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BRICS LAW JOURNAL (BRICS LJ)

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Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It 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. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

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ARTICLES

DEMAND GUARANTEES IN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF SOUTH AFRICA*

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Guarantees play an important role in large commercial contracts internationally. Guarantees can be either independent (demand) guarantees or accessory guarantees. The legal consequences of the two differ significantly and, therefore, it is important to differentiate clearly between the two. In the case of independent (demand) guarantees – the focus of this contribution – the guarantor's liability is independent of the underlying performance it is guaranteeing, and is accordingly to be determined, in principle, with reference only to the terms of the guarantee. However, this is not an absolute principle. Jurisdictions throughout the world recognize exceptions to this principle, the most important and prevalent being fraud on the part of the beneficiary. A Judicial Interpretation by the Supreme People's Court of the People's Republic of China relating to independent guarantees came into operation in December 2016. Its rules depart in some important respects from the law of guarantees in South Africa, both in relation to the determination of the nature of the guarantee (as independent or accessory) and in relation to the exceptions to the principle of independence. This article explores these issues against the background of the law of contract of both countries.

Keywords: independent guarantee; demand guarantee; accessory guarantee; suretyship; independence of guarantee; autonomy of guarantee; fraud; abuse of rights; Chinese Judicial Interpretation relating to independent guarantees; Uniform Rules for Demand Guarantees; China; South Africa.

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Introduction

BRICS is about cooperation amongst its members. In accordance with its South African-hosted website this cooperation "is informed by the need to deepen, broaden and intensify relations within the grouping and among the individual countries for more sustainable, equitable and mutually beneficial development,"[1] and is predicated upon three different tracks of interaction namely (i) formal diplomatic engagement between governments, (ii) engagement through government-affiliated institutions, and (iii) civil society and people-to-people engagement.[2]

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[1] What is BRICS, Africa Facts (Apr. 15, 2019), available at https://africa-facts.org/what-is-brics/.

[2] *Id.* A good example of a combination of tracks (ii) and (iii) is the collaborative reaching out by universities in different BRICS countries (and researchers and teachers in them) towards one another. This should undoubtedly act as powerful catalyst for meaningful research on BRICS issues. Such an agreement was formally concluded on 1 November 2018 between the law faculties of the University of Johannesburg (in South Africa) and the University of Tyumen (in Russia) respectively during the Third Siberian Forum (which focused on BRICS issues) held in Tyumen during the period 1–3 November 2018.

Lawyers will be alive to the fact that "sustainable, equitable and mutually beneficial development" requires strong legal intervention. In this regard a mutual understanding of, and respect for, the legal systems of the different BRICS countries is important. Moreover, the legal systems of the different BRICS countries present exceptionally fertile soil for the comparative lawyer. The history of these five countries reflects a wide diversity of ideologies from the West, the East, Latin America and Africa – influences arising from different economic and religious systems and backgrounds are clearly evident.[3] They further represent civilian,[4] common-law[5] and mixed jurisdictions.[6] In fact, I would be bold enough to state that it is difficult to conceive in general of more fertile and diverse legal comparative material, if one were to select five countries only, than that emerging from the law of Brazil, Russia, India, China and South Africa.

South Africa is one of the leading economies in Africa.[7] China is investing heavily in Africa, mainly in relation to the construction of railway lines and

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[3] Capitalism, socialism and communism, African custom, Confucianism, Hinduism, Islam and Christianity – to name some of the more obvious.

[4] Brazil, Russia and China are all generally regarded as sharing essentially, civilian roots. Regarding Brazil *see* Jan Kleinheisterkamp, *Development of Comparative Law in Latin America* in *The Oxford Handbook of Comparative Law* 261 (M. Reimann & R. Zimmermann (eds.), Oxford: Oxford University Press, 2006) who refers to the oversimplified and superficial notion that Latin American law is "largely an offspring of and, at best, a variation of French law" (262), and goes on to remark on the strong influence of the "*usus modernus pandectarum*, as reflected by contemporary German and Dutch doctrines" in Brazil (266). Due to its tumultuous history the position in Russia is complex. Nevertheless Russian law is generally regarded as falling, historically, within the Romano-Germanic family of law. *See* in this regard René David & John E.C. Brierley, *Major Legal Systems of the World Today* 124 (3rd ed., London: Stevens & Sons Ltd., 1985). On the more recent influence of Western European (civilian) law on Russia as a post-socialist economy *see* Esin Örücü, *Comparatists and Extraordinary Places* in *Comparative Legal Studies: Traditions and Transitions* 467, 474–477 (P. Legrand & R. Munday (eds.), Cambridge: Cambridge University Press, 2003). Finally, regarding China, *see* Zentaro Kitagawa, *Development of Comparative Law in East Asia* in *The Oxford Handbook of Comparative Law*, *supra*, at 237, 257 who describes Chinese law as having strong German pandectist roots but moving towards a more pragmatic approach. Chinese law being a particular focus of this article, I return to aspects of it in more detail below.

[5] India, as former British colony, is generally regarded as a common-law country. *See, e.g.*, H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 312 (5th ed., New York: Oxford University Press, 2014) who refers to the replacement of Hindu law by English inspired statutes in the nineteenth century that amounted to a "virtually complete codification of all fields of commercial, criminal and procedural law." The author actually refers to Indian law as "Anglo-Indian law."

[6] South Africa, with its complex colonial history involving roots in the Netherlands and France, followed by British occupation, is generally regarded as a mixed jurisdiction. *See Introduction to the Law of South Africa* ix, xi–xiv (C.G. van der Merwe & J.E. du Plessis (eds.), The Hague: Kluwer Law International, 2004); Deon H. van Zyl, *Beginsels van Regsvergelyking* 284 *et seq*. (Durban: Butterworth, 1981); K. Zweigert & H. Kötz, *An Introduction to Comparative Law* 231 *et seq.* (T. Weir (trans.), Oxford: Clarendon Press, 1998); C.G. van der Merwe et al., *The Republic of South Africa* in *Mixed Jurisdictions Worldwide: The Third Legal Family* 95, 95 *et seq.* (V.V. Palmer (ed.), 2nd ed., Cambridge: Cambridge University Press, 2012). South African law being a particular focus of this article, I return to aspects of it in more detail below.

[7] According to statistics drawn from the International Monetary Fund (IMF) and based on its gross domestic product (GDP) in 2017 of $349 299bn, South Africa is the second largest economy in Africa (after Nigeria with a GDP of $376 284bn). *See*, in this regard, Top 10 Wealthiest African Countries According to GDP, IT News Africa, 2 July 2018 (Apr. 15, 2019), available at http://www.itnewsafrica.com/2018/07/top-10-wealthiest-african-countries-according-to-gdp/.

energy.[8] Such investments typically require complex commercial contracts which often contain different types of financial and/or construction guarantees involving very large amounts of money. When things go wrong, or even threaten to go wrong, such guarantees may be called up. This, sometimes, leads to litigation or arbitration, and a clear conception of the law relating to guarantees becomes important. Choice-of-law clauses in the contracts, or the principles of private international law, may, where China is operating in Africa, lead, *inter alia*, to the application of South African or Chinese law. Chinese and South African law regarding guarantees, however, contain significant differences in some important respects.

Against this background the intention with this article is to serve BRICS ideals by contributing to a better understanding of the legal implications and effects of guarantees that may be encountered in contracts arising from Chinese investments and construction in Africa. To do so I deal first briefly with the general commercial purpose and basic tenets of these guarantees. Thereafter the South African and Chinese law relating to these instruments is explored in more detail against the background of relevant developments in the law of contract of both countries. The article concludes with a brief comparative analysis.

1. Demand Guarantees

1.1. Introductory Issues

This article deals mainly with "independent" or "demand" guarantees. However, a guarantee can also be "accessory." In fact, when dealing with a guarantee, the first important step is to determine whether it is independent or accessory.[9] In the case of an independent guarantee a second question arises, namely what the extent of the independence is (which includes the question whether the law should allow exceptions to this independence). These two questions are explored in this article with the purpose of determining the extent to which the South African and Chinese law are in harmony or differ.[10]

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[8] On 6 September 2018 Brookings reported an announcement by President Xi Jinping pledging $60bn dollars investment into Africa, most of which relates to transport (mainly the building of railway lines) and energy. *See* Mariama Sow, *Figures of the Week: Chinese Investment in Africa*, Brookings, 6 September 2018 (Apr. 15, 2019), available at https://www.brookings.edu/blog/africa-in-focus/2018/09/06/figures-of-the-week-chinese-investment-in-africa/.

[9] Ningning Zhang, *Independent or Dependent: Chinese Rules of Interpretation for Determining the Nature of Guarantees*, 29(2) Journal of International Banking Law and Regulation 114, 114 (2014) uses the terms "ancillary" or "dependent" instead of my favoured term "accessory."

[10] *See also* Charl Hugo, *Demand Guarantees: Insights from the People's Republic of China* in *Jopie: Jurist, Mentor, Supervisor and Friend – Essays on the Law of Banking, Companies and Suretyship* 129 *et seq.* (C. Hugo & M. Kelly-Louw (eds.), Cape Town: Juta, 2017), in which aspects of these questions are considered.

1.2. International Rules

Rules drafted by international bodies are often contractually incorporated into such guarantees by the parties. Two sets of rules are especially important in this regard. The most important, probably, are the *Uniform Rules on Demand Guarantees* (*URDG*) prepared by the Banking Commission of the International Chamber of Commerce (ICC). The current revision dates back to 2010 and is typically referred to as the *URDG 758*.[11] A competing set of rules, the *International Standby Practices*,[12] was drafted and published in 1998 by the Institute of International Banking Law & Practice (IIBLP) in America. This second set of rules, commonly referred to as the *ISP 98*, received the blessing of the ICC in 1998 by indorsement and publication as an ICC text.[13] An earlier effort to unify this part of law internationally by the United Nations Commission on International Trade Law (UNCITRAL) in the form of a convention, the *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* (adopted by the General Assembly on 11 December 1995)[14] has only attracted very little support[15] and is disregarded in the remainder of this contribution.

1.3. Definition of "Demand Guarantee"

Before embarking upon a discussion and analysis of the South African and Chinese law regarding demand guarantees, it is apt to form a general understanding of this type of instrument from more "neutral" territory. The *URDG 758* is useful in this regard. Article 2 contains the following helpful definitions:

> **Demand guarantee** or **guarantee** means any signed undertaking, however named or described, providing for payment on presentation of a complying demand;

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[11] ICC Publication No. 758 (2010). It was preceded by an earlier version, the *URDG 458* (ICC Publication No. 458 (1992)). For a comprehensive commentary of the *URDG 758 see* Georges Affaki & Roy Goode, *Guide to ICC Uniform Rules for Demand Guarantees (URDG 758)* (Paris: International Chamber of Commerce, 2011). *See* further in general on the *URDG* Charl Hugo, *Letters of Credit and Demand Guarantees: A Tale of Two Sets of Rules of the International Chamber of Commerce*, 1 Journal of South African Law 1, 3–6, 14–16 (2017); Karl Marxen, *Demand Guarantees in the Construction Industry: A Comparative Legal Study of Their Use and Abuse from a South African, English and German Perspective*, LL.D. Thesis, University of Johannesburg (2017), para. 3.2.1.

[12] A standby letter of credit is essentially an independent guarantee widely encountered in the United States, especially (but not only) when financial obligations are secured. *See* in this regard *Goode on Commercial Law* 1087–1088 (E. McKendrick (ed.), 5th ed., London: Penguin Books, 2016).

[13] ICC Publication No. 590 (1998).

[14] The main work was done by the UNCITRAL Working Group on International Contract Practices. *See* United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) (Apr. 15, 2019), available at http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1995Convention_guarantees_credit.html; Marxen 2017, para. 3.2.3.

[15] The Convention was ratified by the following countries only (for whom it entered into force on 1 January 2000): Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama and Tunisia. *See* United Nations Convention, *supra* note 14.

> **Complying demand** means a demand that meets the requirements of a complying presentation; [and]
>
> **Complying presentation** under a guarantee means a presentation that is in accordance with, first, the terms and conditions of that guarantee, second, these rules so far as consistent with those terms and conditions and, third, in the absence of a relevant provision in the guarantee or these rules, international standard demand guarantee practice; <…>

Article 4 goes on to explain that a demand guarantee is "irrevocable on issue" and, then, crucially, Article 5(a) provides as follows:

> A guarantee is by its nature independent of the underlying relationship… and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary.

From these building blocks it is clear that a demand guarantee (as contemplated in the *URDG 758*) should contain the following elements: (i) it must be an irrevocable undertaking by a guarantor to pay the beneficiary on receipt of a demand from the beneficiary that is in conformity with the terms of the guarantee; and (ii) the guarantor's undertaking must be independent of the debt relationship between the beneficiary and its debtor in the underlying debt relationship. This latter element sets the demand guarantee apart from an accessory guarantee or suretyship where the guarantee is accessory to the underlying debt relationship – hence, in the case of an accessory guarantee, any defence available to the principal debtor in the underlying relationship can be raised by the guarantor against the beneficiary of the guarantee. Such defences are, however, precluded in the case of a demand guarantee.

Although the *URDG 758* does not expressly recognize any exception to the independence of the guarantor's obligations in the case of a demand guarantee, this does not mean that there are none. The position is simply that the drafters of the *URDG* deemed it best to leave this aspect to be resolved by domestic law.[16] This has led to different outcomes in different countries.

1.4. Practical Example

Before moving on to consider the approach of South African and Chinese law to the two questions posed in paragraph 1.1 above, this introduction concludes

[16] *See* Affaki & Goode 2011, at 243, para. 5.10.

with a practical example of the typical use of a demand guarantee in a construction project.

The Government of country A wishes to build a dam on land owned by it. The contract is awarded to company B. To secure itself against the detrimental financial consequences should B perform poorly or not at all, A, in the construction contract, requires of B to provide A with a performance guarantee, issued by a reputable bank, C, for an amount of, for example, 10% of the contract price. To comply with its obligations under the construction contract B accordingly requests C to issue such a guarantee. C is only likely to do so if it is satisfied with the creditworthiness of B or has received sufficient security from B, since, if the guarantee is called up, C will seek reimbursement from B. C issues the guarantee which provides that it will be paid on first written demand by A to C. The guarantee further provides that the demand must meet certain specific requirements namely: (i) it must allege that A has cancelled the contract with B due to defective performance by B; and (ii) it must have annexed to it the notice of cancellation of the contract.[17] During the course of the project a dispute develops between A and B as to whether B is building properly. Against this background A cancels the contract with B and demands payment in terms of the guarantee. Provided the demand is conforming (that is meets the two requirements set out immediately above) C must pay. Whether in fact B's performance justified A to cancel the construction contract is totally irrelevant since the question whether C is liable under the guarantee, due to the independence of the guarantee, is to be determined with reference only to the guarantee and not with reference to the underlying construction contract.

2. The South African Law

2.1. Introduction

As mentioned above, South African law belongs to the family of mixed jurisdictions. Zimmermann succinctly describes it as follows:

> [South African law] has inherited a system of private law that is based on the Dutch variant of the *ius commune* prevailing, for many centuries, in continental Europe. Unlike the continental legal systems, but like the English common law, Roman-Dutch law in South Africa has never been codified. As a result we find Courts and legal writers having to grapple, even today, with the historical sources of the *ius commune*. Particular emphasis, of course, is placed on 17th and 18th century Dutch authorities like Grotius, Groenewegen, Voet and Vinnius; but other works from the entire library of learned literature from Bartolus to Windscheid, and even the sources of Roman law itself, are regularly cited in

[17] Note that although these requirements are common in South African construction guarantees, they are not prescribed requirements. The requirements of the beneficiary's demand are whatever the guarantee may state in this regard.

> areas like contract… From the early 19th century, however, English law started to exercise a significant influence on the law prevailing in [South Africa]… and a complex process was set in motion that ultimately transformed Roman-Dutch law in South Africa into a mixed legal system with its own identity…[18]

Although large parts of South African law is statutory law, the law of guarantees is part of the uncodified (and mainly civilian) law of contract in South Africa. Guarantees are not regulated by statute. It should further be noted that one of the main aspects of English law that has been inherited is the *stare decisis* doctrine, in other words, that the decisions of the high courts are binding.

Two further points regarding South African law need to be highlighted. The first is that large parts of especially commercial law have been heavily influenced by English law, both in substance and character.[19] This is certainly the case in relation to banking law in general and the law of bank demand guarantees in particular. In practice this has meant that the South African courts have been heavily influenced by English case law relating to demand guarantees.[20]

The second point to be emphasized is that the advent of full democracy in the country in 1994, heralded a new constitutional dispensation. South Africa became a constitutional state in which the constitution is the highest law of the land. Chapter 2 of the constitution contains the Bill of Rights. Of particular importance for the purposes of this article is that the final section of the Bill of Rights places an obligation on the courts to develop the law. Section 39(2) reads as follows:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

2.2. Independent (Demand) Guarantees and Accessory Guarantees Distinguished

In some instances it is clear that a guarantee is indeed independent. This is especially so when the guarantee is issued subject to the *URDG 758*[21] *or the ISP*

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18 *See Introduction to the Law of South Africa*, *supra* note 6, at xi.

19 *Id.*

20 *See The Law of Banking and Payment in South Africa* 438 (R. Sharrock (ed.), Cape Town: Juta, 2016). *See also* Charl Hugo, *Construction Guarantees and the Supreme Court of Appeal (2010–2013)* in *Essays in Honour of Frans Malan* 159 (C. Visser & J.T. Pretorius (eds.), Durban: LexisNexis, 2014). *See* further *Dormell Properties 282 CC v. Renasa Insurance Co. Ltd. and Another*, 2011 (1) S.A. 70 (S.C.A.); *Minister of Transport and Public Works, Western Cape and Another v. Zanbuild Construction (Pty) Ltd. and Another*, 2011 (5) S.A. 528 (S.C.A.); and *Coface South Africa Insurance Co. Ltd. v. East London Own Haven t/a Own Haven Housing Association*, 2014 (2) S.A. 382 (S.C.A.).

21 As seen above the *URDG 758*, in Article 2, defines a guarantee as a "signed undertaking, however named or described, providing for payment on presentation of a complying demand." Article 5 then provides as follows: "A guarantee is by its nature independent of the underlying relationship… A reference in the

98.[22] The question is also mostly unproblematic when a standard-form construction guarantee forming part of a standard-form industry-formulated suite of contracts is used.[23] However, in the event of a guarantee being drafted *ad hoc* for a specific purpose without incorporating rules such as the *URDG*, it becomes "key"[24] to determine whether the guarantee is independent or accessory. In at least two South African cases before the Supreme Court of Appeal, the *Minister of Transport and Public Works*[25] and *KNS Construction*[26] cases, the outcome of the case depended on whether the guarantee was accessory or independent. The approach of the South African courts in such cases is to read the guarantee as a whole and to determine from its clauses and surrounding circumstances whether the parties intended it to be independent or accessory.[27] In this regard its "label, title, name or heading" is not conclusive.[28] In the *KNS Construction* case the court put it thus:

> In order to resolve the question whether the guarantee is "a call guarantee" [demand guarantee] or "a conditional guarantee" [accessory guarantee], it is apt to restate what this court said about interpreting documents. In *Novartis SA v Maphil Trading* [2016 1 SA 518 SCA par 27]… this court said:

guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary." These provisions read together, it is submitted, place the status of a guarantee incorporating the *URDG* almost beyond contention. It is clearly, almost invariably, independent.

22 Para. 1.06, under the heading "Nature of Standbys," provides as follows: "a. A standby is an irrevocable, independent, documentary, and binding undertaking when issued and need not so state. <...> c. Because a standby is independent, the enforce-ability of an issuer's obligations under a standby does not depend on: i. the issuer's right or ability to obtain reimbursement from the applicant; ii. the beneficiary's right to obtain payment from the applicant; iii. a reference in the standby to any reimbursement agreement or underlying transaction; or iv. the issuer's knowledge of performance or breach of any reimbursement agreement or underlying transaction." The combined effect of these provisions, it is suggested, is that a guarantee issued subject to the *ISP 98* will clearly, almost invariably, be independent.

23 For example the suites of agreements of the Joint Building Contracts Committee (JBCC) and the South African Institution of Civil Engineering's *General Conditions of Contract* (GCC). *See* in this regard *The Law of Banking and Payment in South Africa*, *supra* note 20, at 439–440.

24 The term is borrowed from Michelle Kelly-Louw, *Construing Whether a Guarantee Is Accessory or Independent Is Key* in *Jopie: Jurist, Mentor, Supervisor and Friend*, *supra* note 10, at 110.

25 *Minister of Transport and Public Works*, *supra* note 20.

26 *Mutual and Federal Insurance Co. Ltd. and Another v. KNS Construction (Pty) Ltd. and Another* [2016] Z.A.S.C.A. 87.

27 In *Eskom Holdings SOC Ltd. v. Hitachi Power Africa (Pty) Ltd. and Another* [2013] Z.A.S.C.A. 101, para. 13 Mthiyane A.P. put it thus: "The question... is whether the... guarantee... is, on a proper interpretation of its terms, an on demand guarantee or a conditional guarantee." *See also* Kelly-Louw 2017, at 111.

28 Kelly-Louw 2017, at 111.

> "…the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it… and the court should always consider the factual matrix in which the contract is concluded – the text to determine the parties' intention."

In both the *KNS Construction* and the *Zanbuild* cases the court concluded that the formulation of the guarantees indicated an intention of accessority. In *Zanbuild*, for example, the court referred to "the assertion at the outset that the guarantee provide 'security for the compliance of the contractor's performance of obligations in accordance with the contract,'" as well as to the fact that "in the body of the document the bank guarantees 'the due and faithful performance by the contractor.'" This, the court held, "accords with language associated with suretyships."[29]

Kelly-Louw's interpretation of these judgments (which might be putting it slightly too strong) is in fact that unless an intention of independence emerges clearly from the wording of the guarantee, South African courts are more likely to find it to be accessory: put differently, if the wording is ambiguous the court is more likely to find that the guarantee is accessory as opposed to independent; accessority is the default and if independence is intended this must be made clear.[30]

2.3. Independence and Exceptions to Independence

The independence of demand guarantees is firmly entrenched in South African law. So, too, is the principle that fraud by the beneficiary may provide an exception to this independence. The law in this respect has been developed by following English precedents, some of which relate to letters of credit rather than to guarantees. The foundations of the law of these two (independent or autonomous) instruments are generally regarded, both in South Africa and England, as sufficiently similar to justify this approach.[31] Hence, in a case relating to a demand guarantee, *Lombard Insurance Co. Ltd. v. Landmark Holding (Pty) Ltd.*, Navsa J.A., drawing from earlier South African jurisprudence relating to letters of credit,[32] stated the independence principle as follows:

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29 Para. 19.

30 Kelly-Louw 2017, at 115.

31 *See, e.g.*, *Loomcraft Fabrics CC v. Nedbank Ltd. and Another*, 1996 (1) S.A. 812 (S.C.A.), at 816C–817D; *Union Carriage and Wagon Co. Ltd. v. Nedcor Bank Ltd.*, 1996 C.L.R. 724 (W), at 730; *Lombard Insurance Co. Ltd. v. Landmark Holding (Pty) Ltd. and others*, 2010 (2) S.A. 86 (S.C.A.), para. 20; *Dormell Properties*, *supra* note 20, paras. 38 (per Bertelsman A.J.A.) & 63 (per Cloete J.A.). *See also Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] Q.B. 159 (C.A.), at 169A; *Intraco Ltd. v. Notis Shipping Corporation (The "Bhoja Trader")* [1981] 2 Lloyd's Rep. 256 (C.A.), at 257.

32 *Loomcraft Fabrics*, *supra* note 31, at 815G-I.

> The guarantee... is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which is the establishment of a contractual obligation on the part of a bank to pay the beneficiary (seller). This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold. Whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. The bank's liability to the seller is to honour the credit. The bank undertakes to pay provided only that the conditions specified in the credit are met.[33]

The fraud exception to the independence principle was clearly recognized for the first time in a letter of credit case, *Phillips v. Standard Bank of South Africa Ltd*.[34] In his judgment, however, Goldstone J.A. traced it back historically to a much earlier American case, *Sztejn v. J. Henry Schroder Banking Corporation*,[35] in which Shientag J. stated that the "principle of the independence of the bank's obligation" should not be extended "to protect the unscrupulous [fraudulent] seller."[36] In the *Sztejn* case the seller had literally shipped rubbish to the buyer instead of the bristles contracted for, and an injunction to prevent the bank from paying was successful.

The fraud exception to the independence principle became firmly entrenched in South Africa when the Appellate Division in another letter of credit case, *Loomcraft Fabrics CC v. Nedbank Ltd.*, stated that upon presentation of conforming documents "the bank will escape liability only upon fraud on the part of the beneficiary."[37] For this "established exception"[38] he relied on the judgment of the English House of Lords in the case *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*.[39] In this case Lord Diplock ruled that the fraud exception arises

> where the seller, for the purpose of drawing on the credit, fraudulently presents to the… bank documents that contain, expressly or by implication,

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[33] *Lombard Insurance*, *supra* note 31, para. 20. *See* further *Dormell Properties*, *supra* note 20, para. 38; *First Rand Bank Ltd. v. Brera Investments CC*, 2013 (5) S.A. 556 (S.C.A.), para. 2; *Eskom Holdings*, *supra* note 27, para. 14; *Coface*, *supra* note 20, paras. 9–13. *See also Edward Owen*, *supra* note 31, at 171A-C; *R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* [1977] 2 All. E.R. 862 (C.A.), at 870; *Intraco*, *supra* note 31, at 257.

[34] *Phillips and Another v. Standard Bank of South Africa Ltd. and others*, 1985 (3) S.A. 301 (W).

[35] *Sztejn v. J. Henry Schroder Banking Corporation et al.*, 31 N.Y.S.2d 631 (1941).

[36] *Id.* at 634.

[37] *Loomcraft Fabrics*, *supra* note 31, at 815J.

[38] *Id.* at 816A.

[39] *United City Merchants (Investments) Ltd. v. Royal Bank of Canada* [1983] 1 A.C. 168.

> material representations of fact that to his (the seller's) knowledge are untrue.[40]

In this case the loading broker had falsified the date on a bill of lading without the knowledge of the seller (beneficiary of the letter of credit), and the House of Lords ruled that such third-party fraud could not prevent the innocent beneficiary from receiving payment. From the *Sztejn* and *United City Merchants* cases it is clear that the legal basis of the fraud exception in the common law jurisdictions is public policy. In *United City Merchants* Lord Diplock put it thus:

> The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim *ex turpi causa non oritur actio* or, if plain English is to be preferred, "fraud unravels all." The courts will not allow their process to be used by a dishonest person to carry out a fraud.[41]

Lord Diplock's exposition of the fraud exception equates fraud to fraud in the documents presented by the beneficiary of which the beneficiary has knowledge. Transposed from a letter of credit to a guarantee environment, however, this approach can be problematic since documents play a significantly less prominent role in guarantees than in letters of credit. In the case of guarantees the documents consist mostly of merely a demand augmented sometimes by another document substantiating the basis of the demand (such as a notice of cancellation as in the example set out in paragraph 1.4 above). This has led to the reformulation of the fraud exception in guarantee context both in English and South African case law. In the *United Trading Corporation* case Ackner L.J. stated that it was available when it was

> seriously arguable that, on the material available, the only realistic inference is that… [the beneficiary] could not honestly have believed in the validity of its demand.[42]

Other English cases refer to "a demand which the maker does not honestly believe to be correct";[43] and a claim by a beneficiary "which he knows at the time to be an invalid claim."[44] These renditions of fraud move away from an insistence on

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40 *United City Merchants, supra* note 39, at 183G.

41 *Id.* at 183–184.

42 *United Trading Corporation S.A. v. Allied Arab Bank Ltd.* [1985] 2 Lloyd's Rep. 554 (C.A.), at 561. *See also Banque Saudi Fransi v. Lear Siegler Services Inc.* [2007] 2 Lloyd's Rep. 47 (C.A.).

43 *Uzinterimpex J.S.C. v. Standard Bank Plc* [2007] 2 Lloyd's Rep 187, para. 107.

44 *GKN Contractors Ltd. v. Lloyd's Bank Plc* [1985] 30 B.L.R. 48, at 63.

fraud in the documents. This line of thinking has also spilt over into South Africa as is evident from the following statement by Theron J.A. in *Guardrisk Insurance Co. Ltd. v. Kentz (Pty) Ltd.*:

> It is trite that where a beneficiary who makes a call on a guarantee does so with knowledge that it is not entitled to payment, our courts will step in to protect the bank and decline enforcement of the guarantee in question.[45]

Both the *Loomcraft* case in South Africa[46] and the *United City Merchants* case in England[47] contain dicta to the effect that beneficiary fraud constitutes the *only* exception to the independence principle. In England, however, this statement is no longer true in principle. In *Mahonia Ltd. v. JP Morgan Chase Bank*[48] Colman J., stressing the public policy basis of the fraud exception, recognized also the existence of an illegality exception. With reference to examples of unlawful arms transactions and unlawful heroin sales he stated:

> If a beneficiary should as a matter of public policy (*ex turpi causa*) be precluded from utilizing a letter of credit to benefit from his own fraud, it is hard to see why he should be permitted to use the courts to enforce part of an underlying transaction which would have been unenforceable on grounds of its illegality if no letter of credit had been involved, however serious the material illegality involved.[49]

Although the principle of an illegality exception was acknowledged in this case, the defence did not succeed ultimately since it was not proven.

Although unconscionable conduct falling short of fraud has also been recognized as an exception to independence in certain common law jurisdictions, English law has not yet recognized such an exception.[50] In South Africa, however, some inconclusive *obiter dicta* stressing good faith may be providing impetus towards the recognition of

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45 *Guardrisk Insurance Co. Ltd. and Others v. Kentz (Pty) Ltd.* [2014] 1 All S.A. 307 (S.C.A.), para. 17. *See also Scatec Solar SA 163 (Pty) Ltd. and Another v. Terrafix Suedafrika (Pty) Ltd. and Another* [2014] Z.A.W.C.H.C. 63, para. 23. For an in-depth analysis of the South African and English law in this regard *see* Marxen 2017, paras. 5.2.3 & 5.2.5.

46 *Loomcraft Fabrics*, *supra* note 31, at 815–816.

47 *United City Merchants*, *supra* note 39, at 183G.

48 *Mahonia Ltd. v. JP Morgan Chase Bank* [2003] 2 Lloyd's Rep. 911 (Q.B.).

49 Para. 68. For further authority in this regard *see* John Lurie, *On Demand Performance Bonds: Is Fraud the Only Ground for Restraining Unfair Calls?*, 25(4) International Construction Law Review 443, 454 *et seq.* (2008).

50 Deborah Horowitz, *Letters of Credit and Demand Guarantees Defences to Payment* 129 *et seq.* (Oxford: Oxford University Press, 2010).

an unconscionability exception.[51] The strongest views in this regard were expressed by Jansen J. in *Sulzer Pumps (South Africa) (Proprietary) Ltd. v. Covec-MC Joint Venture*.[52] In this case the applicant for the guarantee sought to prevent the calling up of a guarantee by the beneficiary on the basis that the beneficiary had bound itself not to call up the guarantee in a *pactum de non petendo*. Against this background Jansen J. stated:

> What the old authorities do demonstrate though, is that not only fraud may prohibit the calling up of a construction guarantee, but also *unconscionable conduct* and also when a contract to the contrary has been entered into between the relevant parties…[53]

Later on she concluded:

> [T]he court holds that it is clear that when it is unconscionable to rely on the literal wording of a contract without reading such wording within the context of the back-ground facts, the surrounding circumstances and the purpose of the agreement, then a construction guarantee cannot be called up.[54]

This case, however, runs counter to a rather strong line of decisions from the Supreme Court of Appeal protecting the security of payment offered by demand guarantees.[55] The decision was also criticized stringently by Kelly-Louw and Marxen who termed it "not a well-reasoned judgment."[56] They further state that "the 'unconscionable' and 'bad faith' exceptions have not been dealt with or even raised as a possibility in the South African case law" and that they should be avoided "as they seriously undermine the independence of demand guarantees… [and] diminish the usefulness of these instruments."[57]

Before moving off the South African law one further important development needs to be considered. In the *Dormell* case[58] the guarantor refused to pay on a conforming

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51 *Group Five Construction (Pty) Ltd. and others v. Member of the Executive Council for Public Transport Roads and Works Gauteng and Others* [2015] 2 All S.A. 716 (G.J.), para. 50; *Dormell Properties*, *supra* note 20, para. 65.

52 *Sulzer Pumps (South Africa) (Proprietary) Ltd. v. Covec-MC Joint Venture*, [2014] Z.A.G.P.P.H.C. 695.

53 Para. 115 (my emphasis).

54 Para. 125.

55 *See Lombard Insurance*, *supra* note 31; *Guardrisk Insurance*, *supra* note 45; and *Coface*, *supra* note 20.

56 *See* Michelle Kelly-Louw & Karl Marxen, *General Update on the Law of Demand Guarantees and Letters of Credit* in *Annual Banking Law Update* 276, 292 (C. Hugo (ed.), Cape Town: Juta, 2015).

57 *Id.* at 293.

58 *Supra* note 20. For more detailed analyses *see* Charl Hugo, *Protecting the Lifeblood of Commerce: A Critical Assessment of Recent Judgments of the South African Supreme Court of Appeal Relating to Demand Guarantees*, 4 Journal of South African Law 661, 663–667 (2014); *The Law of Banking and Payment in South Africa*, *supra* note 20, at 452–455.

demand presented by the beneficiary (the employer in a construction contract) raising two spurious defences that were nevertheless successful in the court a quo. The beneficiary appealed. The guarantee had been called up on the basis of an alleged breach of the underlying construction contract by the contractor (the applicant for the guarantee). By the time the case came up for consideration in the Supreme Court of Appeal, however, the dispute in the underlying construction contract had been finally determined *in favor of the contractor*. In other words, the arbitrator's award was to the effect that the contractor had not been in breach of the construction contract. Against this background the Supreme Court of Appeal had to decide whether to permit evidence on the outcome of the construction dispute.

Two of the five judges held this to be untenable on the basis of the principle of independence, since the liability of the guarantor was to be determined on the basis of the guarantee alone and disputes concerning the underlying construction contract were irrelevant. Cloete J.A., the author of the minority judgment, stated:

> Once the appellant had complied with clause 5 of the guarantee [i.e. presented a conforming demand], the first respondent had no defence to a claim under the guarantee. It still has no defence. The fact that an arbitrator has determined that the appellant was not entitled to cancel the contract, binds the appellant – but only vis-à-vis the second respondent [the contractor]. It is *res inter alios acta* as far as the first respondent is concerned.[59]

The majority judgment, however, took the view that in light of the arbitral award the employer had lost the right to enforce the guarantee since "there was no legitimate purpose to which the guaranteed sum could be applied."[60] Moreover, if the guarantor were ordered to pay, the contractor "would be entitled to repayment of the full amount guaranteed."[61] Such an order would accordingly cause additional cost and inconvenience without practical effect, which, in terms of the Supreme Court Act[62] entitled the court to dismiss the appeal on that ground alone.[63]

The effect of the majority judgment in the *Dormell* case – although not stated expressly in these terms – was clearly that another exception to the independence principle had been recognized by the Supreme Court of Appeal: if the underlying dispute has been finally determined against the beneficiary of the guarantee

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59 Para. 64.

60 Paras. 40 & 41.

61 Para. 42.

62 Supreme Court Act 59 of 1959, sec. 21A(1). This was the legislation in force at the time of the hearing. It has since been replaced by the Superior Courts Act 10 of 2013, sec. 16(2) of which is comparable.

63 Para. 45.

in arbitration (or litigation) this would provide a defence against liability on the guarantee, or the basis for an injunction preventing payment thereof.

However, it soon became clear in *obiter dicta* emanating from the Supreme Court of Appeal in subsequent cases that other judges of the Supreme Court of Appeal were not comfortable with the majority decision in *Dormell*.[64] Eventually, in the *Coface* case, the Court held that the minority judgment in *Dormell* had got it right and that the majority judgment was clearly wrong.[65] *Dormell* was overturned with the following motivation:

> Since the decision in *Dormell*, and perhaps predictably, there has been an increasing number of cases in which guaranteeing banks have sought to introduce contractual disputes in order to avoid meeting the guarantee. In some cases the allegedly defaulting contractor sought to join the fray. It is the very consequence that the line of cases prior to *Dormell* sought to avoid.[66]

Since *Coface*, therefore, the South African law will not allow the prior determination of the underlying dispute to form a defence or basis to interdict payment.

In the light of the aforementioned it is clear that the jurisprudence relating to the independence of guarantees and the exceptions in this regard is a constantly developing area,[67] which has led one commentator to conclude that

> [c]ontractors should take comfort that the law governing on-demand performance bonds is becoming more heavily infused with concepts of fairness and equity.[68]

3. Chinese Law

3.1. Introduction: Sources of the Chinese Law of Contract

Ancient and early Chinese law, according to Bing Ling, "failed to develop a civil law tradition comparable to Roman law" but that it nevertheless contained "sophisticated

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64 *See First Rand*, *supra* note 33, at 561F–562G; *Guardrisk Insurance*, *supra* note 45, paras. 22–25.

65 *Dormell Properties*, *supra* note 20, para. 25.

66 Para. 24.

67 In her impressive treatise on the defences to payment Horowitz 2010, at 14 (and at the conclusion of each chapter) works with a "spectrum of abstraction" moving from the "most abstract" to the "least abstract" (or from "autonomy" to "interdependence"). The different potential defences are plotted on the spectrum either to the left or right of an "ideal cut-off point" which determines whether or not the defence should be recognized. Her spectrum (or model) provides for development in that it is not fixed but "movable for policy."

68 Lurie 2008, at 465. The infusion with concepts of fairness and equity is also evident English law from the prominence placed on "bad faith" or a "lack of good faith" in this context in *TTI Team Telecom International Ltd. & Anor v. Hutchison 3G UK Ltd.* [2003] E.W.H.C. 762 (T.C.C.), para. 31.

rules and procedures on private contract" which were for the most part embodied in "conventional rites… and customs."[69] In due course the application of law to contractual disputes was influenced by "Confucian ethos and public mores."[70] The modernization of contract law commenced in the early 20th century in the form of, first, two draft civil codes, and, eventually, after the proclamation of the Republic of China (ROC) in 1912, the promulgation of the ROC Civil Code in 1929. This first modern civil code in Chinese history contained five books dealing respectively with general principles, obligations, real rights, family and succession. It was significantly influenced by the German and Swiss codes. It transplanted many concepts and doctrines of European civil law into China but also placed strong emphasis on public interest and good faith.[71]

With the advent of communism in 1949 the ROC Civil Code was abolished. During the ensuing period three contract laws[72] were enacted, namely, the Economic Contract Law (ECL) in 1981; the Foreign Economic Contract Law (FECL) in 1985; and the Technology Contract Law (TCL) in 1987.[73] The ECL, which governed contracts between Chinese parties, was, according to Bing Ling "mostly general and crude and fail[ed] to include many important concepts and principles of modern contract law."[74] State control and governmental supervision emerge strongly from it. As China adopted an "opening up" policy the need for regulation of economic contracts with foreigners emerged. This resulted in the enactment of the FECL, which was largely modelled on foreign and international laws on commercial contracts and placed more emphasis on party autonomy (less governmental interference).[75] Moreover, a comprehensive code, the General Provisions of Civil Law (GPCL), was passed in 1986. In relation to the GPCL Bing Ling remarks:

> The legislature aimed not to achieve German-style scientific elegance, but rather to serve indigenous pragmatism, namely to enact such basic provisions of law that would meet the demand of a society that was moving towards market economy and civil society. <…> Although the GPLC fails to provide for a comprehensive regime on contract, it spells out certain fundamental concepts and principles of modern civil law and thus lays down the conceptual

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69 Bing Ling, *Contract Law in China* 9 (Hong Kong: Sweet & Maxwell Asia, 2002).

70 *Id. See also* on the role of Confucianism Junwei Fu, *Modern European Chinese Contract Law: A Comparative Study of Party Autonomy* xvii, 9–13 (Alphen aan den Rijn: Kluwer Law International, 2011).

71 Ling 2002, at 10. It is still in force in Taiwan today. *See* in this regard Fu 2011, at xviii.

72 "Law" is used here in the context of statutory law.

73 Ling 2002, at 11–14; Fu 2011, at xviii, 2.

74 Ling 2002, at 12.

75 *Id.* at 12–13.

> and doctrinal foundation upon which further civil and commercial legislation can be built. In substance the GPCL also developed a marked departure from the dominance of the state plan and governmental intervention and placed a new emphasis on private autonomy.[76]

By the early 1990s economic reform towards a market economy was a reality. Much of the ECL was incompatible with this situation. This led to amendments of the ECL in 1993 which were relatively modest since, by that time, the legislature had decided that all major changes should be done by way of a new unified contract law,[77] which eventually come into effect in October 1999 as the Contract Law (CLC). The ECL and FECL were repealed at the same time. Junwei Fu remarks as follows regarding the CLC:

> The CLC is designed to reflect contemporary Chinese social and economic life. While it mirrors the current economic and globalizing developments, it reveals the limited freedom or autonomy in Chinese social life. In other words, the CLC reflects tensions between the imperatives of state control and individual freedom.[78]

Regarding the practical interaction between the CLC and the GPCL the position is that contractual disputes are adjudicated primarily with reference to the CLC. However, if the CLC does not deal with the matter the courts will revert to the GPLC.[79] It should further be noted that the CLC is a general law dealing with contracts. Apart from it the Chinese legislature has enacted several specialized laws dealing with specific contracts.[80] One such law is the Security Law which applies to guarantees.[81] In the event of a conflict between provisions of the CLC and any such special law, provisions of the special law prevail.[82]

Regarding the general principles of contract law in China it is important to highlight the central role of fairness and good faith. Article 5 of the CLC provides:

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76 Ling 2002, at 13.

77 *Id.* at 14.

78 Fu 2011, at 2.

79 *Id.*

80 Ling 2002, at 26–28.

81 *Id.* at 26.

82 Article 123 of the CLC provides: "Where other laws have other provisions for contracts, those provisions shall govern." *See*, in this regard, Ling 2002, at 27–28 who also makes the point that this rule is based on the principle that the more specialised law is stronger than the more general law, and, for this reason, that Article 123 does not apply to a conflict between the CLC and the (more general) GPLC.

> The parties shall observe the principle of fairness in determining their respective rights and duties

and Article 6:

> The parties shall observe the principle of good faith in the exercise of their rights and the performance of their duties.

Fairness is seen as derived from good faith.[83] Any detailed discussion on the role of fairness and good faith falls outside the scope of this article. However, it is important to stress that these principles, which some trace back to Confucianism, are fundamentally important in Chinese law. Bing Ling terms good faith "indeed one of the… fundamental principles that form the doctrinal bases for the specific principles and rules in the Contract Law."[84] Fairness, in turn, "requires that the parties follow generally accepted moral, social and commercial standards and keep to a reasonable balance of interests in the transaction."[85] It is clear that the combination of good faith and fairness in Chinese law entails, *inter alia*, that powers and rights should not be abused.[86]

As evident from this brief background the interpretation of Chinese contract law can be problematic, and, in the words of Bing Ling, is a matter "that has received inadequate treatment in Chinese law."[87] One of the methods by which problems of interpretation is dealt with in Chinese law is by so-called Judicial Interpretation. This, as emerges clearly below, is an aspect of particular importance for the purposes of this article. The Supreme People's Court (SPC) of China is empowered to interpret laws in the course of their concrete application in adjudication. Although the power conferred to the Supreme People's Court (SPC) clearly referred to cases of concrete application, the SPC, as Bing Ling puts it "has gone far beyond the limit and has performed interpretation that should be more properly described as 'quasi legislation.'" He then continues as follows:

> As the SPC has taken an active role in judicial interpretation, judicial interpretation is now a major part of *primary sources* of Chinese law. In practice, many judicial interpretations contain comprehensive provisions

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83 Ling 2002, at 50.

84 *Id.* at 52. *See also* Fu 2011, at 46 who terms it a "significantly important principle" without equating it to the "highest guiding principle for the law of obligations" which prevails in many civil law countries.

85 Ling 2002, at 50.

86 Ling 2002, at 51; Fu 2011, at 44.

87 Ling 2002, at 26.

> that interpret or supplement the provisions of a particular law or deal with particular types of issues.[88]

A judicial interpretation dealing with independent guarantees, *Provisions of the Supreme People's Court of the People's Republic of China on Several Issues Concerning the Trial of Disputes Over Independent Guarantees* (henceforth: *IGP* for "*Independent Guarantee Provisions*") was released in a meeting of the Judicial Committee of the Supreme People's Court on 7 July 2016 and came into effect on 1 December 2016.[89] The English translation of the introductory clause of the *IGP* reads:

> For the purpose of proper adjudication of independent guarantee dispute cases, maintaining the legal rights and interests of the parties, servicing and safeguarding the "Belt and Road Initiatives," and promoting the Opening-up Policy, these Judicial Provisions are formulated in accordance with General Principles of the Civil Law of the People's Republic of China [the GPCL], Contract Law of the People's Republic of China [the CLC], Security Law of the People's Republic of China, Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China, Civil Procedure Law of the People's Republic of China and other laws, and in light of the adjudication practices: <…>

The purpose of the *IGP* emerges from this clause. Some of its provisions to which I turn below are of particular importance for the purposes of this article.

3.2. Independent (Demand) Guarantees and Accessory Guarantees Distinguished

Article 3[90] of the *IGP* provides that a court will support a party's claim that a guarantee is independent if the guarantee meets any one or more of three different requirements. They are:

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88 Ling 2002, at 32 (my emphasis).

89 *LC Rules & Laws: Critical Texts for Independent Undertakings* 317 *et seq*. (J.E. Byrne (ed.), 7th ed., Montgomery Village: Institute of International Banking Law & Practice, Inc., 2018). The translation was prepared by a team headed by Jin Saibo of the Beijing Jincheng Tongda & Neal law firm who was assisted by Feng Jing, Hong Qin, and Zhang Zheng. The English translation was reviewed by Prof James Byrne with the assistance of Justin Berger, Karl Marxen and Yangjun "Anora" Wang (*see*, in this regard, the "Editor's Overview" 317–318 of this work). The *IGP* is also available as a separate publication containing annotations: IIBLP, Independent Guarantee Provisions of the PRC Supreme People's Court – Annotated English Translation (2017). An earlier draft of the *IGP* had already been released in December 2013. *See* in this regard Ningning Zhang, *Abuse: An Exception to Payment Under Independent Guarantees in China*, 26 International Company and Commercial Law Review 265, 266 (2015). It differs, however, in many respects from the final *IGP* and is disregarded in the remainder of this article.

90 The English translation contains headings which are absent in the original Chinese since such headings would apparently be inconsistent with other judicial interpretations. They were added to the translated text "[f]or the convenience of the reader." The heading of Article 3 is "Independence." *See LC Rules & Laws*, *supra* note 89, at 318 note 5.

(i) the guarantee itself "states that it is payable on demand";

(ii) the guarantee states "that it is subject to the ICC Uniform Rules for Demand Guarantees or other model rules for independent guarantee transactions";[91] and

(iii) "based on the text of the Guarantee, the Issuer's payment obligation is independent from the underlying transaction relationship or guarantee application relationship, and the Issuer is liable for payment only against a complying presentation."

However, there is a proviso applicable to all three namely that the guarantee must "specify any document against which the payment shall be made" and "the maximum amount payable." Article 3 then provides that a party's claim that the nature of the guarantee is that of "a general guarantee or a guarantee with joint and several liability" due to the fact that the guarantee refers to the relevant underlying transaction, "shall not be supported by a People's Court." The article then concludes by providing emphatically that the People's Court will not entertain a claim by a party that a guarantee meeting the requirements of an independent guarantee as set out above, should be adjudicated with reference to the rules of the Security Law. Hence, the Security Law referred to in paragraph 3.1 above, regulates accessory guarantees (or, to use the words of the translators, "general guarantees" or "guarantees with joint and several liability"), and not independent guarantees, which, by implication, are to be dealt with in accordance with the provisions of the *IGP*.

3.3. Independence and Exceptions to Independence

The independence of demand guarantees and the exceptions to this independence are dealt with in detail in the *IGP*. First, the independence principle is set out as follows in Article 6:

> The Issuer may not seek to excuse its payment obligation based on defenses arising out of the underlying transaction relationship or the independent Guarantee's relationship with the Applicant and such defenses shall not be supported by a People's Court, except under the circumstances provided in Article 12 [*Fraud*] of these Judicial Provisions.

Article 12 of the *IGP* then states a number of exceptions to independence which are lumped together under the generic term "independent guarantee fraud." The article reads as follows:

> Independent guarantee fraud shall be found by a People's Court under one of the following circumstances:

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[91] It is suggested that the term "other model rules" here refers primarily to the *ISP 98* and the UNCITRAL Convention, on which *see* para. 1.2 *supra*.

(1) The Beneficiary, acting in collusion with the Guarantee Applicant or any other party, has fabricated the underlying transaction;

(2) Any of the third-party documents presented by the Beneficiary is forged or contains false information;

(3) Any court judgment or arbitral award finds that the party obligated on the underlying transaction shall not be liable for payment or damages;

(4) The Beneficiary acknowledges that the obligations under the underlying transaction have been fully discharged or that the payment triggering event specified in the Independent Guarantee has not occurred; or

(5) The Beneficiary otherwise knowingly abuses its right to demand payment when it has no such right.

The procedural aspects of disputes relating to "independent guarantee fraud" are subsequently dealt with in Article 13 which reads as follows:

The Applicant, the Issuer, or the Instructing Party of the Independent Guarantee may, prior to or during the court litigation or arbitral procedure, file a petition with a People's Court of the Issuer's domicile or any other People's Court with competent jurisdiction over the Independent Guarantee fraud dispute to suspend the payment under the Independent Guarantee in the event they find out that any of the circumstances provided in Article 12 [*Fraud*] has occurred.

Finally, Article 14 of the *IGP* goes on to set three requirements, all of which must be met, before a People's Court will be willing to grant a ruling suspending payment in terms of Article 13. They are stated as follows:

(1) The evidence filed by the petitioner for payment suspension supports a high probability of existence of any of the circumstances provided in Article 12 [*Fraud*];

(2) It is under such urgent circumstances that the petitioner's lawful rights and interests will suffer irreparable damage if payment is not suspended; and

(3) The petitioner has provided security sufficient to cover the damage probably caused by the payment suspension to the party(ies) against whom the application is made.

Article 14 further provides that suspension will not be ordered on the basis of breach of contract on the part of the beneficiary. This simply reinforces the independence principle. Finally it provides that where an issuing guarantor has paid a guarantee in good faith, a court will not suspend payment under another independent guarantee intended "to secure the Issuer's right to reimbursement." This provision simply reinforces the independence of the backing guarantee.

4. Comparative Analysis

4.1. Determining Whether a Guarantee Is Independent or Accessory

In accordance with South African law, this question requires interpretation of the guarantee as a whole in order to determine the intention of the parties. Against this background, should the guarantee contain terms indicative of accessority, the South African courts (irrespective of the fact that other terms may indicate independence) have little difficulty in finding the guarantee to be accessory.[92] The Chinese *IGP*, on the other hand, adopts more of a rule-based approach in terms of which a guarantee is to be regarded as independent if it meets any one of three requirements. One of these is that "based on the text of the Guarantee, the Issuer's payment obligation is independent from the underlying transaction relationship or guarantee application relationship, and the Issuer is liable for payment only against a complying presentation."[93] This requirement, it is suggested, is a reasonably accurate reflection of the South African law.

However, the *IGP* add two further bases upon which a court will find the guarantee to be independent, which, from a South African perspective may be a bit more problematic. The first is if the guarantee incorporates the *URDG* or other independent guarantee rules.[94] Since the incorporation of such rules must be a very strong indication of an intention by the parties that the guarantee should be independent, in practice it would be most unusual that such a guarantee will be found to be accessory by a South African court. However, it is not impossible should the guarantee incorporating the *URDG* nevertheless contain a specific term clearly indicative of an intention of accessority.

The second is if the guarantee states that it is payable on demand.[95] This is more problematic. In the *KNS Construction* case, for example, the guarantor's undertaking was indeed to pay "on receipt of a written demand,"[96] yet the court found the guarantee to be accessory on the basis of other indications in it to this effect.

In my view the South African approach is the better one. Leaving that aside, the important fact to note is that some guarantees that may be found to be accessory in South African law, may indeed be considered as independent by a court or tribunal applying Chinese law. Kelly-Louw's view that accessority is the default position,[97] cannot in my view be regarded as true for Chinese law under the *IGP*.[98]

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92 *See* para. 2.2 *supra*.

93 *See* para. 3.2 *supra*.

94 *Id.*

95 *Id.*

96 *Supra* note 26. *See* clause 3 of the guarantee quoted in paragraph 2 of the judgment.

97 *See* para. 2.2 *supra*.

98 It is of interest to note that, according to Zhang 2014, at 115–116, prior to the *IGP* "the relevant rules stated by the Chinese authorities create[d] a presumption that the guarantee is ancillary [accessory]." It is suggested that if this is correct, the *IGP* has changed matters fundamentally.

4.2. Independence and Exceptions to Independence

It is in the area of the independence principle, and, more particularly, the recognized exceptions to this principle, that South African and Chinese law differ significantly. The differences are not to be found in the meaning of independence (as stated in Article 6 of the *IGP*), or in the procedural and evidentiary rules (as set out in Articles 13 and 14 of the *IGP*), which, viewed generally, correspond reasonably well to the South African law in this regard.[99] However, the two systems differ significantly in relation to the exceptions recognized by them.

As mentioned above, the exceptions are grouped together in the *IGP* under the umbrella term "independent guarantee fraud." However, on reading Article 12 it becomes abundantly clear that this "fraud" has a much wider ambit than fraud in South Africa. The English translators, in an annotation to the *IGP*, state that it encompasses "fraudulent activity in relation to an Independent Guarantee seeking to take improper advantage of the independence and documentary nature of an Independent Guarantee."[100] Five such activities are then listed in Article 12 which need to be considered closely.

The first, namely that the beneficiary fabricates the underlying transaction in collusion with another, would in my view also constitute fraud in South African law. It is clearly conduct by the beneficiary aimed at acquiring payment under a guarantee in the knowledge of not being entitled thereto. As such it falls squarely within the test for fraud formulated by the Supreme Court of Appeal in the *Guardrisk* case as set out above.[101]

However, the second of the listed activities, namely the presentation by the beneficiary of a third-party document that is forged or contains false information, is more problematic. There is no indication that the beneficiary must have knowledge of the forgery or falsity. As stated above, the South African law requires such knowledge. Third-party fraud is not recognized as fraud and cannot provide either the basis for a defence on the part of the guarantor against the beneficiary's claim, or a basis for interdicting payment.[102] Although the presentation of third-party documents is not all that prevalent in guarantee practice, it is not unknown. The implication of the *IGP*

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[99] Procedurally the issue can arise in three distinct manners in South African law. The guarantor can refuse to pay, and if sued raise the fraud defence. This is in harmony with Article 6 of the *IGP* which, by implication, allows the issuer "to excuse its payment obligation… under the circumstances provided in Article 12." Article 14 of the *IGP*, in turn, relates well to the South African law of interlocutory interdicts. *See* in this regard D.E. van Loggerenberg, *Erasmus Superior Court Practice. Vol 2* Appendix D6 (Cape Town: Juta, 2015); Stephen Peté et al., *Civil Procedure: A Practical Guide* 440 *et seq*. (3rd ed., Oxford: Oxford University Press, 2008).

[100] IIBLP, *supra* note 89, at 7 note 19.

[101] *See* para. 2.3 *supra*, and especially the text at note 45.

[102] *See* para. 2.3 *supra*, and especially the discussion of the *United City Merchants* case in the text at note 40 *et seq*.

rule is that, for example, if an employer in a construction contract, in order to avail itself of a construction guarantee, must provide a certificate by an expert engineer indicating that the contractor's performance does not meet certain requirements, and the employer does so without knowledge of the fact that the engineer has made a false statement, the contractor, on the basis of independent guarantee fraud, is able to interdict payment under Chinese law. This would not be the case under South African law.

The third of the listed activities, namely that a court or arbitrator has found that the party whose performance was guaranteed is not liable for payment or damages, is likewise problematic from a South African legal perspective, as is evident from the vicissitudes of *Dormell* judgment[103] in South Africa. As described above the South African Supreme Court of Appeal, in the *Coface* case,[104] overruled the majority judgment in the *Dormell* case which was largely in harmony with this (third) listed activity in Article 12 of the *IGP*. Post *Coface*, therefore, a judgment or arbitral award on the dispute on the underlying contract is regarded as irrelevant due to the independence of the guarantee in South African law.

The fourth of the listed activities is a demand for payment despite an acknowledgement by the beneficiary that the underlying obligations have been discharged or that the event triggering payment under the guarantee has not occurred. Such conduct does not fit neatly into the category of a recognized exception or no exception. On the one hand one can argue that a beneficiary who has acknowledged that the underlying obligations have been discharged or that the triggering event has not occurred, and nevertheless calls up the guarantee, will probably meet the *Guardrisk* test of seeking payment under a guarantee in the knowledge of not being entitled thereto. This would constitute fraud. On the other hand, the judgment in the *Coface* case may be interpreted as providing authority to the contrary. In this case the guarantor applied to amend its pleadings so as to reflect that the beneficiary (employer) had demanded payment of a construction guarantee despite the fact that a payment certificate issued by the agent of the beneficiary, which the guarantor contended was to be regarded as a final payment certificate, reflected a nil balance owing to the beneficiary.[105] The court took the view that such a defence was untenable due to the independence of the guarantee and the amendment was disallowed.[106] In my view, in this type of situation, the facts of each case must be scrutinized carefully in order to determine whether the conduct of the beneficiary meets the test for fraud in South African law. It is suggested that the contents of a payment certificate may be valuable evidence to be considered

103 *See* para. 2.3 *supra* (especially the text at note 58 *et seq*.).

104 *See* para. 2.3 *supra* (especially the text at note 65 *et seq*.).

105 *Coface*, *supra* note 20, para. 6.

106 Paras. 9–26.

when testing for fraud. In any event, against the background of *Coface*, it cannot currently be said that the fourth listed activity constitutes a recognized exception to the independence principle in South African law.

The final listed activity refers to a beneficiary who in some other way "knowingly abuses its right to demand payment."[107] This is clearly a catch-all final provision intended to provide for other situations not previously listed.[108] Essentially, it adopts the abuse of rights doctrine (the *Rechtsmissbrauch* of German law)[109] which, in harmony with the importance of good faith and fairness in the Chinese law of contract,[110] forms part of Chinese law.[111] It is suggested that this final listed activity probably includes both the illegality exception and the unconscionability exception (to use the legal terminology employed in this regard in South African and common law legal literature).

Despite its civilian roots, however, South African law does not recognize the abuse of rights doctrine (the roots of which lie in the dominant principle of good faith in the law of contract[112]). The role of good faith does emerge in various contexts in the South African law of contract, but is nevertheless not as prominent as in German or Chinese law. The battle regarding the role of good faith in South Africa is typically fought on the competing principles of *pacta sunt servanda* and fairness. In the pre-constitutional era, the highest South African court came out strongly on the side of *pacta sunt servanda*.[113] In the constitutional era, there are signs that this may be changing, but not quickly or boldly. In *Brisley v. Drotsky* the majority of the Supreme Court of Appeal, in a split decision, put it thus:

> [22] Regarding the role of good faith we agree in essence with the view… that good faith is not an independent, or "free floating" basis for the… non application of contractual terms. Good faith is a fundamental principle that

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[107] The description unfortunately does not stop there. It continues "…when it has no such right." This creates a bit of a semantic nightmare since one can hardly abuse a right that you do not have. Nevertheless, as further argued in the text above, the intention appears to be to apply the "abuse of rights" doctrine.

[108] One such may well be illegality of the underlying contract – a notion that has found recognition in English law. *See* the discussion of the *Mahonia* case, *supra* para. 2.3. For detailed discussions of this aspect *see* Michelle Kelly-Louw, *Illegality as an Exception to the Autonomy Principle of Bank Demand Guarantees*, 42(3) Comparative and International Law Journal of Southern Africa 339 (2009); Marxen 2017, para. 5.4.

[109] *See* in this regard Marxen 2017, chapter 5 *passim* where he discusses the doctrine in various contexts.

[110] *See* para. 3.1 *supra*.

[111] *See* Zhang 2015, at 270: "abuse refers to the improper exercise of one's rights in a manner that produces harm or loss to someone else. It could give rise to an exception to payment under independent guarantees in Chinese judicial practice."

[112] *See* Marxen 2017, para. 5.2.9.

[113] *Sentrale Ko-op Graanmaatskappy Bpk v. Shifren en Andere*, 1964 (4) S.A. 760 (A).

> underlies the law of contract in general and finds expression in specific rules and principles thereof.[114]

The court then went on to refer with approval to the views of Hutchison[115] to the effect that good faith "may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract" and that it thus "has a creative, a controlling and a legitimating or explanatory function." The following dictum from the minority judgment of Olivier J.A. is also noteworthy:

> [R]easonableness and equity in the form of *bona fides* has become more prominent. It is clear that our law is in a phase of development where *contractual justice* has emerged stronger than ever before as a moral and juridical norm. This tendency wil in all probability… be strengthened by constitutional values.[116]

This *dictum* was prophetic. In *Barkhuizen v. Napier*[117] the Constitutional Court had the opportunity to deal with the tension between *pacta sunt servanda* and "[n]otions of fairness, justice and equity, and reasonableness," which the Court held "cannot be separated from public policy," which, in turn, must take into account "the necessity to do simple justice between individuals" and "is informed by the concept of ubuntu."[118] Some five years later (in 2012) the Constitutional Court gave the following guidance and direction to the role of good faith in the South African law of contract:

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[114] *Brisley v. Drotsky*, 2002 (4) S.A. 1 (S.C.A.), at 15. The judgment was in Afrikaans. The English translation in the text is my own. The original reads as follows: "Wat die rol van goeie trou betref, stem ons in wese saam met die siening… waarvolgens goeie trou nie 'n onafhanklike, oftewel "free floating," basis vir die… nie-toepassing van kontraktuele bepalings bied nie. Goeie trou is 'n grondbeginsel wat in die algemeen onderliggend is aan die kontraktereg en wat uiting vind in die besondere reëls en beginsels daarvan."

[115] Dale Hutchison, *Non-Variation Clauses in Contract: Any Escape from the Shifren Straitjacket?*, 118 South African Law Journal 720, 744 (2001).

[116] Para. 25. The English translation is mine. The original Afrikaans reads: "[R]edelikheid en billikheid in die vorm van die *bona fides* [het] al hoe meer op die voorgrond getree. Dit is duidelik dat ons reg in 'n ontwikkelingsfase is waar *kontraktuele geregtigheid* meer as ooit tevore as 'n morele en juridiese norm van groot belang op die voorgrond tree. Hierdie tendens sal na alle waarskynlikheid… deur grondwetlike waardes versterk word."

[117] *Barkhuizen v. Napier*, 2007 (5) S.A. 323 (C.C.), para. 51.

[118] "Ubuntu" is an important concept in African life. T.W. Bennett, *Ubuntu: An African Jurisprudence* 1 (Cape Town: Juta, 2018) quotes the following definition ascribed to Drucilla Cornell, *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation* 40 (New York: Fordham University Press, 2014): "[Ubuntu is] an activist ethic of virtue in which what it means to be a human being is ethically performed, on a day-to-day basis, in a context in which how we are supposed to live together is constantly evoked and at the same time called into question."

> Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.[119]

Whether this means that our courts, in the wake of a growing importance of good faith in the South African law of contract, will become more open towards exceptions to independence in the law of guarantees remains to be seen. I am inclined to the view that the answer is "yes."

Conclusion

There are significant differences between the Chinese and South African law relating to independent guarantees. These differences relate first to the determination whether a guarantee is accessory or independent, and, secondly, to the strength of the independence (in the case of an independent guarantee). The approach of the two legal systems to these issues can be explained with reference to fundamental tenets of the law of contract in the two countries. In this respect it is of interest to note that the South African law of contract appears to be developing towards a greater recognition of good faith, which, in relation to the recognition of exceptions to the independence principle, may bring it closer to Chinese law. For the time being, however, it is important for guarantee practitioners and lawyers of both countries to understand the current differences between the two systems, and to align their guarantee practice accordingly.

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[119] *Everfresh Market Virginia (Pty) Ltd. v. Shoprite Checkers (Pty) Ltd.*, 2012 (1) S.A. 256 (C.C.), para. 22. On this development in South African law *see also* Karl Marxen & Charl Hugo, *Exceptions to the Independence of Autonomous Instruments of Payment and Security: The Growing Emergence of Good Faith* in *Transnational Impacts on Law: Perspectives from South Africa and Germany* 131 (C. Hugo & T.M.J. Möllers (eds.), Baden-Baden: Nomos, 2017).

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INTERMEDIARY IN A COLLECTIVE LABOR DISPUTE RESOLUTION

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Collective labor disputes based on the differences in economic interests between workers and employers can be effectively resolved exclusively through conciliation procedures. Contemporary alternative methods arose mostly due to the necessity to resolve collective labor disputes; mediation for this purpose is applied differently in various countries. National legislation equally provides various means for collective labor dispute resolutions and determines relevant intermediary procedures. An intermediation in a collective labor dispute resolution can be private and/or state-appointed and mandatory or alternative and remains a very perspective means of alternative dispute resolution. An analysis of different countries' legislation distinguishes several common features of intermediation in collective labor disputes, concerning mainly the goals, objectives and principles. For bodies and persons conducting intermediation, the degree of compulsion in their decisions varies greatly from country to country. However, the obtained experience reveals common and distinctive procedural features and provides the possibility to classify existing approaches, having combined them into groups. The analysis also follows general development trends of collective labor dispute intermediation in different countries and identifies several shortcomings that are characteristic to different systems of intermediation legal regulation. Further research on the most effective ways

of collective labor dispute conciliation is necessary for establishing new harmonious labor relations as the grounds for social progress.

Keywords: alternative dispute resolution (ADR); intermediation; collective labor dispute; conciliation procedure; state-private mediation system.

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Introduction

Traditional classification of labor disputes within the doctrine of labor law based on the division of the individual and collective, has a special focus on the rights and interests that the law does not formalize. The application of formal or informal procedures to resolve labor conflicts mostly concerns the possibility or lack of procedures to enforce positive law to settle the disputes. Debates on the protection of legitimate interests in particular of a group of workers in this regard represent a promising ground for applying intermediation as an alternative method of dispute resolution (hereinafter AMDR). The issues of intermediation legal regulation as an AMDR and its active implementation in legal practice remain topical and are widely discussed by scholars globally.[1]

[1] Kazutoshi Koshiro, *Formal and Informal Aspects of Labor Dispute Resolution in Japan*, 22(3-4) Law & Policy 353 (2000); Francesca Ferrari, *The Judicial Attempt at Conciliation: The New Section 185-bis of the Italian Code of Civil Procedure*, 2(3) Russian Law Journal 80 (2014); Hiruy Wubie, *The Settlement of Individual and Collective Labor Disputes Under Ethiopian Labour Law*, 2(1) E-Journal of International and

The article focuses on the most promising method for the resolution of collective labor disputes to protect legitimate interests: a dispute with intermediary participation.

Many scholars have considered intermediation as a universal method for conflict resolution.[2] Intermediaries have neither decision-making authority nor any power over the parties. They provide the necessary conditions for the negotiation and adoption of a consensual, mutually beneficial solution by the parties.[3] The legal doctrine considers the notions "conciliation" and "intermediation" jointly because only intermediation provides each disputing party for profitable settlement of disagreements.[4]

Since intermediation in collective labor dispute resolutions has been used in many countries, it makes it possible to distinguish common features of this AMDR and typical problems of its development, particularly within the context of industrial and post-industrial societies. Additionally, national traditions and peculiarities of legal regulations can influence the attitudes of legislators and law enforcement officials to intermediary participation in collective labor dispute resolutions. This creates specific, sometimes defective, provisions that slow down the effective reconciliation of collective labor disputes via intermediary.

This paper falls into several sections. First, "Definition of a Collective Labor Dispute and the Means for Its Resolution," presents the concept of a collective labor dispute stated in Russian legislation, as well as that of several other countries, and an overview of collective labor dispute resolution (hereinafter CLDR) methods. The second section, "Historical Background of the Conciliation Procedure Application to Collective Labor Disputes in Russia," focuses on Russia's historical development of conciliation procedures for collective labor disputes. Section three, "International Experiences of Conciliation Procedures with Intermediary Participation for Collective Labor Dispute Resolutions," reviews international experiences and empirical evidence. The section "Current Russian Legislation on the Intermediation Application in Collective Labor Dispute Resolutions" gives a critical analysis of Russia's state policy on this issue. The last section, "State Intermediation in Collective Labor Dispute Resolutions," evaluates the possibilities and prospects of state intermediation in collective labor dispute

Comparative Labour Studies 39 (2013); Krishna Agrawal, *Justice Dispensation Through the Alternative Dispute Resolution System in India*, 2(2) Russian Law Journal 63 (2014).

[2] Joseph Duss-von Werdt, *Homo mediator: Geschichte und Menschenbild der Mediation* 104 (Klett-Cotta 2005); Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* 296 (3rd ed., San Francisco: Jossey-Bass, 2003).

[3] *Мириманофф Ж.А.* Универсальный характер медиации: Опыт и свидетельство Европы: триптих [Jean A. Mirimanoff, *The Universality of the Mediation: The Experience and Testimony of Europe: A Triptych*] (May 4, 2019), available at http://www.mediationgeneve.com/docs/Details%2015.pdf.

[4] Paul H. Sanders, *Types of Labor Disputes and Approaches to Their Settlement*, 12(2) Law and Contemporary Problems 211 (1947).

resolutions. Finally, the conclusion presents the main outcomes of the study and highlights the prospects of a contemporary international practice of intermediary application for CLDR.

1. Definition of a Collective Labor Dispute and the Means for Its Resolution

Foreign legislation often lacks a legal definition for "collective labor dispute"[5] as well as specialized legislation on this very private issue. However, as Jorge Sappia claims in the book, "Labour Justice and Alternative Dispute Resolution of Collective and Individual Labour Conflicts," in most countries, individual and collective labor disputes are distinguished within the doctrine of labor justice and positive labor law.[6]

Russian labor legislation and those of former Soviet Union countries are characterized by a significant number of legal definitions of key concepts, with the notion of a "collective labor dispute" being among them. This is typical for countries of the Commonwealth of Independent States and the Baltic states. For example, there is a legal definition of "a collective labor dispute" in the Labor Dispute Law of the Republic of Latvia.[7]

The definition of a "collective labor dispute" in Article 398 of the Labor Code of the Russian Federation (2001) (hereinafter the RF Labor Code) states the subject of such a dispute as the disagreements on the establishment or modification of collective labor conditions (i.e. a collective agreement and local normative acts of the employer that contain labor law norms, the adoption of which may cause a collective labor dispute, also state regulatory terms that determine the working conditions of all or a number of certain people working for the employer). Therefore, collective labor disputes may be initiated:

– to establish or modify working conditions (including wages);

– in connection with concluding/modifying or executing collective bargaining agreements;

– in response to the refusal by an employer to take into account the opinion of the workers' representative body concerning internal procedures and policies.[8]

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5 Annie de Roo & Rob W. Jagtenberg, *Settling Labour Disputes in Europe* (Deventer; Boston: Kluwer Law and Taxation, 1994).

6 Jorge Sappia, *Labour Justice and Alternative Dispute Resolution of Collective and Individual Labour Conflicts* (Lima: International Labour Office, 2002) (May 4, 2019), available at https://pdfs.semanticscholar.org/89e8/d29b21d732bf218a833cc24d4c6a8b48c3ef.pdf.

7 Labour Dispute Law of 16 October 2002 (May 4, 2019), available at http://www.lm.gov.lv/upload/legislation/leg_er_2.pdf.

8 Elena Gerasimova, *Collective Labor Disputes and Strikes in Russia: The Impact of Judicial Precedents and Enforcement*, 5(2) Russian Law Journal 5 (2017).

Consequently, the majority of such disputes are interest-centered. An exception can be made for the debate on the performance of the collective agreement terms. However, this type of dispute depends on the chosen method of violated rights protection and may become a personal dispute if every employee whose individual rights have been violated, due to the failure to fulfill the collective agreement conditions, seeks protection and claim.

Similar approaches to the definition of "a collective labor dispute" via the definition of its subject matter (other than the indication of the collective of the participants) are characteristic for legislation of former USSR countries.

Many researchers have already noted and still mark that a conciliation procedure is the best means to protect violated legal interests.[9] In particular, disputes within the scope of applicable justice and legal norms cannot be resolved regarding the merits of the disputes. Indeed, in the narrow legal sense, there are no innocent or guilty participants of a collective labor dispute. The divergent economic interests of workers and employers, rather than the labor violation, form the essence of a collective dispute.[10] Therefore, Western scholars refer to the interest-centered dispute as an economic conflict and contrast it to legal disputes that can be resolved based on the enforcement of the law.[11]

Conciliation procedures in their current form were used mostly to resolve collective labor disputes, which appeared to be mainly economic conflicts of interest.

Collective labor dispute resolutions have their own national specifications. However, having summarized a variety of approaches to the abovementioned dispute resolutions, we indicate the following highly applicable methods:

– Direct negotiations between representatives of the parties to the collective labor dispute (conciliation or reconciliation commissions);

– Administrative procedures used by state bodies on the grounds of procedures of varying obligation degrees and different levels of state interference in collective labor disputes;

– Choosing an independent intermediary (intermediaries) from among private individuals or private organizations and institutions, purposefully created or encouraged by the state to resolve a collective dispute;

– Arbitration;

– Court consideration of the dispute based on *ex aequo et bono* (ad hoc – equitable).

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[9] Sappia 2002; *Войтинский И.С.* Примирительное и третейское разбирательство. Трудовые споры и регулирование труда на Западе [Joseph S. Voytinskiy, *Conciliation and Arbitration. Labor Disputes and Labor Regulation in the West*] (Moscow: All-Union Central Council of Trade Unions, 1923).

[10] An exception is made for collective labor disputes on the failure to fulfill the collective agreement conditions. However, such offenses, affecting collective interests, are based on economic contradictions between the employer and employees.

[11] Sappia 2002.

The dynamics of collective labor disputes occurring in the Russian Federation are subject to public accountability of the Federal Service for Labor and Employment. This institution provides public services with registrations and resolutions of collective labor dispute data. The following issues are subject to state supervision: the parties to collective labor disputes, which appeal to the Federal Service and territorial bodies for the dispute registration, and information concerning intermediaries or labor arbitrators available for employment in a dispute resolution.

Table 1 presents data on the dynamics of collective labor disputes in the Russian Federation. The report does not include relating data for 2017.

Table 1: Dynamics of Collective Labor Disputes in the Russian Federation

Year	Collective Labor Disputes		
	Total	The number of resolved collective labor disputes	The number of resolved collective labor disputes including those resolved with Rostrud participation
2008	17	16	13
2009	6	6	2
2010	9	9	7
2011	7	6	3
2012	10	9	*
2013	*	*	5
2014	4	3	1**
2015	2	1	–
2016	4	2***	2

Source: Federal Service for Labor and Employment (*Rostrud*) data,[12] 2008–2016

* There is no relevant data in the report of the Federal Service.

** According to Rostrud Activities Report of 2015, a state service was provided to facilitate one collective labor dispute that arose and was registered in 2014 (p. 38 of the Rostrud Activities Report of 2015 (May 4, 2019), available at https://drive.google.com/file/d/0B3tYhO6hNJ2lbG9SdmFnaTFJNnc/view).

*** According to Rostrud, the request to provide the state service to facilitate a collective labor dispute was refused (p. 72 of the Rostrud Activities Report of 2016 (May 4, 2019), available at https://www.rostrud.ru/upload/Doc/report_2016.pdf).

[12] According to Rostrud official progress reports (2014, 2016) and information published on its website (May 4, 2019), available at http://www.rostrud.ru/control/sotrudnichestvo-i-partnerstvo/?ID=236470&sphrase_id=423520.

Despite a comparatively small number of collective labor disputes in a country as big as Russia, which faces economic challenges and difficulties, the importance of collective labor dispute resolutions cannot be underestimated. Unresolved disputes and delays in reconciliation procedures can result in strikes, which are extreme measures of social tension and entail significant political and economic losses. Strikes in the Russian Federation are subject to state statistical supervision of the Federal State Statistics Service. According to its annual reports presented on the official website, strikes in the Russian Federation have the following dynamics (Table 2).

Table 2: Dynamics of Strikes in the Russian Federation

	2008	2009	2010	2011	2012	2013	2014	2015	2016
The number of organizations where the strikes took place	4	1	*	2	6	3	2	5	3
The number of workers involved in strikes:									
thousands of people	1.9	0.01	*	0.5	0.5	0.2	0.5	0,8	0,1
the average number of people in each organization	480	9	*	227	84	65	231	167	19
The amount of time wasted by the employees participating in the strike:									
thousands of man-days	29.1	0.11	*	0.4	2.4	0.2	5.0	10,2	0,1
The average number of wasted working days per participant for a strike	15.1	12.2	*	0.9	4.8	1.2	10.9	12,2	1,7

Source: Federal Service of State Statistics (*Rosstat*) data, 2016

* The data is not available.

Assessment of collective conflicts' relevance and their conciliation prospects in the Russian Federation should not be exclusively based on official statistics because of the formalization of collective disputes, which fall under the supervision of official state registration. A great number of labor conflicts are of latent nature for the Federal State Statistics Service due to the adopted accounting system. The informal data[13] on the number of labor protests (Table 3) deserve special attention. They can precede formalized collective labor disputes and indicate the level of social and labor tensions in the society. Labor Rights Center (Moscow) has conducted public monitoring of labor protests in the Russian Federation for many years. The table below provides data on the number of labor protests in Russia from 2008 until 2017 (http://trudprava.ru/expert/analytics/protestanalyt/1588).

Table 3: The Number of Labor Protests in the Russian Federation

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Total number of protests	93	272	205	263	285	277	293	409	289*	73**

Source: Bizyukov 2016

* According to the Russian Independent Trade Unions Federation (RITUF) (May 4, 2019), available at https://www.gmpr.ru/gallery/14866/.

** For three quarters of 2017, according to data by the Economic and Political Reforms Center (May 4, 2019), available at https://www.rbc.ru/politics/07/11/2017/59fc780e9a794772d40d85d1.

Notably, this information should be treated critically, as it fails to provide a complete idea of the number of collective labor disputes among labor protests related to the protection of workers' collective rights and interests. In compliance with the Russian legislation, a simple set of one-type individual labor disputes does not create a collective labor dispute. Their resolutions will differ from those of collective labor disputes: via a labor dispute committee created in the organization or in the court. Additionally, an individual labor dispute can be resolved via an intermediary, but the practice has not become widespread in Russia since the worker can resolve a dispute in the court free of charge. The narrow legal definition of a "collective labor dispute" presented in the RF Labor Code does not consider the whole number of recorded social and labor protests, does not see them as potential or collective labor disputes.

A report of the abovementioned public organization presents the results of labor protests in Russia (Table 4). They persuasively suggest the possibility of labor

[13] Public monitoring of labor protests in Russia has been carried out by the public organization Labor Rights Center (Moscow) for many years.

conflicts' escalation if the protests lead to the workers' pressure or prosecution of trade union members. Alternatively, a total or partial satisfaction of requirements and the negotiations' prolongation suggest the effectiveness of undertaking measures at a high level.

Table 4: The Results of Labor Protests in the Russian Federation

	2009	2010	2011	2012	2013	2014	2015	2016
No information	31	48	36	39	39	42	38	6
Requirements are not satisfied	17	13	26	21	20	18	21	–
Requirements are partially satisfied	8	7	12	15	18	16	16	66
Requirements are fully satisfied	10	10	9	7	5	7	11	28
Continuation of negotiations	22	18	12	20	31	31	34	–
Creation of a trade union	*	*	*	2	2	1	1	–
Transfer of cases to law enforcement bodies	9	1	5	2	4	4	1,5	–
Pressure on workers	10	6	8	6	8	5	9	–
Persecution of trade union members	9	5	5	6	5	1	3	–

Source: Bizyukov 2016. Note: data refers to all protests (% of a total number of protests)

* The data is not available.

*According to the Russian Independent Trade Unions Federation (RITUF) (May 4, 2019), available at https://www.gmpr.ru/gallery/14866/.

2. Historical Background of the Conciliation Procedure Application to Collective Labor Disputes in Russia

The Russian Empire Charter on Industrial Labor of 1913, among the duties of factory inspection, established "the measures to prevent disputes and misunderstandings between the employers and workers by an immediate examination of any displeasure and an amicable agreement between the parties."[14] Evidently enough, the state organized the factory inspection and it was, actually, the first specialized body of state control and pretrial proceedings, inducing the parties to reconciliate (i.e. factory inspection carried out intermediation functions concerning both collective and individual disputes).

[14] Устав о промышленном труде // Свод законов Российской империи. Т. 11. Ч. 2 [*The Charter of the Industrial Labor* in *The Code of Laws of the Russian Empire. Vol. 11. Part 2*] 1–228 & 541–597 (St. Petersburg: State typography, 1915).

Since 1917, conciliation chambers and arbitration tribunals have functioned as conciliatory institutions in Russia.

According to Soviet ideology, the Russian Federation Code of Laws on Labor, adopted in 1922, testified there was no reason for labor and capital discord, thus stating no grounds for collective labor disputes emergence. Labor disputes were tried by special sessions of the National Courts, by disputes and wage-rates committees in accordance with the conciliatory procedure, by conciliation chambers or arbitration courts. Conciliation consideration was therefore voluntary in nature.

However, conflicts in making and executing collective agreements remained as well as the cases that endangered the security of the proletarian state. Vasiliy Dogadov denounced the intervention of the bourgeois state in the resolution of labor disputes and simultaneously noted the benefits of an analogical intervention of the workers and peasants' state in such conflicts. He defined this intervention type as assistance.[15] Consequently, Soviet scientists believed the state to act as an intermediary and facilitate the parties' reconciliation as well as ensuring enforcement of conciliation bodies' decisions. Furthermore, conciliation chambers and arbitration courts were compulsorily created with the People's Commissariat participation.[16] Therefore, disputes at state enterprises concerning making or interpreting collective agreements or serious conflicts that threatened state security were subject to mandatory (required) arbitration. Regarding collective agreements, the People's Commissariat formed the Arbitration Court whereas the latter was subjected to the highest bodies of the state executive power. Conciliation chambers considered both individual and collective labor disputes.

According to the Decree of the Council of People's Commissars of the RSFSR (1923), the chambers were formed on a parity basis of the parties to the dispute's representatives. Its chairperson, appointed by the relevant authority of the People's Commissariat, did not enjoy a deciding vote but had to promote the development of conciliatory proposals. It was mandatory to achieve conciliation chamber agreement and receive signatures by the chairperson and both parties. Provided, the parties failed to agree in the conciliation chamber, the case was transferred, upon the agreement of both parties, to Arbitration Court.

Arbitration Court was established on the arbitration record, made by relevant authorities of the People's Commissariat and signed by the participating parties. The parties were bound to abide by the decision of the Arbitration Court. The chairperson of the Arbitration Court was elected upon the agreement of the parties or, in some cases, provided by the law; if there was no agreement between the parties, the

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[15] *Догадов В.М.* Очерки трудового права: Учебное пособие [Vasiliy M. Dogadov, *Essays on Labor Law*] (St. Petersburg: Priboy, 1927).

[16] People's Commissariat of Labor is the sectoral state body of executive power in charge of labor regulation issues (the equivalent of a modern Labor Ministry).

chairperson was appointed by the authority of the People's Commissariat. The Arbitration Court consisted of the umpire (the chairperson) and an equal number of representatives from each party. Either all issues were resolved by the agreement of the parties' representatives or, if such an agreement was not reached, by one umpire.[17]

Later, in 1928, the rules on conciliation, arbitration and judicial review of labor disputes were adopted. Based on these rules, disputes and wage-rates committees could hardly be regarded as the bodies to resolve collective labor disputes, as they were "not entitled to make decisions that alter, amend or cancel the terms of collective agreement, unless the right was specifically stated in the collective agreement."[18]

Conciliation chambers were primarily created to resolve collective disputes and were always organized upon the agreement of relevant trade unions and employers, to resolve their labor disputes. Within the scope of competences, they considered conflicts relating to the conclusion, changes, additions and interpretations of collective agreements as well as issues on the establishment of new working conditions that had not been previously resolved in disputes and wage-rates committees.[19] The Arbitration Court was formed similarly and tried disputes that the conciliation chamber failed to resolve.[20] The chairperson of the Arbitration Court (the umpire) could be partly seen as an independent intermediary appointed by the People's Commissariat authority or elected upon the parties' agreement. The chairperson was independent and impartial to the dispute's outcome. However, if the parties failed to agree, the chairperson of the Arbitration Court would make binding to the parties decisions, as they had previously agreed to.

Accordingly, we note that conciliation procedures of labor dispute resolutions have quite a long history. An intermediary, as an independent negotiator invited by the parties to the collective labor dispute, appeared shortly after the adoption of the Federal law "On the Procedure of Collective Labor Dispute Resolutions" in 1995.[21]

USSR laws on collective labor disputes (Law of the USSR of 1989, Law of the USSR of 1991) did not provide for the dispute resolution via an intermediary.

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[17] Декрет Совета Народных Комиссаров РСФСР от 23 марта 1923 г. «Положение о примирительных камерах и третейских судах» [Decree of the Council of People's Commissars of the RSFSR of 23 March 1923 "Provisions on Conciliation Chambers and Arbitration Courts"] (May 4, 2019), available at http://www.libussr.ru/doc_ussr/ussr_1584.htm.

[18] Постановление Центрального исполнительного комитета СССР и Совета Народных Комиссаров СССР от 29 августа 1928 г. «Правила о примирительно-третейском и судебном рассмотрении трудовых конфликтов» [Resolution of the Central Executive Committee of the USSR and the Council of People's Commissars of the USSR of 29 August 1928 "Rules on Conciliation-Arbitration and Judicial Consideration of Labor Disputes Resolution"], Art. 1.

[19] *Id*. Arts. 22–27.

[20] *Id*. Arts. 28–34.

[21] Repealed.

3. International Experiences of Conciliation Procedures with Intermediary Participation for Collective Labor Dispute Resolutions

The main advantage of mediation is the possibility for the parties to resolve the conflict themselves,[22] having come to a mutually beneficial agreement.[23]

Extra-judicial settlements of labor disputes were first mentioned in the second half of the 19th century as "individual private initiatives." By the end of that century, national governments were much concerned about the strikes and therefore initiated the creation of a system of bodies, aimed at bringing together the representatives of workers and employers. In the Netherlands, for instance, "a statutory system of joint committees, the Kamers van Arbeid," was formed. Later, when the Kamers were found to be irresolute, civil servants, called *Rijksbemiddelaars* (government mediators) were introduced in 1923.[24] During the Second World War, the system was abolished and since then, there has not been any formal permanent mechanism for collective labor dispute resolutions in the Netherlands. However, since the 1970s, joint bilateral committees, empowered to participate in dispute resolutions in the workplace, have been formed at the sectoral level. Since 1990, these committees, called *Bedrijfscommissies*, must turn to mediation in all disputes between management and the company workers' council.[25]

Vasiliy Dogadov, in "Essays on Labor Law," noted,

> It was also typical for the foreign practice of the beginning of the twentieth century, to have a conciliatory-arbitration resolution of collective labor disputes.

For instance, beginning in 1806, the Boards of Trustees have worked in France and the commercial courts in Germany, which includes representatives of both employers and employees. Since 1919, industrial courts have operated under the same principles in England, and appellation, to them, was voluntary. Along with the abovementioned practice, many countries exercised the so-called system of compulsory Canadian arbitration (New Zealand, Canada, Australia, Romania and

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22 Медиация – искусство разрешать конфликты. Знакомство с теорией, методами и профессиональными технологиями [*Mediation – the Art of Resolving Conflicts. Introduction to the Theory, Technique and Professional Technology*] (G. Meta & G. Pokhmelkina (eds.), Moscow: Verte, 2004).

23 Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (4th ed., St. Paul: West, 2013); Laurence Boulle & Miryana Nesic, *Mediation: Principles, Process, Practice* 350 (London: Butterworths, 2001); Nadja Alexander, *Mediation and the Art of Regulation*, 8(1) QUT Law & Justice Journal 1 (2008).

24 Annie de Roo, *The Settlement of (Collective) Labour Disputes in the Netherlands* in *Labour Conciliation, Mediation, and Arbitration in European Union Countries* 273 (F. Valdés Dal-Ré (ed.), Madrid: Ministerio de Trabajo y Asuntos Sociales, 2003).

25 *Id.*

Italy). Obviously, Soviet scientists negatively viewed a forced reconciliation, which provided the possibility for the umpire to make a binding decision.[26]

In some branches of U.S. law – for instance, in labor law – informal justice tools have been in practice for a long time.[27] The necessity to resolve collective labor disputes caused the emergence of mediation in the 20th century.[28] In 1947, a special federal agency, the Federal Mediation Conciliation Service of the United States (FMCS), was established and is functioning to date.[29] Within its jurisdiction are the settlement of issues relating to the legality, validity and content of collective agreements and contracts as well as the issues of their correct interpretation. The Court makes decisions on the fine amount for an illegal strike. The ruling of the Labor Court is final.

Presently, some countries prefer mandatory or preferential consideration of collective labor disputes with an intermediary participation. Mandatory intermediation for all labor disputes is typical in Canada and Argentina.[30]

In Germany, there is the Federal Mediation Union in Economy and Labor (*Bundesverband Mediation in Wirtschaft und Arbeitswelt*) whiles the Advisory Conciliation and Arbitration Service (Acas Codes of Practice) exists in the United Kingdom.

In South Korea, mediation of labor disputes is provided as one of the possible alternative resolution procedures.[31]

Legislators of the Baltic countries, as well as most countries of the former USSR, follow a similar approach. For instance, Latvian legislation defines mediation as the means of a collective labor dispute resolution involving one mediator or a panel of mediators, both private and public (included in the official national list).[32]

In the Philippines, the voluntary modes of labor dispute resolutions, including mediation, are most often used.[33]

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26 Dogadov 1927.

27 Carrie Menkel-Meadow, *The NLRA's Legacy: Collective or Individual Dispute Resolution or Not?*, 26(2) ABA Journal of Labor & Employment Law 249 (2011).

28 Jerome T. Barrett & Joseph Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement* 336 (San Francisco: Jossey-Bass, 2004).

29 *Носырева Е.И.* Альтернативное разрешение споров в США [Elena I. Nosyreva, *Alternative Dispute Resolution in the USA*] (Moscow: Gorodets, 2005).

30 Sappia 2002.

31 *Деок К.* Урегулирование коллективных трудовых споров по законодательству Южной Кореи // Трудовое право в России и за рубежом. 2010. № 2. С. 46–54 [Kim Deok, *Collective Labor Dispute Resolution in South Korea Legislation*, 2 Labor Law in Russia and Abroad 46 (2010)].

32 Labour Dispute Law, *supra* note 7.

33 Jonathan P. Sale, *Labor Disputes, Trade Unions and Collective Bargaining: An Analysis from a Decision-Theoretic Perspective*, Working Paper, School of Labor and Industrial Relations, University of the Philippines (2009) (May 4, 2019), available at http://www.ilera-directory.org/15thworldcongress/files/papers/Track_4/Thur_W5_SALE.pdf.

Within the globalization context, the current labor market sets new challenges for states, especially for the members of powerful integrated economic and political unions. So far, the trade unions' work grounds on national associations and protects the workers' rights within one state. Nevertheless, many companies have economic interests in several countries. Therefore, in the process of a common system of social and labor standards creation or making collective agreements legible for several states, the emergence of collective labor disputes outside the legislation scope of one state is highly plausible. As Annie de Roo fairly noted, the issue of creating a European mediation agency in the European Union might soon become topical.[34]

4. From State to Market Oriented Intermediation: Brazil as a Comparison

In order to integrate Brazil in this comparative study, this country long standing labor disputes intermediation will be presented in historical perspective based on the enactment of Brazilian founding legal code in 1943, the Labor Laws Consolidation (*Consolidação das Leis do Trabalho*, hereinafter CLT). Implemented through Law 5.452/1943,[35] CLT not only defined most dimensions of labor in society, but also inspired additional legislation after 1943. This is the starting point of this part of the article that analyzes the 2017 reform of Brazil legal system for labor.

Recapturing and organizing isolated labor laws enacted since early 20th century, CLT was a structured and encompassing labor code, but also had a couple of loopholes, as the lack of inclusion of rural, domestic, and self-employed workers from the very start. Additionally, CLT has always covered labor issues from the private sector; public employees from municipal, state, and federal levels have always had their own political and social labor legislation, not dealt with here.

Throughout the years, CLT and related legislation have approached labor disputes intermediation under the principle that labor was the weaker part of capital/labor relations, and that it-needed protection in order to turn its rights effective. In order to assure legislation effectiveness, a unique judicial institutional structure in charge of managing labor disputes, named Labor Justice (*Justiça do Trabalho*) was established in the country central administration as part of the Executive Power.[36] In any case, the Labor Justice had its own courts, judges, persecutors and other legal personnel, and

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34 De Roo 2003.

35 Lei Complementar 150/15: principais novidades e possíveis efeitos sobre a sociedade e o Poder Judiciário [Supplementary Law 150/15: Main Developments and Possible Effects on Society and the Judiciary].

36 Angela Maria de Castro Gomes, *Burguesia e trabalho: política e legislação social no Brasil* [*Bourgeoisie and Work: Politics and Social Legislation in Brazil*] (Rio de Janeiro: Campus, 1979).

it was the only intermediary channel to deal with labor disputes, either individually or collectively.[37]

Last year however, this whole apparatus was challenged by a market-oriented reform that nonetheless kept basic labor rights. Different from CLT, current labor reform assumed a market metaphor and framed labor and capital as equivalent forces that can freely negotiate contracts on selected aspects of labor relations, under a clout of private intermediation. This reform has however been challenged in upper courts, resulting in an uncertain path in labor disputes intermediation.

In order to analyze the impacts of this new legislation, CLT must be understood as part of the foundations of modern Brazil in the so-called Vargas Era (1930–1945). A dissident landowner from Southern Brazil, Vargas staged a coup in 1930 against a new elected president, and governed the country for fifteen years through authoritarian and dictatorial rule, in search of a full scale social, economic, and political modernization of the country. Backed by a coalition of fellow rural oligarchs, dissatisfied lieutenants and liberal middle classes, Vargas essentially opposed traditional clienteles politics that characterized Brazilian society, supported the emerging manufacturing industry, and implemented various policies towards economic, social and political modernization.

Vargas also had an attentive eye to the working class, which had been striking in major cities with demands of new social and political and social rights under civil law since late 1910s. After various repressive moves against workers' movements, Vargas finally established a peculiar legislation along corporatist lines to deal with workers unrest, by forbidding any type of spontaneous union activity, and created a union structure of those that would meet political clearance.[38] Known as "official unions" they were actually a top down statist instrument to control labor.[39]

In spite of the restricted room for workers[40] movements, in the end of Vargas Era they had been granted rights such as:

– Creation of Department of Labor in the Federal Government (*Ministério do Trabalho*), 1930;

– 8 working hours/day, 48 working hours/week paid weekly rest day, and paid vacations of 15 days/year (Varied origin, consolidated CLT, 1943);

– Workers monthly family-based minimum wage (Origin 1930, Law Decree 2163/1940);

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37 Luiz Werneck Vianna, *Liberalismo e sindicato no Brasil* [*Liberalism and Union in Brazil*] (Rio de Janeiro: Paze Terra, 1976).

38 Mihail Manoilescu, *Le parti unique: institution politique des régimes nouveaux* [*The Unique Party: Political Institution of New Regimes*] (Paris: Les Oeuvres Françaises, 1937).

39 Wanderley Guilherme dos Santos, *Cidadania e justiça: a política social na ordem brasileira* [*Citizenship and Justice: Social Policy in the Brazilian Order*] (Rio de Janeiro: Campus, 1979).

40 "Workers" refers to employed people over 18 years that comprises those who work under contract based on whole existing labor legislation, and leaves out self-employed, rural and domestic laborers.

– A unique Labor Justice system attached to the Executive Power (1934 Constitution).[41]

Interestingly enough, workers' deprivation of their freedom of association and the mandatory organization in the State controlled corporatist unions was the channel for them to have access to health care, retirement, and pension benefits through corporatist defined sectorial social institutes. In spite of being an ordinary workers' right, these social benefits were originally provided in Brazil under discretionary basis and remained as such until mid-1960s.

Brazil successfully underwent a development process towards an urban-industrial society, but Vargas' era and administration came to a close in 1946, for various reasons. According to Skidmore,[42] Brazil then began its first "experiment in [mass] democracy," that lasted until 1964, with four regular presidents whom faced disruptive moments in their elections, and/or administrations, and two vice-presidents who replaced incumbent president also under politically tense conditions.

In economic terms, the country did not face similar unstable times. After the first post II WW presidency, Vargas returned to power and resumed the same state-led development project that essentially continued until early 1960s. With respect to labor, new laws were created and enforced:

– Job tenure after ten years of employment (Origin 1925, consolidated 1946 Constitution);

– Labor Justice System moved to the Judiciary Power (1946 Constitution);[43]

– A "thirteenth wage" practically replacing a traditional Christmas one voluntarily paid by employers was implemented by Vice-President-turned-President Goulart (Law 4.090/1962).[44]

Since late 1950s, Brazil became immersed in a stagnant economy and with an extensive workers unrest both in urban and rural areas that unfolded into a broad politico-economic crisis.[45] A civil-military block that staged a coup in 1964 turning the country again into a dictatorship that emphasized economic growth and modernization. Along with these lines, new labor laws were also created:

– Replacement of ten-year job tenure by a workers' savings account from employers' contribution, useable at dismissals and retirement (Law 5.107/1966);

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41 República Federativa de Brasil Constitución Política de 1934 [Constitution of the Federative Republic of Brazil of 1934].

42 Thomas Skidmore, *Politics in Brazil 1930–1964: An Experiment in Democracy* (Oxford: Oxford University Press, 2007).

43 República Federativa de Brasil Constitución Política de 1946 [Constitution of the Federative Republic of Brazil of 1946].

44 Lei do Décimo Terceiro Salário – Lei 4.090/1962 [Law of the Thirteenth Salary 4.090/1962].

45 Juan Linz, *The Future of an Authoritarian Situation or the Institutionalization of an Authoritarian Regime: The Case of Brazil* in *Authoritarian Brazil: Origins, Policies, and Future* 233 (A. Stepan (ed.), New Haven: Yale University Press, 1973).

– Equalization, and universalization of health care provision and retirement benefits to workers (Complementary Law 72/1966);

– Extension of labor rights to self-employed (Law 5.889/1973) and to rural workers (Law 5.890/1973);

– Maternity leave adopted as new benefit from social assistance (1973).

Since the 1980s, this second authoritarian regime of Brazil's modern history faced a multi-class opposition movement that ended up in a presidential election of a civilian in 1985. Surprisingly enough, in times of economic crisis, an important new right was created – limited unemployment insurance.

This democratizing process ended with the promulgation of a new and important constitution in 1988 that came to be adequately known as "Citizen Constitution" because of its extensive concern with citizen's rights, particularly labor rights. In the Constitutional Assembly that wrote the Constitution, socially oriented political forces succeeded in "constitutionalizing" most of existing labor social and political rights, as a way to turn difficult to have them changed but new ones were also added to the list:

– Paternity leave (1988 Constitution);

– 44 working hours/week (1988 Constitution).

Last, but not the least, another relevant step was taken later on in the inclusion of left out groups:

– extension of labor basic rights to domestic workers (Complementary Law 150/2015).

In sum, from 1943 CLT, Brazil incrementally formed a universal, comprehensive, and egalitarian system of labor political and social rights. It continued to serve only to workers of the private sector, with a low-income ceiling for contribution and benefits, something also expressed into a poor quality of health care provision. Needless to say, this system was and is supported by a Labor Justice of national reach that deals and has dealt with uncountable individual and collective labor disputes.

By and large presented with goals of lowering production costs, stimulate economic growth, and overcome persistent high rates of unemployment, current President Temer passed a year ago two laws forming the so-called Law of Modernization of Labor Legislation (*Lei de Modernização Trabalhista*), in what became a major break with Brazil's labor legal system.

On the one hand, Law 13.429/2017 expanded, and diversified to the limit of the possibility of outsourced workers in the firms, and of working hours regimes, by allowing for outsourced labor to be admissible in any function in any firm, and not only in the general supporting activities of the companies' main business. In addition, it strengthened fixed term, temporary contracts, but went further in this respect.

This new legal document even established a new appealing interim format of working hours through which rendering services is not continuous, occurring in alternate of periods of time of "concrete work" and inactivity, determined in hours,

days or months, regardless of the type of activity performed. Employees have only to be notified of the timetable three days in advance through any means of communication, based on a written contract signed beforehand by both parties.

This legal provision may be suitable for some economic activities but once enforced (as it has been), it represents a break with the labor bond, as it existed until nowadays. Another critical change of CLT inspired system, implied in the above law, can be better seen in the second law.

Law 13.467/2017 modified 201 CLT points, and recognized the superiority of direct negotiation between labor and capital to legislation, as it defined a number of specific dimensions of labor that would be subject of direct negotiation of labor and capital as daily working hours; annual hours bank; scheduled intervals; employees participation in the firms career program; workers' representation in the workplaces; home office work; intermittent work schedule; productivity bonus; holiday day exchange; incentive premiums on goods or services, among others.

Different from CLT principles, these two laws explicitly or implicitly assumed that both parts had an equal power and could freely adjust one's to another's interests, as in a free market, without changing traditional basic labor rights earlier built, but make the jobs that are at the root of rights fewer and fewer.

The long term outcomes of these new laws are still hard to predict, both in qualitative legal aspects, but also in more quantitative ones, IPEA's vary recent assessment of current socio-economic conjuncture suggests that:

The fact that the real GDP is still 6% lower than the pre-crisis level and that the unemployment rate remains very high, around 12.5%, contributes to a widespread perception that the economy is stagnant. This fact is reinforced by the falling growth forecasts for 2018, which shrank from 2.7% as of the end of 2017 to 1.4% last September.[46]

In conclusion, there seems to be an on-going transition in Brazil from State labor disputes intermediation to a market-oriented one through legal definition of a new labor bond without outlawing the long existing one. A somewhat focused reform may look like a revolution.

5. Current Russian Legislation on the Intermediation Application in Collective Labor Dispute Resolutions

The current Russian order of a collective labor dispute resolution presupposes an intermediary participation and appears to be an alternative (optional) stage of conciliation procedures that occurs after the party's failure to resolve disagreements by a conciliation committee.

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[46] Alfred Stepan, *Democratizing Brazil: Problems of Transition and Consolidation* (New York: Oxford University Press, 1989).

The intermediary activities are regulated by Chapter 61 of the RF Labor Code, but they are not subjected to the provisions of the Federal law "On Alternative Procedure of Dispute Resolution with Participation of a Mediator (Mediation Procedure)."[47] Herewith the rule of p. 5, Article 1 of the Russian Law on Mediation (hereinafter the Law on Mediation) states the impossibility of a mediation procedure to be applied to collective labor disputes and disputes affecting the rights and legitimate interests of the third parties not involved in the mediation or public interest. This rule does not appear to be reasonable. Most likely, the focus should be on the inapplicability of legal provisions of the Law on Mediation to the intermediary in collective labor disputes because this procedure has been previously adjusted in the RF Labor Code as a special intermediation covering the specific and complex nature of collective labor conflicts.

The functions and powers of the intermediary in a collective labor dispute resolution, determined by Chapter 61 of the RF Labor Code, are quite specific, but like a mediator, he has no power of decision or of imposing his will over the parties to the conflict.

To comprehend the reasons for inapplicability of the Law on Mediation to collective labor dispute resolutions, it is essential to compare the legal status of a mediator stated in the aforementioned law and of an intermediary in a collective labor dispute.

As Svetlana Golovina[48] states:

> Enunciated in Article 3 of the Law on Mediation principles of voluntariness, confidentiality, cooperation and equality of the parties, impartiality and independence of a mediator are fixed to varying degrees for an intermediary in the Ministry of Labor Decree of 14 August 2002 No. 58 "On Approval of the Recommendations on the Organization of Work to Consider Collective Labor Dispute with Participation of an Intermediary."[49]

In compliance with a new edition of Article 403 of the RF Labor Code, the parties to the collective labor dispute, having drawn the Conciliation Commission

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47 Федеральный закон от 27 июля 2010 г. № 193-ФЗ «Об альтернативной процедуре урегулирования споров с участием посредника (процедуре медиации)» [Federal Law No. 193 of 27 July 2010. On Alternative Procedure of Dispute Resolution with Participation of a Mediator (Mediation Procedure)].

48 *Головина С.Ю.* Проблемы применения медиации при разрешении трудовых споров // Российский юридический журнал. 2013. № 6. С. 119–126 [Svetlana Yu. Golovina, *Problems of Application of Mediation in the Resolution of Labor Disputes*, 6 Russian Juridical Journal 119 (2013)].

49 Постановление Минтруда России от 14 августа 2002 г. № 58 «Об утверждении Рекомендаций об организации работы по рассмотрению коллективного трудового спора с участием посредника» [Resolution of the Ministry of Labor of the Russian Federation No. 58 of 14 August 2002. On Approval of the Recommendations on the Organization of Work for the Consideration of a Collective Labor Dispute with a Mediator's Participation].

disagreements report, are bound to conduct negotiations on the review of the collective labor dispute with intermediary participation. If the parties fail to come to an agreement, the protocol for the conciliation procedure's refusal of both or one of the parties is made. Accordingly, a collective labor dispute consideration with intermediary participation remains the optional step of a conciliation procedure.

If the parties have agreed to arbitrate a dispute with intermediary participation, they shall make an appropriate agreement. Thereafter, within two days, the parties shall cooperatively determine an intermediary candidacy. They are recommended to apply to the appropriate state body in charge of the collective labor dispute settlements. If the parties disagree on an intermediary candidacy, the negotiations will not take place, and the parties will start the procedure in labor arbitration.

Due to the order of collective labor dispute consideration with intermediary participation, if agreed upon by the disputing parties, an intermediary may obtain all required documents and information concerning the dispute.

At the local social partnership level, the consideration of a collective labor dispute with intermediary participation should be carried out within three working days – at other levels, up to five working days from an intermediary invitation date – and should result in the adoption of the collective labor dispute parties' written negotiated solution or drawing up of a disagreements protocol.

Although the principles of a collective labor dispute consideration with a mediator or intermediary participation are much alike, they still differ:

1. The law defines mediation as an alternative to a court procedure, but collective labor disputes in the Russian Federation are not considered by courts at all.[50] However, we can argue that consideration of a collective labor dispute with intermediary participation is also an alternative procedure, which is non-obligatory but optional.

2. A state body may offer the candidate for an intermediary in a collective labor dispute resolution, but the company (not a state body) provides the candidacy of a mediator. The type of interaction between the parties to the dispute and the company or organization is described as an advisory role that is nonbinding. The state body has no power or public authority but aims to facilitate the organization of conciliation procedures and does so for free, in contrast to the company providing mediation.

3. Unlike a mediator, an intermediary for a collective labor dispute does not have to meet certain requirements except one: to suit both parties, especially in terms of public reputation.

4. Chapter 61 of the RF Labor Code establishes time limits for an appointment, and the participation period of an intermediary in a conciliation procedure is comparatively much shorter than that determined for a mediator by the Law on Mediation.

5. An intermediary is empowered to offer the disputing parties options for the conflict resolution while a mediator needs the parties' special permission to do this.

[50] Golovina 2013.

In this regard, we can refer to American mediation researchers who distinguish the "mediator's weighted settlement of a dispute." Under this procedure, a neutral collective labor dispute mediator decides or offers a solution to the conflicting parties, which is comparably more than the facilitation of the mediation process. Collective labor disputes are exactly the appropriate dispute type for such a resolution.[51]

6. If mediation fails, then, in compliance with the law, it should not be drawn up in the form of a document. In contrast, a collective labor dispute procedure with intermediary participation requires even a negative result to be drawn up in the protocol of the disputing parties' disagreements.

7. There is a difference regarding the privacy matter of mediation in general and a collective labor dispute with an intermediary participation procedure. An intermediary in a collective labor dispute shall keep only the state, official, commercial or any other secret protected by law (Decree No. 58 of 2002). On the contrary, a mediator shall keep in secret any information obtained while resolving the dispute.

Nevertheless, we believe that inapplicability of the Russian law on mediation to collective labor dispute resolutions is explained by their public nature. The negotiations of collective labor dispute resolutions that include intermediary participation can hardly ensure the involvement of all stakeholders in the negotiation procedure or, consequently, in the development of an agreed solution. An intermediary in a collective labor dispute organizes the negotiations of the parties' representatives but not the parties themselves, thus lacking procedural and real opportunities to take into account the opinion of each individual employee. The procedure of conducting individual labor dispute mediation, similar to any other case of classical mediation, tends to involve all stakeholders. During the procedure, a mediator is to ask the participants whether all the people whose opinions and decisions can influence the dispute resolution are involved in the negotiations. Consequently, we conclude that a relative prohibition to apply mediation in collective labor dispute resolutions stated in the Law on Mediation may violate the rights of the third party.

6. State Intermediation in Collective Labor Dispute Resolutions

When exploring the procedures of collective labor dispute resolutions, we must draw attention to the role of state authorities in assisting the resolution. Currently, the Federal Service provides state support for Labor and Employment (Rostrud) and its regional offices in the constituent entities of the Russian Federation.[52] Among their

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[51] Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24(4) Florida State University Law Review 937 (1997).

[52] Количество коллективных трудовых споров (КТС), зарегистрированных Рострудом за период с 2006 по 2012 годы // Федеральная служба по труду и занятости (Роструд) [The Number of Collective Labor Disputes Registered by Rostrud from 2008 to 2012, Federal Service for Labor and Employment (Rostrud)] (May 4, 2019), available at http://www.rostrud.ru/control/sotrudnichestvo-i-partnerstvo/?ID=236470&sphrase_id=423520.

functions is the provision of state services in collective labor dispute settlements (Resolution No. 324 of 2004). As the resolution of a collective labor dispute is carried out via conciliation procedures and an intermediary is considered a service to facilitate the reconciliation of an organization and its conduct, we can therefore define the state authorities' intermediary in collective labor dispute resolutions as a specific intermediary.

Among state services, which are of intermediary nature (i.e. aimed to establish the negotiating links between the parties) are the services within the powers of the Labor Agency, stated in Article 407 of the RF Labor Code:

– Assistance in the collective labor dispute resolution;

– Verification, in case of necessity, of the collective labor dispute party representatives' powers;

– Provision of methodical assistance to the collective labor dispute parties provided at all stages of its consideration and approval.

Rostrud authorities also:

– Recommend to collective labor dispute parties the candidates for intermediary and labor arbitrators (Arts. 403 and 404 of the RF Labor Code), carrying out their advance preparation and taking the appropriate records of potential intermediaries and labor arbitrators;

– Create temporary labor arbitration in cooperation with the parties to the dispute (Art. 404 of the RF Labor Code).

Other Rostrud powers as a state authority for the settlement of collective labor disputes are characterized by surveillance and monitoring, ensuring state public security functions.

We should note that, at the minimum, law formalizes the intermediary function of the Russian state authorities in collective labor disputes. State authorities of the Russian Federation and constituent entities, except Rostrud bodies, virtually possess a significant administrative reserve of informal influence on the collective labor dispute parties. The forms of such "hand-controlled" management of conflicts are likely to be unlawful in nature. For instance, there were a number of cases of collective labor dispute resolutions in separate Russian single-industry company towns, where the conflicts were resolved primarily due to the President's direct intervention.[53]

We believe the lack of a clear regulatory framework of state intermediation in this field to be connected with the declared earlier liberal ideas of government and business interactions, where the state takes the position of nonintervention or minimal intervention. Nevertheless, neoliberal economic theories face the needs of an active socially oriented policy. Therefore, the lack of normative regulation of

[53] For instance, the conflict in Pikalevo, Leningradskaya oblast in 2008. *Дмитренко А.* Трудовые конфликты в монопрофильных городах // Закон. 25 марта 2012 г. [Artyom Dmitrenko, *Labor Conflicts in Single-Industry Cities*, Law, 25 March 2012] (May 4, 2019), available at http://zakon.ru/Blogs/trudovye_konflikty_v_monoprofilnyx_gorodax/2553.

this matter does not mislead anyone. State authorities and local governments must intervene actively in any large collective labor conflict to prevent its escalation and proliferation. Within this context, we can hardly call state authorities an impartial intermediary. They have a clearly defined political goal: to preserve social stability. However, the goal is still autonomous from specific interests of the disputing parties. The state, represented by the appropriate authority, is interested in the settlement, but the question of whose interests will predominantly prevail in such a settlement is almost the last to be discussed. Therefore, state authorities primarily stimulate the parties to start the negotiation, and they use administrative resources to explain (mostly to the employer and the owner) the need for social dialogue.

In some countries, especially those that do not have a history of the abrupt change of state ideology from the bourgeois to the communist and vice versa, the state intermediary regulation in the resolution of collective labor disputes is much more consistent and long term in nature.

An intermediary of this type is carried out in at least two ways:

– A certain state authority is empowered to conduct mediation for collective labor dispute resolutions;

– The state establishes a permanent mediation body for collective labor dispute settlements that does not belong to the state justice system but is often created on the principles of tripartism, which develops the existing social partnership system.

In Germany, for instance, in case, an employer and employee fail to come to an agreement on a social plan[54] any of the parties can apply to the Executive Office of the Federal Employment Agency for an intermediary procedure. If this does not result in an agreement, the case is referred to the Conciliation Committee.[55] Consequently, due to the rules of Article 373 of the RF Labor Code, the employer has the right to act on his or her own.

In Canada, as mentioned before, intermediary and conciliation procedures are mandatory in nature, thus relevant services are created purposefully. If the employees and employer fail to sign a collective agreement, they must apply to the Minister of Labor Relations for a conciliation procedure. The minister has the discretion to assign a procedure, reject its implementation and appoint a reconciliation official and Commissioner for Reconciliation Council as well as an intermediary. However, the parties to the dispute cannot resort to a strike or a lockout without the procedures designated by the minister. The Canadian province of Quebec has a rule of collective dispute consideration by an intermediary appointed by the Board of Labor Relations.

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[54] Sozialplan. According to the law, it should be agreed upon since it entails planned changes in the activity of the employer, which may result in a change of working conditions.

[55] *Лютов Н.Л.* Проблема коллизии социальных прав работников и экономических прав работодателей в корпоративной деятельности: сравнительно-правовой аспект // Lex Russica. 2013. № 1. С. 56–69 [Nikita L. Lutov, *The Problem of Workers' Social Rights and the Employers' Economic Rights Conflict in Corporate Activity: A Comparative Legal Aspect*, 95(1) Lex Russica 56 (2013)].

An intermediary enjoys the right to recommend the terms of a collective agreement to the parties. The recommendations, if accepted by the parties, become a part of the collective agreement.[56]

Legislations of Argentina, Brazil and Costa Rica presuppose similar administrative interference in collective labor disputes at an early stage of the conflict (pretrial).[57]

Filipino law requires the state to interfere in labor disputes when it concerns matters of national interest:

Such intervention takes the form of either assumption of jurisdiction (AJ) by the Secretary, presuming the Secretary shall hear and decide the case, or certification of the dispute to the NLRC for compulsory arbitration (CCA), which means referral of the case to the Commission for hearing and decision by a Division.[58]

Therefore, various countries state that an intermediary in a collective labor dispute resolution can be formalized (i.e. legal) and informalized (i.e. political). Such an intermediary can be mandatory or alternative. However, as Annie de Roo remarks,

> The success of conciliation procedures correlates positively with the voluntary character of these institutions.[59]

Conclusion

An intermediary in a collective labor dispute resolution is the most efficient means of overcoming economic disagreements, regardless of the country it is carried out in.

Countries worldwide exercise the following schemes of intermediary system formation in collective labor dispute resolutions:

1. Liberal, which presupposes an intermediary to be private in nature and considers it an alternative and optional procedure. In this case, if there is a formalized state intervention in such conflicts, the state gently assists both parties. A drawback of this approach is the risk of acute social and labor conflicts and that the state and its politicians will have to interfere, but informally. Consequently, a liberal approach turns out to be voluntary in overcoming its consequences.

2. The state-private intermediary system exists in a variety of options. The state facilitates the creation of various conciliation mechanisms, ranging from the intermediary national lists' creation to encouraging the formation of special

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[56] *Лебедев В.М., Воронкова Е.Р., Мельникова В.Г.* Современное трудовое право (опыт трудоправового компаративизма). Кн. 1 [Vladimir M. Lebedev et al., *The Contemporary Labor Law (The Experience of Labor Comparison). Book 1*] (Moscow: Statut, 2007).

[57] Sappia 2002.

[58] Sale, *supra* note 33.

[59] De Roo 2003.

intermediary bodies or organizations based on the principles of freedom in collective bargaining and freedom of association. Their creation and/or work involve either representatives of trade unions or employers. Within the frame of this system, state conciliation bodies can be established, but their decisions will not be binding. This approach presupposes a variety of shortcomings in certain national systems, ranging from the "spray" of some state bodies' jurisdiction to others' lack of competence. A collective labor dispute in such a legislative area runs the risk of being delayed whereas the lack of a quick resolution may result in a conflict escalation.

3. A pragmatic scheme, from our perspective, is a system where the state carries out a conciliation function. The state forms the appropriate administrative authorities and makes it obligatory for the disputing parties to apply to these authorities. The authorities' decisions can be final if all the participants of the disputing parties were involved in the resolution of the conflict otherwise a dispute may be taken to court. The lack of adequate flexibility under this approach does not allow for the complete resolution of a conflict, making it latent for some time.

The classification proposed by the authors and, in particular, the titles of the selected generalized conciliation schemes are rather conventional. Notably, a liberal legislation in this area does not imply a complete liberal legislative policy in the appropriate state; however, a pragmatic approach that is not consistent with the basic principles of civil society will function in the society and be considered civil, with the state declaring democracy as the main value.

The lack of a direct interdependence of state legal policy and established system of national approach to the parties of a collective labor dispute conciliation is rooted in the fact that the system's effectiveness depends on several factors: (1) the society's level of socio-economic development and its labor relations quality; (2) the level of political processes development, public activity and national traditions; and (3) the political conjunction and informal relations development in the economy and public life.

It may seem paradoxical, but there is no alternative to conciliation in a collective labor dispute. Being formally settled by the state body, such a dispute cannot completely be resolved without real conciliation. The decision of a single issue neglecting the views of the parties, which economic interests dramatically oppose, is only a temporary settlement and not a final resolution. Lon L. Fuller[60] noted that as the parties to the employment relationships are significantly interdependent, it makes mediation the only effective method.

To date, no collective labor dispute resolution system is perfect; therefore, the search for new means of resolving collective labor disputes that aim to establish more effective and harmonious labor relations should be continued.

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[60] Lon L. Fuller, *Mediation – Its Forms and Functions*, 44(2) Southern California Law Review 305 (1971).

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LEGAL AND REGULATORY FRAMEWORK OF THE PAYMENT AND E-MONEY SERVICES IN THE BRICS COUNTRIES

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This article focuses research on a comparative analysis of the legal and regulatory framework of the payment and e-money services in the BRICS countries. These services are the most receptive to innovation and considerably contribute to financial inclusion. The central banks of the BRICS countries play key roles in their national payment systems, and they each have different statutory authorities on regulation and supervision or oversight of payment services providers, payment schemes and payment systems. Nevertheless, there are a number of features common to all the BRICS countries and the research emphasizes and describes these features as well as distinguishes national particularities.

Keywords: payment services regulation; e-money regulation; branchless banking regulation; payment oversight; central banks; BRICS legal framework.

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1. Basic Economic and Legal Framework of the BRICS Payment Markets

All five BRICS countries belong to the actively developing payment markets. The statistics of the Bank of International Settlements (BIS)[1] demonstrates the data displayed in Table 1 below. As can be seen from the figures, Brazil, Russia, India and China have non-bank payment services providers including e-money issuers (except Russia). The South African payment market is totally bank-led.

Table 1: Statistics on Payments and Financial Market Infrastructures in the CPMI Countries

2017	Brazil	Russia	India	China	South Africa
Total number of institutions offering payment services/ instruments	1,163	4,822	1,739	4,797	34
Banks	153	562	1,693	4,550	34
Number of e-money issuers		93	60		
Non-banks offering payment services/instruments	1,010	4,260	46	247	
Non-banks offering storage of value	1,004		46		
Number of e-money issuers			46		
Non-banks relying on storage of value offered by others	6	4,260			
Total volume of cashless payments (millions)	31,071	25,794	15,942	133,919	4,492
Credit transfers	10,495	1,817	6,035	9,666	797,76
Electronic means	nap	1,645	nap	nap	nap
Card and e-money payments	14,485	22,397	8,257	122,473	2,848
E-money payments	49.99	1,721	3,459	nap	nap
Fast payments	nap	10,389	nap	8,464	nap
Total value of cashless payments (billions)	47,870	741,545	286,052	3,626	30,110
Credit transfers	37,516	693,061	188,228	2,780	27,244

[1] Statistics on payments and financial market infrastructures in the CPMI countries, Bank for International Settlements (May 12, 2019), available at http://stats.bis/org/statx/toc/CPMI.html.

Electronic means	nap	646,078	nap	nap	nap
Card and e-money payments	1,255	37,350	10,967	628,654	1,082
E-money payments	3,48	1,256	1,416	61,720	nap
Fast payments	nap	8,496	nap	nap	nap

Key trends and indicators of the Russian payment market may be summarized as the following. During the last few years the number and amount of cashless payments of legal entities and individuals have increased. The share of cashless payments in the total amount of retail purchases is expected to exceed 55% by the end of 2018. Online payments have demonstrated an annual growth of more than 26%. One out of five individual customer electronic payments was effected through the internet and smartphones. The Russian payment market is a worldwide leader in contactless payments through mobile apps. The annual growth of e-money operations has reached 39%.

In *Brazil*, the Financial System Law of 1964 established the Banco Central do Brasil (BCB) which, under the National Monetary Council (CMN) policy directives, shall authorize financial institutions and supervise them.

The Payment System Law 10,2014/2001 is the main legal instrument that regulates the Brazilian Payments System (SPB). According to the Law 12,865/2013 (Brazilian Payment Law), payment schemes and payment institutions are also a part of the SPB and governed by CMN and BCB resolutions 4,282/2013 and 4,283/2013, and BCB circulars 3,680/2013, 3,681/2013, 3,682/2013 and 3,683/2013.

According to the Brazilian Payment Law, the BCB shall:

– regulate, authorize and oversee payment schemes;

– regulate the constitution and operation of payment institutions and supervise them;

– regulate fees and commissions relating to payment services;

– regulate risk management and customers funds protection measures.

The *Russian* payment market is governed by the Federal Law "On National Payment System" (Russian NPS Law)[2] as well as by several other federal laws:

– Federal Law "On the Central Bank of the Russian Federation" (Bank of Russia Law);

– Federal Law "On Banks and Banking Activity";

– Civil Code of the Russian Federation;

– Federal Law "On Accepting Payments of Individuals by Payment Agents" (Russian Payment Agents Law);

– Federal Law "On Postal Service" (Russian Postal Law).

The key provisions of the Russian NPS Law include:

[2] *Шамраев А.В.* Законодательство о национальной платежной системе и его влияние на развитие платежных инноваций // Банковское право. 2011. № 5. С. 15–17 [Andrey V. Shamraev, *National Payment System Legislation and Its Influence on the Development of Payment Innovations*, 5 Banking Law 13, 15–17 (2011)].

– definitions of payment services, funds transfer, electronic means of payment, e-money;

– procedures of funds transfer and e-money transfer;

– procedures of interaction between mobile phone companies and e-money operators;

– procedures of the Bank of Russia supervision and oversight over the national payment system.

The Bank of Russia Law establishes the objectives, functions and authority of the Bank of Russia with respect to the national payment system. According to Articles 82.1 and 82.3 of the Bank of Russia Law, the bank shall ensure the stability of and develop the national payment system as well as set the rules, forms and standards of cashless settlements.

The Federal Law "On Banks and Banking Activity" regulates the activities of credit institutions in Russia, determines their legal status and establishes authorization and prudential requirements. The law divides credit institutions into two types – banks and non-bank credit institutions.

A non-bank credit institution shall mean:

– a credit institution entitled to perform funds transfers without opening bank accounts, including e-money transfers, and to open corporate bank accounts for funds transfers without opening bank accounts (so-called "payment non-bank credit institution");

– a credit institution entitled to perform funds transfers with opening bank accounts, including correspondent accounts, as well as without opening bank accounts, including e-money transfers (so-called "settlement non-bank credit institution").

The Civil Code of the Russian Federation sets out the key norms that define the terms of agreements on bank accounts and regulate non-cash payments. It establishes such forms of non-cash payments (similar to payment instruments in international practice) as settlements by payment orders, by letters of credit, by collection orders, by cheques and by remittance orders. The Russian NPS Law additionally regulates direct debits and e-money transfers.

In *India*, the Payment and Settlement Systems Act of 2007 (Indian PSS Law) empowers the Reserve Bank of India (RBI) to regulate and oversee all payment and settlement systems and also to provide settlement finality and a sound legal basis for netting. The Indian PSS Law specifies that the RBI may prescribe policies relating to the regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and give such directions to system providers or the system participants or any other person as it may consider to be necessary. Mobile banking transactions, the issuance and operation of prepaid payment instruments and customer protection from unauthorized electronic banking transactions are regulated by the RBI as follows:

– Guidelines for Licensing of "Payments Banks" 2014 (RBI Guidelines);

– Master Circular "Mobile Banking Transactions in India – Operative Guidelines for Banks" 2016 (RBI MC on MB);

– Master Direction on Issuance and Operation of Prepaid Payment Instruments 2017 (RBI MD on PPIs);

– Instruction "Customer Protection – Limiting Liability of Customers in Unauthorized Electronic Banking Transactions" 2017 (RBI Instruction).

In *China*, the Law of the People's Republic of China on the People's Bank of China (PBC Law) defines the PBC's responsibilities to:

– maintain the normal operation of payment and clearing systems in China (Art. 4.9);

– organize or assist in organizing clearing systems among banking institutions, to coordinate the efforts of such institutions in clearing and to provide services in this regard (Art. 27);

– have the right to inspect the implementation of relevant clearing regulations for banking institutions and other institutions and individuals (Art. 32).

The People's Bank of China (PBC) prescribes payment and settlement rules jointly with the State Council's banking regulator as well as oversees the payment and settlement business of banking institutions.

The PBC is also responsible for market access of payment services of non-financial institutions and regulation of their payment activities. Important examples of such PBC's regulations are:

– Administrative Measures for Payment Services Provided by Non-financial Institutions 2010 and the Administrative Measures for Online Payment Business of Non-bank Payment Institutions 2015 (NFI PSP Administrative Measures);

– People's Bank of China Announcement No. 7 of 2018 (Announcement No. 7).

In *South Africa*, the regulator's authority is represented in section 10(1)(c) of the South African Reserve Bank Act No. 90 of 1989 and in the National Payment System Act No. 78 of 1998 (SA NPS Law). The South African Reserve Bank (SARB) is required by law to perform such functions, implement such rules and procedures and take such steps as may be necessary to establish, conduct, monitor, regulate and supervise payment, clearing or settlement systems. The SARB performs management, administration, operation, regulation and supervision functions concerning payment, clearing and settlement systems in South Africa. The laws mentioned here do not consist of any specific requirements for payment services providers and their activities. In terms of regulation, the SARB may issue directives and position papers. Directives contain binding rules to address payment system risks, while position papers contain guidelines to address payment system risks and to foster sound practices within the payment system.[3]

[3] Charles C. Okeahalam, *Regulation of the Payments System of South Africa*, 4(4) Journal of International Banking Regulations 338, 347–348 (2003).

2. Regulation of Payment Services

The *Brazilian* Payment Law contains definitions relating to payment services in Article 2:

– payment scheme: a set of rules and procedures which regulates the provision of certain payment services to the public accepted by more than one recipient/payee, by means of direct access by end users, payers and recipients/payees;

– payment institution: a legal person adhering to one or more payment schemes and carrying out the following activities:

a) providing cash-in and cash-out services;

b) performing or facilitating payment instructions;

c) managing payment accounts and e-money;

d) issuing and acquiring payment instruments and e-money;

e) money remittances;

f) converting currency into e-money or vice versa.

Funds in payment accounts should be separated from payment institution assets including cases of bankruptcy, and they cannot be pledged or judicially restrained.

Resolution 4,282/2013 empowers the BCB authority to define the requirements for the constitution, operation and cancellation of the payment institutions. The risk management framework for payment institutions should be compatible with the nature of their activities and the complexity of services they offered covering at least operational, credit and liquidity risks.

The payment institution shall meet the following requirements established by Circular 3,683/2013:

– be duly organized as a legal entity;

– have a principal business purpose in the performance of payment transactions;

– be licensed by a payment arrangement settlor;

– be authorized by the BCB in payment modalities as an issuer of electronic currency,[4] an issuer of postpaid payment instruments[5] or an accrediting institution;[6]

– comply with the minimum capital amount of 2 million reals for each payment modality.

Circular 3,681/2013 stipulates risks management and minimum equity requirements as well as governance procedures of payment institutions, preservation of value and liquidity of balances in payment accounts and other measures.

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[4] It is a payment institution that manages payment accounts of end users of a prepaid type and makes payment transactions available based on the electronic currency contributed in such an account, with the possibility of registering its acceptance and converting such funds into physical or book-entry currency or vice-versa.

[5] It is a payment institution that manages payment accounts of end users of a postpaid type and makes payment transactions based on such an account.

[6] It is a payment institution that, without managing payment accounts, accredits individual or legal entity receivers for acceptance of payment instruments issued by a payment institution or a financial institution participating in the same payment arrangement.

Circular 3.682 governs all payment arrangements except cases when payment instruments are:

– accepted only by the issuer or the group of companies with limited transactions volumes;

– offered to individuals in order to pay governmental benefits.

Payment arrangements may be purchase-mode when the payment service is linked to the settlement of a certain obligation or transfer-mode when the payment service is not necessarily linked to the settlement.

A payment arranger shall meet the following requirements:

– be constituted in Brazil as a legal entity;

– establishes risk management and operational procedures;

– has effective and transparent governance mechanisms.

Established procedures shall allow the payment arranger to prevent illegal foreign exchange and money laundering, to combat the financing of terrorism, to settle transactions, to provide availability of services, business continuity, information security, fraud monitoring and interoperability between participants, as well as with other payment arrangements.

Payment institutions and financial institutions joining a payment arrangement become participants. Participation criteria shall be public, objective, non-discriminatory, compatible with the participant's activities and focus on safety and efficiency.

In the framework of one payment arrangement the payment arranger may manage:

– payment accounts and issue payment instruments;

– payment accounts and convert physical or book-entry currency into electronic money.

The Central Bank of Brazil oversees the payment arrangements and may request from the institutions necessary information and documents, including statistics, a list of participants, fraud records, dispute resolution records and audit reports.

In *Russia*, according to the definition in Article 3 of the Russian NPS Law, payment service includes funds transfer service, postal transfer service and payment acceptance service. The payment services providers are money transfer operators (the Bank of Russia, credit organizations,[7] the State Development Corporation "VEB.RF"), banking payment agents,[8] federal postal service organizations[9] and payment agents.[10]

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[7] Credit organizations provide funds transfer services in accordance with the requirements of the Russian NPS Law and the Federal Law "On Banks and Banking Activity."

[8] Bank payment agents participate in the provision of funds transfer services under agreements concluded with money transfer operators accordance with the requirements of Article 14 of the Russian NPS Law.

[9] Federal postal service organizations provide postal funds transfer services in accordance with the requirements of the Russian Postal Law.

[10] Payment agents provide payment acceptance services in accordance with the Russian Payment Agents Law.

According to the Russian NPS Law, the funds transfer service is:

– aimed at providing the payer's funds available in the payer's bank account or provided by the latter without opening a bank account by the money transfer operator to the beneficiary;

– grounded on a contract between the money transfer operator and a customer;

– effected by the money transfer operator upon the customer's instruction issued within the framework of the applicable form of cashless settlements (customer's instruction) by crediting funds to the beneficiary's bank account, cash withdrawal to the beneficiary or the funds record without opening a bank account in favor of the beneficiary in case of e-money transfer.

According to the Russian Payment Agents Law, the payment acceptance service is:

– aimed at fulfilling the payer's monetary obligations before the suppliers of telecommunication services, public utility services, etc., by the payment agent;

– grounded on a contract between the payment agent and a supplier;

– effected by the payment agent through the payer's cash acceptance and subsequent cashless settlements with suppliers.

According to the Russian Postal Law, the postal transfer service is:

– aimed at delivering the sender's money to the recipient by the federal postal service organization;

– grounded on a contract between the federal postal service organization and a sender;

– effected by the federal postal service organization through the sender's money acceptance, processing and delivery to the receiver using postal networks.

The Russian NPS Law stipulates the following rules for the funds transfer service:

– to have such funds transfer important characteristics as irrevocability, unconditionality and finality. Funds transfer irrevocability means a feature of a funds transfer that signifies the absence or termination of the ability to revoke a funds transfer instruction. Funds transfer unconditionality means a feature of a funds transfer that signifies the absence of conditions or the fulfillment of all conditions for transferring funds. Funds transfer finality means a feature of a funds transfer that signifies the provision of funds to the payee;

– to be performed within no more than three business days starting from the day the payer's bank account is debited or from the day when the payer provides cash funds for the purpose of funds transfer without opening a bank account;

– to oblige the money transfer operator to disclose the terms and conditions of the funds transfer to the customers prior to conducting a funds transfer. The money transfer operator shall disclose the amount of fees and the procedure of their charging, the methods of determining the exchange rate applicable to funds transfers in a foreign currency, the procedure of filing claims, including the contact details of the money transfer operator, and other relevant information;

– to prohibit the money transfer operator from deducting any fees from the funds transfer amount except in the case of cross-border funds transfers;

– to oblige the money transfer operator to notify the customer of every transaction using the customer's electronic means of payment and confirm execution of the customers' instructions to the customers;

– to oblige the money transfer operator to compensate the customer the amounts of unauthorized transactions prior to receiving the customers' notification. The money transfer operator shall refund the amount of the transaction performed without the customer's authorization, unless it proves that the customer has violated the procedure of using the electronic means of payment, which resulted in the execution of the transaction without the individual customer's authorization;

– to provide the customer with the right to revoke a payment instruction until the moment of irrevocability;

– to oblige the customer to notify without delay the money transfer operator of unauthorized transactions using the customer's electronic means of payment.

The *Indian* PSS Law does not regulate the provision of payment services, considering "payment system" to be the wider legal concept. Payment system enables payments between payers and beneficiaries involving clearing, payment or settlement services. Any payment system operator shall be authorized by the RBI and may carry out activities as a bank or a non-bank. Non-bank pre-paid payment instruments (PPIs) issuers are in fact authorized as payment systems operators.

Banks may provide payment services if they have banking licenses granted by the RBI according to the Banking Regulation Act of 1949. The RBI Guidelines set up a specific regulatory framework for "payment banks."

Payment banks may:

– issue payment cards (except credit cards) and PPIs;

– provide payments and remittance services through various channels including branches, ATMs, business correspondents, mobile banking and internet banking;

– become a business correspondent of another bank;

– accept remittances on behalf of multiple banks through a payment mechanism approved by the RBI;

– handle cross-border remittance transactions on behalf of individual customers.

Banks are allowed to offer mobile banking services in rupiahs under the requirements of the RBI MC on MB if they are licensed, supervised and if they have physical presence in India with implementation of the core banking solutions. Banks shall implement a registration system of customers who use mobile banking. Banks may transfer funds from the customer's accounts for cash-out in ATMs or through the bank's agents and business correspondents. Such cash-out services shall be provided by banks subject to limitations of the maximum value of such transfers (per month, per transaction, per beneficiary) and with identification of the recipient.[11]

[11] *See* Brazilian, Indian and South African mobile banking regulations: C. Leigh Anderson et al., *Review of Interoperability and Regulations of Mobile Money*, EPAR Request No. 313, University of Washington (September 2015) (May 12, 2019), available at https://evans.uw.edu/sites/default/files/EPAR_UW_Request_313_Mobile%20Money%20Regulations%20and%20Interoperability_10.7.15_0.pdf.

The RBI Instruction stipulates customer protection measures in case of unauthorized electronic banking transactions. The customers shall alert their bank of any unauthorized transaction at the earliest time. The bank's systems shall record the time and date of delivery of the message and receipt of the customer's response. This shall be important in determining the extent of the customer's liability. A customer shall not be liable (zero liability) for the loss occurring due to unauthorized transactions except in cases of the customer's negligence where the maximum liability differs from INR 5,000 to INR 25,000.

In *China*, payment services may be provided by banks and non-financial institutions (NFI PSP). The NFI PSP Administrative Measures stipulate the following scope of funds transfer services provided by non-financial institutions as an intermediary between payers and payees (i.e. third-party payment services):

– network payment that means funds transfers between payers and payees through the internet, private networks, mobile terminals or other electronic devices;

– issuance and acceptance of prepaid cards;

– acquiring of payment cards;

– other types of payment services as determined by the People's Bank of China (PBC).

The NFI PSP shall provide online payment services for clients based on clients' bank accounts or payment accounts. The "payment account" refers to electronic recording of the client's prepaid balance by the NFI PSP. The payment account shall not be overdrawn. When the NFI PSP processes a money transfer between a bank account and a payment account, both accounts shall belong to the same client. The NFI PSP that only holds the business license including mobile payment, telephone payment or digital TV payment shall not open payment accounts for clients.

When providing online payment services based on bankcards, the NFI PSP shall comply with the Administrative Measures of Bankcard Acquiring Business (PBC Announcement No. 9 of 2013). When the NFI PSP processes a money transfer from prepaid cards to a payment account, the NFI PSP shall comply with the Administrative Measures of the Prepaid Card Business of Non-Bank Payment Institutions (PBC Announcement No. 12 of 2012) to implement separate management of the balance of payment account transferred from prepaid cards. Such a balance of a payment account may be used only for consumption and is prohibited from cash-out and investments.

The NFI PSP shall establish and improve its clients identity recognition mechanisms under the principle of Know Your Customer. The NFI PSP shall open payment accounts for clients in real-name system, register and take effective measures to validate clients' basic identity information, verify their valid identity certificates as required and retain the copies or photocopies of the valid identity certificates, and shall not open any anonymous or pseudonymous payment accounts.

The NFI PSP shall sign service agreements with clients stipulating the responsibilities, rights and obligations of the parties, which shall at least specify the business

rules, charging fees and rules for inquiry, dispute resolution and complaints, measures of preventing and handling business risks and illegal activities and the liabilities for clients' losses and reimbursement rules.

When the NFI PSP opens a payment account for a client, it shall inform the client in a conspicuous manner in the service agreement and take valid measures to confirm that the client is fully aware of and clearly understands that the balance of funds in the payment account is not equal to the client's bank deposit, which is as a rule insured.

The NFI PSP shall conduct categorized management of the payment accounts according to the following requirements:

– for an individual client who passes the verification of basic identity information in a non-face-to-face manner through at least one legal and safe external channel, and opens a payment account in the NFI PSP, then the NFI PSP may open a type I payment account for the client where the balance may only be used for consumption and money transfers. The accumulative amount of payments with balance for all payment accounts of the client shall not exceed RMB 1,000 on the date when the account is opened (including the money transfers from a payment account to the client's bank account);

– for an individual client whose identity is verified by the NFI PSP or by their authorized partner in a face-to-face manner, or whose basic identity information is subject to multiple cross-validation by at least three legal and safe external channels in a non-face-to-face manner, the NFI PSP may open a type II payment account for the client where the balance may only be used for consumption and money transfers. The accumulative amount of payment with balance for all payment accounts of the client shall not exceed RMB 100,000 for each year (excluding money transfers from a payment account to the client's bank account);

– for an individual client whose identity is verified by the NFI PSP or by their authorized partner in a face-to-face manner, or whose basic identity information is subject to multiple cross-validation by at least five legal and safe external channels in a non-face-to-face manner, the NFI PSP may open a type III payment account for the client where the balance may be used for consumption, money transfers and investments. The accumulative amount of payment with balance for all payment accounts of the client shall not exceed RMB 200,000 in each year (excluding money transfer from a payment account to the client's bank account).

The channels for the external verification of clients; basic identity information include, but are not be limited to, the databases of government departments, the information systems of commercial banks and commercial databases. The verification of individual client's basic identity information through commercial banks shall apply to type I bank accounts or credit cards.

The NFI PSP shall process money transfers between payment accounts and clients' bank accounts in a timely manner as agreed upon with clients and shall not

limit the number of money transfers from type II and type III payment accounts to clients' bank accounts.

The NFI PSP shall obtain the payment license of the PBC (granted for five years with the possibility of extension) and comply with the following requirements:

– be incorporated in China as a joint-stock company or a limited liability company;

– have the minimum capital for implementation of activities in the territory of China not less than RMB 100 million (about US$ 15 million); within the territory of one province – RMB 30 million (about US$ 5 million);

– have AML/CFT, internal control and risk management rules;

– meet the information security requirements.

Some authors consider that the PBC have imposed strict entry thresholds and onerous obligations on third-party payment providers. These are necessary to maintain quality services and high levels of consumer protection and to control the potential risks associated with third-party payment services and illegal activities.[12] Others suggest that it is inappropriate to put different types of non-financial payment services institutions in the same basket. A universal registration capital requirement is too restrictive for most pre-paid cards institutions and banks cards acquiring institutions.[13]

In Announcement No. 7 the PBC clarified the requirements to foreign investors for the establishment of the NFI PSP.

To obtain the PBC payment license, in addition to the abovementioned general requirements, the foreign investor shall meet the following extra requirements:

– have experience in providing payment services, processing services for financial institutions or e-commerce companies for more than two years until filing of application in the PBC;

– have a profit during three previous years before filing of application;

– not have a penalty imposed for illegal or criminal activities.

The operation and back-up systems of a foreign-owned NFI PSP have to be located in the territory of China. Storage, processing, analysis of personal and financial information created/collected in China have to be handled within the country. The cross-border transfer of such information requires the specific consent of the authorized Chinese state bodies.

South African laws do not define the subject of payment services limited by an intermediary criteria. Section 7 of the SA NPS Law allows a person as a regular feature of that person's business to accept money or payment instructions from any other person for purposes of making a payment on behalf of the first person to a third

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[12] Weihuan Zhou et al., *Regulation of Digital Financial Services in China: Last Mover Advantage?*, 8(1) Tsinghua China Law Review 25 (2015).

[13] Wen Li, *The Regulation of New Electronic Payment Services in China*, PhD Thesis, Queen Mary University of London (January 2014), at 108 (May 12, 2019), also available at https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/8550/Li_Wen_PhD_final_080714.pdf?sequence=1.

person to whom the payment is due. This service may be provided by banks or non-banks in accordance with SARB Directive No. 1 of 2007 (SA Directive No. 1).[14] Non-banks may also provide services as system operators in terms of Directive No. 2 of 2007 (SA Directive No. 2).[15]

The scope of payment services provided by the banks is outlined in the SARB Position Paper of 2007.[16] According to this document, the payment services include only the payments through access to the customers' bank accounts and cash withdrawals in a bank with no payer's account. A bank may provide the payment services using credit payment instruments and debit payment instruments, and paper-based or electronic instruments including card-based.

SA Directive No. 1 stipulates two options for non-bank service providers:

– to accept money from multiple payers on behalf of a beneficiary or to process payers' payment instructions as a beneficiary service provider;

– to accept money from a payer or to process payers' payment instructions to conduct payments to multiple beneficiaries as a payer service provider.

In both cases, the non-bank service provider acts as an agent of the beneficiary/the payer and carries out the following obligations:

– to keep records of the payments to the third parties and retain the records for five years;

– to ensure safe and efficient processing systems compliant with the operational and technical requirements of SA Directive No. 2;

– to notify the bank of the provider's involvement in the payments to the third parties.

An entity that only processes payment instructions on behalf of the banks, non-bank service providers and their customers (users) is a system operator governed by SA Directive No. 2.

The system operator shall:

– meet the criteria recommended by the relevant payment system management body;

– have a written agreement with each user;

– keep the information regarding any user confidential and separate;

– not process the information that allows the offsetting of a user's obligations;

– keep records of the processed payment instructions for five years.

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[14] SARB, Directive No. 1 of 2007 – Directive for the conduct within the National Payment System in respect of payments to third persons (May 12, 2019), available at http://www.reservebank.co.za/.

[15] SARB, Directive No. 2 of 2007 – Directive for conduct within the National Payment System in respect of system operators (May 12, 2019), available at http://www.reservebank.co.za.

[16] SARB, Position Paper – Bank Models in the National Payment System, Position Paper No. 01/2007 (January 2007) (May 12, 2019), available at http://www.reservebank.co.za/.

3. Regulation of Payment Services Provided Through Banking Correspondents or Agents

Payment service providers such as banks, the NFI PSP and e-money issuers play key roles in the national payment markets. Financial inclusion may be significantly increased by the participation of non-bank entities in providing payment services. The Consultative Group to Assist the Poor (CGAP) defines it as branchless banking. Two models of branchless banking – bank-based and nonbank-based – can be distinguished. Both of them use retail agents such as merchants, supermarkets or post offices to deliver financial services outside traditional bank branches. In the bank-based model every customer has a direct contractual relationship with a financial institution – whether account-based or involving a single transaction – even though the customer may deal exclusively with a retail agent. In the nonbank-based model, customers have no direct contractual relationship with a financial institution. Instead, the customer exchanges at a retail agent cash or otherwise transfers funds in return for an electronic record of value. This virtual account is stored on the server of a nonbank, such as a mobile operator or an issuer of stored-value cards.[17]

Regulatory frameworks take different approaches. The treatment of agents depends sometimes on the category of institution represented by the agent (e.g. bank or nonbank), sometimes on the type of account being handled (e.g. e-money or bank deposits) and sometimes on the activities performed by the agent (e.g. account opening or cash handling). Each approach raises distinct challenges to make regulation effective.[18]

Bank-based model's regulation is further considered below at examples of banking correspondents or agents. Nonbank-based model's regulation is presented in section 4 at examples of e-money service providers.

In *Brazil*, private and state-owned banks are allowed to offer the following payment services through agents who are called "bank correspondents" (BCs): domestic and international transfers, cash deposits and withdrawals; prepaid mobile phone top-ups; bill payments; and the issuance and acquiring of payment cards. The activities of BCs are governed by the BCB Resolution 3,954/2011.[19]

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[17] CGAP, Notes on Regulation of Branchless Banking in South Africa (February 2008), at 2 (May 12, 2019), available at http://www.cgap.org.

[18] Stefan Staschen & Patrick Meagher, *Basic Regulatory Enablers for Digital Financial Services*, Focus Note No. 109, CGAP (May 2018), at 3 (May 12, 2019), available at http://www.cgap.org; Michael Tarazi & Paul Breloff, *Regulating Banking Agents*, Focus Note No. 68, CGAP (March 2011), at 3–5 (May 12, 2019), available at http://www.cgap.org/sites/default/files/CGAP-Focus-Note-Regulating-Banking-Agents-Mar-2011.pdf.

[19] Resolution 3,954 (May 12, 2019), available at http://www.bcb.gov.br/Nor/Denor/Resolution_CMN_3954_English.pdf. *See also* Oxford Policy Management, EFInA: Evaluation of Agent Banking Models in Different Countries (October 2011), at 6–9 (May 12, 2019), available at http://www.efina.org.ng.

A bank is fully responsible for the services rendered by its agents. The BCB requires the bank (i) to control the activities of each of its agents by setting transaction limits and implementing mechanisms to block transactions remotely when necessary and (ii) to ensure compliance with all applicable legal and regulatory provisions, such as AML/CFT, customer protection and data privacy. An agent must post a notice in its establishment that it acts on behalf of the bank. Agents cannot give cash advances to clients, guarantee transactions or charge extra fees.

Agent networks can be managed directly by the bank or outsourced to a third party (e.g. a network manager). The BCB considers network managers to be agents. Network managers provide a wide range of services and often communicate directly with the bank on behalf of the agents in their network. Network managers often provide training related to AML/CFT, maintenance of POS, software development, cash handling and marketing.

The BCB has unrestricted access to all information and documents related to the services rendered by the agents. All agents must be registered in the BCB's online system. The BCB monitors and evaluates the largest agent networks by focusing on the bank's internal controls and information technology infrastructure. Agent-related risks are primarily considered part of consumer protection risk. The Conduct Supervision Department of the BCB focuses on particular risks in the largest providers or in a specialized segment of the market, such as providers of payroll loans delivered through agents – and addresses the risks by requiring corrective measures in several institutions incurring the same problem, or by changing regulations. Some aspects of the agent business can also be eventually covered by the prudential supervision departments as a minor item of the operational risk assessment.[20]

The BCs model is characterized by Brazilian researchers as a hybrid model fully integrated into the financial system. The consequences of implementation of the BCs model are two-folded. First, BCs are contracted by regulated banks that, in turn, are liable for the operations before the clients. Second, as part of the financial system, BCs use the technological tools that may increase effectiveness of banking services.[21]

The *Russian* NPS Law allows a credit institution to engage a bank payment agent under an agreement:

– to accept cash from individual customers or to issue cash to individual customers, including ATMs;

– to provide electronic means of payment to customers and to enable the use of these electronic means of payment;

– to carry out identification of individual customers in accordance with the requirements of the Russian AML/CFT legislation.

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[20] Denise Dias et al., *Supervision of Banks and Nonbanks Operating Through Agents: Practice in Nine Countries and Insights for Supervisors*, CGAP (2015), at 11 (May 12, 2019), available at http://www.cgap.org.

[21] Tania Pereira Christopoulos et al., *Evaluating Banking Agents: A Case of Brazilian Banking Correspondents*, 24(2) DLSU Business & Economics Review 92, 94 (2015).

In the cases stipulated by the agreement with the money transfer operator, a bank payment agent that is a legal entity has the right to engage a bank payment subagent.

A money transfer operator may engage a bank payment agent subject to the following requirements to:

– conduct the activity on behalf of the money transfer operator;

– identify an individual customer by the bank payment agent in accordance with the requirements of the Russian AML/CFT legislation;

– use a special bank account (accounts) by the bank payment agent to credit the full amount of cash received from individual customers;

– confirm by the bank payment agent of the receipt (issuance) of cash;

– use ATMs by the bank payment agent in accordance with the requirements of the Russian laws on the use of cash register equipment in cash settlements;

– inform the customers in each place of performance of operations.

A bank payment agent has the right to charge individuals a fee if this is provided by the agreement with the money transfer operator.

The money transfer operator shall:

– maintain a list of bank payment agents available to individual customers and tax authorities upon their request;

– monitor the bank payment agent's compliance with the terms of its engagement in accordance with CBR regulations and the agreement between the money transfer operator and the bank payment agent.

The Reserve Bank of *India* issued Guidelines for engaging Business Correspondents (BCs Guidelines)[22] in September 2010. Banks may engage as BC individuals and entities listed in the BCs Guidelines, including cooperative societies, post offices and companies registered under the Indian Companies Act of 1956 with large and widespread retail outlets, excluding Non-Banking Financial Companies (NBFCs). The scope of payment services provided through BCs may include receipt and delivery of small value remittances and other payment instruments.

The BCs model is restricted by representing and providing banking services of only one bank in accordance with the terms and conditions governing the written agreements between the bank and the BCs. The banks may pay fees to the BCs, the rate of which may be reviewed periodically. The agreement with the BCs should specifically prohibit them from charging any fees from the customers directly for services rendered by them on behalf of the bank.

Banks are required to take full responsibility for the acts of the BCs that they engage and have to ensure due diligence and additional safeguards for minimizing the agency risk. Ensuring compliance with AML/CFT norms as laid down in the Master

[22] RBI, Guidelines for engaging of Business Correspondents (BCs) (September 2010) (May 12, 2019), available at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/CPC28092010.pdf.

Circular DBOD.AML.BC. No.2/14.01.001/2010-11 under the BCs model continues to be the responsibility of banks. Banks shall implement procedures for redressing complaints about services rendered by BCs.

With a view to ensuring adequate supervision over the operations and activities of the BCs by banks, every retail outlet/sub-agent of a BC is required to be under the oversight of a specific bank branch designated as the base branch. The distance between the place of business of a retail outlet/sub-agent of a BC and the base branch should ordinarily not exceed thirty kilometers in rural, semi-urban and urban areas and five kilometers in metropolitan centers.

Banks shall adopt IT solutions to ensure integrity and fraud prevention. Banks are also required to ensure that their arrangements with BCs should specify suitable limits on cash holdings by intermediaries as well as limits on individual customer payments and receipts. It is also specified that the transactions shall be reflected in the bank's books by end of day or next working day.

The *South African* regulatory framework gives wide discretion to banks to use agents to offer payment services. Section 1(1) of the Banks Act No. 94 of 1990 allows a bank to contract agents to receive on its behalf from its clients any deposits, money due to it or applications for loans or advances, or to make payments to such clients on its behalf. According to section 78(1), a bank shall not enter into an agency agreement until provision has been made out of profits for any amount representing the cost of organization or extension or the purchase of a business or a loss or bad debts.

In accordance with SARB Guidance Note 5/2014 "Outsourcing of Functions Within Banks,"[23] outsourcing is defined as the use a service provider to perform on a continuing basis on behalf of the bank a business activity, service, function or process which could be undertaken by the bank.

The Guidance Note does not specify which bank functions may be outsourced, but it does prohibit the outsourcing of a bank's compliance function. All outsourcing arrangements should be measured in terms of the materiality criteria. Where a material business activity or function is outsourced the outsourcing arrangement is deemed material. A material business activity or function is defined as one that has the potential to have a significant impact on the bank's business operations or its abilities to manage risks. From the given definition it follows that outsourcing of payment services will be considered material due to its significant impact on the bank's business operations.

If a bank chooses to outsource agents providing payment services, it shall:

– enter into a detailed outsourcing agreement;

– ensure outsourced services are performed adequately and in accordance with internal policies, standards and the outsourcing agreement;

– ensure processes are in place to identify any weakness in a supplier's service, which may include access to the supplier by the bank's internal and external auditors as well as external agencies;

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[23] Available at http://www.reservebank.co.za/.

– provide the SARB upon request any required information on the outsourced functions or activities.

The flexible regime for banks' use of agents has enabled banks to provide payment services outside traditional bank branches. However, requiring agents to perform in accordance with the internal policies and standards of the bank may result in the exclusion of smaller establishments, which are more likely to be located in low income areas.[24]

4. Regulation of E-Money Services

The *Brazilian* Payment Law defines e-money as resources stored in devices or an electronic system that allow the end user to perform payment transactions. There is no specific type of e-money issuer in the laws and the BCB regulations. Payment institutions that are allowed to provide payment services are also allowed to issue and acquire e-money, to manage e-money and to convert e-money into currency, or vice versa.[25]

E-money is held on prepaid payment accounts[26] of end users. Payment institutions shall ensure the end user has the possibility of full redemption of outstanding balances in prepaid payment accounts at any time.

According to Article 3 of the *Russian* NPS Law, e-money means funds provided in advance by a funds provider (a physical person or a legal person) to an obligor called "e-money operator" for transfers to other parties. E-money transfer is a funds transfer without opening a bank account, using electronic means of payment and at the same time a banking operation according to banking legislation. Only Russian banks and non-bank credit organizations as e-money operators are allowed to transfer e-money.

The e-money operator shall establish rules for e-money transfers, including:

– the procedure for the e-money operator's activity related to e-money transfers;

– the procedure for providing electronic means of payment to customers and making e-money transfers;

– the procedure for the e-money operator's activities when engaging bank payment agents and organizations providing operational services and/or payment clearing services;

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[24] Notes on Regulation of Branchless Banking in South Africa, *supra* note 17, at 14.

[25] Gilberto Martins de Almeida, *M-Payments in Brazil: Notes on How a Country's Background May Determine Timing and Design of a Regulatory Model*, 8(3) Washington Journal of Law, Technology & Arts 347, 360–361 (2013); Simone di Castri, *Mobile Money Regulation in Latin America: Leveling the Playing Field in Brazil & Peru*, GSMA, 19 December 2013 (May 12, 2019), available at https://www.gsma.com/mobilefordevelopment/programme/mobile-money/mobile-money-regulation-in-latin-america-leveling-the-playing-field-in-brazil-peru/.

[26] According to Circular 3,680/2013, payment accounts are used by payment institutions to record the payment transactions of end users and must identity the end user holding such account. These accounts may be either prepaid or postpaid.

– the procedure for ensuring uninterrupted e-money transfers;

– the procedure for the review of claims by the e-money operator, including prompt interactions with customers;

– the procedure for information exchange when conducting e-money transfers.

The e-money operator shall provide uninterrupted e-money transfers in compliance with the requirements established by the CBR. The e-money operator is entitled to conclude agreements with other organizations to provide operational services and/or payment clearing services to the e-money operator.

The Russian NPS Law contains specific AML/CFT requirements applicable to e-money. An e-money transfer shall be effected with customer identification, simplified identification or without identification in accordance with the AML/CFT laws.[27] If the e-money operator does not carry out the identification, the individual customer may only use the electronic means of payment for e-money transfers to merchants provided that the e-money balance at any moment does not exceed RUB 15,000 (US$ 227) and the total amount of e-money transfers during a month does not exceed RUB 40,000 (US$ 606). If the e-money operator carries out the identification, the individual customer may use the electronic means of payment for e-money transfers to other individual customers and the abovementioned monetary limits are extended according to the Russian NPS Law.

A corporate customer shall use an electronic means of payment only after the customer's identification by the e-money operator. These electronic means of payment are deemed corporate and shall be used provided that the e-money balance does not exceed RUB 600,000 (US$ 9,090). If the specified amount is exceeded, the e-money operator shall transfer the excess money to the bank account of the corporate customer. Such a bank account shall be opened by the e-money operator.

The Russian approach presented in the Russian NPS Law has a similar feature to the definition of e-money in *South Africa*. As defined in the SARB Position Paper of 2009,[28] e-money is a monetary value represented by a claim on the issuer. This money is stored electronically and issued on receipt of funds, generally accepted as a means of payment by persons other than the issuer and redeemable for physical cash or a deposit into a bank account on demand. Only registered South African banks[29] are allowed to issue e-money. Some researchers have noted that due to the tightening

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27 Federal Law "On Countering the Legalization (Laundering) of Criminally Obtained Incomes and the Financing of Terrorism."

28 SARB, Position Paper on Electronic Money, Position Paper NPS 01/2009 (November 2009) (May 12, 2019), available at http://www.reservebank.co.za/.

29 A bank can be defined as a commercial bank or branch of a foreign institution registered in terms of the Banks Act of 1990 (Act No. 94 of 1990), a mutual bank registered in terms of the Mutual Banks Act of 1993 (Act No. 124 of 1993) and a cooperative bank registered in terms of the Cooperative Banks Act of 2007.

of regulation, the trade-off is in favor of risk management over financial inclusion.[30] It is also essential that the E-Money regulatory framework is technology-neutral and does not constrain itself to a particular form factor or technology platform. Mobile phone technology is an ideal technology platform to introduce payment products and services. Mobile Money should however not be regulated in isolation and should be a subset of the bigger E-Money regulatory framework.[31]

However, the Russian e-money legal concept is different:

– e-money means funds and does not mean value;

– e-money is transferred but not issued or redeemed.

We can also outline the following similarities between *South African* and *Russian* requirements for e-money providers:

1. Necessity of prior notification to the Central Bank of providing e-money services;

2. Possibility of arrangements for providing operational and clearing services by the non-banks to the banks;

3. Public disclosure of the conditions of e-money services. In Russia, a contract between the bank and its customer is required;

4. The technologies used in e-money must be secure and ensure robust operations.

Russian banks hold e-money in their own accounts, which differs from South African practice where deposits of e-money would have to be held in a separately identifiable e-money account in a bank for each holder of e-money according to the requirements of the Banks Act. Therefore, the South African model of holding e-money resembles the bank account model in Russia.[32]

In *India*, the RBI MD on PPIs defines the term "pre-paid payment instruments" (PPIs) as payment instruments that facilitate the purchase of goods and services, including funds transfer, against the value stored on such instruments. The value stored on such instruments represents the holder's value paid by cash, by debit to a bank account or by credit card. The PPIs can be issued as smart cards, magnetic

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30 Vivienne A. Lawack, *Mobile Money, Financial Inclusion and Financial Integrity: The South African Case*, 8(3) Washington Journal of Law, Technology & Arts 317, 328 (2013); Michael Klein & Colin Mayer, *Mobile Banking and Financial Inclusion: The Regulatory Lessons*, World Bank Policy Research Working Paper No. 5664 (May 2011) (May 12, 2019), available at http://documents.worldbank.org/curated/en/516511468161352996/pdf/WPS5664.pdf.

31 Sarah Langhan & Keith Smith, *The Legal and Regulatory Framework for Payments in 14 SADC Member States: Master Report*, FinMark Trust (August 2014), at 40 (May 12, 2019), available at http://www.finmark.org.za/wp-content/uploads/2016/02/Rep_LegalRegulatoryFramework_Payments_SADC_14states.pdf.

32 Bank accounts are regulated by the Civil Code (ch. 45), while e-money by the Russian NPS Law. *See* Michael Tarazi & Paul Breloff, *Nonbank E-Money Issuers: Regulatory Approaches to Protecting Customer Funds*, Focus Note No. 63, CGAP (July 2010), at 3–5 (May 12, 2019), available at https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Non-bank-E-Money-Issuers-Regulatory-Approaches-to-Protecting-Customer-Funds-Jul-2010.pdf.

stripe cards, internet accounts, internet wallets, mobile accounts, mobile wallets. The PPIs are classified under three categories:

– closed system payment instruments;

– semi-closed system payment instruments;

– open system payment instruments.

Closed system payment instruments are issued to facilitate the purchase of goods and services from the issuer. No cash withdrawal or redemption is allowed. Issuance of these payment instruments is not required by the RBI authorization.

Semi-closed system payment instruments can be used to purchase goods and services including financial services with a group of merchants that concluded a contract with the issuer on acceptance of the payment instruments. These instruments also do not permit cash withdrawal or redemption by the holder.

Open system payment instruments can be used to purchase goods and services including financial services such as funds transfer at any card-accepting merchant locations (point of sale terminals), and they permit cash withdrawal as well.[33]

Banks are permitted to issue all categories of PPIs. However, only banks providing mobile banking transactions may also issue mobile-based PPIs (e.g. mobile wallets and mobile accounts).

Non-banks may be authorized by the RBI to issue only closed and semi-closed system payment instruments including mobile phone-based PPIs. Any non-bank entity seeking the RBI authorization shall meet capital and other eligibility requirements. Existing PPIs license holders could opt for conversion into payments banks.

All authorized issuers may issue reloadable or non-reloadable PPIs depending on the issuer's type and the category of the instrument. PPIs are to be loaded (reloaded) by cash, by debit to a bank account, by credit and debit cards. The electronic loading (reloading) of PPIs shall be conducted through payment instruments issued by regulated Indian entities in rupees only. There are specific requirements for amounts loaded, outstanding in the instrument and debited from the instrument as well as for cross-border transactions through PPIs.[34]

In *China*, opening prepaid accounts and the issuance of prepaid cards by the banks and NFI PSR are substitutes for e-money in the other BRICS countries considered.

In conclusion, it may be noted that legal and regulatory approaches to the payment and e-money services in the BRICS countries have similar features. All

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[33] Shivalik Chandan, *RBI and Regulation of Digital Financial Services in India, 2012–2016*, Centre for Internet & Society, 11 July 2016 (May 12, 2019), available at https://cis-india.org/raw/rbi-regulation-digital-financial-services-in-india-2012-2016; Sharanya G. Randa, *The Legal Framework for E-payments in India and the Challenges It Faces*, TechCircle, 1 December 2016 (May 12, 2019), available at https://techcircle.vccircle.com/2016/12/01/the-legal-framework-for-e-payments-in-india-and-the-challenges-it-faces/.

[34] Jane K. Winn, *Mobile Payments and Financial Inclusion: Kenya, Brazil and India as Case Studies* in *Research Handbook on Electronic Commerce Law* 62 (J.A. Rothchild (ed.), Cheltenham: Edward Elgar Publishing, 2016).

the countries regulate non-bank payment services providers and require their authorization. Brazil, India and Russia have well-developed regulations for banking correspondents and agents. Russia and South Africa allow providing e-money services only for the banking institutions.

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TRANSITIONAL JUSTICE IN SOUTH AFRICA AND BRAZIL: INTRODUCING A GENDERED APPROACH TO RECONCILIATION

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The concept of transitional justice has been associated with the periods of political change when a country emerges from a war or turmoil and attempts to address the wrongdoings of the past. Among various instruments of transitional justice, truth commissions stand out as an example of a non-judicial form of addressing the crimes of the past. While their setup and operation can be criticized on different grounds, including excessive politization of hearings and the virtual impossibility of meaningfully assessing their impact, it has been widely acknowledged in the literature that the Truth and Reconciliation Commission in South Africa can be regarded as a success story due to its relatively strong mandate and widespread coverage and resonance it had in South African society. We would like to compare this commission from the 1990s with a more recent example, the Brazilian National Truth Commission, so as to be able to address the question of incorporation of gendered aspects in transitional justice (including examination of sexual violence cases, representation of women in truth-telling bodies, etc.), since gender often remains an overlooked and silenced aspect in such initiatives. Gendered narratives of transitional justice often do not fit into the wider narratives of post-war reconciliation. A more general question addressed in this research is whether the lack of formal procedure in truth commissions facilitates or hinders examination of sexual crimes in transitional settings.

Keywords: transitional justice; truth commissions; post-conflict resolution; gender-based violence; reconciliation.

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Introduction: Origins and Historical Context of Transitional Justice

Although the term "transitional justice" is relatively recent, and is mostly connected in the literature with post-WWII developments, some authors contend that we can trace the evolution of certain policies regarding post-war reconciliation already in ancient times.[1] It has to be noted from the very start that in international humanitarian law there is no checklist of transitional measures that must be taken in post-conflict situations (with the exception of criminal prosecution). Thus, transitional justice can been understood very broadly to encompass a whole variety of different instruments and mechanisms applied in different settings in an *ad hoc* manner. Norwegian scholars Elin Skaar and Camila Gianella Malca define transitional justice as

> processes and mechanisms for dealing with past atrocities, covering a range of formal as well as informal mechanisms developed in post-authoritarian and post-conflict situations, including prosecution through courts, truth-telling through truth commissions, victims' reparations, amnesties, vetting, lustration, institutional reform, and memorial process.[2]

Thus, the choice of concrete mechanisms very much depends on the context: whether the country is transitioning from an authoritarian regime to democracy

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[1] Anja Seibert-Fohr, *Transitional Justice in Post-Conflict Situations*, Max Planck Encyclopedia of Public International Law (2015) (Apr. 20, 2019), available at https://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e419?rskey=7mBQue&result=4&prd=EPIL.

[2] Elin Skaar & Camila Gianella Malca, *Transitional Justice Alternatives: Claims and Counterclaims* in *After Violence: Transitional Justice, Peace and Democracy* 1, 1–28 (E. Skaar et al. (eds.), London and New York: Routledge, 2015).

or whether it is trying to heal the traumas inflicted by an armed conflict. There are no one-size-fits-all formulas as to which mechanisms would be appropriate and transplantable in any given situation, thus the decision to employ particular measures are context-based and depend on a multitude of factors including institutional capacity, availability of funding, cadres and, perhaps most importantly, political will. The range of transitional justice initiatives is broad and encompasses both judicial and non-judicial mechanisms that include truth-telling, secret files disclosure, prosecution of perpetrators, various mechanisms of redress, institutional reforms, public apology, property restitution, memorialization, and so on. These initiatives increasingly began to be applied by the international community in the 1990s. Since then a whole research agenda has emerged that has looked into various aspects of transitional justice initiatives in an effort to assess their effectiveness, appropriateness and potential for bringing peace and reconciliation.

Astrid Bothmann offers a chronology of transitional justice developments. The first phase began in the aftermath of the atrocities of WWII, when European countries faced the necessity to punish the Nazis, their accomplices and collaborators.[3] Apart from the Nuremberg trials, several important domestic processes took place in Western Europe, where Nazi criminals, who had been on the run for a long time, were finally captured and brought to justice. In the Western European context, very important post-WWII trials were those held in Germany, and Devin Pendas remarks that they were not only numerous, but also had to address a very complex dilemma: the lack of judges who would not have any connection to the politics of the Third Reich.[4] In Italy, Belgium and the Netherlands criminal trials were accompanied by a widespread program of lustration, where collaborators were excluded from holding key positions in society.[5] Transitional justice also became subject to widespread public discussion, mostly in the context of memory politics in both European and non-European contexts.[6]

The second phase began with the third wave of democratization (in Huntington's terms) when the concept of retributive justice was gradually abandoned in favor of restorative justice.[7] This phase was characterized by the widespread establishment of truth commissions in Latin American countries, the most famous of which include CONADEP (Argentinian National Commission on the Disappearance of Persons) set

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[3] Astrid Bothmann, *Transitional Justice in Nicaragua 1990–2012: Drawing a Line Under the Past* 27 (Wiesbaden: Springer VS, 2015).

[4] Devin O. Pendas, *Retroactive Law and Proactive Justice: Debating Crimes Against Humanity in Germany, 1945–1950*, 43(3) Central European History 428 (2010).

[5] Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20(1) Law & Social Inquiry 51 (1995).

[6] Sanya Romeike, *Transitional Justice in Germany After 1945 and After 1990*, Occasional Paper No. 1, International Nuremberg Principles Academy (2016) (Apr. 20, 2019), available at https://www.nurembergacademy.org/fileadmin/media/pdf/news/Transitional_Justice_in_Germany.pdf.

[7] Bothmann 2015, at 29.

up in 1983 and Chilean Investigative Commission on the Situation of Disappeared People and its Causes set up in 1990. In Europe, regime change and the transition of Southern European countries to democracy brought about a number of post-authoritarian transition initiatives.[8]

The recent, third phase began in the mid-1990s and includes not only trials and truth commissions, but also a whole variety of other initiatives. The actual term "transitional justice" also emerged during this time, when the first studies of this phenomenon were appeared, for example the report "Transitional Justice: How Emerging Democracies Reckon with Former Regimes," published in 1995 in the United States. Transitional justice is no longer understood as a range of measures applicable in the context of regime change, but rather as a broad approach to deal with post-conflict situations, including civil wars, political turmoil and even natural disasters. According to the United Nations' understanding of transitional justice, it includes such pillars as prosecution initiatives, truth-telling processes, reparation programs and institutional reform, as well as national consultation.[9]

The end of the Cold War brought about new interpretations of peace-keeping, peace-building and post-conflict reconstruction. With the establishment of the U.N. *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), a whole new debate started on the assumed link between transitional justice and the rule of law.[10] As Elizabeth Andersen noted,

> To summarize, a critical dimension of a rule of law approach to transitional justice is that the transitional justice process is localized, physically situated as close to the rite where the crimes took place as possible, ideally implemented through national and local institutions, and with input to the design and remedy from the affected population.[11]

The connection between transitional justice and democratization also became the topic of lively discussions.[12]

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[8] António Costa Pinto, *Authoritarian Legacies, Transitional Justice and State Crisis in Portugal's Democratization*, 13(2) Democratization 173 (2006).

[9] United Nations, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, DPA/UNSG 2010-00904 (March 2010) (Apr. 20, 2019), available at https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

[10] United Nations Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, S/2004/616 (August 2004) (Apr. 20, 2019), available at https://digitallibrary.un.org/record/527647.

[11] Elizabeth Andersen, *Transitional Justice and the Rule of Law: Lessons from the Field*, 47(1) Case Western Reserve Journal of International Law 305 (2015).

[12] Siri Gloppen, *Reconciliation and Democratisation: Outlining the Research Field*, Report R 2002: 5, Chr. Michelsen Institute (2002) (Apr. 20, 2019), available at https://www.researchgate.net/publication/37166544_Reconciliation_and_Democratisation_Outlining_the_Research_Field.

At approximately the same time the discussion over universal jurisdiction and the *aut dedere aut judicare* principle led to several domestic trials in European countries.[13] In addition, after the collapse of the communist bloc in Central and Eastern Europe, certain measures were taken to ensure the transition to democratic societies. Such measures included, inter alia, open access to secret police files, public denunciation of the crimes committed by the regime and lustration. The implementation of all these measures, however, had very different effects in central and eastern European countries and was accompanied by innumerable political scandals.[14] Political elites tried to manipulate transitional justice initiatives to discredit their opponents, which made these initiatives increasingly unpopular with the population and instead of fostering reconciliation, polarized society even further.[15] European dilemmas in the field of transitional justice only demonstrate that there is no blueprint that can be easily transplanted to a traumatized society and ensure miraculous healing. To forget the past or to talk about it: Which is more harmful? All of these issues still bring about serious discussions in many countries.[16]

One of the frequently discussed topics in academic debates over transitional justice is the appropriateness of criminal trials over more flexible truth-telling mechanisms,[17] as well as the interrelation between the two.[18] The relation between trials and truth commissions is a complex one. On the one hand, truth commissions do not have legal powers and are not entitled to impose punishment on a perpetrator. On the other hand, they have been praised exactly for this flexibility which criminal trials do not have because they focus on specific aspects of specific conduct, thus, an overall picture of abuses might be missing.[19] However, as Priscilla Hayner notes in her book, often evidence gathered by the truth commissions might become useful once criminal trials begin. She gives the example of Argentina where information gathered by the truth commission was used in criminal trials.

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13 Alicia Gil Gil, *The Flaws of the Scilingo Judgment*, 3(5) Journal of International Criminal Justice 1082 (2005).

14 Cynthia Horne, *Building Trust and Democracy: Transitional Justice in Post-Communist Countries* (Oxford: Oxford University Press, 2017).

15 Csilla Kiss, *The Misuses of Manipulation: The Failure of Transitional Justice in Post-Communist Hungary*, 58(6) Europe-Asia Studies 925 (2006).

16 Controversial Monument Divides Hungarians, Angers Jewish Community, EURACTIV, 23 July 2014 (Apr. 20, 2019), available at https://www.euractiv.com/section/central-europe/news/controversial-monument-divides-hungarians-angers-jewish-community.

17 Donald W. Shriver, Jr., *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16(1) Journal of Law and Religion 1 (2001).

18 Elizabeth M. Evenson, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104(3) Columbia Law Review 730 (2004).

19 Giada Girelli, *Understanding Transitional Justice: A Struggle for Peace, Reconciliation, and Rebuilding* 201 (Cham: Springer, 2017).

> In just over five months, the prosecution reviewed the commission's nearly 9,000 case files to choose over 800 witnesses to be presented in the trial, covering some 700 individual cases. The trial began just eighteen months after the military junta left power, when the momentum for accountability and public interest was still strong. The trial was a devastating show of calculated horror, allowing the public to hear firsthand accounts of suffering from those who were caught in the web of the military torture centers and managed to survive.[20]

Then, the commission's flexibility also allows for their easier adjustment to specific contexts, and given that they have fewer formal legal and procedural constraints, they are more understandable to the public (which is very often not trained in the specifics of criminal law and criminal procedure).

International organizations, donor agencies, governmental experts, (I)NGOs and local civil society, victims' groups, religious organizations and prominent individuals are the most common actors in transitional justice initiatives.[21]

As far as transitional justice measures are concerned, scholars usually divide them into two broad categories: judicial (which includes trials, both international and domestic) and non-judicial (which encompasses various other initiatives, such as reparation programs, institutional reforms and truth-telling mechanisms, and visualization, including memorials, museums and popular culture).

In the African and Latin American context, the most famous examples of transitional justice are truth commissions/truth and reconciliation commissions. Truth commissions are usually set up by the government as temporary bodies to investigate gross human rights violations committed by the previous regime. The first truth commission was established in Uganda in the 1970s and, according to Amnesty International, in the period of 1974–2007 there were at least thirty-two commissions, working mostly on the African and Southern American continents.[22] It can be difficult to distinguish truth commissions from other fact-finding bodies. According to Priscilla Hayner, a truth commission:

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[20] Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* 94 (New York and London: Routledge, 2001).

[21] International organizations often act as donors as well. For instance, the European Union has consistently supported transitional justice initiatives and victims' rehabilitation mechanisms. For example, it allocated €5 million to the development of transitional justice projects in Columbia, €300,000 for the creation of a Truth Commission on the Solomon Islands and €100,000 for a project on forced disappearances in Guatemala. For more, *see* Laura Davis, *The European Union and Transitional Justice*, IFP Democratisation and Transitional Justice Cluster (June 2010), at 14 (Apr. 20, 2019), available at https://ictj.org/sites/default/files/ICTJ-IFP-EU-Justice-2010-English.pdf.

[22] Комиссии по установлению истины // Amnesty International [Truth Commissions, Amnesty International] (Apr. 20, 2019), available at https://amnesty.org.ru/node/609.

> (1) is focused on the past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experience; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review.[23]

Elin Skaar notes that the main objective of truth commissions is uncovering, recording and documenting the truth, but this list can be easily expanded. She quotes Tristan Anne Borer who made an alphabetical list of truth commissions' objectives that include

> accountability, acknowledgment, amnesty, apology, coexistence, confession, dignity, forgiveness, healing, human rights culture, justice, mental health, mercy, national unity, nunca más or "never again," peace, political impact, nonprosecutorial punishment, reconciliation, reconstruction, remorse, reparations, repentance, responsibility, restoration, retribution, rule of law, and, finally, truth.[24]

Skaar remarks, however, that despite their varying mandates their end goal is usually the same: reconciliation. At the end of their activities, they produce a final report that includes their main findings, statistical information and policy recommendations.

The South African Truth and Reconciliation Commission is often cited as an example of the most successful commission that not only explored the crimes of the apartheid regime, but also had certain quasi-judicial powers, which included the granting of amnesty. The Commission was regarded as a model for further similar undertakings and was widely covered in the media, mass culture[25] and the academic literature.[26] The Brazilian National Truth Commission, on the contrary, is a relatively recent case, which to date remains unexplored.

In this article, we would like to examine the gender dimension in both commissions with a view to identifying the challenges and achievements of both commissions in the course of "engendering" transitional justice.

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[23] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 11–12 (2nd ed., New York and London: Routledge, 2010).

[24] Elin Skaar, *Transitional Justice for Human Rights: The Legacy and Future of Truth and Reconciliation Commissions* in *International Human Rights Institutions, Tribunals, and Courts* 401 (G. Oberleitner (ed.), Singapore: Springer, 2018).

[25] For instance, the film *In My Country* (*Country of My Skull*), 2004 (UK, Ireland, South Africa).

[26] We would like to refer the reader to the extensive bibliography included in the Transitional Justice Data Base (TJDB) project (Apr. 20, 2019), available at http://www.tjdbproject.com.

1. Gender-Based Crimes in Transitional Justice: Beyond the Prosecutions?

The question of the gender dimension of transitional justice remains a relatively unexplored area. While there are works that assess the role of women in truth-telling, both as members of various initiatives and as victims/witnesses, there are many more broader aspects that deserve more careful analysis. What is the role of women in democratization? To what extent does women's participation in transitional justice increase the likelihood and durability of transition? Can conclusions be drawn as to the applicability of truth-telling mechanisms in cases of sexual crimes against both men and women? The importance of integrating the gender perspective in transitional justice initiatives has long been recognized by the international community. Thus, a World Bank report states that

> incorporating gender-sensitive approaches into the work of the TC not only aids in making effective reparations for victims of human rights abuses, but also helps prevent future conflicts.[27]

Nahla Valji remarks that,

> early concerns with gender and truth commission were very much focused on increasing the number of women commissioners, encouraging the employment of women statement-makers and providing a safe space for women to tell their stories of sexual violence.[28]

Since then, however, the emphasis has shifted to include more nuanced narratives of women's experiences in war, since the excessive focus on sexual violence risked misrepresenting women as passive victims of war, devoid of context and overall cultural background, as well as marginalizing certain stories that did not fit into the general picture of reconciliation and forgiveness.

Incorporating gender into transitional justice mechanisms poses numerous questions: How appropriate are truth-telling mechanisms to deal with traumas inflicted by sexual violence? How can transitional justice account for other forms of harm, not just physical harm (social, economic, psychological)? How can transitional justice mechanisms accommodate and balance between both male and female survivors' narratives of war? The lack of trained professionals and the lack of resources

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[27] World Bank, Gender, Justice, and Truth Commissions (June 2006), at ix (Apr. 20, 2019), available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/GJTClayoutrevised.pdf.

[28] Nahla Valji, *Gender Justice and Reconciliation* in *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* 217, 228 (K. Ambos et al. (eds.), Heidelberg: Springer, 2009).

to provide psychological and other forms of help to victims can lead to further traumatization and stigma.[29] To be fair, the same could be said about criminal trials (both international and domestic), which are often not well equipped to deal with the complexity of such horrendous acts and their long-term consequences.[30] Among the challenges that international tribunals face in addressing gender-based sexualized violence we must mention procedural hurdles that hamper effective investigation and prosecution of such assaults. In the conditions where a certain passage of time occurred between the occurrence of actual crimes and prosecution, the most common way of collecting evidence would be witness testimony (accompanied by photographic evidence, if any, and/or by the perpetrator's confession). In domestic law, however, the range of evidence normally used to prove sexual crimes is wider, and also includes material evidence (biological samples, items used in the course of the crime, etc.), medical examination, forensic evidence and experts' conclusions, which are impossible to obtain in times of war, when the assaults often continue for a prolonged period of time (in cases of sexual slavery or forced marriage). Thus, the defense is often left with a dearth of evidence, but at the same time, cannot disregard the rights of the defendants since in such a case the idea of transferring democratic values to a post-conflict society would seem meaningless. It does not come as a surprise, then, that the number of cases where rape charges were dropped supersede the number of actual convictions. For instance, in the International Criminal Tribunal for the Former Yugoslavia, 78 individuals were charged with sexual violence (out of 161 accused), but only 32 were eventually convicted.[31]

In a traditional patriarchal society where societal relations are regulated by cultural and religious norms even this minimal range of available evidence might be abandoned in the favor of the perpetrators. If testifying is not accompanied by victim-friendly procedures and victim support measures, additional psychological trauma will be inevitable. Security/dignity/privacy concerns would explain the victims' reluctance to come forward with their stories. Even though Anne-Marie de Brouwer argues that in the international context, namely, in the International Criminal Court, direct victim testimony is not a necessary precondition for prosecution,[32] nonetheless it is up to the Chamber to decide on the relevance and applicability of other evidence (the testimony of eyewitnesses, accounts provided by expert witnesses, documentary evidence).

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[29] Karen Brounéus, *The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health*, 54(3) Journal of Conflict Resolution 408 (2010).

[30] *See*, generally, Nicola Henry, *War and Rape: Law, Memory and Justice* (London: Routledge, 2011).

[31] In Numbers (as of September 2016), ICTY (Apr. 20, 2019), available at http://www.icty.org/en/features/crimes-sexual-violence/in-numbers.

[32] Anne-Marie de Brouwer, *Cases of Mass Sexual Violence Can Be Proven Without Direct Victim Testimony* in *Contemporary Issues Facing the International Criminal Court* 282 (R.H. Steinberg (ed.), Leiden: Brill; Nijhoff, 2016).

Truth commissions, therefore, compared to trials, might be more suitable venues in which to assess the extent of sexual crimes and the general context accompanying them, however. In a criminal trial, the limitations as to the applicability of evidence, time constraints and other limitations might discourage (or outright reject) certain witness testimony, while truth commissions, on the contrary, can accommodate more victims who come forward with their stories (as long as the design of the commission so permits). In addition, truth commissions might be more suitable institutions for accommodating alternative discourses that encompass a multitude of women's experiences in war, not just their identity as victims. Drawing on extensive field research, Wendy Lambourne and Vivianna Rodriguez Carreon demonstrate, for example, how adopting a narrow, legal focus on prosecutions can be inappropriate to address the multitude and complexity of harms experienced by women in war, and how other aspects (socioeconomic, political and psychological) must be tackled in addition to formal, legal justice.[33] They note, in particular, that in a formal trial lawyers have control over the evidence to be presented, and victims/witnesses might be discouraged to focus on sexual crimes, interrupted or prevented from speaking about their experience altogether, since the prosecution would only need specific factual information to be able to secure a conviction.[34] Witnesses might also face threats if they choose to testify as well as fear being marginalized and rejected by their community if they choose to speak up.[35] Lambourne and Rodriguez Carreon warn, however, that short-term transitional measures are simply not enough to address the complexity of the customary, cultural, social, political and other forces that put women at a disadvantage in society (for instance, women might continue to live in extreme poverty, have little access to education and training, become victims of domestic violence, etc.), and they conclude that it is necessary to complement existing judicial and non-judicial mechanisms with other initiatives, for instance, legislative reforms that would alter the discriminatory status of women (for instance, in inheritance or land rights). An important point they raise is that very often violence against women can take many forms. Referring to the study conducted in northern Uganda, they list several dimensions of violence:

> sexual or reproductive coercion, harm, torture or mutilation; targeting women's mothering; women, productive labour and property; women and social capital; and gender multipliers of violence.[36]

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33 Wendy Lambourne & Vivianna Rodriguez Carreon, *Engendering Transitional Justice: A Transformative Approach to Building Peace and Attaining Human Rights for Women*, 17(1) Human Rights Review 71 (2016).

34 *Id.* at 76.

35 African Rights & REDRESS, Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes (November 2008) (Apr. 20, 2019), available at https://reliefweb.int/sites/reliefweb.int/files/resources/EACB1B6625BA02A9C1257524003899EF-Full_Report.pdf.

36 Lambourne & Rodriguez Carreon 2016, at 88.

Thus, no fool-proof recipes are available on how to design a transitional justice program that would address the needs of all victims in all possible settings. In the context of post-conflict traumas, the ways in which gender is understood and (re) interpreted in public settings influence not only the future of state institutions but also the societal structures more generally.

It has been noted in the literature that in cases when appropriate mechanisms are not in place (such as *in camera* hearings), speaking publicly about sexual crimes might be in itself a traumatizing experience that would discourage victims from coming forward. However, as Valji points outs, the assumption that women do not want to come forward with their stories does not hold true, it very much depends on the context and on the individual woman.[37] There are many examples of women who wanted to speak of their experience in public, but they did not always have this possibility.[38]

Moreover, excessive focus on women in transitional justice (in both trials and truth-telling mechanisms) as *victims* of war obscures other forms of women's experiences such as direct participation in combat. Former women combatants might find it impossible to obtain certain services and enter rehabilitation programs.[39] The problem of female perpetrators has not been adequately addressed in the literature,[40] thus very little is known about how to address the specific needs of female perpetrators so as to enable their reintegration into the society. Women's participation in atrocities, including sexual crimes, is mostly silenced or downplayed in transitional justice. Suzannah Linton, however, notes quite shocking numbers of women who were accused of international crimes and were tried in some way or another: hundreds of women were tried in the aftermath of WWII, 96,000 were processed in Rwanda through *gacaca* courts, around 30%–40% of combatants in the Liberian civil war were women and around 25% of gang rapes committed in Sierra Leone involved women as perpetrators.[41]

In addition, male victims of sexual violence might also be discouraged from participating in such narrow-tailored initiatives that equate "gender" with "women" due to the predominant view that only women can be victims of such crimes. Elisabeth Porter strongly argues in favor of "gender-aware truth processes," since

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37 Valji 2009, at 230.

38 Vasuki Nesiah et al., *Truth Commissions and Gender: Principles, Policies, and Procedures*, International Center for Transitional Justice (July 2006) (Apr. 20, 2019), available at https://www.ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English_0.pdf.

39 Laura Stovel, *Long Road Home: Building Reconciliation and Trust in Post-War Sierra Leone* (Antwerp: Intersentia, 2010).

40 Laura Sjoberg, *Women as Wartime Rapists: Beyond Sensation and Stereotyping* (New York: New York University Press, 2016).

41 Suzannah Linton, *Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology*, 27(2) Criminal Law Forum 159 (2016).

> these processes avoid viewing women solely as victims, or men solely as perpetrators of abuse, but consider men's and women's experiences as fighters, survivors, perpetrators, victims, community leaders, or household managers.[42]

Thus, this multitude of identities, including gender, color and social class, must be taken into account in the layout of truth-telling initiatives.

2. Truth Commissions in South Africa and Brazil

2.1. South African Truth and Reconciliation Commission (TRC)

The South African Truth and Reconciliation Commission (TRC) was set up in the 1990s as a response to apartheid that plagued the country for almost fifty years. The Commission, established in 1995 by the Promotion of National Unity and Reconciliation Act, worked from 1996 until 1998, though it took a few more years to finalize its amnesty hearings (2001) and publish its final report (2002). The *rationae temporis* of the Commission covered the period from 1960 until 1994 during which the apartheid regime was in control in the country. The structure of the Commission included three bodies, namely the Human Rights Violations Committee, the Amnesty Committee and the Reparation and Rehabilitation Committee. The 1995 Promotion of National Unity and Reconciliation Act required the Commission to establish

> as complete a picture as possible of the causes, nature and extent of the gross violation of human rights which were committed during that period.[43]

The establishment of the Commission was in many ways a political compromise between formal prosecutions and forgetting. The National Party (NP) that had been in power for more than forty years and engaged in brutal excesses in the era of apartheid would have preferred blank amnesty. The African National Congress (ANC), headed by Nelson Mandela, would have opted for Nuremberg-style trials. As a result of long political negotiations, a compromise was reached in 1993, within the framework of the Interim Constitution. At the core of this compromise lay the idea of confessing the truth, for the granting of amnesty, or, otherwise, criminal prosecution (a "carrot and stick" approach).[44]

Not only this political arrangement, but also the underlying concept of the Commission's work, the concept of *ubuntu*, has not been without controversy. Thus, Hanneke Stuit

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[42] Elisabeth Porter, *Gendered Narratives: Stories and Silences in Transitional Justice*, 17(1) Human Rights Review 35 (2016).

[43] Promotion of National Unity and Reconciliation Act 34 of 1995 (Apr. 20, 2019), available at http://www.justice.gov.za/legislation/acts/1995-034.pdf.

[44] For more, *see* Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Antwerp: Intersentia, 2005).

examines, how "the TRC's discourse on nation-building-through-forgiveness relied on and interacted with the concept of *ubuntu* and… how this interrelation has influenced the meaning of *ubuntu*,"[45] to demonstrate that "any consolidation of the notion of *ubuntu* (or of the human) runs a continuous risk of becoming just another dominant discourse in need of questioning."[46] *Ubuntu* is a traditional South African concept which symbolizes, in very simple terms, that harm inflicted on one human being by another human being harms them both. This understanding of common humanity, which binds all people together, posits forgiveness as an act that is vital to both the victim and the perpetrator, and to the whole community, to enable the community to move beyond the traumatic experience. Since there is no word that would adequately render this traditional term in European languages, researchers often engage in theological, philosophical and linguistic analysis trying to grasp the nuances in its etymology and application (added to this is the difficulty that *ubuntu* was predominantly an oral cultural tradition and did not exist in any form of written expression). It is not uncommon to see various analyses of Archbishop Desmond Tutu's memoir "No Future Without Forgiveness,"[47] where he clarifies that,

> It is not "I think therefore I am." It says rather: "I am human because I belong." I participate, I share.[48]

This concept, though controversial and contested, has become the central theme in the Commission's work.

On amnesty, the South African TRC is remarkable for its mandate to examine amnesty applications and make decisions concerning them. In doing so, it introduced several criteria for granting amnesty. While asking for forgiveness was not one of them, it was important to demonstrate that the act/omission could be qualified as a gross human rights violation; the motive of the perpetrator had to have a political objective; and the applicant had to make a public disclosure of his or her acts.[49] All in all, the TRC received around 7,000 applications for amnesty; however, 5,000 were rejected. Around 1,700 were heard through public hearings (out of which 1,300 ended up in full or partial amnesty). Applications were rejected mostly because of the lack of a "political motive."[50]

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45 Hanneke Stuit, *Ubuntu Strategies: Constructing Spaces of Belonging in Contemporary South African Culture* 41 (London: Palgrave, 2016).

46 *Id.* at 43.

47 Archbishop Desmond Tutu was the Commission's Chairman.

48 Quoted in Stuit 2016, at 9.

49 Promotion of National Unity and Reconciliation Act, *supra* note 43, Chapter 2.

50 Truth and Reconciliation Commission of South Africa Report, Vol. 1, Chapter 10, Statistical Information (Apr. 20, 2019), available at http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf.

Another concern is the question of reparations. The TRC had a mandate, through its Reparation and Rehabilitation Committee, to accord a certain amount of money to those individuals who were recognized by the TRC as victims of gross human rights violations (around 18,000 people). Though it is recognized that reparations can be an indispensable component of transitional justice, some caution is necessary as to their potential healing effect. A study conducted in 2004 by South African scholar Oupa Makhalemele found that the effect of this program was controversial, at best.[51] First of all, the government did not consult local NGOs or survivors' groups when deciding on the sum of money to be paid (which made it impossible to tailor them to the specific needs of the survivors and to build a comprehensive reconstruction policy). Neither was the reparations policy a matter of public debate. She assumes that such an approach might have been the result of the state's priorities at the time of the establishment of the TRC, since amnesties, and not reparations, were on the top of the list. By conducting interviews with the survivors from a rural settlement (ten men and ten women) and with some government officials from the Housing, Health, Welfare and Education Departments, responsible for the provision of policies relating to the survivors, the researcher attempted to assess the survivors' experiences in the aftermath of the truth and reconciliation process.

An important finding was that despite the TRC's initial focus on reconciliation, it could not be achieved overnight, once the victims had told their stories. The effects of trauma (both physical and psychological) are long-lasting, and would not end just because a certain amount of money as compensation was received. Among the needs that survivors listed as important were

> acknowledgement of wrong done, revelation of the truth; exhumation of the bodies of victims, pension rights, medical and educational services, social security, housing, and restoration of reputation.[52]

However, even if the survivors were able to meet certain needs (for example, they were able to afford medical treatment), they feared that once the money ran out, they would be left alone with their troubles, without further assistance (in the field of employment and training, for instance, given that often the survivors had certain physical disabilities as a result of the harm they endured, and could not find just any job that ordinary citizens could). Thus, she concludes that the allocated money has "not made any meaningful impact on the survivors' quest to overcome the consequences of their victimisation."[53]

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[51] Oupa Makhalemele, *Still Not Talking: Government's Exclusive Reparations Policy and the Impact of the 30 000 Financial Reparations on Survivors*, Centre for the Study of Violence and Reconciliation (January 2004) (Apr. 20, 2019), available at http://www.csvr.org.za/docs/reconciliation/stillnottalking.pdf.

[52] *Id.* at 12.

[53] *Id.* at 17.

While reparations remain an important and essential component of transitional justice, this research shows that careful planning and involvement of victims in the reparations negotiations and planning at all stages is necessary to ensure the adjustment of programs to the specific needs of individuals and communities more generally. Reparations cannot be conducted in isolation, they must involve other measures to address the survivors' urgent needs such as medical counselling, health issues, education and training, housing, and so on.

As far as gender-sensitive strategies are concerned, it is recognized that due to the involvement of NGOs and academics in the processes, the public hearings were organized where women could come forward with their stories. In this regard,

> the South Africa case set an important precedent in the incorporation of a gender perspective in a TRC.[54]

What were the forms of women's involvement in the Truth Commission? One of the authoritative and frequently quoted studies in this regard is the one conducted by a South African scholar, Pumla Gobodo-Madikizela. Based on extensive field research that included interviews and archival work, this study investigated women's contributions to transitional justice whether as truth commission employees or through their testimonies as victims and witnesses.[55] Gobodo-Madikizela emphasizes how in the post-apartheid conditions it was vital to include both white women and women of color in the transitional processes (black African women's testimonies comprised around 60% of the women's statements, and women's statements more generally comprised more than half of all statements). Having women among the Commission's staff was also very important, because it ensured a more compassionate and female-friendly environment (instead of seeing women as a "crying team" of the Commission, as was the common term used by the media). Special hearings were organized for women to speak about their experiences during apartheid. Such special women-only hearings were held in various regions of the country. Women were also given the possibility to testify behind screens. Women who chose to testify were often regarded as "secondary victims," that is they lost their family members (fathers, husbands or sons) as the result of atrocities, but the activists emphasized that this wrongful representation of women was due to the cultural prejudices that downplayed women's experiences:

> People would come in and ravage their houses in the middle of the night and take away their husbands. It is a direct experience of victimization and suffering. It is presented as secondary because of the nature of our society

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54 Gender, Justice, and Truth Commissions, *supra* note 27, at ix.

55 Pumla Gobodo-Madikizela, *Women's Contributions to South Africa's Truth and Reconciliation Commission*, Women Waging Peace (February 2005) (Apr. 20, 2019), available at https://www.inclusivesecurity.org/wp-content/uploads/2012/08/11_women_s_contributions_to_south_africa_s_truth_and_reconcilliation_commission.pdf.

> and the way women have learned to keep themselves in the background- the kind of fear about focusing on themselves.[56]

Gobodo-Madikizela attributes the relative success of the TRC in the gender-related aspects to the active involvement of civil society, women's advocacy groups and other women's rights' organizations in the work of the Commission. One notable example is the submission prepared by the activists from the Gender Research Project of the Centre for Applied Legal Studies (CALS) and the Centre for the Study of Violence and Reconciliation. In their submission, they emphasized that

> a gendered approach requires looking at the way society locates women and men in relation to all areas of their lives. Thus, women's experience cannot be understood in isolation from men's, but only with reference to the intertwining of women's and men's roles and status in society generally – that is, with women subordinate to men.[57]

Regarding sexual crimes, it was found that it was very difficult for women to come forward with stories of sexual violence or even to admit that they were victims of it. It was even more difficult for men, since

> sexual torture of men aimed to induce sexual perversity and to abolish political power and potency, whereas behind the sexual torture of women lay the activation of sexuality to induce shame and guilt.[58]

The problem was that many women, who chose to submit a statement to the TRC, never appeared at the hearings. In their examination of sexual violence in the South African context, Beth Goldblatt and Sheila Meintjes mention that by April 1997,

> of the nearly 8,000 statements received on rights violations, only 300 deal with sexual assault and of these, only 80 relate to sexual assault on women. Only 17 of 80 deal with rape and these mostly occurred in Kwazulu-Natal… where the conflict followed the more typical contours of open warfare.[59]

Thus, despite rather active participation of women in transition in a variety of different roles that included, to quote Gobodo-Madikizela, "commissioners, activists,

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[56] Ingrid Owens et al., *Stories of Silence: Women, Truth and Reconciliation*, 30 Agenda 66, 69 (1996).

[57] Gender, Justice, and Truth Commissions, *supra* note 27, at 12.

[58] *Id.* at 13.

[59] Beth Goldblatt & Sheila Meintjes, *Dealing with the Aftermath: Sexual Violence and the Truth and Reconciliation Commission*, 36 Agenda 10 (1997).

bystanders, beneficiaries, victims, and survivors,"[60] it was not enough to ensure a safe environment for the survivors of sexual violence. Social stigma and long-standing patterns of abuse and discrimination prevented consideration of other forms of gender-based assaults as human rights violations, for instance, body searching of females by male guards or failure to provide women basic sanitary items. In addition, a problem that frequently occurred in other contexts[61] was prevalent in South Africa as well: sexual assault of women who belong to the same ethnic or political group.[62]

Assessing the impact of truth commissions is not an easy task. In 2004, James Gibson published a study titled "Overcoming Apartheid: Can Truth Reconcile a Divided Nation?,"[63] where he used questionnaires and conducted face-to-face interviews with ordinary people from South Africa, trying to evaluate their attitudes towards the TRC and its potential for reconciliation. Don Foster notes that Gibson's study in fact demonstrated that the situation was "not nearly as gloomy as is often portrayed," in that,

> Along with stark inequalities and the continued salience of racialized identities, there are also glimmerings in these data of commonalities and some degree of optimism.

Thus, "there is, in short, some fertile ground for the seeds of reconciliation."[64] An interesting finding in this research was that it demonstrated how other forms of justice (compensation, apologies, etc.) in a way compensated for the unfairness of amnesty (when amnesty was seen by the majority of the respondents as unfair).

> It suggests that compensation, giving voice to victims, apologies, and shaming may all be part of the mix. It suggests that the informal justice of the TRC may have some advantages over the formal justice of costly trials.[65]

Very little was said about gender peculiarities, however.

Quite often it is assumed that public revelations of the harm endured contributes to healing and reconciliation. Some researchers, however, warn against this widespread

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60 Gobodo-Madikizela, *supra* note 55, at 8.

61 Maureen Murdoch, *Prevalence of In-Service and Post-Service Sexual Assault Among Combat and Noncombat Veterans Applying for Department of Veterans Affairs Posttraumatic Stress Disorder Disability Benefits*, 169(5) Military Medicine 392 (2004).

62 Goldblatt & Meintjes 1997, at 12.

63 James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (New York and Cape Town: Russell Sage Foundation, 2004).

64 Don Foster, *Evaluating the Truth and Reconciliation Commission of South Africa*, 19(4) Social Justice Research 527, 531 (2006).

65 *Id.* at 538.

assumption, emphasizing that this might be a typically Western understanding of healing, which has its roots in the Western practice of psychotherapy. Transplanted to a different setting, this approach can in fact do more harm than good, since in some societies forgetting might be a more appropriate form of dealing with past traumas.[66] Coming to terms with the past does not necessarily involve providing testimony as a form of healing.[67] This is especially true in the case of sexual violence since women might be stigmatized by their community if they choose to acknowledge the wrongs they have lived through, and in the context of extreme poverty, economic inequalities and the lack of resources to improve their life conditions, women might be left without any means to survive. Truth commission very often are simply not equipped to deal with the enormous task of providing support in cases of re-traumatization.[68] In the context of South Africa, it was stressed that some women had already developed certain mechanisms of dealing with the trauma, and they did not see themselves as victims, but as survivors. In addition, they did not want to give up their privacy by publicly acknowledging sexual assaults, because they feared it might have negative repercussions for their careers.[69]

2.2. Brazilian National Truth Commission (NTC)

The Brazilian National Truth Commission was set up in 2011 to investigate crimes committed during military rule. The Brazilian NTC was in many ways unique in the Latin American context. First of all, it addressed crimes that had been committed almost three decades earlier; additionally, it had relatively fewer victims to deal with (434 officially recognized victims), compared to other countries like Argentina (between 8,000 and 30,000) or Chile (between 3,216 and 9,000).[70] Despite its rather limited impact, certain positive outcomes have been noted: namely, "improving historical accountability; promoting international human rights norms; and challenging the veto power that the military still holds."[71] It is not surprising that, similar to the South African Commission, which was widely discussed in the media and in the public domain more generally, the Brazilian truth-telling experience also received country-wide resonance. The Commission's establishment was applauded

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66 Rosalind Shaw, *Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone*, 1(2) International Journal of Transitional Justice 183 (2007).

67 *See also* Fiona Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa* (London: Pluto Press, 2003).

68 Shana Tabak, *False Dichotomies of Transitional Justice: Gender, Conflict and Combatants in Columbia*, 44 New York University Journal of International Law and Politics 103 (2011).

69 Goldblatt & Meintjes 1997, at 11.

70 Marcelo Torelly, *Assessing a Late Truth Commission: Challenges and Achievements of the Brazilian National Truth Commission*, 12(2) International Journal of Transitional Justice 194 (2018).

71 *Id.* at 194.

by Human Rights Watch and other prominent INGOs that continuously called on Brazil to bring the perpetrators to justice.[72]

The *rationae temporis* of the Commission extended to the period of military rule, 1964–1985 (although the Commission looked into a much wider time frame). The difficult question of amnesty was not less relevant in the Brazilian context than in the context of South Africa. Amnesty law was passed in 1979 that shielded the perpetrators from justice.[73] As Rebecca Atencio stresses, this period was characterized by Cold War rivalries (recalling that the Cuban revolution took place a few years before the start of this period) and the struggle against communism. This provided justification for the military hold on to power. This was also the period of economic boom in Brazil due to the large-scale projects sponsored by the state, which enjoyed popular support, and in a way, drew the public's attention away from grave human rights violations.[74] While the Commission's focus was on crimes committed by the state, it did not look into the activities of the armed left wing groups that opposed the dictatorship, which was seen as a disadvantage.[75]

It must be noted that prior to 2011 two other commissions had already been at work in Brazil: the Special Commission on Political Deaths and Disappearances (established by Law No. 9.410, the Law of the Disappeared, in 1995) during the presidency of Fernando Henrique Cardoso and the Amnesty Commission (2001). Civil society groups and human rights activists participated actively in investigating the fate of their loved ones and produced two famous reports: "Brazil: Never Again" (under the leadership of Archbishop Cardinal Paulo Evaristo Arns), which was later introduced in a digital form as an online platform with extensive information about

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[72] Brazil: Prosecute Dictatorship-Era Abuses – Landmark International Decision Provides Powerful Push for Accountability, Human Rights Watch, 14 April 2009 (Apr. 20, 2019), available at https://www.hrw.org/news/2009/04/14/brazil-prosecute-dictatorship-era-abuses.

[73] Certain provisions of the amnesty law were declared incompatible with the American Convention on Human Rights: "The provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, lack legal effect, and cannot continue as obstacles for the investigation of the facts of the present case, neither for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other serious violations of human rights enshrined in the American Convention which occurred in Brazil." *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 24 November 2010, at 113 (Apr. 20, 2019), available at http://corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf. Brazil, however, did not abide by the ruling. For more, *see* Brazil: Panel Details "Dirty War" Atrocities: Truth Commission Identifies Abusers, Calls for Prosecutions, Human Rights Watch, 10 December 2014 (Apr. 20, 2019), available at https://www.hrw.org/news/2014/12/10/brazil-panel-details-dirty-war-atrocities.

[74] Brazilian Truth Commission: Rebecca Atencio's Interview on BBC Live 5, Tulane University (Apr. 20, 2019), available at https://stonecenter.tulane.edu/articles/detail/1739/Brazilian-Truth-Commission-Rebecca-Atencios-Interview-on-BBC-Live-5.

[75] Dom Phillips, *Brazil Confronts Horrors of the Past with Torture Report's Release*, Time, 10 December 2014 (Apr. 20, 2019), available at http://time.com/3629031/brazil-torture-report-truth-commission.

more than 7,000 prisoners,[76] and "The Report of the Families of Dead and Disappeared Persons."[77] Reparations schemes, court-ordered or mandated by the state, also existed prior to the NTC. By the mid-2010s, the abovementioned Amnesty Commission had awarded financial compensation in over 12,000 cases.[78]

The NTC consisted of seven commissioners and fourteen other employees. They had the mandate to collect and examine the truth by receiving written statements and testimonies, interviewing relevant individuals, holding public hearings, establishing links with domestic and international organizations, to request information from various organs, and request witness protection. The Commission worked for two years and seven months. The Commission's final report that came out in 2014 identified hundreds of cases of torture, rape, killings and enforced disappearances.[79] Various forms of torture were documented by the Commission, such as electric shocks to the genitals, psychological abuse, etc. Allegations were made that the United States trained Brazilian military cadres in the use of various interrogation techniques that amounted to torture.[80] In widely publicized images, one could see the then Brazilian President Dilma Rousseff who broke into tears at a ceremony dedicated to the NTC's report.[81] Rousseff, who herself was a victim of torture when in her youth she participated in a Marxist movement, reportedly said during the ceremony that,

> We hope this report prevents ghosts from a painful and sorrowful past from seeking refuge in the shadows of silence and omission.[82]

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76 BRASIL: NUNCA MAIS (Apr. 20, 2019), available at http://bnmdigital.mpf.mp.br/en-us.

77 Comissão de Familiares de Mortos e Desaparecidos Políticos (Apr. 20, 2019), available at http://www.desaparecidospoliticos.org.br/quem_somos_comissao.php?m=2.

78 Comparative Country Studies Regarding Truth, Justice, and Reparations for Gross Human Rights Violations: Brazil, Chile, and Guatemala, IHRLC Working Paper Series No. 2 (April 2014), at 24 (Apr. 20, 2019), available at https://www.law.berkeley.edu/wp-content/uploads/2015/04/Working-Paper-2-India-Comparative-Country-Studies-151027.pdf.

79 Conheça e acesse o relatório final da CNV, Comissão Nacional da Verdade, 10 December 2014 (Apr. 20, 2019), available at http://cnv.memoriasreveladas.gov.br/index.php/outros-destaques/574-conheca-e-acesse-o-relatorio-final-da-cnv.

80 Hayes Brown, *The U.S. Spent Decades Teaching Torture Techniques to Brazil*, BuzzFeed News, 10 December 2014 (Apr. 20, 2019), available at https://www.buzzfeednews.com/article/hayesbrown/the-united-states-spent-decades-teaching-torture-techniques.

81 Relatório da Comissão Nacional da Verdade apresenta história de 434 presos e desaparecidos políticos, TV NBR, 10 December 2014 (Apr. 20, 2019), available at https://www.youtube.com/watch?v=a5dEzgvby8w.

82 Simon Romero, *Brazil Releases Report on Past Rights Abuses*, New York Times, 10 December 2014 (Apr. 20, 2019), available at https://www.nytimes.com/2014/12/11/world/americas/torture-report-on-brazilian-dictatorship-is-released.html.

The report's findings were contested by the representatives of the military, who declared they had done all they could to prevent communism from happening.[83] The Commission identified 377 persons responsible for human rights violations during military rule (about 100 of whom were still alive); however, due to the 1979 amnesty, the Commission had no mandate to initiate prosecutions. Moreover, in 2010 the Supreme Court of Brazil blocked a request to modify the amnesty law despite calls from various human rights organizations.[84]

Various working groups operated within the Commission. Alongside the Commission, local governments and civil society groups created around fifty local commissions by the end of 2012.[85] One of the working groups was titled "Dictatorship and Gender" and looked into cases of sexual abuse. As far as sexual crimes are concerned, various forms of these horrendous assaults were identified by the Commission. Volume I, Chapter 10 of their report ("Sexual Violence, Gender Violence and Violence Against Women and Children") identifies various forms of sexual violence, which include rapes and gang rapes, rape including insertion of foreign objects, mutilation of sexual organs, torture and beatings of pregnant women to induce abortion.[86] The victims included not only political activists but also nuns and LGBT people.[87] According to Brazilian researcher Maria Amélia de Almeida Teles a significant part of the truth was brought to light due to the desire of victims/survivors to speak publicly about their experiences. It was because of their willingness that such crimes as kidnapping, torture, murder, concealment of corpses, as well as gender-based violence, including torture, forced abortion, sterilization, and other forms of sexual atrocities, were uncovered.[88]

It is difficult, if not impossible, to assess the impact of the truth commission on gendered societal structures. Another Brazilian scholar, Mariana Joffily, for example, notes that sexual violence (against both men and women) was a widespread problem in Latin American dictatorships, and continues to be a problem until the present day. Misogynist and sexist attitudes combined with high levels of social and economic inequality create conditions that make it difficult to adequately address this problem in

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83 Romero, *supra* note 82.

84 Adam Taylor, *Brazil's Torture Report Brings a President to Tears*, Washington Post, 10 December 2014 (Apr. 20, 2019), available at https://www.washingtonpost.com/news/worldviews/wp/2014/12/10/brazils-torture-report-brings-a-president-to-tears/?noredirect=on&utm_term=.59bc55839d00.

85 Torelly 2018, at 200.

86 Capítulo 10: Violência sexual, violência de gênero e violência contra crianças e adolescents (Apr. 20, 2019), available at http://cnv.memoriasreveladas.gov.br/images/documentos/Capitulo10/Capitulo%2010.pdf.

87 For a detailed account of human rights assaults committed against women, *see* Maria Amélia de Almeida Teles, *Violações dos direitos humanos das mulheres na ditadura*, 23(3) Revista Estudos Feministas 1001 (2015).

88 *Id.*

the political or judicial realm. However, she rather optimistically points to the fact that truth commissions established in the region have in one way or another addressed sexual violence and made this a matter a public debate. She remarks that,

> of the 24 state commissions/committees on truth – a Brazilian phenomenon – of the five… [that] delivered a final report, four incorporated a discussion on gender in some form.[89]

Certain legislative changes regarding sexual violence were introduced. The feminist movement was very important in the struggle for women's rights, including legislative reforms,

> These conquests represent one of the principal areas of concern of the feminist movement, "that which is private and that which is public," realigning gender violence as a social problem.[90]

Various women's organizations operated in Brazil in the 1970s to 1980s, uniting their efforts in the struggle for equal rights for equal work, access to contraceptives, abortion rights as well as elimination of sexual violence at home and in the street.[91] Fernanda Araújo Pereira et Luísa Santos Paulo, however, notes that the impact of women's rights organizations on the overall human rights struggle was rather limited in Brazil (when compared to Argentina) since, while they were united in the streets, they had few chances to alter institutional practices (mainly due to the highly organized nature of the Brazilian military regime). This, in turn, made it much more difficult to challenge "the misogynistic legacy of the regime."[92]

Marcelo Torelly believes the Commission's work can in general be regarded as positive: it was able to systematize information (even if it was already known to the public), it named names (unlike previous commissions), it looked into several important high-profile cases (such as the deaths of the former presidents Juscelino Kubitschek and João Goulart),[93] it classified certain atrocities as crimes against

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89 Mariana Joffily, *Sexual Violence in the Military Dictatorships of Latin America: Who Wants to Know?*, 13(24) Sur – International Journal on Human Rights 165, 176 (2016).

90 *Id.* at 170.

91 Memórias da ditadura (Apr. 20, 2019), available at http://memoriasdaditadura.org.br.

92 Fernanda Araújo Pereira & Luísa Santos Paulo, *As violências sexuais e de gênero e a justiça de transição no Brasil e na Argentina: uma análise comparativa dos movimentos de mulheres em cada país*, 222 L'Ordinaire des Amériques (2017) (Apr. 20, 2019), available at http://journals.openedition.org/orda/3478.

93 Jan Rocha & Jonathan Watts, *Brazil's Former President Kubitschek Was Murdered, Says Commission*, The Guardian, 10 December 2013 (Apr. 20, 2019), available at https://www.theguardian.com/world/2013/dec/10/brazil-truth-commission-kubitschek-president-murdered.

humanity and, most importantly, it posed a challenge to the military veto power.[94] Torelly warns, however, that implementation of the Commission's recommendations (even though many of them are rather general in nature and are not linked to the military rule per se) might be another challenge that the Brazilian society might have to cope with: after Dilma Rousseff's impeachment in 2015, the implementation slowed down, and the creation of a special independent monitoring body was cancelled. In the conditions where serious disillusionment with democracy has been recorded by Latinobarómetro (a non-governmental organization from Santiago, Chile), in Latin American countries, including Brazil,[95] accompanied by the election of Jair Bolsonaro, a right-wing politician, in January 2019, infamous for his appraisal of the military regime and discriminatory attitude towards race, gender or sexual orientation,[96] it remains to be seen whether any consistent effort would be made to deal with the traumatic past and address the needs of the survivors.

Conclusion

Transitional justice, a rapidly developing field, evokes a lot of interest among academics and practitioners. While the field itself is broad and frequently contested as to what measures and mechanisms can be regarded as part of it, truth commissions undoubtedly fall within the scope of transitional justice initiatives. The challenges of truth commissions involve many aspects including dealing with past amnesties, the question of reparations, the link between truth-telling and reconciliation, the capacity of truth commissions to make a contribution to democracy and respect for human rights, the potential preventive effect of public acknowledgement of crimes and its capacity to ensure long-lasting peace. And while earlier research that tackled all these issues contained a lot of wishful thinking, more careful analysis emerged over the past decade that warns against excessive optimism.

One of the areas of transitional justice that remains problematic and is very often context-specific is the gender dimension which includes not only sexual crimes but also a multitude of roles both women and men play in post-conflict and/or post-authoritarian settings.

South African and Brazilian truth commissions, even though they addressed a number of different crimes and were evaluated as rather successful undertakings,

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94 Torelly 2018, at 215.

95 The number of people disillusioned with democracy was recorded to be as high as 71% (in 2009 the number was 51%) in Latin American countries. In Brazil, the level of satisfaction with democracy was recorded as the lowest. *See* Latin Americans Are Dejected About Democracy, The Economist, 8 November 2018 (Apr. 20, 2019), available at https://www.economist.com/the-americas/2018/11/08/latin-americans-are-dejected-about-democracy.

96 David Child, *Who Is Jair Bolsonaro, Brazil's New Far-Right President?*, Al Jazeera, 1 January 2019 (Apr. 20, 2019), available at https://www.aljazeera.com/news/2018/10/jair-bolsonaro-brazil-presidential-candidate-181007020716337.html.

faced a number of problems in the field of addressing sexual crimes and gender-related issues more generally. First of all, in the context of patriarchy, when deep societal structures have favored discrimination against women, introducing a gender dimension was not without struggle on the part of various civil society groups that did not want to continue living in the atmosphere of silence and impunity. Secondly, both commissions faced a difficult choice (and in that, they were not different from international criminal tribunals) between protecting the victims who often felt insecure, threatened and marginalized by their community, and at the same time, ensuring the rights of the perpetrators who had to be presumed innocent until proven guilty, and, lastly, trying to achieve the goal they had been established for: the long-term societal interests that would involve peace and reconciliation. As the two cases in our analysis show, the link between transitional justice and rule of law (as well as democratization) is not an obvious one (and whether it is desirable is another difficult question).

Drawing broader conclusions, we would like to remark that while the international community tries to address the challenges, drawing on previous mistakes and lessons learned, there are a number of areas that remain barely touched upon. One of such areas is the criminality of non-state actors. Much of our understanding of transitional justice is based on a classical notion of conflicts (whether international or non-international) that progress from a certain beginning to an end (albeit vaguely defined), with transitional justice measures introduced in the aftermath of the atrocities. However, they may be inadequate to address horrendous acts against girls and women committed by Boko Haram in Nigeria[97] or the Islamic State across Middle Eastern countries.[98] And even if international humanitarian law is poorly equipped to deal with non-international armed conflicts, it is hardly suitable to address such issues at all. The increasing involvement of mercenaries and private military companies in combat alters the nature of the conflict and makes existing international law instruments outdated and inadequate.

A serious problem in the context of gender justice in truth commissions remains in assessing the role of transitional justice in shaping and (re)structuring of gender relations in the post-conflict environments, since, frequently, gender imbalance and violence result not from the conflict per se, but from deeper power relations within the society, and from distorted notions of masculinity and femininity. One of the ways to assess gender relations has been the Gender Empowerment Measure (GEM), used by the United Nations Development Programme (UNDP), to plan context-specific policies. The South African Reconciliation Barometer (www.ijr.org.za) set up by the Institute for Justice and Reconciliation (Cape Town) attempted to monitor opinion polls in the country. Obviously, such measurements might be inaccurate, a problem which can

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[97] Sherrie Russel-Brown, *Boko Haram's Violence Against Women and Girls Demands Justice*, Council on Foreign Relations, 11 May 2018 (Apr. 20, 2019), available at https://www.cfr.org/blog/boko-harams-violence-against-women-and-girls-demands-justice.

[98] *See*, for instance, a highly moving memoir by Nadia Murad, *The Last Girl: My Story of Captivity, and My Fight Against the Islamic State* (2017).

be addressed by cross-country comparative studies. Up to the present time, as Elin Skaar remarks in her excellent analysis of transitional justice and its contribution to human rights, there have been very few rigorous studies of truth commissions and their impact in general, and their findings have been disparate, at best.[99]

It is certainly impossible to address all of the difficult questions before the commission is set up, and there are no recipes as to how to avoid thorny issues. Certain pragmatic conclusions can be drawn, however: for instance, tailoring the reparations to the needs of the survivors and the communities, combining reparations with other forms of support, provision of certain services (educational, medical, etc.) in a long-term and consistent manner. Transition might only be a short and fleeting moment – therefore, it is vital to incorporate a gender dimension not only in formal, legal mechanisms, but also in other forms of transitional justice, drawing on the research and findings from various disciplines, including criminology, anthropology, psychology, peace and conflict studies, and others.

Representing the work of truth commissions in art, literature, and popular culture as well as memorialization of the traumatic experience also remains an issue of paramount importance. As Aleida Assmann remarks, triumph and trauma remain two categories that necessitate collective re-thinking and re-interpretation of history. Traditional strategies of "dealing with the past" (whether psychotherapeutical, political or cultural) are simply not enough, however, to confront mass atrocities.[100] Incorporating a gender dimension into these cultural expressions is a vital component of reconciliation.

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[99] Skaar 2018, at 13.

[100] Aleida Assmann, *Der lange Schatten der Vergangenheit: Erinnerungskultur und Geschichtspolitik* (Munich: C.H. Beck, 2006).

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COMMENTS

SUMMARY PROSEDURES AND OPTIMIZATION OF COMMERCIAL COURT PROCEEDINGS IN RUSSIA

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This article deals with the problems involved in implementing simplified forms of legal proceedings in the Russian civil process, which is one of the important directions for optimizing commercial court proceedings. The study is largely based on the analysis of previously unpublished statistical information on the commercial courts of three districts for the period of 2016–2018, showing the results of their procedural activities in the framework of the procedures of simplified and writ proceedings in the context of court data of the commercial court system as a whole. The obtained results are highlighted taking into account domestic, foreign and international experience, doctrinal approaches and the existing need for the optimization of commercial court proceedings. The authors substantiate the conclusion that the consideration of cases in the procedures of simplified production facilitates significantly reducing the caseload burden on the commercial courts of first instance, both by simplifying the procedures for the consideration of these cases and by drawing up judicial acts on them. The article formulates proposals for the development of the current commercial procedural law, in particular the proposal to unify the procedural order of commercial court cases on the recovery of compulsory payments and sanctions. It further proposes possible variants of such unification.

Keywords: forensic statistics; caseload; summary proceedings; writ proceedings; court proceedings in commercial litigation; court proceedings refinement.

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At the present stage, one of the key problems with the Russian judicial system, including the system of commercial courts, is the need for optimization, which will demand overcoming the excessive caseload burden on judges and court staff.

A heavy caseload negatively affects the quality of justice, significantly increases the likelihood of judicial errors, especially in complex and non-standard cases, leads to staff turnover of the judiciary, especially court staff, and ultimately undermines the prestige of the judicial profession and citizens' confidence in justice.

In this regard, it should be noted that the Committee of Ministers of the Council of Europe in Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts, adopted on 16 September 1986, outlined measures to prevent and reduce excessive caseload as one of the key objectives of the judicial policy of Member States.[1]

Currently, the commercial courts are dealing with a huge number of cases. Moreover, in recent years there has been a significant increase. So, whereas in 2013 the commercial courts of the first, appeal and cassation instances dealt with 1,737,213 cases, in 2017 they dealt with 2,164,078 cases. Thus, the increase was about 20% in just four years.[2]

Although the overwhelming majority of cases are considered by the courts in compliance with applicable legal procedures, and in established and fairly short time periods, court work is often judged in the society and by the mass media through consideration of the results of complex, high-profile cases, where the probability of error is much greater than in relatively simple, standard cases. Hence, a negative opinion as to the quality of the work of the Russian judicial system is sometimes heard both in Russia and abroad.

The work of the commercial court judges in modern conditions is in many ways reminiscent of the work on a conveyor, where it is necessary to perform a huge number of very different tasks in a short time: simple and complex, standard and unique. With such tension, of course there are breakdowns, and mistakes, primarily in complex, not standard, cases, especially if the judge is faced with gaps in the legal regulations of economic relations.

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[1] Совет Европы и Россия: Сборник документов [*Council of Europe and Russia: Collection of Documents*] 684–686 (Moscow: Yuridicheskaya literatura, 2004).

[2] *See* Сводные статистические сведения о деятельности федеральных арбитражных судов за 2017 г. [Summary statistics on the activities of federal commercial courts in 2017] (Apr. 28, 2019), available at http://www.cdep.ru/index.php?id=79&item=4430; Сводные статистические сведения о деятельности федеральных арбитражных судов за 2013 г. [Summary statistics on the activities of federal commercial courts for 2013] (Apr. 28, 2019), available at http://www.cdep.ru/index.php?id=79&item=2884.

An illustration of this, in particular, is a well-known case of insolvency in which a judge of a commercial court considered the issue of including a cryptocurrency (Bitcoin) in the bankruptcy. There arose before the court a rather complicated question about the civil legal nature of cryptocurrency. Unfortunately, the judge, in the face of a large, and in many respects, stressful caseload, essentially avoided addressing this issue, indicating in the court order that cryptocurrency cannot be considered property since its current legal status was not defined by the legislation of the Russian Federation. This court order was later found to be erroneous and reversed at the appellate instance.

The overall reduction in the caseload burden on judges will allow more time to be spent analyzing complex and non-standard disputes and, accordingly, there will be fewer judicial errors in such cases.

Recently, many practical steps have been taken to optimize commercial court proceedings and reduce the burden on the system of commercial courts. This is, first of all, the expansion of the application of simplified proceedings, the expansion of the use of pre-trial procedure and claim procedure, inter alia, the settlement of disputes, the development of conciliation procedures, etc. The measures undoubtedly had a positive effect and made it possible to stop a substantial increase in the workload of the system of commercial courts to a certain extent. However, they failed to change the overall situation.

Thus, it is necessary to take additional measures based on impartial and scientific criteria determining the optimization of commercial court proceedings.

These measures should be based on an adequate understanding of the specifics of the subject matter of jurisdictional activity, the main element of which, in the aspect of judicial activity on the consideration and resolution of economic cases, is the resolution of various kinds of legal conflicts (legal disputes). At the same time, it should be borne in mind that the procedural form of resolving legal conflicts cannot be established at will, but must be objectively determined by the nature of the legal conflicts to be resolved.

As is known, the procedural form is aimed at ensuring a certain level of procedural guarantee of the rights of the participants in a particular process. To resolve a certain type of legal conflict a certain level of procedural safeguards is objectively required and, accordingly, the procedural form ensuring this level must be applied.

Obviously, the higher the required level of procedural safeguards is the more difficult the procedural form will be. At the same time, it is erroneous to either underestimate or overestimate the level of procedural safeguards for resolving a certain type of legal conflict. In the first case, this leads to an unjustified simplification of the procedural form and thus to a possible violation of the rights of the participants in the process. In the second case, it may cause unreasonable complication of the procedural form and excessive costs of financial, human, temporary resources and, accordingly, an unreasonable increase in the workload on the courts. In other words, the procedural form must be optimal for resolving this type of conflict.

It is clear that legal conflicts, legal disputes that require a judicial form of their resolution are quite heterogeneous. They differ in the nature of the disputed legal relations, the subject of the dispute, the legal and actual complexity of the case, etc. This, of course, affects the level of procedural safeguards, which should be provided by the procedure of consideration, which, in turn, explains the objective need for differentiation of the procedural form of their resolution. At the same time, it is important to find optimal procedural forms for the respective categories of commercial cases.

At the present time, the commercial courts consider a large number of the most varied both simple and complex cases in common and the most time-consuming, expensive and complicated procedure in the oral proceedings.[3] In other words, the most complicated procedure has become universal for most legal disputes, which is obviously not correct. For a significant number of disputes it is redundant in recruiting procedural guarantees and only leads to unreasonable pressure on the judicial system.

This circumstance, incidentally, does not take into account the criticism to the introduction of simplified judicial procedures, which argues that because the proposed measures to simplify the procedural form do not correspond to the nature of justice they lead to a violation of the rights of citizens and organizations. They, in fact, deny the impartial character of the procedural form and fetishize the existing general procedure for litigation. In this regard, it is important to emphasize once again that the procedural form should be optimal for this category of litigation.

Naturally, the cases that are complex in terms of factual and legal aspects, possessing, so to say, high disputability, require a more complex procedural form. Notably, we are talking about the objective complexity and disputability of the case, and not the external conflict, which can be created by the disputing parties.

Sometimes the defendant cites numerous but completely contrived and unreasonable objections, with the only aim of delaying the execution of his objectively indisputable material and legal duties. Thus, the defendant uses justice for purposes not related to the protection of rights and legitimate interests. The lack of professional competence of the parties' representatives, who declare de jure and de facto unreasonable demands and objections, can also create a conflict. Under these circumstances, it might be wrong to provide the parties with the opportunity to use the expensive and complex procedural form, and the court should be allowed to apply a simpler and faster procedure for handling such objectively indisputable cases.

On the other hand, in the adversarial process the passive behavior of the parties to substantiate the factual and legal basis of their position in the case, failure to fulfill the obligation to prove the actual circumstances of the case, failure to submit a response to the claim, etc., can serve to provide the court the basis to make a decision in a simplified manner.

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[3] Dmitry Maleshin, *Overview of Russian Civil Justice*, 3(4) BRICS Law Journal 41 (2016).

Thus, the modern social and cultural reality requires the Russian legislator to find the optimal models of legal proceedings that will most accurately correspond to the task of ensuring the protection of the rights and legitimate interests of persons applying for remedy.[4]

As noted, one of the areas of Russian civil proceedings to be optimized is the introduction of the forms of civil legal proceedings that are collectively referred to as simplified. Certain achievements have already been realized, while difficulties still exist.

The introduction of simplified models of legal proceedings initially affected the Russian civil process rather than the commercial process although it was the latter that was traditionally considered as especially in need of prompt action. The first attempt to simplify the traditional legal proceedings was made in civil proceedings more than thirty years ago in 1985, when a procedure for judges at their own discretion were permitted to decide on the recovery of alimony for minor children was introduced. Of course, one can hardly dispute the primacy of the civil process in this regard, bearing in mind the introduction of writ proceedings in 1995, which is now represented by a rather detailed regulation enshrined in a dozen articles of the "Court Order" under chapter 11.

Probably, this paradox is explained by the fact that, on the one hand, it was the civil process that turned out to be a procedural form serving the most overloaded segment of Russian judicial procedure. On the other hand, the fact that since the commercial process in the early 1990s turned into a legal process itself, the desire of the supporters of its preservation was seen to endow this kind of process with such full procedural form as would equalize it with a related civil process, eliminating disappointment in some procedural inferiority. The latter, in turn, was obviously linked to the risk relating to its further independent development. This is clearly seen from a comparison of the Commercial Procedure Code of the Russian Federation of 1992, 1995 and 2001. Moreover, at first, the array of cases considered by the commercial courts, judging by the caseload burden on one judge, especially in the 1990s, was significantly less than in the courts of general jurisdiction. Only at the end of this period did the situation begin to change in the commercial process. This is reflected in the fact that a summary procedure was introduced in the Commercial Procedure Code of the Russian Federation in 2002. Notably, it took a form which was not known to either the civil or the commercial process in Russia and, perhaps, did not look like a really necessary modernization at first.

However, the subsequent experience of legal regulation showed that the way to adequately simplify the forms of legal proceedings in the commercial process was not a spontaneous step by the legislator, but the result of a correct prediction of the developmental trends of the commercial court system. In particular, the judicial

[4] Dmitry Maleshin, *The Russian Style of Civil Procedure*, 21(2) Emory International Law Review 556 (2007).

caseload increased significantly and became perceived as excessive at the beginning of the 21st century. This, as a result, in the subsequent period entailed not only the expansion of the scope of application of the simplified proceedings in the commercial process, but also the introduction of writ proceedings as a new form in 2016.[5]

Since then, the modern Russian judicial system, including the commercial court segment, has become one of those national judicial systems that exist in the market economy countries that have introduced various simplified procedure options. However, in all fairness it should be noted that certain types of simplified procedures, in the forms of trial in absentia and summary procedure, have been innate to Russia, at least since the end of the 19th – beginning of the 20th centuries.[6] In a report by the Ministry of Justice, for 1866 2,834 civil cases were resolved, of which 1,450 were considered under simplified procedure; and for 1867 5,547 cases out of 12,579 civil cases were considered in a fast-track order.[7]

Moreover, on 3 July 1891, the Law "On the Simplified Procedure of Judicial Proceedings" was introduced; it was canceled in 1912.

At the same time, it should be noted that in the doctrine, the attitude towards simplified production was quite critical. This is evident from the work of the pre-revolutionary Russian proceduralists, who noted that the simplified, including the fast-track, procedure of consideration of cases does not guarantee their proper resolution.[8]

In the Soviet period, accelerated and simplified proceedings were practically never used in the judicial process. The writ proceedings (Arts. 210–219) appeared in the Code of Civil Procedure of the RSFSR in 1923 but did not gain traction. In fact, this judicial institution was rather quickly transformed into a notarial act.

Similar mechanisms exist in the USA in the special courts for small claims suits. France, Germany, Spain and others use procedures setting out substantial

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5 Федеральный закон от 2 марта 2016 г. № 47-ФЗ «О внесении изменений в Арбитражный процессуальный кодекс Российской Федерации» // Собрание законодательства РФ. 2016. № 10. Ст. 1321 [Federal Law No. 47-FZ of 2 March 2016. On Amendments to the Commercial Procedure Code of the Russian Federation, Legislation Bulletin of the Russian Federation, 2016, No. 10, Art. 1321].

6 Устав гражданского судопроизводства 1864 г. (ст. 145) // Судебные уставы 20 ноября 1864 года, с изложением рассуждений, на коих они основаны. Ч. 1 [*The Statute of Civil Proceedings of 1864 (Art. 145)* in *Judicial Statutes of 20 November 1864, Outlining the Reasoning on Which They Are Based. Part 1*] (St. Petersburg: In the printing office of the Second Division of His Own Imperial Majesty's Office, 1866).

7 *Кутафин О.Е., Лебедев В.М., Семигин Г.Ю.* Судебная власть в России: история, документы. Т. 3 [Oleg E. Kutafin et al., *Judicial Power in Russia: History, Documents. Vol. 3*] 566 (Moscow: Mysl, 2003).

8 For more on this, *see Нефедьев Е.А.* Учебник русского гражданского судопроизводства [Evgeny A. Nefediev, *Textbook of Russian Civil Proceedings*] (Moscow: Printing house of Moscow Imperial University, 1908); *Энгельман И.Е.* Курс русского гражданского судопроизводства [Ivan E. Engelman, *The Course of Russian Civil Proceedings*] (Yuryev: Printing office of K. Mattisen, 1912); *Исаченко В.П.* Русское гражданское судопроизводство: Практическое пособие для студентов и начинающих юристов. Т. 1 [Vasily P. Isachenko, *Russian Civil Proceedings: A Practical Guide for Students and Novice Lawyers. Vol. 1*] (St. Petersburg: Printing office of M. Merkushev, 1910), and others.

simplification of the procedural form (standard application forms). Such simplification makes the trial clearer for the people, increases the role of written documents, decreases the judicial stamp duty, etc. Foreign legal doctrine supports the development of the simplified proceedings taking into account that this facilitates reducing the caseload burden on the courts and decreases the costs not just to the parties but to the state as well.[9] All of these advantages of the simplified proceedings made such proceedings very popular, as American researchers have noted in respect of the courts for small claims suits in the USA.[10]

As a rule, the problems associated with simplified proceedings are analyzed on the basis of trends in the practice of considering relevant cases in the light of the existing legal regulation. At the same time, a sociological approach is also important, for it makes it possible to evaluate judicial-legal realities somewhat differently from using traditional methods (formal legal, comparative jurisprudence, etc.).

The present work, based on the application of the method of forensic statistical analysis, as a type of sociological approach, is seen as a partial filling of this gap in relation to the simplified and writ proceedings in the commercial court process.

It is advisable to comprehend the judicial statistical aspect of the commercial court process, starting with the appearance of simplified proceedings. However, this requires more extensive research. In this case, the published and unpublished statistical data on the simplified and writ proceedings for the years 2016–2018 provided by the relevant commercial courts are analyzed.[11]

It should be noted that the analysis of officially published statistical information on the commercial court system shows only the number of cases that were considered in simplified and writ procedures in the courts of first instance. There is no collected or published information about the number of decisions that were later appealed to higher authorities nor about what the results of the appeal were.

At the same time, the data obtained by these commercial courts are quite informative, not only by virtue of their figures, which is important in itself, but also by the diversity of territories, in relation to disputes over which they exercise law

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[9] Dame Hazel Genn et al., *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure*, Ministry of Justice Research Series 1/07 (May 2007), at 108 (Apr. 28, 2019), available at http://bristol-mediation.org/wp-content/uploads/2011/03/Twisting-arms-mediation-report-Genn-et-al.pdf.

[10] Arthur Bestf et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21(2) Fordham Urban Law Journal 343, 347 (1994); John A. Goerdt, *Small Claims and Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes in 12 Urban Jurisdictions* 4 (Williamsburg: National Center for State Courts, 1992).

[11] Статистические данные предоставлены Арбитражным судом Уральского округа, Арбитражным судом Западно-Сибирского округа и Двадцатым арбитражным апелляционным судом Центрального округа [Statistical data are provided by the Commercial Court of the Ural District, the Commercial Court of the West Siberian District and the Twentieth Commercial Court of Appeal of the Central District].

enforcement practice. They can be important in understanding the state of affairs in the courts and in the commercial court system as a whole for the relevant period. Therefore, they deserve the attention of the professional community. Moreover, the data contain the results of the verification of acts adopted in the framework of simplified and writ proceedings in higher instances for the relevant period.

Understanding all of these forensic statistics is especially important in the context of the emerging trend to streamline the court proceedings, which also applies to the commercial process.

In 2016, the Ural District commercial courts considered 73,255 cases applying summary proceedings, which is 34.4% of the total number of cases examined by the district courts in the first instance; 79,792 cases (32.1% of the total number of cases examined) were considered in summary procedure in 2017.

The largest percentage of the total number of such cases in 2016 in the Udmurt Republic Commercial Court was 54.3%, while the smallest percentage was in the commercial court of the Kurgan region (25.9%); in 2017, the highest percentage was also in the Udmurt Republic Commercial Court – 45.4%, the smallest in the commercial court of the Kurgan region – 14.8%.

The West Siberian District considered 49,953 cases in summary procedure in 2016, and in 2017 49,677 cases, which is, respectively, 38.4% and 31.2% of the total number of cases considered by the courts of the district.

According to the data of the Kemerovo Region Commercial Court, the highest percentage of the total number of such cases was seen in 2016 – 52.48%. The smallest percentage was in the commercial court of the Republic of Altai – 23.1%. In 2017, the largest percentage of the total number of these cases in the Commercial Court of the Yamalo-Nenets Autonomous District was 52.16%, and the smallest (22.46%) was registered in the Altai Republic Commercial Court.

The Twentieth Commercial Court of Appeal considered 11,275 cases over a period of nine months in 2018 in summary procedure, which represents 20% of the total number of cases considered in the appeals district. At the same time, according to the commercial court of the Bryansk region, summary procedure cases reached 40.56%, while in the commercial court of the Ryazan region only 16.8% of the total number of cases were registered.

For comparison: the number of cases in summary procedure in the whole of the Russian Federation commercial court system amounted to 35.7% in 2016 and 42.2% in 2017 of the total number of cases examined by commercial courts.

Another indicator worth evaluating is the number of cases in which the procedure started in a simplified manner, and then the transition to adversary proceedings (part 5, Art. 277 Code of Civil Procedure (CPC) of the Russian Federation (RF)) was made. In 2016, the commercial courts of the West Siberian District carried out the transition in 16,773 cases, and in 16,787 cases in 2017, which is, respectively, 33.5% and 33.7% of

the total number of cases which started in a simplified manner. It should be noted that this is a higher figure than in the judicial and commercial system as a whole. A similar transition occurred in 20.2% of cases in 2016 and in 27.4% of cases in 2017.[12]

As is known, the decision of the commercial court in a case that is considered in summary procedure is taken immediately after the hearing of the case by the judge signing the operative part of the decision (part 1, Art. 229 CPC RF). A reasoned decision is made by the commercial court at the request of one of the interested parties involved in the case (part 2, Art. 229 CPC RF).

From the aspect of making motivated decisions in simplified proceedings, the situation with the commercial courts of the Ural District is as follows. In 2016, they were applied in 14.7% of cases (the most, in the Udmurt Republic Commercial Court – 47.5% of cases; the least, in the commercial court of the Sverdlovsk region – 3.8%), and in 2017 in 14.1% of cases (the most – 32.3% made in the commercial court of the Perm region; and the least, in the Republic of Bashkortostan Commercial Court – 6%).

The commercial courts of the appellate district of the Twentieth Commercial Court of Appeals made 531 motivated decisions in a period of nine months in 2018, which is only 4.7% of the total number of cases considered in summary procedure; in the commercial court of the Bryansk region this was 1.88%, and in the commercial court of the Ryazan region this was 7%.[13]

The percentage of appeals checked in the appeals instance cases in 2016 in this category of cases on commercial courts of the West Siberian District averaged 3.3% of the number of cases considered in summary procedure in the first instance, and in 2017 5.8%. At the same time, the rate of appeal of judicial acts on appeal in all categories of commercial cases in the West Siberian District was significantly higher: in 2016 19.20%, in 2017 16.33% of the total number of cases considered by the courts of first instance.

The percentage of appealed cases considered in a simplified manner by the commercial courts in the appellate district of the Twentieth Commercial Appeal Court for nine months in 2018 was 3.92%. The average percentage of appeals in all categories of commercial cases in the appeals district in the same period was 20.84%.

One hundred seventy-nine judicial acts were annulled or amended on appeal in the case of summary proceedings in the West Siberian District in 2016, which

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[12] Обзор судебной статистики о деятельности федеральных арбитражных судов в 2016 г. [Overview of judicial statistics on the activities of federal commercial courts in 2016] 8 (Apr. 28, 2019), available at http://www.cdep.ru/index.php?id=80&item=4131; Обзор судебной статистики о деятельности федеральных арбитражных судов в 2017 г. [Overview of judicial statistics on the activities of federal commercial courts in 2017] 9 (Apr. 28, 2019), available at http://www.cdep.ru/index.php?id=80&item=4761.

[13] Official published statistics on the motivated decisions in summary proceedings on the commercial court system as a whole are not currently available.

amounts to 0.35% of the number considered at the first instance. Two hundred forty-five judicial acts were examined in summary procedure in 2017, which is 0.49% of the number of acts adopted at the first instance and annulled on appeal in this district. For the commercial courts of the appellate district of the Twentieth Commercial Court of Appeal for the first nine months of 2018, 34 decisions of the court of first instance on cases of simplified proceedings were cancelled, which is 0.30% of all judicial acts adopted in the simplified procedure at first instance.

At the same time, it should be noted that the average percentage of decisions reversed or appealed on the whole in all categories of commercial cases was significantly higher. Thus, the courts of the West Siberian District abolished 4.84%, and in 2017 – 1.94% of all judicial acts adopted at the first instance in 2016. In general, according to the commercial court system data, the percentage of reversals in 2016, 2017 and the first half of 2018 was, respectively, 2.75%, 2.53% and 2.34% of all judicial acts considered at first instance.

In 2016, 120 cases in summary procedure, which is 0.24% of the number of cases considered in this procedure at the first instance, were appealed and checked in the commercial court of the West Siberian District in cassation. One hundred nineteen were checked in the cassation procedure in 2017, which is 0.23% of the number of cases examined in this order at the first instance.

At the same time, the rate of appeal in cassation in all categories of commercial cases in the West Siberian District was significantly higher: in 2016 – 5.98%, in 2017 – 4.87% of the total number of cases considered by the courts of first instance. According to the commercial court system data as a whole, in 2016 and 2017 the percentage of cassation appeals was also significantly higher and amounted to, respectively, 6% and 5.38% of the total number of cases considered by the courts at first instance.

In 2016 and 2017, in the West Siberian District, six judicial acts adopted in cassation order were adopted by way of summary proceedings, which was 0.012% of the number considered at the first instance.

The percentage of reversals or changes in the cassation instance of judicial acts adopted in summary procedure for the same period in the Ural District was 0.013% of the total number of cases considered in the first instance.

It should also be noted that the average percentage of canceled or altered cassation decisions in general in all categories of commercial cases was significantly higher than in simplified cases. Thus, in 2016, the courts of the West Siberian District abolished 1.19%, and in 2017 1.14% of all judicial acts adopted at first instance. In general, the percentage of reversals in the commercial court system in 2017 was 1.29% of all judicial acts adopted at first instance.

The above data on cases of simplified proceedings, considered in 2016–2018 by the commercial courts of the Ural District, the West Siberian District and the Twentieth Appeal District, show that these cases occupy a significant place in the

total number of economic disputes considered by the commercial courts (20% – 38, 4%), which is somewhat less than that in the judicial commercial system as a whole (35.7% – 42.2%). In the courts of first instance there is a significant variation in this indicator – from 14.8% to 54.3% of the total number of economic disputes considered by these courts, which indicates the need for additional analysis of the reasons for such discrepancies.

Attention is drawn to the relatively large number of cases (about 30%) examined in a summary manner, and then the transition was made to the consideration of the dispute per standard procedure. On the one hand, this may indicate the absence in a number of cases of sufficient grounds for the application of the simplified procedure. On the other hand, it may indicate that the current procedural legislation provides the interested parties with ample opportunities to take advantage of a general court judicial procedure, giving more substantial procedural guarantees to protect their rights and legitimate interests than simplified proceedings. Thus, such persons actively use the opportunity.

The statistical data relating to the revision of judicial acts in cases of summary proceedings in the appellate and cassation instances are quite interesting.

It should be noted that judicial acts in cases considered in the summary procedure are much less likely to be appealed and canceled or changed by higher courts in comparison with other categories of commercial cases.

Thus, in the West Siberian District, the percentage of cases of simplified procedure on appeal was in 2016 almost six times and in 2017 almost three times lower than the average percentage of cases on appeal in all cases, both in the district and in the commercial court system in general. The percentage of appeals in this category in the appellate district of the Twentieth Commercial Court of Appeals for the first nine months of 2018 was more than five times lower than the average percentage of appeals in the district and more than four times lower than in the first half of 2018 in the commercial court system in general.

The percentage of cassation appeal of such acts is even lower. In the West Siberian District the percentage of cassation decisions on simplified proceedings by the commercial court of the West Siberian District was in 2016 almost 25 times and in 2017 21 times lower than the average percentage in all cases considered by this cassation court. This ratio almost coincides with the data on the commercial court system as a whole: 2016 – 25 times and in 2017 – 23 times lower than the average percentage in all cases considered in cassation.

The percentage of decisions on summary proceedings in the West Siberian District that were canceled or changed on appeal in 2016 was 13.8 and in 2017 4.5 times lower than the average percentage of reversals in all cases considered by the district appellate courts and, accordingly, 7.8 and 5.8 times lower than the average percentage of reversals for the commercial court system as a whole. For the commercial courts of

the appellate district of the Twentieth Commercial Court of Appeals for the first nine months of 2018, this percentage was lower by a factor of almost eight.

As for the reversal or change of decisions in cassation, in the case of simplified proceedings reviewed by the commercial courts of the West Siberian District in 2017 it was 95 times lower in the district and 105 times lower in commercial court system proceedings as a whole.

Another type of simplified procedure in the commercial process is the order of proceedings (chap. 29.1 CPC RF), which was introduced in the practice of the commercial courts by the Federal Law of 2 March 2016 No. 47-FZ.

In 2016, the West Siberian District commercial courts considered 4,111 cases by the writ procedure, in 2017 this number increased to 38,490 cases, which is largely due to the fact that the writ began to be used only in the second half of 2016.

The number of cases considered in the writ proceedings in the commercial courts of the first instance of the Ural District in 2016 was 5,219, while in 2017 it was 51,923 cases. In the total number of cases considered by the Ural District courts, the writ proceedings examinations in 2016 were 21.9%, in 2017 they reached 33%. In the first half of 2018, the commercial courts of the Ural District considered 30,158 cases in the writ proceedings, which was 26.1% of the total number of cases.

In connection with the timely receipt of the objections of the defendant against the execution of the issued writs (part 4, Art. 229.5 CPC RF), the commercial courts of the Ural District reversed 361 cases in 2016, 3,157 cases in 2017 and 1,873 court orders or 6.91%, 6% and 6.2% of the total number of issued orders for the first half of 2018 in the district, respectively.

Thirty-seven orders were appealed in the cassation procedure to the Ural District Commercial Court in the first half of 2018, which is 0.12% of the total number of cases examined by the commercial courts of this district by way of the writ procedure.

In 2016, the West Siberian District courts had only one court order appealed in cassation, and in 2017 there were 29 orders, totaling 0.02% and 0.08% of the number of issued orders, respectively.

The figures show that in the Ural District Commercial Court seventeen orders were canceled in the first half of 2018, which is 0.05% of the total number of cases considered in the writ procedure during this period in the district commercial courts.

Orders issued in the West Siberian District Commercial Court were not canceled in 2016, while in 2017 thirteen orders were canceled, which is 0.03% of the number of orders.

The analysis of the statistical data shows that in the Ural District and West Siberian District commercial courts a significant number is currently decided in the writ proceeding, which is from 21.9% to 33% of the total number of commercial cases. There is also a small number (within 6%) of reversals of judgments on the basis of part 4 of Article 229.5 of the CPC RF by the commercial courts that issued them. It should also be noted that court orders, as well as judicial acts in cases of simplified

proceedings, are ten times less often appealed and reversed in cassation compared with other categories of commercial cases.

Summing up the analysis of forensic statistical data on simplified and writ proceedings, from the aspect of streamlining proceedings in commercial courts, it seems possible to state the following.

Summary and writ proceedings are now no longer experimental, but rather well-established and, from the practical side, justified and, most importantly, procedural forms of resolving legal disputes by the commercial courts in demand among participants in economic relations. Cases of simplified and writ proceedings in their totality in some courts occupy a significant and, in a number of courts, the prevailing share among the total number of cases considered by the commercial courts of first instance. In this case, we can talk about the trend in the gradual expansion of the use of these types of proceedings in the commercial process.

In addition, from the above statistics it follows that the consideration of cases in the simplified procedures presents the opportunity to reduce significantly the caseload burden on the commercial courts of first instance, both by simplifying the procedures for the consideration of these cases and by drawing up judicial acts.

The introduction of a simplified proceeding also reduces the judicial burden on the two main verification judicial instances – the appellate and cassation.

In this case, the appeal of judicial acts in the overwhelming majority of summary judgments ends with the stage of appeal proceedings. This suggests that the appellate level with the current regulation copes quite effectively with the verification function for this category of commercial cases.

Comparative statistics on appeal and cassation checks of judicial acts adopted in cases of summary proceedings also confirm a higher level of stability of judicial acts adopted in this procedure.

All of this in the aggregate points to the substantial contribution of simplified proceedings to streamlining proceedings in the commercial court process.

This fully applies to the writ proceedings in the commercial court process. The above forensic statistical information on the order of the proceedings in the three judicial districts gives grounds for a rather high assessment of the real as well as the promising contributions of this procedure to streamlining the judicial procedure in the commercial courts.

The above statistical data for 2016–2018, which relate to the reversal of judgments under part 4 of Article 229.5 of the CPC RF, show that more than 90% of orders issued by the commercial courts of first instance were confirmed despite the fairly simple procedure for their reversal.

In this regard, it is impossible not to take into account that the Russian model of filing objections and, accordingly, canceling the order issued by the court to them only for this reason, indicating the existence of a dispute, and not being an instance reversal, corresponds to the most simplified versions of such reversal in foreign

judicial systems. Such a model, providing for automatic transition under certain circumstances different from the usual one, as a general rule, legally more complex, the procedure for consideration of a case, is present, for example, in France (Arts. 1405–1425 CPC) and in Germany (Art. 696 CPC).

In a number of countries this transition is much more complicated. It provides for consideration of the relevant statements of the respondent with the establishment of, for example, procedural violations during the issuance of the act and/or the presence of a worthy consideration of the reason for the defendant or his representative's failure to appear and, accordingly, providing protection for the latter (as is the case with the decision civil proceedings). There are even more complicated options when the condition for such a reversal is to establish a violation of the procedural constitutional norms or fundamental principles of law (e.g. in Italy).

It should be added that, based on statistical data, the stability of the issued court orders during their cassation verification is very high, since the number of reversals in 2016–2018 does not exceed 1% of the number of issued orders, which is significantly less than the average percentage of the same period in the commercial court system as a whole.

In this regard, there is a reason to consider the above indicators for the three districts as largely confirming the realization of most of the goals of implementing this variant of simplified consideration of the case in the commercial court process, including: improving the efficiency of judicial protection of the law and the effectiveness of the execution of judicial acts; the release of commercial courts from those cases that do not need a detailed review procedure; an increase in the awareness of the responsibilities the economic relations participants undertook, thus, consequently, of the level of their legal consciousness; and reduction of the current caseload burden in the commercial courts.[14]

One of the grounds for attributing a legal conflict to those categories of commercial cases that can be considered in the order of a writ or a simplified procedure is their relatively indisputable or low-conflict nature. In many ways, this explains the possibility and necessity of applying simplified procedures to these cases. Judicial statistics data confirm the relatively indisputable nature of cases considered in the form of simplified production models. This is evidenced, in particular, by the fact that only an insignificant number of orders issued are disputed by the debtor, and in the overwhelming majority of simplified production cases the interested parties do not raise the question of drawing up a reasoned decision or a transition to a general lawsuit order for resolution of the case. In other words, the

[14] Пояснительная записка к проекту федерального закона № 638178-6 «О внесении изменений в Арбитражный процессуальный кодекс Российской Федерации» [Explanatory note to the draft Federal Law No. 638178-6 "On Amendments to the Commercial Procedure Code of the Russian Federation"] (Apr. 28, 2019), available at http://www.duma.gov.ru.

application of simplified procedural forms to the specified categories of commercial cases was, on the whole, fully justified.

At the same time, it should be noted that in the procedural doctrine, the attitude towards the current simplified models of legal proceedings is not unambiguous: in particular, claims are made in the absence of a set of necessary procedural guarantees to the participants of the process, the conveyor nature of these procedures, there are concerns that simplifying the procedural forms will lead to a decrease in the level of judicial protection of rights and legitimate interests, etc.[15]

Meanwhile, the results of the analysis of the above statistical data, in our opinion, do not provide sufficient grounds for the stated claims and concerns. This, in particular, is evidenced by information about the appeal of judicial acts in cases of simplified and writ proceedings to higher judicial instances. According to them, the specified acts are much less frequently appealed against and canceled in the appellate and cassation procedures in comparison with other categories of commercial cases. This means that the participants of the process are in the majority satisfied with the results of justice, by judicial acts issued on the basis of the results of consideration of these cases in the courts of first instance. This, among other things, testifies to the effectiveness of applying these procedural forms to protect the rights and legally protected interests of persons participating in cases of simplified and order proceedings.[16] Moreover, in these cases a certain level of adversarial process is preserved, although for obvious reasons it manifests itself in varying degrees, it is implemented in different forms and at non-identical stages of the process.

At the same time, it is important to note that when taking summary judgments at the first instance, there is a mechanism for the transition to their consideration in the order of general production. A similar transition, as can be seen from statistical data for the last several years, occurs on average in every fourth case. This indicates that there are no significant or even insurmountable obstacles to such a transition, in cases where it is justified by the need to protect the rights and legitimate interests of the persons concerned.

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[15] *See Скуратовский М.Л.* О пределах оптимизации арбитражного процесса // Арбитражный и гражданский процесс. 2018. № 7. С. 13–17 [Mikhail L. Skuratovsky, *On the Limits of Optimization of the Commercial Court Process*, 7 Commercial and Civil Procedure 13 (2018)]; *Князькин С.И.* Проблемы проверки судебных актов, принятых в упрощенном порядке, в цивилистическом процессе // Арбитражный и гражданский процесс. 2018. № 2. С. 59–64 [Sergey I. Knyazkin, *Problems of Verification of Judicial Acts Adopted in a Simplified Manner, in a Civil Process*, 2 Commercial and Civil Procedure 59 (2018)], etc.

[16] In this regard, it is difficult to disagree with G. Zhilin, who points out that any changes in the civil procedural form are permissible only if there is more effective judicial protection of the rights, freedoms and legally protected interests of citizens and organizations. Other interests, such as simplification of proceedings for the court itself... should recede into the background. *See Жилин Г.А.* Цели гражданского судопроизводства и их реализация в суде первой инстанции: Автореф. дис. ... докт. юрид. наук [Gennady A. Zhilin, *The Objectives of Civil Proceedings and Their Implementation in the Court of First Instance: Synopsis of a Thesis for a Doctor Degree in Law Sciences*] (Moscow, 2000).

It is also difficult to agree with the reproach in the so-called conveyor approach when dealing with cases in a simplified procedure. It seems that in conditions where the judicial form of resolving legal conflicts has become dominant and, consequently, there is massive recourse to the court, the conveyor element inevitably becomes inherent in any dispute resolution procedure, including general lawsuit proceedings.

Moreover, the introduction of simplified forms of legal proceedings is just one of the real ways to minimize this "assembly line" in cases considered by way of a lawsuit, since the introduction of simplified and writ proceedings in the commercial process creates essential prerequisites for a more thorough consideration of cases in the ordinary lawsuit form of cases for which the latter is truly optimal.

These types of proceedings of commercial court cases contribute to the optimization of court proceedings in the commercial courts and a significant reduction in the caseload burden on judges and court staff, if only because they greatly simplify and speed up court proceedings in the commercial courts. This, in particular, manifests itself in these categories of cases in refusal or minimization of oral proceedings, the release of the registration of motivated judicial acts in cases corresponding to the procedural law, etc.

In this connection, the idea of M. Shvarts deserves much attention: the simplified procedure, the removal of certain duties from the court, the refusal to perform certain actions, which, in turn, speeds up the consideration of the case, increases the risks to the parties.[17] However, we note that, taking into account the parties involved in the commercial court process these risks may not be decisive.

It is also important to note that the use of simplified and writ proceedings seriously reduces the caseload burden not only on the judges of the commercial courts of the first instance, but also on those of a verification instance. The introduction of various models of simplified production, as confirmed by the above statistics, is one of the most effective options for reducing this burden. Therefore, a positive attitude towards these models of legal proceedings in a number of Recommendations of the Committee of Ministers of the Council of Europe is understandable. Thus, it is indicated in the Recommendation No. R (81) 7 of the Committee of Ministers of the Council of Europe to Member States on measures facilitating access to justice of 14 May 1981, that court proceedings are often so complex, lengthy and expensive that individuals, especially those who are economically disadvantaged, have difficulty in exercising their rights in Member States (preamble, para. 2 of the Recommendation). In this regard, it is noted that it is desirable "to take all necessary measures to simplify the procedure in all cases in order to facilitate private access to the courts, while respecting the proper order of

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[17] *Шварц М.З.* Систематизация арбитражного процессуального законодательства (проблемы теории и практики правоприменения): Автореф. дис. ... канд. юрид. наук [Mikhail Z. Shvarts, *Systematization of the Commercial Procedural Legislation (Problems of the Theory and Practice of Law Enforcement): Thesis for a Candidate Degree in Law Sciences*] (St. Petersburg, 2004).

administration of justice" (preamble, para. 5). To this end, it is stated that in order to facilitate access to justice "it is desirable to simplify court documents" (preamble, para. 7). Among the principles of this activity, the Recommendation indicates simplification, speeding up proceedings and the rationalization of legal costs.

Other Recommendations of the Committee of Ministers of the Council of Europe, in particular, Recommendation No. R (84) 5 on the principles of civil procedure designed to improve the functioning of justice of 28 February 1984, must also be taken into account.[18]

In this state of affairs simplified and writ proceedings correspond not only to the idea of streamlining proceedings in commercial courts, but also to the basic guidelines of the European legal space which modern Russia shares. It is also important to note that in today's interconnected world legal space, the orders of simplified commercial court proceedings discussed above, by virtue of the principle of equality (Art. 7 CPC RF), are relevant for all individuals applying to Russian the commercial courts for judicial protection, including foreign investors, especially those representing medium and small businesses, and for the latter it is particularly important to apply affordable, understandable, in form and the terms of implementation, i.e. predictable, and prompt legal proceedings.[19]

At the same time, summary procedures must consider the peculiarities of the progress of the procedure, due to the participation of foreign persons in the affairs, including, in particular, those related to their location as well as notices and a special time period for the consideration of the case involving foreign persons (part 2, Art. 26 and part 3, Art. 253 CPC RF).[20]

It is hardly possible to imagine the successful development of the commercial process in the foreseeable future without differentiation of the judicial procedure or introduction and development of its simplified models established in the procedural law in the form of precisely defined conditions as to when and in what cases they should be implemented in particular (taking into account the will of the persons applying for judicial protection in relevant cases).

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[18] *Council of Europe and Russia*, *supra* note 1, at 681–684. Moreover, not only the experience of certain foreign countries in which summary procedures were implemented (the USA, Germany, France, etc.), but also the legal experience of associations of states, in particular the European Union, where it was implemented in the Rules Procedures for the consideration of small claims in the European Union (Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, 2007 O.J. (L 199) 1) and the abovementioned Rules of the European Payment Order, although it should be noted that a lot of foreign and international experience is already taken into account by the domestic legislator.

[19] It is known, for example, that the small claims courts in the USA minimize the duty when filing a relevant application to the court (e.g. when filing a lawsuit in the small claims court in New York State, the state duty is $15 to $20, though the full routine will cost over $45), provide an opportunity for the parties not to exchange pleadings.

[20] *Решетникова И.В.* Упрощенное производство. Концептуальный подход // Закон. 2013. № 4. С. 93–98 [Irina V. Reshetnikova, *Simplified Production. Conceptual Approach*, 4 Law 93 (2013)].

At the same time, it is clear that the current commercial procedural legislation cannot remain unchanged, including from the aspect of regulating simplified production models, and, of course, it will require appropriate modernization. This last point may concern its various components. We believe it is possible to formulate certain approaches in some of the most frequently discussed areas.

First of all, this is a question concerning the criteria for classifying cases as the ones to be considered in the framework of simplified procedure. Without going into the details of the well-known discussion over the concept of the "indisputability" of requirements, as well as "insignificance" to be considered in simplified production models,[21] we note the following.

The real absence of a dispute is an important point in determining the category of cases submitted for consideration in summary procedure. It is difficult to explain the use of a general-market model for cases in which there is no real dispute between the participants in a legal conflict with any private or public interest. In addition, from the aspect of the criterion of "insignificance" in determining the categories of cases to be considered in simplified proceedings, it seems arguable to use the factor of the level of per capita income.[22] In any event, it can hardly be generally applicable to all types of civil processes. So, in the commercial court process, considering the peculiarities of the parties involved, this factor is not a priority, rather it has an auxiliary value.

According to some researchers, who point out the experience of foreign legislation, thus denying the expediency of a normative fixation of the notion of the "insignificance" requirement, the simplest and most effective means is to indicate a fixed upper limit in the number of claims that allow the use of a certain simplified procedure.[23] The rationality of such an approach is hardly worth arguing over, although it cannot be universal. In some cases, in particular, with obvious signs of the lack of a dispute, it is hardly acceptable.

As an example in this regard, we consider it expedient to consider in more detail the legal regulation and published judicial and statistical data concerning cases of claims for the recovery of compulsory payments and sanctions, for which there is often no dispute. Meanwhile, a certain limitation is established in such cases. For their simplified models consideration it is established in clause 5 of part 1 of Article 227 of the CPC RF that cases on the recovery of compulsory payments and sanctions are to be considered in summary order if the total amount of money to be collected is between 100,000 and 200,000 rubles. The writ proceedings require the

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21 On the issue of the category "indisputability," *see Юдельсон К.С.* Советский нотариат. Избранное [Karl S. Yudelson, *Soviet Notaries. Selected Writings*] 297 (Moscow: Statut, 2005), etc.

22 *Соломеина Е.А.* Упрощенное производство в арбитражном процессе: пути совершенствования // Арбитражный и гражданский процесс. 2018. № 7. С. 38–40 [Elizaveta A. Solomeina, *Simplified Production in the Commercial Court Procedure: Ways to Improve*, 7 Commercial and Civil Procedure 38 (2018)].

23 *Сивак Н.В.* Упрощенное производство в арбитражном процессе: Монография [Natalia V. Sivak, *Simplified Proceedings in the Commercial Court Procedure: Monograph*] (Moscow: Prospekt, 2011).

maximum number of mandatory payments and established sanctions of 100,000 rubles indicated in the application (cl. 3, Art. 229.2 CPC RF).

Such restrictive regulation in these types of cases is debatable. In support of this conclusion, we present a number of statistical data.

Judicial statistics show that in the total number of cases considered in the commercial courts, cases on claims for the recovery of compulsory payments and sanctions are among the most massive. So, 295,200 of such cases were considered in the commercial courts in 2017, at the first instance, which is about 17% of the total number of commercial cases or 48.9% of the cases arising from administrative and other public legal relations.[24] Consequently, cases on claims for the recovery of mandatory payments and sanctions are among those that create a fairly large caseload burden on the commercial courts.[25] At the same time, it is noteworthy that 284,234 legal actions were satisfied in 2017, which is 96.3% of the total number.

The absolute majority of such cases can hardly be considered truly disputable, and, accordingly, worthy of consideration in the procedure, which corresponds in its procedural complexity to the routine case (chap. 26 CPC RF). This is confirmed not only by the above high percentage of satisfied claims, but also by the fact that in the same year only 601 appeals were considered in these cases, which is only 0.20% of the number of similar cases examined at the first instance, as well as the fact that in 2017 only 70 judicial acts were annulled or changed, which is 0.02% of the number of cases examined in the court of first instance.

One hundred eighty of such cases were considered on appeal for this period, which amounts to 0.06% of the cases examined at the first instance, and eighteen judicial acts were reversed or amended, which represents 0.006% of the cases reviewed in the courts of first instance.[26]

At the same time, the statistics on the appeal and cassation on litigation, considered in the adversary proceedings, give a completely different result.

For example, in disputes arising from sales contracts, the number of which in 2017 was more than a quarter of the total number of commercial cases, 11.6% of the number of judicial acts adopted at the first instance were appealed, while the number of canceled or amended cases was 1.58% of the total number of cases considered at the first instance.[27] In cassation, 2.7% of the number of judicial acts adopted at the first instance were appealed, and 0.35% of the number of cases of this category considered at the first instance were canceled or amended.[28]

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[24] Overview of judicial statistics on the activities of federal commercial courts in 2017, *supra* note 12, at 4, 9.

[25] *Id.* at 3, 6–7.

[26] *See* Summary statistics, *supra* note 2.

[27] *See Id.*

[28] *See Id.*

Whereas, in cases of the recovery of a penalty, ranked third in quantitative terms (12.09% of the total number of commercial cases), 21,512 appeals or 9.95% of the cases examined at the first instance were considered. Three thousand one hundred thirty-three judicial acts or 1.44% of the number considered at the first instance were canceled or amended. In the cassation procedure, 3,839 complaints were considered, which is 1.44% of the number of cases considered at the first instance and 482 judicial acts were canceled or amended, which is 0.22% of the number considered at the first instance.[29]

Consequently, the results of the appeal and cassation checks are clearly in favor of cases on recovery of mandatory payments and sanctions, especially in terms of the number of appeals and the sustainability of the judicial acts taken on them.

The above results of the procedural activities of the commercial courts of the first, appellate and cassation instances in cases of recovery of mandatory payments and sanctions show that the restrictive criteria set forth in the norms of the CPC RF for the amounts of requirements established for classifying these cases to be considered in the order of simplified procedure models can hardly be considered really optimal.

It is quite possible, in our opinion, to abandon the current procedural variation, when the same cases are of the same legal nature, depending on the amount of the stated requirement are considered in three procedural orders: adversarial (chap. 26 CPC RF) and two simplified procedure models.

As an option to change the procedure in cases of applications for the recovery of compulsory payments and sanctions from organizations and citizens, they can be proposed to be considered subject to consideration only in a simplified procedure and at the same time, with the complete removal of the ones now established in paragraph 5 of part 1 of Article 227 CPC RF restrictions on the number of claims the presence of which is difficult to explain in the commercial court process.

In addition, bearing in mind the abovementioned specifics of cases involving claims for recovery of mandatory payments and sanctions from organizations and citizens, a second, more radical option is possible: the inclusion of all cases of this category in the number of cases to be considered in order of writ proceedings without any threshold amounts of a restrictive nature, for their consideration in this order, particularly, considering that with regard to the recovery of compulsory payments and sanctions for citizens such restrictions are not established by procedural law (chap. 32 Administrative Court Procedure Code RF).

In addition, it is worth mentioning the proposals made in the literature on the need to completely abandon the judicial recovery of arrears, fines and penalties for violation of the obligation to pay taxes, fees and other obligatory payments and

[29] *See* Summary statistics, *supra* note 2.

transfer the said cases to the relevant fiscal or supervising state bodies with the possibility of subsequent appeal of their decisions in court.[30]

The proposed options for modifying the regulation of the procedure for the consideration of cases on applications for the recovery of compulsory payments and sanctions for organizations and citizens have their pros and cons. However, ultimately all of them are aimed at further optimization of the commercial procedural law and a significant reduction of the judicial caseload burden.

When improving the procedural forms of simplified proceedings, it is important to develop the necessary standard, including electronic forms of expression of the will of the participants in the process. The introduction of standard forms in the cases to be taken is perhaps one of the obvious reserves for the development of legal regulation in domestic commercial procedure. Such forms are implemented to some extent, as is well known, in the national legislation of France, Germany and the United States, as well as in well-known international procedures, as seen, in particular, from the EU Rules of Procedure for Considering Small Claims in the European Union, which contain the corresponding models in the form of enclosures.

As noted earlier, the drafting of a motivated court decision in summary proceedings in the commercial process is not an ordinary or inevitable result of legal proceedings. The above statistics indicate a rather small percentage of manufactured motivated judicial acts in cases of summary proceedings. At the same time, there is no reason to believe that this is connected with any regulatory barriers for persons participating in commercial cases, since they are given only the option to decide whether to ask for a reasoned decision or not, which in itself is a significant positive factor, ensuring a fair degree of fairness.

However, there might be a need for some clarification of the regulation, which is now enshrined in part 2 of Article 229 of the CPC RF, and provides for the relevant person to file an application for drafting a reasoned decision of the commercial court within five days from the date of posting the decision taken in summary procedure on the official website of the commercial court. Interested persons, in our opinion, should have the right to declare this at any stage of the process until the end of the proceedings at the first instance. That will increase the degree of protection of the rights and legitimate interests of persons involved in the relevant cases.

It should be noted that the Russian judicial system as a whole, including its commercial court segment, in terms of the specifics of making motivated decisions in simplified proceedings, cannot be recognized as having certain unique features. It is known that in the English civil procedure in cases involving the consideration of "small claims" court decisions are traditionally substantiated by judges shortly and simply, based, of course, on the essence of the dispute (often orally). Written

[30] *Тимофеева О.Ю.* Совершенствование порядка взыскания обязательных платежей и санкций // Известия ИГЭА. 2011. № 5(79). С. 159–163 [Oksana Yu. Timofeeva, *Improving the Procedure for Collecting Compulsory Payments and Sanctions*, 5(79) News of ISEA 159 (2011)].

substantiation of the decision becomes the duty of the judge only if the party fails to appear and the court is notified of this in accordance with clause 27.9 of the Rules of Civil Procedure, in which case a court order is issued to the parties.

As for the writ proceedings, in relation to the decisions taken on the basis of its results, the requirement of motivation for understandable reasons is hardly applicable. This is also not a feature of the domestic commercial court system. Foreign experience of making decisions on similar matters through the design of standard (template) forms is known. According to the procedure for issuing a European order for payment, orders are formed in accordance with the standard forms contained in the annex to the relevant rules of the petition procedure.

Another issue worthy of assessment is the formation of optimal ways to verify judicial acts in cases of simplified and writ proceedings. In this regard, referring to such an aspect as the features of the appeal of judicial acts, adopted in the order of simplified models, the following shall be taken into account. As is known, in the civil procedure in France the possibility of appeal against cases with a claim amount not exceeding €4,000 is excluded. In Germany, it is not allowed to appeal the decision in cases with the sum of claims up to €600 if such a possibility was not reflected in the decision itself being appealed. In Austria, with a few exceptions, it is not allowed to go to a third court instance in cases where the value of the claim €4,000 or less.[31]

Moreover, in relation to certain foreign legal orders, the illusory nature of the appeals procedure in such cases is noted. Thus, J. Lebowitz points to this in the American court of a petty lawsuit, referring to the high cost of initiating an appeal, which is clearly disproportionate to the essence of a petty lawsuit. In some states, the possibility of appeal is limited. For example, in California and Massachusetts it is only the respondent who has the right to file an appeal. In Virginia, there is no right to appeal if the disputed amount is less than $50 (however, for all other disputes there is no restriction on appeal). Washington state does not allow appeal of decisions on claims up to $100. At the same time, in initiating appeal proceedings the party must pay a fairly high fee. In some states it is not available at all. For instance, in Arizona there is no right to appeal.

In this situation, the conclusion by E. Nosyreva looks logical. She claims:

> The use of the appeal is disadvantageous to the parties from the procedural and financial points of view. The increasing complexity of the procedure, the need to use traditional procedural mechanisms require the participation of lawyers and entail significant new costs that are inconsistent with the nature

[31] *See* Проверка судебных постановлений в гражданском процессе стран ЕС и СНГ [*Verification of Court Decisions in Civil Proceedings in the EU and the CIS*] 26 (E.A. Borisova (ed.), Moscow: Norma, INFRA-M, 2007).

of the dispute. For these reasons, as practice shows, decisions of small courts are appealed very rarely.[32]

From the aspect of admissibility of limiting appeals to relevant judicial acts, clause 15 of the Appendix to the Recommendation No. R (81) 7 of the Committee of Ministers of the Council of Europe of 14 May 1981 is to be considered, which states that

> for disputes on claims, a small amount there must be established a procedure that allows the parties to go to court without incurring costs disproportionate to the amount of the dispute. With that in mind, it would be possible... to limit the right of appeal.

At the same time, however, the Committee of Ministers of the Council of Europe indicates the need for a principled possibility of supervision over any decision of a lower court by a higher court.[33]

In general, restrictions on the appeal of judicial acts adopted in simplified procedures in the commercial process are an inevitable price for other advantages associated with them (speeding up the proceedings in relevant cases, etc.).[34] At the same time, it is important that when introducing the relevant rules in procedural rules the acquisitions and losses associated with their implementation are adequately weighed. From the statistics provided in this paper it does not appear that the existing options for appealing against judicial acts adopted in the considered simplified production models contain obvious or significant flaws.

When searching for the optimal legal regulation of legal proceedings in the commercial courts, it is necessary to take into account the so-called financial factor. Despite the fact that the financial costs of society (budget) for the administration of justice cannot be considered to be a fundamental factor determining the nature of the court proceedings, it is difficult to ignore it completely as a factor affecting its quality.

An increase in the quantitative indicators inevitably entails an increase in the financial costs of the administration of justice. For the period from 2014 to 2017, the volume of budget funds allocated to the Judicial Department at the Supreme Court of the Russian Federation to support the activities of the courts increased by

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[32] *Носырева Е.И.* Альтернативное разрешение споров в США: Дис. ... докт. юрид. наук [Elena I. Nosyreva, *Alternative Dispute Resolution in the United States: Thesis for a Doctor Degree in Law Sciences*] 226–227 (Voronezh, 2001).

[33] Российская юстиция. 1997. № 6. С. 4 [6 Russian Justice 4 (1997)].

[34] Incidentally, this is not anything new for our procedural regulation. As is known, in accordance with Article 162 of the Charter of Civil Procedure, all decisions of the justice of the peace could be appealed within a month. At the same time, appeals against decisions of the congresses were allowed only in cases with the cost of a claim exceeding 100 rubles (Art. 186). As for the decisions of Zemstvo chiefs and city judges, they were not subject to appeal in cases of up to 30 rubles (Arts. 90, 111 Charter of Civil Procedure).

an average of 26%. Therefore, it is not by chance that the development of simplified procedures for the implementation of justice allows achieving the goals of legal proceedings with less financial expense, among other things.[35]

Thus, the presence of claims to the current models of simplified and writ proceedings should entail not a rejection of them, but a further improvement of the related legal regulation and commercial practice, since they are a promising factor for streamlining court proceedings in the commercial courts.[36]

The optimal legal proceedings in any country and at any time are, on the one hand, achieved at an appropriate stage as the result of adapting the judicial mechanism to the needs of persons applying for judicial protection. On the other hand, they are a very complicated and sometimes a very painful process of considering the main components of the legal development of society.

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35 Hazel Genn et al., *supra* note 9.

36 Stuart Sime, *A Practical Approach to Civil Procedure* 250 (6th ed., Oxford: Oxford University Press, 2003); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, Cornell Law School Research Paper No. 08-022 (May 2008) (Apr. 28, 2019), available at https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1107&context=lsrp_papers.

LEGAL TECHNIQUES AND TECHNOLOGY AS THE MOST IMPORTANT FACTORS FOR THE SUSTAINABLE DEVELOPMENT OF THE SOCIETAL LEGAL SYSTEM

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Legal techniques were initially developed as a kind of repeater of the legislator's will into the language of law with the help of special skill in legal design. Historically, the theory of legal technique was formed in stages with state reforms, social transformations and active work on systematizing legislation having significant impact on it. At the present stage, legal technique resources are legislated in some CIS and European countries, and the status of legal technique is firmly entrenched in legal theory and practice in continental law countries as well as common law. Complications from modern legal life in society and the need to optimize legal activity drive the search for new ways to improve the legal technology field. The uniqueness of legal technology is that it links all types of legal activity into a single production process, standardizes its potentially separate segments and introduces sound stability into legal processes. This makes it possible to improve effectiveness indicators for consolidating legislative priorities and implementing them in practice, in order to ensure the national interests of the state. Combining the potential of legal technology and legal technique provides legal activity a systematic and constructive validity for legal transformations, hinders the expansion of legal errors, optimizes the stages of legislative activity, systematizes the actions and operations that are being implemented, and ultimately ensures high indicators for legal development and the achievement of the state's constructive tasks.

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Introduction: Evolution of the Legal Technique Doctrine

Traditionally the instrumental nature of the law is associated with legal technique. It is a special art of communication within the legal field and includes a system of resources used to prepare legal acts (other legal documents) and other types of legal activities that ensure the perfection of form and content. At the same time, legal technique has largely evolved empirically, which has provided high reliability for its theoretical foundations. Legal technique is firmly rooted as a fairly distinctive category, reflecting the historical conditions in which the legal system of a particular state develops while at the same time having international components.

Legal technique appeared even at the birth of the law itself, although, according to the German scientist Rudolf von Jhering, scientific views on legal technique began to appear much later. At the same time, the philosophical foundations of legal technique were laid by the ancient philosophers Socrates, Plato, Aristotle and Cicero; they drew attention to the importance of observing certain rules, which affected the development of legal technique. The ancient Roman lawyers, participating in lawmaking and law enforcement, had already called for brevity of exposition and in fact sought to implement this rule of legal technique. Its tools began to emerge during this period. However, the transition to a systematic study of legal technique, the development of its theoretical positions and the formulation of a doctrine of legal technique occurred much later, which is a quite natural process.

The evolution of the legal technique doctrine is characterized by distinct stages, based not only on the spasmodic movement to scientific results, but also on reformatory resources, the scientific interest in which has significantly intensified during periods of social transformation and state reforms. The early stages of the legal technique theory are associated with the British scientist and politician Francis Bacon. A lot of researchers consider Francis Bacon to be the father of the legal technique doctrine, which is consistent with the scientific paradigm followed by the scholar. The meaning of all his scientific work he saw in the revival of science, which should be ahead of practice and noted that "science aims to enrich human life with real events, i.e. the new means."[1] Legal technique is precisely such a field of science, thanks to which legal life is enriched by practical methods for improving the law.

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[1] *Бэкон Ф.* Новый органон, или Истинные указания для истолкования природы [Francis Bacon, *The New Organon, or True Directions Concerning the Interpretation of Nature*] (Nov. 7, 2018), available at http://modernlib.ru/books/bekon_frensis/velikoe_vosstanovlenie_nauk_noviy_organon/.

Francis Bacon contributed to the development of legal technique by laying out several rules for legislative composition, especially the need for the legal language to be laconic and exact, so that no pretexts were given for ambiguous interpretation of legal acts. He was one of the first to notice the role of incorporation as a reliable manner for composing a corpus of legal acts as way to systematize legislation and claimed that people needed science in the first place to solve practical problems.

Samuel von Pufendorf,[2] a German thinker, historian and jurist, developed the idea for the first approaches to the legal technique doctrine and began not only to make serious requirements for the substance and purely technical aspects of legislation, but also extended the concept of legal technique beyond the bounds of exceptional legislative technique. The scholar included legal enforcement, stating that legal acts created by the government ought to be clear to the addressees; in other words, they ought to be set forth in plain language and be brought to the knowledge of citizens. In case of discrepancies in formulations, Pufendorf recommended addressing interpretation directly in a legislative body, or in special bodies delegated with the right of interpretation.

French scholar, Charles de Montesquieu, based on the rational ideas from the rational nature of humans and their surrounding environment speculated about what should be the "style of legal act" regarding the importance of the successive terminology and the consistent principles used in legislation. In the opinion of Montesquieu, one should be extremely cautious about changing previously established laws:

> It is necessary to observe such solemnity and to take so many precautions that the people come to the conclusion that the laws are holy, since so many formalities are required to repeal them.[3]

Montesquieu also gave an account on several legislative statement principles in "The Spirit of the Laws" mentioning, among them, a simplicity and brevity in style, whereby the norms should set forth in a laconic and precise manner. The scholar pointed out that the essential condition of a law is the demand for "every word of its statement to evoke the same ideas with all people."[4] He also proceeded to say that laws should not go too far into refinements, as "they are meant for ordinary people and contain the sound ideas of an ordinary housefather rather than the art of reasoning."[5]

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[2] *See, e.g.*, Samuel von Pufendorf, *Two Books of the Elements of Universal Jurisprudence* (1660); Samuel von Pufendorf, *Of the Law of Nature and Nations* (1670); Samuel von Pufendorf, *On the Duty of Man and of the Citizen* (1671) and other works.

[3] *Монтескье Ш.* Избранные произведения [Charles de Montesquieu, *Selected Works*] (Moscow: Gospolitizdat, 1955).

[4] *Id.*

[5] *Id.*

Jeremy Bentham, the English sociologist, jurist and theoretical founder of political liberalism is also considered to be the father of nomography – the science of making legislation. Bentham characterized the linguistic rules for composing laws, as well as the rules for their internal structure. When composing a procedural law book, he pointed out that it was necessary to be motivated by principles that would provide simplicity, lack of ambiguity, and comprehensibility for the addressees.

This stage of the formation of legal technique theory can be traced back to the period from the early 16th century to the late 18th century. This formation laid out the general ideas on the subject of legal technique, whereas the term "legal technique" was being coined in to legal use and the scope of its application outlined. In the 18th century, separate elements of legal technique contents were researched, wherein the indicated fact implies a new step in the development, motivated by the intensive development of social processes for the emerging role of regulators.

The second stage in the development of legal technique doctrine began in the early 19th century, marked by the first special "Legal Technique" writing, dedicated to the study subject area by the German scientist, Rudolf von Jhering. Jhering also noted that legal technique had emerged in the early days of the law itself, although scientific views on legal technique were just beginning to appear much later.[6] Jhering described the purpose and role of legal technique as "something that ought to convince every layman in his ignorance... a legal method... it just creates a legal actor."[7] Subjectively, "technique" means the legal art of finishing legal material; on the objective level, it is a technical mechanism for a legal act.[8] Jhering formulated the concept of legal technique understanding it essentially to be a legislative technique. He classified the accumulated rules of legislative technique, thoroughly analyzed many of them, proposed some new rules for law-making, and defined the purpose of legal technology, including the nature and direction of its tools. In "Legal Technique," Jhering proved that technique was important for legal activity by claiming that

> technique is implicitly endued with significant ethic value whereas technical practical jurisprudence, being extremely careful with the smallest detail when dealing with the material, can praise itself for improving legal technique for the good of the sublime and the great; its hardly-visible work on the low-profile of the law fosters its development even more strongly that any intellectual work.[9]

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[6] *Иеринг Р. фон.* Юридическая техника [Rudolf von Jhering, *The Legal Technique*] 33–34 (A.V. Polyakov (comp.), Moscow: Statut, 2008).

[7] *Id.* at 18–19.

[8] *See Id.* at 34.

[9] *Id.*

An important step in the development of the doctrine of legal technique at this stage was the formulation of the right targets for legal technique that determine the nature and direction of its instrumental basis. Thus, in particular, Jhering and François Gény, developing the ideas regarding the interrelation between law and interests, saw in legal technique a means of translating social needs into the language of law and constructing mandatory norms for maintaining order in society, which the sources of law serve in a formal sense. Positivism and communication in law represent the inalienable aspects of legal activity, determining its effectiveness.

Serious attention to the text of standard laws for achieving potential simplicity and clarity only began in the 19th century.[10] Lord Thring, who has become famous for the art of editing laws, specified rules in an essay on practical legislation regarding the internal distribution of articles in a standard law.[11]

At this stage the legal technical requirements for law-making and certain other types of legal activities related to law-making (in particular, the technique of systematization) were formed. However, the general scope of legal technique was still in the law-making field, and this period lasted from the beginning of the 19th century until the threshold of the 20th century. The achievements during this stage include the entry and "rooting" of legal technique into the legal framework of the Roman-Germanic system, as well as its systematic study as an independent research topic.

The third stage in the development of the legal technique doctrine is associated with active research into the technique and elaboration of numerous technical tricks, which began during the 20th century and continues to the present time. This is evidenced by the practice of most states to consolidate, in particular, the rules on law-making technique. However, there are examples of a different status of legal technique.

Presently in many European countries, the legally fixed rules of law-making have been applied for many years. This experience is highly instructive and useful not only with regard to methods for drafting legal texts, but also in terms of the correct choice of subject matter (regulation), the form of instrument, restrictions on amendments, and additions to legal texts, even in their legal expertise. It can be stated that the requirements for legislative technique have not found a uniform legislative consolidation as it is impossible to identify all requirements for drafting laws.

The ratio of doctrinal principles and regulatory requirements for bills and other regulations differs from country to country. In particular, there are several approaches to the sources where legal technical rules are set out, including: laws, parliamentary regulations, guides, recommendations, and special government and ministry of

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[10] *Ильберт К.* Техника английского законодательства: из книги «Legislative Methods and Forms», by Sir Courtenay Ilbert. Oxford, 1901 [Courtenay Ilbert, *The Technique of English Legislation: From the Book "Legislative Methods and Forms," Oxford, 1901*] 4–5 (A. Nolde (trans.), St. Petersburg: Senate printing house, 1907).

[11] Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* 3 (London: John Murray, 1902).

justice documents. Given such diversity, the recognized status of legal technique in a particular state's legal system can be observed, which does not minimize its role and is associated exclusively with the insufficient study of the required unification and harmonization of legal technical resources to ensure uniform standards and deeper interaction between legal systems.

Attention is drawn to the diversity in the legal force of the laws in which they are contained. In Poland, France, the Czech Republic and Hungary there are legal technical operations contained either in parliamentary regulations or in special documents issued by the government and the ministries of justice. A striking example is the regulation of legal technical operations in Poland through the regulations of the Sejm and the Senate of the Polish Republic,[12] and the Decree by the Chairman of the Council of Ministers "Rules of Legislative Technique"[13] dated 20 June 2002.

In Germany the legal technical requirements are contained in the Law on Preparing Legislation and the Handbook on the Rule-Making Technique dated 22 September 2008, developed by the Federal Ministry of Justice of Germany (hereinafter referred to as the Handbook).[14] The Handbook is based on legal norms and practical rule-making experience, the increased influence of European rule-making, and most of its recommendations refer to specific stages of the rule-making process.[15] The German Federal Ministry of Justice, aware of the importance of rule-making technology for the legislative process, accompanied the rule-making process with a kind of "guidebook" on the use of rule-making techniques in the form of recommendations that "are designed to ensure legal perfection while at the same time preserve the uniformity of the legal technique used in federal legislation..."[16]

In the European political and legal landscape the particular interest presents the legal technique in the United Kingdom of Great Britain and Northern Ireland as representative of common law countries with an excellent approach to official sources of the law in comparison with the countries of the continental laws. Great Britain similarly regulates issues around statute registration through the following

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[12] Регламент Сейма Республики Польша от 30 июня 1992 г. [Regulations of the Sejm of the Republic of Poland of 30 June 1992] (Nov. 11, 2018), available at http://www.parliament.am/library/Standing%20orders/POLAND.pdf; Regulations of the Senate of the Republic of Poland, confirmed by the Senate Decision of 23 November 1990 (Nov. 11, 2018), available at https://www.senat.gov.pl/en/about-the-senate/regulamin-senatu/.

[13] Decree of the Chairman of the Council of Ministers of the Republic of Poland "Rules of Legislative Technique" dated 20 June 2002, Dziennik Ustaw, 2002, No. 100, Item 908.

[14] Опубликование Справочника по нормотворческой технике. 22 сентября 2008 года: рекомендации Федерального министерства юстиции Германии по единообразному оформлению законов и нормативных постановлений [*Publication of the Handbook on the Rule-Making Technique, 22 September 2008: Recommendations of the German Federal Ministry of Justice for Uniform Design of Laws and Regulations*] (3rd ed., Berlin: Federal Ministry of Justice, 2008).

[15] *Id.* at 3.

[16] *Id.*

laws: the Parliament Act 1911, the Parliament Act 1949, the Acts of Parliament Numbering and Citation Act 1962,[17] the Law on Rule-Making Legal Acts of 1996, and also the additional information contained in a number of manuals – Guide to Making Legislation of 2014,[18] Drafting Guidance of 2018,[19] A Manual for Those Concerned with the Preparation of Statutory Instruments and the Parliamentary Procedures Relating to Them of 2006.[20] This demonstrates the increasing importance of rule-making legal acts, even in common law countries, and the role of technical and legal rules in preparing their texts.

In the near-abroad countries, there is an aspiration to legislatively establish legal technique rules. For example, Kazakhstan and Armenia have laws "On Legal Acts,"[21] in Byelorussia, the Kirghiz Republic and Tajikistan laws have been passed "On Normative Acts,"[22] and in Moldova "On Legislative Acts."[23] Russia has not adopted a similar legislative act yet, which indicates the many unresolved theoretical problems.

At the present stage, we can say that legal technique is firmly rooted in legal theory and practice, and the idea of Jhering that

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17 *Богдановская И.Ю.* Закон в английском праве [Irina Yu. Bogdanovskaya, *Law in English Law*] 34–63 (N.S. Krylova (ed.), Moscow: Nauka, 1987).

18 Cabinet Office, Guide to Making Legislation (July 2014) (Dec. 8, 2018), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328408/Guide_to_Making_Legislation_July_2014.pdf.

19 Office of the Parliamentary Counsel, Drafting Guidance (July 2018) (Dec. 8, 2018), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293866/guidancebook-20_March.pdf.

20 Her Majesty's Stationery Office, Statutory Instrument Practice: A Manual for Those Concerned with the Preparation of Statutory Instruments and the Parliamentary Procedures Relating to Them, 4th edition (November 2006) (Dec. 8, 2018), available at www.opsi.gov.uk/si/si-practice.doc.

21 Закон Республики Казахстан от 6 апреля 2016 г. № 480-V «О правовых актах» [Law of the Republic of Kazakhstan of 6 April 2016 No. 480-V "On Legal Acts"] (Nov. 11, 2018), available at http://adilet.zan.kz/rus/docs/Z1600000480; Закон Республики Армения от 29 апреля 2002 г. № ЗР-320 «О правовых актах» [Law of the Republic of Armenia of 29 April 2002 No. ZR-320 "On Legal Acts"] (Dec. 8, 2018), available at http://base.spinform.ru/show_doc.fwx?rgn=19491.

22 Закон Республики Беларусь от 10 января 2000 г. № 361-З «О нормативных правовых актах Республики Беларусь» [Law of the Republic of Belarus of 10 January 2000 No. 361-Z "On Normative Acts of the Republic of Belarus"] (Nov. 8, 2018), available at http://www.pravo.by/pravovaya-informatsiya/normotvorcheskaya-deyatelnost/pravovye-akty-po-teme/; Закон Кыргызской Республики от 20 июля 2009 г. № 241 «О нормативных правовых актах Кыргызской Республики» [Law of the Kyrgyz Republic of 20 July 2009 No. 241 "On Normative Acts of the Kirghiz Republic"] (Nov. 8, 2018), available at http://base.spinform.ru/show_doc.fwx?rgn=28680; Закон Республики Таджикистан от 30 мая 2017 г. № 1414 «О нормативных правовых актах» [Law of the Republic of Tajikistan of 30 May 2017 No. 1414 "On Normative Acts"] (Nov. 8, 2018), available at http://base.spinform.ru/show_doc.fwx?rgn=97969.

23 Закон Республики Молдова от 27 декабря 2001 г. № 780-XV «О законодательных актах» [Law of the Republic of Moldova of 27 December 2001 No. 780-XV "On Legislative Acts"] (Nov. 8, 2018), available at http://base.spinform.ru/show_doc.fwx?rgn=5135.

> technology indirectly has significant ethical value, and practical jurisprudence, referring to the technical processing of material with extreme care, even with attention to the little details that can improve the technique of law in favor of everyone; its subtle work in the low places of the law contributing to the development of the latter often more of a deep nature[24]

found its actual confirmation in spite of the resistance which it met from natural law advocates. The scope of "legal technique" includes its doctrinal and typological peculiarities, the specific character of the legal form and structure, special juridical and stylistic aspects of the legal matter formation, as well as the scientific views on it. As a result of finding an independent place for legal technique in the late 20th century and early 21st century, there was a tendency for it to move to a new development stage, prompted by the complications of modern legal life and the need to optimize the processes for implementing legal activities.

1. Preconditions for Transitioning from Instrumental to Technological Support of Legal Activity

Technologies have a significant impact on social development. They help to choose algorithms for reasonable behavior and contribute to the creation of truly new approaches. The term "technology" was introduced into scientific circulation for the first time by Johann Beckmann in 1777, in relation to the industrial sector.[25] Bernard J. Hibbitts notes that the law is technological because, "it was predominantly born as a technology, namely, communication technology."[26] Although the specificity of social connections is their ability to be empirically implemented until a certain level of complication. After that, the risk increases significantly, which requires the "inclusion" of the technology which, according to Joseph Agassi, is an awareness of the method of action, a kind of theory on technique.[27] This is the moment observed in the present period due to the fact that legal activity has become a complex process in which the role of labor tools belongs to legal technique.

However, technological processes are mediated not only by certain methods, rules, ways to apply technique, but also by the division into elementary procedures and operations having their corresponding theoretical foundations. This is what separates technique from technology, i.e. process mediation of legal technique resource usage from the entirety of its instruments.

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[24] Jhering 2008, at 34.

[25] Johann Beckmann, *Beiträge zur Ökonomie, Technologie, Polizei und Kameralwissenschaft* (Göttingen: Vandenhöck u. R., 1777).

[26] Bernard J. Hibbitts, *The Technology of Law*, 102(1) Law Library Journal 101, 104 (2010).

[27] *See* Joseph Agassi, *Technology: Philosophical and Social Aspects* 14 (Dordrecht: Reidel, 1985).

> Thus, legal technique is the cumulative effect of intentions, skills, procedures, methods, sensitivities and emphases aimed at producing some given reality out of the given dynamics in the name of and as an act of – and in conformity to – the "law."[28]

Technological security is inherent in any activity that has a complex nature among its individual elements and a corresponding set of relevant tools.

A legal activity is a process and at each step or stage, certain resources are consistently applied. The characteristic of changeability ensures the transition from one state of legal validity to another in the process of achieving an expected legally significant result. Norbert Wiener notes that

> the theory and practice of law entail two groups of problems: a group of problems related to General purpose law, the understanding of justice in law; and a group of problems related to the techniques by which these concepts will become effective.[29]

Legal technology is designed to accompany the complex legal reality of reliable instrumental solutions, which in a sense can be considered technological standards for implementing legal activities. The legal process, combined with a properly built technological process, creates a purposeful transformative activity in a legal environment.

The main goal for legal technology is to streamline the diversity of legal processes, procedures, actions and operations used by legal entities. It has the ability to manage their choices by synchronizing the procedures, actions and instrumental solutions required for this. Legal activities subordinated to technological requirements acquire a systemic character, purposefulness, orderliness, and "the regularities of technological stages and the corresponding orders and rules that mediate them should be presented as a form (regime) of legal activity... and legal activity does not exist outside of technological principles and rules..."[30] After all, purposefully influencing the legal reality is only possible if there is an algorithm of actions, an ability to coordinate and support the necessary positive changes to the law with instrumental decisions.

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[28] Csaba Varga, *Doctrine and Technique in Law*, Internationales Rechtsinformatik Symposion / IRIS 2004, Salzburg, 26–28 February 2004 (Jul. 3, 2018), available at https://ru.scribd.com/document/167936751/Legal-Technique.

[29] *Винер Н.* Кибернетика и общество [Norbert Wiener, *Cybernetics and Society*] 29 (Moscow: Izdatelstvo inostrannoy literatury, 1958).

[30] *Власенко Н.А.* Юридическая техника как комплексная система знаний // Доктринальные основы юридической техники [Nikolay A. Vlasenko, *Legal Technique as a Complex System of Knowledge* in *Doctrinal Basis for Legal Technique*] 162 (N.A. Vlasenko (ed.), Moscow: ID "Yurisprudentsiya," 2010).

The content boundaries of legal technology are still in the process of forming and this process should reflect the individuality of different legal areas, forming its specific content in unity. The technological processes of lawmaking, law enforcement, interpretation and systematization each pursue its own goals and objectives, which affect the process and relevant instrumental basis. The exact application of a specific tool at a particular stage in the production cycle is necessary to move forward or adjust in order to achieve a certain legal result.

The methodology for scientific knowledge of legal technology at the present stage is based on a variety of approaches that make it difficult to consolidate its place in legal theory and practice. The most significant are research positions which represent a comprehensive view of the existing approaches that accumulate theoretical knowledge and practical experience. In this case, the unity of the goals, tasks and resources that form its substantive basis is ensured.

Legal technology is a special branch of scientific knowledge for administering stages of legal activity for preparing, registering and adopting a variety of legal decisions based on applying rule-making or doctrinally sound legal technical resources, as well as methods for designing changes in law and planning actions to achieve legal prospects in order to ensure the most effective and systematic legal practice. To achieve this goal, legal technologies should be looked at as integrated technologies, when the design and implementation of legal reforms are made based on the corresponding indicators of state development, coordinating the implementation of different types of legal activities by optimizing the consistent application of steps, stages, particular segments and the tools required for this purpose.

The essence of legal technology is to optimize the actively transforming impact on legal activities, when the actions of an authorized entity become orderly and synchronized with strategic objectives and technical and legal resources. The study of the technical side of a particular stage of legal activity will allow tools to be established for monitoring the actions of entities in more detail to normalize legal processes and, in a sense, to manage the management decision. This quality of legal technology allows the concept of sustainable legal development to be effectively implemented, to implement the principles of a "smart" state regulatory policy and to ensure a qualitative transition to new legal standards for legal activity.

In our opinion, the basis for the theoretical and methodological difficulties in introducing legal technologies in practice relates to the discussion over whether, for example, the development of laws is art or science? Supporters of the first position consider it is an art[31] because each law requires an individual approach, while others believe that it is enough to master technology and skill. In our opinion, it is wrong to oppose art and science, because they are designed to solve completely different problems. If art in the given context appears in the form of creativity which

[31] *See* Geoffrey Bowman, *The Art of Legislative Drafting*, 64 Amicus Curiae 2 (2006).

provides uniqueness in the law, then the role of science consists in ordering the activity organization to achieve the required results thereby providing sustainable development for the system. We believe that the scale of creativity in law should not be overestimated. After all, a large number of legal tasks can be successfully solved by the skillful deployment of technical legal resources within a framework of certain legal procedures, operations, and actions. At the same time, the effective use of technical and legal tools is similar to art. It is possible to say that uniqueness is born in creativity, and it is further repeatedly applied, finding technological patterns in proportion to the solved problems.

Legal technology is not limited exclusively by definition to the application of a sequence of legal technical resources, and their optimization, but also provides process validity based on established laws establishing legal validity. Consequently, legal technology should include everything that is associated with the legal process, rules and procedures for using technical legal resources to implement legal activities.

Some foreign scholars consider legal technology not from the standpoint of organizing professional legal activity, but believe that it appears as "a system of social methods created to monitor the behavior of large groups of people, and as an institutionalized form of dispute resolution."[32] Organizing the introduction of legal technology can really be considered as a specific method for implementing types of legal activities, and managing them by algorithm. The initial task for determining the essence of legal technology is to assess the focus of its potential for work within the law, or outside of it in terms of the social action of law. This approach can be conditionally called communicative in a broad sense since, in this case, legal technologies are able to expand their capabilities beyond the legal environment. But it is still difficult to agree that these are social means. They have an expressive legal nature.

Communication consists of transferring information through the signal system outside, and within the law as a means of legitimizing public tasks that require legal support. It is legal technologies that can systematically realize the task of combining political, socio-economic and legal processes, procedures, actions, and their administration and synchronization. This is the main essence and advantage of legal technologies that are able to consolidate volitional acts by authorized entities into a common system to achieve the objectives of transformations in the law.

The uniqueness of legal technology is that it links all types of legal activity into a single production process, standardizes its potentially separate segments and, in a certain sense, introduces stability into legal processes. At the same time, it is reasonable to admit that the law will always have the intellect of lawyers, including

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[32] Mary E. Cato, *The Limits of Law as Technology for Environmental Policy: A Case Study of the Bronx Community Paper Company*, Master's Thesis, Virginia Polytechnic Institute and State University (1996), at 1.

their emotional intellects, which allows you to make decisions in unusual life situations. However, this does not detract from the role and importance of legal technologies aimed at identifying patterns and establishing rules for implementing legal activities.

As for the dilemma of "legal technique *v.* legal technology" there is no complexity or mystery, in our opinion. The fact is that there is some substitution between the concepts. Although "legal technique" is most often referred to in literature as the instrumental know-how of legislation,[33] "for me it is the instrumental skill covering the entire legal process from making to applying the law."[34] What is called legal technique is often actually a legal technology, as a process of creating and expressing rights, and legal technique is the toolkit that allows you to create, modify and interact with law. The combined potential of legal technique and legal technology is capable of modernizing various tasks to increase the effectiveness of the legislative and law enforcement practice.

Scientists note that

> these terms should be regarded as two independent, but interrelated phenomena that function in one objective reality and solve common goals and objectives.[35]

Therefore, they can be considered complex categories, only by the simultaneous application of which is it possible to carry out a transformative function in the legal reality, especially in the context of large-scale legal modernization. Legal technology and legal technique, combining their potential, provide legal activity a systematic and constructive validity for legal transformations, reduce legal errors, optimize the stages of lawmaking activity, systematize the actions and operations that are being implemented, and ultimately ensure high indicators of the legal development and achievement of state construction tasks.

The transition to technological support of legal activities is the answer to the complication in society's legal life, the strengthening of the role of law in addressing state construction tasks. These factors influence the need to prevent the occurrence of legal technological and legal technical defects. Actually, legal technique was developed for the sake of improving the form and content of the law. Therefore, at this stage, an important development for the technological side of legal activity

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33 Varga, *supra* note 28.

34 *Id.*

35 *Шарно О.И.* Соотношение категорий «техника» и «технология» в контексте правореализации // Вестник Волгоградского государственного университета. Сер. 5. Юриспруденция. 2012. № 1(16). С. 254 [Oksana I. Sharno, *Relations of the Categories "Technique" and "Technology" in the Context of the Implementation of Law*, 1(16) Bulletin of Volgograd State University. Series 5. Jurisprudence 251, 254 (2012)].

should be formulating a concept that will prevent technological defects. Only in this case can we talk about the successful transition from instrumental to technological support of legal activities.

2. Technological Defectology of Law

Legal technologies should be developed as one of the most important areas within the defectology of law, which represents the doctrine of shortcomings in legal activities and legal errors, as well as methods for suppressing and mitigating them in a timely fashion. In this case, the technological component allows you to control the process to prevent certain distortions in legal activities. Different kinds of legal defects arise due to shortcomings in legal activities and legal errors caused by improper actions in applying the rules of legal technique.

Despite the fact that legal technique is an important condition and a means for preventing and correcting mistakes, nevertheless, at the present stage, many defects are caused precisely by violations of legal technique requirements. The specifics aspects of technical legal defects are such that at the modern level of legislative development, far from all of the requirements of legal technique are regulated by the rules of law. This significantly affects the ability to identify and prevent factors that determine the error.

One of the significant consequences from the presence of legal technical defects in the law is the discrepancy in the actual meaning with the form of a textual or other external expression of the legal prescription. Such defects can arise due to excessively abstract formulations, one of the reasons for which is the influence of the existing socio-political situation on the creator of the right. Some legal technical defects are noticeable to the "naked eye," which include, in particular, excessive congestion in formulations for normative legal acts, discordance of legal terms, when an unreasonable repetition of identical combinations of sounds interfere with the perception of the material, the choice of semantically unsuccessful terms, complex grammatical sentence constructions, and so on.

The nature of technological defects differs somewhat from legal technical defects and is associated with process, procedural and other violations which led to the appearance of certain flaws and inaccuracies in the sequence of applying legal technical resources. Both types of defects in the law are interrelated and interdependent, but their delineation allows a more focused look at the causes of their occurrence, and thus ensure work towards their targeted prevention, detection and suppression.

Technological defects are a consequence of underestimating certain order and proper instrumental support for implementing legal activities, the use of which either legitimized the adoption of legal decisions, or optimized the achievement of an expected legal result. In the first case, this ensures compliance with the principle

of lawfulness, and in the second case, this reduces costs by eliminating redundant procedures, operations, etc. and the need to use comparable technologies. In our opinion, the prevention, detection and suppression of technological defects will positively effect a significant reduction in legal technical defects, and in this sense it is the technological defects that initially provoke the defectiveness factor in the law. After all, the established processes, procedures, operations and other actions of an authorized entity should prevent the occurrence of errors, distortions, and inaccuracies.

With technological defects, legal-competence mistakes are closely connected, i.e. these are flaws and inaccuracies committed by an official regarding establishing the boundaries of his own jurisdiction. It can be overstating or understating the jurisdiction, appropriating the jurisdiction of other state authorities, local self-government bodies, or federal executive bodies, or a lack of harmony in legal decisions between the relevant bodies or officials. This category of errors is accompanied by a choice of technical and legal instruments that are disproportionate to the scope of the established jurisdiction for the relevant authorized entity. With such flaws, legal technical resources make it possible to obtain an external form of expression by the subject's jurisdiction, which is presumed by the subject. In this case, legal technical resources, on the one hand, help to formalize legal decisions, including those made based on defects and mistakes made, and on the other hand, the ability to formalize erroneous decisions, which helps flaws to be "removed from the shadow flaws is a great merit." Although this will require an expert assessment of the disproportion between legal technical tools and official powers.

In the future, we can talk about creating a kind of legal technical model or matrix for implementing certain powers by an official, which will work to improve the performance discipline and ensure the established powers are accurately applied. This circumstance encourages us to approach preparing jurisdictional norms[36] with particular scrupulousness that accurately and explicitly correspond to the rights and obligations of the authorized entity, which is "a necessary condition for strengthening the discipline of civil servants and officials, and an important guarantee of respect for the rights of citizens."[37] Legal technical provisions for jurisdictional norms allow us to

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[36] According to S. Belousov, a jurisdictional norm is understood as a generally binding rule of conduct aimed at regulating public relationships regarding the establishment, consolidation and implementation of powers of the jurisdiction's subjects, within the scope of their subjects and in accordance with the tasks and functions assigned to them. At the same time, the scientist distinguishes among the functions of jurisdictional norms like: establishing the subjects of a jurisdiction; empowering subjects with powers within their jurisdiction; and defining goals, tasks and functions of jurisdictional subjects. In our opinion, such norms have the additional function of instrumental security associated with the subject-regulatory function. *Белоусов С.А.* Компетенционные нормы российского права: Автореф. дис. … канд. юрид. наук [Sergey A. Belousov, *Jurisdictional Norms of Russian Law: Synopsis of a Thesis for a Doctor Degree in Law Sciences*] 17 (Saratov, 2002).

[37] *Id.* at 14–15.

clarify the limits on the subject matter for the authorized subject from an instrumental standpoint. The following logical rule can serve as a guideline for improving such norms: if it is proven that such a norm (or system of norms) is not effective enough due to certain defects, then eliminating the identified defects can improve its efficiency.[38] This rule can be fully extended to the principles of working with technical and legal defects, which also reduce the effectiveness of legal norms.

A defect can occur at an immediate stage in implementing an appropriate procedure or operation. We believe that by the nature of legal technical resources and the sequence in which they are applied, it is possible to reliably enough establish the type of legal activity, its specific stage or procedure (or other segment of the relevant activity). Consequently, technological certainty opens up the possibility to prevent defects by establishing or limiting the choice of legal technical instruments. However, it should be noted that the legislative regulation of the procedure, the rules for implementing a certain legal action and accompanying legal technical requirements does not differ in equivalence from regulation. For example, the procedural law book of the Russian Federation gradually fixes the sequence of legal actions within the framework of appropriate judicial proceedings, although, for most of them, there are no legal technical requirements which are primarily restricted to formally attributive and structural rules.

The prevailing majority of procedural norms are concentrated in the field of law-making and law enforcement activities, which is justified by virtue of their specifics characteristics. However, these norms are accompanied, with rare exceptions, by legal technical requirements, which selectively regulate this aspect of the activity. In this regard, one of the technological defects is a gap in establishing the procedures and legal technical tools required to effectively implement it. Moreover, the gap in this case is of a functional nature with a negative connotation.

There is a natural question: is any procedure to be accompanied by technical and legal tools? We believe that the formal rule in this case may be the following: any procedure or a combination thereof, the result of which is a prepared legal act, requires technical and legal security. And whether the relevant rules will be contained in the legal act[39] or in a special act regulating the rules for preparing, adopting and enforcing any type of legal act is not fundamental. Also, such rules can be established in recommendations and documents of a referential nature.[40] Combining legal technical rules for a certain set of processes should be guided by a unity of purpose towards which all these legal actions are directed. The unity of

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[38] Эффективность правовых норм [*Efficiency of Legal Norms*] 243 (M.: Yuridicheskaya literatura, 1980).

[39] No special law on normative legal acts has yet been adopted in the Russian Federation, although international practice shows a preference for this approach in regulating the rules for preparing, enforcing and revoking normative legal acts.

[40] For example, *Handbook on the Law-Making Technique*, *supra* note 14.

the goal is determined by the unity of the means of achieving it, and when the legal technical instruments radically change on the way to the goal, this always indicates a change in the guidelines that require a scientific justification and an update of its instrumental basis.

The formation of technological defectology of the law opens up new opportunities for assessing the effectiveness of legal activity, both from the point of view of selected legal processes and technical and legal instruments, and the validity of the subject's actions. Because it allows differentiation of legal errors and defects arising in practice and, therefore, the development of rules based on this empirical experience in response to legal errors and defects. Here there is a connection between theory and practice regarding the origins of legal technique and legal technology. The potential of legal technology is aimed at managing decision-making and routing resources as part of legal activities in order to improve the efficiency and quality of resource provision.

3. The Prospects for Implementing Legal Technologies

The main task for legal technology as a science is to transform the legal reality, taking into account the pre-existing ideas about the changes required in the legal system, and supporting them with the appropriate resources selected in accordance with a given sequence of processes, procedures, operations, and other legal actions based on identified economic, political, social, legal and other patterns. This requires an understanding of the direction future developments will take with a clear system of actions by authorized entities that provide legal support for public administration.

The theory of sustainable development is a rapidly developing scientific field and can be considered a progressive concept for strategic planning in developed countries. "Sustainable development" means continuous progressive development, the main principle of which is to reconcile the interests of present and future generations, and tactical and strategic goals. Any development involves changing the existing elements of the system, and stability is traditionally associated with avoiding change, "preserving" relationships and obstructing anything new. However, a timely change in legislative provisions, reflecting the dynamics of public relations, is an indicator of the smooth operation of regulatory mechanisms and the sustainable provision of law and order.

Designing sustainable development involves identifying goals and the mechanisms for achieving them, which creates prerequisites for interaction between legal policy and legal technology. Legal policy is the scientifically-based, consistent and systematic activity of state and municipal bodies to improve regulatory mechanisms, and the civilized use of legal means to fully provide human rights and freedoms, strengthen discipline, legality and law and order, and to create legal

statehood and a high level of legal culture in the life of society and the individual. In legal policy, a conceptual framework is laid out in the form of goals, principles and tasks that determine the tactics and strategy for legal development. The role of legal policy is to balance the spontaneity, variability and non-linearity of legal life, which are considered to be legal risks.

> In the final analysis, legal technique serves in fact as a bridge between law as an issue of positivism and its practical implementation as shaped by legal policy considerations.[41]

Legal policy can fill the "void" in the scientific substantiation of a choice in a given set of legal decisions based on modern scientific concepts, and thus facilitate the coordination of actions of authorized subjects and processes, and optimize the legal technical resources for which legal technology is responsible. In the context of stable development, the role of legal technology is to effectively contribute to creating a stable legal system by preparing, adopting, and promulgating various legal acts with the help of a scientifically based set of principles, means, methods and rules, in accordance with plans and forecasts.[42] The combination of the stability factor and the transforming function of legal activity provide a complex interaction between legal technique and legal technology which ensures the consistency and constructive validity of legal reforms, prevents legal errors, and optimizes the stages of lawmaking activities.

The process of technological development in legal activity begins with the creation of a regulatory framework for optimizing legal activities related to preparing various legal acts. These goals are partially achieved through developing and adopting legislation on legal acts. In this law, the stages of the law-making process should be fixed, and the parameters for effectively planning norm-setting activities, and the rules for drafting normative legal acts, implementing expert activity and accounting for its results should be established. It should be noted that unresolved legislative issues will significantly hamper the development of legal activities in the future, which is especially aggravated by declining quality in drafting laws and increasing volumes of corrective legislation. It must also determine the legal technical specifics of law enforcement and contain requirements for implementing interpretation and systematization activities.

In our opinion, the adoption of such a law testifies to the recognition of the official (legitimate) status of legal equipment resources. However, a large-scale transition to standardized technological support for legal activities can be carried out only if

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41 Varga, *supra* note 28.

42 *Бахвалов С.В.* Законодательная технология (некоторые проблемы теории и методологии): Автореф. дис. ... канд. юрид. наук [Sergey V. Bakhvalov, *Legislative Technology (Some Problems of Theory and Methodology): Synopsis of a Thesis for a Doctor Degree in Law Sciences*] 22 (Nizhny Novgorod, 2006).

changes are made in the system of normative legal acts: 1) determining the sequence of actions by authorized entities, coordinated with the legal technical rules for preparing laws or other legal documents; 2) establishing rules for expert activity (for example, when carrying out expert examinations of draft laws, including an assessment of regulatory impact, monitoring law enforcement, etc.). Important documents for establishing rationing rules are also of a referential and recommendatory nature, containing technological standards for implementing various types of legal activities. Despite the non-applicability of the application, the role of the final rationing sources is significant. Since they allow for more detailed specifications of various types of legal activity implementations by virtue of their capability.

A more complex task is to restructure the thinking of the legal community to incorporate technological elements. In a general sense, such subject-specific thinking connects the human intellect and the technical means for carrying out activities. In the aspect of the subject area under consideration, this is the intellect of the lawyer and legal technical resources that help to consolidate the sequence of acts of thought. Technological thinking regarding the comprehension of legal activity comes to the fore when it is necessary to solve large-scale state tasks having significant social and legal consequences.

Legal technologies should be viewed as a promising method for ensuring national interests, the study of which mainly has a "bias" towards the political and economic aspects. Although the most important factor is correctly chosen and implemented legislative priorities that can neutralize negative trends within the country and internationally, and reflect the Russian characteristic of legislative consolidation of national interests. It is possible with the help of legal technologies to implement the interests of the Russian state's federal system in the most comprehensive way, the principle of social justice in Russian society, the priority of public interests over departmental, narrow interest groups, and to strengthen the clarity and thoughtfulness of legislative decisions, establishing an approach to determine the sequence of transformations to provide software development for legislation. A separate place in ensuring national interests should be hindering legal defects and mistakes and improving the current legislation. The role of legal technologies in solving these problems is significant, since they allow not only for consistently implementing the required legal transformations, but also for offering the most effective legal technical and legal-technological tools.

The 2017 Report on the State of Civil Society in the Russian Federation prepared by the Public Chamber of the Russian Federation shows that the main demand by an absolute majority of Russians is for social justice, and among its main indicators, in particular, the unity of law is singled out.[43] This indicator reflects the attitude of

[43] Доклад о состоянии гражданского общества в Российской Федерации за 2017 год [2017 Report on the State of Civil Society in the Russian Federation] (Nov. 8, 2018), available at http://www.opiv.ru/upload/doklad_o_sostoyanii_gragd_obshestva_RF_2017.pdf.

Russians towards the realization of the principle of equality of all before the law, regardless of wealth, social status, nationality and other characteristics. Consistent implementation of this principle can be realized with the help of modern legal technologies that synchronize legal procedures ensuring guarantees of individual rights and freedoms and equal responsibility for all, to monitor the actions of authorized entities within the framework of law enforcement activities.

Improving legal activity and, first of all, law-making should be based on the concept of "smart" state administration, the basis of which is the stimulation of qualitative changes by introducing new technologies. An example of introducing such technologies is the introduction of procedures for assessing the regulatory impact and the actual impact of rule-making legal acts in the law-making process, thanks to which the optimal level of impact on public relations is chosen. Qualitative and quantitative cooperation by stakeholders in sustainable development makes management "smart" and provides a special role for legal technologies. In this case, technologies aimed at reducing defects in legal activity, improving the quality of rule-making legal acts, and forecasting the consequences of adopting given legal rules will be actively developed.

A new level of development for the legal system is seen in the close interaction between legal and information technologies. This will help to transform primary data into a new quality of information and, on this basis, to offer optimal legal solutions. Information technologies help to not only optimize and improve systems and processes, but become a catalyst for radical changes over time, and in the near future will become the basis for the judicial system.[44] Their ability to serve an impressive array of legal information, at the same time taking into account the large number of facts, circumstances, characteristics, etc., creates a real opportunity to search for weak points in the logical structure of legal work, and allows you to convert the professional activities of a lawyer. At the same time, legal technologies are responsible for optimizing legal processes based on their resource support, which will eventually lead to the possibility of automating the methods for tracking and monitoring the state of the legal system.

Introducing technologies into the process of legal decision-making management helps to minimize the physical movement of people and documents, significantly reduce the time to consider applications, complaints, appeals and other documents, and to create opportunities to more fully take advantage of electronic document storage.[45] And, what is perhaps more important to prevent the emergence of serious errors in the implementation of legal activities arising from the presence of the

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[44] *See* Harry K. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: H.M.S.O., 1996).

[45] For more details *see* Waleed H. Malik, *Judiciary-Led Reforms in Singapore: Framework, Strategies, and Lessons* 53 (Washington: The World Bank, 2007).

human factor of different origin. The formation and use of information resources allows not only to optimize the information technology process, ensuring the timely provision of information, its validity, reliability and completeness, but also to design a new legal reality, setting certain standards for the stability of the legal system. The increased technological efficiency of legal activity is aimed at improving the quality of legal life, the protection of rights and freedom, and ensuring the stable rule of law and legal security of state.

Conclusion

Legal technology is a special legal phenomenon that ensures technological perfection of legal activity based on optimizing resource support and reducing defects in the law. They are able to act as a driver for modernizing the legal life of society. After all, it is possible to improve the qualitative aspect of legal activity by introducing an established sequence of procedures, operations, and actions into the legal practice accompanied by the necessary tools. This is confirmed by interviews with jurists who note that the rules of law that establish such a sequence[46] are the most difficult to understand and apply. The development of legal and technological strategies addresses many issues aimed at determining the optimal tactics for achieving a given legal result.

The concept of improving legal activity using legal technologies is based on establishing sound choices of procedural and instrumental solutions as a priority. This does not just work to improve the effectiveness of the law enforcement practice, but also ensures high standards in observing civil rights and freedoms, the modernization of legal statehood. The image of the future legal system of the state should be created now. For this, it is necessary to develop the practice of consolidating technical, legal technical and legal-technological rules. And it is not so important, in exactly what status these rules will be initially fixed. Gradually accumulated empirical experience will encourage transitioning certain rules to mandatory standards of legal activity. However, the first step that triggers this process is certainly the adoption of special legislation on the legal status of various sources of law and the special requirements imposed on them.

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[46] The survey was conducted from March to August 2018, which was attended by 160 practicing specialists of the Southern Federal District of the Russian Federation in the field of legal proceedings, the prosecutor's office, notary, customs, the state registration of cadastre and cartography, the federal prison service. According to the results of the answers, 43% of respondents consider the law to be the most problematic for understanding and applying the rule of law, establishing the sequence of procedures, actions, operations defined by the provisions of the law, and 38% of respondents have difficulties with legal norms that establish specific content of rights and obligations of addressees of law. At the same time, the prevailing majority of respondents (64%) believe that the legislatively fixed sequence of instruments necessary to implement the provisions of the law accompanying the enforcement stage will reduce the number of law enforcement mistakes, systematize the technology of application of the law, subject to complex processing of the legislative array.

Normally fixed (legitimized) technologies should become the basis for ensuring legal security. Legal security is considered in two aspects, firstly, as a set of measures, means and methods of legal provision (protection) carried out in the legal system and through the law, and secondly, the state of legal protection (guarantee) for the vital interests (statuses, regimes, etc.) of subjects of the law in connection with entering into legal relationships.[47] Even in countries where the rules of legal technology are fixed, they nevertheless do not determine the legal technical standards of legal security. Although it is rightly noted that it is possible to provide all kinds of security with the full protection of the law itself, which acts as a guarantor of security within the existing legal system, and "legal defects have no boundaries and permeate the entire social organism."[48] Therefore, it is important to create a basis for preventing legal defects, penetrating "dirty" technologies into legal transformations, and legal technologies are one of the effective methods for achieving these goals.

The formation of high-tech jurisprudence is a way to optimize legal activity, provide better service to international, supranational and national law, create conditions for improving the legal system, managing the adoption of optimal law-making decisions and improving transparency in the law enforcement process.

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[47] *Фомин А.А.* Юридическая безопасность субъектов российского права (вопросы теории и практики): Автореф. … докт. юрид. наук [Alexey A. Fomin, *Legal Security of Subjects of Russian Law (Theory and Practice Issues): Synopsis of a Thesis for a Doctor Degree in Law Sciences*] 12 (Penza, 2007).

[48] *Id.*

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CONFERENCE REVIEW NOTES

INTERNATIONAL SEMINAR REVIEW NOTES DISMISSAL PROTECTION IN THE BRICS COUNTRIES*

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Introduction

Legal scholars from Brazil, South Africa and Russia gathered in Saint Petersburg on 25 January 2019 to attend the International Legal Science Seminar hosted by the Department of Labor Law and Labor Protection at Saint Petersburg State University.

The city of Saint Petersburg became an intellectual centre of debate and discussion for seminar participants on the theme "Dismissal Protection in the BRICS Countries." The 2019 International Legal Science Seminar focused on the important issues relating to dismissal protection in South Africa, Brazil and Russia in terms of the International Labour Organization (ILO) Convention 158. The seminar was a resounding success, opening up prospects for legal scientific collaborations in research on legislation in the BRICS countries.

Before offering a summary of the presentations from the seminar, it should be useful as background to review related presentations given in another setting prior to the seminar.

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* This review is prepared based on the material in the presentations provided by the speakers at the International Legal Science Seminar.

1. Background to the BRICS International Legal Science Seminar

The 10th BRICS Academic Forum drawing attendees from academia, think tanks and non-governmental organizations from Brazil, Russia, India, China and South Africa took place in Johannesburg, South Africa on 28–31 May 2018. The event was hosted jointly by the BRICS Think Tank Council (BTTC) and the South African BRICS Think Tank (SABTT) with the support of the South Africa Government and the National Institute for the Humanities and Social Sciences (NIHSS) as SABTT custodian and coordinator. The core objective of the Forum was to encourage academic and research interests, bring together collective knowledge and expertise, and shape the intellectual remit of intra-BRICS discussions. The Forum theme "Envisioning Inclusive Development Through a Socially Responsive Economy" set the framework for discussion and elaboration on many issues, one of which was comprehensive social protection.[1] Dismissal protection is an essential part of this sphere. The basic provisions are provided under the ILO Convention 158 concerning termination of the employment relationship at the initiative of the employer, which includes the following provisions.

A worker shall not be dismissed without a valid ground for dismissal linked to the worker's ability or conduct, or based on the operational requirements of the undertaking, establishment or service.

Temporary absence from work due to illness or injury shall not constitute a valid reason for dismissal.

The employees shall not be dismissed for reasons connected with their conduct or work until they have been offered the opportunity to defend themselves against the allegations made.

The employees who consider that they have been the subject of an unjustified dismissal measure will have the right to appeal against that measure before an impartial body such as a court, a labor court, an arbitration board or an arbitrator.

The burden of proving the existence of a valid ground for termination of employment shall be on the employer.

If the bodies reach the conclusion that the dismissal is unjustified, they can annul the dismissal and/or they shall be entitled to order the payment of adequate compensation.

The employee who is to be dismissed will be entitled to a reasonable period of notice or compensation for the particular period, unless he/she has been guilty of serious misconduct, that is to say, misconduct of such a nature that the employer cannot reasonably be expected to continue to employ the worker during the period of notice.

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[1] Elena Gladun, *BRICS Development Through Socially Responsive Economy*, 5(3) BRICS Law Journal 152 (2018).

The ILO Convention 158 has not been ratified by the BRICS countries. Brazil ratified this Convention in 1996, but denounced it a few months later because the Convention had a negative impact on the Brazilian labor market – dismissal protection must be balanced.

2. Summary of the International Legal Science Seminar

The International Legal Science Seminar, held at Saint Petersburg State University on 25 January 2019, brought together scholars from the top institutions of academia of Russia, South Africa and Brazil to discuss the challenges relating to dismissal protection.

The seminar's theme "Dismissal Protection in the BRICS Countries" enabled discussion and elaboration of many issues, with the focus on the following:

– Sources of the BRICS countries' dismissal law;
– Dismissal protection in the BRICS countries in light of the ILO Convention 158;
– The types of justification for dismissal;
– Notifications;
– The right to appeal;
– Severance payment and possible reinstatement.

The key speakers at the seminar were distinguished researchers: Professor Paul Smit, Associate Professor of Labor Relations, School of Industrial Psychology and Human Resource Management, Faculty of Economic and Management Sciences of North-West University, South Africa; Professor Mauro M. Laruccia, PhD in Communication and Semiotics, engaged by Fundacentro/Ministry of Economics, Professor at Pontifical Catholic University of São Paulo (PUC-SP), Brazil; Professor Dalton T. Cusciano, PhD Candidate in Public Administration and Government at FGV/SP, engaged by Fundacentro/Ministry of Economics, Professor at the Law School of São Paulo FGV/SP and ENS/SP, Brazil; and Elena Sychenko, Associate Professor, Law Faculty of Saint Petersburg State University, Russia.

Professor Smit delivered a presentation titled "Dismissal Protection in South Africa in Terms of the ILO Convention 158." He noted that the South African Constitution is the source of South African dismissal law. The Constitution defines the basic principle that everyone has the right to fair labor practices. The Labor Relations Act (LRA) and the Code of Good Practice determine that dismissal must be for a fair reason and in accordance with a fair procedure. However, the concept of fairness has not been defined.

The LRA recognizes only three grounds on which a dismissal might be fair:

– Employee conduct/misconduct;
– Employee capacity/incapacity (e.g. poor work performance or health problems);
– Employer operational requirements (in this case, severance is paid).

For any dismissal to be fair it must comply with substantive fairness (the reason justifies a dismissal) and procedural fairness (the dismissal must follow procedure).

If a dismissal is considered unfair, the employee can make a claim for reinstatement or re-employment. There are no fixed rules on this issue, as every case will be judged on its own merits.

Dismissal may be justified for reasons of gross dishonesty, wilful damage to property, endangering the safety of others, assault on the employer or fellow workers or customers.

All other reasons will have to be justified as fair.

Summary dismissal does not exist. In all circumstances, the employer must prove that the offence committed by the employee justifies a dismissal.

Some types of dismissal are viewed as very serious, and the employee can get up to twenty-four months wages as compensation (over and above reinstatement or re-employment).

The following will be viewed as automatically unfair grounds for a dismissal:

– Employee participation in a protected strike;
– Union membership;
– Any reason related to discrimination;
– Pregnancy or intended pregnancy or if the employee is on maternity leave;
– Selective dismissal;
– Any reason related to transfer of business.

A dismissal will only be considered fair if a disciplinary hearing is held in which five principles must be observed:

1. Notification of the employee of allegations;
2. Opportunity to state a case;
3. Reasonable time to prepare;
4. Assistance by fellow employee/shop steward;
5. Informing the employee of the outcome and reminding the employee of the right to refer to the CCMA or BC.

The CCMA and BC are statutory dispute resolution organizations. The Commission for Conciliation, Mediation and Arbitration (CCMA) is a dispute resolution body established under the terms of the Labor Relations Act. A Bargaining Council (BC) is a dispute settlement body for specific industries, e.g. the automotive industry.

Although the ILO Convention 158 was not ratified by South Africa, its principles have been fully incorporated into dismissal law.

Professor Laruccia and Professor Cusciano gave their presentation on "Dismissal Protection in Brazil." They informed attendees that the Labor Law Consolidation (in Portuguese, CLT) is the principal body of labor legislation in the private sector in Brazil. The Brazilian Labor Law Consolidation was inspired by the Carta del Lavoro of Italy, published in 1927, and the Encyclical Rerum Novarum, a document of the Catholic Church on workers' conditions. People employed under the CLT (known

as *celetistas*) are in a formal employment relationship. They make up 52 per cent of the Brazilian working class.

The legal basis of dismissal protection for Brazilian public sector professionals is different from that for the private sector. Law No. 8,112/1990 and the Brazilian Constitution of 1988 are the main sources of rules for the federal Brazilian civil service. Brazilian public sector professionals gain stability after three years of work experience. They have a higher level of social guarantees and can be dismissed only after an administrative or judicial process.

Dismissal protection in the private sector under the Labor Law Consolidation (CLT) has other rules. Employment stability is first guaranteed to industrial and commercial workers after ten years' service, as well as the right to compensation if they are not put on permanent contracts and are unjustly dismissed. It then makes clear that any change in the ownership of an establishment or in the management of an enterprise will be without prejudice to employment, as it will not affect the length of service calculations for compensation purposes. Compensation for dismissal will have a priority status in case of bankruptcy or collective insolvency.

What subsequently occurred is that employers started to dismiss workers on the eve of reaching – stability status – ten years of work, which led to intense judicial litigation. The Brazilian Superior Labor Court (in Portuguese, TST), basing its decision on precedents, declared that,

> A hindrance to stability is to be presumed in the case of the dismissal, without due cause, of an employee who reaches nine years of service to the enterprise.

Consequently, employers began to dismiss workers with eight years of service. Obviously, another concept of dismissal protection against layoffs was necessary.

The solution was found in Law No. 5107 of 13 September 1966 that created the Length of Service Guarantee Fund (FGTS), which created a financial instrument of protection against dismissal.

The FGTS aims at protecting the worker who has been fired due to lay-offs by means of opening an account attached to the labor contract. At the beginning of each month companies deposit an amount corresponding to 8 per cent of the salary of each employee. Employees, under certain circumstances (e.g. dismissal with no cause, retirement, serious illness), may withdraw these contributions made by the employer. The companies' contributions are made as deposits in a restricted-access bank account, in the name of each employee, and these accounts are managed by a Federal Government Institution (Caixa Econômica Federal). The deposits made yield annual interest of 3 per cent plus inflation. If an employee is dismissed without cause, the employer must also pay the employee an additional fine, equal to 40 per cent of the deposits made into the employee's FGTS account during the time of his/her

employment with the company. Another fine equal to 10 per cent of the deposits made into the employee's FGTS account during the time of his/her employment with the company has to be paid to the government. Employers must pay one month's salary as severance pay for the notice period when dismissing employees without cause and without prior notice. This prior notice has a minimum time of 30 days, up to 90 days according to the time of hiring (30 days plus 3 days for the year of hiring, limited to 90 days.)

Employees dismissed without cause have access to unemployment insurance for three to five months (depending on the length of the labor contract).

Causes for dismissal are the following:

– Impropriety of conduct;
– Unacceptable behavior;
– Criminal activity;
– Neglect;
– Habitual drunkenness;
– Secrecy breach;
– Indiscipline/Insubordination;
– Job abandonment;
– Physical offences;
– Moral offences;
– Gambling.

Companies try not to fire their employees by claiming justification for dismissal, for it often results in lawsuits. Also, getting fired by justified dismissal leaves a negative impression on the employee's professional record and it may directly affect the prospects of getting a new job. Brazil has about 5 million worker-related judicial suits pending, most of which are related to justified dismissal cases.

The Brazilian Parliament ratified the ILO Convention 158 on protection against arbitrary dismissal or termination without just cause. However, the ILO Convention 158 was in force for only seven months, between 10 April 1996 and 20 November 1996, for in that same year Brazil denounced the ILO Convention 158 because it had had a negative effect on the Brazilian labor market, according to the Brazilian Institute for Applied Economic Research (Ipea). For example, the possibility of being offered a formal contract diminished and employers refrained from employing staff. Women and unskilled workers suffered the most during that seven-month period.

Professor Sychenko, in her report titled "Dismissal Protection in Russia in Light of ILO Convention 158," pointed out that although the principles contained in the ILO Convention 158 can be found in the legislation of many countries, there are only a few countries that apply all of the principles (only 18 out of 105 ILO member states, and the same number out of the 35 countries that have ratified the Convention). The Convention has not been ratified by Russia. The Labor Code of the Russian Federation provides a list of grounds for dismissal. Dismissal must be lawful and in

accordance with the established procedures. The employer may dismiss an employee in the following cases:

1. Liquidation of a company;
2. Job redundancy;
3. Insufficient qualifications;
4. Change of the owner of the property of the organization (only for the head of an enterprise, his/her deputies and the accounting manager);
5. Duplicative culpable non-performance of labor duties if the employee has a disciplinary sanction;
6. Gross misconduct –

– absenteeism;

– appearance at work in a condition of alcoholic, narcotic or other toxic intoxication (drunkenness);

– disclosure of secrets (secrecy breach);

– theft and embezzlement at work;

– violation of labor protection rules and requirements.

The employer must comply with the dismissal procedure, depending on the reasons for dismissal:

– offer a transfer to another job in respect of job redundancy and insufficient qualifications;

– notify in advance of dismissal in the case of liquidation of a company and job redundancy;

– obtain a trade union's reasoned opinion in the case of dismissal due to job redundancy, insufficient qualifications and duplicative culpable non-performance of labor duties, if the employee has a disciplinary sanction.

The employee is entitled to severance pay at dismissal in the case of liquidation of a company and job redundancy.

The employee shall not be dismissed for reasons connected with his conduct or work until he has been offered the opportunity to defend himself against the allegations by written explanation.

The employee who considers that he has been the subject of an unjustified dismissal measure will have the right to appeal against that measure before a court.

In concluding her remarks, Professor Sychenko underlined the high standards of dismissal protection among the BRICS countries. High standards of dismissal protection often lead to abuse by some employers who put pressure on employees to quit a job "voluntarily" or refuse to offer a formal contract. Excessive protection from dismissal thus may lead to discrimination in the labor market.

The participants at the International Legal Science Seminar agreed on the necessity to hold similar events on a regular basis.

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