BRICS LAW JOURNAL
Volume I (2014) Issue 1

ISSN 2409-9058

Published by
LLC V. Em Publishing House,
92 Lobachevskogo str., Moscow,
Russia, 119454

Subscription enquiries should be directed to V. Em Publishing House

The *BRICS Law Journal* invites the submission of manuscripts for consideration. Manuscripts should be e-mailed to the Chief or Executive Editors. Citations must conform to the *Bluebook*: *A Uniform System of Citation*.

Contacts:
www.bricslawjournal.com
blj@bricslawjournal.com

Frequency of Publication:
biannually

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CHIEF EDITOR'S INTRODUCTORY NOTE

DMITRY MALESHIN,

Lomonosov Moscow State University
(Moscow, Russia)

BRICS, an acronym for an association of Brazil, Russia, India, China and South Africa, has evolved from mere investment lingo to an organised network, in the process assuming a greater geopolitical role aimed at institutional reforms that shift global power. The *BRICS Law Journal* is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The Journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant.

The *BRICS Law Journal* is published biannually.

Our editorial policy is governed by independent quality control, which is guaranteed by the Editorial Council. We are proud to have eminent scholars in our Editorial Council, which is composed of professors from the BRICS countries' leading law schools: Pontifical Catholic University of São Paulo (Brazil), Lomonosov Moscow State University (Russia), National Law University, Jodhpur (India), Peking University (China), University of Pretoria (South Africa).

First, in view of the goal of our Journal, the law of integration of the BRICS countries is our priority. We want to improve the scientific research of BRICS legal regulation.

Second, due to the origin of our Journal, the law of BRICS countries is important to the Journal. We want BRICS countries' legal theories, practice and legislative innovations to be widely known in the international academic environment.

Third, we welcome articles on comparative law from other countries. We want to make our Journal a platform for international comparative discussion on different legal subjects, regardless of nationality.

In conclusion, I would like to thank all prominent members of our Editorial Council for joining this promising academic project.

ARTICLES

THE BRICS COMMITMENT IN THE PROMOTION OF EQUALITY BETWEEN WOMEN AND MEN: ANALYSIS FROM THE HUMAN RIGHTS AND PEACE PERSPECTIVE

CHRISTIAN GUILLERMET FERNÁNDEZ,

Permanent Mission of Costa Rica in the United Nations in Geneva
(San José, Costa Rica),

DAVID FERNÁNDEZ PUYANA,

Permanent Mission of Costa Rica in the United Nations in Geneva
(Barcelona, Spain)

The contribution of women to peace has been very relevant throughout history. The full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields. Gender equality has always been seen as an endless project, which should be realized by everyone around the world. The long-term effects of conflict and militarization create a culture of violence that renders women especially vulnerable in a post-war scenario. The interest in involving women and girls in the peace processes often stems from their experiences of armed conflicts, whether primarily as victims or as armed participants. They are aware of the potentials for transformation and reform in periods of peacemaking. Since 2008, the Human Rights Council has been working on the 'Promotion of the right of peoples to peace.' Pursuant to resolutions 20/15 and 23/16, the Council decided firstly to establish, and secondly to extend the mandate of the open-ended working group (OEWG) aimed at progressively negotiating a draft United Nations declaration on the right to peace. The OEGW welcomed, in its second session (July 2014), the approach of the Chairperson-Rapporteur, which is essentially based on the promotion of equality between men and women, and the relationship between the right to life and human rights, peace and development.

Keywords: war and violence; BRICS; women; right of peoples to peace; Human Rights Council; General Assembly; Open-Ended Working Group; right to life in peace, human rights and development; equality.

1. Introduction

The paper will analyze the notion of equality between women and men, and the promotion of the right of peoples to peace at the Human Rights Council [hereinafter HRC], and in particular those of BRICS. The maintenance of peace and security is crucial for the protection of the human rights of women and girl children, as well as for the elimination of all forms of violence against them and of their use as a weapon of war. Afterwards, the role played by women in decision-making with regard to conflict prevention and resolution will be also studied in light of the current development of the Security Council Resolution 1325 and the text prepared by the Chairperson-Rapporteur. In addition, the gender mainstreaming in the field of disarmament, non-proliferation and arms control will be also analyzed. Finally, the elimination of all forms of violence against women as a means to strengthen world peace will also be studied. The paper will briefly refer to the other forms of violence against women, such as poverty, lack of access to education and discrimination based on the ground of sex. Particularly, the paper will take into account the situation of indigenous women and migrants.

2. Promotion of the Right of Peoples to Peace

Since 2008 the HRC has been working on the 'Promotion of the Right of Peoples to Peace' inspired by previous resolutions on this issue approved by the UNGA and the former Commission on Human Rights [hereinafter CHR], particularly GA Resolution 39/11 of November 12, 1984, entitled 'Declaration on the Right of Peoples to Peace' and the United Nations Millennium Declaration.

On June 17, 2010, the HRC adopted Resolution 14/3 on the right of peoples to peace, which explicitly requested the Advisory Committee, in consultation with Member States, civil society, academia and all relevant stakeholders, to prepare a draft declaration on the right of peoples to peace.

On July 5, 2012, the HRC adopted Resolution 20/15 on 'The Promotion of the Right to Peace.' The Resolution established an open-ended working group [hereinafter OEWG] with the mandate of progressively negotiating a draft UN Declaration on the right to peace on the basis of the draft submitted by the Advisory Committee, and without prejudging relevant past, present and future views and proposals.

The OEWG concluded in its first session that there were some governmental delegations and other stakeholders that recognize the existence of the right to peace. They argued that this right was already recognized by soft-law instruments (such as UNGA Resolution 39/11 of 1984, entitled 'Declaration on the Right of Peoples to Peace'). On the other hand, several other delegations stated that a stand-alone 'right to peace' does not exist under international law. In their view, peace is not a human right, but a consequence of the full implementation of all human rights.

On June 13, 2013, the HRC adopted Resolution 23/16, at the initiative of the Community of the Latin American and Caribbean States [hereinafter CELAC] by

which the HRC requested the Chairperson-Rapporteur of the working group to prepare a new text on the basis of the discussions held during the first session of the working group and on the basis of the intersessional informal consultations to be held, and to present it prior to the second session of the working group for consideration and further discussion thereat.

The second session took place from June 30 to July 4, 2014, in Geneva. At the final meeting of this session, the OEWG, which is composed of all States, civil society organizations and other stakeholders, acknowledged the constructive dialogue, broad participation and active engagement of governments, regional and political groups, civil society and relevant stakeholders, and took note of the input received from them and finally welcomed the approach put forward by the Chairperson-Rapporteur.[1]

The new approach proposed by the Chairperson-Rapporteur is based on the relationship between the right to life and human rights, peace and development; the protection of human beings of armed conflicts in light of UNGA Resolution 60/251 on the HRC of 2006; the content of the right of peoples to peace and the notion of human dignity, the role of women in the construction of peace and the importance of prevention of armed conflicts in conformity with the Charter of the United Nations. Additionally, this new approach has been inspired by the values and principles contained in the legal instruments on gender, and further elaborated upon in the United Nations.

On July 15, 2014, BRICS, which is composed by Brazil, Russian Federation, India, China, South Africa, approved at the Sixth Summit, Fortaleza Declaration, in Brazil by which they pledged

> [T]o foster dialogue and cooperation on the basis of equality and mutual respect in the field of human rights both within BRICS and multilateral fora – including United Nations Human Rights Council where all BRICS serve as members in 2014 – taking into account the necessity to promote, protect and fulfill human rights in non-selective, non-politicized and constructive manner, and without double standards (¶ 28).

On September 25, 2014, the HRC approved, at the initiative of CELAC, Resolution 27/17 on 'Promotion of the Right to Peace' by 33 votes in favor,[2] 9 against[3] and 5

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[1] *Report of the Open-ended Intergovernmental Working Group on the Draft United Nations Declaration on the Right to Peace*, U.N. GAOR, Human Rights Council, 27th Sess., Agenda Item 5: Human Rights Bodies and Mechanisms, ¶ 93, U.N. Doc. A/HRC/27/63 (2014) (Chair-Rapporteur: Christian Guillermet-Fernández), at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A-HRC-27-63_en.doc> (accessed Jan. 26, 2015).

[2] Algeria, Argentina, Benin, Botswana, Brazil, Burkina Faso, Chile, China, Congo, Costa Rica, Cote D'Ivoire, Cuba, Ethiopia, Gabon, India, Indonesia, Kazakhstan, Kenya, Kuwait, Maldives, Mexico, Morocco, Namibia, Pakistan, Peru, Philippines, Russian Federation, Saudi Arabia, Sierra Leone, South Africa, United Arab Emirates, Venezuela and Viet Nam.

[3] Austria, Czech Republic, Estonia, France, Germany, Japan, Republic of Korea, the United Kingdom and Northern Ireland, the United States of America.

abstentions.[4] The BRICS, which represent the major emerging economies in the world, jointly supported the resolution along the lines of the Fortaleza Declaration. It is relevant to highlight that India changed from abstention to a vote in favor for the first time since the CHR and the HRC.

The Resolution requested to convene a third session of the OEWG on the right to peace with the purpose of finishing the Declaration and also requested the Chairperson-Rapporteur of the working group to prepare a revised text on the basis of the discussions held during the first and second sessions of the working group and on the basis of the intersessional informal consultations to be held.

The Fortaleza Declaration recalled that the BRICS have been guided by the overarching objectives of peace, security, development and cooperation. The promotion of social development and their contribution to the definition of the international agenda in this area, building on its experience in addressing the challenges of poverty and inequality will be a priority. In addition, they recalled that development and security are closely interlinked, mutually reinforcing and key to attaining sustainable peace. Additionally, they reiterated that the establishment of sustainable peace requires a comprehensive, concerted and determined approach based on mutual trust, equity and cooperation that addresses the root causes of conflicts. The importance of bringing gender perspectives to conflict prevention and resolution, peacebuilding, peacekeeping, rehabilitation and reconstruction efforts will be another objective to be achieved by the BRICS.

In line with the BRICS purposes, the gender approach to the notion of peace, human rights and development decisively framed the text prepared by the Chairperson-Rapporteur by including in its preambular ¶ 11 the preambular ¶ 12 of the Convention on the Elimination of All Forms of Discrimination against Women [hereinafter CEDAW], which proclaims that '. . . the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.'

3. Women in Times of War and Conflict

Inequality is particularly gendered in war and conflict which severely compromises women's right to sustainable development. Even though women provide unpaid services in times of peace, such as the search for water, the preparation of food and energy conservation, inequality is intensified during conflict since the peacekeeping infrastructure is often destroyed.

Along with the deepening violence women experience during war, the long-term effects of conflict and militarization create a culture of violence that renders women especially vulnerable after war, because institutions of governance and law

[4] Ireland, Italy, Macedonia, Montenegro and Romania.

are weakened and social fragmentation is pronounced. The maintenance of peace and security is crucial for the protection of the human rights of women and girl children, as well as for the elimination of all forms of violence against them and of their use as a weapon of war.[5]

The interest in involving women and girls in the peace processes often stems from their experiences of armed conflicts, whether primarily as victims or as armed participants. They are aware of the potentials for transformation and reform in periods of peacemaking. As the Platform for Action of Beijing indicated 'the girl child of today is the woman of tomorrow. The skills, ideas and energy of the girl child are vital for full attainment of the goals of equality, development and peace.'[6]

Women have a unique opportunity to become organized in peace movements to focus on shared social experiences. Women have common barriers based on cultural relativism and thus create networks of solidarity that are able to cross invisible borders. The Forward-looking Strategies on Equality, Development and Peace of Nairobi states that women should be completely integrated into the development process in order to strengthen peace and security in the world. Thus, the realization of equal rights for women at all levels and in all areas of life contributes to the achievement of a just and lasting peace.[7]

Ms. Rashida Manjoo, Special Rapporteur on violence against women, its causes and consequences, stressed in her annual report submitted to the HRC in 2011[8] that if a woman experiences violence in her home and is then denied security and protection by the legal system, she is encountering more than one form of violence. In addition, she indicated that the response required to ensure that women's lives are free of violence must occur on multiple levels, from the individual to the institutional, from the local to the transnational, and from times of peace to times of post-conflict. Furthermore, she pointed out that many regions in the world are currently experiencing violence, both public and private – be it in actual military conflict and combat zones, or in the aftermath of conflicts, or during periods of supposed 'peacetime.' Conflict and post-conflict situations often exacerbate an environment of violence against women including through sexual violence, trafficking and forced prostitution.

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5 *Report of the Fourth World Conference on Women (Beijing, Sept. 4–15, 1995)*, Annex 2: Platform for Action, ¶ 12, U.N. Doc. A/CONF.177/20, at <http://www.un.org/documents/ga/conf177/aconf177-20en.htm> (accessed Jan. 27, 2015) [hereinafter *Report of the Fourth World Conference on Women*].

6 *Report of the Fourth World Conference on Women*, *supra* n. 5, Annex 2: Platform for Action, ¶ 39.

7 *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women*, G.A. Res. 40/108, U.N. GAOR 3rd Comm., 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/108 (1985), at <http://www.un-documents.net/a40r108.htm> (accessed Jan. 27, 2015).

8 *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo*, U.N. GAOR, Human Rights Council, 17th Sess., Agenda Item 3: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, ¶¶ 66, 88, U.N. Doc. A/HRC/17/26 (2011), at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-26.pdf> (accessed Jan. 27, 2015).

The first thematic report submitted to the HRC by Ms. Rashida Manjoo, Special Rapporteur on violence against women, its causes and consequences,[9] focused on the topic of reparations to women who have been subjected to violence in contexts of both peace and post-conflict. Section II.B of the report analysed the procedural and substantive considerations emerging in reparations initiatives responding to violence in conflict, post-conflict and authoritarian settings. Section II.C examined reparations to women and girls in contexts of 'peace' or consolidated democracies, by looking first at discriminatory practices against certain groups of women.

As indicated by Ms. Radhika Coomaraswamy, former Special Rapporteur on violence against women, its causes and consequences,[10] when a peace agreement has been reached and the conflict brought to an end, women often face an escalation in certain gender-based violence, including domestic violence, rape, and trafficking into forced prostitution. Unfortunately, many of the peace agreements and processes of reconstruction after the conflict do not take note of these considerations. In addition, she noted that women may also be exposed to violence by the international authorities or forces assigned to protect them. There have been a growing number of reports of rape and other sexual abuse being committed by United Nations peacekeeping forces and staff. She proposed that the United Nations should ensure that women are represented in all ceasefire and peace negotiations, and that gender issues are an integral part of these processes. Special efforts should be made to engage local women's NGOs in the peace negotiations.

The role of men and boys is indispensable in achieving both gender equality in economic, social and cultural rights and the right to peace. The Charter of the United Nations was the first international instrument to recognize women's equal rights with men and has prompted / stimulated / motivated the provision of a legal codification of these rights in international human rights treaties and national laws. It follows that a transformed partnership based on equality between women and men is needed as a condition for people-centred sustainable development and world peace.

The most critical deterrent to the establishment of world peace is the inequality that remains in the mental attitudes and behaviour that perpetuate the notion of power that deprives others of the enjoyment of their basic human rights and human

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[9] *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo*, U.N. GAOR, Human Rights Council, 14th Sess., Agenda Item 3: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, U.N. Doc. A/HRC/14/22 (2010), at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.22.pdf> (accessed Jan. 27, 2015).

[10] *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2000/45. Violence against Women Perpetrated and/or Condoned by the State During Times of Armed Conflict (1997–2000)*, U.N. ESCOR, Commission on Human Rights, 57th Sess., Agenda Item 12(a): Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, ¶¶ 57, 58, 117, U.N. Doc. E/CN.4/2001/73 (2001), at <http://www.awf.or.jp/pdf/h0015.pdf> (accessed Jan. 27, 2015).

dignity. It follows that equality between women and men is a matter of human rights and a condition for social justice, as well as a necessary and fundamental prerequisite for equality, development and peace. The preamble of the CEDAW highlights that 'the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.'

4. Women and Peace

At the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, held in Nairobi in July 1985, the issue of violence against women was only raised as an afterthought to issues of discrimination, health and economic and social issues.

In addition, ¶ 258 of the Nairobi Forward-Looking Strategies for the Advancement of Women, adopted by the World Conference, stated as follows:

> Violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacle to the achievement of peace and the other objectives of the Decade and should be given special attention. Women victims of violence should be given particular attention and comprehensive assistance.

The landmark Convention on the Elimination of Discrimination against Women is considered the primary document for women's human rights. Yet, it did not directly address violence against women. Nevertheless, it should be noted that the CEDAW Committee created the General Recommendation No. 12 on violence against women in its eighth session in 1989 as a component of Member State Reports to the CEDAW Committee.

Women's peace movements have raised major issues on war around the world, notably when war and conflict situations have increased. Without doubt, these movements to wage peace have been able to accomplish significant and historical inroads in impacting public opinion. For instance, Security Council resolutions 1325 (2000), 1820 (2008), 1888 and 1889 (2009) on women, peace and security, stated that bringing a gender perspective into peace negotiations is an evident outcome of this movement.

The UN Security Council 1325 covers a broad spectrum of violence against women and girls in conflict and specifically notes in the following terms:

> expressing concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements, and recognizing the consequent impact this has on durable peace and reconciliation;

> reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution; and
>
> reaffirming also the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts.

This Council resolution recognized gender mainstreaming as a major global strategy for the promotion of gender equality by indicating that 'all those involved in the planning for disarmament, demobilization and reintegration should consider the different needs of female and male ex-combatants.'

5. Women and Approach to Disarmament

In accordance with Arts. 11 and 26 of the UN Charter, the United Nations is pursued to enhance the general principle of cooperation in the maintenance of international peace and security through the disarmament and regulation of armaments. Nevertheless, Member States have always been more interested in controlling or restraining the use and development of certain arms,[11] rather than promoting an effective disarmament at the highest level.[12] It follows that the number of victims of the countless international and national armed conflicts have dramatically increased since the end of the Cold War.

The continuing existence of nuclear weapons poses a threat to the world as their use would have catastrophic consequences for all life on Earth and humankind in general.[13] The HRC recognized that the 'designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront humankind today.'[14] As stated by the advisory opinion of the

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[11] Limited Test Ban Treaty (1963), Nuclear Non-Proliferation Treaty (1968), Strategic Arms Limitation Treaty I (SALT I, 1972), Anti-Ballistic Missile Treaty (ABM, 1972), Threshold Test Ban Treaty (TTBT, 1974), Underground Peaceful Nuclear Explosions Treaty (PNE, 1976), SALT II (1979), Intermediate Nuclear Forces Treaty (INF, 1987), Strategic Arms Reduction Treaty (START, 1991–92), START II (1993), Comprehensive Test Ban Treaty (CTCBT, 1996), START III (1997).

[12] Antarctic Treaty (1959), Outer Space Treaty (1967), Treaty of Tlatelolco (1967), Seabed Treaty (1971), South Pacific Nuclear Free Zone (Treaty of Rarotonga, 1985), Southeast Asia Nuclear Weapons Free Zone (Treaty of Bangkok, 1995), African Nuclear Weapons Free Zone (Treaty of Pelendaba, 1996).

[13] The Russell–Einstein Manifesto, London, Jul. 9, 1955, Resolution.

[14] *CCPR General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life*, U.N. GAOR, Hum. Rts. Comm., 23rd Sess., ¶ 4 (1984), at <http://www.refworld.org/docid/453883f911.html> (accessed Jan. 27, 2015).

International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons based on Art. 6 of the *Nuclear Non-Proliferation Treaty*,[15] Member States are obligated to conduct negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

The final outcome of the International Conference on the Relationship between disarmament and development[16] concluded that true and lasting peace and security in this interdependent world demand rapid progress in both disarmament and development, since they are the most urgent challenges facing the world today and the pillars on which enduring international peace and security should be built. As a consequence of the growing interdependence and interrelationship among nations and global issues, multilateralism provides the international framework within which the relationship between disarmament, development and security should be shaped.[17]

As the General Assembly underlines, excessive armament and military spending may have negative effects on development, because their spread and availability endanger stability and welfare and diminish social and economic confidence. Although disarmament does not necessarily lead to development, there is no doubt that disarmament may help to create more stable international, national and local situations favourable to development.[18] Thus, the international community should devote part of the resources from the implementation of disarmament and arms limitation agreements, to economic and social development with a view to meeting the Millennium Development Goals (MDG).[19]

Paragraph 9 of the *2005 World Summit Outcome*[20] recognizes the linkage between peace, development and human rights as follows:

> We acknowledge that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective

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15 *Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. 54/54 Q, U.N. GAOR 1st Comm., 54th Sess., Supp. No. 49 I, U.N. Doc. A/Res/54/54 Q (1999), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/231/83/PDF/N0023183.pdf?OpenElement> (accessed Jan. 27, 2015).

16 *Report of the International Conference on the Relationship between Disarmament and Development (New York, Aug. 24 – Sep. 11, 1987)*, U.N. Doc. A/CONF.130/39 (1987) [hereinafter *Report of the International Conference*].

17 *Report of the International Conference*, *supra* n. 16, at 19.

18 *Report of the Group of Governmental Experts on the Relationship between Disarmament and Development*, U.N. GAOR, 59th Sess., ¶ 18, U.N. Doc. A/59/119 (2004), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/402/50/PDF/N0440250.pdf?OpenElement> (accessed Jan. 27, 2015).

19 *Relationship between Disarmament and Development in the Current International Context*, G.A. Res. 61/64, U.N. GAOR 1st Comm., 61st Sess., Supp. No. 49 I, ¶ 4, U.N. Doc. A/Res/61/64 (2007), at <http://www.worldlii.org/int/other/UNGARsn/2006/131.pdf> (accessed Jan. 27, 2015).

20 G.A. Res. 60/1, U.N. GAOR, 60th Sess., Supp. No. 49 I, U.N. Doc. A/Res/60/1 (2005), at <http://www.refworld.org/docid/44168a910.html> (accessed Jan. 27, 2015).

security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing.

Although gender and disarmament relationship are not immediately apparent, gender mainstreaming represents a different approach to the traditionally complex and politically sensitive fields of security, disarmament, non-proliferation and arms control.[21] The Beijing Declaration and Platform for Action stated that full participation of women in decision-making, conflict prevention and resolution, and any other peace initiative are essential to the realization of lasting peace.[22]

6. Other Forms of Violence against Women

6.1. Poverty

Extreme poverty is a universal and multidimensional phenomenon, which currently affects millions of people in both in rich and poor countries.[23] According to the World Health Organization statistics, about 1 billion people globally live in extreme poverty on an income of just $1 a day and 270 million people, most of them women and children, have died as a result of poverty since 1990.[24] Thus, peace is not only economic and social justice, as important as it may be, it relies first on respect of the human dignity and self-esteem of the poor.[25]

As Mr. Leandro Despouy stated in 1996[26] the lack of basic security, or the absence of one or more factors enabling families to assume basic responsibilities and to enjoy fundamental rights, leads to chronic poverty when it simultaneously affects several aspects of people's lives, when it is prolonged and when it severely compromises people's chances of regaining their rights and of reassuming their responsibilities in

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21 Briefing Note Issued by the Office for Disarmament Affairs in Collaboration with the Office of the Special Adviser on Gender Issues and the Advancement of Women of the Department for Economic and Social Affairs (2008).

22 *Report of the Fourth World Conference on Women*, *supra* n. 5, Annex II: Platform for Action, ¶ 23.

23 *Report Submitted by Ms. A.-M. Lizin, Independent Expert on the Question of Human Rights and Extreme Poverty Pursuant to Commission on Human Rights Resolution 2002/30*, U.N. ESCOR, Commission on Human Rights, 56th Sess., ¶¶ 10–11, U.N. Doc. E/CN.4/2000/52 (2000) [hereinafter *Report Submitted by Ms. A.-M. Lizin*].

24 *Health Poverty and Millenium Development Goals*, Report of the WHO, Regional Office for the Western Pacific (2005).

25 U.N. ESCOR, Commission on Human Rights, 59th Sess., 56th mtg. ¶ 1.a, U.N. Doc. E/CN.4/2003/L.11/Add.3 (2003).

26 *The Realization of Economic, Social and Cultural Rights: Final Report on Human Rights and Extreme Poverty, Submitted by the Special Rapporteur, Mr. Leandro Despouy*, U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Sess., Agenda Item 8: The Realization of Economic, Social and Cultural Rights, Annex 3, U.N. Doc. E/CN.4/Sub.2/1996/13 (1996), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/130/26/PDF/G9613026.pdf?OpenElement> (accessed Jan. 27, 2015).

the foreseeable future. The lack of basic security destroys family ties and prevents people from taking responsibility for family planning and proper care of their children, thus increasing child mortality. Widespread extreme poverty inhibits the realization of human rights[27] in general and political, civil, economic, social and cultural rights in particular.[28]

People affected by chronic extreme poverty are at risk of becoming socially excluded from full participation in the society in which they live. Usually the poor, the unemployed, people belonging to ethnic minorities and other vulnerable groups remain 'outsiders' and low in the social hierarchy.[29] Moreover, the poor may express their despair and trauma through physical violence or conflict.[30] Thus, as stated by the Secretary-General of the United Nations, full realization of political, economic and social rights of all people is the solid way to maintain the social balance which is vital for a society to develop in peace.

To establish lasting peace, the right to enjoy the highest attainable standard of physical, mental and spiritual health should be central to creating and sustaining the capabilities that the poor need to escape from the scourge of poverty. As stressed by Mr. Paul Hunt, United Nations Special Rapporteur on the right to the highest attainable standard of health, ill health destroys livelihoods, reduces worker productivity, lowers educational achievement, limits opportunities and reduces human development.[31] A fundamental right which must be respected not only in times of peace but also in times of war, is the right to a minimum standard of living, including regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food supplies.[32]

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27 Vienna Declaration and Programme of Action: World Conference on Human Rights (Vienna, Jun. 14–25 1993), ¶ 14, U.N. Doc. A/CONF. 157/23 (1993), at <http://www.ub.fu-berlin.de/service_neu/ubpubl/mitarbeiter/dbe/UDHR60/Vienna_declaration.pdf> (accessed Jan. 27, 2015).

28 *Human Rights and Extreme Poverty*, G.A. Res. 53/146, U.N. GAOR 3rd Comm., 53rd Sess., Supp. No. 49 I, ¶ 3 (1999), U.N. Doc. A/RES/53/146, at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/771/01/PDF/N9977101.pdf?OpenElement> (accessed Jan 27, 2015).

29 *Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Arjun Sengupta*, U.N. ESCOR, Commission on Human Rights, 61st Sess., Agenda Item 10: Economic, Social and Cultural Rights, ¶ 14, U.N. Doc. E/CN.4/2005/49 (2005), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/108/86/PDF/G0510886.pdf?OpenElement> (accessed Jan. 27, 2015).

30 *Human Rights and Extreme Poverty: Report Submitted by Ms. A.-M. Lizin, Independent Expert, Pursuant to Commission Resolution 2000/12*, U.N. ESCOR, Commission on Human Rights, 57th Sess., Agenda Item 10: Economic, Social and Cultural Rights, ¶ 93, U.N. Doc. E/CN.4/2001/54 (2001), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/112/93/PDF/G0111293.pdf?OpenElement> (accessed Jan. 27, 2015).

31 *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur, Paul Hunt, Submitted in Accordance with Commission Resolution 2002/31*, U.N. ESCOR, Commission on Human Rights, 59th Sess., Agenda Item 10: Economic, Social and Cultural Rights, ¶ 45–46, U.N. Doc. E/CN.4/2003/58 (2003), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/109/79/PDF/G0310979.pdf?OpenElement> (accessed Jan. 27, 2015).

32 *Report by the Special Rapporteur on the Right to Food, Mr. Jean Ziegler, Submitted in Accordance with Commission on Human Rights Resolution 2001/25*, U.N. ESCOR, Commission on Human Rights, 58th Sess., Agenda Item 10: Economic, Social and Cultural Rights, ¶ 72, U.N. Doc. E/CN.4/2002/58 (2002), at <http://www.righttofood.org/wp-content/uploads/2012/09/ECN.4200258.pdf> (accessed Jan. 27, 2015).

International human rights law is concerned particularly with vulnerable marginalised and minority groups who live in extreme poverty. The exponential increase in prostitution and trafficking of women and children is a perceptible reflection of the spread of poverty.[33] People's security also deals with international and states' legislation prohibiting and punishing violence in particular in relation to women and the girl child, and taking action against trafficking and sexual exploitation of women and children. The extremely poor, especially women, children elderly and disabled persons, should be the main targets of anti-poverty strategies. To be successful in these strategies, children's right to food needs to be respected in order to combat hunger and guarantee peace.[34] And as many empirical studies demonstrate women's full enjoyment and participation in all human rights is a precondition to the full realization of the right to peace and has a major impact on the enjoyment of these rights for society as a whole.

The International Peace Conference held in The Hague in 1899 concluded that peace finds its roots in the 'consciousness of the world.' Those who live in extreme poverty, in special poor rural women, understand better than we realize what is at stake in wars and who ultimately benefits from them. They therefore are in a position to demand a redistribution of the world's priorities and resources.[35]

6.2. Lack of Access to Education

The right to education requires enforceable individual entitlements to education, safeguards for human rights in education and instrumentalization of education to the enjoyment of all human rights through education. As stated by UNESCO, 'the inclusion of human rights in education is a key element of a quality education.'[36] Thus, richly endowed education systems may be faulted for their failure to halt intergenerational transmission of racism or xenophobia.[37] It follows that a successful human rights education system should be able to eliminate any and all types of

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[33] *Report Submitted by Ms. A.-M. Lizin*, *supra* n. 23, ¶ 58.

[34] *Report of the Special Rapporteur on the Right to Food, Jean Ziegler*, U.N. GAOR, Human Rights Council, 4th Sess., Agenda Item 2: Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council,' ¶ 4, U.N. Doc. A/HRC/4/30 (2007), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/103/43/PDF/G0710343.pdf?OpenElement> (accessed Jan. 27, 2015).

[35] *Human Rights and Extreme Poverty: Report Submitted by Ms. A.-M. Lizin, Independent Expert*, U.N. ESCOR, Commission on Human Rights, 60th Sess., Agenda Item 10: Economic, Social and Cultural Rights, ¶ 79, U.N. Doc. E/CN.4/2004/43 (2004), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/111/24/PDF/G0411124.pdf?OpenElement> (accessed Jan. 27, 2015).

[36] *Elements for an Overall UNESCO Strategy on Human Rights*, UNESCO Executive Board, ¶ 31, U.N. Doc. 165 EX/10 (2002), at <http://www.fau.edu/divdept/schmidt/unesco/hr_strategy_paper.pdf> (accessed Jan. 27, 2015).

[37] *The Right to Education: Report Submitted by the Special Rapporteur, Katarina Tomaševski*, U.N. ESCOR, Commission on Human Rights, 60th Sess., Agenda Item 10: Economic, Social and Cultural Rights, ¶ 53, U.N. Doc. E/CN.4/2004/45 (2004), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/103/32/PDF/G0410332.pdf?OpenElement> (accessed Jan. 27, 2015).

inequality, exclusion or discrimination based on prejudices, bias and discriminations transmitted from generation to generation.

Inequality is a cross-cutting variable that affects all social strata. Women constitute a main group affected by this inequality as shown by the increasing number of women victims of violence. Other groups seriously affected are children, indigenous people, disabled persons, the elderly, minorities, displaced or people infected or suffering from AIDS. Patriarchy and all other practices based on the idea of inferiority and / or superiority among human beings are not structures of autonomous oppression but an undifferentiated set of oppressive factors deriving from race, gender, ethnic origin, economic and social background. As stated by the current Special Rapporteur on the Right to Education, gender inequality and other forms of social, religious, ethnic and racial discrimination impede social mobility and impact negatively on the full realization of all human rights, including development, peace and security.[38]

Educational statistics demonstrate how discrimination based on gender, race, ethnicity, religion, or language, combines to trap new generations of people in a vicious downward cycle of denied rights, where the lack of access to education leads to exclusion from the labour market, which then results in perpetuating and increasing impoverishment.[39] As stressed by the United Nations, the exclusion of the poorest from education perpetuates social inequalities in many parts of the world.[40] Denial of the right to education leads to denial of other human rights and the perpetuation of poverty. It could be concluded that the recognition and enforcement of this fundamental human right is vital to creating stable and prosperous societies.

6.3. Racism and Discrimination on the Ground of Sex

Racism, racial discrimination, xenophobia and related intolerance manifest themselves in an aggravated and differentiated manner for women and girls 'causing their living standards to deteriorate, generating multiple forms of violence and limiting or denying them the exercise of their human rights . . .'[41] As affirmed by the Beijing Declaration and Programme of Action, all forms of gender-based violence

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[38] *Girls' Right to Education: Report Submitted by the Special Rapporteur on the Right to Education, Mr. V. Muñoz Villalobos*, U.N. ESCOR, Commission on Human Rights, 62nd Sess., Agenda Item 10: Economic, Social and Cultural Rights, ¶ 18, U.N. Doc. E/CN.4/2006/45 (2006), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/106/70/PDF/G0610670.pdf?OpenElement> (accessed Jan. 27, 2015).

[39] *Annual Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, Submitted in Accordance with Commission on Human Rights Resolution 2000/9*, U.N. ESCOR, Commission on Human Rights, 57th Sess., Agenda Item 10: Economic, Social and Cultural Rights, ¶ 45, U.N. Doc. E/CN.4/2001/52 (2001), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/101/77/PDF/G0110177.pdf?OpenElement> (accessed Jan. 27, 2015).

[40] United Nations, 1985 Report on the World Social Situation at 34, U.N. Doc. ST/ESA/165, U.N. Sales No. E.85.IV.2 (1985).

[41] *Id.* at 43 (¶ 29).

should be eliminated. Moreover, gender-based violence, such as battering and other domestic violence, sexual abuse, sexual slavery and exploitation, and international trafficking in women and children, prostitution, pornography and sexual harassment, are often aggravated by or resulting of racism, cultural prejudice, racial discrimination and xenophobia.[42] The CEDAW, as well as its Committee's General Recommendations, in particular GR 19 (1992) on violence against women, including older and immigrant women, should also be stressed.

A transformed partnership based on equality between women and men is needed as a condition for people-centred sustainable development and world peace.[43] In addition, the role played by men and boys in advancing gender equality is vital, as recognized both by the Beijing Declaration and the Commission on the Status of Women.[44] Therefore leaders at all levels, as well as parents and educators, should promote positive male role models that facilitate boys to become gender-sensitive adults and enable men to support, promote and respect women's rights.[45]

Equality before the law and non-discrimination in the enjoyment of human rights are structural principles of international human rights law which reaffirm the principle of dignity of human beings and are indispensable for establishing the international human rights law system. The Inter-American Court of Human Rights stated that the latter principles are norms of '*jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.'[46]

6.3.1. Indigenous Women

The *Beijing Declaration and Platform for Action of the Fourth UN World Conference on Women* of 1995 recognized the need to ensure full respect for the human rights of all women in general,[47] including indigenous women. As stressed by the former Special Rapporteur on indigenous peoples, 'the threefold discrimination women

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42 *Report of the Fourth World Conference on Women*, *supra* n. 5, Annex 2: Platform for Action, ¶ 224.

43 *Id.* at ¶¶ 1, 131.

44 *The Role of Men and Boys in Achieving Gender Equality: Report of the Expert Group Meeting (Brasilia, Brazil, Oct. 21–24, 2003)*, U.N. Division of Advancement of Women, U.N. Doc. EGM/MEN-BOYS-GE/2003/REPORT (2004), at <http://www.un.org/womenwatch/daw/egm/men-boys2003/reports/Finalreport.PDF> (accessed Jan. 27, 2015); *Thematic Issue before the Commission: The Role of Men and Boys in Achieving Gender Equality: Report of the Secretary-General*, U.N. ESCOR, Commission on the Status of Women, U.N. Doc. E/CN.6/2004/9 (2003), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/671/62/PDF/N0367162.pdf?OpenElement> (accessed Jan. 27, 2015).

45 Special Session of the UN General Assembly on Population and Development, held in New York in June/July 1999, ¶ 50.

46 Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter.-Am. Ct. H.R. (ser. A) No. 18, ¶ 101, at <http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf> (accessed Jan. 27. 2015).

47 *See* the Convention on the Elimination of All Forms of Discrimination against Women.

suffer (for being women, indigenous and poor) marginalizes even further regarding economic and political sphere.'[48]

Currently, many indigenous women are submitted to discriminatory practices within communities, such as forced marriages, frequent domestic violence, dispossession of property and other forms of male patriarchal domination. Moreover, women are often excluded from participative processes and decision-making on development projects and programmes in indigenous communities.[49] Thus, taking into account that the realization of equal rights for women at all levels and in all areas of life contributes to the achievement of a just and lasting peace[50] their marginalization and discrimination impedes the social, economic and cultural development of the indigenous peoples as a whole.

6.3.2. Women Migrants

Women and children constitute two groups particularly vulnerable to human rights violations when they become migrants. The Fourth World Conference on Women in 1995 examined the situation of migrant women and called upon States to recognize their vulnerability as a consequence of violence and other forms of abuses.[51] The CHR indicated that both origin and destination countries should take appropriate legal measures against intermediaries that deliberately promote the clandestine movement of workers. According to this human rights body, intermediaries not only exploit women migrant workers but also violate their human dignity.[52] The General Assembly recalled that States should promote and safeguard human rights and fundamental freedoms of all migrants in accordance with international human rights law, whatever their immigration status, especially those of women and children.[53]

The former Special Rapporteur on the human rights of migrants stressed the problem of violence against women migrant workers due to their double

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48 *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen*, U.N. GAOR, Human Rights Council, 6th Sess., Agenda Item 3: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, ¶ 67, U.N. Doc. A/HRC/6/15 (2007), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/149/23/PDF/G0714923.pdf?OpenElement> (accessed Jan. 27, 2015).

49 *Id.* at ¶ 55.

50 G.A. Res. 40/108, *supra* n. 7.

51 *Report of the Fourth World Conference on Women*, *supra* n. 5, at ¶ 46.

52 *Violence against Women Migrant Workers*, U.N. ESCOR, Commission on Human Rights Res. 2002/58, 58th Sess., Supp. No. 3, ¶ 4, U.N. Doc. E/2002/23–E/CN.4/2002/200 (2002), at <http://www.un.org/en/terrorism/pdfs/2/G0215272.pdf> (accessed Jan. 27, 2015).

53 *Protection of Migrant Workers*, G.A. Res. 60/169, U.N. GAOR 3rd Comm., 60th Sess., Supp. No. 49 I, ¶ 5, U.N. Doc. A/RES/60/169 (2006), at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/169> (accessed Jan. 27, 2015).

marginalization as women and as migrants.[54] There exist a high number of women who are obliged to cross borders and make long distances to engage in poorly paid work at home. It follows that they have a high risk of suffering situations of isolation and subordination, including physical or psychological violence. The kinds of abuse and violence suffered by women migrant workers include the withholding of their wages, acts of physical and sexual violence, undernourishment, the seizure of their passports, and the lack of medical and health care, among other abuses.[55]

7. Conclusion

The Fortaleza Declaration indicated that BRICS shall promote gender perspectives in conflict prevention and resolution. As recognised by the UN practice, the maintenance of peace and security is crucial for the protection of the human rights of women and girl children, as well as for the elimination of all forms of violence against them. The role played by women in decision-making with regard to conflict prevention and resolution is a fundamental element in the Security Council Resolution 1325 and the text prepared by the Chairperson-Rapporteur. In addition, the gender mainstreaming in the field of disarmament, non-proliferation and arms control should also be taken into account in the context of peace. The elimination of all forms of violence against women is a clear means to strengthen world peace. In particular, the paper referred to the other forms of violence against women, such as poverty, lack of access to education and discrimination based on the ground of sex and gender. Particularly, the paper took into account the situation of discrimination suffered by indigenous women and migrants.

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[54] *Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, Submitted Pursuant to Commission on Human Rights Resolution 1999/44*, U.N. ESCOR, Commission on Human Rights, 56th Sess., Agenda Item 14(a): Specific Groups and Individuals: Migrant Workers, ¶¶ 55–56, U.N. Doc. E/CN.4/2000/82 (2000), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/100/36/PDF/G0010036.pdf?OpenElement> (accessed Jan. 27, 2015).

[55] *Id.* at ¶ 63.

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Information about the authors

Christian Guillermet Fernández (San José, Costa Rica) – Deputy Permanent Representative of Costa Rica to the United Nations in Geneva and Chairperson-Rapporteur of the Working Group on the Right to Peace (23 Rue de France, Geneva, 1202, Switzerland; e-mail: christian.guillermet@ties.itu.int).

David Fernández Puyana (Barcelona, Spain) – PhD (European Mention), Legal Assistant of the Chairperson-Rapporteur at the Permanent Mission of Costa Rica in the United Nations in Geneva (23 Rue de France, Geneva, 1202, Switzerland; e-mail: costaricanmissionpeace@gmail.com).

PUBLIC-PRIVATE PARTNERSHIPS (PPPs) AND CONCESSIONS OF PUBLIC SERVICES IN BRAZIL

CESAR A. GUIMARÃES PEREIRA,

Justen, Pereira, Oliveira & Talamini Law Firm
(São Paulo, Brazil)

This paper examines the current regulation of public-private partnerships (PPPs) and concessions of public services in Brazil. Under the Brazilian Constitution, certain public utility services and infrastructure works must be provided or built either directly by the government or through a government franchise. Such franchise takes the form of either concessions or PPPs. The difference between the two is based on the form of government contribution. PPPs are concessions in which part or all of the concessionaire's compensation is paid by the government and does not come directly from the revenue gained through the service or work at issue. These contractual arrangements are available and actually employed throughout all government levels in Brazil. Most of the government activity in these areas in the past 20 years has adopted a concession or PPP format. By analyzing the main features of the Brazilian concession and PPP system, this paper aims to offer the international reader an introductory view of the legal framework behind most large-scale investments in Brazilian infrastructure.

Keywords: administrative law in Brazil; public services; concessions; public-private partnership (PPP); public bidding; investments; arbitration; dispute resolution.

1. Introduction[1]

The purpose of this paper is to examine the rules concerning the provision of public services, particularly through its delegation to private individuals or companies. This examination first requires previous clarification of certain premises that are particular to the Brazilian legal system.

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[1] I would like to thank *Karina Carvalho* (CAMFIEP) and *Fernanda Caroline Maia* (*Justen, Pereira, Oliveira & Talamini*) for their invaluable assistance in the research and revision of this article. I thank also *Kristin Dreckstrah*, who kindly took time from her busy practice at *Gomm & Smith LLP* (Miami, FL) to proofread the final draft and assist me with her insightful comments about the text.

1.1. Administrative Law in Brazil

For a broader examination of the Brazilian notion of government and administrative law, I refer the reader to the essay 'An Overview of Brazilian Law' by Marçal Justen Filho.[2] As the author points out in his essay, administrative law in Brazil encompasses matters beyond those covered by this field in some other jurisdictions.

One of these matters of Brazilian administrative law is the provision of public services. The government in Brazil undertakes various types of economic activities under different legal arrangements. The government may compete with the private sector, for instance in the banking field. It may exploit government monopolies, such as with regard to certain aspects of oil and gas exploitation. It may pursue promotion activities, by offering financing and financial stimulus to private business. And it may be called upon to provide public services.

1.2. Public Services

Public services are certain activities that are considered – by law or directly by the Constitution – as particularly relevant to the general welfare. They are therefore subject to a specific system of rules. In the aforementioned essay, Marçal Justen Filho indicates the following:

> A public service is not to be confused with a public monopoly. The difference is in the legal system applied. The public monopoly is related to an economic activity, developed and performed under the private law legal system. Public service is an activity aimed at the satisfaction of essential collective needs, engaged under a public law legal system.

As an example, the author explains:

> Oil refining is a monopoly: it is an economic activity, subject to the rules of private law and performed by the state according to its own economic principles. Urban transportation, however, is a public service, since it is designed to attend relevant collective needs.

Since public services are defined as relating to essential public purposes, the state is required to provide them. In general terms, Art. 175 of the Brazilian Constitution states that the government is 'required, pursuant to the law, to provide public services, directly or by concession or permission, always through public bidding.' Public services are a portion of the economic activities of the state. Because of their importance, they comprise a certain selection of activities that the legal system

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[2] Marçal J. Filho, *An Overview of Brazilian Law*, in Infrastructure Law of Brazil 31–42 (Marçal J. Filho & Cesar A.G. Pereira, eds.) (3ª ed., Fórum 2012).

requires the government to provide.[3] One could say that the government *owes* a duty to society to provide public services, and society is entitled to *demand* these services. Such demands often become formal lawsuits. Health services are particularly prone to cause such societal demands, and many individual and class actions are brought against all levels of government requiring specialized health treatment not offered *sua sponte* by the state. The courts generally grant such requests and order the government to comply with its duty to offer public health services.

Under a different perspective, the legal framework that creates such governmental duty to provide public services is based on the idea of *ownership* of the service. When the legal system qualifies an activity as a public service, that activity is taken away from the market and placed under the state's ownership. This means that the activity is no longer available to be freely pursued by private enterprises unless through a franchise granted by the state. This franchise allows a private company to provide the service under government control; it does not transfer ownership of the service, nor does it waive government accountability for the service at hand.

The definition of which specific services the government has the duty to provide is the subject of great debate. In general terms, Arts. 21, 25 and 30 of the Constitution define a number of services as public, *i.e.* subject to the command of Art. 175. Those defined as federal services are provided by the Union. This is the case for certain port services, for instance. Others are defined as local (municipal) services, such as passenger transportation service within a city. Residual services are considered reserved to the states and the Federal District (Brasília, the federal capital). A typical public service attributable to the different states is passenger transportation between cities within a certain state. Telecommunications and the distribution and transmission of power are federal public services. Water and sewerage are generally considered municipal services, although there is a great deal of state-level intervention.

As it could be expected, there is great discussion concerning which aspects of those activities are necessarily public services and which should be considered simply a private activity. The regulation of telecommunications in Brazil has evolved to a point in which some activities (part of the landline services) are still public services, while others (all mobile phones communication) are a private activity, subject only to government authorization.[4]

1.3. Direct and Indirect Provision of Public Services

As mentioned above, Art. 175 of the Constitution allows the government to provide public services directly or by franchise (concession or permission). This franchise is

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[3] For a contemporary notion, *see* Juliane E. de Carvalho, *A noção contemporânea de serviço público*, 1(0) Revista de Direito Administrativo Contemporâneo 121–38 (2013).

[4] *See also* Aline L. Klein & Alan G. Troib, *Telecommunications Law of Brazil*, in Infrastructure Law of Brazil, *supra* n. 2, at 31–42.

usually referred to as a delegation of public service; specifically, the actual provision of the service is transferred to a private company (a concessionaire). But the ownership and, more importantly, the regulation of the service are kept under the government's responsibility. The private company will obtain a concession agreement for a finite period (usually ranging from 15 to 50 years, normally subject to one extension) and will carry out the activities as required under the contract. This arrangement permits the government to fulfill its duty to provide public services. That is why the concession agreement allows for a strong government intervention on the activities of the concessionaire. The government is ultimately responsible for the service and must have the means to ensure that the concessionaire will provide the service as required.

On the other hand, the concession agreement offers the concessionaire economic and financial protection against any negative effects of intervention. As Marçal Justen Filho points out in his essay, the government is entitled to unilaterally change some aspects of the agreement, but 'all these changes must come with measures intended to guarantee the original relation established between the obligations and the advantages, the so-called economic and financial balance of the contract.'

The origin of the system adopted in Brazil is the French notion of 'service public' and the related construction about the various forms of *délégation*. However, there are important differences between the Brazilian and the French systems. The idea of public service is more limited in Brazil. It also has different purposes, since in Brazil there is no administrative jurisdiction, which exists in France and in many related jurisdictions. The specific extents of the parties' rights under a concession agreement in each of these two systems are also not equivalent.

1.4. Concessions and Public-Private Partnership

The last premise to clarify is the difference between a public service concession and a public-private partnership [hereinafter PPP]. In general terms, a concession is a form of partnership between the government and the private sector. Therefore, a broad definition of PPP will encompass concessions in general.[5]

However, in 2004, Brazil enacted legislation (Law No. 11.079, or PPP Law) that distinguishes concessions (since then styled 'common concessions') from PPPs based on certain features of the contractual arrangement. The most pronounced differences relate to the nature of the activities subject to each arrangement, the form of compensation of the concessionaire and the system of guarantees. It is fair to say that Brazilian PPPs correspond generally to what in the British system is known as PFI – Private Finance Initiative. A private party will make investments and recover them by either totally or partially by receiving payment from a government entity.

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[5] 'The Brazilian public-private partnership (PPP) is a type of public service concession contract. As such, by that agreement the Government delegates to a private party the execution of an activity held by the state' (Fernão J. de Oliveira, *Public-Private Partnerships (PPP) in Brazil*, in Infrastructure Law of Brazil, *supra* n. 2, at 215).

Even before Law No. 11.079 was enacted, Brazil had amassed significant experience negotiating government concessions and franchises in the areas of transportation, toll roads, energy, telecommunication, railways and waste management. Consistent with Brazil's federation system, federal, state and local governments may all grant concessions.

These concession arrangements were – and to a great extent continue to be – modeled after the French notion of *délégations de service public*. A 'delegation concession' awarded by public tender (*i.e.* a bidding process) grants a private company (the concessionaire) the right to perform in the concessionaire's own name, for a certain number of years, a public service that the government is legally bound to offer to the public. The concession is subject to government regulation and control, including the ability to terminate the concession if the concessionaire fails to carry out the purpose of the contract. Following in the French notion of ordinary and extraordinary contractual risks, Brazil's concession system protects concessionaires against contractual changes ordered by the government or that arise out of force majeure or other circumstances beyond the control of the concessionaire. After the concession contract is terminated or comes to term, the concessionaire transfers the assets accumulated for the operation of the concession to the government, through a build-operate-transfer (BOT) arrangement.[6]

The concessionaire may charge users to access the service, or it may charge for associated projects, such as a fee to install optical fiber networks alongside toll highways. When the concessionaire receives concession revenue from sources other than the government, the arrangement is known as a *common concession*. Although this type of concession would be considered a PPP internationally as the term is understood, Brazil's 2004 PPP Law limited the concept to concessions under which the government provides all or part of the concessionaire's revenues. When all revenue is obtained from the government, the arrangement is called an *administrative concession*; when only part of the revenues are from the government, it is called a *sponsored concession*. This more limited view of PPP came about in order to address the situation in which private capital and expertise would be desirable, but the income derived by providing the service (user or installation fees) would be insufficient from a project finance point of view.[7]

Although Brazil's PPP Law has narrowed the concept of this type of partnership in one respect, it has broadened the concept in another by allowing for concessions

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[6] 'This model has the great advantage of releasing the government from payment, to the extent that the necessary resources for the construction of the enterprise are borne by the contracted company. Furthermore, the enterprise is transferred to the public officials after the term of the operation by the contracted firm had lapsed' (Rodrigo G. de Freitas Pombo, *Construction Contracts in Brazilian Law and the Standard International Model Contracts*, in Infrastructure Law of Brazil, *supra* n. 2, at 364).

[7] *See* Fernão J. de Oliveira, Parceria público-privada: aspectos de direito público econômico (Lei nº 11.079/2004) (Fórum 2007).

in fields other than public utility services, including public construction and the operation of penitentiaries, hospitals and schools. Prior to 2004, budgetary regulations required the government to have specific financial resources to fund the works, and they limited service contracts to a maximum duration of five years. The 2004 PPP Law changed this. Instead of having to allocate specific financial resources to the concession, the government can now incur debt. Therefore, new PPP arrangements can be entered into so long as the government offering the concession is able to incur new debt. What is more, concessions (PPP) can be granted for services provided in favor of the government, such as penitentiary management. Until recently, local governments had difficulty entering into PPP arrangements because they were subject to a maximum borrowing limit of 1 percent of their annual net revenue each fiscal year. In August 2009, this limit was raised to 3 percent and in 2012 it was again raised to 5 percent. This has allowed a larger number of local governments to pursue PPPs as a means to fulfill their administrative duties.

The fact that part or all of PPPs revenue comes from the government creates a risk for the concessionaire that does not occur with common concessions, which is the risk of a government default. To allay this risk, the 2004 PPP legislation created an unprecedented system of financial guarantees by forming a fund for this purpose, thereby avoiding the time-consuming process of seeking a judgment against the government and then seeking to collect on that judgment. This feature makes concession contracts governed by the 2004 Law advantageous.

These concession agreements are also advantageous in another way. Concessionaires (investors) have the ability to arbitrate under Art. 11(III) of the 2004 PPP Law. This provision calls for 'the use of private dispute resolution mechanisms, arbitration included, to be carried out in Brazil in the Portuguese language, pursuant to Law No. 9.307 of September 23, 1996, in order to solve conflicts arising from or relating to the contract.' In 2005, this provision was extended by Federal Law No. 11.196 to public-private partnerships and common concessions.[8]

Since Brazil is not a signatory of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Washington Convention of 1965), these arbitrations may not be administered by the International Center for the Settlement of Investment Disputes (ICSID). However, the country has developed a strong arbitration environment and a much-acclaimed arbitration law (Federal Law No. 9.307 (1997)) that follows the framework of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The Superior Court of Justice, Brazil's highest court for matters applying federal law, has repeatedly confirmed the legality of using arbitration to resolve disputes involving government bodies. After

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[8] *See* Mauricio G.F. dos Santos, *Brazil – A Brief Overview of Arbitration in Contracts Entered as Part of Public and Private Sector Partnerships (PPPs)*, 21(6) Mealey's Int'l Arb. Rpt. (2006), available at <http://www.oas.org/es/sla/ddi/docs/Brasil%20-%20MEALEY%E2%80%99S%20International%20Arbitration%20Report.pdf> (accessed Jan. 28, 2015).

some hesitation, the Federal Court of Audit (Tribunal de Contas da União (TCU)), Brazil's equivalent to the US Government Accountability Office (GAO), has rendered decisions accepting arbitration for government contracts under certain conditions.[9] At the time of preparation of this article, a bill styled PL No. 7.108/2014 was under examination in Congress to permit arbitration in any type of government contract.

Notwithstanding relatively strict budgetary rules, since 2004, several state governments in Brazil have entered into concession contracts, including a project to construct a subway line in the state of São Paulo, a toll road and several penitentiaries in the state of Minas Gerais, and a sewerage system in the state of Bahia. In practice, the PPP programs of states such as Minas Gerais have so far been much greater and more comprehensive than their federal counterparts.

In the context of the preparations for the FIFA World Cup in 2014 and the Olympic Games in Rio de Janeiro in 2016, a great deal of attention has been directed toward the possibility of using PPPs to construct sports facilities. However, the 2004 statute expressly forbids using these partnerships for the mere construction of public works. The law states that PPPs must involve the provision of continuous services by the private partner, not only the construction of public facilities. Therefore, in a contract involving the construction of facilities, the PPP arrangements must point out that the private investor will operate the facility for a certain number of years. For the duration of the PPPs, the public partner (a government body) will make payments to the private investor (under an *administrative concession* or *sponsored concession* arrangement) based on the private company's performance as operator of the facility.

2. Concession of Public Services as One of Many Forms of Providing Services

Just as other jurisdictions, in Brazil private organizations provided socially relevant services before the notion of public service, with its current meaning, was coined. Until the beginning of the 1900s, private companies would obtain a temporary grant of the right to use public land or municipal property, using them to provide collective services such as railway transportation.

Under that scenario, there was no delegation of the service itself but rather a grant of the government property necessary for setting up infrastructure. The service was identified as something separate from its infrastructure only during the first half of the 1900s. Today, there is no doubt that the government 'owns' the service independently from the existence of any specific real property.

Activities relevant to society can now be carried out in Brazil under many different legal arrangements.

Some public services are offered directly by the state; others are franchised through concessions or PPPs.

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9 *See* TCU, Acórdão n° 2.145/2013-Plenário, Relator: Min. Benjamin Zymler, 14.08.2013.

Some services (health, education and pension funds) are identified as non-exclusive public services, which are public services when provided by the state, but they can also be freely (under a government authorization, but not a concession) offered by the private sector. For instance, private schools or hospitals in Brazil are not subject to a concession, but road toll companies, landline operators or bus transportation services are.

Some activities are simply private yet, subject to a government license. Mobile phone services are now under this arrangement. Many sectors, such as pharmaceuticals and banking, are completely private but undergo strong regulation and may be subject to authorization.

In sum, all different sectors have specific rules creating a variety of arrangements. In addition to one single standard format for the concession of public services (created by Law No. 8.987 in 1995), laws regulating the various sectors (oil and gas, telecommunications, electrical energy, roads, ports, transportation, water provision and sewerage, solid waste management)[10] define specific means for providing and operating services and economic opportunities in each sector.

The concession of public services is therefore only one way of providing services for the collective good. Before 1995, there was no comprehensive statute regulating public services concessions, which were governed by a combination of rules concerning different sectors. Law No. 8.987, together with Law No. 9.074, both enacted in 1995, brought about the general rules applicable to concessions, organizing a system of concessions that had been granted at various times under several different conditions.

In many sectors – electrical power generation and distribution, port terminals and bus transportation are some of them – there are still ongoing discussions concerning the adaptation of old concessions to the much more formal rules enacted after the mid-1990[s]. One of the main points of discussion concerns the need for public bidding to grant concessions. This was not widely required before the enactment of the Constitution of 1988, and it remained unregulated by statute until Law No. 8.987 was enacted in 1995. Many current concessions were originally granted without prior public bidding, and the consequences (if any) of this fact are still open to discussion in Brazil.

Law No. 9.074 of 1995 contains a list of public services that the federal government is authorized to grant by concession. Article 2 of Law No. 9.074 also requires a statutory authorization for other services to be granted by federal, state or municipal governments. The exceptions are services already referred to in the Constitution, state constitutions and municipal organization laws, as well as water provision and management of sewerage and solid waste. Many specialists consider this law

[10] Laws Nos. 9.478/1997 and 12.304/2010 (oil and gas); No. 9.427/1996 (electrical power); No. 9.472/1997 (telecommunications); Nos. 9.277/1999, 10.233/2001 and 12.815/2013 (roads, transportation and ports); No. 8.630/1993 (ports); No. 11.445/2007 (water provision and sewerage); and No. 12.305/2010 (solid waste management).

unconstitutional because it provides a waiver of formal legislative authorization for two specific types of non-federal services.

3. Features of the Concession Agreement

As mentioned above, Art. 175 of the Constitution allows for the provision of public services directly by the government or through two types of franchises, namely concession or permission. It also requires that the contractor be selected through a public bidding process.

The difference between concession and permission is merely that of stability (duration and warranties for the private company). Concessions are more stable because the services they refer to require more upfront investment. In turn, services subject to a permission arrangement are generally those that require smaller investments and therefore admit shorter durations and less compensation in the event of termination.[11]

Article 21(XI) and (XII) of the Constitution directs the Union to develop certain public services, but it mentions that such services may be developed through concessions, permissions and authorizations.

This reference to authorizations has two meanings. First, it confirms that parts of certain broad sectors (*e.g.*, energy and telecommunications) can be legally organized as private activities subject to government authorization, and not necessarily as public services. Second, it allows for the authorization of public services in some exceptional situations, such as a temporary grant for the provision of public services needed to face an emergency. Authorizations are even less stable than permissions as described above.

Regulation of a concession agreement reflects the basic premise that only the provision of the service is transferred to the private company. Ownership – comprising the regulation and ultimate responsibility for the service – remains in the hands of the state. The features of the concession reflect this balance between government prerogatives designed to enable it to carry out its duties and warranties to the private company to protect its economic rights in view of such government powers.

4. A Trilateral Legal Bond

Concession agreements are said to create a trilateral bond between the state (styled in the concession regulation as the 'Granting Authority,' since it is the public authority charged with granting the concession), the private company (the 'Concessionaire') and the users.

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[11] For a general overview about this topic, *see* Marçal J. Filho, Curso de Direito Administrativo (10ª ed., Revista dos Tribunais 2014).

It is correct to identify this as a trilateral legal bond. Even though the users are not signatories to a concession agreement, they are subject to its regulation, and they are legally granted a series of rights and duties relating to the concession. Each one of the three parties to this bond is linked to the other two through a range of duties and rights. Even if not a signatory, the users (as a category or class and, in different situations, as private individuals) can exercise rights before the granting authority or the concessionaire, and they are bound by rules that impose duties upon them.[12]

Under a concession, the concessionaire engages in a relationship directly with the user. As Law No. 8.987 says, the concessionaire acts 'on its own account and at its own risk.' This is not precise in terms of allocation of risks, since many risks remain in the hands of the granting authority. But it illustrates the fact that the concessionaire acts on its own behalf when providing services under the concession agreement. In simple terms, a user may sue directly the concessionaire for poor performance or malfeasance or for lack of adequate services; it may also sue the granting authority under partially different standing.

In a concession, the concessionaire obtains its compensation through operation of the service – in most cases, through tariffs (user fees) collected directly from the users – or of additional, ancillary or associated projects. Examples of such projects are selling advertisement spots or charging for the installation of cables along a toll road. As a general rule, a concessionaire will not receive compensation from the state (the granting authority). Payment made totally or partially by the state is a typical feature of a PPP under Brazilian law. Whether a concessionaire may receive regular payments from the state under a 'common concession' arrangement is still open to discussion.

The independent regulatory agencies created by a variety of statutes since the mid-1990s play an important part in the regulation of concessions. In some cases, they assume the role of granting authorities, carry out public biddings prior to concessions and exert government control over the concessions throughout their duration. In other cases, these agencies act as external and independent regulators and their deliberations affect both the concessionaire and the granting authority (which, in such cases, consists of a separate government body or agency).[13]

An important practical topic is the distinction between the concession of a public service, the concession to use public property and provision of services to the government. The concession to use public property allows a private individual or company to use public property (such as land) for its own benefit, not as a means to provide services to users in general. In providing services to the government, the service provider does not enter into a direct legal bond with a third party (users in general), only with the government itself. The duration of a service contract is legally

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[12] *See also* Cesar A.G. Pereira, Usuários de serviços públicos: usuários, consumidores e os aspectos econômicos dos serviços públicos (2ª ed., Saraiva 2008).

[13] An account of the subject of regulatory agencies in Brazil is found in Alexandre W. Nester, *Control of the Independent Regulatory Agencies*, in Infrastructure Law of Brazil, *supra* n. 2, at 43–53.

limited to 5 or 6 years (Art. 57 of Law No. 8.666), whereas a public service concession has a much longer duration, in many areas with no legally defined maximum duration.

5. Prior Public Bidding

Article 175 of the Constitution requires granting concessions and permissions to private companies or individuals that are selected by means of a public bidding process.

Law No. 8.666, enacted in 1993, contains the general regulation for bidding procedures. The bidding for concessions and permissions is subject to certain specific rules created by Law No. 8.987, and Law No. 8.666 applies to aspects that are not covered by Law No. 8.987.[14]

According to Art. 5 of Law No. 8.987, together with the invitation for bids, the granting authority must publish a document justifying the need for the concession. This document is an opportunity unity to publicly present an explanation based on value-for-money criteria, comparing the concession option through a private company with the provision of the service directly by the state, including a cost-benefit analysis. In Brazilian tradition, this justification has never been given specific importance, and there is no theoretical or practical construction similar to the UK's Public Sector Comparator (PSC). It is nonetheless a formal requirement of the bidding procedure. A similar requirement exists in the more recent PPP regulation (Law No. 11.079).

The general principles of Law No. 8.666 are the same: morality, transparency, equality, evaluation of bids using objective criteria and respect to the binding nature of the solicitation proposal (Art. 14 of Law No. 8.987).[15]

The first main difference is the evaluation criteria. Whereas under Law No. 8.666 there are three basic criteria (lowest cost, best technical offer and a combination of the two), Art. 15 of Law No. 8.987 offers a variety of criteria:

a) lowest tariff (user fee);

b) highest offer, in cases in which the bidding is evaluated based on the amount quoted to be paid to the granting authority in exchange for the purchase of the right to be the concessionaire;

c) best technical offer, with price previously set by the solicitation;

d) best offer based on the combination of lowest tariff and best technical offer;

e) best offer based on the combination of highest offer for the concession and best technical offer;

f) highest offer for the concession after pre-qualification of technical offers; and

g) combination, two by two, of the criteria of items 'a,' 'b' and 'f.'

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[14] For a broader and deeper view, *see* Marçal J. Filho, Teoria geral das concessões de serviço público (Dialética 2003).

[15] On this topic, *see also* Cesar A.G. Pereira, *Public Procument: General Rules*, in Infrastructure Law of Brazil, *supra* n. 2, at 103–28.

PPP Law contains yet another set of evaluation criteria, providing for combinations in which the amount of compensation payable by the government to compensate the concessionaire is one of the critearia.

Two important rules concerning the participation of state companies in biddings for concessions are in Art. 17 of Law No. 8.987 and Art. 32 of Law No. 9.074. The first orders the rejection of bids submitted by state companies that rely on financing or other advantages granted by the controlling state not available to other bidders. The second provides for preliminary contracts to be signed by state companies and third parties, *e.g.*, power plant construction contracts, in preparation for state companies' bids in concession biddings.

The general procedure is that of the sealed competitive bidding, which is the most detailed and thorough bidding method under Brazilian law. Article 18 of Law No. 8.987 sets forth the requirements for the solicitation of proposals. An important difference between the general regulation and that of concession biddings is that, under general law, the qualification phase comes necessarily first and only the offers of the qualified bidders will be evaluated. In contrast, Art. 18-A of Law No. 8.987 allows bids to open first with a post-qualification process undertaken only with regard to the winning bidder.

Another important difference is that concession bids may allow a stage of open oral bids (a normal or reverse auction). Law No. 11.079 first brought about this possibility with regard to PPPs in 2004, regulating in great detail the procedure for the offering of open bids. Shortly after that, Law No. 11.196 of 2005 included Art. 18-A, with a mere reference to 'the offering of open bids.' This is usually acknowledged as sufficient to bring about the possibility of an auction (or reverse auction) procedure into a concession bid – in which the bidders would dispute to reduce tariffs or increase financial offers for the grant of the concession. However, due to the vagueness of the statute on this point, it is a topic still open for discussion.

6. Adequate Service

Article 6 of Law No. 8.987 requires the concessionaire to provide adequate service. This is defined as service provided with regularity, in a continuous manner, with efficiency, safety, with technologically updated methods and equipment, to the public in general (with no discrimination), with consideraration and for an affordable user fee.

These general legal criteria are specified in the invitation for bids and in the concession agreement language. The agreement between the granting authority and the concessionaire will stipulate objective criteria for all such topics.

This leads to an important finding. The idea of 'adequate service' may have different criteria and definitions for the granting authority and for the concessionaire. The concessionaire enters into an agreement with the granting authority and is

required to fulfill its contractual obligations, by complying with the contractual parameters regarding adequacy of service.

However, the criteria may not be sufficient to meet the people's needs or expectations. In this case, the concessionaire will not be in breach, but the granting authority may be required to change the service regulation to meet legitimate needs and expectations to the extent deemed possible and convenient. This will be also a political, not only legal evaluation.

This raises the issue of the extent of the user's rights and obligations under the concession. Article 7 of Law No. 8.987 lists such rights and obligations without prejudice to what is provided for in the Brazilian Consumer Protection Code (Law No. 8.078).

There is a wide discussion about the applicability of the Consumer Protection Code to public services provided under concession arrangements.[16] In spite of doctrinal clarification about the differences in legal standing between consumers and public service users, courts tend to resort loosely to consumer laws when hearing cases concerning public services. But in most cases in which there exists actual conflict between the consumer regulation and the applicable public service regulation, courts tend to apply the latter. A good example is case law admitting the discontinuance of the service due to a user's failure to pay user fees.

7. Allocation of Risk and Protection of Economic and Financial Balance

Many will say that a concession agreement is all about allocation of risks. This statement seems accurate to a great extent. There are many risks involved in the long-term provision of public services, and the statutory regulation and the concession agreement at hand deal with the allocation of such risks among the concessionaire, the granting authority, the users and the general budget (*i.e.* the taxpayers).

For the limited purposes of this introductory essay, suffice it to focus on the main aspect of the allocation of risks. Under the concession law, the granting authority is given the prerogative to unilaterally change the conditions under which the service must be provided. As noted in the the discussion above, if the granting authority finds that the service being provided, albeit compliant with the contractual parameters, is insufficient to satisfy the public's needs, it is entitled to change such parameters. It may – within reason and in a justified and procedurally sound manner – require additional equipment or more personnel. And the concessionaire is required to comply with any such new requirements.

Compensation for unilateral change provides the concessionaire with absolute protection of the economic and financial balance between burdens and benefits in the concession. Upon submission of the ultimately winning bid, there is the formation

[16] *See* Cesar A.G. Pereira, *Direitos dos usuários de serviços públicos*, 2009(34) Informativo (*Justen, Pereira, Oliveira & Talamini*), available at <http://www.justen.com.br/informativo.php?l=pt&informativo=34&artigo=936> (accessed Jan. 28, 2015).

of a theoretical equation, with all positive items on one site (tariff income, associated projects income, other payments from different sources) and all negative ones on the other one (investment and current costs, other liabilities).[17] This equation is generally reflected in economic terms such as internal revenue rates or present net worth and is generally the basis for the ongoing assessment of the concession equilibrium.

Therefore, if the granting authority decides to change parameters in a way that increases costs, it will be required to simultaneously compensate the concessionaire in order to maintain the initial equilibrium.

This system is regulated by Art. 9(2), (3) and (4), and Art. 10 of Law No. 8.987:

> Article 9
>
> <. . .>
>
> § 2. The contracts may provide for mechanisms of revision of the tariffs, in order to maintain the economic and financial balance.
>
> § 3. Except for the income taxes, the creation, modification or extinguishing of any tributes or legal obligations, after the presentation of the offer, when its impact is proven, shall imply the revision of the tariff, for more or less, according to the case.
>
> § 4. In the case of unilateral modification of the contract that affects its initial economic and financial balance, the granting authority must reestablish it, concomitantly to the modification.
>
> Article 10
>
> Whenever the conditions of the contract are complied with, its economic and financial balance is considered maintained.

A good example of this regulation is that of the possible creation of supervening tariff exemptions by the granting authority. Article 35 of Law No. 9.074 requires the granting authority to simultaneously have 'the provision, in law, of the source of funds or of the simultaneous change in the tariff schedule of the concessionaire or licensee, so as to preserve the economic and financial balance of the contract.' This rule has been actually invoked with success by bus transportation service concessionaires to challenge a law providing for tariff exemptions for senior citizens without compensation for the service providers.

The same reasoning applies to risks linked to circumstances beyond the control of the concessionaire, such as acts of God, *force majeure* or general economic distress. The provision of Art. 2(II), (III) and (IV) of Law No. 8.987 ('on its own account and at its own risk') is not to be read literally. It refers to what is known as *ordinary risk*, or the

[17] 'In order to protect the private contractors from such events, there is the guarantee of the maintenance of the contractual economic-financial balance. The guarantee concerns the relation between obligations and benefits that are established when the contract is signed' (Aline L. Klein et al., *Government Contracts in Brazilian Law*, in Infrastructure Law of Brazil, *supra* n. 2, at 195).

normal risk of the business undertaken by the concessionaire. It is recommended that the concession agreement be clear about the allocation of risks. But in any case, the *extraordinary risk* is placed in the hands of the granting authority. Such extraordinary risk corresponds, in general terms, to (i) the risk of contractual breach by the granting authority; (ii) the risk of change of generally applicable rules – the typical case is the creation of new taxes, charges or regulatory requirements; and (iii) the risk relating to unforeseeable or uncontrollable circumstances, such as acts of God, *force majeure* or extraordinary economic changes.

An interesting example occurred in January 1999 when the Brazilian government abruptly changed its currency exchange policy, causing a sudden and significant rise in exchange rates. Most court decisions recognized this as a cost attributable to an extraordinary risk and ordered adequate compensations to government contractors.

It is important to point out that the restoration of economic and financial balance is due when the supervening facts cause an increase or a decrease in the concessionaire's burdens or benefits. Therefore, it is possible for the granting authority to apply an increase in the concessionaire's burdens as compensation for a supervening unforeseen advantage that was not included in the ordinary risk in the underlying agreement. Again, a reduction in tax costs is a clear example.

Due to Brazil's long experience with inflation up to the 1990[5], all government contract regulations (including concessions) provide for predefined criteria for readjustment of tariffs (user fees) as a means to protect against inflation. Article 9 provides for readjustment, as well as for the revision of tariffs due to the breach of economic and financial balance. Such revision is generally defined in concession agreements as either ordinary – normally every five years – and extraordinary – whenever a reason for revision arises. Ordinary revisions are generally considered more flexible and not too strictly attached to the criteria of extraordinary revision based on an unforeseen event falling under the concession's extraordinary risk.

Evidently, as concessions become less monopolistic and more competitive and commonplace in a market environment, economic and financial balance (*i.e.* the allocation of risks) becomes more dynamic and less strict. The lesser the governmental control over the concessionaire's activities and investments, the larger the freedom of action for the concessionaire and the lesser the guarantee related to the contractual balance.

Put another way, more flexible governmental control leads to a greater assumption of risk by the concessionaire. As a consequence, the concept of protection of economic and financial balance or equilibrium has a smaller field of application. The concept is still the same, but the area of extraordinary risk is reduced.

8. Compensation of the Concessionaire

In a common concession (as opposed to sponsored and administrative concessions, the two existing formats of PPPs), the most important source of income

for the concessionaire is the tariff or user fee. According to Art. 9 of Law No. 8.987, the tariff is set by the amount offered in the winning bid – if not previously defined by the solicitation – and protected against inflation by readjustment (escalation) rules that must be provided for in the agreement.

One of the aspects of adequate service, as seen above, is its continuity, meaning that it is not to be interrupted. But Art. 6(3)(II) allows for the discontinuation of the service if the users breach their obligation to pay tariffs. There are frequent legal discussions about the possibility of discontinuation of essential services (*e.g.*, water and power), and the courts tend to allow concessionaires to discontinue most services due to user default. Only in exceptional circumstances will the concessionaire be required to maintain the services in spite of the user default, in which case the concessionaire will be entitled to compensation from the granting authority.

Before the enactment of Law No. 11.079 and the creation of PPPs, there was little objection to the possibility of, in lieu of or in addition to tariffs, the granting authority making payments to the concessionaire as compensation. This was viewed also as a means to make the tariffs more affordable to the user, fulfilling the concept of adequate service. Since this is specifically the purpose of a PPP (sponsored or administrative concessions, with payments made partly or totally by the state), many scholars believe that such payments are now improper in common concessions. The reason for that lies in the fiscal responsibility requirements created by Law No. 11.079 as a condition for such payments from public funds, which would be dodged if similar payments could be made in a common concession.[18] However, the general tendency favors the possibility of government subsidies or payments under various formats even in common concessions.

A frequent discussion concerning tariffs relates to the possibility of collection of tariffs for services that have no free counterpart available to the user. This discussion started with road tolls created in highways that were the only possible way to reach a certain destination. Articles 7(III) and 9(1) of Law No. 8.987, as amended in 1998, state clearly that a choice between a free service and a paid service is not mandatory and that only a statute may subject the collection of tariffs to the existence of a free alternative service. This is the orientation generally adopted by courts as well.

It is widely recognized that tariffs may have a social or promotional purpose. It is common for granting authorities to set minimum levels of service to be provided free of charge and to set social tariffs at subsidized amounts for low income populations. This is usually done by means of cross-subsidies internally to the concession's tariff schedule, but there are statutory authorizations for government subsidies in these cases. The idea behind the PPP is precisely to allow concession-format contracts in areas in which the mere exploitation of the service by the concessionaire would not be financially viable.

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[18] For additional discussion on this issue, *see also* Cesar A.G. Pereira, *O processo licitatório das parcerias público-privadas (PPP) na Lei 11.079/2004*, in Parcerias público-privadas: um enfoque multidisciplinar 193–234 (Eduardo Talamini & Monica S. Justen, eds.) (Revista dos Tribunais 2005).

Article 11 of Law No. 8.987 addresses the issue of income from additional, ancillary or associated projects. This topic raises many questions, since it involves an advantage to the concessionaire but also a means to permit greater affordability of tariffs. Difficulties arise from the need to create economic incentives to the concessionaire and from the fact that such associated activities are not public services in the legal sense, but private activities, *e.g.*, advertisement in the vicinity of highways.

One last topic with regard to tariffs is their role as 'receivables' in concession finance arrangements. Articles 28 and 28-A create a detailed regulation of the assignment of income as collateral in financing agreements. Article 28 allows for the assignment of tariff income 'up to the limit that does not compromise the execution and continuity of the service.' More recent changes have also modified a crucial limitation that existed in the original regulation, and they have allowed the government agency to make advance payments to facilitate initial works in a PPP.[19]

9. Reversible Assets

The assets involved in the provision of public services are subject to a special regulation and are expected to become public property at the end of the duration of a concession.

The regular duration of a concession should allow for the amortization of all investments, so that at the end of the contract the state should receive the assets at no additional cost.

However, this is not true in most cases. There is a detailed regulation concerning the situation of reversible assets at the end of a concession, precisely due to the various problems that usually take place when a concession is approaching its end.

10. Termination of Concession

A concession may end for a variety of reasons. One is the mere end of its duration (term). But it may also end due to redemption (early termination for reasons of public interest), forfeiture (breach of the contract by the concessionaire), rescission (breach of the contract by the granting authority, recognized by a court ruling) or annulment (in view of a violation of the law). Other less common occurrences are addressed in Art. 38(1)(VI) as follows: bankruptcy, extinction of the concessionaire as a legal person, loss of civil capacity, agreement to terminate, disappearance of the service and *force majeure*.

Article 35 of Law No. 8.987 regulates the end of a concession. In all cases, the granting authority is responsible for compensating the concessionaire for reversible assets not yet fully amortized. The difference is that in the cases of end of duration and

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[19] *See* Rafael W. Schwind, *Alterações na Lei das parcerias público-privadas pela Lei nº 12.766*, 2013(71) Informativo (*Justen, Pereira, Oliveira & Talamini*), available at <http://www.justen.com.br/informativo.php?&informativo=71&artigo=898> (accessed Jan. 28, 2015).

redemption, compensation must be made prior to the takeover of the concession by the granting authority. When a concession ends in forfeiture, previous compensation is not a condition for the takeover (Art. 38(4) of Law No. 8.987).

11. Arbitration

Article 23-A of Law No. 8.987, inserted by an amendment of 2005, expressly provides for arbitration as a means of dispute resolution between concessionaire and granting authority.[20] Arbitration must take place in Brazil and be conducted in Portuguese, but it may be administered either by a Brazilian arbitration center or by an international institution, such as ICDR or ICC. There are many arbitral institutions with experience in PPPs and concession contracts, such as CAMFIEP (Câmara de Arbitragem e Mediação da Federação das Indústrias do Estado do Paraná (Chamber of Arbitration and Mediation of the Federation of Industries of the State of Parana)) in the state of Parana, CAMARB (Câmara de Arbitragem Empresarial – Brasil (Commercial Arbitration Chamber of Brazil)) in the state of Minas Gerais and CAM-CCBC (Center for Arbitration and Mediation of the Chamber of Commerce Brazil – Canada) in the state of São Paulo. CAM-CCBC is also frequently chosen as arbitral institution in PPP and concession contracts made by the federal government. Generally, the government agency in charge of the bidding process will choose the arbitral institution at its discretion, normally by including a pre-dispute settlement clause (arbitration clause) as part of the bidding documents (RFP – Request for Proposals, solicitation or invitation to bid) for the PPP or concession. However, Brazilian case law also admits that the government agency and the private party enter into a post-dispute submission agreement even in the absence of an arbitration clause in the bidding documents.[21]

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[20] A variety of topics concerning arbitration and state parties are found in a book Eduardo Talamini and I have edited and written for: Arbitragem e poder público (Cesar A.G. Pereira & Eduardo Talamini, eds.) (Saraiva 2010).

[21] STJ, REsp No. 904.813/PR, Relatores: Min. Nancy Andrighi, Terceira Turma, 20.10.2011, DJe 28.02.2012.

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Information about the author

Cesar A. Guimarães Pereira (São Paulo, Brazil) – Brazilian Attorney, Partner at *Justen, Pereira, Oliveira & Talamini* Law Firm, President of Chamber of Arbitration and Mediation of the Federation of Industries of the State of Parana (Câmara de Arbitragem e Mediação da Federação das Indústrias do Estado do Paraná (CAMFIEP)), Vice-President of Brazil Infrastructure Institute (São Paulo and Curitiba, Brazil) (413 Rua Joaquim Floriano, cj 111, São Paulo, 04.534-011, Brazil; e-mail: cesar@justen.com.br).

COMMENTS

THE DEFENSE OF TRANSINDIVIDUAL INTERESTS: BRAZIL AND IBERO-AMERICA

ADA PELLEGRINI GRINOVER,

University of São Paulo
(São Paulo, Brazil)

This article deals with the background, applicability and requirements of collective actions in the defense of transindividual rights and interests, both diffuse and collective, homogenous individual rights, as well as citizen's actions in the context of the Brazilian legal system. It also broaches the impact of the regime of res judicata on such actions, and offers a brief comparative analysis of the protection of transindividual interests in Ibero-America.

Keywords: transindividual interests; citizen's actions; collective actions; res judicata; Brazil and Ibero-America.

1. The Brazilian Legal System

Brazil is considered to have a legal system of 'civil law,' but one can also find many concepts of 'common law' in it. Enrico Tullio Liebman, who conducted an in-depth study of Brazilian law during his stay in São Paulo, where he sheltered from the war, said that the Brazilian legal system blended features of both systems.

In 1981, the Brazilian federation was inspired by the North Americans to create the Brazilian Constitution and, therefore, some concepts of procedural law have also been directly taken from common law. In the same way, we do not have administrative jurisdictions and, as in the United States, ordinary courts have competent jurisdiction in whichever type of lawsuit or issue. Therefore, for us Brazilians to talk about diffuse, collective and homogeneous individual interests or rights is absolutely the same thing, since the legitimate interest and the individual right are both regulated by the judiciary. Also, we have learned from the United States that several writs can

be regarded as instruments of constitutional guarantee: the *habeas corpus*, for the protection of personal freedom even as a preventive measure; the writ of mandamus, for the protection of rights other than those of freedom and even against an illegal or abusive jurisdictional act. As from the 1988 Constitution, the *habeas data* was created for the protection of the information data. The 1934 Constitution included citizen suits. In Brazil, citizen suits are corrective, that is, the lawsuit is filed against the administration for the protection of the public goods and values. We have constitutional control, like in the USA, either diffuse or concentrated; therefore, judges may or may not apply the law if they consider it constitutionally legal or illegal. Similarly, the direct action of constitutional legitimacy falls within the competent jurisdiction of the Federal Supreme Court and is based on the American Supreme Court's actions.

2. The Powers of a Brazilian Judge

A Brazilian judge holds strong powers. First of all, I would like to recall the legislative introduction of the so-called mandatory provisions – largely corresponding to the injunctions – initially in the field of the diffuse and collective rights or interests and, then, as a general rule of the procedural system, based on a new rule of 1996, which regulated the obligations to do or not to do. These must be put into effect in a specific way, either by means of indirect constraint, like the *astreintes*, or by means of direct constraint imposed by the judge, who can change the provision of the sentence into another provision specifically meant to achieve the results that would have been obtained if the obligation had been implemented. An example concerning the environment would be the obligation of a company to prevent pollution. The judge can apply the *astraintes* or, at the same time, he can transform the negative obligation of not polluting into a positive one of installing a filter. If this task is not accomplished, the judge can go beyond and determine that a third party install the filter at the expense of the party. In case this cannot be done either, the closing of the plant shall be determined.

Another example could be interlocutory relief as a general principle of the legal system with characteristics that differ from those of the provisional remedy because it is a matter of bringing forward effectively, partially or totally, the effects of the decision. Also in this matter, a judge holds strong discretionary powers, although the law evidently establishes the conditions and the limits of the interlocutory relief.

One can notice that the Brazilian judge, even without having the defining function of the North American judge, has been invested with large discretionary powers. The Brazilian legislator, influenced by the procedural law scholars that were in charge of the changes, invested the judge with confidence, maybe because the work can be very well controlled. The Appellate Court can immediately suspend the interlocutory relief determined by the judge of the trial court and an injunction against the jurisdictional act would be adequate to this situation.

That confidence is based on a political position since Brazil, like many countries in Latin America, is hostile to and suspicious of the government – due to previous authoritarian regimes. However, people have a great deal of confidence in the judge and in the administration of the justice. Naturally, there are controls and limits like those that refer to the application of the principle of reasonableness, an unwritten constitutional principle and considered a principle of necessity and adequacy between the means and the goals.

3. Introducing the Protection of Transindividual Interests in Brazil

Without a doubt, the first source of inspiration for the protection of the transindividual interests in Brazil were the Italian jurists / legal writers in the 70[s]: Cappelletti, Denti, Proto Pisani, Vigoriti, Taruffo were / are civil law jurists who have examined, in depth, the issue of the collective actions both in terms of the analysis of North American law and in terms of general proposals for a jurisdictional protection of collective interests.

More pragmatic, the Brazilian system began with theoretical exercises of the Italian jurists of the seventies in order to build a jurisdictional system that could be put into practice immediately and that protected the diffuse interests.

Since 1977, a revision of the constitutional Citizen Suit Act of 1965 considered as a 'public asset' the assets and rights of artistic, esthetic, historical or tourist value.

Several citizen suits were filed to defend diffuse interests related to the environment. However, the citizen suit could not cover the wide range of the protection required by diffuse interests, not even as far as the environment is concerned, since its practice is subordinated to the illegality that comes from the acts or omissions of the government, whereas the threat or the violation of the diffuse interests usually arises from private actions. On the other hand, the standing, exclusively conferred on the citizen, excluded the intermediary bodies, which were stronger and more prepared than the individual to fight against the environmental threat or harm.

In 1985, Law No. 7.347 was passed to govern public interest civil actions for the protection of the environment and of the consumer as far as indivisible assets and, consequently, diffuse interests were concerned. Later, the 1988 constitution pointed out, in many provisions, the relevance of the collective interests, raising the defense of all the diffuse and collective interests to a constitutional level – without any limits to the matter – and making them an institutional task of the Office of the Attorney General, which is extremely autonomous and independent in Brazil (but allowing the law to increase the standing (Art. 129(II)(1)); mentioning afterwards, the judicial and extrajudicial representation of the associative entities for the defense of their members (Art. 5(XXI)); creating the collective writ of mandamus with the standing to sue of the political parties, the unions and the associations legally constituted

and established for at least one year (Art. 5(LXX)); finally, pointing out the purpose of the unions for the defense of the collective and individual rights and interests of the corresponding class (Art. 8(III)) and highlighting the standing regarding the Indians and their communities and the organizations for the defense of their interests and rights (Art. 232).

But, it still lacked the collective jurisdictional protection for the personal rights of the members of the groups that had to resort exclusively to individual actions, which multiplied the claims, led to contradictory decisions, did not stimulate the access to the judicial proceedings and weakened the principle of making the suits less expensive. It was necessary to create procedural mechanisms that would permit the collective protection of individual rights that could be put together when they were homogeneous and had a common source (in fact and of right). A tool, similar to the class action for damages in the North-American law, had to be created and expanded beyond the scope of the condemnatory action, respecting the principles inherent to the civil law systems.

It was in this context that the Consumer Defense Code (Law No. 8.078/1990) appeared in Brazil to crown the legislative work and to extend the scope of the public civil action law by determining its applicability to all the diffuse and collective interests and creating a new category of rights and interests, individual in their nature and approached as personal but dealt with by the civil justice as collective due to their common source, which awarded them the denomination of homogeneous individual rights. It must be mentioned that the procedural protection of the Consumer Defense Code comprehends the diffuse, collective, individual and homogeneous rights of any nature, even those which are not included in the consumer's relation, in accordance with the law.

Nowadays, it is usual to admit two kinds of collective rights (in a broad sense) in the legislation, legal writings and jurisprudence, these being: (i) the diffuse rights, which are indivisible and to which indefinite classes of people are entitled; (ii) the homogeneous individual rights (in the Brazilian and Iberian-American jargon), which are divisible and to which the members of specific classes are entitled. They may be taken to court in the form of personal suits, but may also be dealt with in a collective way.

That is why an astute Brazilian legal scholar, Barbosa Moreira, remarked that diffuse rights are ontologically collective whereas homogeneous individual rights are only incidentally collective because, as far as the procedure is concerned, they may have a collective impetus.

One more remark shall be made: sometimes, the diffuse rights belong to indeterminate and indeterminable people, since there is not any legally binding relationship that joins the members of the group. They are rights concerning quality of life, like environmental, consumer, and public service user rights. But, sometimes, one cannot determine who is entitled to them, as people are members of a group

having some kind of legal connection – for instance, associations and legal entities – and they may be determinable. This legal relationship can also be found between each member of the group and the adverse party, like a relation between the Treasury Department or a school and an individual person.

In Brazil and in several South-America countries, the first abovementioned rights are, strictly speaking, diffuse, whereas the latter are named collective, also *stricto sensu*. Nevertheless, the procedure for both diffuse and collective rights is alike. Anyway, it is important to point out that there are two kinds of 'transindividual' rights that are subject to collective suits: the first kind are diffuse rights (in Brazil they are subdivided into diffuse and collective); the other kind are the ones we will call homogeneous individual rights, according to Brazilian and Iberian-American terminology.

4. Diffuse and Collective Interests *stricto sensu*

Both the diffuse rights or interests and the collective ones have a transindividual and indivisible nature because they can only be dealt with in a combined way; therefore, they are essentially collective. Essentially collective due to their indivisibility: the satisfaction of the right or interest of a member of the group necessarily corresponds to the satisfaction of the interest or right of all the others, while the refusal of the interest or the right of a member of the group corresponds to a refusal for everyone.

5. Law No. 7347/1985

In Brazil, at first, there was a specific statutory law dating back to 1985 that governed diffuse and collective interests or rights. We were perfectly aware that it still lacked the jurisdictional protection of individual rights for a collective damage, that is, the mass tort cases or class actions for damages. That became particularly obvious in the case of the consumers who suffered any kind of consumption damages. The environment, for example, can be regarded in its indivisible dimension also for the compensation of damages. The Law of 1985 provided for decisions that demanded the restoration of the damaged environment. However, as far as the consumer relations were concerned, the most that the law could do was to deal with the actions for injunctive relief. As far as indivisibility was concerned, the only possibility for enforcement actions was perhaps the adverse judgment stemming from misleading advertising for the benefit of all consumers. Nevertheless, the compensation for personal damages incurred by the consumer, in a collective way, still had to be considered. Then, the consumer defense code was enacted.

However, intentionally, the 1985 Law did not deal with that. Intentionally, because the Brazilian legal system was already deeply innovating as a system of civil law in

a segment that could receive a simpler procedural treatment, which was the field of diffuse or collective rights or interests of an indivisible nature. Which aspects / provisions of the law remained in force after the enactment of the Consumer Protection Code?

The standing, which is attributed to public agencies and associations, is mixed. Firstly, it is attributed to the Attorney General's Office, which is an institution of great autonomy regarding both the judiciary and the government. One dares to say that the Attorney General in Brazil is a fourth power and, effectively, it can be thus considered. The Brazilian Attorney General has always performed some functions concerning the civil procedure, either as a plaintiff or as *custos legis*. With the passing of the law for the protection of the collective interests, broadly speaking, it has been strengthened in such a way that today 90 percent of the collective actions are instituted by the Attorney General. Together with this standing, as a concurrent and independent standing, there is the one attributed to governmental agencies working for the public interest, like those for the consumers defense, the environment, *etc.*, even if they are not legal entities. In the private sector, the standing is attributed to the associations, which have been established for at least one year and which have among their institutional goals the defense of those interests; however, a judge can exempt the association from the former requirement whenever there is a need for a group that is not yet organized to perform. The standing is concurrent and independent. The Brazilian legal system does not confer standing to citizens but they have the standing to file the constitutional citizen suit.

In Brazil, at first, the standing is *ope legis*, without the judge's control over the so-called adequacy of representation. I would remark that legal writers argue that, in spite of not having a written statute regarding the judge's representation control (the seriousness, the credibility, the coincidence between the plaintiff's claim in court and the group's true interests, *etc.*), the Brazilian legal system enables the judge's control in this regard.

6. The Constitutional Citizen Suit

On the other hand, it must be noted that while the Brazilian system of collective actions does not provide the citizens with the standing to bring collective actions, one cannot consider it as a deficiency, because they have the standing to file constitutional citizen suits. The reason for this is that, together with the collective actions from 1985 (named in Brazil as 'public civil actions' – because institutionally the Attorney General is entitled to and performs the various procedural controls and initiatives when the lawsuit is filed by an association or any other public agency), in Brazil there is also the citizen suit, which is a constitutional action against the Government for the defense of the 'public asset' including the goods and rights of artistic, esthetic, historical or tourist value.

The citizen suit was later incorporated into the constitution of 1988. What happened was that, between the enactment of the 1965 Law and the 1985 Law, the citizen suit was the only instrument for the defense of the diffuse and collective interests regarding the environment, broadly speaking. In the case of the citizen suit, the standing is awarded to the citizen who, by means of that legal remedy, may go to court to request the protection of diffuse and collective interests, in the field of the environment.

7. The Collective Defense of the Divisible Rights: Homogeneous Individual Interests

However, the 1985 Law left the jurisdictional protection of the personal subjective rights uncovered but they could be judicially dealt with in a collective way. Those rights are individual, divisible and every holder could – and can – file his / her claim on these grounds. Nevertheless, those individual rights can be dealt with in a collective way, as long as some particular aspects are respected.

Then, in 1990 the consumer defense code was enacted, opening to the protection of the so-called homogeneous individual rights: individual rights that, in court, may be dealt with in a collective way if they bear the characteristics of 'common origin' and 'homogeneity.' It must be remarked that the procedural provisions of the consumer defense code are not applied just to the consumer relations, but to all the segments in which the purpose of the procedure is the protection of the diffuse collective and homogeneous individual interests. The law is very clear in this matter.

8. Collective Actions for the Defense of the Homogeneous Individual Interests

We shall see now how this collective action is carried out when the matter is the compensation of the damages personally suffered by a group of people which roughly corresponds to the class actions for damages and to the mass tort cases in the North American system. But in Brazil it is not necessary to fund group litigation: the standing to sue of public and private entities allows the party to file the claim without naming the persons who form the group. The first part of the action is an enforcement action, without indication of the group's members, and it is brought by the ones who have the standing and, as already mentioned here, in favor of an undetermined group (the consumers of a harmful product, the inhabitants of a region, or the participants in an undertaking). The generic decision that sustains the compensation of the damage endured, at this point by undetermined individuals, will replace the entitled party in court. Once the general damage is accepted by the court, the liability is established and it is determined that compensatory damages will have to be paid, the individual lawsuits begin. Either individuals or entities may bring

the action, the latter acting as representatives. During the lawsuit, each and every member of the group will have to prove his / her personal damage, the link between their personal damage and the general damage sustained in the judgment for the plaintiffs, as well as to quantify the damage. This is similar to the North American system with the difference that it does not establish a total compensation, which means that in Brazil the judgment for the plaintiffs are for damages endured. It means that for every damaged individual, the personal compensation will have to be quantified according to the adversary system in an action known in Brazil as 'liquidation according to new evidence' because new facts will have to be proved. It is different from that realization that usually follows the generic judgment for the plaintiff in the traditional Brazilian lawsuits, since it will not be enough to prove the *quantum debeatur*, but the *an debeatur* (if the personal damage has a link with the general damage) will still have to be discussed. So, in the payment of monetary damages, the sum is not divided among claimants, but each of them receives the sum corresponding to the personal damage effectively sustained. There are cases in which the Brazilian system resorts to the North American idea of fluid recovery, and that happens when the personal damages are insignificant if compared to the total damage, as usually happens with consumer relations. An example is when a consumer finds out that the weight printed on the label is slightly different from the actual contents of the container. Then, if the personal compensation is not proportional to the general damage, one can make use of the fluid recovery technique, and the total sum (corresponding to the damage caused and not to that personally endured) will be deposited in a fund for the protection of the consumers.

9. Requirements of the Collective Action to Protect Homogeneous Individual Interests

When the consumer defense code was enacted / drawn up it included the category of the homogeneous individual rights or interests. At that time, we used to say that for the collective protection to exist, said rights or interests had to be homogeneous, having a common origin. But today one believes that this homogeneity must be emphasized and that, indeed, it must be one of the conditions of the collective action of compensation for the damages personally endured. In my point of view, two requirement of the North American legal system for this type of class action are also necessary in Brazil: the prevalence of the common interests over the individual interest and the superiority of the collective protection. In our civil law system, I will refer to the fact that the prevalence is an issue of the theory of procedural law (conditions of the action) because if there is no prevalence of common matters over private matters, the rights are not homogeneous, at least not sufficiently so to be dealt with collectively. The superiority of the collective protection can be demonstrated in terms of the usefulness of the provision, and, therefore, in terms

of the interest to sue because the collective decision that determines the generic adverse judgment needs to be effective for the individual. Since the individual will have to prove all the facts again in the process of realization, if the collective decision is not effective for all practical purposes, it will be of no use. I recall, as an example, the damage caused by asbestos or tobacco in the United States, when the North American courts did not classify the action as a class action because it lacked the requirements of prevalence and superiority. In this way, the Brazilian doctrine limits the broad field of homogeneous rights, which are sometimes successfully dealt with collectively and refer back to the North American concepts of the conditions of the action in civil law, also because the moment of the certification corresponds to our condition of admissibility.

10. The Suitable Actions

The provision is clear in Brazil and in the Model Code of Collective Suits for Iberian-America. Under the title 'Effectiveness of the jurisdictional protection' it says: 'For the defense of the rights and interests protected by this Code, all kinds of actions that provide their adequate and effective protection shall be admitted' (Art. 4).

There is not any doubt, thus, that reality itself has already extended the collective jurisdictional protection to all kinds of litigations: so, the focus of the suit on the defense of individual homogeneous rights is not only present in the North American class action for damages.

11. The Regime of the *res judicata* in Actions to Protect Indivisible Interests

Concerning the *res judicata,* we have followed a path which is different from that of the North American system. With regard to the diffuse and collective interests or rights, of indivisible nature, the procedural treatment is *erga omnes* (and it could not be different because that is in the same concept of indivisibility of the right) with a combination that came from the constitutional citizen suit, in the sense that, when a judge rejects the request of the citizen claimant for insufficiency of evidence there is no *res judicata* and a new suit can be brought by anyone who is entitled to do so, always based on new evidence. This solution, traditional in Brazil, was studied and described as a kind of acceptance of the decision *secundum eventum litis*, or considered as a case of *non liquet,* in which the judge was allowed to be exempt from making a decision. And this technique, devised as an instrument against the possible collusion of the citizen party against his / her counterpart (in order to get a contrary decision with *erga omnes* effects), has been reproduced from the law of the public civil action and from the consumer defense code, with regard to the diffuse and collective interests or rights.

12. The Regime of the *res judicata* in the Action to Protect Divisible Interests: The Decision *secundum eventum litis*

The treatment of the *res judicata* for homogeneous individual rights *secundum eventum litis*. It deliberately bears on the opt-out and the opt-in of the common law system, in which the member of the group will not be affected by the *res judicata* unless the class action was chosen (opt in) or the intention to be excluded from the action has been demonstrated (opt out). I must say that we have studied the system of the North American opt out a lot, and we have noticed that in the United States it often causes insoluble problems like when one intends to get the personal notification to all the members of the group so that they can opt. Just bear in mind the famous *Eisen* case, in which the obligatory notification put an end to the class action. Nowadays, the notification is more parsimonious, but in this way one cannot tell whether all the members of the class have been made aware. And, it could affect the constitutional right of everyone having his / her day in court. Another way had to be chosen, also because in Brazil there would have been obstacles for the implementation of the opt-out or opt-in techniques, such as inadequate information, the social level of the population, the difficulty to access the judiciary and so on.

So, for the homogeneous individual rights we have opted, frankly, for the *res judicata secundum eventum litis*, that is, a decision *erga omnes*, intended to favor and not to harm personal objectives. If the decision is unfavorable towards the collective action it will only be effective in a collective way, preventing a new collective action. However, the personal matters will not be affected and every individual will be able to make them useful during an ordinary proceeding. The former unfavorable collective decision may be equivalent to a simple precedent (and in Brazil one does not follow the *stare decisis*, the binding precedent). *Res judicata* will not hinder a new lawsuit.

13. The Decision *secundum eventum probationis*

Nowadays new issues on the decision *secundum eventum litis* have been proposed in Brazil. For example: when the judge rejects the claim without asserting that he did so based on the insufficiency of evidence, what will happen if science later discovers that a certain product was effectively harmful, differently from was proved in court? This is new evidence that could not be produced at the time of the judgment, and may be valid when an eventual suit of revocation ends. I support, therefore, in a recently published article in the *Magazine of Procedural Law* that the claim can be brought again even if the judge did not assert that his refusal was based on insufficiency of evidence. But how can one justify, according to legal writers, a position that seems to represent an offense to the myth of the *res judicata*? Firstly, I need to say that in Brazil there is a recent remarkable tendency to the making *res judicata* 'relative' when

there are other constitutional interests at stake. One does not need to go too much further into this field but it is worth mentioning the existence of a sentence *secundum probationem*, which does not mean an innovation in Brazil. There are cases in Brazil where the judge decides that the party is not entitled based on the documental evidence provided. It is the case of the writ of mandamus and the *habeas corpus*, based only on documental evidence, in which the judge makes a decision based on the evidence produced. But in case the claim is rejected the part may bring another suit following the ordinary proceeding and based on broader evidence.

Therefore, one should draw a parallel between the above-mentioned Brazilian solutions and *res judicata* in collective actions. This idea could then be extended to the classical procedure, in the lawsuits of new scientific evidence for the acknowledgment of paternity (DNA). The existence of a decision *secundum probationem* would naturally appear circumscribed to the cases of the new evidence that could not be produced at the time of the judgment. This way, the issue of the preclusion of the sentence would be overcome.

I recognize that this is a daring position, and one must recognize that in Brazil we are free from prejudice. The new Brazilian civil procedure tried to review the principles, the concepts, the traditional institutes specially the most valuable one for civil procedure: effectiveness.

14. Collective *res judicata* to Benefit Individual Claims

The *res judicata* that refers to a favorable decision in a class action may be transferred to individual claims, and thus shorten the procedural steps through which one intends to have individual rights recognized.

This is true not only of the favorable decision that referred to the homogeneous individual rights. As a matter of fact, in this case, the transfer of the *res judicata* is almost a truism. But it is also true of the decision that favorably decided about the litigation on diffuse and collective rights.

For example: if in the decision it was admitted that there was environmental damage, indivisibly considered, and determined that the defendant should repair it, the people who individually suffered the personal damages may make use of the collective *res judicata* to shorten the procedural steps whose aim is to obtain a personal compensation. It seemed to Liebman when he wrote about the Old Italian regime of the transfer of the penal *res judicata* to the civil area to compensate an *ex delicto* damage, that in this case, there would be an extension of the penal res judicata to the reasons, which would be '*abnorme*.' The Brazilian doctrine chooses to explain this phenomenon – both concerning the effectiveness of penal *res judicata* in the field of civil compensation and concerning the effectiveness of *res judicata* in the collective suit for the defense of the diffuse and collective rights to benefit the individual claims of damages compensation – as an objective amplification

of the litigation purpose. Therefore, when the judge declares 'I sentence you to reconstitute the environment,' he is implicitly declaring that he is also sentencing you to compensate the victims of the environmental damage.

15. The Defendant Class Action

Brazilian law does not provide for the passive class action – the North American defendant class action.

But today both legal writers and jurisprudence recognize that in Brazil, even without an express provision, the combined analysis of several statutes shows the possibility of a collective litigation not brought by the group, but against them. I realize that, in this case, the issue of the judicial control on the 'legitimate representation' is still more subtle, so that the people who are members of the group can suffer the effects of the contrary decision.

16. Notifications

The Brazilian criterion of *res judicata,* for individual homogeneous rights (class actions for damages, among others), just to benefit and not harm the individual claims – without the opt-out system, renders notifications less important than in other systems. But the law requires that the class action be broadly publicized to allow the members of the group to intervene in the action, not as a form of opt-in, but in order to help the party to obtain a successful result. It is a form of joinder of parties, but the individuals cannot prove and require their personal recovery in the first part of the proceeding.

17. Settlements

A great number of collective suits are filed in Brazil by the Attorney General, the most active entity in this matter. Before the suit, the Attorney General conducts an administrative inquiry that many times leads to a settlement. Public Defenders often obtain settlements of individual damages. Settlements are less frequent during judicial proceedings. Settlements oblige the parties and constitute an enforceable instrument. But we do not have statistics in Brazil.

18. Costs and Benefits

The entity entitled to the collective action does not pay any court costs nor, in case of defeat, the other party's attorneys' fees, unless the judge deems that the party acted in bad faith (*in mala fide*), in which case the party has to pay an amount equivalent to the court costs multiplied tenfold as well as the attorneys'

fees (normally 10 percent of the value of the action) to the other party. Should the collective action be successful, the defendant pays the court costs and, if the plaintiff is an association, the attorney's fees.

In Brazil, we do not face the North American problems posed by the high cost of attorneys' fees.

19. The Protection of Transindividual Interests in Ibero-America

Of the civil law systems, Brazil was the first country to introduce the protection of the diffuse and collective interests or rights in its legal system, and, later, of homogeneous individual rights. This attitude was welcomed, little by little, by the other Latin American countries. The Model Code of Civil Procedure for Ibero-America mentions diffuse interests and a wider standing is awarded to the citizen, while the regime of *res judicata* is identical to the Brazilian regime for the diffuse and collective interests. This code, that is only a model inspired by the several legal systems, was fully adopted in Uruguay. In Argentina the case law had already established some concepts and today the Constitution of 1994 sets forth a remedy for the protection of collective rights, a kind of injunction, better than its predecessor. Portugal introduced the defense of the diffuse and collective interests by means of the law for the constitutional citizen suit of 1995, and, later, the case law recognized, with the same name used in Brazil, the category of the homogeneous individual rights. Nowadays, almost all the other countries in Latin America – like Peru, Colombia, Guatemala, Costa Rica, Paraguay and others – have adopted in their systems, though sometimes with different names, the procedural protection of the diffuse or collective interests as well as of the homogeneous individual rights. But the great boost for the improvement of the collective actions system was provided by the Model Code of Collective Actions for Ibero-America, promoted by the Ibero-American Institute of Procedural Law, prepared by a commission coordinated by me and approved in 2004. The Code is only a model, as its name says, but it contains principles and immediate operating rules and was considered a source of inspiration by numerous South American countries for their own national laws. As the source of inspiration of the Model Code is the Brazilian system, it was expanded to many Latin American legal systems. Similarly, so were the mixed standing (which also included the citizens), the *res judicata secundum eventum litis* for the homogeneous individual interests, the Attorney General's control over actions and possibly being a party, the *res judicata secundum probationem*, *etc.*

20. The Practical Application of Collective Actions in Brazil

It can be said that the existence of collective actions has changed Brazilian Civil Justice, from an individualistic view to a collective and social view. Sometimes the

associations and the Attorney General exaggerate in the number of lawsuits filed, but this was expected. It was also expected that once in a while the courts and judicial decisions would slow down, sometimes excessively. But it seems that in that process of come-and-go, of forward and backwards steps, of continuous reorganizations, Brazil found the way towards the effective protection of the transindividual rights. To sum up, Brazil reviewed the tasks of the judge and the Attorney General and also those of the associations. These, in fact, are exceptions in suiting and have not yet reacted to the appeals as expected. Although free from procedural expenses and from the burden of the defeat, they prefer to resort to the General Attorney in order to bring the collective action.

In Brazil, we have a large amount of collective actions and interlocutory provisions are frequent. Even though they are often reviewed by the Court of Appeals, there has been a clear distinction between individual and collective actions, with all the differences that must exist and really exist between them. But, unfortunately, we do not have statistics.

Information about the author

Ada Pellegrini Grinover (São Paulo, Brazil) – Professor at the University of São Paulo, Honorary President of the Brazilian Institute of Procedural Law (Instituto Brasileiro de Direito Processual (IBDP)), Doctor *honoris causa* in Milan University (Italy) (600 Rua Silvia Celeste de Campos, São Paulo, 05462-010, Brasil; e-mail: adapell@pbrasil.com.br).

PECULIARITIES OF THE REASONING OF JUDICIAL DECISIONS IN BRAZIL: THE NEW CIVIL PROCEDURE CODE

TERESA ARRUDA ALVIM WAMBIER,

Pontifical Catholic University of São Paulo
(São Paulo, Brazil)

This paper deals with a relevant topic: the reasoning of a judicial decision as a requirement for its validity. In fact, this need is typical of democracies. In democracies, authorities have to justify their decisions which interfere in private lives. Decisions have to be reasoned also because they are, as a rule, appealable. What is challenged in an appeal is precisely the reasoning / motivation of judicial decisions.

The main novelty in this context is a provision which exists in a Brazilian Bill for a new Civil Procedure Code, which determines how the decision must be reasoned. It openly recognizes that a judge bases his or her decision not only on statutes literally considered, but also on legal writing and on case law. The legislator was very bold, because we are a civil law jurisdiction, where students are currently led to believe the decisions emerge automatically from statutory law.

Furthermore, this new provision teaches judges how to deal with all these elements, under penalty of having the decision being declared void or null.

Keywords: decision; judicial decision; reasoning; motivation; case law; legal writing.

Brazil is a country of great contrasts. Some things, such as the so-called 'defensive'[1] case law, are regrettable, while others are highly laudable. One of the latter is the widespread awareness among judges and jurists that the judicial decision does not arise from the automatic application of statutes to the case at hand. It is openly acknowledged that a judge interprets the law in the light of legal writings and case law. In general, it can be said that it is acknowledged that the law is based on a tripod: legal rules (statutes) and legal principles, legal writings and case law.

The possible subjectivity on which a decision may have been based, must be conveniently *absorbed* by the objectivity of the reasoning.

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[1] Due to the case overload of Brazilian courts, judges very often do not hear appeals based on the lack of formalities which in fact are not necessary.

The reasoning, as we know, is rational rather than logical. Logic is nothing but one of the aspects of rationality.

The current demand that judicial decisions be substantiated arises from two needs. One of them is the need to be accountable to society, in states ruled by law. This need *absorbs* the possible subjectivity of the decision and is a way of avoiding arbitrariness. The other is a technical need: it makes it possible to appeal against the decision. In the appeal, it is precisely the motivation that is challenged.

When one studies the reasoning of the decision, in fact, one is studying what *appears* in the decision, which is a sort of '*façade*,' but, in any case, it is interesting to study this phenomenon, as it represents, at least, that which is understood to be satisfactory substantiation of a decision, in terms of the demands of a given system. Other grounds that may influence decisions (ideological, psychological, *etc.*) are not clearly evident in the text and are not relevant to the law. They should have been *absorbed* by the suitable objectivity and rationality of the reasoning. Otherwise, the decision will be arbitrary and contrary to the law.[2] These are the grounds that will be analysed in this article: the visible grounds.

The awareness that a judge does not decide based exclusively on statutory law, *i.e.* that the decisions do not automatically '*sprout*' from the statutes, cannot be found either in the legislation or judicial practice of many European countries. The statutory provision in Italian legislation that forbids a judge to quote the opinions of jurists[3] is well known, as is the common practice in French law of settling cases in few words, as a syllogism, as if the only element taken into consideration by a judge were the literal wording of the law.[4] Through not in every country.[5]

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[2] Zenon Bankowski et al., *On Method and Methodology*, in Interpreting Statutes: A Comparative Study 17 (Neil MacCormick & Robert S. Summers, eds.) (Darthmouth 1991).

[3] A respeito da proibição da citação da doutrina, a lei italiana é expressa (Art. 118(3) do CPC Italiano): '*118 disp. att. c.p.c. – Motivazione della sentenza*
La motivazione della sentenza di cui all'art. 132, secondo comma, n. 4), del codice consiste nella succinta esposizione dei fatti rilevanti della causa e delle ragioni giuridiche della decisione, anche con riferimento a precedenti conformi.
Debbono essere esposte concisamente e in ordine le questioni discusse e decise dal collegio ed indicati le norme di legge e i princìpi di diritto applicati. Nel caso previsto nell'art. 114 del codice debbono essere esposte le ragioni di equità sulle quali è fondata la decisione.
In ogni caso deve essere omessa ogni citazione di autori giuridici.
La scelta dell'estensore della sentenza prevista nell'art. 276 ultimo comma del codice è fatta dal presidente tra i componenti il collegio che hanno espresso voto conforme alla decisione.'

[4] See interesting reflections on the topic in: Antoine Garapon & Ioannis Papapoulos, Julgar nos Estados Unidos e na França: cultura jurídica francesa e Common Law em uma perspectiva comparada 172 (Lumen Juris 2008); Eugênio F. Neto, *A sentença em perspectiva comparada; Estilos norte-americano, francês e italiano em confronto*, 39(235) Revista de Processo São Paulo 407 (2014).

[5] In German law, for example, both the opinions of jurist and case law are cited in judicial decisions. There are statutory articles that demand, as a prerequisite for granting leave of appeal, the potential to contribute to the development of the law. This provision is a good example and was included in the *Zivilprozessordnung* (ZPO) in 2011:

Brazilian legal writers openly acknowledge that a judge makes use of a series of elements to reach a decision on the merits, *i.e.* that a judicial decision is not based only on statutes. When the Bill for the New Civil Procedure Code [hereinafter NCPC] is passed, the law will contain explicit reference to fact that a judge must base his / her decision on precedents.

Since 2009, there has been a Bill, drafted by a Commission of 12 jurists appointed by the Senate, which is pending in Congress (of which I / the author was the rapporteuse). This Bill contains a very interesting provision precisely about the way in which judicial decisions should be reasoned. The NCPC includes an interesting article that tells a judge *how* he / she must reason the decision. If the reasoning is not drawn up in accordance with the provisions of Art. 499 of the NCPC,[6] it is deemed that the decision is *not substantiated*.

'**§ 543. Zulassungsrevision**

(1) Die Revision findet nur statt, wenn sie

1. das Berufungsgericht in dem Urteil oder

2. das Revisionsgericht auf Beschwerde gegen die Nichtzulassung zugelassen hat.

(2) Die Revision ist zuzulassen, wenn

1. die Rechtssache grundsätzliche Bedeutung hat oder

2. die Fortbildung des Rechts oder die Sicherung einer einheitlichen Rechtsprechung eine Entscheidung des Revisionsgerichts erfordert.

Das Revisionsgericht ist an die Zulassung durch das Berufungsgericht gebunden.'

[6] Article 499. Below are the essential elements of the judgment:

I – the report, which will include the names of the parties, the identification of the case, with a summary of the claim and the answer, as well as a record of the main occurrences in the course of the proceedings;

II – the basis on which the judge will analyse the matters of fact and law;

III – the provision based on which the judge will settle the main issues brought before him / her by the parties.

§ 1. One shall not consider to be substantiated any judicial decision, whether it is interlocutory, judgment or appellate decision that:

I – that merely names, reproduces or paraphrases the law, without explaining its connection with the claim or issue settled;

II – employs vague legal concepts, without explaining the concrete reason for their incidence in the case;

III – cites grounds that would serve to justify any other decision;

IV – does not take into consideration all the arguments drawn from the proceedings that could, in theory, invalidate the conclusion reached by the judge;

V – only cites case law or quotes precedents without identifying the decisive reasoning or showing that the case on trial fits that reasoning;

VI – does not adhere to the precedent or case law cited by the party without demonstrating the existence of a distinction between the case on trial and the case cited or the subjugation of the understanding.

§ 2. In the case of a conflict between rules, the court must justify the subject matter and the general criteria used in the deliberation carried out, stating the reasons that allow the rejection of one rule and the factual grounds for the conclusion reached.

§ 3. The judicial decision must be interpreted as the conjunction of all its elements and in conformity with the principle of good faith.

This provision lists the essential elements of the *judgment*: the report, the reasoning and the order imposed by the judgment or *decisum*.

Paragraph 1 is certainly a welcome and interesting innovation, which demonstrates how concerned the commissions dealing with the NCPC were with the 'constitutionalisation' of procedure, that is, making it very clear that the CPC is part of a broader normative context, at the top of which is the Federal Constitution.

This provision states that the guarantee of the substantiation of judicial decisions, of a constitutional nature, has not been fulfilled if said substantiation does not comply with certain minimum parameters of quality. In other words, the requirement will not be fulfilled by just *any* reasoning.[7] The rules discussed below do not merely refer to judgments, but to *any* judicial decision, even those that settle incidental matters.

In subsequent rules, the NCPC lists cases in which it is considered that the judicial decision is not, strictly speaking, substantiated. This is a typical case of the applicability of Motions for Clarification: due to the absence of reasoning.

According to Art. 499(1)(I), it is considered that there is no substantiation of any judicial decision that, purely and simply, paraphrases the law without expressly stating *why* the rule is applicable to the case being judged. Thus, if the decision states: the decision is x, because the rules determines y, this decision lacks substantiation as it did not establish a *link* between the wording of law, stated differently, and the facts of the action.

This rule will be inserted into the system. The fact that it is not in the 1973 CPC, currently in effect, does not, in any way, mean that the requirement did not exist.

This requirement, which will be expressly included in the new law will be more incisive in cases where the judge decides based on a legal rule, whether a statute or some principle, that uses a *vague or indeterminate* concept in its wording (Art. 499(1)(II)).[8]

Principles, as we know, are almost always verbally formulated using vague concepts and, increasingly, in the modern world, these concepts are also frequently inserted into the wording of statutes.

Lately, all over the world, there has been a visible change in the style of legislating. Positive law increasingly presents less detailed rules with a broader scope and whose boundaries are not very clear (*fuzzy*). The complexity of contemporary societies, the trend towards having the law almost completely govern life in society, and the growing access to justice have demanded intentionally less precise rules of the legislator.[9]

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[7] As already stated: 'Inadequate reasoning is not reasoning.' Teresa A.A. Wambier, Nulidades do processo e da sentença ¶ 3.2.3, at 322 (7ª ed., Revista dos Tribunais 2014).

[8] 'Vague or indeterminate concepts are linguistic expressions (signs) whose semantic reference is not so clear, lacking clear boundaries. These concepts do not refer to subjects that are easily, immediately and readily identificable in the world of facts.' Teresa A.A. Wambier, Recurso especial, recurso extraordinário e ação rescisória 151 (2ª ed., Revista dos Tribunais 2008) [hereinafter Wambier, Recurso especial].

[9] 'The complexity of the situations that arise in modern societies has led us to believe that they should "be solved by the applier of the law according to their circumstances; since the increase in demand, in general, for greater justice, even if, to some extent, at the detriment of the stability and predictability of the past," constituting, for science, the obligation to meet life's demands, which no longer recognises all rights in the statutes.' Wambier, Recurso especial, *supra* n. 8, ¶ 1.4, at 28.

These legal rules, intentionally less detailed, more open-ended and flexible, usually employ vague concepts and occasionally include *general clauses*, which are also vague expressions loaded with value judgments, given that they incorporate principles.

The content of general clauses is gradually built from the work of legal writers, but also, mainly, from the work of judges. Therefore, they are intentionally vague. A good example of this is Art. 1.228(1) of the Civil Code, which states that property must perform its *social role*.[10]

Vague concepts are those that refer to a subject matter that is, in itself, not very well defined. *Core business, best interest of the child, respectable media, general repercussion* and many other terms, are examples of terms that can give rise to discussion, in other words, it is possible that some will understand that a concrete measure serves the public interest, while others will understand the exact opposite.

This does not occur, or occurs to a lesser degree, with the so-called determinate concepts, such as *lease-purchase agreement, retirement, commodatum (loan for use or gratuitous loan), husband, salary* and many others.

There are varying degrees of vagueness, and it is also clear that the vaguer the concept contained in the rule applied to the settlement of the concrete case, *the greater the need for a judge to explain why he / she considered that the rule should apply to the facts of the case adjudged*. The reason for this is that, when the law contains vague concepts or general clauses, there is no detailed verbal description of the factual framework to which it must be applied. The same occurs with legal principles: its wording does not contain a careful and precise description of the facts that must lead to its application.

This *difficulty* corresponds to the *need* that the decision be *solidly* reasoned. When said decisions are based on *legal principles*, on *general clauses* and on rules whose wording includes *vague concepts*,[11] the act of substantiating the judicial decision is more complex.

The proposed Bill does not consider that a motivation which would serve the purpose of justifying any merits would be appropriate. The decision, reasoned in this way, is considered *not to be* reasoned: 'I grant the preliminary injunction given that all the legal requirements have been met.'

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[10] 'General clauses, alongside legal principles and vague or indeterminate concepts, that are increasingly found in the wording of statutes, are characteristic elements of contemporary Law. They are expressions, whose meaning is also vague, that unite in "pores," allowing the law to communicate with reality.

The general clauses are signs that contemporary Law tends to be open and flexible. Laws with these features intend to encompass both contemporary and future reality.' Wambier, Recurso especial, *supra* n. 8, ¶ 6.1, at 161.

[11] '. . . In our view, they are all excellent examples of *hard cases*, in which the Judicial Branch not only could but, in fact, should apply a healthy dose of creativity, comprehensively and significantly substantiating the decision, showing that it has arisen from the combination of the elements of the *system* and applying universal arguments.' Wambier, Recurso especial, *supra* n. 8, ¶ 4.2, at 107.

There is another rule in this Bill that has generated much discussion and that, in my opinion, need not have done so because, in fact, it is a guideline that can be deduced from the system – mainly in a system such as ours that prizes *the right to be heard*. Article 499(1)(IV) establishes that unless *all* the arguments raised in the proceedings are dealt with, and by arguments one means both factual and legal arguments that would have the power to *otherwise* sway the judge's decision, said decision is deemed to be unsubstantiated. Should these arguments not be admitted, they must be expressly dismissed in the decision.

This does not, in any way, imply that a judge, or the court, is required to answer a 'questionnaire.' It does, however, intend to show the judge that his / her duty is to *hear* the parties, which must be shown to have been done in the motivation of the decision.

This is merely the outline of the contemporary notion of the principle of *the right to be heard* (*audi alteram partem*). This principle, known as '*contradictoire*' in French, is not limited to the actions of the parties, in the sense that they have the *opportunity* to declare and *prove* the right they claim to have. They have the right *to be heard*. In fact, the right to be heard only makes sense if one assumes the existence of a neutral, meaning impartial, observer who *witnesses* the dialogue between the parties (claims + evidence) in order to later decide.

The proper moment for a judge to show that he / she participated in the adversary proceedings is at the time of substantiating the decision. The parties must be heard and have their allegations taken into consideration, even if these allegations are not admitted, if they could have led to a decision that diverges from the one rendered.

After all, in Brazilian law, the judge may base his / her decision on grounds not mentioned by either of the parties (*jura novit curia*), but not before giving the parties an opportunity to manifest themselves.[12]

A consequence of this, that is both interesting and relevant, is that: a decision can only be judged to have been well reasoned, or not, *within the context of the case in which it was rendered.* Its *interna corporis* consistency does not suffice: it must refer to elements outside its internal consistency, dismissing them even so as to reinforce the correctness of the decision taken.

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[12] '. . . [T]he assurance of having the grounds recited represents the last *manifestation of the right to be heard*, as the duty to recite the grounds of his / her decision represents, as far as the judge is concerned, the obligation of taking into consideration the results of the right to be heard and, at the same time, demonstrate that the formulation of the judgment occurred as a result of the participation of the interested parties.

In fact, it would be pointless to grant the parties such a broad and complex range of prerogatives, powers and resources, that converge to achieve a favourable result at the end of process, if the measures actually taken could be dismissed by the judge at the moment of rendering the judgment. The dialectic structure of the process is not limited to the mere participation of the interested parties making themselves heard, but implies above all the relevance of what is said by both sides to the author of the judgment; the statements of the parties may even be dismissed, but never ignored.' Antonio M.G. Filho, A motivação das decisões penais n. 4, at 84 (2ª ed., Revista dos Tribunais 2013).

In line with what was mentioned at the beginning of these considerations, assuming that a judge bases his / her decision on case law, or even on *one* precedent when it is , for example, an appellate decision of the Federal Supreme Court (Supremo Tribunal Federal (STF)), there is still another situation in which it is deemed that the decision is not substantiated: should the decision cite, as a relevant element of its reasoning, a *precedent* without showing *why* the holding, which is the basis of the precedent and is mentioned in its wording, is applicable to the facts of the case, the decision will also not be considered to have been substantiated. Strictly speaking, this rule is identical to the one mentioned previously – if a statutory rule is applied to the case at hand, it must be explained *why* the rule is deemed applicable to settlement of the specific case. Similarly, if one applies a *precedent*, one is, in fact, applying the core of the precedent: likewise, its pertinence to the case at hand must be shown in the reasoning of the decision.

Item V is, in a way, contained within item IV: if the precedent, case law cited by the party is disregarded, the reasons for dismissing it must be explained. The reasons can be the following: either the case is not analogous or the legal doctrine on which the precedent is based cannot be admitted because it has become obsolete.

This provision could, and one hopes that it does, have a very interesting and desirable consequence.

We know that in Brazil, in recent decades, we have witnessed the prominence of a phenomenon which should not be welcomed. There have been frequent and radical changes in the guidelines provided by case law, mainly in the superior courts, especially the Superior Court of Justice. This throws the courts of second instance, the first instance judges and society itself into a state of confusion.[13]

The Bill for a NCPC introduces several provisions aiming to control this trend. Clearly, the reach of such a Civil Procedure Bill in terms of the resolution of this problem, which is serious and has reached unacceptable proportions in Brazil, is very limited because this is a cultural problem and laws do not work miracles. There is a whole aspect based on principles that aims to discourage the courts from behaving thus. It is said, for example, that the Superior Courts must respect their own precedents, in order to generate uniform and stable case law that serves as a guideline for the other bodies of the Judicial Branch.

This provision may discourage the courts from *departing from their own precedents*! This provision establishes a judge's duty to explain *why* a precedent from a second

[13] '. . . [I]t is interesting to note that there are judges in Brazil who feel diminished by the fact that they have to bow down to the dominant precedents of a superior court or binding precedent. Fortunately, there are those who recognise that the dispersion of case law and lack of stability fundamentally compromises the credibility of the Judicial Branch as a whole. The standardisation of case law "is most probably the practice that increases the power of the institution whose role it is to decide . . . internal harmony or coherence reinforces external credibility." I believe this too occurs in Brazil: excessive dispersion of case law discredits the Judiciary and lets down those who litigate before the official courts. It represents an evil for society.' Teresa A.A. Wambier, *Precedentes e evolução do direito*, in Direito Jurisprudencial ¶ 3, at 40 (Teresa A.A. Wambier, ed.) (Revista dos Tribunais 2012).

instance or superior court cited by one of the parties *was dismissed*, and why he / she settled the case differently. However, it also sets forth the need for the *judge to justify the dismissal of a precedent from the same Court to which he / she belongs*! Hence, one foresees that there will be fewer occurrences of incessant divergences on certain topics within the same court. Nowadays, this occurs habitually with immense and undesirable frequency, and judges normally do not even make any mention of the precedents that are being contradicted.

Despite its complex wording, para. 2 contains a salutary rule: it may happen that two different rules, which can lead to different solutions, can be applied to the same situation. One of the two is chosen based on the consideration of values. These values inspire. Said values inspire or are applied by conflicting rules.

Once again, one notes the perception held in Brazil that a judicial decision is often an *option* between several possible alternatives. This option must be justified. One cannot, therefore, 'make believe' that the alternative chosen was the only possible one in more complex cases. In other words, we think positively, as one cannot control reality while denying its existence.

Finally, para. 3 contains an interpretative rule of judicial decisions. These must be understood in the light of the set of elements they contain and in accordance with the principle of good faith. This provision corresponds to the sole paragraph of Art. 323,[14] which refers to the claim. The correlation between the claim and the judgment is undeniable. As has already been stated, the former is a 'rough draft' of the latter, when the claim is held to be valid.

This new rule does not mean that the right to be heard can be disrespected and that a judge may grant that which was not requested. Instead, it is a matter of understanding, for example, that a decision that terminates an agreement also involves a deciding that one must return to the *status quo ante*.

To conclude, we can say that according to the NCPC, the decision is held to be *unsubstantiated* if the substantiation of a judicial decision does not comply with the minimum parameters of quality. One hopes that, once the NCPC is in effect, this provision will be taken seriously and not be rendered banal. Adherence to the rules contained in the Bill will certainly be able to generate improved judicial relief. It may even be that the number of reversed decisions, as well as the number of appeals, will decline.

Not all decisions need be substantiated in accordance with *all* the rules contained in Art. 499. The degree of complexity of the disputes that must be settled by the Judicial Branch varies greatly. It is, therefore, up to the parties to show the judge

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[14] Article 323: 'The claim must be valid; however, the following are included in the principal: statutory interest, price index adjustment (adjustment for inflation) and costs of loss of suit, including the respective counsel's fees.

§ 1. The interpretation of the claim will take into account all the elements of the action and observe the principle of good faith.'

that there is conflicting case law for the situation under analysis, that it is a complex case, and that there is more than one way of settling it (one being the correct way and the others must be dismissed...) *etc.* and that, therefore, judgment must be rendered in accordance with the quality parameters determined by Art. 499, which can be pointed out by the parties.

At this point, it is pertinent to recall another principle mentioned in the NCPC and which is not always readily understood. It is the *principle of cooperation.* An excellent example is: the parties must cooperate[15] so that a judge may render a decision without defects, which is desirable for the case, for the good of all concerned, and for the Judiciary itself.

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Information about the author

Teresa Arruda Alvim Wambier (Curitiba, Brasil) – Full Associate Professor at the Faculty of Law of the Pontifical Catholic University of São Paulo (30 Rua Hildebrando Cordeiro – Ecoville, Curitiba, 80740-350, Brasil; e-mail: teresawambier@wambier.com.br).

[15] Article 6 of the NCPC: 'All those involved in the case must cooperate with each other in order to achieve, in a reasonable period of time, a just and effective decision on the merits.'

SMALL CLAIM AND SUMMARY PROCEDURE IN CHINA

YULIN FU,

Peking University
(Beijing, China)

In Mainland China, summary procedure is procedure applied at the first instance by basic-level courts and their detached tribunals. As simplified formal procedure, summary procedure can be classified into three types: 1) general / mandatory summary procedure, which is applied to cases with clear facts, unambiguous rights and obligations and minor disputes; 2) consensus procedure, which is applied to cases other than those to which mandatory summary procedure is applied, with the parties' agreement on the application; 3) special summary procedure, which is 'small claim procedure' applied to cases involving amounts lower than 30 percent of the previous year's average annual wages of workers in a given province and the judgment of the basic-level court or detached tribunal shall be final.

Keywords: civil procedure; small claim; small claim procedure; summary procedure; summary judgment.

1. Introduction

In Mainland China, there are two kinds of procedures at first instance trials. One is formal procedure (officially translated as 'ordinary procedure') and the other is summary procedure. Summary procedure is the simplified procedure which used in basic-level courts and their detached tribunals. The Civil Procedure Law [hereinafter CPL] of 2012 provides three types of summary procedures: 1) general / mandatory summary procedure, which is applied to cases with clear facts, unambiguous rights and obligations, and minor disputes; 2) consensus procedure, which is applied to cases other than those to which mandatory summary procedure is applicable, with the parties' agreement on the application; 3) special summary procedure, which is 'small claim procedure' applied to cases with amounts lower than 30 percent of

the previous year's average annual wages of workers in a given province and the judgment of the basic-level court or detached tribunal shall be final.

The connection between small claim procedure, summary procedure and formal procedure is described as 'Matryoshka doll.' This metaphor makes lots of sense. Formal procedure is standard first instance procedure, while summary procedure simplifies some of its elements, such as composition of judicial tribunal, approaches of service, time limit of the trial, *etc.* The judgment entered with summary procedure can be appealed; but the judgments rendered in small claims are not allowed to be challenged by appeal. As a special summary procedure, small claims shall follow not only the rules of summary procedure, but also its own special rules. The amount of a small claim shall be lower than 30 percent of the previous year's average annual wages of workers in a given province, autonomous region or municipality directly under the Central Government (Art. 162); and the judgment of the basic court or detached tribunal shall be final, which means small claim procedure simplifies the appeal right through summary procedure. By simplifying the elements of procedure layer by layer, from formal procedure into summary procedure and further still into small claim procedure, there is a distribution of cases. This is the fundamental logic of the mechanism for the distribution of cases in distribution Mainland China.

Compared with the vague difference between summary procedure and formal procedure, small claim procedure is more revolutionary or constructively significant to the legislation in that it develops a brand new procedure for the trial level system and strikes the universal system of 'the second instance being the final,' since 1954 when the Organic Law of the Courts of the People's Republic of China first provided for it. However, this view seems to be shallow. Among the elements to be decreased layer by layer, some are fixed, quantifiable and non-discretionary, such as sole-judge or panel, time limit of trial, the amount of dispute, the right of appeal, *etc.*; while others are flexible, unquantifiable and discretionary, such as the conditions of application as mentioned above. Hence, the latter elements act as keys or channels to break through the boundaries between small claim procedure, summary procedure and formal procedure. For instance, since the conditions for the application of summary procedure, defined as 'clear facts, unambiguous rights and obligations and minor disputes,' are so flexible, the case can be legally transferred from the scope of summary procedure to that of formal procedure if the applicability is found to be actually unclear and ambiguous at some stage of the proceedings. So, even though there is a clear limit on the amount of the dispute, it is possible that small claim procedure will not be applied to the case for not complying with the conditions of 'clear facts, unambiguous rights and obligations and minor disputes' which are the basic requirements for applying the summary procedure; therefore the proceeding shall be transferred to the sphere of formal procedure and is no longer covered by the 'system of one trial being the final one.' In brief, cases involving small claims but that are difficult or complicated still have the chance to appeal by way of

a procedural shift. Moreover, there is the frequently applied procedure of 'judicature supervision' in Mainland China which may challenge all types of effective judgments, regardless of the type of procedure applied, if the errors committed fall under Art. 200 of the CPL of 2012. Thus, the three different procedures have no impact on the application of the supervision procedure.

By making some comparisons between summary procedure and small claim procedure, and analyzing values and elements of small claim procedure in different countries, this article will discuss the role that small claim procedure is expected to take in the distribution of cases, which is neither embodied in the statutes nor realized in practice, against the background of Chinese style civil procedure. Consideration must be given to the distribution of cases and convenience of litigation in order to utilize and integrate the existing systematic resources in the specific context of China, and to establish a system with multiple elements and clear layers, explicit classification and different values. That is the unique mold of Chinese mediation and shortcut procedure.[1]

2. The Scope of Summary and Small Claim Procedure

Summary procedure may be applied in basic-level courts and their detached tribunals, but not in intermediate or higher courts. It can be applied to cases in first instance proceedings, but not second instance or retrial proceedings. CPL and judicial interpretations[2] of the Supreme Court provide different conditions for the application of mandatory summary procedure, consensus summary procedure and small claim procedure. The details follow below.

2.1. Mandatory Summary Procedure

Article 157 of the CPL provides the scope of the application of summary procedure as follows: basic-level courts and detached tribunals shall apply summary procedure to try civil cases 'with clear facts, unambiguous rights and obligations, and involving minor disputes.'

Under Art. 168 of Several Provisions of the Supreme Court on the Application of CPL[3] (Opinion of the Supreme Court in 1992), 'clear facts' means parties have

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1 Yulin Fu, *Small Claims and Short-Cut Procedure*, 5(3) Tsinghua Law Journal 46, 47 (2011)

2 *See, e.g., The Several Provisions of the Supreme People's Court on the Application of Summary Procedures in the Trial of Civil Cases* (adopted at the 1280th meeting of the Adjudication Committee of the Supreme People's Court on July 4, 2003), Public Announcement No. 15 [2003] of the Supreme People's Court, available at <http://en.pkulaw.cn/display.aspx?cgid=49521&lib=law> (accessed Jan. 29, 2015).

3 *Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China* (discussed and adopted at the 528th meeting of the Judicial Committee of the Supreme People's Court, and promulgated by Judicial Interpretation No. 22 [1992] of the Supreme People's Court on July 14, 1992), available at <http://www.cietac.org/index/references/Laws/47607cb9b0f4987f001.cms> (accessed Jan. 29, 2015).

unanimously stated the facts in question and provided reliable evidence so that there is little fact-finding work to be done by the court in order to reach a decision. 'Unambiguous rights and obligations' means that, in the legal relationship of the parties to the dispute, the rights and obligations of the respective parties are clearly defined. 'Minor dispute' means that parties to the claim have no severe disagreement regarding core issues such as facts, right or wrong, and liability. Summary procedure must be applied to such cases, waiving the need for the consensus or application of the parties, or any other special procedure such as a report; therefore, this kind of summary procedure is called mandatory or legal summary procedure. In fact, with vague and flexible conditions, the application of mandatory summary procedure is mainly up to the discretion of the judge in specific cases. In this sense, mandatory summary procedure is actually (judicially) discretionary summary procedure.

2.2. Consensus Summary Procedure

Article 157 of the CPL provides the scope of consensus summary procedure: where a basic court and its detached tribunals try civil cases other than those in the preceding paragraph, and where the parties may agree on the application of summary procedure.

This is a new provision included in the amendment of CPL 2012. The CPL of 1991 only provided for mandatory summary procedure, but the application, choice of procedure and procedure shift were totally up to the discretion of the judge(s). In practice, summary procedure was largely abused due to the pressure of caseload which was rising at an amazing speed. On the other hand, some cases that did not qualify for the application of summary procedure, especially those involving large claims, were tried with the formal procedure although the parties to those case were willing to have a simplified and quick procedure. In view of these considerations, some courts made changes of their own accord by applying short-cut procedure to such cases when there were consensus of parties, achieving significant results. Said reforms were confirmed in the Several Provisions of the Supreme Court on the Application of Summary Procedures in the Trial of Civil Cases by the Supreme Court in 2003[4] [hereinafter Judicial Interpretation 2003]. Under the Art. 2, basic-level courts could apply summary procedure to the cases which should apply the formal procedure but in which parties agree on the application of summary proceedings. Then, amendment of CPL 2012 directly provides a consensus summary procedure in order to partly shift the right to procedural selection from the courts to the parties. Thus, the rule of autonomy of will is demonstrated, the balance between efficiency and due process is achieved so that the inflexibility of mandatory summary procedure is eased.

[4] *Supra* n. 2.

2.3. Special Summary Procedure – Small Claim Procedure

Special summary proceedings, or small claim procedure, is provided in Art. 162:

> Where a basic court or its detached tribunal tries a simple civil case as described in Paragraph 1 of Article 157 of this Law, if the amount of the subject matter is lower than 30 percent of the previous year's average annual wages of workers in a province, autonomous region or municipality directly under the Central Government, the adjudication of the basic court or detached tribunal shall be final.

That is to say, only if a case meets both of the general application conditions of mandatory summary procedure, namely 'clear facts, unambiguous rights and obligations and minor disputes,' and the special application conditions of the small claim procedure, *i.e.* a dispute amount lower than 30 percent of average annual wages. From this point of view, small claim procedure in China is not an independent or separate procedure, but special summary procedure dealt with by summary procedure.

It should be noted that the fact that the value which determines whether the case will be handled as a small claim is a contingent value (percentage), and not a fixed value, represents significant progress in legislative techniques. This contributes, as a good example or reference, to other legislations. China has a vast territory, with great economic inequalities between cities and provinces. In the CPL amendment process, the draft makers first determined that the amount be lower than 5,000 RMB and then increased it to 10,000 RMB. However, both of them were fixed amounts, which would not take into consideration either the economic differences or the recurring inflation in China. Finally, in accordance with the findings of the research and comparative investigations conducted, Art. 162 established that the amount be below 30 percent of the previous year's average annual wages of workers in a given province, autonomous region or municipality directly under the Central Government. It is more suited to China's reality.

2.4. The Exclusions of Application of Summary Procedure

In order to regulate its proper application, the Supreme Court established clear situations excluding the applicability of summary procedure in the Judicial Interpretation 2003, which is still effective even after the amendment of CPL 2012. The exclusive conditions are as follows: 1) when the whereabouts of the defendant are unknown (if the plaintiff provides the accurate address for the service of notice on the defendant, but the court cannot directly serve the notice of response to action or leave the notice with the defendant) summary procedures shall be replaced by formal procedures; 2) when the case is remanded for retrial; 3) when there is a large number of people as a party or parties to a joinder; 4) when there are special procedures, procedures for trial supervision, procedures for supervising and urging the clearance

of debt, procedures of public summons for exhortation, or procedures of bankruptcy and liquidation of a business corporation shall be applied as provided for by law; 5) when the court deems it inappropriate to apply summary procedure in a trial.

3. The '*Simplification*' of Summary Procedure and the Safeguards of Fundamental Procedural Rights

Summary procedure is a measure used to develop a mechanism of case distribution, to implement a doctrine of cost-benefit balance, and realize access to justice in basic-level courts. By simplifying or omitting some steps and elements from the formal procedure, summary procedure attempts to work in a simple and convenient manner at first instance courts so that the process is easier and less costly, and the courts can therefore admit more cases, while the limited judicial resources are better used to settle the hard and complicated matters. However, simplification only cuts down on some of the procedural elements, while safeguarding fundamental procedural rights in order to preserve the fundamental rights of parties and the public credibility of courts. So there must be a balance between the 'simplification' (of the process) and 'fundamental' (of the rights).

3.1. The 'Simplification' of Summary Procedure

The basic characteristics of summary procedure are simplicity, convenience, and flexibility. Under CPL and the Judicial Interpretation 2003, the differences between formal procedure and summary procedure, *i.e.* the 'simplification,' are as follows:

1. Simple and convenient at the stage of docketing (referred to as Instituting and Accepting an Action). The plaintiff may institute an action verbally (Art. 158). When the plaintiff files a complaint orally, the court shall accurately record the parties' personal information, contact information, claims, facts and grounds, and register the relevant evidence provided by the plaintiff. The court shall read out the aforesaid records and registration in the presence of the plaintiff, who shall sign on the materials if he or she thinks there is no mistake. The filing of the action is then complete.

2. Flexible forms of service of notice / subpoena. A basic court and its detached tribunals may use simple ways to notify / summon the parties and witnesses (Art. 159). After the plaintiff files the suit, the court may serve notice on the parties and the witnesses by either a summons or other written forms, or any simple and convenient methods such as oral massage, telephone, fax, and email, *etc.*; and the notice may be issued at any time.

3. Sole judge system. Under Art. 160, a case in which summary procedure is applied shall be tried by a sole judge. However, the court records must be taken by a court clerk and the trial judge is forbidden to act as the clerk.

4. Brief pretrial preparations. Both sides may appear at the same time before a basic court or its detached tribunal for the resolution of a dispute, which shall be tried

immediately or scheduled for another day. If the parties request permission to produce evidence at the hearing, such request shall be granted and will not be subject to the regulations governing the exchange of evidence. There is no requirement of written notice and public announcement 3 days prior to the hearing; but the claims of the plaintiff must be delivered to the defendant in advance either verbally or in writing.

5. Simplification of the hearing. When both parties are present in court, if the defendant agrees to oral pleadings, the court may start hearing immediately. When the defendant requires written pleadings, the court shall serve notice on both parties about the time limit for the submission of pleadings and the specific dates of the hearing, with an explanation of the legal consequences in case of failure to produce evidence within the time limit or to attend at the hearing; in addition, the parties shall sign (by means of a signature or fingerprint) the records and receipt of service of the summons. The hearing is not subject to the rules applied to formal procedure, provided it is public and fair, allowing the parties to produce evidence and be heard in adversarial proceedings. In principle, the case shall be concluded after one hearing, unless it is necessary to hold an additional hearing, and the judgment shall be entered and declared at end of the hearing.

6. Shorter trail deadlines. Under CPL, a court shall dispose of a case under summary procedure within 3 months of the case being docketed, with no extension (Art. 161). Where a court discovers, during the trial, that a case is too complicated to apply summary procedure, it shall rule to transfer the case to formal procedure (Art. 163), under which a case shall be disposed of in 6 months. However, such a ruling shall be entered before the expiration of the trial deadline, and the parties shall be notified in written form.

7. Simplification of adjudicatory documents. The court may appropriately simplify the fact finding, reasoning of the judgment, or any other adjudicatory documents related to summary procedure cases in any of the following situations: 1) the parties reach a mediation agreement and file a motion for entry of consent judgment; 2) a party, during the legal proceeding, expressly admits all or some of the claims of the opposing party; 3) the parties have little or no dispute over the facts of the case; 4) where the case involves personal privacy or business secrets, one party requests the simplification of the relevant contents in the adjudicatory documents and the court deems the grounds are justified; 5) both parties agree to simplify the adjudicatory documents.

8. Emphasis on mediation. With respect to the following civil cases, the court shall first conduct mediation before starting the hearing: 1) disputes related to marriage, family and inheritance; 2) disputes over labor contracts; 3) disputes over damages resulting from traffic or work accidents where the rights and obligations are relatively clear; 4) disputes over home sites and adjacent relationship; 5) disputes over partnership agreements; 6) disputes involving relatively small amounts. However, there are some exceptions to the above mediation where the case cannot or need not be mediated because of its nature and the actual situation of the parties. This provision creates a system which is called antecedent mediation

or mandatory mediation in China. This is the very beginning of a modern system based on categorization with diverse proceedings, in which some procedure takes into consideration the nature of cases, *e.g.*, marriage and domestic disputes and succession disputes, disputes over home sites and adjacent relationship, and disputes over partnership agreements; and some others emphasize the values orientation of small claims procedure in modern time, *e.g.*, damage compensation.

3.2. Safeguards of Fundamental Procedural Rights in Summary Procedure

There are numerous simplified steps in summary procedure. However, the necessary safeguards of fundamental procedural rights are provided under the Judicial Interpretation 2003.

1. The conditioned right of procedure selection of parties. Where a party raises objection against the application of summary procedures and the court upholds the objection, summary procedure shall be replaced by formal procedure. Where both parties to the case which should have legally applied formal procedure choose to apply summary procedure on their own accord, the basic-level court may do so; but the court may not transfer such a case from formal procedure to summary procedure against the parties' free will.

2. Guarantee of minimum due process, the parties' right to be notified. As a basic aspect of due process, notice of litigation and hearing may be delivered by oral message, telephone, fax, or e-mail, *etc.*; but by whatever the means of notice, the court cannot use the mere service of notice as grounds to enter a default judgment or dispose of the case as a withdrawal (dismissal) unless the delivery of the notice has been confirmed or there is sufficient evidence to prove that the parties received the notice.

3. Emphasis on the judge's duty of clarification to the parties who have no legal counsel at the trial. The judge shall give the necessary explanation and description of the relevant contents of disqualification, confession, burden of proof, *etc.*, and shall, during the hearing, direct that party to correctly exercise procedural rights, perform obligations, and conduct proper litigation activities. This effort aims to balance the converse want of specialization and popularization and to ease the conflict between procedural safeguard and efficiency.

4. Reservation of the right of appeal. Judgments entered under summary procedure, except small claim procedure, can be reviewed by appeal. However, considering the context of judicial practice and legal culture in China, especially the fact that summary procedure has been the main choice of first instance, the reservation of the right of appeal is necessary to guarantee due process, justice and legitimacy.

5. Improvement to the records of significant matters. A court clerk shall record all the activities in the trial under summary procedure, as well as the following matters in detail: 1) important matters such as the judge informing the parties about their procedural rights and obligations, summarizing the issues of the dispute, affirming evidence, and declaring the judgment and order, *etc.*; 2) important matters such

as the a party's application for disqualification / avoidance, confession, withdrawal of action, settlement, *etc.*; 3) other statements made by the parties in the hearing which are directly related to the parties' litigation rights.

3.3. The 'Specialty' in Small Claim Procedure and the Relief to It

Under Art. 162 of the CPL, small claim procedure is an independent procedure that parallels formal procedure and summary procedure; it is special procedure within summary procedure. Therefore, small claim procedure shares the general rules of summary procedure, with the 'simplification' and 'safeguard' of summary procedure, while the only 'special' thing is that the parties under small claim procedure are not entitled to appeal against the judgment entered by the basic court or detached tribunal, meaning the judgment of first instance shall be final.

However, the limitation applies only to the right of appeal, not to the retrial by way of 'trial supervision' (retrial or reopening proceedings) or other forms of relief. From a comparative perspective, even though the legislation may provide differently for each procedure, there are alternative forms of relief for small claims, such as appeals to higher courts or requests for retrial / appeal to ordinary / formal tribunal in the same court. In China, 'trial supervision,' as a form of relief for serious errors, which is more difficult to move than an appeal, is an appropriate way to remedy small claim judgments.

There is no rule providing whether small claim procedure could be transferred to formal procedure or not. However, since the application of small claim procedure not only meets the general requirements of summary procedure but also the special condition of the amount of a small claim, there must be some cases in which the amount complies with the condition but other aspects do not fit into the general requirements of summary proceeding, such as a case involving a serious dispute. In this case, one could not even apply summary procedure, much less small claim procedure. In such a situation, Art. 163 of CPL should be applied:

> A court which, during the trial of a case, discovers that the application of summary procedure is not appropriate for the case shall issue a ruling to transfer the case to formal procedure.

Then, by being transferred to formal procedure, the case with small claim but complicated issues shall get a judgment that can be challenged by appeal to a higher court.

4. The Value Orientation of Small Claim Procedure and Searching for Mechanism of Split / Distribution of Cases

In China, small claim procedure is considered as an effective way of handling a large number of cases and alleviating the caseload. The point of view was criticized

due to a misunderstanding of the function and value of the small claims system.[5] Nonetheless, with the aggravation of the caseload problem and mechanism of case distribution still faltering, small claim procedure became a hot topic again during the drafting of the new version of the CPL 2012. From the very beginning, fierce debate over Chinese small claims procedure has resulted in an overwhelming number of motions, values, goals and functions.

4.1. The Core Value of Small Claim Procedure is Not the Distribution of Cases

In the amendment of the CPL of 2012, the drafters from the Law Committee of the National People's Congress of the People's Republic of China clearly stated that the value or goal of small claims procedure is not to distribute the caseload, but to rectify the defects of formal procedure with regard to access to justice. Its intended purpose is to serve 'users' of the system (parties), not 'runners' of the system (courts). Yet, in practice, its multiple goals lead the system to fail to give due consideration to a diversity of functions, finally finding itself in a quandary.

In a comparative context, the value orientations of small claim procedure in different countries are relatively unanimous even though there are some differences with regard to amount, agency, requisite documents, time and / or venue. In addition, they also share some features and elements, including: high professionalism as background, access to justice as a goal, limited case types, obvious tendency of mediation, informal process, special relief by objection or retrial, optional rights, encourage *pro se* representation with adequate assistance of the courts, enough information provision, fundamental procedural safeguards, *etc*. With all of these characters or limits, small claim procedure cannot be an important way to split cases used by the courts. In view of these characteristics and limitations, small claims procedure cannot be deemed to be an important mechanism for the distribution of cases among the courts.[6]

Small claim procedures can be split into two types: voluntary and mandatory. The former is typical of that used by a justice of the peace or a magistrate's court in a common law system, which is independent and separate from ordinary courts. There are two different points of view: on the one hand, an oral trial ensures great convenience and speed albeit with high risk and some difficulty to review the decision; on the other hand, formal procedure and retrial requiring records and written documents, would imply greater complexity, delay, professionalism (accuracy and standard) and dependence on lawyers. Therefore, voluntary small claim procedure does not try to combine convenience and security in the same

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[5] Fan Yu, *Studies on the Legal Procedure of Small Claims*, 3 Social Sciences in China 141, 141–53 (2001).

[6] Civil Justice in Crisis: Comparative Perspectives of Civil Procedure (Adrian A.S. Zuckerman, ed.) (Oxford University Press, 2005); Bruce Zucker & Monica Herr, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F.L. Rev. 315, 317 (2003), available at <http://lawblog.usfca.edu/lawreview/wp-content/uploads/2014/09/A223.pdf> (accessed Jan. 29, 2015).

procedure. On the contrary, the system establishes two different types of procedure, small claims procedure and formal procedure, giving the parties the right to select one in advance. In fact, relief to small claim procedure is *ex post facto* in that appeal, in this context, is retrial brought by parties to the formal procedure. One reason for the party to choose small claims procedure and waive greater procedural guarantees is that formal procedure is much more costly and takes a long time, having the mandatory representation of a lawyer and a complex process. Meanwhile, the technique to restrain the abuse of small claims procedure to settle claims involving huge amounts (by splitting a large amount into several small ones) is the strict rule of estoppel, standard object of action and mandatory joinder of claims.[7]

Compared with a common law system, in the civil law system, which lacks the magistrate's court's obvious separation from formal procedure, there is no mechanism prompting parties to choose accordingly. Hence, small claims procedure is provided in statutes and applied in a mandatory way or under judicial discretion. Since there is no legitimacy without the parties' right to select procedure, given that it restrains important rights such as appeal, there is some risk of violating the constitution. Therefore, for one thing, small claim procedure has to be limited to a very small amount of claims, and for another, there must be flexible discretion (such as in Germany and Japan) and some means of transferring cases between small claim procedure and formal procedure has to be reserved (such as in Japan). Furthermore, the civil law system still offers some flexibility regarding the restriction imposed on the appeal and retrial. For instance, there is relief by objection in Japan; in Germany, there are permissive appeals on significant legal issues and special complaints made to constitutional courts; and in France, the right of appeal is generally afforded except for special cases and even when there is no right to appeal for small claim procedure, the parties still have the opportunity to revoke the judgment in the Cassation (Supreme) Court on the grounds of violation of the constitution. The elements used to control all the relief channels, so that they are not abused by parties, still bear a high cost in formal procedure in the context of highly professionalized justice, and meanwhile judicial discretion must be relied on. Judicial discretion, in turn, depends on the appointment of judges and on the review of the constitutionality of the procedure.

By contrast, in China, it is neither necessary nor feasible to develop a small claim procedure. As to the background of system, there is no 'formal' procedure with a strict doctrine of disposition (*jus disponendi*), antagonistic or adversary proceedings which heavily relies on a lawyer for its formal, professional, time-consuming and expensive application. On the contrary, the whole procedure system is simple, informal, nonprofessional, and relatively speedy, cheap and convenient. It was

[7] Stephen N. Subrin et al., Civil Procedure: Doctrine, Practice and Context (translation into Chinese) (Yulin Fu et al., trans.) (China University of Political Science and Law Press 2003).

constructed on the basis of traditional minor disputes, and judicial mediation is conducted by the same judge who enters the judgment. Hence, it will be unattractive for the parties to utilize a small claim procedure in common law style. Nonetheless, it will be more difficult to set forth the mandatory small claim procedure like in Germany and Japan. This is because the advantages of mediation and *pro se* representation in small claim procedure are already contained in Chinese ordinary / formal procedure, in which mediation and trial are found in the same procedure and there is no compulsory representation even in the Supreme Court. Furthermore, the cancellation of the right of appeal in small claims will give rise to more problems against the background of a petition system and political policy of social harmony, especially with so little confidence in the courts.

4.2. Summary and Short-Cut Procedure Aiming for the Distribution of Cases

Since distribution of cases is not the common goal of small claim procedures in all systems, and the distribution effect is quite different due to the differences in its basic structure and scope of application, the development of mandatory small claim procedure is of greater political significance than of practical value. Actually, the distribution of cases in a civil law system is achieved by means of diverse short-cut procedures which generate their respective advantages. Take Germany as an example, the primary means of prevention and distribution of cases is a well-developed non-contentious system and procedures for supervising and promoting the clearance of debt. The latter dealt with more than 7,000,000 cases of which 90 percent are no longer in litigation. So, actually, there are fewer than 3,000,000 cases which have to be settled at first instance; in contrast, small claim procedure is too insignificant to contribute to the distribution of cases. In Japan, mediation and non-contentious procedure are very important in the distribution of cases.

Even in the common law countries where small claim procedure plays an important role, there are still other important paths to distribute cases from formal trial, such as summary judgment, pretrial settlement and mediation with lawyers, fast track with restrictive steps and multi-track (in UK) and multi-door (in US) with comprehensive case management. In the US, by promoting a policy of pretrial settlement and sanction rules by cost shoulder, about 95 percent cases could be dealt at pretrial stage with no need to proceed with an expensive trial. In the UK, courts provide three mechanisms for the parties to select: traditional small claim procedure, short-cut procedure with simplified steps according to a timetable, and multi-track combined with diverse forms of case management. Then, in 2009, nearly 50 percent of 316,000 cases were settled or withdrawn before being distributed, 93,000 went to small claim procedure, 61,000 to fast track, and 25,000 to multi-track proceedings.[8]

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[8] Civil Judicial Reform in the UK 344–61 (Qi Shujie, ed.) (Peking University Press 2004).

Civil procedure in Mainland China has severe defects due to the simple structure and the unitary type. Before the 1980s, when the reform and opening-up policy started, traditional civil cases were the majority, and court mediation and a judge's control in fact investigations were the main characteristics of civil procedure, which worked just like small claim procedure. Nevertheless, this type of procedure was obviously unfit for judicial practice as there was an increasing number of commercial cases, which were characterized by professional, complicated, contentious and speedy claims involving large sums. Then, in an initial reaction to the new situation, some types of commercial cases were separated, as an exception or special issue, from the ordinary (traditional) proceedings, and dealt with by separate maritime courts, intellectual property divisions, and security tribunals to which relatively more specialized judges were appointed.

Then, as the number of commercial cases further increased dramatically and become the prevailing concern of the courts, especially because the problems that arose in commercial cases were new, difficult and complicated, the whole civil procedure started a single-track reform to adjust to the market regime. This resulted in the whole procedure becoming adversarial, formal, professional, and costly which is not suitable for small claims and traditional cases. The consequence of the above reform led to the criticism of the modern procedure doctrine and to the counter reform around the turn of the 21st century.

Obviously, such uniform procedure patterns cannot satisfy diverse practice, no matter which direction the reform maintains or turns to, because while it fits one type of case it is not suitable for the others. Therefore, the only solution is the classification of procedures, designing a diversity of procedural patterns to undertake different value and realize different goals. Commercial cases should apply commercial proceedings, family cases should go to family proceedings, small claims to small claim track and non-contentious cases apply non-contentious procedure.[9] In the judicial reform and procedure design, the status of small or traditional cases are equally important with specialized or commercial cases as diverse requests from society, and the government has to provide different but suitable services to the 'markets.' According to this concept, the reason why small claim procedure does not need to be standard, formal or professional is that, for the parties, the benefits are not comparable to their costs. For the judicial system, reasonable design of diverse procedure shall lead people to be rational in selecting judicial products. However, if the parties are willing to access formal justice despite the cost and other disadvantages, then it does not make sense to forbid them to apply formal procedure and provide no relief simply because the value of the claim is small. This is definitely not the essence of small claim procedure in western countries; and it does not match the reality of China either.

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[9] Subrin, *supr*a n. 7.

To solve the evident problems in the types and shift of procedures, reform should focus on the classification of procedures, specifically as follows: 1) to expand the scope of non-contentious proceedings which apply the system 'the first instance also being the last;' 2) to separate family proceedings from ordinary procedure; 3) to remove the tie of solo-judge trial and summary proceeding so as to create formal procedure with solo-judge, designing procedure in the light of case characteristics, not trial organization, and controlling the flexibility and randomness of procedural steps; 4) to improve short-cut proceedings for commercial cases, including cases involving large sums. Short-cut procedure for commercial cases is different from small claim procedure in demand of convenience and efficiency, value orientation and problems met in the trial; it may take great advantages in distribution of cases and further improve formal procedure with autonomous features.

Short-cut procedure for commercial cases can be designed in diverse ways. It can, for instance, be developed to improve the existing order of payment, to explore arbitral commercial trial, and to normalize the mechanism of 'mediation & short-cut judgment' with Chinese characteristics. If the current small claim procedure is considered to be legal short-cut procedure to achieve the goal of convenience, then commercial cases which involve amounts over the legal small claim limit may be allowed to waive the right of appeal by consensus of parties. The point is that the agreement to waive the right of appeal is binding on the parties, just like arbitration clause excluding the right of litigation. If there is no consensus, appeals should be allowed. Of course, short-cuts attract the parties to select partly rely on some encouraging rules, such as court fees and compensation of attorney fees. The manner of the parties' consensus may be flexible, either by some provisions as in arbitration, or by showing clear intention in filing forms or pleadings. As in the latter case, the parties shall have all the details about short-cut procedure clarified and completely understand the relevant legal consequences. Under consensual short-cut procedure, if the parties cannot reach a settlement in the legal time limit and do not apply for further mediation in written form, the case should be transferred to formal procedure at the expiry of the mediation time. The case shall be disposed of according to formal procedure and the plaintiff should be charged court fees under the rules of litigation expenses.

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Information about the author

Yulin Fu (Beijing, China) – Professor of Peking University Law School (316 Chen Ming Building of Peking University Law School, Haidian District, Beijing, 100871, China; e-mail: fuyulin65@126.com).

DO WE STILL NEED A CONVENTION IN THE FIELD OF HARMONISATION OF THE INTERNATIONAL COMMERCIAL LAW?

ANZHELA KORZHEVSKAYA,

FESCO Transportation Group
(Moscow, Russia)

The paper critically discusses the opinion of certain scholars that the use of multilateral treaties (conventions) in the field of harmonisation of international commercial law has been in a state of steady decline. They believe that traditional treaty law has been gradually replaced in recent years by softer methods of making international law, such as the use of restatements and model laws. Some scholars even claim that treaty law is dead or dying. The work assesses whether this view has reasonable grounds, providing an overview of the most prominent hard law and soft law harmonising instruments and outlining issues relating to the success of conventions, their advantages, drawbacks and tensions arising in this area. The paper suggests that conventions remain necessary where the third party or public interest are at stake, however, further improvements are needed to make conventions more successful instruments in international commercial law.

Keywords: conventions; harmonisation of international commercial law; soft law; hard law; multilateral treaties; model laws; formulating agencies.

1. Introduction

In the initial stages of the harmonisation of international commercial law, treaties or conventions representing hard law methods of harmonisation were the primary instruments. However, along with diversification in business and commercial transactions, many soft law instruments like model laws, restatements and codified customs and usages have been developed by formulating agencies for the benefit of businesses. Although until recently there have been a number of success stories and failures in both the areas of hard law and soft law, certain scholars and critics argue that the use of conventions in the area of harmonisation of international commercial law has been in a state of steady decline, with traditional treaty law

gradually being replaced in recent years by softer methods of making international law. In order to assess whether the above view has reasonable and sufficient grounds, this essay will review general issues of harmonisation and how it can be achieved through particular instruments. The tendency to adopt and use conventions and soft law instruments will be addressed by focusing on particular examples of the most prominent instruments recognized worldwide. The paper will study the views of academics and scholars on the development of treaty law, the success of conventions, along with tensions arising from harmonisation. An overview of improvements needed to perfect conventions will finalise the work, supporting the idea that treaty law is unlikely to be solely replaced by softer methods of law-making, but rather should be improved in accordance with recent business trends and evolving international commercial law.

2. Harmonisation of International Commercial Law: Aims, Instruments, Formulating Agencies

2.1. Notion of Harmonisation

The term 'harmonisation' is often used interchangeably with unification, though they have slightly different meanings. While 'unification contemplates the replacement of multiple and different rules with a single uniform rule, harmonisation contemplates the move to greater similarity, but not necessarily to unity or identity.'[1] At the international level, the necessity to unify rules primarily relates to international transactions between persons having their place of business in different states.[2] The unification of commercial law is considered a factor in reducing the costs of doing business as it enhances the predictability and legal certainty for the parties of a cross-border transaction.[3]

A number of prominent scholars, including C. Schmitthoff, R. Goode, L. Mistelis, M. Bonell dedicate their researches and works to the harmonisation, a key factor in international commercial law.

2.2. General Characteristics, Approaches, Methods

Goode asserts that the 'particular characteristic of twentieth century harmonisation lies in its motivation, which is *to reduce the impact of national boundaries*.'[4] Goode

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[1] A. Claire Cutler, *Public Meets Private: The International Unification and Harmonisation of Private International Trade Law*, 13(1) Global Society 25, 35 (1999). doi:10.1080/13600829908443177

[2] Roy Goode, *Rule, Practice and Pragmatism in Transnational Commercial Law*, 54(3) Int'l & Comp. L.Q. 539, 554 (2005) [hereinafter Goode, *Rule*]. doi:10.1093/iclq/lei017

[3] Cutler, *supra* n. 1, at 37.

[4] Roy Goode, *Reflections on the Harmonisation of Commercial Law*, os-19(1) Unif. L. Rev. 54 (1991) [hereinafter Goode, *Reflections*]. doi:10.1093/ulr/os-19.1.54

also identified two separate and unique approaches: firstly, harmonisation of conflict-of-law rules, and secondly, representing the next, more ambitious step, the harmonisation of substantive law, aimed to harmonise the substantive law of contract in various jurisdictions, which are party to the same project.[5]

There are several methods by which harmonisation may be effected: multilateral conventions, a set of bilateral treaties, a model law, a codification of custom and usage and international trade terms promulgated by an international non-governmental organization, model contracts, or restatements by scholars and experts.[6]

Mistelis makes a collateral distinction of harmonisation purposes between hard law and soft law as follows: '*Hard law* consists of international conventions, national statutory law and regional or international customary law.'[7] Hardness of law may be explained by the fact that when parties choose a substantive law they must take the law as it is, without any modification, with the only possibility to change it set out within their contractual provisions.[8]

'*Soft law* consists of provisions embodied in model laws (but not incorporated in the national law), principles to be found in legal guides and in scholarly restatements of international commercial law,'[9] and contractual stipulations agreed by parties. These rules are not legally binding unless the parties to a commercial transaction decide otherwise.[10]

Therefore, harmonisation may be achieved through the hard law sources (multilateral agreements) or soft law sources, including model laws, contracts and contract guides, or general statements of principles.[11]

2.3. Successful Harmonising Instruments

Goode names several instruments that, in his view, may be considered 'continued and documented success stories'[12] in harmonising international commercial law. Among these instruments are: the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958), the *UN Convention on Contracts for the International Sale of Goods* (CISG or the Vienna Convention) (1980), the UNCITRAL

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5 Roy Goode et al., Transnational Commercial Law: Text, Cases and Materials 505–06 (Oxford University Press 2007) [hereinafter Goode, Transnational Commercial Law].

6 Goode, *Reflections*, *supra* n. 4, at 57.

7 Loukas Mistelis, *Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sorces of International Trade Law*, in Foundations and Perspectives of International Trade Law 1-036 (Ian Fletcher et al., eds.) (Sweet & Maxwell 2001).

8 *Id.*

9 *Id*. at 1-037.

10 *Id*.

11 Cutler, *supra* n. 1, at 36.

12 Goode, Transnational Commercial Law, *supra* n. 5, at 729.

Model Law on International Commercial Arbitration (1985), the *Cape Town Convention on International Interests in Mobile Equipment* (the *Cape Town Convention*) (2001), the *Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (2002), the UNIDROIT *Principles of International Commercial Contracts* (UPICC) (last revision 2010), the *INCOTERMS* (last revision 2010) and *Uniform Customs and Practice for Documentary Credits* (UCP) (last revision 2007).[13]

2.4. Formulating Agencies

The most prominent law-producing bodies in the area of international commercial law are the United Nations Commission on the International Trade Law [hereinafter UNCITRAL], the International Institute for the Unification of Private Law [hereinafter UNIDROIT], and the Hague Conference on Private International Law [hereinafter Hague Conference]. While the Hague Conference focuses on the forms of conflict-of-law conventions, UNIDROIT and UNCITRAL deal with a variety of instruments such as multilateral conventions, model laws, and international restatements of contract law.

Also, a number of non-governmental international organisations, being non-law-producing bodies, deal with unifying and harmonising commercial law using soft law methods. Among them are the International Chamber of Commerce (ICC) and the International Bar Association (IBA).

3. The Traditional Multilateral Treaties in the Field of Harmonisation of International Commercial Law: Examples of Successful and Unsuccessful Instruments

The treaty notion is defined in the *Vienna Convention on the Law of Treaties 1969* (Art. 2(1)(a)) as follows:

> An international agreement between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

Therefore, all forms of agreements within this definition, including international conventions, fall under the category of treaties. For the purposes of our analysis we will refer to the multilateral private commercial law conventions available for all states. The treaties become binding for the parties to these agreements after ratification or accession. The Hague Conference, UNIDROIT and UNCITRAL are responsible for promulgating the bulk of international conventions in the field of commercial law.

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[13] Goode, Transnational Commercial Law, *supra* n. 5, at 729.

Initially, bilateral and multilateral treaties or conventions were the primary harmonising instruments for resolving issues and facilitating trade between states in key areas of commercial trade. The following approaches were used: either ratifying States implemented conventions by adapting their domestic laws accordingly, or they used uniform laws created by conventions.[14] However, along with the diversification of business and commercial transactions many soft law instruments have been promulgated by formulating agencies for the needs of businesses.

3.1. What Does Determine the Success of the Conventions?

This is a question often raised by scholars and practitioners. An answer would help to identify the relative strength of a particular instrument so that formulating agencies could implement the best practice, and avoid possible tensions in future drafting of conventions and / or other harmonising instruments. Their success, according to Goode, is measured by the fact that harmonising instruments 'are not embroiled in constant or periodical divergences regarding their interpretation and application.'[15]

Kronke, in turn, emphasises that 'a large number of ratifications, a rapidly growing body of case law from many countries which succeeds in maintaining uniformity, no calls for revision enable us . . . to dub "advantageous" those Conventions that succeeded . . .'[16]

At the same time he notes that the number of ratifications of the convention and its important technical qualities might not be relevant if traders do not apply the convention to their transactions. Finally, he concludes by saying that a uniform law convention succeeds 'if it reduces costs and enhances benefits in a given area of transnational commercial transactions.'[17]

3.2. Success Stories Regarding the Conventions

3.2.1. The Vienna Convention (CISG)

Three major formulation agencies have spent the last two decades formulating and promulgating a number of international conventions in diverse sectors of commercial law. Among them 'the *Vienna Convention* probably represents the high water mark for comprehensive global unification. Since then, however, initiatives are increasingly fragmented, sectorally focused, and soft in application.'[18] The Vienna

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[14] Goode, Transnational Commercial Law, *supra* n. 5, at 194.

[15] *Id*. at 729.

[16] Herbert Kronke, *International Uniform Commercial Law Conventions: Advantages, Disadvantage, Criteria for Choice*, 5(1) Unif. L. Rev. 13, 15 (2000). doi:10.1093/ulr/5.1.13

[17] *Id.*

[18] Cutler, *supra* n. 1, at 43.

Convention [hereinafter CISG], operating in the area of commercial sales, came into force in 1988. As of today, 80 countries, including major trading nations like the USA, but excluding the UK, have adopted the CISG.[19] The most challenging factor in the CISG is that it has been successful in bringing together common law and civil law principles in one document.[20] 'It also has been tested in thousands of cases and arbitral hearings in many of the world's jurisdictions and it has been a subject of exhaustive academic commentary.'[21]

3.2.2. The Cape Town Convention

While the *CISG* was criticised for excluding from its regulation questions relating to property rights issues, the *Cape Town Convention*, promulgated by UNIDROIT with an extensive involvement and support of intergovernmental aviation organization ICAO, addressed 'the problem of taking and retaining rights *in rem* in assets such as aircraft objects'[22] and contains rules governing priority and the effects of insolvency. The Convention provides substantive rules that would displace any consistent domestic law.[23] This instrument is characterized as 'the most ambitious problem-solving convention to date without doubt.'[24] The Convention was adopted in 2001, entered into force in 2006 and as of 2014 has been ratified by 60 States, including the USA and the European Community. The Convention is unique in that it combines public law and private law provisions.[25] In addition, its structure is unusual as it contains supplemental protocols setting forth industry specific rules. The Convention does not enter into force until the contracting State ratifies the protocol. This novel technique is aimed at eliminating deadlocks in the negotiations and allows for a speedy conclusion to negotiations.[26] The Convention solved the problem of the 'lack of a legal system to support the purchase, sale and financing of an aircraft.'[27]

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19 *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, <https://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> (accessed Jan. 29, 2015).

20 Goode, Transnational Commercial Law, *supra* n. 5, at 309.

21 *Id.*; *see also CLOUT Abstracts*, at <http://www.uncitral.org/uncitral/en/case_law/abstracts.html> (accessed May 5, 2014).

22 Goode, *Rule*, *supra* n. 2, at 557.

23 Amelia H. Boss, *The Future of Uniform Commercial Code Process in an Increasingly International World*, 68 Ohio St. L.J. 349, 393 (2007), available at <http://papers.ssrn.com/abstract_id=978025> (accessed Jan. 29, 2015).

24 Goode, *Rule*, *supra* n. 2, at 557.

25 Goode, Transnational Commercial Law, *supra* n. 5, at 113.

26 Boss, *supra* n. 23, at 386.

27 *Id.* at 388.

3.3. Less Successful Stories

On a less optimistic note, it is worth saying that in many cases formulating agencies invested time, money and effort into projects that have never gotten off the ground.[28] For example, the *Convention on Independent Guarantees and Standby Letters of Credit*, produced by UNCITRAL in 1995 has been ratified by only eight States, none of which represents any major trade State. As the Convention, to some extent, follows *Uniform Rules for Demand Guarantee* (URDG), which is the ICC's soft law instrument, it is obvious that the parties will prefer to incorporate the URDG in the majority of cases.[29]

Similarly, the *Convention on Agency in the International Sale of Goods*, adopted by UNIDROIT in 1983, was considered as 'the ill-fated project on agency in the international sale of goods' due to its over-ambitious aims.[30] It has been ratified by only five of the ten required States to bring it into force.

4. Recent Developments of Softer Methods of Making International Law in the Field of Harmonisation of International Commercial Law

'The growing trend in the use of soft law sources and voluntary or non-binding arrangements, like UNIDROIT's recent *Principles of International Commercial Contracts* signals the increasing salience of the private ordering of commercial relations that grants maximum scope to merchant autonomy and flexibility.'[31] In the areas of commercial law, where the binding instruments were not essential, alternative ways of unification have become increasingly popular. They include, *inter alia*, model laws which States consider when drafting domestic legislation or general principles and 'which the judges, arbitrators and contracting parties they address are free to decide whether to use or not.'[32]

4.1. Restatements (PICC and PECL)

Two sets of Principles aimed at harmonising contract law were published in the 1990[s]. The first set of *Principles of International Commercial Contracts* [hereinafter PICC] was published by UNIDROIT in 1994 (and revised in 2004 and 2010) and was specifically tailored for international commercial transactions worldwide. The other

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28 Michael J. Bonell, An International Restatement of Contract Law 14 (3rd ed., Transnational Publishers 2005) [hereinafter Bonell, International Restatement].

29 Goode, Transnational Commercial Law, *supra* n. 5, at 356.

30 *Id*. at 230.

31 Cutler, *supra* n. 1, at 43.

32 A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law (United Nations 2013), available at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> (accessed Jan. 29, 2015).

set, the *Principles of European Contract Law* (PECL), was published and prepared in 1995 (with certain parts published in 2000 and 2005) for the member States of the European Union. It shares the same purposes as the PICC.[33]

The PICC represent the legislative codification of restatement of a law of international commercial contract, but do not have the force of law. They offer a set of rules produced by scholars, which cover all important areas of general contract law and appear to be 'a resource for those courts and arbitral tribunals who find them helpful – there have been numerous arbitral awards invoking them.'[34] 'Despite the fact that these Principles are nonbonding, they have gained worldwide recognition in academic circles and practice . . .'[35] They have been used as a model for law reform projects by many countries and are increasingly chosen by parties to govern their contracts (even if there is no express reference to them in the contract, as an expression of general principles of law, the *lex mercatoria*).[36] The PICC defer to internationally mandatory rules and also contain mandatory rules of their own.[37]

Professor J. Bonell, who headed up the work of international scholars on the PICC, says: 'It was both the merits and shortcomings of CISG which prompted UNIDROIT to embark upon a project as ambitious as the Principles.'[38] Though both CISG and the PICC in general address the same issues, the non-binding nature of the PICC allows them to address questions that are not covered by the CISG, such as authority of agents, fraud, third party rights, and others; making the PICC a more comprehensive instrument when compared to the CISG.[39]

Nevertheless, the PICC do not compete with the CISG and other harmonising instruments. The PICC are often applied as a gap-filler, to interpret and supplement uniform law instruments and specifically the CISG. These two instruments 'may actually fulfil very important functions side by side.'[40]

Bonel argues that '. . . the impact of the Principles may prove to be even greater than that of an international convention . . .'[41] At the same time he points out that '[l]ike any other soft law instrument in the field of contract law, they are binding within

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33 Ole Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?*, 8(1–2) Unif. Law Rev. 123 (2003). doi:10.1093/ulr/8.1-2.123

34 Goode, *Rule*, *supra* n. 2, at 553.

35 Michael J. Bonell, *Do We Need a Global Commercial Code?*, 106 Dick. L. Rev. 87, 99 (2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/bonell1.html> (accessed Jan. 29, 2015).

36 *Id.*

37 Goode, *Rule*, *supra* n. 2, at 553.

38 Bonell, International Restatement, *supra* n. 28, at 305.

39 *Id.* at 311, 313.

40 *Id.* at 314.

41 *Id.* at 25.

the limits of party autonomy.'[42] This fact causes discussions about the transformation of the PICC into a binding instrument.

4.2. Model Laws

'Treaties may result in unified law, but cross border harmonisation can occur in the absence of treaties when countries adopt as a part of their domestic law the same or similar legal principles. International model laws, for example, may serve as models for use in drafting domestic legislation.'[43] Model laws propose an option for regulating a certain type of transaction or a certain area of law. The model law, however, is a facultative harmonising instrument, which is not legally operative. As model laws do not require any ratification, states are free to accept them (wholly or in part), amend them, or even reject them. The description below illustrates two positive examples of recent development and promulgation of model laws in the areas of arbitration and insolvency.

4.2.1. Model Law on International Commercial Arbitration

The most successful instrument in international commercial law is the 1985 UNCITRAL *Model Law on International Commercial Arbitration*, amended in 2006, and adopted by a large number of jurisdictions. Though its scope is limited to international and commercial arbitration, this model law was used as a blueprint for modernizing laws governing both national and domestic legislation as well as commercial and non-commercial arbitration.[44] UNCITRAL published the *Digest of Case Law on the Model Law on International Commercial Arbitration*, a tool specifically designed to present selected information on the interpretation and application of the Model Law based on the large number of cases collected in the database CLOUT (Case Law UNCITRAL Texts), and also to further promote the adoption of this law.[45]

4.2.2. Model Law on Cross-Border Insolvency

Another positive example in the area of international commercial law is the *Model Law on Cross-Border Insolvency* adopted by UNCITRAL in 1997 with the purpose of presenting a set of internationally harmonised model legislative provisions on cross-border insolvency. The Law was prepared in collaboration with the International

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[42] Michael J. Bonell, *Symposium paper: the UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospectus for the Future*, 17 Australian International Law Journal 177, 181 (2010), available at <http://www.austlii.edu.au/au/journals/AUIntLawJl/2010/8.html> (accessed Jan. 29, 2015).

[43] Boss, *supra* n. 23, at 385.

[44] Goode, Transnational Commercial Law, *supra* n. 5, at 36.

[45] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration (United Nations 2012), available at <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> (accessed Jan. 29, 2015).

Association of Insolvency Practitioners as a reaction to the growing number of insolvency cases. The Law 'has steadily grown in influence'[46] and has been adopted by 20 countries, including major trade states like the USA and the UK.[47] 'It focuses on encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency laws and respects the differences among national procedural laws.'[48] In spite of the worldwide adoption, there has been some criticism with respect to certain aspects of the law, including, *inter alia*, enhanced uncertainty about creditor rights in a bankruptcy proceeding.[49]

In certain cases, model laws provide a basis for further conventions in a particular area. Thus, 'the UNCITRAL Convention on the use of Electronic communications in international contracts (E-Commerce Convention) is based in large part on two model laws previously drafted by UNCITRAL, namely, the *Model Law on Electronic Signatures* (2001) and the *Model Law on Electronic Commerce* (1996).'[50]

5. Scholars: Is the Treaty Dead?

'Why is that the treaty collections are littered with conventions that have never come into force for want of the required number of ratifications, or have been eschewed by major trading states or targeted developing and law reform countries?'[51] This question posed by Goode has been reviewed and analysed by many prominent academics.

Mistelis outlines the following major drawbacks of harmonisation of commercial law by international conventions:

(i) 'a lengthy and costly process' of negotiation and drafting of the convention;[52]
(ii) 'a degree of unification may be excessively restricted and the differences may be irreconcilable;'[53]
(iii) 'issues of sovereignty may arise in the context of international trade regulation;'[54]

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46 Goode, Transnational Commercial Law, *supra* n. 5, at 554.

47 *Id.*

48 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations 2014), available at <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (accessed Jan. 29, 2015).

49 Paul B. Stephan, *The Futility of Unification and Harmonisation in International Commercial Law* 1, 32 (University of Virginia School of Law, Legal Studies Working Paper No. 99-10, June 1999), <http://ssrn.com/abstract=169209> (accessed Jan. 29, 2014).

50 Boss, *supra* n. 23, at 399.

51 Goode, Transnational Commercial Law, *supra* n. 5, at 729.

52 Mistelis, *supra* n. 7, at 1-049.

53 *Id.*

54 *Id.*

(iv) possible delays in ratification of the conventions that may last for many years before the convention comes into force;[55]

(v) 'the statutory law is subject to interpretation by the courts . . . and there is no guarantee that harmonised law will be interpreted in a harmonised manner.'[56]

In Mistelis' opinion, alternative means of soft harmonisation of commercial law could avoid the pitfalls of international conventions described above through their flexibility and 'effective convergence of different legal systems.'[57]

Further, Kronke outlines the principal disadvantages of the conventions in that they 'are normally rather specific and fragmentary in character.'[58] This 'so-called isolated-position syndrome'[59] may potentially create a case where, for instance, a convention on agency may be implanted in a body of law whose domestic rules on contracts, restitution and property are hard to reconcile with the Convention's solutions.'[60]

In addition, Kronke argues that the worldwide impact of most conventions on domestic law reform seems to be less significant than the impact which various model laws or other soft law instruments, such as the PICC, have enjoyed. Lastly, the 'adoption of Convention considerably reduces room for competition among legal systems and regulatory arrangements because in some areas competition has been and will continue to be vital . . .'[61]

Kronke highlights certain shortcomings of conventions in terms of their elaboration process. For instance, the right choice of subject of the convention is a sensitive area where most mistakes have been made. 'Some projects were either too broadly or too narrowly tailored,'[62] while others tackled problems not recognized by commercial circles at all. Also, very slow progress in negotiations between governmental delegations and the fact that they very often aim to merely find a compromise between different legal systems, cause a serious impediment to the convention to succeed.[63]

Despite the number of disadvantages, discussed above, conventions still play a significant role as harmonising instruments. This brings us to the next point of the essay that will focus on the critical assessment of scholars as to whether instruments such as conventions are still needed in international commercial law and if so, how they could be improved upon to ensure their success.

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55 Mistelis, *supra* n. 7, at 1-049.

56 *Id.*

57 *Id.*

58 Kronke, *supra* n. 16, at 18.

59 *Id.*

60 *Id.*

61 *Id.* at 19.

62 *Id*. at 17.

63 *Id.*

6. Do We Need a Convention? Proposals for Improvement

6.1. What Do the Statistics Say?

The statistics, showing facts of preparation and promulgation of harmonising instruments in international commercial law and the frequency of their invocation in court decisions and arbitral awards worldwide, could reflect tendencies in terms of their use in international commercial law. Therefore it is necessary to look at the data available on the official UNCITRAL and UNIDROIT websites.

From 1991 until now, UNCITRAL has prepared five conventions. The last document was adopted in 2008. During the period from 1992, it has prepared six model laws the last of which was adopted in 2011. Three of the conventions endorsed in 1978, 1991, 2008 relate to sea transportation. UNCITRAL introduced three documents dedicated to electronic trade: two model laws in 1996 and 2011 respectively, and the convention of 2005.[64]

CLOUT currently includes cases referring to the *CISG*, the *Model Law on International Commercial Arbitration*, the *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, the *UN Convention on the Carriage of Goods by Sea*, *the Model Law on Electronic Commerce and the Model Law on Cross-Border Insolvency*.[65]

UNIDROIT's statistics show that this institution has effectively worked on the preparation of PICC, endorsing it in 1994, with subsequent updated versions in 2004 and 2010. The *Cape Town Convention* and its Protocols were promulgated in 2001, and a new Protocol on matters specific to agricultural, mining and construction equipment is still being under formulation. A *Model Law on Financial Leasing* was endorsed very recently in 2008.

As we can see from the above, a good balance is demonstrated in the production by these agencies of both hard law (conventions) and soft law instruments (model laws and restatements) and also the use of these instruments in recent years. With the latest convention adopted by UNCITRAL in 2008, the continuing work of UNIDROIT on a new Protocol to the *Cape Town Convention*, a massive invocation of the CISG, and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* in case law, it is hard to say that there is no progress in the arena of treaty law nor that it is in its final death throes.

6.2. Advantages of Conventions

One of the considerable advantages of conventions, indicated by Kronke, is the certainty of law as opposed to the flexibility and adaptability allowed by other sources of soft law, such as the PICC. 'It is submitted that the less satisfactory the state of the

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[64] *About UNCITRAL*, <https://www.uncitral.org/uncitral/en/about_us.html> (accessed Jan. 29, 2014).

[65] *Case Law on UNCITRAL Texts (CLOUT)*, <http://www.uncitral.org/uncitral/en/case_law.html> (accessed Jan. 29, 2015).

art in private international law (conflict of laws) with regard to any area of substantive law, the greater the need for uniform law Conventions.'[66] Therefore, the convention should not be abandoned, but improved based on past useful experience. 'We shall continue to need the Convention, especially in the more demanding areas beyond the law of contracts.'[67]

'It would be a misconception to envisage a future of harmonisation and unification of commercial law solely driven by the market operators and loosely framed by soft law instruments.'[68] A strong argument for this is that soft law instruments would not be suitable for resolving property issues such as, for instance, a delicate issue like the acquisition of title from a non-owner.[69]

6.3. Improvements to Be Made

The convention may be very successful if certain changes relating to the general approach and structure could be implemented. In particular, conventions should be innovative and create the techniques needed by participants involved in international trade.[70] Very positive examples of such innovations are the CISG, and the two secured financing Conventions (UNIDROIT and UNCITRAL).

Another suggestion is that formulating agencies and states consider a commercial approach rather than seeking compromise as implemented in the *Cape Town Convention* (in terms of determining credit issues, in particular). Other improvements, such as audit and monitoring committees, and 'quite novel fast-track accession'[71] are also under consideration.

One of the major tensions that arise in the preparation of international conventions, as outlined by Goode, is the necessity to maintain the 'balance between pressure from commercial interests and respect for the rights of others.'[72] This relates to situations where the business community, which is best equipped to identify commercial and financial problems, must be a major player in a harmonising project and therefore, may not ensure that other interests are respected. One of the best examples where these tensions have been overcome is the *Cape Town Convention*, demonstrating the use of various techniques to respect the interests of others: 'a compromise approach to a proposed rule; the provision of variants, leaving it to each Contracting State to decide which it prefers, the insertion of provisions

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66 Kronke, *supra* n. 16, at 19.

67 *Id.*

68 *Id.* at 20.

69 *Id.*

70 *Id.*

71 *Id.*

72 Goode, *Rule*, *supra* n. 2, at 560.

allowing a State to opt out of rules . . .' *etc.*[73] In summarizing the features, which should be improved or developed in terms of the use of international conventions as harmonising instruments, Goode makes the following conclusion: these conventions should be 'clearly drafted and sharply problem-oriented'[74] with active involvement of business experts in the work from the beginning necessary, but with a fair balance of competing interests and 'fundamental values'[75] of the convention being well preserved.

7. Conclusion

The initial role of treaties in the harmonisation of international commercial law can only be considered to be in a state of steady decline because of the very diversification of business. The growing number of complex commercial transactions and new areas of commercial law that may require regulation by more flexible and fast approaching mechanisms, stand in the face of convention. Certainly, these soft law instruments have their advantages – flexibility, easiness to accept and implement, and as shown above, there are certain examples of soft law instruments, *i.e. Principles and Model Law on International Commercial Arbitration*, which are deemed successful and widely used. Their very success has created grounds for scholars to opine that 'treaties risk remaining a dead letter, or nearly so.'[76] This essay has attempted to review this question by analysing various issues relating to the success of conventions and in particular, the measure of success; their advantages, drawbacks and the tensions arising in this area, together with recent work of UNCITRAL and UNIDROIT on formulating and promulgating conventions. This led to an assessment of features needing to be improved to make conventions more successful instruments. Based on the analysis, it can be said that the principal advantages of conventions are in providing certainty of law and remain crucial where third parties or public interests are at stake, as in property law issues. Soft law instruments would not be suitable for resolving these issues and therefore, conventions remain necessary, especially given the recent tendency of formulating agencies to move into 'areas previously taboo, such as property rights, priorities and even to a limited degree insolvency law.'[77] The *Cape Town Convention*, ratified by a large number of States, remains a unique instrument combining public law and private law provisions, containing a combination of novel techniques that make it 'the most ambitious problem-solving

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[73] Goode, *Rule*, *supra* n. 2, at 560.

[74] *Id*. at 562.

[75] *Id.*

[76] Bonell, International Restatement, *supra* n. 28, at 14.

[77] Goode, *Rule*, *supra* n. 2, at 557.

convention.' The fact that UNIDROIT continues its work on a new Protocol to the *Cape Town Convention* and the Convention's almost worldwide recognition belies the suggestion that treaty law is dying. In addition, the CISG and other conventions have been vastly invoked in case law, which provides further support to the view that conventions are still commonly used in the international commercial law. Their continuing success will depend on formulating agencies being innovative and problem-oriented regarding commercial approaches, with business experts involved to ensure a fair balance of competitive interests and the principal values of the convention being well preserved.

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Information about the author

Anzhela Korzhevskaya (Moscow, Russia) – Deputy Director of Legal Department, *FESCO* Transportation Group, LLM in the International Commercial and Competition Law at the University of East Anglia (UK) (29 Serebryanicheskaya emb., Moscow, 109028, Russia; e-mail: Akorzhevskaya@gmail.com).

FURTHER IMPROVEMENT OF THE INVESTMENT CLIMATE IN RUSSIA AS A RESULT OF MODERNIZATION OF THE RUSSIAN CIVIL CODE

VALERY MUSIN,

St. Petersburg State University
(St. Petersburg, Russia)

This article traces the history, and discusses some of the recent changes in the Russian Federation Civil Code, which result in a more favorable business climate in Russia. In particular, it discusses the development of changes related to the documentation of contracts, expansion in the durations and uses of powers of attorney, and the modernization of the statute of limitations period for bringing an action.

Keywords: Russian civil law; investment climate; Russian studies.

The Civil Code of the Russian Federation [hereinafter Code] consists of four parts.[1] Part One became effective as of January 1, 1995,[2] Part Two – as of March 1, 1996, Part Three – as of March 1, 2002, Part Four – as of January 1, 2008. This demonstrates that preparation of the Code had been lasting gradually; the time difference between enacting the first part of the Code and the enacting last one exceeded 13 years. So long a period is quite understandable, since a lot of time and efforts were needed for transforming our legal system from that appropriate for regulating a planned economy to that regulating a market economy.

Meanwhile, in February 2012, the President of the Russian Federation initiated modernization of the Code by introducing in the State Duma a draft law [hereinafter Draft Law] containing amendments.[3] The aim of this modernization is to make the Code even more consistent with a market economy.

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[1] Гражданский кодекс Российской Федерации [*Grazhdanskii Kodeks Rossiiskoi Federatsii* [Civil Code of the Russian Federation]], available in English in a version with changes only through 2003 at <http://www.russian-civil-code.com> (accessed Jan. 29, 2015).

[2] Chapter 4 'Legal Entities' was incepted as of the date of the official publication of Part One of the Code, *i.e.* as of November 8, 1994.

[3] Проект федерального закона № 47538-6 «О внесении изменений в части первую, вторую, третью и четвертую Гражданского кодекса Российской Федерации, а также в отдельные законодательные

The Draft Law was preceded by a Presidential Decree on the Concept of the Development of the Civil Legislation of the Russian Federation [hereinafter Concept], elaborated by a special group of scholars and legal practitioners under the patronage of the President.[4]

The amendments contained in the Draft Law are being implemented step by step, which is, in itself, an indication of the thoroughness of our legislative bodies in undertaking such an important matter. This process in not yet completed, so it makes sense to concentrate on the novelties already adopted. In particular, this article focuses on three improvements: documentation of contracts, powers of attorney, and statutes of limitations.

1. Documentation of Contracts

To start with, let me discuss changes to the rules concerning transactions requiring written form, and the legal consequence of the correct form not being observed.

Traditionally these legal consequences were that, in the case of a dispute, the parties to such a transaction are not entitled to refer to witness testimony in order to confirm the existence of the transaction and the terms and conditions thereof. They are, however, allowed to use written and other evidence.[5]

акты Российской Федерации» [*Proekt federal'nogo zakona No. 47538-6 'O vnesenii izmenenii v chasti pervuyu, vtoruyu, tret'yu i chetvertuyu Grazhdanskogo kodeksa Rossiiskoi Federatsii, a takzhe v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii'* [Bill No. 47538-6 'On Amendments to Parts One, Two, Three and Four of the Russian Civil Code, and to Individual Acts of Legislation of the Russian Federation']] (April 3, 2012). This Draft Law, passed in first reading on April 27, 2012, was initially expected to be implemented at once, was subjected to much commentary and eventually was broken down into several parts, which have each been or are being considered individually. *See, e.g.,* Федеральный закон от 30 декабря 2012 г. № 302-ФЗ «О внесении изменений в главы 1, 2, 3 и 4 части первой Гражданского кодекса Российской Федерации» [*Federal'nyi zakon ot 30 dekabr'ya 2012 g. No. 302-FZ 'O vnesenii izmenenii v glavy 1, 2, 3 i 4 chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii'* [Federal Law No. 302-FZ of December 30, 2012, 'On Amendments to Chapters 1, 2, 3 and 4 of Part One of the Civil Code of the Russian Federation']] (effective March 1, 2013); Федеральный закон от 7 мая 2013 г. № 100-ФЗ «О внесении изменений в подразделы 4 и 5 раздела I части первой и статью 1153 части третьей Гражданского кодекса Российской Федерации» [*Federal'nyi zakon ot 7 maya 2013 g. No. 100-FZ 'O vnesenii izmenenii v podrazdely 4 i 5 razdela I chasti pervoi i stat'yu 1153 chasti tret'ei Grazhdanskogo kodeksa Rossiiskoi Federatsii'* [Federal Law No. 100-FZ of May 7, 2013, 'On Amendments to Subsections 4 and 5 of Section I of Part One and the Article 1153 of Part Three of the Civil Code of the Russian Federation']] (effective September 1, 2013); Федеральный закон от 2 июля 2013 г. № 142-ФЗ «О внесении изменений в подраздел 3 раздела I части первой Гражданского кодекса Российской Федерации» [*Federal'nyi zakon ot 2 iyulya 2013 g. No. 142-FZ 'O vnesenii izmenenii v podrazdel 3 razdela I chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii'* [Federal Law No. 142-FZ of July 2, 2013, 'On Amendments to Subsection 3 of Section I of Part One of the Civil Code of the Russian Federation']] (effective October 1, 2013).

[4] *See* Вестник Высшего Арбитражного Суда Российской Федерации. 2009. № 11. С. 8–99 [*Vestnik Vyshchego Arbitrazhnogo Suda Rossiiskoi Federatsii*. 2009. No. 11. S. 8–99 [2009(11) Bulletin of the Supreme State Arbitration Court of the Russian Federation 8–99]], available at <http://base.garant.ru/12176781> (accessed Jan. 29, 2015).

[5] *See* Гражданский кодекс РСФСР [*Grazhdanskii kodeks RSFSR* [Civil Code of the Russian Soviet Federative Socialist Republic]], Art. 64 (1964); Civil Code of the Russian Federation, Part One, Art. 162(1) (1995).

The written form of a foreign trade transaction, in particular, has a history of its own. Previously, of course, there was a state monopoly of foreign trade in the Soviet Union. This state monopoly meant that only those organizations to whom the right had specifically been granted were entitled to operate in international markets, and foreign trade activities of such organizations were under strict state control.

With regard to the written form of foreign trade transactions the state control was manifested in two aspects. First, a foreign trade transaction had to be signed by two persons on behalf of any Soviet organization that was a party to the transaction.[6] Second, in case of failure to comply with the rules concerning the written form of a foreign trade transaction and the procedure of signing thereof the transaction had to be deemed null and void.[7] These rules were under strict judicial control. As an illustrative case, there was a foreign trade contract, signed by two persons on behalf of the Soviet participant, which was at some later stage was supplemented by an additional protocol, signed by one person on behalf of the Soviet participant. The Foreign Trade Arbitration Commission of the Chamber of Commerce and Industry of the USSR[8] declared the protocol null and void.[9]

However, reconstruction of our economy under a market model was accompanied by gradual reducing of the state monopoly on foreign trade, finally abolished by the Decree of the President of the Russian Federation of November 15, 1991, 'On Liberalization of Foreign Economic Activity in the Russian Federation.'

In line with this trend, requirements concerning the written form were gradually softened. It is worthwhile to note that, according to the Fundamentals of the Civil Legislation of the USSR and Republics of May 31, 1991, 'non-observance of the form of foreign economic transactions shall result in invalidity of the transaction' (Art. 30(2)).[10] There was no reference in this text to non-observance of the procedure of signing a foreign trade transaction. In practical terms, this meant that a foreign economic transaction might be signed by one person on behalf of the Soviet participant.

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[6] *See* Постановление Совета Министров СССР от 14 февраля 1978 г. № 122 «О порядке подписания внешнеторговых сделок» [*Postanovlenie Soveta Ministrov SSSR ot 14 fevralya 1978 g. No. 122 'O poryadke podpisaniya vneshnetorgovykh sdelok'* [Decree of the Council of Ministers of the USSR No. 122 of February 14, 1978, 'On the Procedure of Signing of Foreign Trade Transactions']], Sec. 1.

[7] Civil Code of the Russian Soviet Federative Socialist Republic, Art. 45 (1964).

[8] The predecessor to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.

[9] *See* Арбитражная практика: Практика внешнеторговой арбитражной комиссии, 1971–1974 гг. Ч. 7 [*Arbitrazhnaya praktika: Praktika vneshnetorgovoi arbitrazhnoi komissii, 1971–1974. Ch. 7* [7 Arbitration Practice: Practice of the Foreign Trade Arbitration Commission]] 8–9 (Chamber of Commerce and Industry of the USSR 1979).

[10] The Fundamentals were to become effective as of January 1, 1992, however by that time the USSR ceased to exist. Nevertheless, since the Fundamentals contained rules consistent with a market economy, the Fundamentals were incorporated into the laws of the Russian Federation by the Decree of the President of the Russian Federation of July 14, 1992.

A similar approach was adopted by the Code, Part One, effective as of January 1, 1995.[11]

Further simplification of requirements in relation to the written form of foreign economic transactions is connected with the Concept.[12]

The Concept states, *inter alia*, that the rule of Art. 162(3) of the Code on invalidity of a foreign trade transaction concluded without observance of the simple written form was introduced in the Russian law when a state monopoly of foreign trade was in place. Currently such a rule is no longer justified since it puts parties to foreign economic transactions in unequal positions compared with parties to domestic transactions. Therefore it should be abolished.[13]

Further to this statement, according to the Federal Law No. 100-FZ of May 7, 2013, 'On Introducing of Amendments in Subsections 4 and 5 of Section I of Part One and the Article 1153 of Part Three of the Civil Code of the Russian Federation,' Art. 162(3) of the Code ceased to be effective as of September 1, 2013.

This means that, now, failure to observe the written form of a foreign economic transaction will lead to consequences described in the Art. 162(1), *i.e.* prohibition, in case of a dispute, to refer to witness testimony to confirm the fact of the transaction and its terms and conditions; but written and other proofs may be used as supporting evidence.

In other words, the new version of Art. 162 of the Code provides identical consequences for failure to observe the required written form of transactions both in domestic and foreign transactions.

It makes sense to deal with the kinds of admissible evidence in some detail. The notion 'written evidence' embraces any documents containing information on circumstances relevant to the case, such as contracts, statements, references, business correspondence, *etc.*[14]

As for other evidence to prove the existence of an non-written contract, the parties may introduce, for example, tangible evidence; in other words any object which by its appearance, features, place of location or other indicia may serve as a means of establishment of circumstances relevant to the case.[15]

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[11] *See* Code, *supra* n. 1, Art. 162(3) of the unamended version.

[12] *Supra*, n. 4.

[13] Concept, *supra* n. 4, pt. II, sec. 4, subsec. 4.1.4.

[14] *See* Арбитражный процессуальный кодекс Российской Федерации [*Arbitrazhnyi protsessual'nyi kodeks Rossiiskoi Federatsii* [Arbitration Procedural Code of the Russian Federation]], Art. 75(1); Гражданский процессуальный кодекс Российской Федерации [*Grazhdanskii protsessual'nyi kodeks Rossiiskoi Federatsii* [Civil Procedural Code of the Russian Federation]], Art 71(1).

[15] *See* Arbitration Procedural Code of the Russian Federation, Art. 78(1); Civil Procedural Code of the Russian Federation, Art 73.

Meanwhile a question arises whether the prohibition to use witness testimony should be interpreted as a prohibition of any oral evidence. Both the Arbitration Procedural Code and the Civil Procedural Code contain rules relating to such kinds of oral evidence as written testimony, on the one hand, and explanations of persons participating in the case (plaintiff, respondent, third party participants, *etc.*), on the other.[16] The prohibition in question is limited to witness testimony and not extended to explanations of persons participating in the case. Therefore such explanations may be used as supporting evidence in order to prove the fact of a transaction, its terms and conditions.

Moreover, if one litigant (*e.g.*, a plaintiff) makes some statement in relation to certain circumstances and another litigant (a respondent) does not contest it, no further evidence is needed to prove these circumstances.[17] In the case of discrepancies between explanations of the litigants, the court should assess those explanations in conjunction with all other evidence.[18] These rules are now applicable both to domestic transactions and foreign trade ones, so parties of transactions of either kind are now in equal positions.

2. Powers of Attorney

Substantial innovations were also introduced in the rules relating to a power of attorney, almost significantly, to the period of its validity. Previously, this period could not exceed three years; whereas in cases where the period was not specified, the power of attorney was valid for only one year from the date of its issuance.[19] Currently (as of September 1, 2013) Art. 186(1) reads: 'If a power of attorney does not specify a period of validity, the power of attorney shall be valid during one year from the date of its issuance.' The provision governing the outer length of a power of attorney is omitted. Therefore, now a power of attorney may be issued for a period exceeding three years (5 years or even longer).

Another very important amendment is contained in Art. 188.1 that provides the possibility to issue an irrevocable power of attorney with regard to an obligation in the sphere of business activity. Such a power of attorney cannot be revoked until expiration of the period of its validity, or may be revoked only in certain cases specified in the power of attorney. Such a power of attorney should be notarized. These rules create new possibilities for persons involved both in consumer and business transactions.

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[16] *See* Arbitration Procedural Code of the Russian Federation, Arts. 81 and 88; Civil Procedural Code of the Russian Federation, Arts. 68 and 69.

[17] Arbitration Procedural Code of the Russian Federation, Art. 70.

[18] *See* Arbitration Procedural Code of the Russian Federation, Art. 71(1); Civil Procedural Code of the Russian Federation, Art 67(1).

[19] *See* Code, *supra* n. 1, Art. 186(1) of the unamended version.

3. Statute of Limitations

One more sphere where the rules of the Code were substantially renewed was the statute of limitation, which is defined as the 'term for protection of a right upon a suit by a person whose right is violated.'[20] This description is traditional and unamended. The general limitation period remains the same (three years) but novelties touch such issues as its starting point and factors influencing its duration (*i.e.* its interruption and suspension).

As it appears from the definition above, until a right is violated, no judicial protection is needed, so a time limitation period cannot commence prior to the violation of a right. However, the fact of violation is, in and of itself, insufficient to trigger a judicial protection mechanism. First, this fact should become known to the rightholder, because only after it is known can the latter take care to protect his violated right. Second, even after the rightholder became aware of violation of his right, he would be unable to apply for judicial protection until identification of a person of the respondent since a suit cannot be brought 'to whom it may concern.'

Of course, if a time limitation period is long (*e.g.*, in such countries as Austria, Belgium, France, Germany it amounts to 30 years with respect to some claims), a rightholder has plenty of time both to discover the fact of violation and find the wrongdoer.

Meanwhile in countries where this period is much shorter, such as the three year period in Russia, it may well happen that by the moment the statute of limitations expires, the respondent is not yet identified. In previous Russian Civil Codes of the Soviet era, a short time limitation period was balanced by a rule of reinstatement of this period in case a rightholder missed the limitation deadline for a justified reason.[21]

However, under the Code that became effective in Part One as of January 1, 1995,[22] reinstatement of the limitation period was absolutely prohibited for legal entities, and was available for natural persons only in exceptional situations such as disease or helpless condition, illiteracy, *etc.*[23]

The combination of a short time limitation period and impossibility of its reinstatement created a threat for a rightholder to lose judicial protection of his violated right when the statute of limitations expired, regardless of the rightholder's inability to identify the respondent due to circumstances beyond his control.

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[20] Code, *supra* n. 1, Art. 195.

[21] *See, e.g.,* Civil Code of the Russian Soviet Federative Socialist Republic, Art. 49 (1924); Civil Code of the Russian Soviet Federative Socialist Republic, Art. 87 (1964). According to this Code (Art. 83), the starting point for the running of the limitation period coincided with the date when a rightholder became, or ought to have become, aware of violation of his right.

[22] The starting point of running of the time limitation period was the same as that provided in the Civil Code of 1964. *See* Code, *supra* n. 1, Art. 200(1) of the unamended version.

[23] *Id.* at Art. 205.

It would be reasonable and fair to prevent such a situation, and recently the Code was amended to this effect. Now, the current version of Art. 200(1) reads: 'Unless otherwise provided by law, running of the time limitation period shall commence from the date when a person became or ought to have become aware of the violation of his right *and of a person who is the proper respondent in the suit on protection of this right*' (emphasis added). There is no doubt that a three year term starting from this date is quite sufficient for a rightholder to make up his mind whether to apply to a court for judicial protection of his violated right.

Meanwhile it should be noted that, as it is stated in UNIDROIT Principles of International Commercial Contracts 2010 [hereinafter Principles],[24] there should be:

> [A] balance between the conflicting interests of the obligee and the obligor of a dormant claim. An obligee shall have a reasonable chance to pursue its right, and should therefore not be prevented from pursuing its right by the lapse of time before the right becomes due and can be enforced. Furthermore, the obligee should know or at least have chance to know its right and the identity of the obligor. On the other hand, the obligee should be able to close its files after some time regardless of the obligor's knowledge, and consequently a maximum period should be established.

Given this approach, Art. 10.2 of the Principles reads:

> (1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised.
>
> (2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised.

In line with these provisions Art. 196 of the Code (the amended version) states:

> 1. The general time limitation period shall be three years from the date to be determined in accordance with Article 200 of this Code.[25]

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[24] UNIDROIT Principles of International Commercial Contracts 2010 347 (UNIDROIT 2010), available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> (accessed Jan. 29, 2015).

[25] Article 200(1) connects the starting moment of the statute of limitations with the date when a rightholder becomes (or ought to become) aware of the violation of his right and of the wrongdoer (see above). According to Art. 191 of the Code '[r]unning of a term determined by a period of time shall commence of the next day after a calendar date or occurrence of an event whereby its start is defined.' Therefore the moment limitation period begins to run is identically determined both in the Principles and in the Code.

2. The time limitation period cannot exceed ten years from the date of violation of the right for whose protection this period is established.

One can see that the rules of the Principles aimed at establishing a balance between the opposite interests of the rightholder and the wrongdoer are reflected in the amended version of the Code.

The statute of limitations may be extended due to its interruption or suspension. In the case of an interruption, running of the limitation period shall start anew; the period that lapsed prior to interruption shall not be included in the new term. Traditionally the Russian Civil Codes provided for interruption of the time limitation period in two situations: (1) in case of acknowledgement of the debt by an obligor, and (2) in case of bringing a suit in due course.[26] In the first situation, a rightholder may approach a court for judicial protection of his violated right at any moment within the new time limitation period. The second situation, however, may create a problem. Consideration of a complex case could conceivably take a long enough time period to exceed the limitation; so by the moment of its expiry the case will not yet be finally resolved. This could unfairly limit a plaintiff's flexibility in pursuing his complaint.

In order to prevent such a situation, the Principles (Art. 10.5(1)(a)) provide that the time limitation period is suspended 'when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor.'[27] Furthermore (Art. 10.5(2)): 'Suspension lasts until a final decision has been issued or until the proceedings have been otherwise terminated.'[28] This approach is now shared by the Code. According to the amended version of Art. 204(1) '[t]he time limitation period shall be tolled from the date of application to a court in due course for protection of the violated right during the whole time period within which the judicial protection of the violated right is being performed.'

This rule, taken by the Code from the Principles, which are a kind of *lex mercatoria*, makes judicial protection of violated rights more effective.

The new version of the Code distinguishes a general time limitation period, on the one hand, and a maximum time limitation period, on the other. While the general period is three years, the total maximum period for judicial protection of a violated right is now 10 years from the date of violation of the right. Thus, it makes sense to discover a correlation between these two terms and, in particular, to establish whether (and if so, on what conditions) an interruption of the general time limitation period may result in extension of the maximum time limitation period.

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[26] *See, e.g.*, Civil Code of the Russian Soviet Federative Socialist Republic, Art. 50 (1924); Civil Code of the Russian Soviet Federative Socialist Republic, Art. 86 (1964); Code, *supra* n. 1, Art. 203 of the unamended version.

[27] UNIDROIT Principles, *supra* n. 24, at 356.

[28] *Id.*

The answer to this question is contained in the Principles. Article 10.4 reads:

> (1) Where the obligor before the expiration of the general limitation period acknowledged the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgment.
>
> (2) The maximum general limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Article 10.2(1).[29]

As it is explained in the Official Comment on this Article,

> [t]he commencement of a new general limitation period following acknowledgment can take place either during the general limitation period under Article 10.2(1), or during the maximum limitation period under Article 10.2(2). While the maximum limitation period will not in itself begin again, the new general limitation period may exceed the maximum period by up to three years if the obligor acknowledges the right of the obligee after more than seven years but before the maximum period has already expired.[30]

Given that the Code rules with regard to the general time limitation period and maximum time limitation period are similar to those of the UNIDROIT Principles 2010, both Art. 10.4 of the Principles and the Official Comment, it may be helpful in determining a correlation between these time limitation periods in terms of the Russian law. According to the Preamble to the Principles they may be used, *inter alia*, 'to interpret or supplement domestic law.'

To summarize, modernization of the Code, albeit it is not yet completed, introduced innovations based upon well-established international commercial practices, and ensured more effective legal protection of rights belonging both to domestic and foreign investors operating on the Russian market, which in turn results in further improvement of the Russian investment climate.

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Арбитражная практика: Практика внешнеторговой арбитражной комиссии, 1971–1974 гг. Ч. 7 [*Arbitrazhnaya praktika: Praktika vneshnetorgovoi arbitrazhnoi komissii*,

[29] UNIDROIT Principles, *supra* n. 24, at 353.

[30] *Id.* at 354.

1971–1974. Ch. 7 [7 Arbitration Practice: Practice of the Foreign Trade Arbitration Commission]] 8–9 (Chamber of Commerce and Industry of the USSR 1979).

Гражданский кодекс Российской Федерации [*Grazhdanskii Kodeks Rossiiskoi Federatsii* [Civil Code of the Russian Federation]], available at <http://www.russian-civil-code.com> (accessed Jan. 29, 2015).

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Information about the author

Valery Musin (St. Petersburg, Russia) – Professor of Civil Procedural Law and Head of the Civil Procedural Department at St. Petersburg State University (7/9 Universitetskaya emb., St. Petersburg, 199034, Russia; e-mail: mp@mipar.ru).

BOOK REVIEW NOTES

THE YEARBOOK ON INTERNATIONAL ARBITRATION (Vols. I–III)[1]

NATALIYA BOCHAROVA,

Lomonosov Moscow State University
(Moscow, Russia)

International arbitration provides efficient means of resolving international disputes. Among other forms of alternative dispute resolution arbitration is regarded as a preferred method since it provides speedy and professional dispute resolution process. Arbitration in contrast to adjudication gives parties more flexibility with regard to choice of arbitrators, location, procedural rules and the substantive law that will govern the relationship and rights of the parties.[2]

The popularity of the arbitration can be proved by the increasing case-loads at leading arbitral institutions, with the number of reported cases increasing between three and five-fold in the past 25 years.[3]

International arbitration is a fast developing institute. The rules and practice of arbitral proceedings are volatile and voluminous. The market is flooded with of academic textbooks and reference works on international arbitration, but only few of these academic texts are up-to-date.

The idea of the *Yearbook of International Arbitration* is to take up recent trends in international arbitration and leading them in scholarly debate. The *Yearbook* covers not only international commercial arbitration but also investor-state conflicts and sports controversies.

The editor of the *Yearbook* Prof. Marriane Roth claimes the *Yearbook* to be an ongoing work presenting reviews analyses of current and edge-cutting topics in

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[1] Reviewed book: 1–3 Yearbook on International Arbitration (Marianne Roth & Michael Geistlinger, eds.) (Intersentia 2010, 2012, 2013).

[2] Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26(3) Am. Bus. L.J. 511, 512 (1988). doi:10.1111/j.1744-1714.1988.tb01153.x

[3] Gary B. Born, International Arbitration: Law and Practice 17 (Wolters Kluwer 2012).

international arbitration and related topics. The *Yearbook* is truly international in respect of discussed topics and the authors of the essays.

The *Yearbook* volumes have different structure and cover various topics concerning international dispute resolution. Volume I (2010) of the *Yearbook* is divided into nine parts: Arbitration rules and regimes; Initiating arbitration proceedings; Other issues of arbitral procedure; Arbitral awards and their enforcement; Applicable substantive law; Sports arbitration; ADR; Notes; and Reviews. It covers various topics including recent changes in the UNCITRAL Arbitration Rules (Marianne Roth, *The Revision of the UNCITRAL Arbitration Rules* 19–28); incorporation of the UNCITRAL Model Law on international commercial arbitration in Russia (Antonida Netzer, *Incorporation of the UNCITRAL Model Law on International Commercial Arbitration in the Russian Federation* 29–56). Russian perspective is also employed in the Eugen Salpius essay on 'The interpretation of arbitration clauses – a change of approach in the Russian Federation' (207–13). Serbian scholar Alexsandar Ćirić analyzes the procedure for settling international trade disputes between the members of the World Trade Organization (WTO) (57–74). Alex Brenninkmeijer and Tijn van Kamp make a particular review of the Dutch arbitration law (75–88). Austrian scholar Peter Egger gives a brief review of the concepts of arbitrator independence, impartiality and disclosure. He analyses the ICC Court Statement of Acceptance, Availability and Independence (2009) (103–13). The subject of Alexander Bělohlávek essay is the impact of the insolvency proceedings and declaration of bankruptcy on pending arbitration in light of recent decisions of the Czech, English and Swiss arbitral tribunal (145–66). The *West Tankers* case is criticized by John Verbeck (USA) in his essay 'International arbitration practice in Europe: antisuit injunctions' (185–95).

Volume II (2012) of the *Yearbook* contains essays of the 29 renowned experts coming from 14 countries around the world and the main topic of it is the intersection between arbitration and litigation and the specific features of the investor-state arbitration as well as trust and anti-trust arbitration. The Volume is divided into nine parts including Arbitration agreement; Arbitral procedure; Intersection with court proceedings; Arbitral awards and their enforcement; Investment disputes. Volume II contains review of some arbitral awards and judicial decisions as in the essay of Austin Pullé 'From Paris to UlaanBaatar – non signatory liability' where the scholar analyzes the decision of the UK Supreme Court in *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan* (51–62). Hans-Patrick Schroeder and Tanja Pfitzner analyze some recent trends regarding dissenting opinions in international commercial arbitration based on some recent case law in different European jurisdictions (133–49). Courts practice concerning arbitral awards is examined by Thomas Kendra in his essay ' The international reach of arbitral awards set aside in their country of origin – a turning point?' The essay reviews the international approach to the enforcement of arbitral awards annulled in their country of origin (151–65). Some essays from Volume II examine recent

developments of the arbitral rules. The article of Marianne Roth and Claudia Reith 'Emergency rules' provides an overview of the different approaches concerning emergency rules in the various arbitral institutions. The contribution of Marianne Stegner gives an overview of the different approaches to calculate cost of arbitration (under an ICC, AAA, LCIA and UNCITRAL procedure) (85–93). Cristina Lenz in her article explains the EU Directive on Mediation and its implementation in Austria (375–93). Louis Buchman makes a review of the French arbitration law reform which has rejuvenated the law of arbitration by incorporating some practical solution devised over the last years by case law into the provisions of the Civil Procedure Code dealing with domestic and international arbitration (95–100). Jaunius Gumbis and Miglė Dereškevičiūtė raise a theoretical question concerning the concept of justice in arbitration proceedings (101–06). An extensive examination of differences between disputes governed only by the domestic investment law of the host State and those governed by a BIT, and ICSID arbitration is conducted by Mauro Rubino-Sammartano (225–37). Russian scholars Boris Karabelnikov and Alexei Zhiltsov in their contribution analyze the Law of Russian Federation No. 57-FZ 'On the Procedure of Contribution of Foreign Investment to Companies of Strategic Impotence for National Defense and State Security' (277–97).

The Volume III of the *Yearbook* offers a comprehensive range of articles comprising topical issues of arbitration in general, investment arbitration, sports arbitration and ADR. First of all Volume III is devoted to the creation of arbitral institutions in the Common Market of the South, the delimitation of confidentiality, the handling of set-off and counter-claims, trends regarding interim relief and the enforcement of arbitral award. Attention is also given to the need for reasoned decisions in arbitrator challenges, and to mass procedures in investment arbitration. Martin Hunter and Gerson Damiani study the increasing importance of International Dispute Resolution within emerging markets, in particular the Common Market if South America – Mercosul (59–72). Rodrigo Garcia da Fonseca and André de Luizi Correia analyze the general framework and the limits or exceptions to confidentiality in arbitration under a Brazilian perspective (119–37). Particular section of the Volume III is devoted to interim measures in arbitral proceedings. Marianne Roth analyzes to what extent an arbitral tribunal is empowered to order interim measures in an international commercial arbitration (141–50). Sumeet Kachwaha presents an analysis of the UNCITRAL amendments to the Model Law concerning interim relief and points out some problematic areas (155–61). Volume III also includes area studies. Clarisse von Wunschheim reports on recent trends in the enforcement of arbitral awards in China (225–38). Katarína Chovancová introduces enforcement procedures of arbitral award in Sweden, the Netherlands and Slovakia (209–24). Marianne Roth and Marianne Stegner give an overview of the current legal situation of mediation in Austria.

The idea to unite different relevant up-to-date essays and articles concerning international dispute resolution in one book bears fruits. The *Yearbook of International*

Arbitration will help both international arbitration practitioners and academics to identify and better understand trends, developments and procedural issues relating international arbitration.

Each volume features thought-provoking articles by leading practitioners and academics, insightful case law from the different arbitration institutions and domestic courts, extensive analysis of important legislative and procedural documents.

Cautiously selected essays of the *Yearbook* undoubtedly will influence the research in the field of international arbitration and will be a great help for the practitioners and scholars all over the world.

Information about the author

Nataliya Bocharova (Moscow, Russia) – Associate Professor at Faculty of Law, Lomonosov Moscow State University, Executive Editor of the *Russian Law Journal* (1 Leninskie Gory, bldg. 13-14, Moscow, 119991, GSP-1, Russia; e-mail: nbocharova@mail.ru).

CONFERENCE REVIEW NOTES

THE BRICS IN THE SPOTLIGHT: A RESEARCH AGENDA

LUCIA SCAFFARDI,

University of Parma (Parma, Italy),

VERONICA FEDERICO,

University of Florence (Florence, Italy)

On November 6–7, 2014, the University of Parma (Italy) hosted a profound two-day discussion on the BRICS, *i.e.* Brazil, Russia, India, China and South Africa, a relatively new actor in the international arena, gathering the most innovative research and the leading experts and scholars.

The first macro-theme addressed was the role of the BRICS in global politics. Against the mainstream analysis of the BRICS phenomenon focusing on the economy, quite interestingly the core question of the first session of the conference was the capacity of the BRICS to take on the role of new legal actor on the international stage. In her reasoning, Mihaela Papa examined 'the BRICS'"actorness" through its ability to offer a distinctive vision of global regulation, develop intra-BRICS cooperation in the field of law, and evolve as an entity over time.' Through an in-depth discussion of the legal cooperation among the BRICS, Papa argued that 'the BRICS displays regulatory innovation by changing the dominant legal narrative' as it introduces the idea of 'a strategically negotiated transition away from hegemonic law to emancipatory multipolarity and implements it through a coalition of countries representing more than 40% of the world's population.'[1] Moreover, as will be discussed further on through the analysis of the other themes of the conference, the BRICS' rise also fosters debates on sovereignty as a socio-economic responsibility and opens space for its normative evolution to address the production of inequalities through global regulation.

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[1] Mihaela Papa, *BRICS as a Global Legal Actor: From Regulatory Innovation to BRICS Law?*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27757> (accessed Jan. 29, 2015).

Inherent to this analysis was the discussion of the nature of the BRICS. Andrew F. Cooper and Asif B. Farooq suggested the idea of considering the group as an 'informal club.' In fact, 'after six consecutive summits' they maintained, 'the BRICS has emerged as a multilateral institution that has stable constitutive, regulative and procedural norms. Institutionally, however, BRICS maintains the characteristics of an informal club model. This type of institutional arrangement demonstrates a club model when participation is restricted, members are privileged to act as agenda-setters in policy-making, provide exclusive goods to its members and acts as a hub which irons out differences and ensures that diversity does not lead to divergence or conflict. The exclusive benefit helps ensure collective action within the groups.'[2] In addition, the analysis of the evolution of the new Development Bank provided the appropriate case-study to test the BRICS informal club model.

From a different perspective, building on what the BRICS is not, that is to say in terms of the 'absence of geographical proximity; the absence of bilateral and multilateral relations that are common among the BRICS countries; the absence of converged economic systems; the absence of stable organizational structures to represent the economic bloc; the absence of an internal leadership; the absence of direct or indirect democratic legitimacy in the promotion of the BRICS phenomenon; the absence of common tariff, customs and monetary policies,' Michele Carducci and Anna Silvia Bruno pointed to the peculiar nature of the group. While producing legal flows and communication vectors, the BRICS 'does not create standardization, harmonization and unification of the law of the member States,'[3] meaning that it stands unique in the horizon of supra-national and regional organizations, and is able to transform its heterogeneity into a competitive element of international cooperation. Moreover, this is a sort of reversal of a consolidated paradigm, especially if confronted with the experience of the European Union, whose cooperation strategy strongly relies on the element of 'conditionality.'

Another important aspect was highlighted by the paper of Michael Kahn that sought to measure the cohesiveness of the BRICS through the analysis of the rhetoric and reality of BRICS cooperation in science, technology and innovation. Again, the paper clearly demonstrated how the BRICS moved from a mere economic phenomenon to a very complex system of cooperation and exchange, entailing very different sectors of what are typically labeled as fields of State intervention. Indeed, the BRICS' Cape Town Declaration (February 2014) 'acknowledges the lead role of science and technology for long-term development, and builds on the rising importance of the BRICS nations in

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[2] Andrew F. Cooper & Asif B. Farooq, *Testing the Club Culture of the BRICS: The Evolution of a New Development Bank*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27750> (accessed Jan. 29, 2015).

[3] Michele Carducci & Anna S. Bruno, *BRICS as Constitutional Inhomogeneous Dynamics*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27749> (accessed Jan. 29, 2015).

contributing to the global stock of knowledge.' However, the publication data discussed by Kahn attested that intra-BRICS cooperation in science remains more rhetoric than reality. 'The five BRICS each engage in much higher levels of "cooperation" with the centres of science production in the United States and European Union than with one another. Even so, much of this "cooperation" with the US and EU is unidirectional. Of the five BRICS, South Africa has the highest rate of international co-publication.'[4]

Following the first macro-theme, the discussion in Parma moved to more specific topics: socio-economic rights and inequalities; the economic dimensions, sustainable development and energy. These panels hosted both comparative research (including all, or some, of the five countries) and a country-specific focus. In the panel dealing with socio-economic rights and inequalities, a great deal of time was dedicated to the discussion of the right to health. Marina Larionova, Mark Rakhmangulov, Andrei Sakharov, Andrey Shelepov discussed the positive dynamics of the BRICS dialogue on health (institutionalization of the cooperation on health through regular ministerial meetings; adoption of specific action plans; creation of special working mechanisms and institutions and a move from deliberation to direction-setting and decision-making). And yet, the authors noticed that 'commitments are made mainly by the ministers. The implementation of the global governance development function is limited to the expression of a collective stance on specific issues together with other international organizations and does not include substantive cooperation through the delegation of mandates.' Whereas, to make a tangible contribution 'to global health governance, the BRICS should elevate the health agenda to the leaders' level, strengthen decision-making and delivery, and change the pattern of their cooperation with relevant institutions from expressing their collective stance to productive cooperation involving the relevant institutions such as the UN and the WHO in the full chain of global governance functions.'[5] Building on the positive dynamics side, Sandra R. Martini Vial discussed how the enforcement of the right to health can become a sort of bridge to include further socio-economic rights in the future BRICS agenda, especially if framed in the context of the 'fraternal law.'[6]

The discussion of the right to health has been further developed through the analysis of the role of private health insurance in BRICS countries and of the strategies for assuring fair health treatment to a larger part of the population. In contrast with the USA and EU countries experiences, in her paper, Diana Cerini argued that while

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4 Michael Kahn, *BRICS Cooperation in Science, Technology and Innovation: Rhetoric and Realities*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27751> (accessed Jan. 29, 2015).

5 Marina Larionova et al., *BRICS: Emergence of Health Agenda*, 9(4) International Organisations Research Journal 73, 86, available at <http://papers.ssrn.com/abstract_id=2542955> (accessed Jan. 29, 2015).

6 Sandra R.M. Vial, *Right to Health as a Bridge to Effectuate the Other Social Rights in the BRICS*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27769> (accessed Jan. 29, 2015).

health insurance is rapidly growing in BRICS countries, it reaches mainly the upper and middle classes, and leaves the lower classes aside. In order to include lower classes, 'health microinsurance products, offered by completely private plans or by joint plans between private and public entities,' seem appropriate, but 'as well as some Western experiences countries are showing, the expansion of private solutions should not be an excuse to abandon the idea of a global social health policy.'[7]

Alongside the right to health, the themes of the enforcement of corporate law in Brazil, of the South African socio-economic rights and constitutional case-law were discussed as crucial elements in the debate. 'Brazil is one of the world's largest emerging markets, with many opportunities for development' stated John Armour and Caroline Schmidt, but the enforcement of law remains problematic. In order to provide for certainty and stability, 'authorities and market participants have developed an array of specialist enforcement institutions, which build upward from the authority of the inefficient courts, and overlap each other. None is sufficient to provide a stand-alone solution, but through the layering of multiple overlapping jurisdictions, the net effect is a far more robust and effective enforcement regime.'[8] The interest in this case-study lies in the fact that weak enforcement is an endemic problem for legal institutions in several of the BRICS countries, and other countries could draw lessons from the Brazilian experience. *Mutatis mutandis*, the same applies to Sara Cocchi's analysis. In her scrutiny of the South African Constitutional Court jurisprudence on socio-economic rights, Cocchi highlighted the role played by the Constitutional Court (and the judiciary at large) in facilitating the development of the South African legal and political discourse on socio-economic rights and helping it take root in South African society.[9] The question of the exportability of the model, which indeed has its own dark side, remained open for discussion.

The BRICS' economic dimension is a well explored field, and yet the innovative aspect of the Parma conference has been to present two unconventional aspects of the economic dimension: first, Helmut Reisen discussed how a BRICS' New Development Bank can help the reform of the global financial architecture transforming the very economic principles on which the contemporary system is built;[10] second, Natalie Mrockova discusses, on the basis of the Chinese case-study, the importance and

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[7] Diana Cerini, *'Micro in Macro:' The Role of Private Health in BRICS*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27752> (accessed Jan. 29, 2015).

[8] John Armour & Caroline Schmidt, *Layers of Legality: Building Enforcement Capacity for Brazilian Corporate Law*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27761> (accessed Jan. 29, 2015).

[9] Sara Cocchi, *Socio-Economic Rights and the South African Constitutional Court. Selected Case Law for a Map of Open Problems*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27754> (accessed Jan. 29, 2015).

[10] Helmut Reisen, *Will the BRICS Bank Help Reform the Global Financial Architecture?*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27755> (accessed Jan. 29, 2015).

the role of law for economic development. Despite the recent criticism against the assumption that good laws are essential for a well-functioning banking and financial sector, as well as for the good quality of the economic development, Mrockova argued that 'it is true that *prima facie* China's growth does not seem to support the general thesis that only strong law can support strong economic performance.' Chinese 'economic development was initially co-supported and subsequently formalized and boosted by law' and she concluded that 'law matters, but . . . it matters to greater or lesser extent depending on the stage of transition of the economy, and formal law is never sufficient alone since, through choice or necessity, state does not regulate all areas of human activity, and so social norms and other extra-legal substitutes are needed to fill the gaps.'[11]

Last but not least, the themes of sustainable development and green economy have been addressed in three different papers, focusing on India and China (Domenico Amirante), Brazil (Camila Gramkow), and Brazil, India, China and Russia (Paolo Fabbri and Augusto Ninni). Unfortunately, no paper discussed or included the South African case. Despite the acknowledgment of a new political will for a 'green turn' in the environmental legal order in both India and China, Amirante concluded his analysis pointing out that this political will 'is extremely important but not sufficient, given the deficiencies shown by both the Indian and Chinese legal systems in applying environmental principles, statutes and standards. The comparison between the two systems has confirmed that they would benefit very much not only from mutual cooperation but especially from reflection on the divergent reasons that lie behind their common "enforcement gap" in environmental protection, in order to exchange best practices and legal instruments.'[12] Building on this, Gramkow discussed the appeal of green innovation 'not only as a source of economic development, but also as a driver for environmental protection, particularly in the context of developing countries.' Moreover, she argued that green innovation has proved to have a significant, positive impact on labour productivity and a stronger potential to enhance competitiveness than non-green innovation. The conclusions were that 'the results indicate that green innovation can be a driver of long term economic development, which is an appealing result for developing countries facing substantial challenges in the context of sustainable development.'[13] Surely, a positive datum for a more environment-friendly development!

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[11] Natalie Mrockova, *Does Law Matter for Economic Development: The Case of China*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27762> (accessed Jan. 29, 2015).

[12] Domenico Amirante, *The Protection of Environment in BRICS Emerging Economies: A Comparative Approach to India and China*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27763> (accessed Jan. 29, 2015).

[13] Camila Gramkow, *Competitiveness and Innovation Towards Green Growth in Emerging Economies: A Case Study of Brazil*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27758> (accessed Jan. 29, 2015).

P. Fabbi and A. Ninni concluded the panel with an in-depth study on sustainable development and renewable energy in the BRIC (excluding South Africa). As the authors pointed, 'the VI BRICS Summit – held in Fortaleza and Brasilia in 2014 – was devoted mainly to social inclusion and sustainable development. The debate was based on the slogan "inclusive growth: sustainable solutions"' and renewable energy is a key factor in sustainable development policies. India and China, according to Fabbi and Ninni, have proved to be more capable than Brazil and Russia of developing appropriate renewable energy policies, and their policies, indeed mainly adopted in a nationalistic perspective, rather than because of supra-national imperatives, 'benefited one of the most important public goods at the world level, environment, so contributing to reduce emissions and energy intensity in the planet.'[14] All papers have been critically discussed and the debate involved both the paper presenters and the conference participants. A high attendance by University of Parma students indicated the interest of such topics to the new generations.

Alongside the main panel sessions, a number of papers were illustrated through video presentations hosted in a separate venue. The papers addressed the themes of the determining factors of industrialization in Africa (Samouel Beji and Aram Belhadj);[15] labour policies in China, India and Brazil (L. Beltrame and M. Cappelletti);[16] the impact of institutions on patent property across BRICS countries (D. Benoliel);[17] the emerging middle class and labour market policies (A. Bianco);[18] the protection of fundamental rights in Russia (C. de Stefano);[19] the comparison between Rio de Janeiro's favelas and Johannesburg townships (J.M. Rampini and C.V. Figueiredo);[20] constitutional transplants

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[14] Paolo Fabbri & Augusto Ninni, *Environmental Problems and Development Policies for Renewable Energy in BRIC Countries*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27766> (accessed Jan. 29, 2015).

[15] Samouel Beji & Aram Belhadj, *What Are the Determining Factors of Industrialization in Africa?*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27764> (accessed Jan. 29, 2015).

[16] Lorenzo Beltrame & Monica Cappelletti, *Recent Labour Policies in the BRICS Countries: The Case China, India and Brazil*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27772> (accessed Jan. 29, 2015).

[17] Daniel Benoliel, *The Impact of Institutions on Patent Propensity Across Countries*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27771> (accessed Jan. 29, 2015).

[18] Adele Bianco, *The Emerging Middle Classes and the Labour Market Policies: Actors and Drivers of BRICS' Development*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27759> (accessed Jan. 29, 2015).

[19] Carolina de Stefano, *The Protection of Fundamental Economic Rights in Post-Soviet Russia. The Case of Russian Commercial Courts*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27765> (accessed Jan. 29, 2015).

[20] João M. Rampini & Carolina V. Figueiredo, *For Less Segregated BRICS-Cities: The Experiences of Rio de Janeiro's Favelas and Johannesburg's Townships Public Policies*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27770> (accessed Jan. 29, 2015).

in PRC (F. Jizeng);[21] the analysis of intra-industry trade in environmental goods (M. Kallummal, S. Sharma and P. Varma);[22] and the developmental state in Brazil (J. Ricz).[23] These video presentations provided the opportunity to further enlarge the discussion and reflections on the BRICS and BRICS countries bringing into the debate new themes, innovative and unconventional research approaches, as well as critical analysis.

Why spend two days discussing the BRICS phenomenon?

More than 40 percent of the inhabitants of this planet live in the BRICS countries, and one fifth of the world's wealth is generated in Brazil, Russia, India, China and South Africa.[24] If we add that one fourth of the Earth's dry land flies the flag of a BRICS country, the picture becomes really significant, both numerically and geographically. The BRICS countries are much more than a mere concept;[25] they are a tangible reality, as the Parma conference proceedings have clearly shown. What is also important to ponder on, when talking about the BRICS, is how fast these emerging countries are becoming main actors, and often real protagonists, in fields such as world economics, geopolitics and global opportunities.[26]

It was the year 2009 when, for the first time, the BRIC countries (which would have the 'S' added a few years later) decided to formally regroup under a Summit. Five years have now passed by since that June day in Yekaterinburg (Joint Statement of the BRIC Countries' Leaders, Yekaterinburg, 2009) but what this young 'creature' has already achieved is astonishing. A fast string of dates, agreements and decisions: in 2010 the second Summit took place in Brasilia, followed by the one in Sanya (China) in April of 2011. And it was in 2011 that South Africa decided to join the group. This moment is the beginning of a new era: the name changes from BRICs to BRICS, but, more relevantly, the international network is complete. Other African countries could have been admitted to the group if the sole criterion had been the economic dimension (for example, Nigeria), but what supports the BRIC expansion is the political dimension,[27]

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21 Fan Jizeng, *Constitutional Transplant in PRC: The Communism Russian Legacy and Globalized Era Challenge*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27768> (accessed Jan. 29, 2015).

22 Murali Kallummal et al., *An Analysis of Intra Industry Trade in Environmental Goods: A Case Study of BRICS Countries*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27760> (accessed Jan. 29, 2015).

23 Judit Ricz, *Developmental State in Brazil: Past, Present and Future*, 2014(20) *Federalismi.it*, <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=27767> (accessed Jan. 29, 2015).

24 Jim O'Neill, The Growth Map. Economic Opportunity in the BRICs and Beyond (Penguin Group 2011).

25 Kwang H. Chun, The BRICs Superpower Challenge Foreign and Security Policy Analysis (Ashgate 2013).

26 Andrew F. Cooper & Asif B. Farooq, *BRICs and the Privileging of Informality in Global Governance*, 4(4) Global Policy 428. http://dx.doi.org/10.1111/1758-5899.12077

27 Lucia Scaffardi, *BRICS, a Multi-Centre 'Legal Network'?*, 2014(5) Beijing Law Review 140. doi:10.4236/blr.2014.52013

as the democratic South African nation best represents the whole African continent.[28] (Orrù 2012). The Summits have kept on alternating country after country (New Delhi in 2012, Durban in 2013, and Fortaleza in 2014), broadening the range of discussions and debate. From economy and commerce, the summits' focus has moved to transport, healthcare, security, food safety, environmental protection, and each Final Declaration is the demonstration of how the five countries want to play the role of protagonists. The creation of the New Development Bank (2014 in the Fortaleza summit) also named 'the BRICS' bank,' with an initial capital of 100 billion dollars, together with a provision fund, the BRICS contingent Reserve Arrangement, provided with an identical plafond that will safeguard the needs of the five subscribing countries, is a clear sign of the group's presence and force in the international arena.

The Conference 'BRICS in the Spotlight,' organised by the BRICS Parma research group, directed by Professor Lucia Scaffardi, has contributed by pointing the spotlight of European scholars on the phenomenon in its multidimensional aspects and forms. It has provided the opportunity for the creation of a network of scholars working on these topics and, even more interestingly, it has brought into the mainstream research the new and innovative approaches to the BRICS phenomenon. The conference has obtained the patronage of the Embassy of Brazil in Italy, the Embassy of the Russian Federation in Italy, the Embassy of India in Italy, the Embassy of the People's Republic of China in Italy, the Embassy of the Republic of South Africa in Italy and of the Italian Ministry of Foreign Affairs. Fostered by the panel chairs (Niu Haibin (Shanghai Institute for International Studies), Paulo Esteves (BRICS Policy Center, Rio de Janeiro), Augusto Ninni (University of Parma), Patrick O'Sullivan (Grenoble Graduate School of Business) and Danny Pieters (University of Leuven)) the discussion in Parma has been inspiring and has opened new paths for future research, as every scientific conference should do.

Information about the authors

Lucia Scaffardi (Parma, Italy) – Associate Professor, Department of Law, University of Parma (Italy), Coordinator of BRICS Parma Research Group (12 – I Via Università, Parma, 43121, Italy; e-mail: lscaffardi@yahoo.it).

Veronica Federico (Florence, Italy) – Research Fellow, Department of Legal Sciences, University of Florence (Italy), Member of BRICS Parma Research Group (4 P.za S. Marco, Florence, 50121, Italy; e-mail: veronica.federico@unifi.it).

[28] Romano Orrù, *L'ordine costituzionale sudafricano post-apartheid: Luci ed ombre nell'orizzonte dei BRICS*, in BRICs: Paesi emergenti nel prisma del diritto comparato (Lucia Scaffardi, ed.) (Giappichelli 2012).

BRICS Law Journal

Volume I (2014) Issue 1

Редактор *Павел Савкин*
Оформление и компьютерная верстка: *Виола Самойлова*

Подписано в печать 09.02.2015. Формат 70x100 $^{1}/_{16}$. Объем 7,5 п.л.
Цена свободная.
Заказ №

Наш адрес: ООО «Издательский дом В. Ема»,
119454, г. Москва, ул. Лобачевского, 92, корп. 2.
Тел.: (495) 649-18-06