

## THE PROTECTION OF CONSUMER RIGHTS IN THE DIGITAL ECONOMY CONDITIONS – THE EXPERIENCE OF THE BRICS COUNTRIES

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*Online contracts are characterized by unequal economic opportunities. The consumer, traditionally, has fewer economic opportunities, the seller – more. Digitalization of consumer-seller relations did not solve the old problem of insufficient consumer protection, but rather exacerbated it. Now the consumer needs to be protected from unscrupulous actions of both the seller and the aggregator of the information on goods, works, and services, i.e. the owner of the site on which the consumer buys the good, orders the work or the service. A contract concluded on a site is a special type of adhesion contract. If a site sells goods from different sellers (which often happens), the terms and conditions of the adhesion contract are determined not only by the seller, but also by the site owner. Thus, the economically weak party – the consumer, needs to be protected both against the seller's abuse, and against the site owner's abuse. The article compares the experience of regulating the relations between the consumer, the seller (contractor) and the information aggregator accumulated by the EU countries, on the one hand, and BRICS countries, on the other. It is concluded that the development of regulation in all the BRICS countries is currently moving towards providing the consumer with the widest information opportunities. It is necessary to support the idea of holding the e-commerce aggregator responsible for any failure to fulfill its obligations to the consumer. The responsibility is considered acceptable when the aggregator has not informed the consumer that it does not provide goods, work, services, or in cases of the aggregator's gross negligence in identifying the user when registering a potential seller on the site. A separate problem is the public legal status of the online platform aggregator, since when an onsite contract is concluded, the consumer should not receive less secure goods than when a contract is concluded through an exchange of documents in the ordinary "paper" form.*

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## Table of Contents

### Introduction

#### 1. Do We Need a Special Law Regulating E-Commerce with the Participation of the Consumer?

##### 1.1. Russia

##### 1.2. India

##### 1.3. China

##### 1.4. Brazil

##### 1.5. South Africa

#### 2. Responsibility of the Information Aggregator for the Defects of Goods, Works, and Services

#### 3. E-Commerce Aggregators as Employers

#### 4. Are the Activities of Information Aggregators Licensed?

#### 5. Protection of Individuals' Deposits from Illegal Internet Instructions

### Conclusion

## Introduction

In the summer 2016, Forbes Magazine announced that the title of the world's richest man went to Jeff Bezos, the owner of Amazon.com, whose fortune was measured at 90.5 billion dollars and who unseated the notorious Bill Gates from this ambiguous "position." A bit earlier, in 2016, Ma Yun (better known as Jack Ma), the owner of alibaba.com with a fortune of over 32 billion dollars, was recognized as the richest man in the People's Republic of China.

What is common between them? The fact that both sites, which brought such impressive fortunes to their founders, have one purpose – to sell all kinds of goods to consumers worldwide. These are just two sites most famous for their size out of many thousands (if not tens of thousands) of similar sites, including Russian ones. Some of them offer their own goods, while others are only intermediary resources. Some specialize in a specific category of goods (cars, digital and household appliances, clothing, food and drinks, etc.).

Today, the widespread use of the Internet in world commerce forces lawmakers in all countries to look for ways for a correct reflection of the new phenomena in legislation. Often, the seller is on one side, and the buyer is on the other.<sup>1</sup> Therefore, it is desirable that legislations provide consumers with an approximately equal level of protection.

At the same time, today it is already clear from a review of the largest sites that site owners do not only sell their own goods. They provide different sellers with the opportunity to trade on their site.

Sellers can be both legal entities and individual entrepreneurs. If a site is well-known, the consumer does not focus on the seller's identity. The consumer believes that he/she purchased the goods from the organization owning the site. An important problem is that the intermediary (the site owner) should at least minimally check those whose goods (works or services) are provided on the site. An example is a very well-known case considered by the Supreme Court of the Russian Federation in 2018.

A woman called a taxi on the website of organization P., the driver who arrived (as it turned out later) had previously had his driving license revoked. The driver violated the traffic regulations. As a result, the woman died. The husband of this woman acting on behalf and in the interests of their minor children filed a claim to compensate for moral damages. The question arose: should organization P. be responsible for the driver's actions? The defendant, organization P., considered that it provided only intermediary services. As evidence, the defendant presented a contract for the provision of information services, under which it was obliged to transmit information on the received orders to drivers.

Nevertheless, the court reasonably held the organization responsible. To justify the responsibility of the organization, the court used an analysis of agent relations. The court noted that the agent can act either on its own behalf or on behalf of the principal. In this case, the defendant did not provide evidence that, by accepting the customer's order for the provision of a passenger transportation service, it did not act on its own behalf, but on behalf of the principal (the car owner). The defendant insisted that the customer entered into a contract with the principal (the taxi owner). After all, the principal's employee drove the taxi. And the customer could get information on the principal by searching for it on the site.

However, the court did not agree with these arguments. It indicated that the agent in this case entered into contractual obligations with the customer. Pursuant to Article 1005 of the Civil Code of the Russian Federation, the agent should act in good faith. In this case, the agent did not fulfill the obligation of acting in good faith. The court took into account the evidence presented by the claimant. It followed that,

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<sup>1</sup> Yaroslav Eferin et al., *Digital Platforms in Russia: Competition Between National and Foreign Multi-Sided Platforms Stimulates Growth and Innovation*, 21(2) *Digital Policy, Regulation and Governance* 129 (2019).

when concluding the contract, the defendant did not notify that it was not they, but another businessman, who would be driving. The claimant, in particular, presented an advertising booklet from the defendant for transportation services. Nothing was said there about a third-party carrier.

Further, the claimant presented a snapshot of the SMS message sent to his wife by the defendant. It indicates the price and the car number, and nothing is said that the car does not belong to the defendant, and the driver does not work for the defendant. On the contrary, in this SMS message, the defendant thanked the complainant for using its services.

Based on all this evidence, the court made a convincing conclusion that the defendant entered into a contract with the customer and had to be responsible for the quality of the services provided to the customer (Ruling of the Supreme Court of the Russian Federation of 9 January 2018 No. 5-KG17-220).

As we can see from the description of this judicial act, the Supreme Court of the Russian Federation considered it fair to lay the responsibility for the damage caused by improper service on the owner of the site that organized the provision of this service.

However, when justifying the responsibility, the Supreme Court of the Russian Federation did not explicitly draw attention to a fact which we consider to be key. The responsibility lies with the company which accepted the order on the site because it did not provide the customer with the information that it is only an intermediary. After this judgment was published, many companies began to indicate that they provide only intermediary services. The question of whether the intermediary (the site owner) is responsible if a service is of inadequate quality has not yet been solved.

Another problem is the distribution of administrative responsibilities. The fact is that passenger transportation is often subject to licensing. Site owners, such as Uber taxi, save time, do not get a license, but compete in the market with the carriers which received a license according to the normal procedure. However, it remains unclear whether such an act constitutes an abuse of law.

How are these problems solved? The article has the following structure. In part 1, we will characterize the sources of law governing online consumer contracts in each of the BRICS countries.

In part 2, we will consider the question of whether the site owner is responsible for the defects of the good, work, or service sold on the site.

In part 3, we will consider the question of whether an e-commerce aggregator is an employer in relation to the individuals attracted to provide consumer services.

In part 4, we will consider the problems of licensing online platforms.

Finally, in part 5 we will consider measures to protect individuals' deposits from unjustified debiting.

## 1. Do We Need a Special Law Regulating E-Commerce with the Participation of the Consumer?

Each of the BRICS members has its own consumer legislation, the rules of which are applied to online transactions.<sup>2</sup> It did not make sense initially to establish special legislation covering Internet consumer transactions, since the relations had not yet reached the desired development level. Now the problems connected with the arrangement of online trading are already obvious. Nevertheless, a special regulatory instrument covering online trading has been so far adopted only in China. All other BRICS members incorporate online contract standards into the common consumer right protection laws. Let us consider this legislation in more detail.

### 1.1. Russia

One of the first attempts to create specialized norms regulating consumer participation in online trading was made in Russia. The Resolution of the RF Government of 27 September 2007 No. 612 (as amended on 4 October 2012) "On the Approval of the Rules for Goods Sale by Remote Method," despite its name, was aimed not only at selling goods as described in leaflets and booklets. This Resolution constituted a rather successful experience in regulating online contracts.<sup>3</sup>

However, since there had been no much experience in solving complex problems of online trading by the time this resolution was passed, the resolution also turned to be incomplete. It regulated clearly and in detail some consumer rights, in particular, the right to decline from accepting a quality product, so that the corresponding norm was later repeatedly applied in practice. However, the resolution did not solve many of the issues – simply because at the time of its passing these issues did not exist.

In particular, the resolution left open the question of the site owner's responsibility. In fact, in many situations when an online contract is concluded, it does not matter for a consumer on which site he/she orders a good, work, or service. The consumer does not always know that the seller or contractor is not the site owner but a third party. The site owner thus acts as an intermediary. But this is a specific intermediary whose popularity is so high that the identity of the seller or contractor is simply hidden in the shadow of the intermediary. In Russia, the status of such intermediaries was determined only from 1 January 2019.

On 1 January 2019, the amendments to the Consumer Protection Act of 7 February 1992 No. 2300-1 (Federal Law of 29 July 2018 No. 250-FZ)<sup>4</sup> entered into force.

<sup>2</sup> Neeta Pramod Ghadge, *Comparative Study of Legal Aspects of E-Commerce with Developing Countries in 2015 2<sup>nd</sup> International Conference on Computing for Sustainable Global Development (INDIACom)* 291 (M.N. Hoda (ed.), IEEE, 2015).

<sup>3</sup> Eferin et al. 2019.

<sup>4</sup> Федеральный закон от 29 июля 2018 г. № 250-ФЗ «О внесении изменений в Закон Российской Федерации «О защите прав потребителей» // Собрание законодательства РФ. 2018. № 31. Ст. 4839

Intermediaries are the owners of the sites on which consumers buy goods or order services – the law calls them “information aggregator owners.” According to the definition set forth in the preamble, the information aggregator owner is a legal entity or an individual entrepreneur meeting the following criteria. Firstly, they own software, a website, or a page on a social network. Sellers or contractors can post their offers on this site to sell goods or perform work for consumers. And the site owner creates technical capabilities for posting the offers. It may also establish a mandatory form for these offers or clauses obligatorily included in such offers.

The Consumer Protection Act obliges the aggregator owner to provide the consumer with the information on itself and the seller of the goods (Art. 9). The norm of clause 2 of Article 12 of the Consumer Protection Act establishes the obligation of the aggregator owner to compensate for any losses caused by the consumer’s lack of the necessary information.

Now, the Russian legislation protects the consumer only by half. It is certainly important that the aggregator informed the consumer that it is not it but a third party which sells goods. But it is even more important that the aggregator verified the information about the seller or contractor. Who is offering their goods or services on the site? Does he/she have a proper license? Is this contractor or seller registered as a legal entity or individual entrepreneur?

You can surely say that the verification obligation is implied in Articles 9 and 12 of the Consumer Protection Act. But the site owner (aggregator) still has very weak motivation. In order to really encourage the site owner to conduct a check, it is necessary that the site owner is responsible alongside with the seller or contractor. The applicable Russian legislation lacks any rules on joint and several liability of the aggregator (site owner) and the seller (contractor).

## **1.2. India**

There is no special regulation of online trade relations in India, but there is a law regulating Internet relations in general – the Information Technology Act, 2000.<sup>5</sup> It applies to criminal law, civil law, and administrative law. It regulates the order of issuing electronic signatures and liability for cybercrimes.

For a long time, the main act on consumer protection was the Consumer Protection Act, 1986.<sup>6</sup> In 2010, a discussion began concerning the extent to which this law was applied to Internet trading. In 2014, the Minister of State for Consumer

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[Federal Law No. 250-FZ of 29 July 2018. On Amendments to the Consumer Protection Act of the Russian Federation, Legislation Bulletin of the Russian Federation, 2018, No. 31, Art. 4839].

<sup>5</sup> Kanika Satyan, *E-Commerce and Consumer Rights: Applicability of Consumer Protection Laws in Online Transactions in India*, SSRN, 5 July 2015 (May 2, 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2626027](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2626027). See also Sumanjeet Singh, *The State of E-Commerce Laws in India: A Review of Information Technology Act, 52(4) International Journal of Law and Management* 265 (2010).

<sup>6</sup> Satyan, *supra* note 5. See also Singh 2010.

Affairs, Food, and Public Distribution made a special statement, in which the Ministry confirmed the applicability of the Consumer Protection Act. The India's Consumer Protection Act was adopted in 2015. It regulates in detail the relations connected with the safety of goods, works and services. Besides, the mediation procedure received special regulation.<sup>7</sup>

Researchers note that the development of Internet commerce in India is favorably influenced by the fact that English is widely spoken in this country,<sup>8</sup> which simplifies the provision and receipt of information.<sup>9</sup>

Online trading relations are developing rapidly,<sup>10</sup> the legislation is not keeping pace with the development of these relations. The main problem of protecting consumer rights when online contracts are concluded is the nature of the contract. This is an adhesion contract – it is concluded on the conditions set forth on the site. Notably, the conditions set forth on the site may change at the discretion of the commercial organization, but such a change should not have any retroactive effect.<sup>11</sup>

### 1.3. China

Until recently, researchers have noted that China lacks a special law governing e-commerce.<sup>12</sup> Today, there is such a law – it is the E-Commerce Law of the People's Republic of China adopted at the 5<sup>th</sup> Session of the Standing Committee of the 13<sup>th</sup> National People's Congress of the People's Republic of China on 31 August 2018. It defines that the online platform operator is an individual or a company which sells goods or provides services through its own website or other similar service (Art. 3 of the E-Commerce Law). It has been established that online platform operators should sell goods or provide services complying with safety and environmental standards, not sell any goods and services, which free provision is prohibited by the public legislation (Art. 14 of the E-Commerce Law). When trading, online platform operators should issue

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<sup>7</sup> Bhagirath Ashiya, *India's Consumer Protection Bill 2015: Redefining Notions of Liability*, 38(2) Statute Law Review 258 (2017).

<sup>8</sup> Nir Kshetri, *What Determines Internet Diffusion Loci in Developing Countries: Evidence from China and India*, 23(3) Pacific Telecommunications Review 25, 32–33 (2005).

<sup>9</sup> Prateek Kalia et al., *E-Commerce in India: Evolution and Revolution of Online Retail in E-Retailing Challenges and Opportunities in the Global Marketplace* 99 (A.K. Sinha & S. Dixit (eds.), Hershey, PA: IGI Global, 2015).

<sup>10</sup> Prasanta Kr. Chopdar & V.J. Sivakumar, *Understanding Continuance Usage of Mobile Shopping Applications in India: The Role of Espoused Cultural Values and Perceived Risk*, 38(1) Behaviour and Information Technology 42 (2019).

<sup>11</sup> *Id.*

<sup>12</sup> Чайка И.Ю. Новеллы правового регулирования в сфере трансграничной электронной торговли в Китайской Народной Республике // Актуальные проблемы российского права. 2016. № 9. С. 176–185 [Igor Yu. Chaika, *Novels of Legal Regulation in the Field of Cross-Border E-Commerce in the People's Republic of China*, 9 Actual Problems of Russian Law 176 (2016)].

paper or electronic invoices or other documents confirming the purchase. Electronic invoices are equivalent to a paper invoice (Art. 14 of the E-Commerce Law).

Online platform operators should inform the consumer on their available licenses and the identity of the seller or contractor (Arts. 15, 17 of the E-Commerce Law). Online platform operators are subject to the laws of the country where the consumer lives concerning the matters of export and import (Art. 26 of the E-Commerce Law). If third parties' goods are sold through the online platform, the online platform operator should request information from these third parties sufficient to make a claim against them and verify this information (Art. 27 of the E-Commerce Law).

The online platform operator should take the necessary measures to protect the consumer from cyber-attacks and other unlawful interventions when concluding an online contract (Art. 30 of the E-Commerce Law). Online platform operators should store the information online and ensure the confidentiality of this information (Art. 31 of the E-Commerce Law). Thus, many provisions of the Chinese legislation impose rather reasonable requirements on the online platform operator.

#### **1.4. Brazil**

Brazil applies the rules of the consumer law – the Code of Consumer Defense and Protection Law No. 8.078 of 11 September 1990. In addition, Brazil applies the Personal Data Protection Law (Law No. 13709, of 14 August 2018, also known as the Brazilian Internet Law). It mainly regulates the relations to protect privacy and personal information on the Internet. In general, the legislation is characterized by caution and certain conservatism.<sup>13</sup> The judicial practice pays attention to the consumer's right to information on the manufacturer and the seller, private information exchange services are under development.<sup>14</sup>

#### **1.5. South Africa**

In the Republic of South Africa, Chapter 7 of the Electronic Communications and Transactions Act, 2002 deals with consumer protection when online contracts are concluded. The consumer has the right to reject any online contract without cause and without paying penalties. As applied to the contract of purchase and sale, the deadline for rejection is limited to seven days upon receipt of the goods, as applied to the paid service contract, the right to reject the contract is valid within seven days after the contract is concluded (para. 1 of Art. 44 of the Electronic Communications and Transactions Act).

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<sup>13</sup> On the peculiar features of the development of jurisprudence in Latin America, see Matthew C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (Austin: University of Texas Press, 2004).

<sup>14</sup> Thais Helena Garcia et al., *E-Gov Model for Consumers Protection and Defense: A Brazilian Experience* (May 2, 2020), available at [https://www.academia.edu/29403071/E-gov\\_model\\_for\\_consumers\\_protection\\_and\\_defense\\_a\\_Brazilian\\_experience](https://www.academia.edu/29403071/E-gov_model_for_consumers_protection_and_defense_a_Brazilian_experience).

The only obligation that may be imposed on the consumer is to pay the cost of return shipping (para. 2 of Art. 44 of the Electronic Communications and Transactions Act). If the goods or services were paid before the consumer declared the rejection, the money should be returned to the consumer within 30 days after the notice of rejection. The consumer's right to information, which relates to the properties of the product (work or service), and the seller's identity, its form of incorporation, location, etc., is regulated in detail (Art. 43 of the Electronic Communications and Transactions Act). The consumers' personal data protection is ensured by a special law – the Protection of Personal Information Act (POPIA) of 2014.<sup>15</sup>

Thus, the current development level of online trade relations already requires special regulation. To this end, it is most desirable to have a specialized regulatory legal act which would regulate the relations between the information aggregator owner and the consumer.

## **2. Responsibility of the Information Aggregator for the Defects of Goods, Works, and Services**

The massive and widespread introduction of aggregators of information on goods, works, or services was long ago called Uberization in honor of the Uber online taxi hailing platform which was the second to enter this mass international market. The first, Airbnb, which is designed to search for housing, probably did not turn into the name of a social phenomenon simply because the "Airbnb" abbreviation is not so sonorous and vivid.

The online trading sphere is developing so dynamically that the consumer may have no choice. If there is no room in hotels, you may have to use Airbnb.<sup>16</sup> If there is no way to use public transport, and all taxis work according to the Uber model, i.e. the trip is arranged by the information aggregator owner. The consumer, in relation to the information aggregator, is exposed to one risk, namely, the risk that after the contract is violated, it turns out that the information aggregator is just an intermediary not responsible for a default by his principal.

The actual seller or contractor will turn out to have insufficient funds such that it will be very difficult to enforce a judicial act. To this end, in 2016 a group of enthusiastic scientists developed a draft EU Directive on Online Intermediary Platforms (Discussion Draft of a Directive on Online Intermediary Platforms) (hereinafter the Academic Project).<sup>17</sup> The main idea of the Academic Project is that two parties should be liable to

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<sup>15</sup> Ridoh Adonis & Bethuel Sibongiseni Ngcamu, *An Empirical Investigation into the Information Management Systems at a South African Financial Institution*, 11(3) *Banks and Bank Systems* 58 (2016).

<sup>16</sup> Airbnb is an information aggregator allowing you to search for housing for accommodation or short-term lease worldwide. The site contains offers from both individuals wishing to rent out and individuals wishing to rent.

<sup>17</sup> Christoph Busch et al., *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*, 5(1) *Journal of European Consumer and Market Law* 3 (2016).

the consumer – firstly, the direct seller and contractor, and secondly, the information aggregator owner (i.e. as a rule, the site owner). Moreover, for the maximum protection of consumer interests, the authors of the Academic Project choose the kind of plurality of persons in the obligation which best of all meets the interests of the creditor, namely joint and several liability.

Article 18 of the Academic Project states that the information aggregator owner is jointly and severally liable with the seller or contractor if (1) it has not warned the consumer that it does not provide the goods, works or services itself; or (2) even if there was such a warning – if the site owner had a decisive influence on the consumer's decision to enter into the contract. Moreover, some authors believe that the idea of joint and several liability is so good to encourage the site owner to diligently check the participants offering their products or services on the site that it should be continued further.<sup>18</sup>

Thus, according to C. Cauffman, online platform owners often make easy money receiving a percentage from each contract concluded through the online platform. The creation of the site surely requires initial investments (although, not too large), but as soon as the site is created, the operating costs are low, since most operations are automated. The passive behavior of the platform operator, which emphasizes in all its contracts that it is not responsible for anything, cannot be considered an excuse for relieving the platform operator from liability.<sup>19</sup> In fact, the site registration rules are set by the site owner, and this depends on it how carefully persons who will offer their goods, works or services to consumers through this site will be verified.

Therefore, the rules establishing joint and several liability to the consumer would be appropriate in the Russian civil law if (a) the information aggregator owner did not inform the consumer that the goods seller or the contractor under the paid service contract is a third party; (b) if the information aggregator owner placed an offer of a person under a fictitious name, or of a company, in respect of which there was information on liquidation (bankruptcy), liquidation, etc. at the time of its registration on the site.

These norms can be explained by the fact that today no special permission or license is needed to create an information aggregator (except for crowdfunding, which will be discussed later). Any legal entity can own the information aggregator, which simplifies launching of this activity. The information aggregator owner is in contractual relations with users and receives remuneration from one of them (there may be situations when both contractors pay remuneration to the intermediary).

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<sup>18</sup> Caroline Cauffman, *The Commission's European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?*, Maastricht European Private Law Institute Working Paper No. 2016/07 (December 2016) (May 2, 2020), available at [https://www.academia.edu/36329211/THE\\_COMMISSIONS\\_EUROPEAN\\_AGENDA\\_FOR\\_THE\\_COLLABORATIVE\\_ECONOMY\\_TOO\\_PLATFORM\\_AND\\_SERVICE\\_PROVIDER\\_FRIENDLY](https://www.academia.edu/36329211/THE_COMMISSIONS_EUROPEAN_AGENDA_FOR_THE_COLLABORATIVE_ECONOMY_TOO_PLATFORM_AND_SERVICE_PROVIDER_FRIENDLY).

<sup>19</sup> *Id.*

The main transaction, whether it is a purchase and sale contract, a rental contract, or a carriage contract, is concluded between users registered on the online platform. The site or the application (information aggregator) thus represents a small “market” of a particular product or service, therefore, the first thing you can expect from the online platform operator is the determination of such market access conditions which would preclude the execution of patently unprofitable contracts. Although such rules will significantly complicate the registration procedure on sites serving as a platform for concluding contracts, at the same time, they can make the contract conclusion procedure more reliable and contribute to better consumer protection.

There is a relevant norm in the legislation of China. Article 38 of the Chinese E-Commerce Law says that the aggregator which is aware or has to be aware that a product, work or service sold on its site does not meet the obligatory safety requirements, is jointly and severally liable with the seller for any damage caused by the properties of this product, work or services. When concluding a contract with the consumer, the aggregator which has not verified the user’s personal data shall bear the same joint and several liability. We did not find equally strict rules on the responsibility of the platform aggregator in other BRICS countries, but the Chinese experience deserves the most focused attention.

The literature expresses an opinion that contracts concluded within the framework of e-commerce significantly differ in their structure from ordinary civil law contracts. It is noted that due to the lack of special norms of transactions concluded via e-commerce aggregators, the general rules on contracts and the general principles of contract law have been applied to onsite contracts. It is known that general provisions on contracts are built on the principle of freedom of contract, in particular, freedom to choose a contractor and freedom to determine the contractual terms. Besides, the general provisions on contracts emphasize the relativity of the contractual relationship, i.e. the fact that no third party has the right to interfere into the determination of the terms and conditions of the contract or in its execution.<sup>20</sup>

E-commerce aggregators drew conclusions from these principles which are advantageous for them, and decided to avoid liability for any failure to fulfill the main obligation under a transaction conducted between the site users. If the site owner accepts responsibility (issues a guarantee), it is done for an additional fee.<sup>21</sup>

One can hardly fully agree with this opinion. Indeed, contracts concluded online are characterized by the fact that their terms and conditions are not determined by the seller or the buyer, but by a third party – the site owner. Indeed, the influence of the site owner is significant in relation to each subject of the obligation arising from an onsite transaction. But this does not mean that the structure of the obligation

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<sup>20</sup> Felix Maultzsch, *Contractual Liability of Online Platform Operators: European Proposals and Established Principles*, 14(3) *European Review of Contract Law* 209 (2018).

<sup>21</sup> *Id.*

should be reviewed. The contract of purchase and sale remains a contract of purchase sale, a carriage remains a carriage, just another entity, which responsibility should be discussed, joins the seller and the contractor.

Notably, online platform operators often have a determining influence on the user's decision to complete a transaction.<sup>22</sup> Competent marketing<sup>23</sup> and the reputation of the online platform operator as an important individual owning significant financial resources does not allow the consumer to fully realize that the transaction is in fact being made with a stranger, moreover, with a stranger whose solvency may turn to be rather limited. In addition, it is important that the standard terms and conditions of a contract concluded between users of the online platform are determined by the online platform operator.

To be able to determine the conditions for admission to this small "market" on the site, but not to bear any responsibility – is this not too generous in relation to the online platform operators?<sup>24</sup> The organizers of this trade, the site owners, should be responsible at least for initial verifications. In relation to a legal entity, its registration should be verified; in relation to an individual – his/her passport data. The sites organizing only special interest communication may remain anonymous, but the sites concluding transactions should have a procedure to verify the identity during registration.

One of the essential features of e-commerce is that the contract the consumer concludes online is always an adhesion contract. The terms and conditions of this contract are formulated by the information aggregator owner in such a way that the other party has a choice – either to join the contractual terms completely or refuse to conclude the contract. In the Russian legislation, such contracts are governed by Article 428 of the Civil Code of the Russian Federation, which provides additional opportunities to the jointing party to amend the contract. Notably, in other BRICS countries, consumers tend to have an impulsive attitude to online contracts.<sup>25</sup>

Therefore, consumers need increased protection when concluding an online contract, which is no less than with a conventional contract. Scientists note that the equally high level of consumer protection is one of the factors effectively contributing to the conclusion of international trade agreements.<sup>26</sup>

In particular, the Chinese E-Commerce Law requires the owner of an e-commerce aggregator to disclose the information on goods and services comprehensively, truthfully, accurately and timely to guarantee the consumer's right to choose the

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<sup>22</sup> Maultzsch 2018.

<sup>23</sup> *Id.*

<sup>24</sup> Julie E. Cohen, *Law for the Platform Economy*, 51(1) UC Davis Law Review 133 (2017).

<sup>25</sup> Dong Yu-Wei et al., *Empirical Study on Scaling of Human Behaviors in E-Commerce*, 62(2) Acta Physica Sinica 8 (2013).

<sup>26</sup> Jie Huang, *Comparison of E-Commerce Regulations in Chinese and American FTAs: Converging Approaches, Diverging Contents, and Polycentric Directions?*, 64(2) Netherlands International Law Review 309 (2017).

needed good, work or service (Art. 17). Notably, Article 16 of the Chinese E-Commerce Law established a rule on the cessation of the site activity: if the site owner plans to cease the activities using the site, it is obliged to notify thereon within 30 days, and the relevant notice should, within 30 days, be placed on the site.

The Russian legislation does not yet contain any rules on joint and several liability of the aggregator and the seller. Nevertheless, some norms characterizing the consumer's claims in case of a transfer of non-conforming goods to him/her can be recognized as quite effective. They include the following norms:

1. Determination of court jurisdiction in a dispute involving the consumer. To the end that a Russian court had the right to consider a dispute concerning a violation of the consumer's right as a result of e-commerce, it does not matter whether the seller from whom the goods are purchased is a domestic or foreign company.

As explained by the Moscow Municipal Court in the Ruling of 12 January 2011 in case No. 33-70, it does not constitute an obstacle for the Russian court to consider a case at the location of the consumer, in particular, the fact that the defendant or its branches or representative offices are located outside the Russian Federation, no contracts were concluded with the defendant, and the defective goods (faulty laptop) were purchased by the claimant in an online store, which currently does not exist. The court of appeal presented quite simple logic: the goods were received and paid on the territory of the Russian Federation, the goods manufacturer is the defendant, i.e. there is a contract of purchase and sale executed on the territory of the Russian Federation, so the case could be considered in a Russian court subject to the requirements of part 3 of Article 402 of the Civil Procedure Code of the Russian Federation.

However, it should be noted that the protection of consumer rights violated by a foreign seller, which does not have branches or representative offices on the territory of the Russian Federation, may be significantly complicated both by the problems of notifying the defendant of the initiated trial and the procedure of enforcing the decision on the territory of the defendant's state.

Therefore, all other things being equal, preference should be given to those sellers who have branches or representative offices on the territory of the Russian Federation;

2. Responsibility of the seller for the nonconformity of goods with the description.

Therefore, the law requires the seller to describe precisely and in detail the properties of the goods. This is established in Article 26.1 of the Consumer Protection Act of 7 February 1992 No. 2300-1 (as amended on 3 July 2016) and in paragraph 25 of the Rules for Goods Sale by Remote Method (hereinafter the Rules), approved by the Resolution of the RF Government of 27 September 2007 No. 612 (as amended on 4 October 2012).

The seller should provide the buyer with the goods, "the quality of which confirms with the contract and the information provided to the buyer when concluding the contract, as well as the information communicated to him/her when the goods are

delivered (in the technical documentation attached to the goods, on the labels, by marking or in other ways provided for certain types of goods)."

Any nonconformity of the goods with the description given on the site is assessed as a significant shortcoming (Appeal Ruling of the Supreme Court of the Republic of Bashkortostan of 14 January 2016 No. 33-27/2016). The law grants the right to the buyer, at his/her choice, to demand the replacement of non-conforming goods with conforming goods or to reject the contract and demand a refund of the money paid. Citizens who purchased goods on the Internet, in case of their nonconformity with the description, usually prefer the second option.

Goods should be delivered to the consumer together with accessories and documents. If the seller places the goods on the site together with accessories and does not indicate directly that the accessories should be purchased for a fee, the buyer has the right to demand the delivery of the goods to him/her with those components, accessories and documents presented during the demonstration of the goods on the site.

Unfortunately, in this respect, judicial practice does not always correctly evaluate the contractual terms. For example, in the circumstances of one case, a buyer purchased an engine from a seller. A picture and specifications of the engine were posted on the site showing the engine equipped with a water pump, a fuel return pipe, 4 high-pressure injection tubes, a glow plug plate, and 2 ICE mounting brackets. However, upon receipt of the goods, the consumer did not find all these components. Unfortunately, the court did not satisfy the consumer's claims in this case, considering that the image of all these components in the picture does not mean that all these components were included in the price of the purchased goods (Appeal Ruling of the Krasnoyarsk Regional Court of 10 October 2016 No. 33-13726/2016). One could argue with this conclusion: since the seller places the product information on the site, all the ambiguities regarding the characteristics of the product, including its components, should be interpreted in favor of the buyer;

3. The consumer's right to change his/her mind and refuse to accept quality goods.

Article 26.1 of the Consumer Protection Act and paragraph 21 of the Rules provides the consumer with a useful opportunity. The consumer has the right to return the product he/she did not like, even if it is a conforming product, provided that its marketable condition and consumer properties are preserved.

The consumer has the right to refuse the goods at any time before their delivery. The money should be returned to the consumer no later than within 10 days from the refund request sent to the seller. How can the refund request be sent to the seller? The method depends on the contractual terms (instructions can be also posted on the site next to the goods offered for sale). For example, the request can be sent by e-mail or SMS, or on the same site where the goods were purchased in the buyer's personal account. The buyer shall bear return shipping expenses. This follows from paragraph 21 of the Rules stating that

... if the buyer refuses the goods, the seller shall return to him/her the amount paid by the buyer according to the contract, except for the seller's return shipping expenses.

The consumer also has the right to return the goods which, when purchased in a conventional store (where the goods can be viewed and touched), are recognized as non-refundable. For example, in case of ordinary retail purchase and sale, technically sophisticated products of good quality are not subject to return or refund.

For example, a claimant bought a cell phone on the Internet, but upon receipt, she was disappointed (the judicial act refers to the fact that the claimant did not like the specifications of the phone, but no quality defects were detected). Therefore, *ad idem*, the claimant might not like, for example, the color of the phone. The claimant asked the seller to take back the product, demanding a refund. The seller refused, referring to the fact that technically sophisticated goods of good quality are not subject to return or refund. In fact, the phone belongs to final sale goods. Such goods are described in the List approved by the Resolution of the RF Government of 19 January 1998 No. 55.

However, the court did not agree with the defendant's arguments and ordered the defendant to return the money to the claimant, stating that there are no return bans in respect of other goods purchased online, including technically sophisticated goods, Article 26.1 of the Consumer Protection Act does not provide for any references to the List of proper quality goods not subject to return or refund.

However, the consumer has to comply with the return deadlines. These deadlines are established by paragraph 21 of the Rules. Pursuant to the general rule, the consumer has 7 days calculated from the goods delivery date to return the goods which are of a good quality but which the consumer did not like. If the information on the goods return is not posted on the same site where the goods are offered (or in a separate document attached to the goods), the goods return period is extended up to 3 months from the goods delivery date.

In another case, the claimant bought a refrigerator in an online store. 2 weeks after the delivery, she requested to return the refrigerator and refund her money. The court refused to satisfy her claim to terminate the contract and return the money, but not because the proper quality refrigerator purchased on the Internet is not subject to return, but because the claimant missed the deadline to file a claim (Appeal Ruling of the St. Petersburg City Court of 6 September 2016 No. 33-16160/2016 in case No. 2-4804/2016).

There is one restriction which prohibits returning goods. According to paragraph 21 of the Rules, the buyer is not entitled to refuse from proper quality goods with individually-defined properties, if the specified goods can be used only by the buyer. However, this ban cannot be interpreted too broadly. Even if the goods purchased on the Internet were produced in a rather limited batch, they can still be returned. It is impossible to return only the goods specially designed for a particular consumer.

For example, in one case, a consumer bought a radio adapter from a seller trading parts on the Internet. However, the adapter did not fit the buyer's car. The buyer decided to return the goods, but the seller did not accept them, referring to the contract clause stating that individualized goods are not refundable. The court indicated that the radio adapter purchased under the contract did not have individualized properties, since it was purchased according to the catalog without making any changes to it at the request of the customer, and besides, it was not proved that this product was custom-made exclusively for this consumer (Decision of the Federal Antimonopoly Service of the West Siberian District of 30 October 2012 in case No. A70-763/2012).

India and China also focus on the consumer's right to information. The consumer has the right to receive information on the product, its consumer properties, and specifications of use. Both civil and administrative liability is established for insufficient information provided to the consumer.<sup>27</sup>

Thus, we can conditionally distinguish two groups of norms protecting consumers in the field of online trading. Some, older, well-known and familiar norms consolidate guarantees in case of insufficient quality of goods and grant the right to the consumer to change his/her mind. Other unusual and not yet elaborated norms blame the site owner (intermediary) for the defects of the goods sold on its website by a third party. While the first group of the norms is already present in all the laws of the BRICS countries, the second group still needs to be discussed.

### 3. E-Commerce Aggregators as Employers

Another problematic issue related to the activities of e-commerce aggregators is the relations between these aggregators and the third parties involved in the provision of consumer services. Until recently, the Brazilian law enforcement recognized that taxi drivers working with the Uber platform were its employees as applied to the provisions of labor law. As an illustrative example of this approach, we can cite a case described by the Reuters news agency.

In February 2017, Judge of the Brazilian Minas Gerais Labor Court Marcio Toledo Gonzalves ruled that Uber should pay about 30,000 Brazilian reais (about 10,000 U.S. dollars, respectively) to one driver in compensation for his overtime work, night shifts, holidays and gasoline costs, as well as water and refreshing lollipops for passengers (which may seem exotic to Russian readers, but, apparently, is normal in the conditions of Brazilian climate). However, judging by the report of the Financial Times newspaper in March 2018,<sup>28</sup> as a result, Brazilian lawmakers made amendments to their legislation

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<sup>27</sup> Sheetal Sahoo & Aman Chatterjee, *Consumer Protection – Problems and Prospects*, SSRN, 14 August 2009 (May 2, 2020), available at <https://ssrn.com/abstract=1452526>.

<sup>28</sup> Brazil's Lawmakers Back Looser Rules for Uber, Financial Times, 1 March 2018 (May 2, 2020), available at <https://www.ft.com/content/7bf04e08-1d63-11e8-aaca-4574d7dabfb6>.

exempting Uber from fulfilling the requirements posed to ordinary carriers (including liability insurance).<sup>29</sup>

In 2016, the Chinese division of Uber was acquired by a competitor, the DidiChuxing platform. A benchmark case is described in a publication of yicaiglobal.com in December 2016.<sup>30</sup> In the described case, a passing cyclist crashed into a randomly opened door of a parked car and was severely injured.

As it turned out during the trial, the driver of this car was not insured against liability for harm during commercial carriages. The Beijing court, justifying the liability of the aggregator owner, referred to the fact that acting reasonably and in good faith, the company could have and should have verified that the driver had the appropriate insurance. The court emphasized that, as opposed to traditional taxi companies, labor relations between such private drivers and aggregator owners, with which they are registered, are not directly regulated by law, therefore there will be inevitable future disputes concerning the party who bears responsibility and is obliged to pay compensation in the event of such an accident, and therefore it is necessary to establish an appropriate precedent for making decisions on similar future cases.

In the Russian judicial practice and doctrine, there is extensive experience in distinguishing between civil law and labor contracts, which can be used in the new conditions as applied to the e-commerce aggregator. In the Ruling of the Judicial Division for Civil Cases of the Supreme Court of the Russian Federation of 5 February 2018 No. 34-KG17-10, it is noted that labor relations are relations based on a contract between an employee and an employer on the employee's personal performance of a paid labor function (job position according to the personnel schedule, profession, specialty according to the qualification; specific type of work entrusted to the employee) in the interests, under the supervision and control of the employer, the employee's subordination to the internal code of labor conduct provided that the employer ensures the working conditions stipulated by the labor legislation and other regulatory legal instruments containing employment and labor statutes, collective agreements, contracts, local regulatory instruments, the labor contract. It is not permitted to conclude civil contracts actually regulating labor relations between an employee and an employer (Art. 15 of the Labor Code of the Russian Federation).

In case when civil law contracts are concluded with taxi drivers and other similar employees, there is a high probability of their requalification into labor contracts. As it is indicated in paragraph 24 of the Resolution of the Plenum of the Supreme

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<sup>29</sup> See also Alceu Fernandes-Neto, *The Gray Zone of Regulation Brought by Urban Mobility Apps: An Analysis of Uber in Brazil*, 6(12) Development of Innovation eJournal 44 (2018); Mauro Maia Laruccia et al., *Digital Platforms and Informal Work: Analysis of Labor Lawsuits in the City of São Paulo Related to Uber*, SSRN, 5 October 2018 (May 2, 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3248444](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248444).

<sup>30</sup> The first Uber's case in China is decided now (2016) (May 2, 2020), available at <https://www.yicaiglobal.com/news/beijing-court-holds-didi-liable-in-ooring-accident-test-case>.

Court of the Russian Federation of 29 May 2018 No. 15 “On the Courts’ Application of the Legislation Regulating the Labor of Employees Working with Employers – Individuals, and with Employers – Small Businesses Classified as Microenterprises,” taking into account that Article 15 of the Labor Code of the Russian Federation does not permit to conclude civil contracts actually regulating labor relations. Therefore, courts are entitled to recognize the existence of labor relations between the parties formally bound by a civil law contract, if the trial establishes that this contract actually regulates labor relations.

In these cases, labor relations between the employee and the employer are deemed to begin from the day when the individual is actually admitted to fulfill the obligations stipulated by the civil law contract (pt. 4 of Art. 19.1 of the Labor Code of the Russian Federation). Thus, for example, a labor contract differs from a paid service contract in the subject of the contract, according to which the contractor (employee) does not perform any specific casual work, but certain labor functions which are part of the duties of the individual employee, while the process of his/her fulfilling this labor function but not the service provided is important.

Under a paid service contract, the contractor also retains the position of an independent business entity, while under a labor contract the employee assumes the obligation to perform the work according to a specific labor function (specialty, qualification, position), becomes part of the employer’s staff, submits to the established labor regime and works under the supervision and guidance of the employer; the contractor under a paid service contract works at his/her own risk, while the individual working under a labor contract does not bear the risk associated with the performance of his/her work. If a civil law contract is concluded between the parties, but during the trial it is established that this contract actually regulates labor relations between the employee and the employer, the provisions of the labor law and other instruments containing employment and labor statutes shall be applied to such relations pursuant to part 4 of Article 11 of the Labor Code of the Russian Federation. In this case, when a court considers any disputes on the recognition of relations arising on the basis of a civil law contract as labor relations, any irremediable doubts are interpreted in favor of labor relations (pt. 3 of Art. 19.1 of the Labor Code of the Russian Federation).

Chinese lawmakers require companies operating in the field of Internet commerce to obtain the necessary licenses. In fact, the Chinese legislation does not distinguish Internet commerce from ordinary trade with regard to licenses and security requirements.<sup>31</sup>

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<sup>31</sup> See for more detail Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21(2) *Journal of International Economic Law* 297 (2018).

#### 4. Are the Activities of Information Aggregators Licensed?

Article 12 of the Chinese E-Commerce Law requires that aggregator owners receive the necessary licenses. In other BRICS countries, such a provision is not directly fixed, but can be inferred from a systematic interpretation of laws on licensing certain types of activities and consumer legislation instruments. The question is only what activities are carried out by the online trading aggregator. For example, can Airbnb be considered a hotel business and Uber – a carrier?

In this case, there are two possible positions. The first, on which e-commerce aggregators often base their arguments, is that they provide only commercial services. The second, to which the authors of the aforesaid Academic Project incline, is that a person organizing online carriages becomes the carrier himself/herself. This is contributed by the abovementioned qualification between the owner of the site meant to order a taxi, and taxi drivers as employment relations. Therefore, if a contract concluded on the site requires licensing, the e-commerce aggregator's activities should be also licensed.

The reason for the discussion is clear. On the one hand, transactions made through the unique mediation of the e-commerce aggregator significantly contribute to economic development. On the other, it is necessary to ensure fair competition between the aggregator (as well as the aggregator's customers) and those who provide goods, works, or services in a "traditional" way.

Many disputes particularly concern Uber and other taxi services. The fact is that if you consider Uber to be just an intermediary between a non-professional driver and a passenger, then the Uber platform operator does not have to pay the social fees due to taxi companies. If Uber is considered an employer, then it cannot be exempted from the obligation to pay appropriate fees.<sup>32</sup>

In 2016, the State Duma of the Russian Federation introduced the Draft Federal Law No. 69583-7 "On Amendments to Some Legislative Acts of the Russian Federation Regarding the Improvement of State Regulation of Passenger and Baggage Carriage by Passenger Taxis in the Russian Federation," which aims to regulate the activities of taxi aggregators. This draft law provides for the obligation of the taxi aggregator to engage only licensed drivers by means of entering into an information and dispatch service contract.<sup>33</sup>

<sup>32</sup> See Eric Albert et al., *Taxis : la colère contre la nouvelle concurrence gagne en Europe*, Le Monde.fr, 11 February 2014 (May 2, 2020), available at [https://www.lemonde.fr/economie/article/2014/02/11/taxis-la-colere-contre-la-nouvelle-concurrence-gagne-en-europe\\_4364106\\_3234.html](https://www.lemonde.fr/economie/article/2014/02/11/taxis-la-colere-contre-la-nouvelle-concurrence-gagne-en-europe_4364106_3234.html).

<sup>33</sup> Пояснительная записка к проекту федерального закона № 69583-7 «О внесении изменений в отдельные законодательные акты Российской Федерации в части совершенствования государственного регулирования деятельности по перевозке пассажиров и багажа легковым такси в Российской Федерации» [Explanatory note to the Draft Federal Law No. 69583-7 "On Amendments to Some Legislative Acts of the Russian Federation Regarding the Improvement of State Regulation of Passenger and Baggage Carriage by Passenger Taxis in the Russian Federation"] (May 2, 2020), available at <http://base.garant.ru/57263670>.

The explanatory note to this Draft Law says:

the activities of passenger taxi carriers are directly related to the activities of passenger taxi services (dispatch services), which directly influence the process of organizing passenger carriages, but do not have a specific status. For the reasons of commercial gain and staying in the shadow sector, these services transfer passenger orders in an organized and mass manner both to persons who, in the prescribed manner, have received permits to perform passenger and baggage carriages by passenger taxis, and to hundreds of thousands of drivers who are not individual entrepreneurs and do not have permits for the specified activity.

The activities of dispatch services (passenger taxi order services) do not have special regulation at the federal legislation level, respectively, there is no effective mechanism for monitoring dispatch services, and the responsibility of dispatch services for the transfer of orders to “illegal taxis.” Moreover, these services form carriage fees by setting the maximum carriage price and dump prices on the passenger and baggage taxi carriage market. In this situation, legal taxi drivers do not have a chance to compete with illegal ones.

Although the explanatory note does not directly mention e-commerce aggregators, the phrase about dumping shows that the main dissatisfaction of entrepreneurs is precisely connected with the fact that e-commerce aggregators save on organizational costs typical of ordinary organizations, and are an extremely unfavorable competitor. A. Ivanov believes that one of the reasons for the negative attitude to aggregators is the absence of licensing.<sup>34</sup>

Some activities assume an increased public control related to their nature. This requires an individual approach to the conformity with performance standards. Business aggregators cannot provide this, but, on the contrary, standardize operations which can hardly be controlled by the state. Hence the cautious attitude to business aggregators during auditing, rendering of accounting and legal services, etc. Another case is public cash in various forms – from subsidies and subventions to government contracts with budgetary payments. For example, let us take advantageous rates for accommodation and communal services, which are actually provided to those who rent housing through business aggregators. It is unlikely that this public support makes sense.<sup>35</sup>

At the same time, a possible solution to this contradiction, perhaps somewhat idealized, but understandable,<sup>36</sup> is demonstrated by the Chinese legislation – no

<sup>34</sup> Иванов А.А. Бизнес-агрегаторы и право // Закон. 2017. № 5. С. 145–156 [Anton A. Ivanov, *Business Aggregators and Law*, 5 Law 145 (2017)].

<sup>35</sup> *Id.*

<sup>36</sup> Jin Yongjun, *Driving off a Tiger, but Leading a Wolf: A Review of the Chinese Contract Law Art. 11*, ResearchGate (January 2005) (May 2, 2020), available at [https://www.researchgate.net/publication/221550437\\_Driving\\_off\\_a\\_tiger\\_but\\_leading\\_a\\_wolf\\_a\\_review\\_of\\_the\\_Chinese\\_contract\\_law\\_art11](https://www.researchgate.net/publication/221550437_Driving_off_a_tiger_but_leading_a_wolf_a_review_of_the_Chinese_contract_law_art11).

matter the area in which the aggregator works, all the obligatory requirements established by law shall apply to it and its site users. Internet sale of goods is associated with increased risks.<sup>37</sup> It would be fair to distribute the risks in such a way so as to maximize the motivation of the site owner to verify the information on the dealers selling their goods on this site.

### **5. Protection of Individuals' Deposits from Illegal Internet Instructions**

The area of e-commerce is also the area of cashless payments,<sup>38</sup> in which instructions are also sent via the Internet. In India, the protection of deposits from unauthorized access is regulated, among many other technologies, by the Information Technology Act, 2000.<sup>39</sup> Most other BRICS countries adopted special normative acts to solve these problems.

On 26 September 2018, the Federal Law of 27 June 2018 No. 167-FZ "On Amendments to Some Legislative Acts of the Russian Federation Regarding the Prevention of Thefts of Funds" (hereinafter the Law No. 167) came into force. Briefly characterizing the changes, we can say that the purpose of the innovations is, as indicated in the name, to prevent various fraudulent theft schemes.

The law is aimed at the protection of the interests of both individuals and legal entities.<sup>40</sup> There is a particularly large danger of thefts from the accounts of individuals who are often somewhat careless about the requirements to the safe conduct of transactions using a variety of "mobile banks" and other smartphone applications operating monetary funds.

However, the accounts of legal entities are also at risk. The explanatory note to the law contains very expressive statistics: in 2016, the Bank of Russia received information on 717 unauthorized transactions from the accounts of legal entities for a total amount of 1.89 billion rubles. Moreover, over 50% of all the attempts to carry out unauthorized transfers of funds from the accounts of legal entities were successful, i.e. funds were debited from the client's account in full or in part.

To prevent thefts, a number of authorities are granted to banks and other organizations engaged in cashless transactions, in which the corresponding accounts

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<sup>37</sup> Elke U. Weber & Christopher Hsee, *Cross-Cultural Differences in Risk Perception, but Cross-Cultural Similarities in Attitudes Towards Perceived Risk*, 44(9) Management Science 25 (1998).

<sup>38</sup> Eferin et al. 2019.

<sup>39</sup> Yogendra Nath Mann & Kavindra Nath Mann, *E-Retailing Laws and Regulations in India: E-Commerce in India – Legal Perspectives in Internet Taxation and E-Retailing Law in the Global Context* 8 (Hershey, PA: IGI Global, 2018); Subhajit Basu & Richard Jones, *E-Commerce and the Law: A Review of India's Information Technology Act, 2000*, 12(1) Contemporary South Asia 7 (2003).

<sup>40</sup> See Igor B. Ilvovskiy et al., *Institutional Model for the Protection of Rights of the Parties Concerned in the Sale of Goods and Services with the Use of Information Technologies in Ubiquitous Computing and the Internet of Things: Prerequisites for the Development of ICT* 881 (E.G. Popkova (ed.), Cham: Springer, 2019).

of individuals and legal entities are opened (hereinafter referred to for brevity as operators in the text of the law). If there are signs that the accounts are debited without the consent of the account holder, they are authorized to suspend debiting from the payer's account (for 2 days) or crediting to the recipient's account (for 5 days).

The Law No. 167 amended Article 8 of the Federal Law of 27 June 2011 No. 161-FZ "On the National Payment System" – it is supplemented by paragraphs 5.1, 5.2 and 5.3. According to paragraph 5.1, the operator is obliged to suspend the execution of the debiting instruction for a period of up to 2 business days if he/she finds out that the operation has any signs of debiting without the individual's consent, as provided for in the list approved by the Central Bank of the Russian Federation.

This list is currently approved by the Order of the Bank of Russia of 27 September 2018 No. OD-2525 with the self-explanatory name "The Signs of the Funds Transfer Without the Client's Consent." The list covers three types of cases:

Type 1: The recipient of funds was previously noticed in the receipt of money debited without the senders' consent, and was put on the corresponding "black list" of the Central Bank of the Russian Federation – a special database accessed, for understandable reasons, only by the employees of the relevant organizations. To date, we did not manage to find any legal information on the possibility and procedure for the exclusion from this registry.

Type 2: The parameters of the device, from which the account was accessed, coincide with the parameters of the device, with which money was debited without the sender's consent, and which made into the "black list" of the Central Bank of the Russian Federation similar to the previous one. By the way, this contains another solid reason not to buy used smartphones.

Type 3: Unusual date, time, place, amount, device, purpose, payment recipient. The order of the Central Bank reflects this sign as follows:

a discrepancy of the nature, or parameters, or the volume of the conducted transaction with the transactions usually made by the client of the money transfer operator or the activities carried out by the client.

Perhaps, the latter type of the situation raises the most questions, since it is extremely subjective and non-specific.

Notably, this criterion has some similarities with the criterion of confusing and unusual nature of a transaction (this criterion is enshrined in the Federal Law of 7 August 2001 No. 115-FZ "On Anti-Money Laundering and Anti-Terrorist Financing"). Consequently, banks already have some experience of working with such value concepts. Banks will undoubtedly compare the disputed payment not only with the transactions previously made by the same client, but also with the transactions which are standard for all individual clients (or for all clients – legal entities), and act depending on the situation.

In any respect, the presence of any of the cases, by virtue of paragraph 5.2 of the law, entails only a notice to the account holder of such a suspension and sending a request to confirm the payment by any means provided for in the contract with the operator. However, even in the absence of such confirmation, by virtue of paragraph 5.3, the transaction will be carried out 2 business days after the date of suspension (the same norm is essentially duplicated in paragraph 9.1 of Article 9 of the same Law).

Thus, the innovations should not essentially create special problems to payers. But if the payer sends a corresponding notice to debit funds without his/her consent or informs of the loss of the means by which the payments were made (for example, a card with a chip allowing to make settlements without entering a PIN code or a virtual card on a smartphone), recipients of the funds will experience very serious problems.

The Law No. 167-FZ also added new paragraphs 11.1–11.5 of Article 9 of the Federal Law of 27 June 2011 No. 161-FZ “On the National Payment System.” According to paragraphs 11.1 and 11.2, immediately upon receipt of such a notice, the payer’s operator sends a message to the recipient’s operator obliging the payer to suspend crediting for up to 5 business days, and send a notice to the recipient of the need to submit documents confirming the validity of the payment. However, the law itself does not contain any specifics as to what documents will be deemed proper confirmation.

It is obvious that we can take into account contracts, consignment notes, and other documents confirming the occurrence or fulfillment of an obligation, however, these documents will confirm the person’s right to receive payment only if they contain the correct reference to the reason for payment (indicated type of contract, date, number, etc.). If the funds were debited without specifying the reason for payment or due to technical errors, the reason for payment in the document accompanying the debiting and in the document submitted by the recipient do not match, the bank has the right not to take into account the documents submitted by the recipient and return the trapped money back to the payer.

According to paragraph 11.3 of Article 9 of the Law “On the National Payment System,” if the documents are submitted, the receipt of payment will continue in the usual procedure.

However, if the money does not arrive in the account (including, it should be assumed, if the operator considers it improper for some reason), by virtue of paragraph 11.4, the recipient’s operator will return it to the payer’s operator, and the payer’s operator, in turn, – to the payer himself.

Finally, according to paragraph 11.5, if the notice of the suspension of operations comes from the payer’s operator after the recipient’s operator has credited the account, no suspension will be possible, of which the recipient’s operator will nevertheless have to notify the payer’s operator. No one doubts the need to prevent thefts of money from accounts and deposits. Therefore, it is undoubted that annotated the Law No. 167 is aimed at achieving a good goal. Besides, the rules established by this law are largely based on the existing banking practice: banks already try to track suspicious transactions and inform clients about the existing risks. However, some questions

remain. Let us consider the most obvious of them, i.e. those which have already arisen in the interpretation and application of the Law No. 167.

Question No. 1. Will the control provided for by the Law No. 167 entail an increase in settlement periods?

The explanatory note to the Law declared that the law does not extend the deadline for making payments. However, it must be admitted that a certain extension of the period for crediting money can still happen, but it will not exceed 5 business days. At the same time, the terms provided for by the Law No. 167 are correlated as follows: 2 days are given to the bank to ask the client (payer) whether he/she really performed an operation, which seemed suspicious to the bank, and 5 days are given to the recipient of money to submit documents to the bank confirming the validity of receipt. It can be assumed that the calculation of both terms begins simultaneously – from the moment when the money is debited from the payer's account. In general, a slight extension of the settlement period can be considered an acceptable fee related to risk reduction.

The bank's liability for the delay (in the form of interest stipulated by Article 856 of the Civil Code and compensation for losses) will only occur if there was no legal reason to suspend debiting/crediting, or if the procedure provided for by law has been violated (for example, no notice has been sent). If one of the grounds to suspend debiting stipulated by the aforesaid order of the Bank of Russia was really available, the bank is not liable for any losses caused by the delay (but only if the delay does not exceed five business days).

For example, in the Review of the court practice of considering disputes on the protection of consumer rights related to the sale of goods and services approved by the Presidium of the Supreme Court of the Russian Federation on 17 October 2018, it is concluded that the actions of the bank, which suspended the execution of a client's instruction having signs of a questionable transaction, were lawful. At the same time, the Presidium of the Supreme Court of the Russian Federation emphasized that "when a questionable transaction is detected, the bank has the right to limit the banking services provided to the client by blocking the bank card until the end of the circumstances giving rise to suspicions of fraudulent actions with the card or the circumstances indicating the risk of violating the RF legislation, and also refuse to fulfill the client's instruction to complete the transaction" (cl. 13 of the Review).<sup>41</sup> However, if there were no signs of a write-off without the account holder's consent, the bank may be held liable for untimely crediting of the funds.

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<sup>41</sup> Обзор практики рассмотрения судами дел по спорам о защите прав потребителей, связанным с реализацией товаров и услуг (утв. Президиумом Верховного Суда РФ 17 октября 2018 г.) [Review of the Practice of Court Consideration of Cases of Consumer Protection Disputes Related to the Sale of Goods and Services, approved by the Presidium of the Supreme Court of the Russian Federation on 17 October 2018] (May 2, 2020), available at <https://www.garant.ru/products/ipo/prime/doc/71981026/>.

### Question No. 2. How to prevent accidental “blacklisting”?

The “black list” of recipients and their devices is maintained by the Bank of Russia. According to paragraph 5 of Article 27 of the Federal Law “On the National Payment System” as amended by the Law No. 167,

in order protect information when making money transfers, the Bank of Russia creates and maintains a database of cases and attempts to make money transfers without the client’s consent.

This list is only beginning to be formed, since the norm is valid only from 26 September 2018. However, we can assume already now that a malicious or simply careless payer, who does not respond to the bank’s requests, can create a risk for the recipient of funds to be unreasonably “blacklisted.”

If the bank considers a transaction doubtful, and the payer does not respond to the bank’s request, the recipient will be given the opportunity to submit supporting documents to the bank, and if there are no such documents, the money will be returned to the payer, while the recipient and his/her devices can be “blacklisted.” Therefore, we can advise the recipient to receive in advance an offer signed by the payer or any other document confirming the contract.

### Question No. 3. How to be excluded from the “black list”?

It can hardly be considered justified that the applicable legislation does not provide for any procedure for the exclusion from the “black list” of recipients and their devices. “Blacklisting” surely limits subjective civil rights. On the other hand, this inclusion is carried out by the Bank of Russia exercising the functions of public control in the sphere of money circulation. Therefore, the blacklisting decision may be appealed as a non-normative act. Besides, the absence of grounds for blacklisting can be proved when considering a claim for compensation of losses caused by an untimely transfer of funds.

As a result, we can conclude that the Law No. 167 carries more opportunities which are both positive and negative. It can become either a big problem for payers and recipients, or a considerable way to protect against illegal debiting.

Russia cooperates with the BRICS member states to control money laundering and financing of terrorism. Such cooperation is provided, in particular, by the Concept of Participation of the Russian Federation in BRICS approved by the President of the Russian Federation. The techniques and methods developed in the course of such cooperation to control cash flows will possibly help in the future to control illegal debiting of accounts and deposits held by individuals and legal entities.

Practice shows that aggregators interested in attracting new customers already offer additional services to help the parties to the transaction to perform and accept payment performance.<sup>42</sup> Now, it includes taking money into deposit and advising on

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<sup>42</sup> Aditya Upadhyay et al., *Comparative Analysis of Online Visual Merchandising Practices Between Government and Private Indian Online Retailers*, 7(6) *Global Journal for Research Analysis* 486 (2018).

the issue of which bank to choose for settlements in another country. In the future, the list of such intermediary services is likely to increase.<sup>43</sup> One of the advantages of the Internet is its constant development and improvement.

The global network is not just one of the technological methods of interaction similar to mail or telephone, which do not have a significant legal effect, but a phenomenon with an architecture that predetermines a system of common legal problems of any relations, as well as the limits and characteristics of their possible legal regulation.<sup>44</sup> Payment security and information security are two indispensable conditions posed by consumers to online contracts.<sup>45</sup> BRICS contributes to the interaction of the member countries to ensure secure payments.<sup>46</sup>

In South Africa (as the researchers note), the legislation needs to be improved to ensure security of online trading settlements.<sup>47</sup> In this case, the security of settlements and, in general, the security of Internet communications cannot be achieved by restricting Internet access.<sup>48</sup>

When developing e-commerce regulations, China faced the need to choose what is more important – an easy access to sales or purchase, or accurate user identification? Chinese lawmakers chose the advantages of accurate identification, due to which they obtained rather vast opportunities to control the circulation of goods and cash. Although literature evaluates the Chinese experience in different ways, the benefits of accurate identification on the Internet are recognized by almost all authors. When the security and speed of transactions are in competition, sometimes security should be a priority.<sup>49</sup> Researchers note that in China, cultural traditions are favorable for the

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<sup>43</sup> Christine Riefa, *Consumer Protection on Social Media Platforms: Tackling the Challenges of Social Commerce in EU Internet Law in the Digital Era: Regulation and Enforcement* 321 (T. Synodinou et al. (eds.), Cham: Springer, 2019).

<sup>44</sup> Архипов В.В, Киликсарова Е.В, Мелашенко Н.В. Проблемы правового регулирования оборота товаров в сети Интернет: от дистанционной торговли до виртуальной собственности // Закон. 2014. № 6. С. 120–143 [Vladislav V. Arkhipov et al., *Problems of Legal Regulation of the Circulation of Goods on the Internet: From Distance Trading to Virtual Property*, 6 Law 120 (2014)].

<sup>45</sup> Raymond R. Burke, *Technology and the Customer Interface: What Consumers Want in the Physical and Virtual Store*, 30(4) *Journal of the Academy of Marketing Science* 411 (2002).

<sup>46</sup> Tatiana V. Zaitseva, *Banking System as a Growth Pole of the Global Economy: Historical Experience and Future Perspectives*, 73 *Lecture Notes in Networks and Systems* 857 (2020).

<sup>47</sup> Leon Perlman, *Legal and Regulatory Aspects of Mobile Financial Services*, PhD Thesis (Pretoria: University of South Africa, 2012).

<sup>48</sup> Charles Lewis, *Negotiating the Net: The Internet in South Africa (1990–2003)*, 2(3) *Information Technologies and International Development* 3 (2005).

<sup>49</sup> Jane K. Winn & Yuping Song, *Can China Promote Electronic Commerce Through Law Reform? Some Preliminary Case Study Evidence*, 20 *Columbia Journal of Asian Law* 415 (2007); Jörg Binding & Kai Purnhagen, *Regulations on E-Commerce Consumer Protection Rules in China and Europe Compared – Same Same but Different?*, 2 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 186 (2011).

development of Internet commerce,<sup>50</sup> so that even more stringent public control of Internet communications than in other BRICS countries does not interfere with the development of Internet commerce in China.

Besides, analyzing the Chinese experience, we can note that the institution of escrow and letters of credit is successfully used. The online platform operator receives the payment from the consumer and deposits the money until the consumer receives the goods. Sometimes consumers are additionally given 5–7 days to exercise their right to return the goods. Therefore, it is easier for the consumer to return the money if the goods are returned.<sup>51</sup>

### Conclusion

The conducted research allowed us to highlight some of the problems connected with the regulation of e-commerce with the participation of consumers. The main problem is economic inequality in the relations between the seller and the consumer. It lies in the fact that the terms and conditions of the contract are formulated by the seller, and the consumer can only join these conditions. In a situation when the contract is concluded on the site, the correlation of forces somewhat changes. Now the contractual terms are determined not by the goods seller, but by the site owner (e-commerce aggregator). The aggregator has a contract with the seller, and the seller generally pays for the opportunity to sell its goods on a certain well-known site. Therefore, the contract concluded through the aggregator can be considered an adhesion contract, though a very specific one.

It is necessary to support the idea of holding the e-commerce aggregator responsible for any failure to fulfill its obligations to the consumer. The responsibility is considered acceptable when the aggregator has not informed the consumer that it does not provide the goods, works, services, as well as if the aggregator was negligent when registering a potential seller on the site, without, for example, verifying the passport data of an individual. Although such responsibility is not yet provided for by the Russian legislation, it was proposed in the literature, and this proposal should be supported. There is a corresponding norm in the Chinese legislation. Article 38 of the Chinese E-Commerce Law says that an aggregator who is aware or has to be aware that a product, work or service sold on its website does not meet the obligatory safety requirements, shall be jointly and severally liable together with the seller for any damage caused by the properties of this product, work or service. When concluding a contract with a consumer, the aggregator which has not verified the user's personal data shall bear the same joint and several liability.

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<sup>50</sup> Kshetri 2005; Angus Young, *Conceptualizing a Hybrid Approach in Enforcement and Compliance in China: Adapting Responsive Regulation and Confucian Doctrines to Regulate Commerce*, SSRN, 10 August 2013 (May 2, 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2308447](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308447).

<sup>51</sup> Ying Yu, *Contemporary Lex Mercatoria in China*, SSRN, 6 April 2015 (May 2, 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2590350](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2590350).

We did not find equally strict rules on the responsibility of the platform aggregator in other BRICS countries, but the Chinese experience deserves the closest attention.

Further, when considering the issue of when the aggregator should be considered an employer in relation to the individuals involved in the provision of services, it has been suggested that it is necessary to follow the common criteria for distinguishing between civil law and a labor contract, and if the individual's activity is constantly connected with the performance of a specific labor function under the supervision of an organization, the contract is labor, even if the parties call it a paid service contract. Notably, conflicts involving some online trade aggregators in Brazil, China and other BRICS countries were resolved in the same way.

An integral part of free trade is secure settlements. In this respect, it is necessary to expand the cooperation between the BRICS countries to control illegal debiting of funds from accounts and deposits. The Russian legislation in this respect has undergone important changes, which should be generally assessed in a positive way.

Finally, as for licensing the activities of e-commerce aggregators, the practice of China should be supported – if the activities, in which the aggregator acts as an intermediary and an organizer, are subject to licensing, the aggregator's activities should be also licensed. It is important not to go to extremes in the regulation of e-commerce aggregators, as probably in any other regulation. It is better to avoid excessive prohibitions and restrictions, which can destroy the rapidly developing branch of the economy, but it should also be borne in mind that e-commerce aggregators are only at the beginning of their history, therefore, it is necessary to set a correct vector for their development.

The core values protected in the regulation of this activity should be the consumers' life, health and safety. In addition, one should not forget about public interests, particularly the interest in the development of competition.

The further development of e-commerce aggregators will certainly force us to review some licensing and control rules. So, an opinion has already been expressed that it is necessary to develop different licensing rules – some for passenger transport, and others – for aggregators acting as dispatchers. Nevertheless, until such specialized requirements are developed, the general licensing rules should be extended to e-commerce aggregators, especially when individuals providing goods, works or services can be recognized as employees of the site-owning organization.

The scope of Internet commerce is rapidly expanding, and regulation should not actually create unnecessary restrictions on such development. However, so that consumers receive a safe product, work or service, it is advisable, in case of the most serious omission, to hold both the site owner (e-commerce aggregator) and the seller or the contractor liable. Now, coming back to the case of the taxi and the dead passenger, i.e. to the case cited in the introduction, we can see that the Russian court found the right decision, although it did not precisely justify this decision. It was certainly correct to hold the e-commerce aggregator liable because it had done nothing to check whether the driver sent by it to the passenger had the driver license.

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