

ARTICLES

CORPORATE LIABILITY LAWSUITS AGAINST OFFICERS, DIRECTORS, AND CONTROLLING SHAREHOLDERS: AN EMPIRICAL OVERVIEW OF THE BRAZILIAN EXPERIENCE

RODRIGO BELLOTTI AZEVEDO*

ABSTRACT

The purpose of this paper is to explore the characteristics and use of corporate liability lawsuits against officers, directors and controlling shareholders (arts. 159 and 246 of the Brazilian Law of Corporations), between 1987 and 2023, within the scope of the state Courts of São Paulo (“TJ/SP”), Rio de Janeiro (“TJ/RJ”) and Minas Gerais (“TJ/MG”), with the following objectives: (i) to identify the number of suits related to the application of arts. 159 and 246 of the Brazilian Law of Corporations; (ii) to ascertain which players are responsible for filing them, contrasting the participation of corporations (direct lawsuits) with that of shareholders (derivative lawsuits); (iii) to identify the distribution of lawsuits over the years, trying, if possible, to observe any pattern of growth in the filing of lawsuits; and (iv) to explore the outcomes and results of the lawsuits before the Courts of the TJ/SP, TJ/RJ and TJ/MG, in order to understand how corporate liability suits have been addressed and dealt with. To this end, judgments were collected from an independent, comprehensive survey conducted by the author in the search platforms of each of the Courts, which were then separated and grouped into a database responsible for guiding the analysis.

* Bachelor of Laws (LL.B.) from FGV Rio Law School and International Visiting Student at Harvard Law School. Former researcher at the Center for Justice and Society of FGV Rio Law School. Licensed attorney under the Brazilian Bar Association. This paper is based on the independent research survey I conducted for my dissertation thesis presented to FGV Rio Law School, awarded as the runner-up to the *Miranda Rosa Award for Best Quality Thesis*. For guidance and mentorship, I thank Professor Fabiano Robalinho Cavalcanti. For helpful comments and suggestions, I thank Professor Nelson Eizirik and Professor Márcio Guimarães.

I. INTRODUCTION

This paper aims to empirically review the filing of corporate liability lawsuits against officers, directors and controlling shareholders under Brazilian law.¹ Provision is made for such lawsuits under arts. 159 and 246, respectively, of Law No. 6.404/76 (the Brazilian Law of Corporations – *Lei das Sociedades Anônimas* – hereinafter referred to as the “LSA”). These lawsuits comprise the LSA’s private law enforcement system. They are aimed at redressing losses or other harm caused to corporations by enforcing the legal norms applicable to directors, officers and controlling shareholders, while also deterring the practice of future illegal acts.²

The corporate liability lawsuits provided by arts. 159 and 246 of the LSA can be filed as either direct or derivative suits. In the first situation, the corporation that has been harmed by abusive, or unlawful, acts files for redress against its directors, officers or controlling shareholders.³ In the second situation, a minority shareholder that has not directly suffered the harm files the lawsuit, under their (i.e. shareholder’s) own name, asserting the rights of the corporation and applying for the redress to which the corporation is entitled.⁴ In these derivative lawsuits, the shareholder, having fulfilled the applicable legal requirements, is deemed to hold “extraordinary” standing to assert in their own name the rights of the corporation. The corporation may then join the proceedings as a third party if it so wishes.⁵

Legal scholars have traditionally recognized the importance of these instruments, which serve not only as a guarantee of redress for potential harm, but also as a channel to safeguard the rights of the corporation, enforce the provisions of the LSA, and deter future unlawful conduct.⁶

1. For independent research and tables presented in this article, see appendix for list of cases.

2. See Comissão de Valores Mobiliários (CVM), *Fortalecimento dos Meios de Tutela Reparatória dos Direitos dos Acionistas no Mercado de Capitais*, at 4 (October 2019), [<https://perma.cc/KJ68-PRJ8>] (“Access to effective private enforcement mechanisms is key to the development of a strong capital market. When minority shareholders are harmed by misconduct carried out by controlling shareholders or managers of a publicly-held company, the existence of effective mechanisms for enforcing their rights will not merely satisfy their individual interests, but it will also produce positive externalities. Redress can improve market compliance and build investor confidence in capital markets”).

3. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), *Private Enforcement of Shareholder Rights: A Comparison of Selected Jurisdictions and Policy Alternatives for Brazil* 111 (Nov. 18, 2020) [<https://perma.cc/3T7B-MY8N>] (“When harmed by the actions of directors, officers or shareholders, the company is the proper plaintiff to bring these lawsuits”).

4. See CÂNDIDO R. DINAMARCO, *PROCESSO CIVIL EMPRESARIAL* 605, 613–14 (1st ed. 2010), [<https://bdjur.stj.jus.br/jspui/handle/2011/93730?mode=simple>] [<https://perma.cc/76TS-6YES>].

5. *Id.*

6. See OECD, *supra* note 3, at 24 (“[L]itigation is often considered an important right in the menu of options available to shareholders. Like anyone operating in an ineffective legal system, directors and officers not facing sanctions for violating their duties of care or loyalty may have insufficient incentives to comply with these (except e.g. reputational incentives affecting capital

Considering that the substantive rights asserted in these lawsuits belong to the corporation, standing to sue would originally rest upon the corporation itself, which is the ultimate beneficiary of any damages that may be awarded. However, corporations are faced with certain practical difficulties in filing direct suits against their controlling shareholders, or against their own directors and officers. After all, they are the ones who either manage or control the corporation's affairs, thus influencing on the decision of filing or not the lawsuit.⁷ For that reason, arts. 159 and 246 offer a series of incentives aimed at enabling shareholders to seize the initiative and substitute the corporation as plaintiffs in litigation.⁸ Acting as what is known as "procedural substitutes", these shareholders then proceed to claim, in their own name, the rights belonging to their corporations.

Recently, the use and the scope of shareholder derivative lawsuits have become the subject of questions and mixed reactions amongst scholars and practitioners. Some scholars consider corporate liability lawsuits to be overly dispersed across the legislation and underutilized in practice, especially by the corporations themselves.⁹ These scholars consider that further procedural incentives are necessary to encourage minority shareholders to file derivative lawsuits pursuant to arts. 159 and 246 of the LSA.¹⁰ Other scholars, however, have expressed skepticism and concern regarding the scope and use of such instruments and even alerted that derivative lawsuits are beginning to be used by malicious, opportunistic minority shareholders seeking to benefit from the

markets or managerial labour markets) [...] Consequently, it appears to be necessary to create a mechanism for (minority) shareholders to initiate such litigation"); Eduardo S. Munhoz, *A Importância do Sistema de Solução de Conflitos para o Direito Societário: Limites do Instituto da Arbitragem*, in *PROCESSO SOCIETÁRIO* 93 (Flávio L. Yarshell & Guilherme S. J. Pereira eds., 2012).

7. See Gabriel S. K. Buschinelli & Rafael H. Bresciani, *Aspectos Processuais da Ação de Responsabilidade do Controlador Movida por Acionista Titular de Menos de 5% do Capital Social* (art. 246, §1º, 'b', da Lei 6.404/76), in *2 PROCESSO SOCIETÁRIO* 251–53 (Flávio L. Yarshell & Guilherme S. J. Pereira eds., 2015); GUILHERME S. J. PEREIRA, *ENFORCEMENT E TUTELA INDENIZATÓRIA NO DIREITO SOCIETÁRIO E NO MERCADO DE CAPITAIS* 71–75 (Quartier Latin, 2018), [<https://perma.cc/G7XR-T8V3>].

8. See LUIZ G. P. B. LEÃES, *PARECERES VOL. 1*, § A PRÉVIA DELIBERAÇÃO ASSEMBLEAR COMO CONDIÇÃO DE LEGITIMAÇÃO AD CAUSAM NA AÇÃO SOCIAL, 705 (Editora Singular, 2004), [<https://perma.cc/BFR3-LGRN>].

9. See OECD, *supra* note 3, at 111 ("Despite the importance the LSA grants to derivatives suits, studies have shown that they are usually regarded as an ineffective mechanism for redress in Brazil. The studies have concluded that there is scarce litigation pursuing civil liability of managers and controlling shareholders").

10. See FÁBIO U. COELHO, *LEI DAS SOCIEDADES ANÔNIMAS COMENTADA* 1353 (Editora Forense, 2021); Marcelo V. Von Adamek, *Temas Atuais e Controvertidos da Ação de Responsabilidade Contra Sociedade Controladora* (LSA, art. 246), in *5 IV PROCESSO SOCIETÁRIO* 941 (Flávio L. Yarshell & Guilherme S. J. Pereira eds., 2021), [<https://perma.cc/A4PD-DELW>] ("The legislator's intention to encourage the judicial realization of these possibilities is unequivocal, and it is certain that in our country, far from there being a surge in abusive strike suits in other countries, the real problem is exactly the opposite: the disconcerting passivity and monolithic inertia of shareholders in the face of serious and recurrent breaches committed by controlling shareholders" [translated]).

incentives offered to them by the LSA, rather than actually defending the rights of the corporation.¹¹

Considering this scenario and the debate as to the use of the legal instruments in question, this paper sets out an empirical analysis of corporate liability lawsuits under the LSA. This analysis is drawn from research into the level and frequency of liability lawsuit filings based on arts. 159 and 246 of the LSA before the state Courts of São Paulo (“TJ/SP”), Rio de Janeiro (“TJ/RJ”) and Minas Gerais (“TJ/MG”). Specifically, the present paper seeks to answer the following questions: (i) based on the data obtained, is it possible to identify the extent to which corporations and shareholders are making use of these liability lawsuits? (ii) further, based on the data, is it possible to identify which corporate actors have referred to such lawsuits? (iii) what patterns, if any, can be identified in the data over the analyzed period (1987 to 2023)? (iv) based on the data, is it possible to identify the outcome of the cases analyzed?

The ultimate goal of this paper is to contribute to the academic debate on the subject with quantitative data as to the frequency and use of arts. 159 and 246 of the LSA. Drawing on the findings of the research, the paper seeks to trace the profile of corporate liability lawsuits filed by corporations and shareholders before the TJ/SP, TJ/RJ and TJ/MG, identifying the number of lawsuits, the year in which they were filed, by whom they were filed, and the outcome of the claims. The purpose is to provide a quantitative basis for the interpretation of arts. 159 and 246 of the LSA, and to illustrate how these legal instruments have truly been used before Brazilian Courts.

The exposition of this paper is organized as follows. Item 2 offers a comprehensive overview of the legal regime surrounding the scope and application of corporate liability lawsuits under the LSA. Item 3 further specifies the differences and procedural classifications of direct and derivative lawsuits against officers, directors and controlling shareholders, analyzing the requirements established by arts. 159 and 246 of the LSA. Item 4 then dissects the reality of Brazilian Courts by conducting and reviewing an independent and original survey of corporate liability suits before the TJ/SP, TJ/RJ and TJ/MG, addressing each of the questions presented above. At last, item 5 concludes the paper.

II. THE LEGAL REGIME APPLICABLE TO CORPORATE LIABILITY LAWSUITS UNDER THE LSA

The LSA introduced a corporate governance model that confers broad decision-making powers to controlling shareholders, directors and officers.¹² However, the exercise of these powers is conditioned to a range of duties, limits

11. See Nelson Eizirik, *Usos e Abusos do Artigo 246 da Lei das S.As. [Uses and Abuses of art. 246 of the Corporations Law.]*, CAPITAL ABERTO (Mar. 5, 2023), <https://capitalaberto.com.br/secoes/colunistas/usos-e-abusos-do-artigo-246-da-lei-das-s-as/> [https://perma.cc/S5YJ-MVG2].

12. See Von Adamek, *supra* note 10, at 939–40.

and obligations that, together, comprise a general framework of corporate liability.¹³ In general, it can be noted that the Brazilian legislator designed a legal regime that seeks to strike a balance between the broad independence granted to corporate controllers and the officers who manage the corporation and, on the other hand, the insertion of several rules and duties to contain their behavior and avoid any violation of the LSA.¹⁴

Still, as acknowledged by legal scholars, there is little purpose in establishing rules, however stringent they may be, on the exercise of powers by controllers, directors and officers, unless provision is also made for legal instruments capable of both enforcing these rules while reprimanding unlawful acts.¹⁵ That means that, in addition to the abstract stipulation of duties and restrictions, the LSA must also account for legal instruments that are capable of effectively holding controllers, officers, and directors accountable—without their interference.¹⁶

To that effect, the LSA introduced two specific legal instruments to enforce its provisions and compensate corporations for the losses caused by abuses or unlawful conduct:¹⁷ (i) a corporate liability lawsuit against controlling shareholders, provided by Art. 246 of the LSA;¹⁸ and (ii) a corporate liability lawsuit against officers and directors, provided by Art. 159 of the LSA.¹⁹

13. *Id.* at 941–42.

14. See Alfredo L. Filho, *A Reforma da Lei de Sociedades Anônimas*, 8 CADERNOS DA PUC: SÉRIE CIÊNCIAS JURÍDICAS 22 (1972).

15. See Von Adamek, *supra* note 10, at 939–40.

16. See Pereira, *supra* note 7, at 71–72.

17. See OECD, *supra* note 3, at 110 (“The LSA gives ample leeway to the controlling shareholders and to the managers (directors and officers) elected and guided by the former; however, the LSA submits them to a stringent set of duties and responsibilities (LSA arts. 116, 117, 153 through 158, and 245). The LSA prescribes some lawsuits to put those corporate reins into practice, such as: (i) the liability suit against directors and officers (art. 159); and (ii) the liability suit against the controlling shareholder (art. 246)”).

18. Lei No. 6.404, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.12.1976 (Braz.), art. 246 (“A controlling corporation shall be obliged to compensate any damage it may cause to a controlled corporation by any acts infringing the provisions of arts. 116 and 117. § 1. Proceedings for compensation may be brought by: (a) shareholders representing five percent or more of the capital; (b) any shareholder, provided he guarantees payment of the legal costs in the event of the action being dismissed. § 2. If the controlling corporation is held responsible, in addition to paying compensation and costs, it shall pay an indemnity in respect of lawyers' fees of twenty percent of the compensation awarded and a further premium of five percent to the plaintiff.”).

19. Lei No. 6.404, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.12.1976 (Braz.), art. 159 (“Art. 159. By a resolution passed in a general meeting, the corporation may bring an action for civil liability against any officer for the losses caused to the corporation's property. § 1. The resolution may be passed at an annual general meeting and, if included in the agenda or arising directly out of any matter included therein, at an extraordinary general meeting. § 2. The officer or officers against whom the legal action is to be filed shall be disqualified and replaced at the same general meeting. § 3. Any shareholder may bring the action if proceedings are not instituted within three months from the date of the resolution of the general meeting. § 4. Should the general meeting decide not to institute proceedings, they may be

The Brazilian legislator's aim in designing legal instruments that enforce compliance with the duties and responsibilities applicable to controllers and officers was made very clear in the LSA's own Statement of Purpose. In relation to Section IV of Chapter XII of the LSA (titled "the Board of Directors and Executive Board"), the Statement of Purpose provides, under the heading "Duties and Responsibilities" that "*this section is of the utmost importance to the [LSA's] Project in that it seeks to fix the standard of conduct expected of officers and directors.*"²⁰ This clarifies the importance afforded by the drafters of the LSA both to the imposition of duties and obligations upon controlling shareholders, officers and directors, as well as to the creation of legal instruments capable of ensuring that such duties are complied with in practice. As Brazilian scholars explain, the rules on liability in corporate affairs are the "*cornerstone of the norms that govern corporations.*"²¹

III. THE PROCEDURAL CLASSIFICATION AND REQUIREMENTS OF CORPORATE LIABILITY LAWSUITS: DIRECT SUITS AND DERIVATIVE SUITS

As stated above, corporate liability lawsuits can be filed either by the corporation itself (*uti universi*), or, alternatively, by shareholders (*uti singuli*).²² Given that it is the corporation that directly suffers the harm caused by the wrongdoing of the controlling shareholders, officers and directors, it falls upon the corporation itself, at least in theory, to file the lawsuit seeking redress and sanctions against the perpetrators.²³

However, legal scholars have pointed to circumstances that dissuade corporations from filing direct lawsuits, especially against controlling shareholders.²⁴ After all, it is the controlling shareholder who generally holds the reins of the corporation, and who dictates the majority of the votes in

instituted by shareholders representing at least five per cent of the capital. § 5. Any damages recovered by proceedings instituted by a shareholder shall be transferred to the corporation, but the corporation shall reimburse him for all expenses incurred, including monetary adjustment and interest on his expenditure, up to the limit of such damages. § 6. A judge may excuse the officer from liability, when convinced that he acted in good faith and in the interests of the corporation. § 7. The action permitted under this article shall not preclude any action available to any shareholder or third party directly harmed by the acts of the officer.").

20. See Statement of Purpose No. 196 (Brazilian Treasury, Dec. 15, 1976), <https://www.gov.br/cvm/pt-br/acao-a-informacao-cvm/institucional/sobre-a-cvm/EM196Lei6404.pdf> [<https://perma.cc/Q5GS-LFHK>].

21. See José L. B. Pedreira & Alfredo L. Filho, *Abuso de Poder de Controle de Capital Social de Banco Comercial*, in 2 A LEI DAS S/A 244 (Renovar, 2d ed., 1996).

22. See LUIS F. SPINELLI, CONFLITO DE INTERESSES NA ADMINISTRAÇÃO DA SOCIEDADE ANÔNIMA 79–80 (Malheiros Editores, 3rd ed. 2012).

23. See Buschinelli & Bresciani, *supra* note 7, at 261–63.

24. See II Egberto L. Teixeira & José A. Tavares, *Das Sociedades Anônimas no Direito Brasileiro*, 711 (Bushatsky, 1979).

shareholder meetings.²⁵ Because of this, the controlling shareholder usually appoints the directors and officers, who, in turn, are then responsible for representing the corporation in its business dealings and running its day-to-day operations.²⁶

This scenario presents a clear conflict of interest. Thus, in order to mitigate the risk of controlling shareholders (and their appointed officers or directors) using their power to avoid the filing of direct suits, the LSA also establishes that shareholders may file derivative lawsuits, provided that certain requirements are met (arts. 159, paragraphs 3-4 and 246, paragraph 1).²⁷

With respect to this point, the Brazilian Securities Commission (“CVM”) has already taken the position that derivative shareholder lawsuits hold special importance for the protection of the LSA’s provisions and minority shareholder rights. In the ruling of Administrative Proceedings n° 19957.007423/2021-12, CVM Chief Commissioner Nascimento stated that a robust and functional system of corporate liability “is essential in order to ensure the effective protection of minority rights, which is one of the main objectives of Law n° 6.404/1976 [the LSA].”²⁸ Chief Commissioner Nascimento also added that “one of the main objectives of the LSA is to regulate the relationship between the controlling shareholder on the one hand and the company and other shareholders on the other, having consolidated a system of liability of the controlling shareholder and the repression of acts of abuse of corporate control.”²⁹

The filing of a lawsuit by a minority shareholder under arts. 159, paragraphs 3-4, and 246, paragraph 1, of the LSA, is an example of “procedural substitution” under Brazilian civil procedure law.³⁰ According to Brazilian scholars, procedural substitution – equivalent to extraordinary standing to sue –

25. See Von Adamek, *supra* note 10, at 941 (“Furthermore, by giving extraordinary legitimacy to the shareholders to act in court, as the company’s procedural substitute (CPC, art. 18) and, furthermore, by providing incentive mechanisms for the promotion of the corresponding lawsuit – incentives which consist of 20% (twenty percent) attorney fees and a 5% (five percent) premium to the plaintiff, calculated on the amount of damages” [translated]).

26. See José R. C. Tucci, *Questões Polêmicas Acerca da Substituição Processual do Acionista*, in 5 PROCESSO SOCIETÁRIO 804–05 (Flávio L. Yarshell & Guilherme S. J. Pereira eds., 2021).

27. See OECD, *supra* note 3, at 111 (“It is against this backdrop that LSA provides for shareholder standing to sue on behalf of the company (art. 159, paragraphs 3 and 4 and art. 246, paragraph 1)”; Comissão de Valores Mobiliários (CVM), STRENGTHENING THE ENFORCEMENT OF SHAREHOLDERS’ RIGHTS: INTERIM REPORT 12 (2019) (“In addition, the Brazilian Corporate Law enables shareholders to initiate litigation on behalf of the company under certain circumstances. In these cases, the shareholder is not acting as the company representative, but as its procedural substitute”); Tiago A. R. Lima, *A Legitimidade Ativa e Passiva nas Ações de Responsabilidade Civil Contra o Administrador e o Controlador na Lei das S/A*, in PROCESSO SOCIETÁRIO 506 (Flávio L. Yarshell & Guilherme S. J. Pereira eds., 2012); Teixeira & Tavares, *supra* note 24.

28. See Opinion of Chief Commissioner João Pedro Nascimento, Comissão de Valores Mobiliários (CVM), Administrative Proceeding No. 19957.007423/2021-12, Reporting Director: João Accioly (Feb. 28, 2023) (Braz.), [https://perma.cc/LN5J-AZ2F].

29. *Id.*

30. See Fredie Didier Jr., *Curso de Direito Processual Civil* 465 (Editora jus Podivm, 24th ed., 2022).

can be defined as a specific group of circumstances in which standing to file a given lawsuit is transferred to third parties who are not the holders of the legal rights at stake.³¹ These third parties then hold extraordinary standing to assert, in their own name, the rights of the “substituted” parties and ultimate beneficiaries of the claims.³²

The Brazilian Civil Procedure Code (*Código de Processo Civil* – “CPC/15”), in its art. 18, headnote, stipulates that no one is entitled to assert in their own name the legal right of another unless expressly authorized to do so by the law.³³ The exceptional circumstances that give rise to such entitlement are found in various provisions dispersed across the Brazilian legislation. In introducing these provisions, the Brazilian legislator has identified the existence of obstacles for the party with ordinary standing to sue and file a direct lawsuit and assert their rights.³⁴ Brazilian law reflects the view that, in these cases, in order to encourage the filing of beneficial (if not necessary) lawsuits, it would be fruitful to extend the standing to sue to third parties, who, thereafter, would act as “procedural substitutes” in the proceedings.³⁵

Under the rules of Brazilian Civil Procedure, “extraordinary” standing to sue can be classified as follows: (i) “subordinate” extraordinary standing, in which the substitute is only authorized to act as a co-plaintiff of the substituted party that holds the “ordinary” standing to sue³⁶ (in this case, the corporation); and (ii) “autonomous” extraordinary standing, in which the substitutes are authorized to file the suit alone and in their own name.³⁷ Furthermore, extraordinary standing to sue can either be “exclusive,” in which case the participation of the “substituted” party is restricted or subject to conditions, or “concurrent,” in which case the party with “ordinary” standing to sue and the party with “extraordinary” standing can independently file the lawsuit.³⁸

As legal scholars point out, under the LSA—notwithstanding the fact that the corporation itself is entitled to assert its rights before a Court—arts. 159, paragraphs 3-4 and 246, paragraph 1 reflect the legislature’s decision to confer extraordinary standing upon minority shareholders, enabling them as “procedural substitutes,” to file derivative lawsuits seeking to hold controlling shareholders, directors and officers liable for abuses or unlawful acts.³⁹ The legislature specifically chose—in analyzing the LSA’s liabilities regime—to encourage, by means of derivative lawsuits, the participation of minority

31. See Dinamarco, *supra* note 4, at 612.

32. *Id.*

33. See Lei N. 13.105, de 16 de Março de 2015, DARIO OFICIAL DA UNIAO (D.O.U.) (Braz.).

34. See Pontes de Miranda, *Comentários aos Códigos de Processo Civil*, Tomo I – arts. 1º a 45, at 186 (5th ed. 1999).

35. See Dinamarco, *supra* note 4, at 613–14.

36. See José M. G. Medina, *Novo Código de Processo Civil Comentado: Com Remissões e Notas Comparativas ao CPC/1973* at 94–95 (Revista dos Tribunais, 2017).

37. *Id.*

38. *Id.*

39. See Buschinelli & Bresciani, *supra* note 7, at 261.

shareholders in redressing the losses suffered by the corporation and enforcing the applicable legal norms.⁴⁰

Here, note that the drafters of the LSA drew a distinction between the requirements for the filing of direct and derivative lawsuits pursuant to arts. 159 and 246.⁴¹ Starting with art. 159 of the LSA, liability suits against officers and directors may be brought directly by the harmed corporation following approval by a prior resolution adopted at a general shareholders meeting.⁴² As stated by art. 129 of the LSA, said shareholder resolution must be adopted by a majority vote in the general meeting.⁴³ Following approval, the management of the harmed corporation is given the green light to file the direct lawsuit, with its officers being responsible for raising the claim and representing the corporation's interests.⁴⁴ This does not apply, however, to the officers or directors who happen to be defendants in the lawsuit, who are immediately disqualified and replaced following the adoption of the shareholder resolution which approved the lawsuit.⁴⁵

Nevertheless, in case the harmed corporation remains inert or unresponsive, paragraphs 3 and 4 of art. 159 provide the following requirements for shareholders to be conferred extraordinary standing to file derivative lawsuits on behalf of the corporation:⁴⁶ (i) first, if the corporation does not directly file the lawsuit within 3 months of the adoption of the shareholder resolution which approved it, all shareholders are entitled to file derivative suits;⁴⁷ and (ii) if the general meeting adopts a shareholder resolution that does not approve the filing of a direct lawsuit, shareholders holding a minimum stake of 5% in the corporation are granted extraordinary standing to file derivative suits.⁴⁸ As explained above, this means that the extraordinary standing conferred upon

40. See Leães, *supra* note 8, at 464; OECD, *supra* note 3, at 111 (“This circumstance makes derivative suits pivotal to a successful system of duties and responsibilities attributable to the controlling shareholder and to the managers. It is against this backdrop that LSA provides for shareholder standing to sue on behalf of the company (art. 159, paragraphs 3 and 4 and art. 246, paragraph 1). The shareholders who bring a derivative suit are a party to it, but as they are not the direct beneficiaries of the relief, any favorable outcome is awarded to the company”); See also Comissão de Valores Mobiliários [CVM], *supra* note 2, at 14 (“Arguably, the Brazilian Corporate Law created a strong incentive for lawyers to support minority shareholders in lawsuits against controlling shareholders”).

41. See Leães, *supra* note 8, at 463–64 (Some scholars argue that arts. 159 and 246 establish separate regimes, with distinct requisites); See Buschinelli & Bresciani, *supra* note 7, at 248–53.

42. See Von Adamek, *supra* note 10, at 414.

43. *Id.*

44. See José A. T. Guerreiro, *Impedimento de Administrador em Ação Social “ut Singuli”*, 46 REV. DIREITO MERCANTIL 23, 25–26 (1981).

45. See Ana C. Rodrigues, *A Responsabilidade Civil dos Administradores de Companhias Abertas Não Financeiras por Danos Causados à Sociedade e aos Acionistas e o Desenvolvimento do Mercado de Valores Mobiliários Brasileiro* (Oct. 28, 2011) (M.A. Thesis, Fundação Getúlio Vargas School of Law) (on file with author).

46. See Lima, *supra* note 27, at 710–13.

47. See OECD, *supra* note 3, at 9.

48. *Id.* at 10.

minority shareholders by art. 159 is subordinate in nature, in that it requires inertia or inaction from the corporation in order to produce effects.⁴⁹

Anyhow, either if filed directly or derivatively, liability lawsuits against officers and directors (art. 159) must necessarily be preceded by the filing of an annulment lawsuit aimed at rescinding the shareholder resolution which approved the corporation's latest financial statements and management accounts, adopted at the annual general meeting held within the first four months after the end of each fiscal year.⁵⁰ This is because, according to art. 134, paragraph 3 of the LSA,⁵¹ the unreserved approval of financial statements and accounts exempts directors from liability.⁵² According to scholars, this makes up the so-called "*quitus*", responsible for liberating officers and directors *ex ante*, and thus, preventing the filing of liability lawsuits against them (either directly or derivatively).⁵³ Said *quitus* must be set aside by a separate annulment suit prior to the filing of the liability suit against the officers or directors responsible for the wrongdoing.⁵⁴

On the other hand, with respect to art. 246 of the LSA, even though the controlled (and harmed) corporation is entitled to file a direct suit against its controlling shareholder, shareholders are also conferred extraordinary standing to file derivative suits, this time, without having to submit the issue to shareholder approval at a general meeting.⁵⁵ Therefore, the extraordinary standing to sue conferred by art. 246 is autonomous and concurrent, enabling

49. See José C. B. Moreira, *Apontamentos para um Estudo Sistemático da Legitimação Extraordinária* 41, 45 (1969); See Pereira, *supra* note 7, at 79.

50. See José L. B. Pedreira & Luiz A. C. Rosman, *Aprovação das Demonstrações Financeiras, Tomada de Contas dos Administradores e Seus Efeitos; Necessidade de Prévia Anulação da Deliberação que Aprovou as Contas dos Administradores para a Propositura de Ação de Responsabilidades*, in *SOCIEDADE ANÔNIMA – 30 ANOS DA LEI, 6.404/76*, 41 (Editora Quartier Latin, 2007).

51. Lei No. 6.404, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 17.12.1976 (Braz.), art. 134, § 3. ("The approval, without reservations, of the financial statements and accounts shall exempt the officers and members of the statutory audit committee from liability except as regards error, bad faith, fraud or misrepresentations (art. 286)").

52. See ALFREDO S. L. NETO, *LEI DAS SOCIEDADES POR AÇÕES ANOTADA 356* (Saraiva, 4th ed. 2012).

53. See Fábio K. Comparato, *Natureza Jurídica do Balanço de Sociedade Anônima*, 3 *DOCTRINAS ESSENCIAIS DE DIREITO EMPRESARIAL*, 693 (1978); See RENATO BERGER, *AS AÇÕES DERIVADAS NO DIREITO SOCIETÁRIO* (Editora Quartier Latin, 2023) ("With regard to the first point, the majority of scholars point out that the liberating effect operates in a comprehensive and full manner, reaching all management acts of the fiscal year analyzed at the meeting, regardless of whether such acts were specifically presented and discussed at the meeting" [translated]).

54. See MARCELO V. VON ADAMEK, *RESPONSABILIDADE CIVIL DOS ADMINISTRADORES DE S/A E AS AÇÕES CORRELATAS 249* (Saraiva, 1st ed. 2009).

55. See Dinamarco, *supra* note 4, at 622 ("There would be no point in the law abstractly imposing sanctions on the director for possible harmful acts, defining the contours of his civil liability (LSA. arts. 117 and 246, caput), if there were no one else, apart from himself, or people appointed by him, in a position to make this liability operational in court. In order to achieve this goal, the law relies on the encouragement of the minority shareholder himself, stimulated in the first place by the natural beneficial repercussions on his assets that will be projected by the judgment that protects the corporation." [translated]).

the minority shareholder to immediately proceed with the filing of the lawsuit (or request for arbitration), independently of the position taken by the corporation.⁵⁶

The only requirements for such are provided by paragraph 1 of art. 246, according to which derivative suits may only be filed by shareholders holding a minimum stake of 5% in the corporation (item “a”), or, in the alternative, any shareholder who secures payment of the legal costs in the event of the lawsuit being rejected on the merits (item “b”).⁵⁷ In addition, as a means of encouraging minority shareholders to make use of derivative suits, paragraph 2 of art. 246 establishes that if the controlling corporation is held liable in Court, it shall pay attorney fees equivalent to 20% of the damages awarded in the suit and a further premium of 5% to the shareholder who initiated the suit.⁵⁸ Note that these additional payments are not provided for or extended to liability suits against officers and directors (art. 159).⁵⁹

IV. EMPIRICAL SURVEY OF CORPORATE LIABILITY LAWSUITS BEFORE THE STATE COURTS OF SÃO PAULO (TJ/SP), RIO DE JANEIRO (TJ/RJ), AND MINAS GERAIS (TJ/MG) BETWEEN 1987 AND 2023

In order to assess the frequency and use of arts. 159 and 246 of the LSA, the author conducted an original, independent empirical survey concerning judgments issued by the TJ/SP, TJ/RJ and TJ/MG between 1987 and 2023.⁶⁰ Methodologically, for the purpose of mapping out all lawsuits involved, the judgments were used as a base to identify the total number of lawsuits filed in the examined period. In total, one hundred and twenty-five (125) judgments were found in the survey,⁶¹ sixty-eight (68) of which were issued by the TJ/SP, forty (40) by the TJ/RJ and seventeen (17) by the TJ/MG⁶². The choice for these

56. See Moreira, *supra* note 49, at 45; see also Pereira, *supra* note 7, at 79.

57. See Buschinelli & Bresciani, *supra* note 7, at 251–53; see also Pereira, *supra* note 7, at 262–63.

58. See OECD, *supra* note 3, at 8.

59. See *id.* at 119.

60. For a comprehensive overview of Brazilian civil procedure and the functioning of local state courts, see Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487 (1986).

61. The survey was limited to the following classes of judgements: Civil Appeals (“*Apelação Cível*”) and Interlocutory Appeals (“*Agravo de Instrumento*”). The following markers were used: (i) “art. 17 OR art. 17”; (ii) “art. 158 OR art. 158”; (iii) “art. 159 OR art. 159”; (iv) “art. 246 OR art. 246”; (v) “6.404”; (vi) “controller OR control”; (vii) “administrator OR administration”; (viii) “liability OR liability lawsuit”; (ix) “damages OR damages lawsuit”; (x) “substitute OR substitution”; and (xi) “standing to sue OR legitimacy.”

62. The survey relied on the institutional search engines of the TJ/SP, TJ/RJ and TJ/MG to locate and review the judgements and lawsuits object of this investigation. See Consulta Completa, TRIBUNAL DE JUSTIÇA DO ESTADO DE SÃO PAULO, <https://esaj.tjsp.jus.br/cjsg/consultaCompleta.do?gateway=true> [https://perma.cc/CT48-VHCL]; Consulta Jurisprudência, TRIBUNAL DE JUSTIÇA DO ESTADO DO RIO DE JANEIRO, <https://www3.tjrj.jus.br/ejuris/ConsultarJurisprudencia.aspx> [https://perma.cc/LRS3-VY7W]; Pesquisa por Jurisprudência, TRIBUNAL DE JUSTIÇA DO ESTADO DE MINAS GERAIS, <https://www5.tjmg.jus.br/jurisprudencia/formEspelhoAcordao.do> [https://perma.cc/KN5Y-2ZEP].

three Courts was justified on the grounds that most Brazilian corporations are registered and incorporated in São Paulo, Rio de Janeiro and Minas Gerais, respectively.⁶³

Considering that some of the collected judgments and decisions referred to the same initial lawsuit, a new filter was applied in order to identify all the original first-instance lawsuits that involved the application of arts. 159 and art. 246 of the LSA. Applying this filter, a final database was then created containing a total of eighty-nine (89) lawsuits, distributed as follows: (i) fifty-three (53) suits before the TJ/SP, of which eight (8) were pending a final ruling; (ii) twenty three (23) suits before the TJ/RJ, of which two (2) were pending a final ruling; and (iii) thirteen (13) suits before the TJ/MG, of which two (2) were pending a final ruling.

A. Is it possible to identify, from the data, the extent to which the corporate liability lawsuits have been used before the TJ/SP, TJ/RJ and TJ/MG?

After carrying out the independent survey described above, the author identified a total of eighty-nine (89) lawsuits involving the application of arts. 159 and 246 of the LSA before the TJ/SP, TJ/RJ and TJ/MG. Given that the data revealed variations and combinations of different types of lawsuits (as will be further described below), a specific classification was adopted to understand and organize the identified cases.⁶⁴ The purpose of this organization was to identify, in each case, the type of lawsuit, or combination of lawsuits, that was filed before each Court. The findings, together with the number of times each type of lawsuit was filed, are set out in Figure 1 below.

63. See *Demografia das Empresas e Estatísticas de Empreendedorismo*, INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (ibge), 45–46 (2020) (“Among the Federative Units, the ones with the largest distribution shares were São Paulo (26.9%), Minas Gerais (10.4%) and Rio de Janeiro (7.6%).” [translated]).

64. For a detailed overview of the different types of lawsuits available in the context of business or corporate law in Brazil, see Rodrigo Carneiro, Fernando Zorzo & Eider Avelino Silva, *Brazil*, in *THE SECURITIES LITIGATION REVIEW*, at 19–28 (7th ed., 2021); see also Janaína da Silva Ferreira & Suliani Rover, *An Analysis of the Relevant Lawsuits in Brazilian Companies: Characteristics that Influence the Change in the Probability of Loss Provision and Contingent Liabilities*, 13 J. ACCT. ORG. e155596, 1–18 (2019).

Figure 1. Total number of each type of lawsuit.

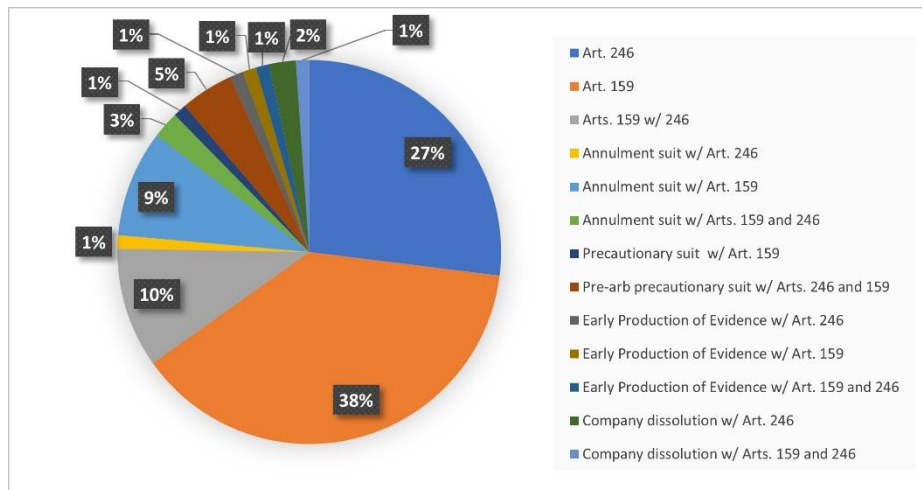
Type of Lawsuit	SP	RJ	MG	Total
Liability lawsuit against controlling shareholders (art. 246).	12	10	2	24
Liability lawsuit against officers or directors (art. 159).	22	6	6	34
Liability lawsuit against controllers and officers or directors (arts. 246 and 159).	2	2	5	9
Resolution annulment lawsuit combined with a liability lawsuit under art. 246.	0	1	0	1
Resolution annulment lawsuit combined with a liability lawsuit under art. 159.	5	3	0	8
Resolution annulment suit combined with a liability suit under both arts. 159 and 246.	2	0	0	2
Request for precautionary relief related to a liability lawsuit under art. 159.	1	0	0	1
Request for pre-arbitration precautionary relief related to a liability lawsuit under arts. 246 and 159.	4	0	0	4
Request for early production of evidence related to a liability lawsuit under art. 246.	1	0	0	1
Request for early production of evidence related to a liability lawsuit under art. 159	0	1	0	1
Request for early production of evidence related to a liability lawsuit under arts. 159 and 246.	1	0	0	1
Request for partial dissolution of the corporation combined with a liability lawsuit under art. 246.	2	0	0	2
Request for partial dissolution of the corporation combined with a liability lawsuit under arts. 159 and 246.	1	0	0	1
Total	53	23	13	89

Source: Author's elaboration.

From this classification, it was possible to identify which types of lawsuits were most frequently used, as displayed by Figure 2 below. The results indicate that the most commonly used types of lawsuits before the TJ/SP, TJ/RJ and

TJ/MG, between 1987 and 2023 were: (i) liability lawsuits against officers and directors, under art. 159 of the LSA, with a total of thirty-four (34) suits (38%); (ii) liability lawsuits against controllers, under art. 246 of the LSA, with a total of twenty-four (24) suits (27%); (iii) liability lawsuits against both controllers and directors and/or officers (combining arts. 159 and 246), with a total of nine (9) suits (10%); and (iv) liability lawsuits against officers and directors (art. 159) combined with annulment lawsuits against shareholder meeting resolutions, with a total of eight (8) suits (9%).

Figure 2. Percentage occupied by each type of lawsuit.



Source: Author's elaboration.

The other types of lawsuits are also illustrated by Figure 2, having been filed much less frequently. They are either other combinations of different types of lawsuits or lawsuits filed with a much narrower purpose. For example: (i) requests for pre-arbitration provisional relief, filed on 4 occasions (5%); (ii) annulment lawsuits against shareholder meeting resolutions combined with both arts. 159 and 246 lawsuits, filed on two (2) occasions (3%); (iii) requests for partial dissolution of the corporation, combined with arts. 159 and 246, filed from one to two times; and (iv) requests for early production of evidence in connection with liability lawsuits under arts. 159 or 246, which, individually, were only filed once each.

Across the 36-year period examined, the number of lawsuits filed, and the frequency of filing were certainly not high. Between 1987 and 2023, a total of only eighty-nine (89) lawsuits were filed. The filing of some types of lawsuits were particularly infrequent, even rare. Even in the case of the three most frequently filed lawsuits, the results do not indicate a high or significant degree of use. In the analyzed period, liability lawsuits based on art. 159 were only filed

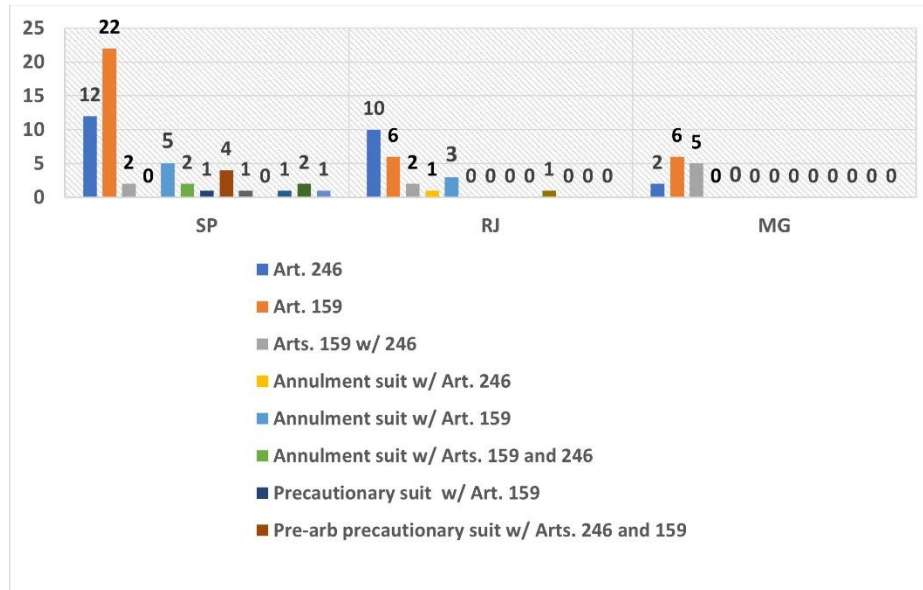
thirty-four (34) times whereas liability lawsuits based on art. 246 were filed on only twenty-four (24) occasions. Liability lawsuits combining the application of arts. 159 and 246 were only filed nine (9) times. In other words, even the most frequently filed types of lawsuits did not exceed thirty-five (35) cases in total.

The results of the search fall in line with the findings of other Brazilian scholars on the matter, who, in their respective studies, contended that liability suits based on arts. 159 and 246 of the LSA are underutilized and scarce in the practical reality of local Courts. Some scholars have indicated that liability lawsuits against officers and directors (art. 154 of the LSA) are not frequently utilized, seeming to present a series of obstacles in their filing.⁶⁵ Similarly, other scholars have also claimed that, with regard to arts. 159 and 246, there are relatively few occasions in which the Court has considered a claim for liability or damages.⁶⁶

The lawsuits may also be examined in relation to the state Court before which they were filed, thus allowing the paper to identify possible variations between the data collected for the TJ/SP, TJ/RJ and TJ/MG. Figure 3, below, illustrates the number of lawsuits filed before each Court between 1987 and 2023:

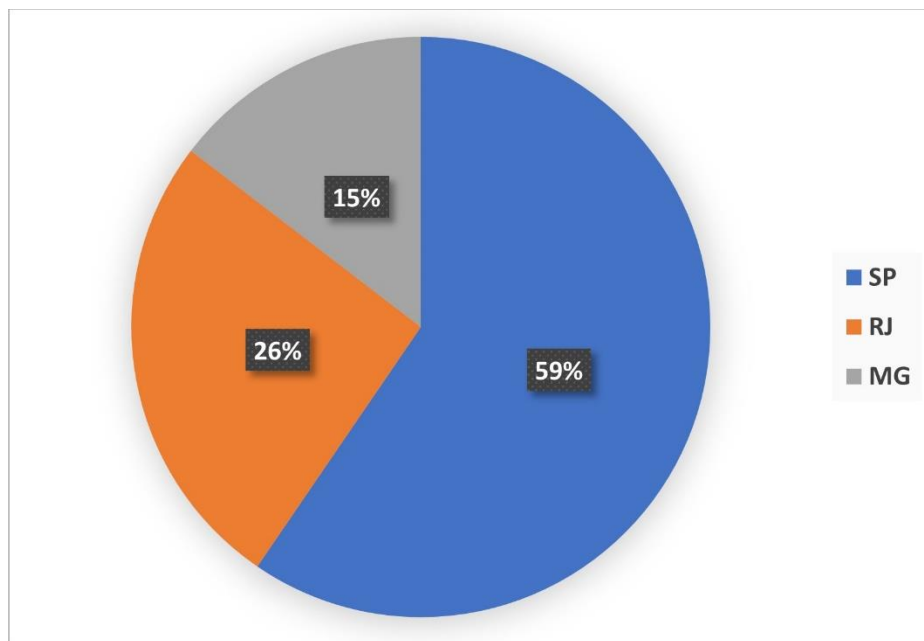
65. See Rodrigues, *supra* note 45, at 66.

66. See André E. Schwartz & Mariana Pargendler, *O Perfil do Contencioso Societário Brasileiro: A Predominância de Ações Anulatórias de Deliberação Assemblear Relativamente a Ações Indenizatórias*, REV. DIREITO SOC. VALORES MOBIL., 458 (2021); see also Viviane M. Prado & Vinícius C. Buranelli, *Relatório de Pesquisa e Jurisprudência sobre Direito Societário e Mercado de Capitais no Tribunal de Justiça de São Paulo*, 2 CADERNOS DIREITO GV 1, 36 (2006).

Figure 3. Number of each type of lawsuit per state Court.

Source: Author's elaboration.

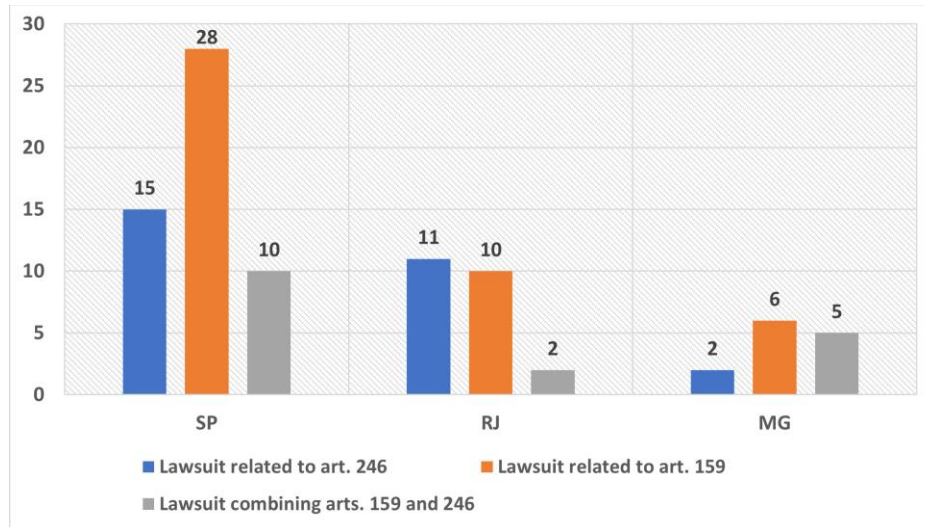
As can be seen, there is a relatively high degree of variation in the number of lawsuits filed before each Court. In particular, we note that 53 lawsuits were filed before the TJ/SP, representing 59% of the total number of examined lawsuits. Twenty-four (24) cases were filed before the TJ/RJ, accounting for 26% of the data, and the TJ/MG demonstrated a considerably lower result, with just thirteen (13) lawsuits, representing 15% of the total identified cases. These findings are set out in Figure 4 below:

Figure 4. Percentage of cases per state Court.

Source: Author's elaboration.

Moreover, the lawsuits collected in the database were then subjected to another filter in order to better visualize the application of arts. 159 and 246 of the LSA by the TJ/SP, TJ/RJ and TJ/MG. The total number of cases was aggregated and re-grouped according to a broader classification, namely: (i) lawsuits related to art. 246 of the LSA; (ii) lawsuits related to art. 159 of the LSA; and (iii) lawsuits in which there were combined claims applying both provisions. The justification for the use of this classification is that it indicates, with greater clarity, the total number of lawsuits which share a connection with both types of liability lawsuits (i.e., suits against officers and/or directors and suits against controlling shareholders).

As can be seen from Figure 5 below, the TJ/SP dealt with the largest number of lawsuits in each of the three categories. Indeed, the highest number of lawsuits witnessed in any category by any of the state Courts was 28 (TJ/SP; lawsuits in relation to art. 159 of the LSA). Other than that, no other category exceeded a total of fifteen (15) lawsuits.

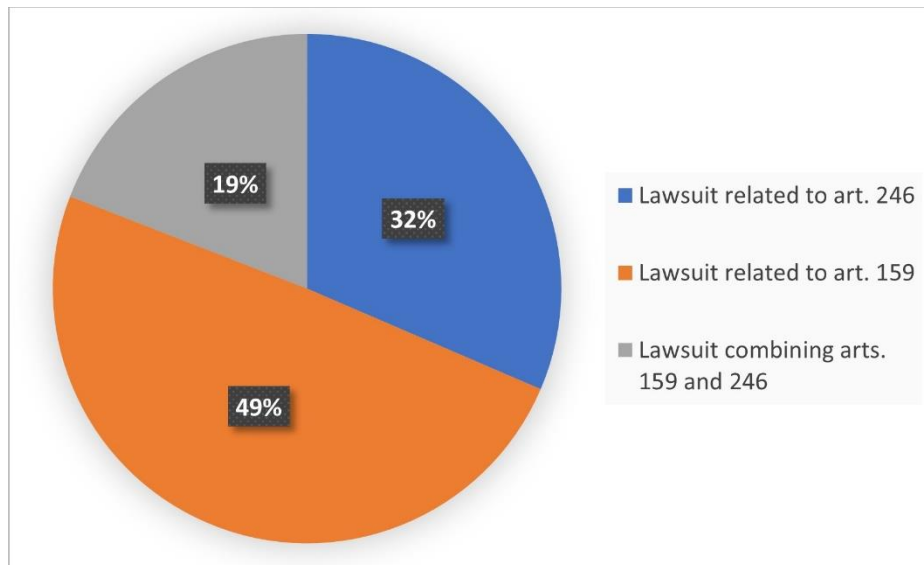
Figure 5. Number of cases per state Court.

Source: Author's elaboration.

Figure 5 again shows that art. 159 of the LSA was referred to at a greater length in comparison to art. 246. Before the TJ/SP, 28 lawsuits related to art. 159 were identified, compared to 15 lawsuits related to art. 246, and 10 lawsuits related to the application of both arts. 159 and 246. Before the TJ/RJ, whilst there was one additional case involving art. 246 in comparison to art. 159 (11 vs. 10), there were two lawsuits related to the application of both provisions. In the context of the TJ/MG, where the number of cases was significantly lower overall, there were six lawsuits involving art. 159 compared to 2 lawsuits involving art. 246, and 5 lawsuits related to the application of both provisions.

Based on this classification of lawsuits, Figure 6, set out below, illustrates, in relation to all the analyzed cases before all the three Courts, the proportion of each type of lawsuit.

Figure 6. Percentage of the aggregated types of lawsuits.



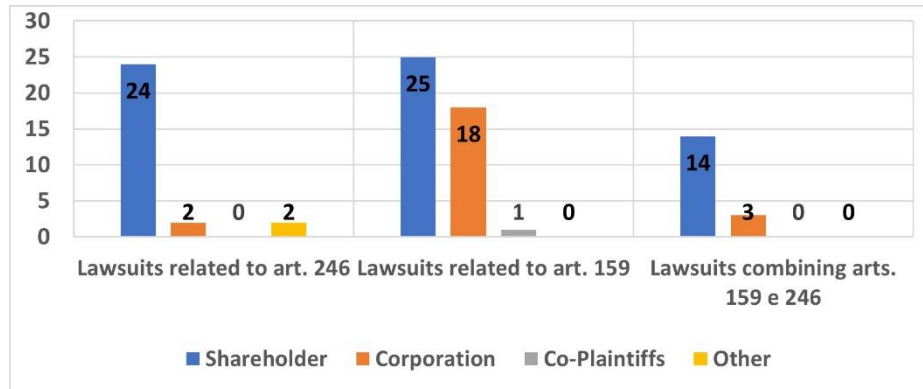
Source: Author's elaboration.

With respect to this point, it can be seen that, as shown in Figures 2 and 6 above, the lawsuits related to art. 159 of the LSA occupy almost half of the collected database, with a total of 44 cases (49%), followed by the lawsuits related to art. 246 of the LSA, with just 28 cases (32%). As was already explored, the survey identified a smaller number of cases in which both provisions were referred to, in a total of 17 cases (19%).

All in all, the total number of lawsuits identified in the scope of the survey, which involved the application of arts. 159 and 246 of the LSA, was not high.

B. On the basis of the data, is it possible to identify which players filed corporate liability lawsuits before the TJ/SP, TJ/RJ and TJ/MG?

In addition, a further analysis of the research findings indicates that a greater number of lawsuits were filed by shareholders (derivative suits) than by corporations (direct suits). The results are set out in Figure 7, below.

Figure 7. Types of lawsuits according to the plaintiff.

Source: Author's elaboration.

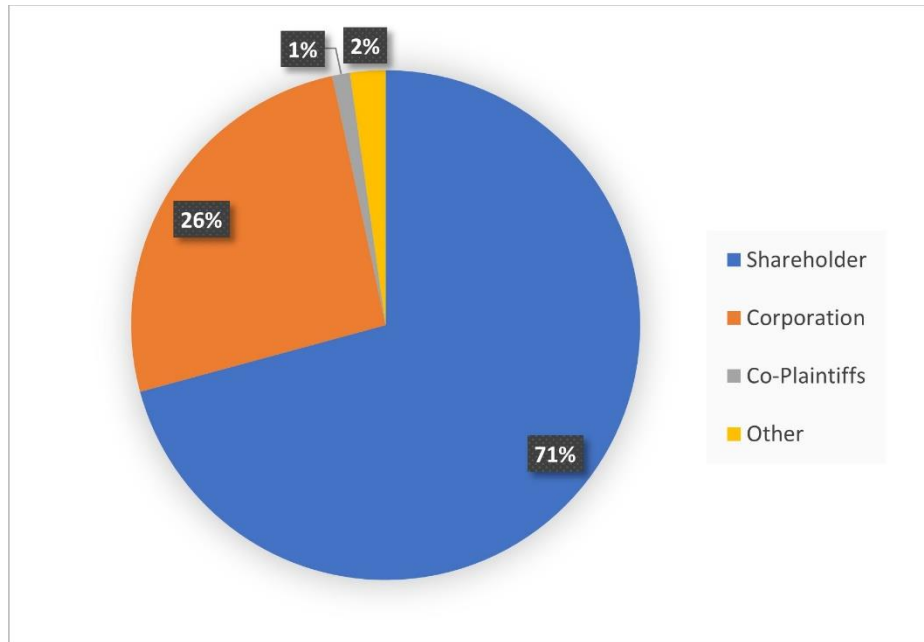
As can be seen, with respect to the lawsuits related to art. 246 of the LSA, twenty-four (24) suits were filed by shareholders derivatively and just two were filed by the corporations directly. Other than that, there were two lawsuits that were filed by other kinds of players, namely: (i) in one case, one of the shareholders comprising the corporation's control block, who was considered by the TJ/SP to be a "co-controller";⁶⁷ and (ii) in the other case, by a former officer of the corporation.⁶⁸

With regard to art. 159 of the LSA, twenty-five lawsuits were filed by shareholders derivatively and eighteen by the corporations that had been directly harmed. One case was filed jointly by the affected corporation and one of its minority shareholders. Additionally, in lawsuits involving the combined application of arts. 159 and 246, there were fourteen lawsuits filed by shareholders derivatively compared to just three filed by corporations directly.

Drawing on these results, it is possible to illustrate the total distribution of lawsuits filed by each corporate player i.e.: (i) shareholder; (ii) corporation; (iii) co-plaintiffs (shareholders and corporations); and (iv) others. There is a clear difference, in this context, between shareholders (derivative suits) and corporations (direct suits). Shareholders filed sixty-three out of the eighty-nine lawsuits (71%), whereas the corporations only filed twenty-three lawsuits (26%). The results are illustrated in Figure 8 below.

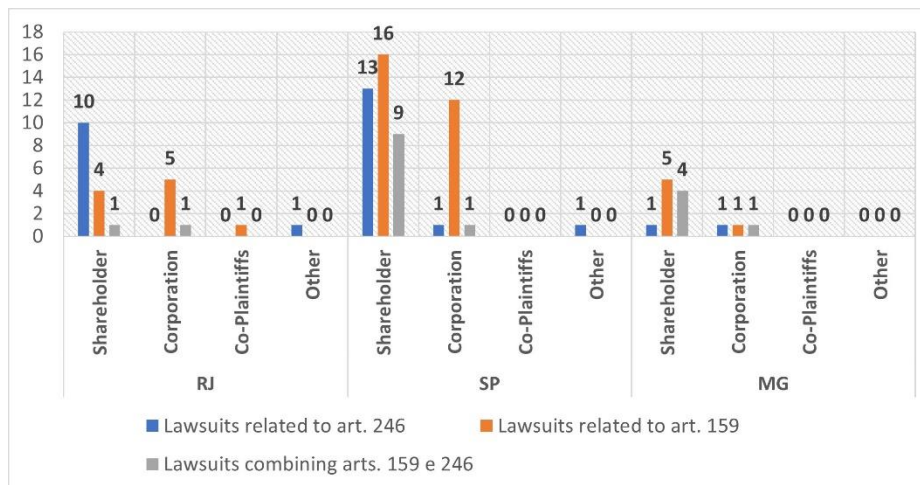
67. TJ-SP, Apelação Cível No. 1034953-37.2018.8.26.0100, Relator: Fortes Barbosa, 05.08/2019, 1ª Câmara Reservada de Direito Empresarial, 05.10.2019, (Braz.) (this referred to Lawsuit No. 1034953-37.2018.8.26.0100/SP, filed before the 2nd Court for Business and Arbitration Related Conflicts in the District of State Capital - TJ/SP).

68. See TJ-RJ, Apelação Cível No. 0002772-34.2000.8.19.0000, Relator: Nilson De Castro Diao, 06.13/2000, Décima Sexta Câmara Cível, 06.21.2000, (Braz.) (this referred to Lawsuit No. 0002772-34.2000.8.19.0000/RJ, filed before the 17th Civil Court of the District of the State Capital - TJ/RJ).

Figure 8. Percentage of lawsuits according to plaintiff.

Source: Author's elaboration.

Furthermore, similarly to what was done in item 4.1, it is possible to pinpoint the plaintiffs in each of the lawsuits that were filed before the three examined Courts: TJSP, TJ/RJ and TJ/MG. The results are set out in Figure 9 below.

Figure 9. Distribution of lawsuits according to plaintiff and state Court.

Source: Author's elaboration.

With regard to the lawsuits related to art. 246 of the LSA, they were rarely filed by the corporations themselves before any of the three Courts. At the TJ/SP, thirteen lawsuits were filed by shareholders derivatively and just 1 by a corporation directly. Before the TJ/RJ, ten lawsuits were filed by shareholders derivatively and none by a corporation directly. Finally, before the TJ/MG, which had a lower number of cases overall, one lawsuit was filed by a corporation directly and another by shareholders derivatively.

It is also noteworthy that in the cases combining arts. 159 and 246 of the LSA, more lawsuits were filed by shareholders derivatively than by the corporations directly, with nine derivative suits compared to 1 direct suit before the TJ/SP, and four derivative suits compared to 1 direct suit, before the TJ/MG.⁶⁹

It can be seen that, in overall terms within the scope of this study, corporations filed a comparatively low number of direct lawsuits, fewer than the derivative lawsuits filed by shareholders. This statistic is particularly relevant to lawsuits based on the application of art. 246 of the LSA (i.e. liability suits against controlling shareholders), for which corporations filed only two direct liability lawsuits before the TJ/SP. This finding confirms the perception among Brazilian scholars that corporations lack sufficient incentives to pursue direct lawsuits, especially against controlling shareholders, thus justifying the LSA's proposition to encourage third-party actors – namely, shareholders – to pursue officer, director and controller liability via derivative lawsuits.⁷⁰

The only moment in which the corporations demonstrated a significantly higher degree of proactiveness was in lawsuits involving the application of art. 159 of the LSA. This is because eighteen lawsuits were filed in total: twelve before the TJ/SP (only four below the number of derivative lawsuits filed by shareholders), five before the TJ/RJ and just one before the TJ/MG. Accordingly, it can be acknowledged that – for the purposes of the present analysis – corporations were more inclined to file direct lawsuits against directors and officers in comparison to controlling shareholders.

69. The exception, as can be seen from the graph, was the TJ/RJ, before which there were just two cases that involved both provisions. One of the lawsuits was filed by a minority shareholder and the other by a corporation.

70. NELSON EIZIRIK, *A LEI DAS S/A COMENTADA*, VOL. I 261–63 (Quartier Latin, 2d ed., 2011) (“the corporate liability lawsuit against the controlling shareholder, for the damage caused to the corporation, can be brought, in the first instance, by the corporation itself, which has suffered direct harm. It is difficult for this to happen, as the controlling shareholder will not allow this initiative, which may occur, however, if there is a change of control, with the new controlling shareholder deciding to hold the previous one liable.” [translated]); Lima, *supra* note 27, at 718 (“Although this is a claim aimed at defending the company's collective interests (in other words, it is the legal entity itself that has directly suffered losses from the controlling shareholder), in this legal provision, the legislator did not even bother to give the company (controlled company) a first opportunity to sue its controlling shareholder. This is because it would be very unlikely, not to say impossible, that any decision by the company would opt to take the controlling shareholder to court (since the controlling shareholder, by nature and also by legal definition, is the one who has control of the company's decisions and effectively exercises its power in the direction of the company's social activities).” [translated]).

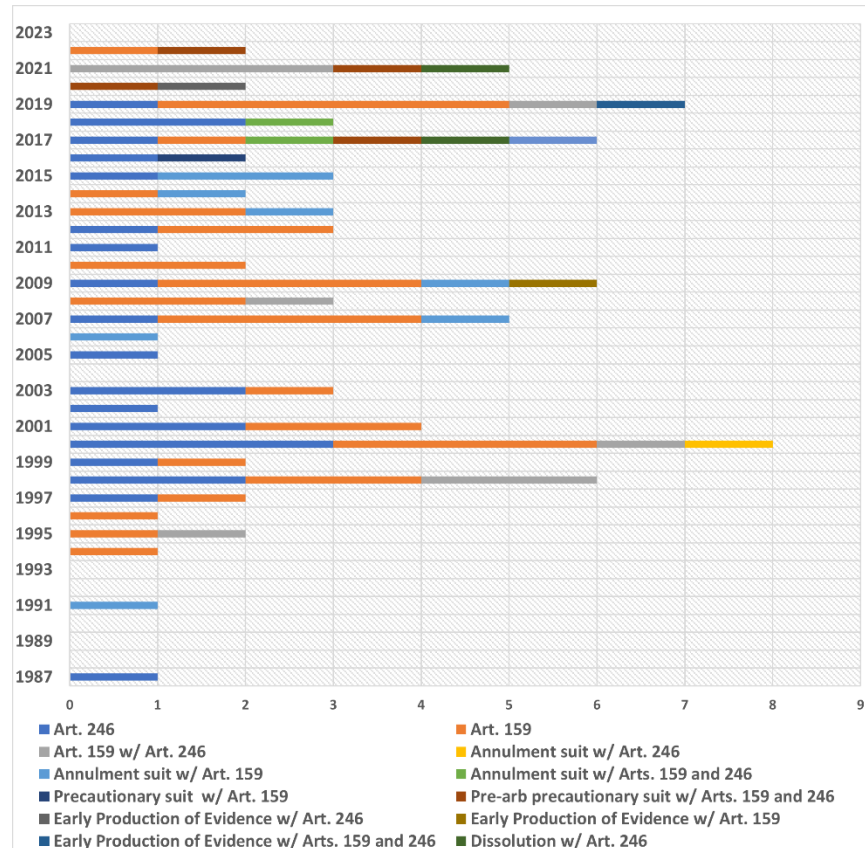
One possible explanation suggested by scholars for the comparatively higher number of direct lawsuits filed against officers and directors is the existence of particular incentives for corporations to file suit under art. 159 of the LSA. As noted by scholars, there are not as many conflicts of interest for corporations to file such a lawsuit.⁷¹ After all, as it is the corporation, via shareholder meetings, that appoints and dismisses its officers and directors, it is the corporation alone that approves and proceeds with the filing of the lawsuit. Officers and directors are not as capable of interfering with this decision. On the other hand, there is no such incentive for the corporation to file a lawsuit against controlling shareholders, as this would involve securing approval for the suit at a shareholders meeting, where controlling shareholders exercise their powers *par excellence*.⁷²

C. Were any patterns identified during the analyzed period (1987-2023)?

Bearing in mind the eighty-nine (89) total lawsuits involving the application of arts. 159 and 246, of the LSA, that were identified at the TJ/SP, TJ/RJ and TJ/MG, Figure 10 below illustrates the distribution of all the above explored types of lawsuits throughout the analyzed period, that is, from 1987 to 2023.

71. See Buschinelli & Bresciani, *supra* note 7, at 263–64.

72. *Id.*

Figure 10. Distribution of all types of lawsuits per year.

Source: Author's elaboration.

As can be seen, Figure 10 does not illustrate a visually clear pattern when it comes to the filing of the examined lawsuits before the TJ/SP, TJ/RJ and TJ/MG between 1987 and 2023. The findings do not point to any identifiable trend in the analyzed period. The overall number of cases (89) was a considerably low figure for a period of thirty-six years in total. If anything, the identified lawsuits were filed in a dispersed manner, scattered across the analyzed time frame, without any piece of evidence indicating that the filing of lawsuits were concentrated in a given period. The only exception to this conclusion was that in the first 10 years of the analyzed period (i.e. from 1987 to 1997), the total number of filed lawsuits was particularly low – just eight in total.

These findings reveal a mean average of 2.47 and a median figure of two cases for the entire analyzed period. Once again, from these results, it can be concluded that the annual rate of lawsuit filings was considerably low. The year

with the highest number of lawsuits filed was 2000, with only eight lawsuits.⁷³ In 2019, there were seven, and in 2017, 2009, and 1998, six lawsuits were filed.^{74 75 76 77} Altogether, the results further confirm the perception among scholars that the instruments provided by arts. 159 and 246 of the LSA are underutilized in practice, scattered and not regularly explored before Brazilian Courts.⁷⁸

It can also be seen that the particular type of lawsuit that was most frequently filed in any single year was the corporate liability suit against officers and directors, provided by art. 159 of the LSA – which was filed on four occasions in 2019. In no other year was a single type of lawsuit filed four times or more. The closest results were, once again, all pursuant to liability lawsuits under art. 159, with three cases filed in 2000, 2007, and 2009. Additionally, it is relevant to note that in 2021, three liability lawsuits were filed combining the application of arts. 159 and 246. These figures reinforce the finding that, within the examined period, there was a low level of filings in any given year with respect to all the different types of lawsuits identified by the survey.

Turning to the individual scenario of each of the Courts that were examined – starting with the TJ/SP – it can again be seen that the results do not indicate a clear pattern of evolution or development. As confirmed by Figures 11 and 12, the filing of lawsuits was uneven, with little uniformity and with considerable oscillation over the years. In fact, in several years, no lawsuit was filed, and the

73. In 2000, as can be seen from the data contained in Figure 11: (i) three lawsuits were filed under art. 159; (ii) three lawsuits were filed under art. 246; (iii) one combined lawsuit (arts. 159 and 246); and (iv) one lawsuit related to art. 246 combined with a request to annul a shareholder meeting resolution.

74. In 2019, as can be seen from Figure 11: (i) four lawsuits were filed under art. 159; (ii) one lawsuit under art. 246; (iii) one lawsuit combining the application of arts. 159 and 246; and (iv) one precautionary lawsuit related to art. 159.

75. In 2017, as can be seen from the data contained in Figure 11: (i) one lawsuit was filed under art. 159; (ii) one lawsuit was filed under art. 246; (iii) one lawsuit pursuant to both arts. 159 and 246 combined with a request to annul a shareholder meeting resolution; (iv) one precautionary measure requested in preparation for an arbitration involving arts. 159 and 246; (v) one lawsuit seeking partial dissolution combined with the application of arts. 159 and 246; and (vi) one lawsuit seeking partial dissolution combined with the application of art. 159.

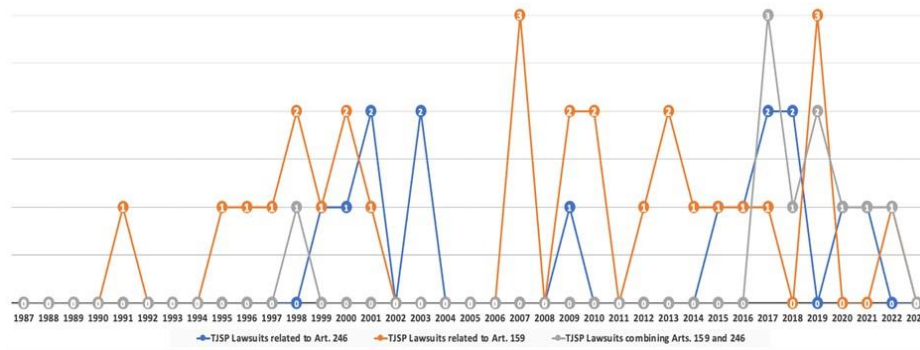
76. In 2009, as can be seen from the data contained in Figure 11: (i) three lawsuits were filed under art. 159; (ii) one lawsuit was filed under art. 246; (iii) one combined lawsuit was filed, with a claim under art. 159 together with a request to annul a shareholder meeting resolution; (iv) one action seeking early production of evidence combined with a claim under art. 159.

77. In 1998, as can be seen from the data contained in Figure 11: (i) two lawsuits were filed under art. 159; (ii) 2 lawsuits were filed under art. 246; and (iii) two lawsuits were filed with the combined application of arts. 159 and 246.

78. See Rodrigues, *supra* note 45, at 66 (“According to what has been said so far, we have noticed that filing civil liability lawsuits against directors of publicly traded companies seems to present a number of obstacles” [translated]); Schwartz & Pargendler, *supra* note 66, at 458 (“there are relatively few occasions when the Court has considered a claim for compensation [brought by] an investor” [translated]); BERNARDO R. TEIXEIRA, A EFETIVIDADE DA AÇÃO DE RESPONSABILIDADE DE SOCIEDADE CONTROLADORA, IN ATUALIDADES EM DIREITO SOCIETÁRIO E MERCADO DE CAPITAIS, VOL. IV 97 (Lumen Juris, 2019) (“However, in a corporation with a defined controlling shareholder, the directors have no incentive to seek such redress, since they were, at least for the most part, elected by the one from whom they must seek it” [translated]).

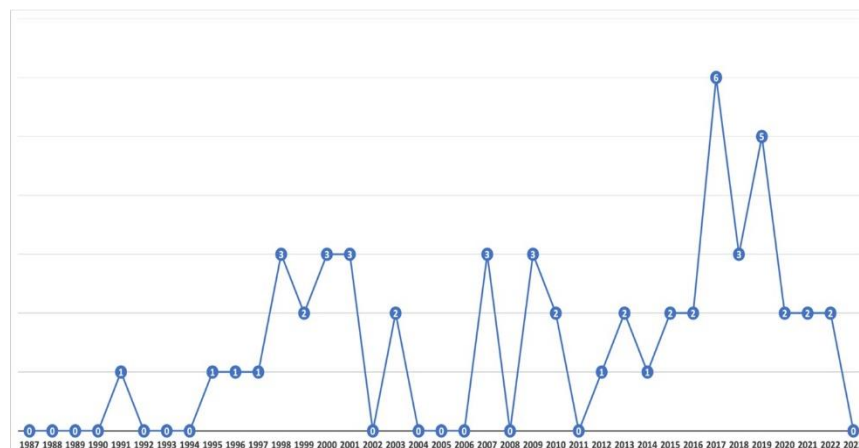
maximum figures for the TJ/SP were six lawsuits filed in 2017 and five in 2018. Overall, there was a mean average of 1.43 lawsuits per year throughout the examined period. In the last three years (2022, 2021, and 2020), six lawsuits were filed – two per year.^{79 80 81}

Figure 11. Distribution of the aggregated types of lawsuits before the TJ/SP per year.



Source: Author's elaboration.

Figure 12. Total distribution of lawsuits before the TJ/SP per year.



Source: Author's elaboration.

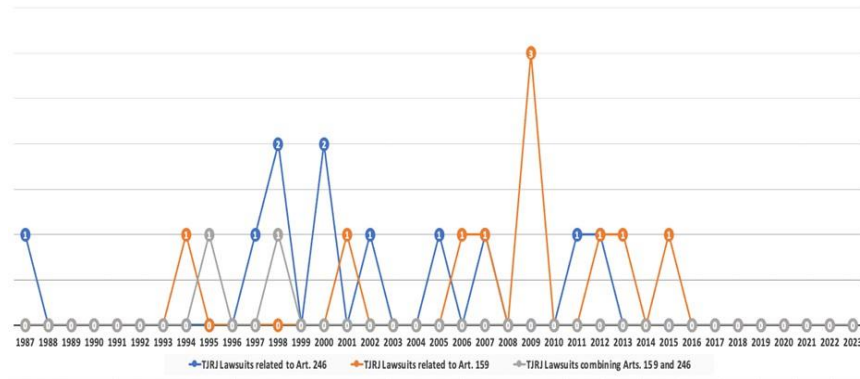
79. In 2022, as can be seen from the data contained in Figure 12: (i) one lawsuit was filed under art. 159; and (ii) one combined lawsuit was filed, with the application of both arts. 159 and 246.

80. In 2021, as can be seen from the data contained in Figure 12: (i) one lawsuit was filed under art. 246; and (ii) one lawsuit was filed under art. 159.

81. In 2020, as can be seen from the data contained in Figure 12: (i) one lawsuit was filed under art. 246; and (ii) one lawsuit was filed under art. 159.

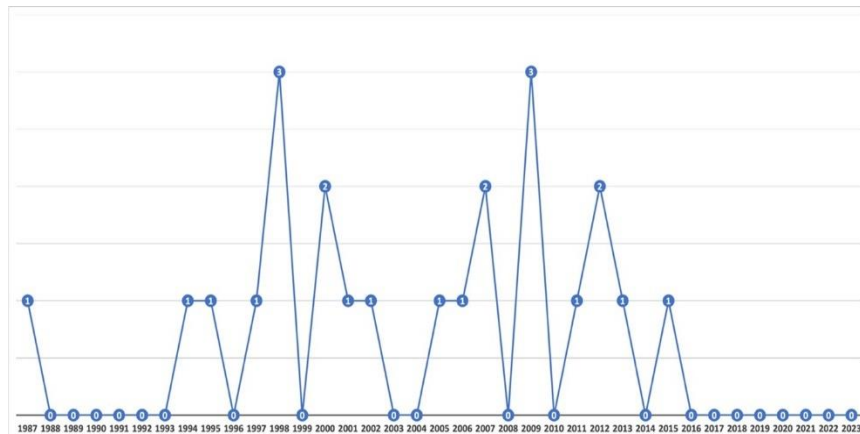
The results for the TJ/RJ are also in line with the conclusion set out above. It can be seen from Figures 13 and 14 below, that there was a high degree of oscillation between 1986 and 2023. There was no consistency in the rate of lawsuit filings, which was subject to a series of fluctuations throughout the analyzed years. The mean average extracted from the sparse and fluctuating findings was 0.62 filed lawsuits. In the case of the TJ/RJ, no more than three lawsuits were filed in a single year, and the filing of three lawsuits occurred only once, in 2009 (with the filing of three lawsuits related to art. 159 of the LSA). It is relevant to note that the TJ/RJ did not register a single lawsuit following the filing of a lawsuit related to art. 159 of the LSA in 2015.

Figure 13. Distribution of the aggregated types of lawsuits before the TJ/RJ per year.



Source: Author's elaboration.

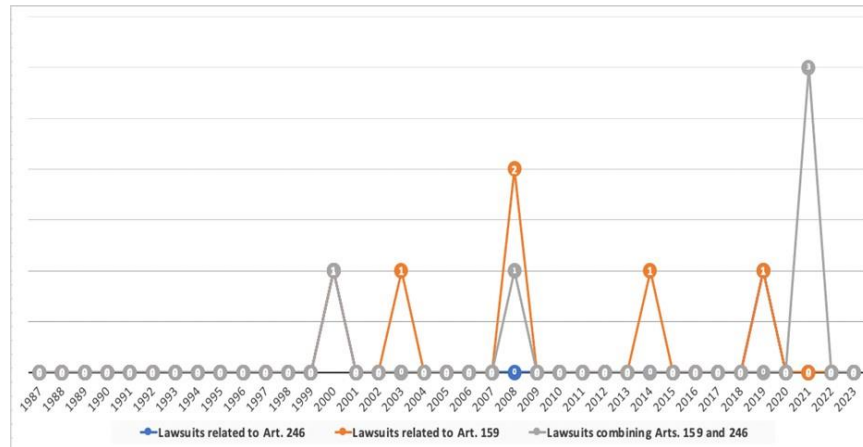
Figure 14. Total distribution of lawsuits before the TJ/RJ per year.



Source: Author's elaboration.

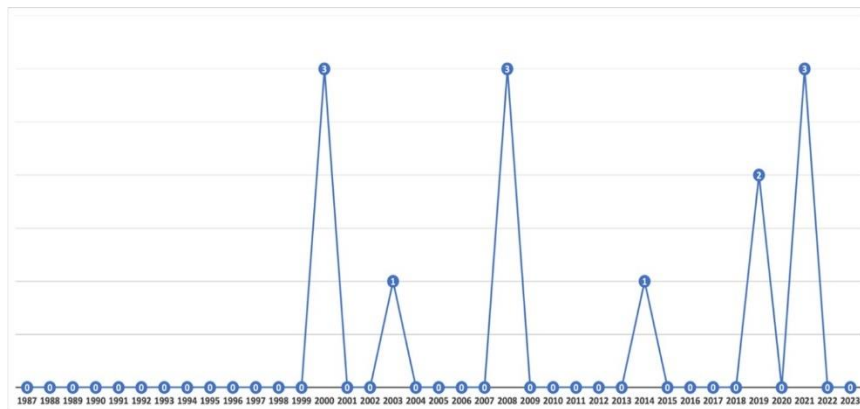
Turning finally to the TJ/MG, the distribution of lawsuits throughout the examined period is set out in Figures 15 and 16.

Figure 15. Distribution of aggregated types of lawsuits before the TJ/MG per year.



Source: Author's elaboration.

Figure 16. Total distribution of lawsuits before the TJ/MG per year.



Source: Author's elaboration.

Out of the three Courts examined, the TJ/MG was the one that registered the lowest number of lawsuits and the highest rate of lawsuit dispersion throughout the analyzed period. The findings show that: (i) three lawsuits were filed in 2021, 2008 and 2000; (ii) two lawsuits were filed in 2019; and (iii) just one lawsuit was filed in 2014 and in 2003 (both related to art. 159 of the LSA). Not a single lawsuit was identified for the remaining years and as such the mean average for the TJ/MG is 0.35.

D. Is it possible, from the database, to identify the outcome of the analyzed lawsuits?

The paper now turns to an examination of the outcome of each of the eighty-nine (89) lawsuits collected and included in the database. In order to facilitate the interpretation of the data, the survey identified and classified the outcome of the proceedings as follows: (i) lawsuits that were granted full relief on the merits; (ii) lawsuits that were granted partial relief on the merits; (iii) lawsuits that were rejected on the merits; (iv) lawsuits closed due to settlement; (v) lawsuits dismissed without prejudice; and (vi) lawsuits still on-going at the first instance (before a state Court).

The outcomes of the lawsuits were classified in light of the types of lawsuits filed before the TJ/SP, TJ/RJ and TJ/MG (according to Figure 1, *supra*) i.e. (i) lawsuits related to art. 159 of the LSA; (ii) lawsuits related to art. 246 of the LSA; and (iii) lawsuits combining the application of both arts. 159 and 246 of the LSA. The findings are set out in Figure 17 below:

Figure 17. Outcomes of the types of lawsuits per state Court.

	Lawsuits related to Art. 246			Lawsuits related to Art. 159			Lawsuits combining Arts. 159 and 246		
	RJ	SP	MG	RJ	SP	MG	RJ	SP	MG
Granted	2	3	0	2	6	0	1	1	1
Partially Granted	0	0	1	1	2	0	0	0	0
Rejected	6	7	0	3	6	2	1	2	1
Settlement	1	0	0	0	1	2	0	1	0
Dismissed	1	1	1	3	11	2	0	4	1
Pending	1	4	0	1	2	0	0	2	2

Source: Author's elaboration.

There are two points that need to be considered based on the findings from each state Court. Firstly, it can be seen that before each of the state Courts, more lawsuits were rejected than granted on the merits. That was particularly the case for lawsuits related to art. 246 of the LSA.

Specifically: (i) before the TJ/RJ, six lawsuits related to art. 246 were rejected, whereas two were granted relief on the merits. Pursuant to art. 159, three lawsuits were rejected and two were granted relief on the merits, and of all the lawsuits which combined the application of arts. 159 and 246, one was rejected and one was granted; (ii) before the TJ/MG, two lawsuits related to art. 159 were rejected and none was granted; one lawsuit combining the application of arts. 159/246 was granted and another of the same type was rejected; (ii) before the TJ/SP, seven lawsuits related to art. 246 were rejected, with only three being granted; and out of the lawsuits combining the application of arts. 159 and 246, two were granted and one was rejected.

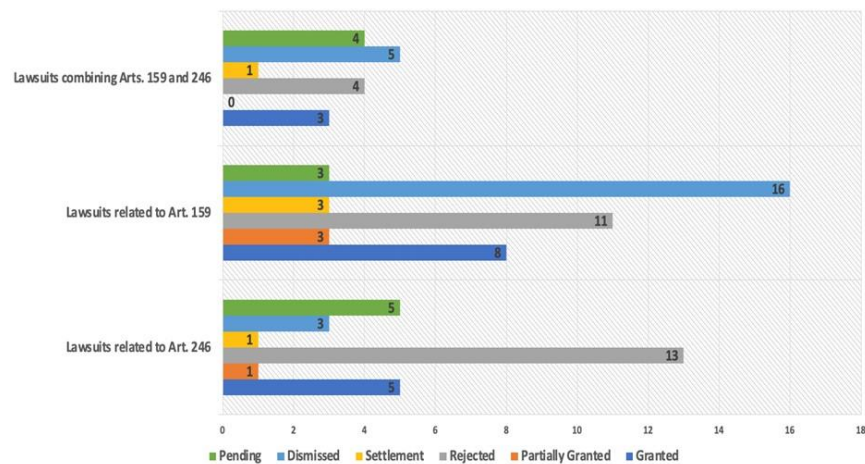
However, it can be seen from Figure 17 that, with respect to the lawsuits related to art. 159 of the LSA, the TJ/SP managed to diverge from the general trend. In fact, in the context of the TJ/SP, six lawsuits were rejected on the

merits, six were granted in full and two were partially granted. This marked the only occasion in which a favorable outcome was obtained on more than three occasions by one of the types of examined lawsuits.

Another noteworthy finding is the high level of lawsuits based on art. 159 of the LSA (i.e. liability of officers and directors) being dismissed without prejudice. As can be seen from Figure 18 *infra*, out of the total of forty-four lawsuits related to art. 159 filed before all the three Courts, sixteen were dismissed without prejudice, and eleven of these dismissals were determined by the TJ/SP. Indeed, that was the only outcome of any type to have occurred in more than ten lawsuits, in all three of the state Courts examined.

That said, moving on from this initial analysis, the study then collected the individual data from the three Courts that were analyzed – TJ/SP, TJRJ and TJ/MG. In order to provide a more comprehensive overview of the results, Figure 18, set out below, presents the total distribution of outcomes of the lawsuits, classified, once again, as: (i) lawsuits related to art. 246; (ii) lawsuits related to art. 159; and (iii) lawsuits which combined the application of both provisions.

Figure 18. Total distribution of outcomes of the of aggregated types of lawsuits.



Source: Author's elaboration.

As a whole, the following observations can be made. Firstly, in the twenty-eight cases related to corporate liability suits against controlling shareholders, based on art. 246 of the LSA: (i) the claims were rejected in thirteen lawsuits (46.43%); (ii) the claims were fully granted in five lawsuits (17.86%); (iii) five lawsuits were still on-going before the first instance Court (17.86%); (iv) three lawsuits were dismissed without prejudice (10.71%); (v) the claims were partially granted in just one lawsuit (3.57%); and, lastly (vi) just one lawsuit was closed following settlement between the parties (3.57%).

Therefore, it can be seen that almost half of the lawsuits related to art. 246 (i.e. liability lawsuits against controlling shareholders) ended in their ultimate rejection on the merits. Note that the present paper does not propose to review the individual merits of each case or the grounds on which the plaintiffs' claims were either accepted or rejected. As such, it is not possible to ascertain whether the rejection on the merits was attributable to difficulties in producing evidence, the absence of solid legal arguments, or even due to the possibly rigorous approach taken on by the benches of the TJ/SP, TJ/RJ and TJ/MG. Still, there is no denying the fact that, at least within the scope of the present survey, the plaintiffs had comparatively little success in stating their cases, proving their claims and obtaining relief. Such a finding has already been suggested by scholars and practitioners, confirming the suggestion that liability or compensation-based lawsuits, on the merits, have struggled to obtain relief and compensate the affected corporations.⁸²

Turning, secondly, to the forty-four lawsuits related to art. 159 of the LSA (i.e. liability suits against officers or directors), it can be seen that: (i) most of them (sixteen) were dismissed without prejudice (36.36%); (ii) in eleven lawsuits the plaintiffs' claims were rejected on the merits (25%); (iii) in eight lawsuits the plaintiffs' claims were granted on the merits (18.18 %); (iv) three of the cases were still ongoing before the first instance Court (6.82 %); (v) three of the cases were closed following a settlement agreement between the parties (6.82 %); and (vi) in three cases the plaintiffs' claims were partially granted on the merits (6.82%). As such, with regard to the cases related to art. 159 of the LSA, even though the rate of rejection of the lawsuits was significant (25%), they had four rejections less in comparison to the lawsuits related to art. 246. In any case, the most noteworthy finding of art. 159 related lawsuits was the elevated number of dismissals without prejudice (36.36%), as shall be further examined below.

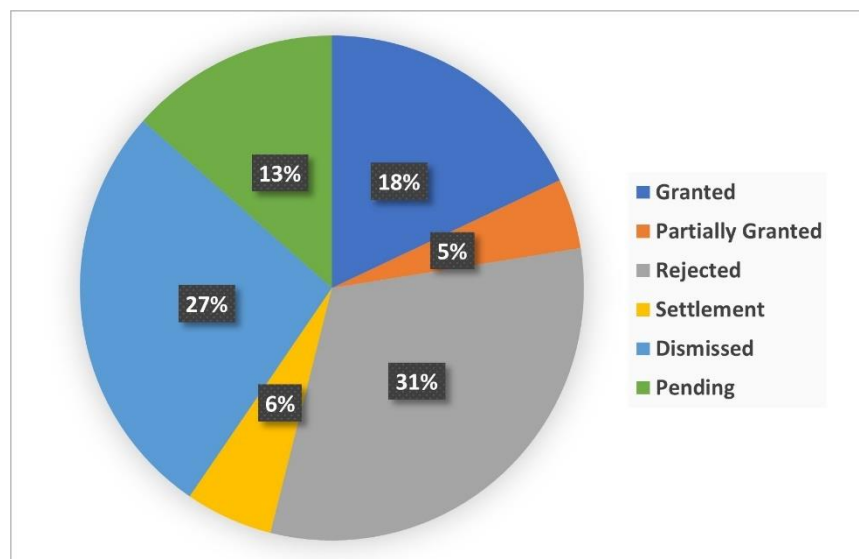
Thirdly, with respect to the lawsuits that involve the combined application of both arts. 159 and 246 of the LSA, the results were less expressive, mainly attributable to the fact that the number of identified cases of this kind was generally lower. Out of the seventeen cases in which there were combined applications of both provisions: (i) five were dismissed without prejudice (29.41%); (ii) four were rejected on the merits (23.53%); (iii) four are still underway before the first instance Court (23.53%); and (iv) three were granted on the merits (17.65%). Once again, the low number of cases in which there were combined applications of both types of liability lawsuit is particularly noticeable.

With this in mind, Figure 19 gathers all the data and presents the total outcomes for all collected lawsuits filed before the three examined Courts. The

82. See André E. Schwartz, *Shareholder Litigation in Brazil: The Overlooked Role of Rescission Lawsuits*, 2 CORP. & BUS. L. J. 342 (2022), [<https://perma.cc/LR2L-KH3Z>] (“most liability suits with a decision on the merits have failed to provide redress to shareholders due to the lack of proof of the defendant’s liability”).

findings are as follows: (i) 31% of the lawsuits were rejected on the merits; (ii) 27% of the cases were dismissed without prejudice; (iii) 18% of the lawsuits were granted on the merits; (iv) 13% were still underway before the first instance Courts; (v) 6% of the lawsuits ended in settlement; and (vi) in 5% of the cases the claims were partially granted. We highlight, in this regard, that over half of the cases that were identified in the present study (58%) were either rejected on the merits or dismissed without prejudice.

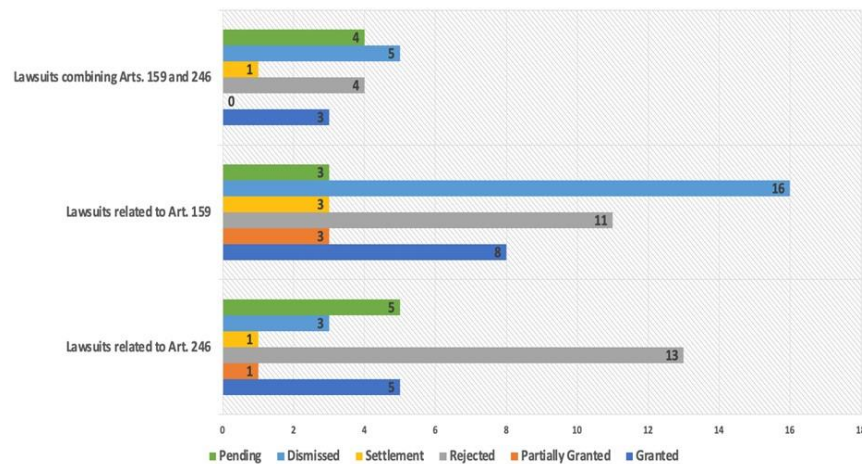
Figure 19. Percentage of lawsuits in terms of outcome.



Source: Author's elaboration.

At last, the analysis of the present item can still take one final step further. The paper shall now identify the outcome of the proceedings in light of the type of players that filed the lawsuits and acted as plaintiffs. In other words, by gathering the findings obtained for each of the Courts, Figure 20, which is set out below, separates and highlights the outcomes for the claims made by each of the players listed in item 4.2 *supra* i.e.: (i) shareholders; (ii) corporations; and (iii) others.

Figure 20. Distribution of the aggregate types of lawsuits, according to plaintiff and outcome.



Source: Author's elaboration.

In order to fully comprehend the differences in outcomes for each player, we now turn to an analysis of the individual scenario of each particular type of lawsuit.⁸³ Beginning with the lawsuits related to art. 246 of the LSA, there is a noticeable difference between the lawsuits filed by shareholders and those filed by corporations. Only two lawsuits were filed by corporations – one of them was rejected on the merits and the other was partially granted. On the other hand, the outcomes of the twenty-four derivative lawsuits filed by shareholders can be classified as follows: (i) eleven were rejected on the merits; (ii) five were granted on the merits (less than half the number of cases that were rejected); (iii) five were still underway before the first instance Courts; (iv) two were dismissed without prejudice, in both cases due to the existence of contractual provisions referring disputes to arbitration; and, finally (v) on just one occasion, the lawsuit was concluded by means of settlement between the parties.

Moving on to the lawsuits related to art. 159 of the LSA, it can be seen that there is a greater level of balance – between lawsuits filed by corporations and by shareholders – compared to the results of art. 246 related lawsuits. On the one hand, out of the eighteen lawsuits filed by the corporations: (i) five were dismissed without prejudice; (ii) five were rejected on the merits; (iii) five were granted on the merits; (iv) two were still underway before the first instance Courts; and (v) just one lawsuit was closed following settlement between the parties. Here, it should be noted that four out of the five lawsuits that were dismissed without prejudice were due to absence of a prior shareholders meeting

83. Due to limitation of space, the category “others” includes the results pertaining to co-plaintiffs.

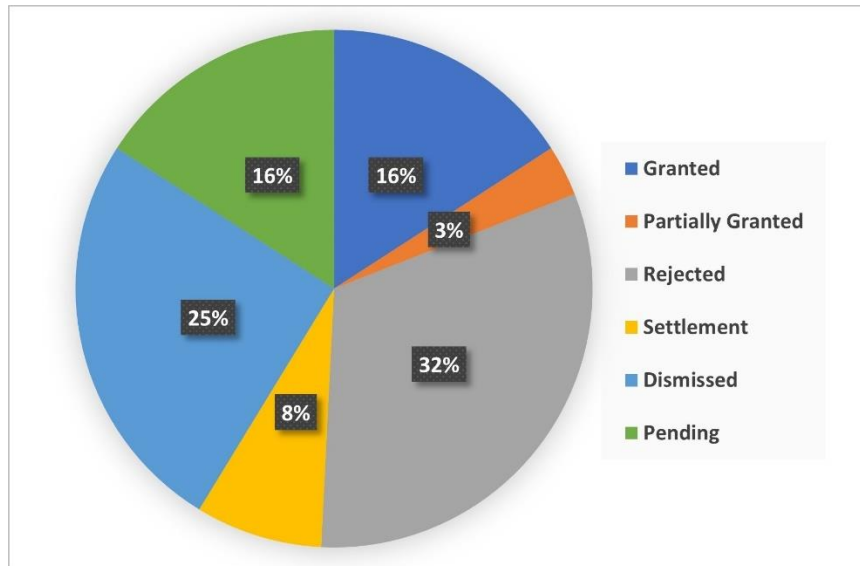
approving the filing of the lawsuit. In other words, the corporation had filed the lawsuit without having obtained the prior approval of the shareholders meeting (as required by art. 159 of the LSA). In the other lawsuit that was dismissed without prejudice, the Court found that there had been no attempt by the corporation to annul the prior shareholders meeting resolution approving the financial statements and accounts, and thus, to rescind the *quitus* afforded to corporate officers and directors (art. 134, paragraph 3 of the LSA).

On the other hand, out of the twenty-five lawsuits related to art. 159 that were filed by shareholders: (i) eleven were dismissed without prejudice; (ii) five were rejected on the merits; (iii) three were granted on the merits; (iv) another three were settled; (v) two were partially granted; and (vi) just one was still underway before a first instance Court. Of the 11 cases that were dismissed without prejudice, it can be seen that: (a) five were dismissed due to the absence of a prior shareholder meeting resolution approving the filing of the lawsuit; (b) four were dismissed because they did not satisfy the pre-requisites for legitimate standing to sue in accordance with art. 159, in particular, the need for a minimum ownership of 5% of the capital stock; (c) one was dismissed due to the existence of a provision in the bylaws referring disputes to arbitration; and (d) the last one was due to the failure to observe the deadline of three months to file the lawsuit following the date of the shareholder meeting resolution which approved it (art. 159, paragraph 3).

Moving on to the findings from lawsuits which combined the application of arts. 159 and 246, we can see that, of the three lawsuits filed by corporations, one was granted on the merits, and the other two were dismissed without prejudice. The dismissal of the lawsuits, in these two instances, was due to the existence of an arbitration clause in the bylaws, in the first case, and the lack of prior approval by a shareholder meeting resolution, in the second case. On the other hand, in the lawsuits filed by shareholders as procedural substitutes: (i) four were rejected on the merits; (ii) four were on-going before the first instance Courts; (iii) three were dismissed without prejudice; (iv) two were granted on the merits; and (v) just one was closed following settlement. Of the three lawsuits that were dismissed without prejudice, all of them favored the referral of the case to arbitration, i.e. on grounds of the existence of an arbitration agreement in the bylaws or the fact that a competent arbitration Tribunal had already been constituted to hear the matter.

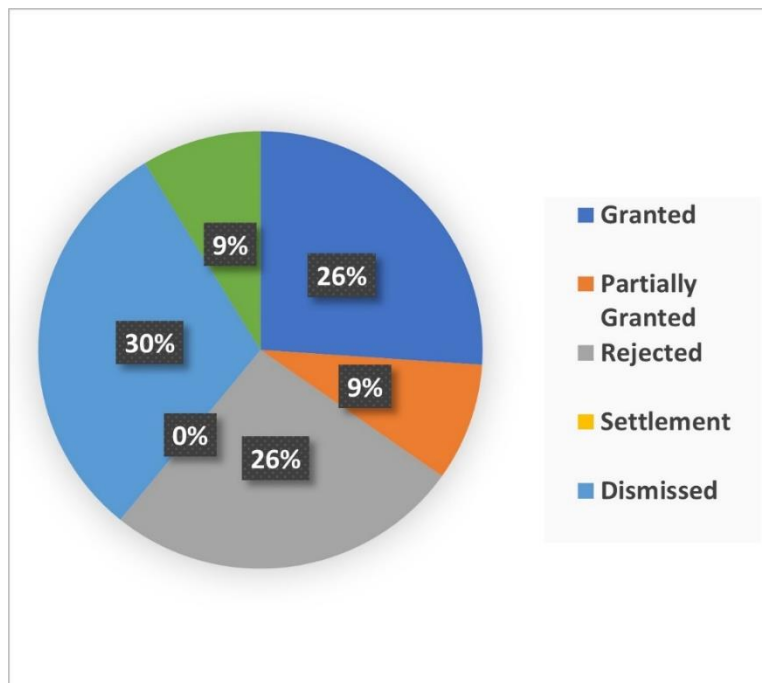
Finally, bringing together the results of the lawsuits in light of the types of players that filed them, Figures 21 and 22 *infra* illustrate the distribution of outcomes, and consequently, the rate of success, of all the derivative lawsuits filed by shareholders as procedural substitutes for the corporations, on the one hand, and of all direct lawsuits filed by the corporations themselves, on the other.

Figure 21. Percentage of lawsuits filed by shareholders according to outcome.



Source: Author's elaboration.

Figure 22. Percentage of lawsuits filed by corporations, according to outcome.



Source: Author's elaboration.

Altogether, it can be seen from the figures that most of the direct suits filed by corporations and the derivative suits filed by shareholders ended in dismissal without prejudice, or in the of the claims in the merits. In the case of corporations, 30% of the lawsuits were dismissed without prejudice and 26% were rejected on the merits. The combined total of unfavorable outcomes (dismissals and rejections) was therefore 56%. It can also be noted that out of the seven lawsuits that were dismissed without prejudice, five were rejected due to the absence of prior approval by a shareholder meeting resolution. This finding falls in line with the assertion of scholars and practitioners that corporate liability lawsuits face a series of procedural obstacles that hinder their progress or effective use (at least within the scope of this investigation).⁸⁴ That is particularly the case of the requirement for prior approval by a shareholder meeting resolution for the filing of liability lawsuits against officers and directors, based on art. 159 of the LSA.⁸⁵ Yet, similarly to the conclusions of other scholars, the data does indicate that the requirement to rescind the *quitus* and annul the prior shareholder resolution that approved the financial statements and management accounts did not stand as a significant burden for the filing of direct or derivative suits.⁸⁶

Finally, in the case of lawsuits filed by shareholders, a significant number of the examined cases – 57% – resulted in an unfavorable outcome, either by dismissal without prejudice or by rejection on the merits. After all, 32% of the lawsuits were rejected on the merits, whereas 25% were dismissed without prejudice. This confirms the findings and perspective of scholars that shareholders struggle to demonstrate before Courts the full extent of the actual harm suffered by the corporations.⁸⁷

These findings also dialog with scholars who suggest that, in derivative lawsuits, shareholders acting as procedural substitutes face considerable obstacles that are inherent to the LSA provisions, which hinder the exercise of “extraordinary” standing and therefore the ability of shareholders to file lawsuits before Brazilian Courts.⁸⁸ Indeed, within the cases examined by the present paper, sixteen lawsuits were dismissed without prejudice. In six of these cases,

84. See Rodrigues, *supra* note 45, at 70 (“Having considered all of the above, we conclude that the corporate liability lawsuit, despite its importance, seems to present serious obstacles to its filing. As a result, the use of this institute to protect minority shareholders, as mentioned in the Introduction to this study, is seriously hampered.” [translated]); Schwartz & Pargendler, *supra* note 66, at 462 (“The finding suggests that corporate litigation in Brazil follows the pattern identified by Martin Gelter in other civil law countries, given the legal and institutional obstacles to filing derivative social actions.” [translated]).

85. See Rodrigues, *supra* note 45, at 56 (“The first obstacle that minority shareholders may encounter when deciding whether to bring a lawsuit for civil liability against directors relates to calling a general meeting. This is because, as a rule, it is the directors themselves who have the power to call the meeting.” [translated]).

86. See Schwartz & Pargendler, *supra* note 66, at 318, 344 (“Finally, this study has not identified the lack of rescission of the *quitus* as a major reason for the failure of derivative actions against officers and directors.” [translated]).

87. *Id.* at 342.

88. See Schwartz & Pargendler, *supra* note 66, at 461–62.

the dismissal was based on the lack of prior approval to sue by a shareholder meeting resolution, whereas in four cases, dismissal was due to the failure to meet the criteria to file a shareholder derivative suit (e.g. the requirement to own a minimum percentage of shares).

V. CONCLUSION

The present paper managed to empirically map out the profile of corporate liability lawsuits filed by corporations (direct suits) and by shareholders (derivative suits) against directors, officers and controlling shareholders, over a thirty-six-year period, before the TJ/SP, TJ/RJ and TJ/MG. A survey was carried out which identified the total number of lawsuits filed, the year in which they were commenced, who filed them and their outcomes.

Specifically, it was possible to conclude that: (i) the use of lawsuits seeking the application of arts. 159 and 246 of the LSA was neither frequent nor substantial between 1987 and 2023, with only eighty-nine cases being identified. Of these cases, forty-four were related to art. 159 of the LSA, twenty-eight were related to art. 246 of the LSA and seventeen combined the application of both provisions; (ii) within this range of lawsuits, there was a preponderance of derivative lawsuits filed by shareholders, particularly in connection to art 246 of the LSA – with the only exception being a more active posture by corporations in the filing of lawsuits related to art. 159 of the LSA; (iii) given the low number of cases that were identified (eighty-nine) over a period of thirty-six years, the distribution of the lawsuits over the years was sparse and dispersed, without a clear trend of growth or evolution, and with few lawsuits being filed per year, on average; and (iv) with regard to the outcomes, most of the lawsuits were either dismissed without prejudice or rejected on the merits, which was usually the case in both derivative lawsuits filed by shareholders and direct lawsuits filed by corporations —demonstrating the difficulties for plaintiffs to prove their case before Courts and how procedural obstacles impacted the progression of these suits (with a notable example being the need for prior approval by a shareholder meeting resolution).

APPENDIX

TJ/SP	
No. of Lawsuit	Year of Filing
1068809-21.2020.8.26.0100	2020
1092488-21.2018.8.26.0100	2018
1009583-72.2017.8.26.0009	2017
1000798-13.2015.8.26.0100	2015
1086219-29.2019.8.26.0100	2019
1110009-13.2017.8.26.0100	2017
1037473-62.2021.8.26.0100	2021
9097935-82.2003.8.26.0000	2003
1034953-37.2018.8.26.0100	2018
1003528-36.2016.8.26.0011	2016
9172849-83.2004.8.26.0000	2001
9167807-48.2007.8.26.0000	2007
1121451-73.2017.8.26.0100	2017
0250192-35.2009.8.26.0002	2009
9133789-11.2001.8.26.0000	2001
2222436-66.2022.8.26.0000	2022
0054434-04.1998.8.26.0100	1998
0517189-28.2000.8.26.0100	2000
0041264-86.2003.8.26.0100	2003
1059312-80.2020.8.26.0100	2020
1049772-13.2017.8.26.0100	2017
1090755-83.2019.8.26.0100	2019
1097498-46.2018.8.26.0100	2018
1033664-64.2021.8.26.0100	2021
1069283-94.2017.8.26.0100	2017
0013246-44.2009.8.26.0068	2009
1116362-69.2017.8.26.0100	2017
1009853-57.2015.8.26.0562	2015
3003790-53.2013.8.26.0270	2013
0000024-98.1991.8.26.0404	1991
9126588-70.1998.8.26.0000	1998
9026566-38.1997.8.26.0000	1997
9023441-62.1997.8.26.0000	1995
1040320-81.2014.8.26.0100	2014
0030518-25.2000.8.26.0114	2000
1075839-54.2013.8.26.0100	2013
0003410-53.2011.8.26.0011	2010
0017496-92.2012.8.26.0011	2012
0529350-18.1996.8.26.0583	1996
9069250-70.2000.8.26.0000	2000
9128966-96.1998.8.26.0000	1998
9068606-64.1999.8.26.0000	1999

9070420-33.2007.8.26.0000	2007
1068730-76.2019.8.26.0100	2019
0244410-15.2007.8.26.0100	2007
0147539-24.2010.8.26.0000	2010
1004029-38.2016.8.26.0286	2016
0226168-37.2009.8.26.0100	2009
0203624-26.2007.8.26.0100	2007
0362587-73.2009.8.26.0000	2009
9012742-70.2001.8.26.0000	2001
1086738-96.2022.8.26.0100	2022
1000455-47.2019.8.26.0368	2019
TJ/RJ	
No. of Lawsuit	Year of Filing
0384545-05.2012.8.19.0001	2012
0040169-03.1995.8.19.0001	1995
0020087-75.2000.8.19.0000	2000
0002772-34.2000.8.19.0000	2000
0000263-87.1987.8.19.0000	1987
0199400-61.1998.8.19.0001	1998
0009395-85.1998.8.19.0000	1998
0002784-53.1997.8.19.0000	1997
0105707-08.2007.8.19.0001	2007
0000222-23.1998.8.19.0037	1998
0129167-92.2005.8.19.0001	2005
0106634-47.2002.8.19.0001	2002
0308997-08.2011.8.19.0001	2011
0136239-96.2006.8.19.0001	2006
0069171-22.2012.8.19.0001	2012
0386742-35.2009.8.19.0001	2009
0007920-71.2010.8.19.0001	2010
0170181-85.2007.8.19.0001	2007
0075008-44.2001.8.19.0001	2001
0001559-03.1994.8.19.0000	1994
0244296-96.2015.8.19.0001	2015
0052173-81.2009.8.19.0001	2009
0034884-96.2013.8.19.0001	2013
TJ/MG	
No. of Lawsuit	Year of Filing
5110909-51.2019.8.13.0024	2019
1276872-24.2000.8.13.0000	2000
5161239-81.2021.8.13.0024	2021
4919826-82.2000.8.13.0000	2000
1177002-40.2008.8.13.0480	2008
1909866-21.2021.8.13.0000	2021
1940887-15.2021.8.13.0000	2021
2517796-13.2014.8.13.0024	2014
1838997-15.2008.8.13.0024	2008

2327636-41.2008.8.13.0024	2008
5000021-73.2019.8.13.0134	2019
1811847-35.2003.8.13.0024	2003
3003878-45.2000.8.13.0000	2000