into the regulation for mediation. The legislator in both countries understood the importance of confidentiality.

Moreover, the role of the mediator is crucial. It must choose properly between the two types of negotiation tactics and identify the parties real interest. Successful conciliators have to create a safe, respectful, and confidential environment where the parties can share their goals and concerns. They have to encourage the parties to be honest and promote their active dialogue to be able to arrive at the co-creation of a long-lasting resolution. In addition, the conciliator must seek to understand the parties' situation so that he or she can be an effective mechanism to clarify their interests and facilitate the exchange of ideas. [150]

In an effort to explore the empirical dimension of mediation, this thesis includes insights from a valuable interview with Dr. María Clara Jaramillo, a professional mediator with an outstanding academic and professional background. She has studied at several prestigious institutions, including Pontificia Universidad Javeriana, the University of North Carolina at Chapel Hill, Georgetown University Law Center, and completed her doctorate at the

[149] *Ibidem*.
[150] K. Tasa and E. Chadha, Conflict Resolution Through Negotiation and Mediation, Wiley**,** 2023, p. 489.

University of Bern. Dr. Jaramillo is a recognized expert and passionate advocate for conflict resolution, with extensive experience in high-profile mediation cases.[151]

Beyond the general benefits of mediation, Dr. Jaramillo placed particular emphasis on its capacity to restore relationships. She highlighted that mediation creates a space for parties to repair damaged connections and return to a more natural and constructive dynamic. Unlike judicial proceedings, where relationships often deteriorate further because judgments favors only one side. In contrast, mediation serves for mutually acceptable outcomes that can satisfy both parties. A compelling example she mentioned, where she mediated between the Inter-American Development Bank (IDB) in the conflict surrounding the Bogotá metro project. In this case, mediation not only addressed the substantive issues at the heart of the dispute but also helped reestablish a working relationship between the parties, enabling long-term cooperation.[152]

Dr. Jaramillo also underscored mediation's unique value in preserving, and even in many cases strengthening relationships, especially when the parties must maintain ongoing interactions. One of the mediator's key roles is to help participants gain clarity about the core of the conflict. While parties may enter the process with intense rigid positions, mediation guides them toward collaboration, fostering a shift from confrontation to constructive dialogue and shared solutions. She emphasized the importance of sensitizing the parties and

[151] M. C. Jaramillo, *Professor of Negotiation and Strategy at Pontificia Universidad Javeriana*. Interview by Valeria Solano, Bogotá, May 2025.

[152] *Ibidem.*

nurturing their relationship, helping them understand that they are not enemies, but rather allies facing a shared problem. The problem or conflict is real "enemy" that needs to be resolved together.[153]

When asked how she manages the psychological aspects of the parties involved, such as strong emotions, Dr. Jaramillo explained that once the parties enter a collaborative path, the negotiation begins to flow, and those emotions can be redirected towards addressing the conflict that is dividing them. She emphasized the importance of using negotiation techniques really makes a difference. For instance, using framing effects, particularly how questions are posed to guide the parties toward constructive solutions. According to her, various mediation techniques are highly effective and demonstrate a clear connection between theory and practice, often leading to real, lasting outcomes. Most importantly, these solutions belong to the parties themselves, allowing them the possibility of reconnecting in the future, rather than ending the process as adversaries.[154]

Finally, after a successful negotiation the final part of a mediation is doing an agreement. As it has been stated before it is important to reach an outcome that; fist, is constructed by the parties, reflecting party autonomy; and second, that the resolution is beneficial for both parties. In addition, to these substantial aspects, regarding a more formal characteristic, it is important to make the agreement legally enforceable. This is crucial because it helps build trust in the process, as it reassures the parties that a legal mechanism supports and upholds

[153] *Ibidem.*
[154] *Ibidem.*

the agreement.[155] As mentioned before in this chapter, the EU, Italy and Colombia regulate mediation agreements for them to be enforceable in court.

Moreover, enforceability has effects in the negotiation itself, as parties are more likely to engage in it in a more serious way. While it is true that in most of the cases mediation settlement do not need any enforcement as they are complied with in 80% of the cases, having a legal baking still plays a vital role.[156] It helps for the parties to abord the negotiation in a committed way and for the process to have a solid resolution, not only from a substantive point of view but also a formal one as well. In addition, it adds credibility to the resolution of the process by reassuring the parties of their mutual commitments. Having an enforceable resolution, can even help promote mediation because it encourages those who might otherwise be hesitant to participate in ADR. Overall, beyond its other advantages, the central role of the enforceability of the mediation agreements is to prevents further litigation in the event that one party fails to comply. In the strange case judicial intervention become necessary, the existence of an enforceable agreement significantly expedites the process compared to situations where mediation has not been pursued. [157]

[155] K. Paisley and J. Player, *The Impact of Enforcement on Dispute Resolution Methodology*, International Mediation Institute, accessed 10/05/2025, Available at https://imimediation.org/2021/05/04/the-impact-of-enforcement-on-dispute-resolution-methodology/. "The value of resolving that dispute is enhanced to the extent that the outcome is enforceable if the other side does not live up to its side of the bargain."

[156] *Ibidem* "One set of practitioners questioned the need for it as 80% of mediated settlements are adhered to anyway because they are the parties' own agreed solutions to their commercial problems and so there is high likelihood of compliance."

[157] *Ibidem.*

In conclusion**,** integrating insights from behavioral economics into mediation practices enhances both the efficiency and human sensitivity of ADR. By promoting the access to mediation, by acknowledging cognitive biases and the need for clear, accessible information, it becomes a more approachable and trusted option, one that individuals are increasingly willing to choose over traditional litigation pathways. For the negotiation stage, it is important a combination of practical negotiation techniques, the crucial role of the mediator, in order to guide the parties into positive outcomes and help them preserve their relationships. For the last step of the process, it is crucial the assurance provided by enforceable agreements, which main role is the legal security behind the negotiations. Ultimately, this interdisciplinary approach strengthens mediation as a viable alternative to litigation, as well as it reaffirms its capacity to deliver fair, lasting, and meaningful resolutions.

Final remarks

Through the lens of behavioral economics, law can be integrated with other fields of knowledge. In an increasingly complex world, it is essential to develop new strategies to address emerging challenges, which are not only those brought by new technologies, but also those arising from evolving theories and a deeper understanding of ourselves as individuals and as a society. The legal sciences should not remain isolated, as it has done in the past, instead, we should use these advancements to better guide policymaking and the building of legal institutions that better reflect the realities of contemporary life.

From the judicial system analysis, seen though behavioral economics it was clear the great importance of party satisfaction. The research discussed throughout the third chapter shows that the idea of absolute judicial objectivity is actually an illusion. Despite the efforts, the members of the judiciary, including judges, remain human beings, meaning that they can be influenced by cognitive biases, emotional states, and even the hour of the day can represent an impact in their judgement. We necessarily arrive at the controversial realization, that if perfect rational impartiality cannot be achieved, then perhaps the justice system should not focus in not being perfectly objective, but rather bring attention to how people sense justice. In other words, the perception of fairness may be just as important, or more, than fairness in its technical sense. Meaning that party satisfaction is a powerful mean of justice. Identifying the imperfection of the judicial system is an opportunity to adapt to people's needs. This is important especially in modern welfare state, where social protection is a priority. Therefore, the development of institutions that may not be perfectly rational, as we have seen through

this thesis, but they are perceived as legitimate, fair, and worthy of public trust, is an essential requisite. Turning the lance to what we the people[158] want is, ultimately, what democracy is all about.

As a concrete response to the challenges that I have identified throughout this thesis, judicial agreements and ADR (mediation) are promising tools to make justice more accessible, efficient, and people-centered. While both Colombia and Italy already recognize procedural autonomy within their legal frameworks, there is still great potential to expand the use of procedural agreements, but never neglecting substantive rights and public order. The open interpretation of procedural norms, especially in Colombia through constitutional principles, opens the door to a more dynamic judicial process.

Furthermore, the implementation and promotion of mediation as an alternative dispute resolution (ADR) mechanism offers tangible benefits in terms of time and cost savings, judicial efficiency and party satisfaction. Clearly the EU, Colombia and Italy recognize its importance and benefits. All of these jurisdictions have shown efforts to build legislation and promote it. Going as far as making it a requisite, in some cases, to access the judicial process. This is the case especially for civil and consumer-related disputes. The comparative analysis reveals that both the EU and Italy have developed strong frameworks for mediation, grounded in Directive 2008/52/EC. Colombia, while still developing its mediation system,

[158] *Preamble to the U.S. Constitution.*

could benefit greatly from similar initiatives, like empirical experimentation, data analysis, and other advantages that Italy has for being a member of the EU.

Mediation as an ADR and Judicial Agreements, also aligns with the insights that have been studied through this thesis of behavioral economics. These are tangible solutions, though which we can acknowledge the cognitive, emotional, and psychological aspects of human behavior and use them in favor of the welfare. Mediation, in particular, provides a setting in which parties can have more autonomy, engage directly in the resolution of their conflicts, and improve perceptions of fairness and legitimacy.

This thesis was born out of a personal need. Throughout my academic journey, I increasingly felt the frustration of witnessing a persistent gap between the law and reality, especially in Colombia. I quickly understood that the legal sciences needed to mix with as many other fields of knowledge as possible. As my research advanced, especially in empirical studies and behavioral experiments, I realized that many researchers shared this very frustration, recognizing, just as I did, the limitations of a strictly legalistic and formal approach when confronted with the complexity of real human behavior.[159] I hope this thesis is a start to

[159] Vanessa Mertins, Procedural Satisfaction Matters - Procedural Fairness Does Not: An Experiment Studying the Effects of Procedural Judgments on Outcome Acceptance, IAAEG, 2009. P 26 "However, there is a large gap between a sheer bulk of empirical, experimental, and theoretical studies by non-economists and the fact that there is hardly any economic research on procedures. In particular, experimental economists remained surprisingly silent about procedural aspects of strategic interactions. The present study is intended to contribute to this issue by analyzing the effects of various procedures and procedural judgments."

reimagine and understand what our real needs as a species are, with the wish of creating more democratic States.

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